

# FIDUCIARY FOUNDATIONS OF ADMINISTRATIVE LAW

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*An enduring challenge for administrative law is the tension between the ideal of democratic policymaking and the ubiquity of bureaucratic discretion. This Article seeks to reframe the problem of agency discretion by outlining an interpretivist model of administrative law based on the concept of fiduciary obligation in private legal relations such as agency, trust, and corporation. Administrative law, like private fiduciary law, increasingly relies upon a tripartite framework of entrustment, residual control, and fiduciary duty to demarcate a domain of bounded agency discretion. To minimize the risk that agencies will abuse their entrusted discretion through opportunism or carelessness, administrative law empowers the political branches to exert limited residual control over agencies and subjects agencies to nonderogable duties of care and loyalty. As an interpretivist theory, this fiduciary model helps to explain controversial features of administrative law such as the contemporary nondelegation doctrine, Chevron deference, and the limits of presidential control over agency action. By clarifying administrative law's internal dynamics and implicit ambitions, the fiduciary model also provides a blueprint for reform in critical areas such as the standing doctrine and the due process restraints on agency discretion.*

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## INTRODUCTION

Enthusiasts have hailed the rise of the modern administrative state as “the triumph of legitimate, liberal governance in a world full of dangerous alternatives.”<sup>1</sup> There is much to commend this view. Legislative enactments such as the Administrative Procedure Act (APA)<sup>2</sup> and the Federal Advisory Committee Act (FACA)<sup>3</sup> have greatly enhanced the administrative state’s transparency, formal rationality, and procedural fairness. Courts in the United States have followed the U.S. Congress’s lead, demanding that agencies provide increasingly detailed and persuasive justifications for their discretionary policy decisions. Yet, at the same time that legislators and judges have been dutifully fine-tuning agency procedure, legal theory’s shifting currents

1. Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 27 (2001).

2. Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (1946).

3. Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. §§ 1–15 (2000)).

have gradually eroded the administrative state's conceptual foundations, precipitating a "crisis of legitimacy" in administrative law.<sup>4</sup>

Over the past century, administrative law scholars developed a variety of theories for reconciling agency policymaking with the core principles of our constitutional democracy. Early apologists envisioned Congress as the source of all regulatory policy and characterized agencies either as mere transmission belts for legislative directives or as dispassionate experts capable of translating Congress's generalist instructions into specialized regulatory regimes.<sup>5</sup> As legal realism dampened enthusiasm for these technocratic theories of agency action, new theories arose to take their place, each reflecting a vision of agencies as political institutions embedded in the political process. The "interest representation" model emerged in the 1970s, emphasizing agencies' role as facilitators of public deliberation and characterizing agency notice-and-comment rulemaking as a microcosm of the democratic process.<sup>6</sup> More recently, proponents of enhanced legislative oversight and executive power have advanced "political-control"<sup>7</sup> and "unitary-executive"<sup>8</sup> models of the administrative state, seeking to anchor agency policymaking to the political branches' constitutional and popular mandates. Each of these models has aspired to reconcile agency administration with liberal constitutional values

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4. Peter H. Schuck, *Introduction*, in FOUNDATIONS OF ADMINISTRATIVE LAW 4 (Peter H. Schuck ed., 1994); see, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 131–34 (1980); JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY* 78 (1978).

5. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675–78 (1975); see also Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 577–78 (1985) (describing these models); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1618 (1985) ("In the half-century prior to the end of World War II, most Americans viewed public administrators as experts who used their experience and training to discover the best means for attaining goals established by statute. The administrator's task was merely to solve the problems identified by democratic processes; the legitimacy of his role was no major issue.") (citation omitted).

6. Stewart, *supra* note 5, at 1760–61; see also Garland, *supra* note 5, at 579 ("The interest representation model evolved in response to widespread disillusionment with both the 'transmission belt' and 'expertise' models of administrative action."); Reich, *supra* note 5, at 1620 ("The job of the public administrator, according to this vision, was to accommodate—to the extent possible—the varying demands placed upon government by competing groups. The public administrator was a referee, a skillful practitioner of negotiation and compromise.").

7. See e.g., Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).

8. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

and rationalize administrative procedures by tracing agency policy to specific directives from Congress, the president, or the people as a whole.

In the end, however, these descriptive models have struggled to deliver a coherent explanation for a central feature of the administrative state: the ubiquity of agency discretion.<sup>9</sup> As legal realists have shown, the transmission-belt and expertise models underestimate agencies' proactive role in the progressive development of regulatory policy. The interest-representation model offers a more sophisticated strategy for taming agency discretion, but it, too, has limited traction as a descriptive theory of administrative law because agencies are not obligated to honor interest-group preferences in the rulemaking process. Even advocates of the interest-representation model readily concede that interest groups' "participation in such proceedings may have little impact on agency policy determinations."<sup>10</sup> Nor does the political-control model offer a persuasive descriptive account of agency discretion. In a variety of contexts, administrative law significantly restrains the president's control over administrators and thereby insulates agency decisions from the political process. Although Congress could theoretically redesign the administrative state to draw all agency operations more firmly under the president's direct command and control, this would require drastic reconstructive surgery to semi-autonomous "independent" agencies and adjudicatory tribunals. In short, none of the descriptive models advanced to date fully captures the role of agency discretion in the legal architecture of the administrative state.

This Article seeks to reframe the problem of agency discretion in administrative law by exploring the thematic and doctrinal parallels between administrative law's regulation of agency discretion and the legal constraints on fiduciaries in private legal relations such as trust, agency, partnership, guardianship, and corporation. Fiduciary metaphors have long played a prominent role in the rhetoric of administrative law jurisprudence, but the influence of this rhetorical tradition in the development of administrative law has eluded critical analysis. The basic insight of this Article is that administrative law's metaphorical fiduciary foundations can no longer be dismissed as mere rhetoric; rather, public law increasingly draws upon fiduciary law's three foundational elements as a conceptual framework for constraining agency discretion and mediating relationships between the executive, legislative, and judicial branches.

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9. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 1 (1983) (noting administrative law's legitimacy crisis and describing the history of American administrative law as a "history of failed ideas"); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469 (2003) (reviewing and critiquing these models).

10. Stewart, *supra* note 5, at 1775.

The emerging “fiduciary model” in administrative law posits that administrative agencies are endowed with authority to set regulatory policy when Congress and the president, acting jointly as proxy settlors for the sovereign people, entrust them with regulatory discretion over an area of public concern. While agency discretion may enhance the efficiency and responsiveness of public governance, it also gives rise to “agency costs”—monitoring and bonding expenditures and losses arising from the divergence between the public interest and agency practice. To minimize the risk that agencies will abuse their discretion through opportunism or negligence, each political branch monitors agency activity and retains some residual control to correct agency mismanagement. Agencies also are bound by a duty of fidelity to their statutory mandates, and duties of care and loyalty to their statutory beneficiaries. I argue that the fiduciary model of entrustment, residual control, and fiduciary duty offers a lucid lens for examining the role of agency discretion in contemporary administrative law because it deftly interweaves the law’s disparate thematic strands—delegation, discretion, fidelity, rationality, impartiality, and accountability—into a coherent and intelligible whole.<sup>11</sup>

While entrustment and residual control are familiar leitmotifs in administrative law jurisprudence, the same cannot be said for agency fiduciary duties. Certainly, courts do not routinely describe agency obligations in the lofty rhetoric of fiduciary duty; rather, agencies’ legal duties to act prudently, impartially, and without undue self-interest have emerged incrementally over time as “due process” or “arbitrary and capricious” restraints on agency discretion. In practice, however, these constitutional and quasi-constitutional standards radiate a similar aura of moral authority and serve similar functions—namely, to deter breaches of the public trust and spur agencies to internalize vital social norms such as impartiality, rationality, and, most importantly, fidelity. The fiduciary model shows that administrative agencies’ emerging fiduciary duties complement the political branches’ residual controls and reinforce the social norms that shape agency behavior.

As an interpretivist theory, the fiduciary model makes a valuable contribution to contemporary criticism in administrative law by clarifying

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11. A few scholars have used simple principal-agent models to explore the “agency costs” incurred when the U.S. Congress and the president delegate authority to agencies. See, e.g., D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION* 24–25 (1991); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239 (1989); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994). In contrast to the fiduciary model advanced here, these principal-agent models posit either Congress or the president as the relation’s sole “principal” and focus on the political branches’ tools of residual control without considering the other legal and social norms that shape agency action.

the principles and policies that underpin enigmatic legal doctrines. For example, the fiduciary model suggests that the contemporary nondelegation doctrine, which theoretically limits Congress's authority to delegate lawmaking authority, might be best understood as a minimalist rule of prudent administration akin to the "prudent-investor" rule in trust law. Likewise, the controversial theory of legislative delegation, which grounds judicial deference to agency interpretations of ambiguous statutes, comes into sharper relief when viewed against the backdrop of agencies' residual political controls and fiduciary duties. The fiduciary concept also helps explain the APA's standards for judicial review of agency informal rulemaking, adjudication, and choice of policymaking procedures. In each of these contexts, the fiduciary model envisions administrative agencies as stewards exercising discretion on behalf of their statutory beneficiaries, subject to the traditional fiduciary duties of care, loyalty, and transparency.

The balance of this Article proceeds in four parts. Part I provides a general overview of contemporary fiduciary law, elaborating fiduciary relations' characteristic elements of entrustment, residual control, and fiduciary duty. Part II applies this model to the administrative state, demonstrating that fiduciary law and administrative law bear strikingly similar features and perform analogous functions. Part III disaggregates the fiduciary model, exploring ways in which the binary principal-agent paradigm of administrative entrustment, which has long dominated legal and political theory, fails to capture administrative law's flexible approach to agencies' structural and functional diversity. Specifically, I argue that other paradigmatic fiduciary relations such as trust, guardianship, and corporation may serve as useful alternative paradigms for independent agencies, government corporations, and other administrative institutions.

By illuminating administrative law's internal dynamics and implicit ambitions, the fiduciary model also promises a practical payoff: It reveals areas where the law could be refined to enhance agency fidelity. As an illustration, Part IV explores two normative implications of the fiduciary model that enjoy broad acceptance in private law but have yet to take hold in administrative law. First, I argue that courts should expand Article III "injury-in-fact" standing where agency action prevents the agency's statutory beneficiaries from protecting their rights through the democratic process, provided that beneficiaries establish their adequacy as class representatives. Second, courts should enforce agencies' due process duties of care and loyalty more vigorously in settings where the agency costs of administrative governance are likely to be highest (for example, where

the president lacks effective control over agency policymaking). These measures would reinforce the fiduciary norms implicit in agency entrustment.

Before setting out along this path, let me first clarify one point to avoid confusion: Although the fiduciary model advanced in this Article boasts significant advantages over previous positive models of the administrative state, I harbor no illusions that the model might serve as a silver bullet for administrative law's legitimacy crisis. Since agency "legitimacy" is a contested concept resting on other contested concepts such as "democratic accountability" and "the rule of law," agency legitimacy is, and always will be, an ongoing national debate.<sup>12</sup> Moreover, care must be exercised to ensure that comparisons between administrative law and fiduciary law, "starting as devices to liberate thought," do not "end . . . by enslaving it."<sup>13</sup> Keeping these limits in mind, however, the fiduciary model remains highly useful as a "device" for disclosing the values implicit in current administrative law doctrines, refocusing debates over agency legitimacy, and thereby fostering interpretive communities. The fiduciary model reveals, for example, that administrative law incorporates multiple conceptions of agency fidelity, from pluralist majoritarianism to communitarian commitment reinforcement. The fiduciary model also suggests that some doctrines that have become flashpoints in administrative law's perceived legitimacy crisis (for example, the nondelegation doctrine and agency independence) may be less problematic than they initially appear—or, more accurately, problematic in ways that are different from what critics generally assume. The fiduciary model thus serves as an invitation to discussion rather than a suppressant to current debates over the legal, political, and social legitimacy of the administrative state.

## I. THE ARCHITECTURE OF FIDUCIARY LAW

In a sense, the fiduciary concept is the oldest and most familiar model of the administrative state. The rhetoric of fiduciary obligation permeates western

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12. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (outlining three conceptions of constitutional legitimacy: legal, sociological, and moral); Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795 (1999) (reviewing several competing conceptions of "democracy" in administrative law).

13. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926). In a previous article, I critiqued the U.S. Supreme Court's reliance upon contract metaphor in treaty interpretation. See Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 450–55 (2004).

political theory, from Cicero's discourses *On Moral Obligation*,<sup>14</sup> to Locke's *Two Treatises of Government*,<sup>15</sup> to the seminal *Federalist Papers*.<sup>16</sup> American legal rhetoric has internalized the metaphor of government officials and institutions as "agents and trustees"<sup>17</sup> of popular sovereignty to such an extent that the terms "administrator" and "administrative agency" rarely arouse sustained critical reflection. Yet the fiduciary concept's pervasive influence in American political theory and legal rhetoric should not obscure the concept's role in defining the "deep structure" of administrative law. As a starting point in excavating the fiduciary foundations of administrative law, this part briefly reviews the fiduciary concept's history, foundational elements, and interplay with social norms.

Legal historians trace the fiduciary concept's genesis to the Roman *fiducia* or *fidei-commis*,<sup>18</sup> or, in Anglo-American law, to the rise of trusts in the Middle Ages.<sup>19</sup> Over time, the trust developed into a favored legal device for

14. See, e.g., CICERO, *ON MORAL OBLIGATION* bk. I, ch. 25, § 85, at 69 (John Higginbotham trans., Faber & Faber 1976) ("The guardianship of the state is a kind of trusteeship which should always be managed to the advantage of the person entrusted rather than of those to whom he is entrusted.").

15. See, e.g., JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. II, §§ 77–79, 107–09, 119–22, 136, 229–30 (Legal Classics Library 1994) (1698); see also E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1026 (1975) ("To formulate a new theory of constitutional government calling for restrained public authority, Locke . . . relied upon the concept of a trust to limit governmental power to the exercise of those specific functions delegated to the Government. . . . [T]he Government's power should be encumbered with a trust to act on behalf of the beneficiaries—all those who had created government by the social contract."); *id.* at 1049 ("Lord Hardwicke held in 1742, the fiduciary obligations of officers are uniform regardless of whether they exercise their powers in a public or a private capacity.") (referring to *Charitable Corp. v. Sutton*, 2 A.T.K. 400, 406 (1742)); J.C. Shepherd, Note, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51, 76 (1981) ("In the area of public officials, for example, as early as John Locke it was conceived that the fiduciary duty of representatives was the result of a conditional delegation of power.") (citation omitted).

16. See, e.g., THE *FEDERALIST* NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961) ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes."); THE *FEDERALIST* NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs speak for themselves.").

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

18. See ERNEST VINTER, *A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIP AND RESULTING TRUSTS* 1 (3d ed. 1955) (explaining that the Latin "fiduciarius" denotes "a trustee or one in a position of trust and as used in our law denotes anyone who holds the character of a trustee, or character analogous thereto").

19. See Jerry W. Markham, *Fiduciary Duties Under the Commodity Exchange Act*, 68 NOTRE DAME L. REV. 199, 207–08 (1992). Even before the trust, the fiduciary concept resurfaced with the "use" in twelfth- and thirteenth-century England. 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* §§ 1.3–1.8, at 12–28 (William Franklin Fratcher ed., 4th ed. 1987).



conveyances of property because it empowered persons to “split the atom” of personal property rights between legal and equitable title. Trustees could obtain legal title to trust assets and responsibility for the assets’ day-to-day administration, while beneficiaries—the *cestui que trust*—could acquire equitable title, including the right to enjoy the fruit of the trustee’s labors. In its early history, however, the trust covered a much broader field of confidential relations. Courts of equity employed the trust concept whenever a party undertook “to exercise a power, to conduct a sale, to supervise an estate or business, or in some other way to become [another’s] employee or agent.”<sup>20</sup> As stewards for trust beneficiaries, trustees were expected to manage assets or perform other services in a conscientious manner, manifesting unqualified fidelity to their beneficiaries’ interests.<sup>21</sup>

Over the centuries, Anglo-American courts gradually extended the fiduciary concept from trusts to a host of other private relations, including agency, partnerships, guardianships, conservatorships, receiverships, bailments, corporations, joint ventures, equitable charges, security arrangements, venture capital, strategic alliances, franchising, and certain counseling relations such as the attorney-client relationship.<sup>22</sup> More recently, the rhetoric of fiduciary obligation also seems to be taking root in the legal obligations of parents, educators, physicians, psychiatrists, clergymen, and a variety of other confidential associations.<sup>23</sup> Although this burgeoning field of “fiduciary law” remains very much a work in progress, there are strong indications “that our society is evolving into one based predominantly on fiduciary relations.”<sup>24</sup>

The fiduciary concept, like many other dynamic common law concepts, is not easily reduced to rote definition.<sup>25</sup> Its slipperiness arises, in part, from its common law genealogy. Courts have eschewed formalistic criteria for identifying fiduciary relations and instead reason by analogy to paradigmatic relations such as trust, partnership, and agency. This case-by-case, analogical

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20. L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69.

21. See Charles E. Rounds, *Fiduciary Liability of Trustees and Personal Representatives*, 853 TAX MGMT. A-3 (2003) (“[E]quity accepts the common law ownership of the trustee, but regards it as against conscience for him to exercise that legal ownership otherwise than for the benefit of the cestui que trust, and therefore engrafts the equitable obligation upon him.”) (quoting G.W. KEETON, *AN INTRODUCTION TO EQUITY* 95 (6th ed. 1965)).

22. See Markham, *supra* note 19, at 214 (chronicling this expansion).

23. See, e.g., Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, *BYU EDUC. & L.J.* 159 (2005); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

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

25. See 1 SCOTT & FRATCHER, *supra* note 19, § 2.3, at 40 (noting that legal concepts would lack practical value if they could be easily reduced to exact definitions).

approach has led some scholars to characterize fiduciary law—like administrative law—as an “atomistic” field resistant to unified theory.<sup>26</sup>

While the fiduciary concept resists essentialization, three elements are generally considered to be foundational for all fiduciary relations: entrustment, residual control, and fiduciary duties.

#### A. Fiduciary Entrustment

The starting point for all fiduciary relations is substitution: Fiduciaries stand in as stewards with discretion over an aspect of their beneficiaries' welfare.<sup>27</sup> Most fiduciaries—including agents, partners, and trustees—acquire their authority through a consensual delegation from dependants. Consent and reliance are not prerequisites for fiduciary relations, however. In some circumstances, the common law treats persons in confidential relations as fiduciaries even if they were not authorized through an actual delegation from one holding authority. Guardianships are one obvious example: Minors and incompetents do not ordinarily delegate authority to their guardians to act on their behalf, but fiduciary law nonetheless imputes an entrustment of fiduciary authority to guardians and relies upon these fiduciaries to act in the best interests of their wards.<sup>28</sup> Even in the absence of express or implied consent, courts superimpose the fiduciary concept “wherever special confidence is reposed, whether the relationship be that of blood, business, friendship, or association,” rendering the beneficiary vulnerable to abuse of trust.<sup>29</sup> Thus, the hallmark of fiduciary relations is not delegation per se, but rather the law's ex post identification of a confidential relation as one founded on trust.

One reason why trust lies at the heart of all fiduciary relations is that fiduciaries cannot exercise complete control or ensure comprehensive monitoring of fiduciaries' actions without negating the fiduciary relation's efficiencies. Monitoring costs may be high due to fiduciary specialization and the difficulty of reducing fiduciary responsibilities to objective performance measures. Entrustors necessarily rely upon fiduciaries to perform their duties honorably, rendering the desired services in good faith without exploiting

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26. See Shepherd, *supra* note 15, at 53 (reviewing various theories of fiduciary relations).

27. See RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b (2003) (“[O]ne characteristic . . . common to all [fiduciary relations is that] a person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship.”).

28. See generally Scott & Scott, *supra* note 23.

29. Dawson v. Nat'l Life Ins. Co. of the U.S., 157 N.W. 929, 933 (Iowa 1916).

beneficiaries' vulnerability for personal gain.<sup>30</sup> Thus, fiduciary entrustment is predicated upon the expectation of fiduciary fidelity.

The scope of fiduciary discretion varies significantly. In many employment relationships, for example, employees exercise discretion only when employers are unable to capture all significant terms of their employment contract with sufficient specificity.<sup>31</sup> Shareholder-director relations fall closer to the opposite end of the spectrum. In public corporations, directors often enjoy sweeping discretion to set corporate policy and to appoint or remove corporate officers. This discretion does not arise solely from shareholders' inability to reduce their responsibilities to fixed contractual terms; rather, shareholders deliberately delegate policymaking duties to directors in order to mediate conflicts with corporate officers and take advantage of directors' experience and expertise. Whereas many employers view employee discretion as a necessary evil, corporations—even in the skittish post-Enron environment—embrace director discretion as a tool for maximizing shareholder profits. In short, the scope of fiduciary discretion reflects a variety of contextual factors, including the purpose of the entrustment and the perceived trustworthiness of the particular fiduciary.

By law, a fiduciary's authority extends no further than necessary for the performance of its entrusted function.<sup>32</sup> A trustee's managerial responsibilities, for example, are limited to the discrete assets identified in the terms of trust. Similarly, the "trust relation between the shareholders and the directors of a corporation . . . usually extends . . . only to the management of the general affairs of the corporation, with a view to dividends of profits."<sup>33</sup> Courts enforce these limits on fiduciary discretion to prevent unnecessary encroachments on beneficiaries' autonomy.

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30. See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 392 (1980) ("Such reliance plausibly is based on the simple belief that the party with discretion in performance will keep the contract, and therefore will not use its discretion to recapture forgone opportunities."); Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1684 (1990) ("The dependent's reliance upon the power holder or, not quite conversely, the power holder's service as a surrogate for the dependent, characterizes the fiduciary relationship.").

31. See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981) ("[D]efinitive obligations may be impractical because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance.").

32. Frankel, *supra* note 24, at 809 n.48; see also Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 10 (1975) ("The extent of the fiduciary's discretion is demarcated, and the fiduciary obligation is imposed in order to compel a proper exercise of that discretion within the scope of the authority thus delineated.").

33. *Dawson*, 157 N.W. at 932 (quoting *Carpenter v. Danforth*, 52 Barb. 581, 581 (N.Y. 1868)).

## B. Fiduciary Accountability: Residual Control and Fiduciary Duties

The fiduciary concept presumes that fiduciaries will manifest altruism (or, at very least, honesty) in the exercise of their entrusted authority.<sup>34</sup> Fiduciary relations stand or fall on “the fiduciary’s commitment to abandon self-interest and promote her beneficiary’s welfare instead of her own.”<sup>35</sup> The dark side of fiduciary discretion, of course, is that it places beneficiaries in a position of acute vulnerability. Allowing fiduciaries to substitute for beneficiaries poses the risk that fiduciaries may behave opportunistically, misappropriating valuable resources or opportunities. They may devote insufficient energy to a delegated task or behave negligently or recklessly, dissipating entrusted resources, squandering opportunities, or injuring third parties. Furthermore, as recent corporate scandals illustrate all too vividly, fiduciaries often have both the opportunities and incentives to conceal their malfeasance from beneficiaries to avoid legal sanctions and public censure. Beneficiaries who are able to monitor fiduciary conduct may lack the expertise or experience to evaluate a fiduciary’s performance effectively. The dangers posed by fiduciary entrustment are thus at least as great as the potential benefits.<sup>36</sup>

If fiduciary entrustment relies upon a naively sanguine view of human nature, other aspects of fiduciary law view this relation with a jaundiced eye. To compensate for the potential divergence of interests between fiduciaries and beneficiaries, fiduciary law seeks to deter fiduciary malfeasance through a combination of hard and soft accountability mechanisms: residual control, judicial review, and socialization. First, fiduciary law holds fiduciaries accountable for failing to meet their commitments by honoring the entrustors’

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34. See Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 438–39 (2001); Frankel, *supra* note 24, at 832 (“By characterizing the fiduciary as an altruistic person, the courts emphasize and highlight the substitution aspect of the fiduciary relation, reassuring the entrustor that the fiduciary will act in the entrustor’s interest.”); Mitchell, *supra* note 30, at 1687 (“[T]he law assumes a high degree of altruism on the part of the fiduciary.”).

35. Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1783 (2001).

36. See Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138, 160 (1999) (“Th[e] need for dynamic management precludes the possibility of dictating the behavior of the fiduciary by specific and easily enforceable rules.”); Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives*, 80 NW. U. L. REV. 1, 5 (1985) (discussing the threat of fiduciary opportunism); Goetz & Scott, *supra* note 31, at 1129 (“The fiduciary is in control of the level of efforts expended on the client’s behalf; a conflict of interests over the proper level of efforts . . . predictably will arise.”); Scott & Scott, *supra* note 23, at 2420 (“[B]eneficiaries—whether shareholders, trust beneficiaries or legatees—are presumed to lack the requisite information or expertise to understand and evaluate the fiduciary’s performance, and acquiring such information is very costly.”).

residual equitable rights to intervene under certain limited circumstances. Second, the common law imposes certain basic duties on fiduciaries, which, if violated, give rise to a presumption of malfeasance and empower courts to nullify fiduciary judgments. Third, legal rules reinforce preexisting social norms so as to encourage voluntary norm-internalization. Each of these bonding mechanisms deters opportunism and waste, encourages beneficial socialization, and equips beneficiaries to discern ravenous wolves masquerading in sheep's clothing.

### 1. Residual Control

Residual-control rights are one mechanism for promoting fidelity. Even after entrustors delegate authority to fiduciaries, they reserve the right to supervise fiduciary performance and, in appropriate circumstances, to take corrective action to remedy fiduciary malfeasance—for example, by revoking fiduciaries' discretionary judgments or withdrawing entrusted authority. Some legal scholars have viewed these residual-control rights as “the defining attribute of fiduciary relationships.”<sup>37</sup>

Residual-control rights are not all created equal, however. In agency relations, most principals may intervene at will to correct agency mismanagement and may dismiss agents without advance notice or legal fanfare.<sup>38</sup> Not so for trustees. To remove a prodigal trustee, beneficiaries must seek judicial intervention and show that the proposed removal is authorized by the trust terms or justified by “cause.”<sup>39</sup> Judicial standards for interfering with a trustee's exercise of “discretionary power” are similarly stringent; courts will not disturb a trust except “to prevent misinterpretation or abuse of the discretion by the trustee.”<sup>40</sup>

Strong policy considerations counsel beneficiaries against contracting for agency-style control in relations where fiduciaries exercise trustee-style discretion. Fiduciary discretion tends to be greatest in relations where beneficiaries rely on fiduciaries to employ specialized skills or utilize context-specific knowledge. In corporations, enhanced discretion may also reflect fiduciaries' crucial role as mediator between competing classes of beneficiaries or between the beneficiaries as a whole and other stakeholders such as corporate

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37. See, e.g., D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1405 (2002).

38. RESTATEMENT (SECOND) OF AGENCY § 406 (1958).

39. RESTATEMENT (THIRD) OF TRUSTS § 37 (2003); LEWIS M. SIMES, CASES AND MATERIALS ON THE LAW OF FIDUCIARY ADMINISTRATION 91 (1941).

40. RESTATEMENT (THIRD) OF TRUSTS § 50.

management.<sup>41</sup> Under such circumstances, beneficiaries intentionally abdicate a greater measure of control to fiduciaries, recognizing that even the most well-intentioned interference with fiduciary performance may inadvertently stymie productivity.

On the other hand, courts do not ordinarily enforce agreements that preclude beneficiaries from exerting any residual control over fiduciaries. The *Restatement (Third) of Trusts* explains that “[i]t is contrary to sound policy, and a contradiction in terms, to permit the settlor to relieve a ‘trustee’ of all accountability. . . . Even under the broadest grant of fiduciary discretion, a trustee must act honestly and in a state of mind contemplated by the settlor.”<sup>42</sup>

## 2. Fiduciary Duties

Fiduciary duties offer a complementary mechanism for promoting fiduciary accountability. As an ethical and legal imperative, fiduciaries are to act “primarily for the benefit of [their beneficiaries] in matters connected with [the] undertaking,” performing their designated roles with due diligence and unqualified fidelity.<sup>43</sup> In traditional legal parlance, these responsibilities are grouped under two general headings: the “duty of loyalty” and the “duty of care.”<sup>44</sup> Since these two general duties apply to diverse types of fiduciary relations, their precise application is necessarily context dependent. Courts enforce the duties of loyalty and care to encourage prudent exercise of entrusted authority and to prevent fiduciaries from reaping personal benefit from self-interested transactions unless the beneficiaries expressly authorize the breach.<sup>45</sup> Although fiduciary duties may, in some instances, be modified or abrogated by contract, courts tend to treat these duties as nonnegotiable.<sup>46</sup> Fiduciary duties complement beneficiaries’ residual-control rights, granting fiduciaries broad latitude to set discretionary policies but ensuring that these policies do not transgress reasonable limits.

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41. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 271 (1999).

42. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. c.

43. Nagel v. Todd, 45 A.2d 326, 327–28 (Md. 1946) (quoting RESTATEMENT OF AGENCY § 13 cmt. a (1933)); see also *Meinhard v. Salmon*, 164 N.E. 545, 548 (N.Y. 1928) (describing this “rule of undivided loyalty” as “relentless and supreme”).

44. Some courts have hinted that there might be an analytically distinct “duty of good faith,” but the attributes of this nascent duty are not entirely clear. E.g., *In re Walt Disney Co. Derivative Litig.*, No. Civ. A. 15452, 2005 WL 2056651, at \*35 (Del. Ch. Aug. 9, 2005).

45. See Blair & Stout, *supra* note 35, at 1782–83.

46. See Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century’s End*, 88 CAL. L. REV. 1877, 1911 (2000).

### a. The Duty of Loyalty

The duty of undivided loyalty obligates fiduciaries to act “solely in the interest of the beneficiary” without giving consideration to personal advantage.<sup>47</sup> Fiduciaries may not conclude transactions that engender conflicts of interests with their beneficiaries. Judicial decisions give this duty a prophylactic edge: Fiduciaries are prohibited from consummating self-interested transactions without beneficiaries’ informed authorization even if the transactions were for fair market value and did not adversely affect the beneficiaries’ interests.<sup>48</sup> If a fiduciary enters into a self-interested transaction without making full disclosure to the beneficiary and obtaining the beneficiary’s approval, or if the transaction is otherwise unfair to the beneficiary, the beneficiary may ask a court in equity to void the transaction, impose a constructive trust, and compel the fiduciary to disgorge any profits obtained from the transaction.<sup>49</sup> Courts may also enjoin fiduciaries from using beneficiaries’ property or privileges for an unauthorized, self-serving purpose.

Where a fiduciary relation involves multiple beneficiaries, the duty of loyalty takes on an antidiscrimination aspect: Unless otherwise provided for by contract, fiduciaries are bound to render an equal measure of fidelity to each beneficiary. An exercise of discretion that facially augments one beneficiary’s interests at another’s expense is as much a breach of fiduciary duty as a self-interested transaction.

### b. The Duty of Care

In addition to the duty of loyalty, fiduciaries bear a duty to exercise reasonable care in performing their services for beneficiaries. Courts generally characterize this duty as an iteration of the prudent-steward standard; fiduciaries must perform their tasks in “good faith,”<sup>50</sup> use “best efforts,”<sup>51</sup> or exercise “such

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47. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 655 (1995) (quoting RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959)); see also RESTATEMENT (SECOND) OF AGENCY § 387 (1958) (describing fiduciaries’ obligation to beneficiaries primarily as a duty “to act solely for the benefit of the principal in all matters connected with his agency”).

48. See Langbein, *supra* note 47, at 655–56.

49. See 1 SCOTT & FRATCHER, *supra* note 19, § 2.5, at 43; see also *Snepp v. United States*, 444 U.S. 507, 515 (1980) (holding that constructive trust and disgorgement are appropriate remedies for a fiduciary’s breach of trust).

50. Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1049 & n.8 (1991).

51. *Id.*; see, e.g., *Cristallina S.A. v. Christie, Manson & Woods Int’l, Inc.*, 502 N.Y.S.2d 165, 172 (N.Y. App. Div. 1986) (regarding implied duty to use best efforts); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 215 (N.Y. 1917) (regarding implied reasonable efforts in contractual relationships).

care and skill as a man of ordinary prudence would exercise in dealing with his own property.”<sup>52</sup> In practice, however, courts do not ordinarily hold fiduciaries personally liable for actions within the scope of their discretion (as opposed to actions outside their vested authority) absent a showing that the actions were grossly negligent or reckless, rather than merely unreasonable or imprudent.<sup>53</sup> Thus, the duty of care requires fiduciaries to take and preserve a beneficiary’s property, to defend legal actions against the fiduciary relation, to pay income due to the beneficiaries, and to inform themselves of all material information reasonably available prior to making an important decision. Unlike the duty of loyalty, the duty of care is not prophylactic; beneficiaries must demonstrate that they have suffered cognizable injury from the fiduciary’s failure to meet the requisite standard of care.<sup>54</sup>

c. Recordkeeping and Accounting Duties

From the general duties of loyalty and care, courts have extrapolated a series of subsidiary duties that share elements of both duties and operate as prophylactic rules. These include the duty “to keep clear and accurate accounts,”<sup>55</sup> the duty to give beneficiaries a complete and accurate accounting of their performance when requested,<sup>56</sup> and the duty to keep beneficiaries’ property separate from the fiduciary’s personal property.<sup>57</sup> Each of these duties decreases beneficiaries’ monitoring costs and enhances their ability to detect and deter breaches of trust. Fiduciaries must satisfy these duties whether or not the beneficiaries can demonstrate actual injury.<sup>58</sup>

C. Fiduciary Socialization

Although fiduciaries are accountable for flagrant abuses of trust, courts generally turn a blind eye to garden-variety indiscretions. Fiduciary law is not necessarily indifferent to less egregious forms of fiduciary misbehavior, but it recognizes that formal accountability mechanisms can also have deleterious

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52. RESTATEMENT (SECOND) OF TRUSTS § 174; *see also* 1 SCOTT & FRATCHER, *supra* note 19, § 2.5, at 43 (discussing this standard).

53. *See* Rounds, *supra* note 21, at A-4 (“The current state of the default law is to limit the trustee’s or personal representative’s personal exposure in tort to situations where the trustee is personally at fault.”).

54. *See* Langbein, *supra* note 47, at 656.

55. 2A SCOTT & FRATCHER, *supra* note 19, § 172, at 452.

56. *Id.* § 172, at 454–56.

57. *See* SIMES, *supra* note 39, at 215.

58. *See* Hillary A. Sale, *Delaware’s Good Faith*, 89 CORNELL L. REV. 456 (2004).



effects. Overenforcing fiduciary duties can diminish fiduciary relations' effectiveness by stifling expert innovation or deterring reasonable risk taking. Fiduciaries may be more likely to shirk their obligations if they perceive that shirking has become the status quo. Beneficiaries may lose faith in their fiduciaries and commit more resources to monitoring, defeating the fiduciary relation's erstwhile efficiencies. Thus, fiduciary relations' utility and viability ultimately turn upon the perception of fiduciary fidelity.<sup>59</sup>

To preserve the fragile environmental conditions where trust can survive and thrive, fiduciary law works "in concert with extralegal influences," reinforcing, rather than displacing, pre-existing rules of moral conduct.<sup>60</sup> For this reason, it is not uncommon for judicial opinions to adopt a sermonizing tone when discussing fiduciary duties, as in then-Judge Cardozo's classic statement that fiduciaries owe their beneficiaries a duty of "finest loyalty . . . stricter than the morals of the market place" or the "punctilio of an honor the most sensitive."<sup>61</sup> Fiduciaries must manifest "undivided and unselfish loyalty" and "utmost good faith," and they must conform their actions to "the highest standards of honor and honesty."<sup>62</sup> Such uncompromising moralistic rhetoric may seem excessive as a description of fiduciaries' legal obligations,<sup>63</sup> but it has great practical value, reinforcing the extralegal aspirational norms that shape fiduciary behavior. In the words of Edward Rock, fiduciary law "evolves

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59. See Blair & Stout, *supra* note 35, at 1798 (describing the business-judgment rule "as a 'second best' solution to the problem of opportunism in corporate relationships—a solution that recognizes that corporate law influences behavior not just by imposing sanctions but also by shaping perceptions of what sort of behavior is expected, appropriate, and common").

60. Scott & Scott, *supra* note 23, at 2476.

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

62. *Davis*, *supra* note 36, at 1–2 (quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (describing the duty of loyalty as a "rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty"); *Grossberg v. Haffenberg*, 11 N.E.2d 359, 360 (Ill. 1937)).

63. Contractarians who view fiduciary duties as mere default terms have derided then-judge Cardozo's formulation, arguing that "the underlying deal" may not "support[ ] th[is] level of fiduciary obligation." Langbein, *supra* note 47, at 658; see, e.g., Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 71–72 (1990); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426–27 (1993). Anti-contractarians argue that fiduciary duties cannot plausibly be characterized as mere default contract rules because courts routinely enforce these duties as mandatory standards irrespective of the contracting parties' agreements. See, e.g., Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1403–10 (1985); Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, in *PRINCIPALS AND AGENTS* 55, 60–61 (John W. Pratt & Richard J. Zeckhauser eds., 1985); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879; Melvin A. Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461 (1989).

primarily at the level of norms rather than the level of rules”<sup>64</sup> and influences fiduciary performance “not primarily by threatening liability but by expressing and reinforcing social norms of careful and loyal behavior.”<sup>65</sup>

Fiduciary law thus serves an important expressive function, conveying society’s aspirations for fiduciary diligence and loyalty. Courts encourage fiduciaries to view their role as a call to service, drawing motivation from a spirit of duty and honor as much as from a fear of coercion or sanctions. These “soft” norms accomplish something that “hard” fiduciary law cannot: They decrease the need for judicial intervention by enhancing the reputational rewards of fiduciary fidelity. As Elizabeth and Robert Scott have observed, fiduciary entrustment “invokes respect in the community, signaling that the individual has assumed an important responsibility, and is trustworthy and morally upright. Community recognition of these attributes carries its own reward, enhancing the nonpecuniary value of the fiduciary role.”<sup>66</sup> Fiduciary relations function most effectively, therefore, when legal constraints operate in concert with social norms to promote fidelity.

#### D. Balancing Fiduciary Discretion

In this rough sketch of fiduciary law, the architecture of fiduciary relations emerges as a delicate dialectic of trust and distrust, discretion and accountability, hard legal rules and soft social norms. Fiduciary law honors entrustment, allowing fiduciaries to exercise discretion within the scope of their prescribed authority. But the law also reinforces the heightened expectations for fiduciary behavior by calibrating beneficiaries’ residual control and fiduciary duties to reduce the threat of opportunism and waste. Placing too much emphasis on any one element of fiduciary relations—say, beneficiary control or fiduciary duty—could prove counterproductive if it interferes with fiduciary expertise or gives rise to a perception of fiduciary untrustworthiness. The architecture of fiduciary law depends, therefore, upon courts cautiously calibrating and recalibrating fiduciary duties and beneficiaries’ control to preserve the balance between competing pressures, incentives, and values.

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64. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1097 (1997).

65. Blair & Stout, *supra* note 35, at 1794 (“[D]irectorial care is largely driven by social norms, rather than by the threat of liability . . .”) (citing Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1265 (1999)); Rock, *supra* note 64, at 1016 (“Delaware courts generate in the first instance the legal standards . . . which influence the development of the social norms of directors [and] officers . . .”).

66. Scott & Scott, *supra* note 23, at 2429.

In the end, fiduciary law's perceived legitimacy depends upon its efficacy: Does the law's mix of entrustment, residual control, and fiduciary duties promote fiduciary care and loyalty in a particular context? Opinions will differ, of course, on where the law should strike this balance. Some policymakers might prefer to increase fiduciary discretion and risk malfeasance so as to maximize the fiduciary relation's potential efficiencies. Others might choose to strengthen beneficiaries' residual control or fiduciary duties at the expense of fiduciary efficiency and expertise. Because different fiduciary relations involve different types of discretion, the balance between entrustment, residual control, and fiduciary duties necessarily varies from one fiduciary relation to another. Efforts to enhance the legitimacy of fiduciary relations thus necessitate engagement with the fiduciary concept's contextual and normative dimensions.

## II. TOWARD A FIDUCIARY MODEL OF ADMINISTRATIVE LAW

Administrative law, like private fiduciary law, vests individuals and institutions with authority to perform services for beneficiaries. Delegation may enhance government's specialization and responsiveness, but it also generates opportunities for corruption, factionalism, arbitrariness, and waste—the enduring hazards of fiduciary representation.<sup>67</sup> In light of these important commonalities between public and private law, courts often envision the administrative state, “in its own way, [a]s the people's . . . fiduciary for certain purposes.”<sup>68</sup> This view of government officers and institutions as public fiduciaries is not “mere metaphor,” according to some courts, but rather “a living tenet of our society.”<sup>69</sup>

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67. See Robert O. Keohane, *Governance in a Partially Globalized World*, 95 AM. POL. SCI. REV. 1, 1 (2001) (coining the term “governance dilemma” to denote the difficulty that “[a]lthough institutions are essential for human life, they are also dangerous”).

68. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (quoting Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 385 (1976)); see also *Taylor v. Beckham*, 178 U.S. 548, 577 (1900) (describing public offices as “mere agencies or trusts”); *Stone v. Mississippi*, 101 U.S. 814, 820 (1879) (“The power of governing is a trust committed by the people to the government . . . . The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights.”); *Black River Regulating Dist. v. Adirondack League Club*, 121 N.E.2d 428, 433 (N.Y. 1954) (approving “the theory that the power conferred by the Legislature is akin to that of a public trust to be exercised not for the benefit or at the will of the trustee but for the common good”).

69. *Nuesse v. Camp*, 385 F.2d 694, 706 (D.C. Cir. 1967); see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 546 (1969) (discussing the role of public officials as “rulers and representatives . . . at the same time”); Rogers & Young, *supra* note 15, at 1029–30 (“The English Whigs and the American framers embraced the private law concept of trust and extended its application even further in regulating public offices. . . . Just as citizens could give their property in trust, the sovereign could give his offices in trust.”).

The fiduciary concept's pervasive influence in administrative law merits closer investigation. Traditionally, legal scholarship has viewed the law's recourse to metaphor with skepticism, if not outright hostility.<sup>70</sup> Yet scholarly discomfort with "legal fictions" has not unsettled the private-law metaphors that are embedded so deeply in the conceptual foundations of administrative law. If anything, the venerable rhetoric of public institutions as "agencies" headed by "administrators" and "officers," all exercising "delegated" authority as a "public trust," has become more apt as a description of administrative law doctrine over the last half-century. Fiduciary law's core elements of entrustment, residual control, and fiduciary duty increasingly capture the "deep structure" of administrative law—from the glacial evolution of constitutional precepts to the flowering of statutory standards for agency discretion. Throughout administrative law jurisprudence, the fiduciary model "triggers powerful, recurring frameworks of meaning and patterns of belief . . . [and] sets in motion deeply rooted folk images, archetypes, and story lines," thereby mediating the relationships between administrative agencies, the political and judicial branches, and the people as a whole.<sup>71</sup> Analyzing administrative law from a fiduciary perspective thus illuminates the law's internal logic and ambitions, and offers glimpses into administrative law's future.

#### A. Administrative Entrustment

At its heart, administrative law governs the exercise of entrusted authority by institutions that serve as stewards for the people. The terms of an administrative agency's enabling statute reflect the type and degree of trust that the people, through their elected representatives, have chosen to repose in the agency. Implicit in this public entrustment is the expectation that agencies, like private-law fiduciaries, will align their performance with the expressed and implicit interests of their beneficiaries, exercising their discretion to promote the beneficiaries' welfare. In theory, this marriage of agency specialization, discretion, and fidelity should enhance the federal government's efficiency and responsiveness.

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70. See, e.g., LON L. FULLER, *LEGAL FICTIONS* 2 (1967) ("The fiction has generally been regarded as something of which the law ought to be ashamed, and yet with which the law cannot, as yet, dispense."); Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 186 (2004) ("Legal scholars have traditionally understood metaphor as, at worst, a perversion of the law, and at best, a necessary but temporary place-holder for more fully developed lines of argument. On this view, metaphors are vague and inherently manipulable, appealing to base instincts, whereas explicit legal argumentation represents the rigorous, authentic core of law.").

71. Tsai, *supra* note 70, at 189.

Although virtually all agencies trace their authority to an express or implied delegation from Congress, the scope of agencies' authority varies dramatically. Some federal agencies have sweeping substantive missions and enjoy correspondingly broad powers. The Federal Trade Commission Act, for instance, authorizes the Federal Trade Commission (FTC) to take steps to curb "unfair methods of competition" and "unfair or deceptive acts or practices," but provides strikingly little guidance regarding what competitive strategies would qualify as "unfair" or "deceptive."<sup>72</sup> Such broadly phrased standards give agencies enormous flexibility to craft regulatory regimes responsive to legislative policies in complex or changing circumstances.

To the extent that agencies are authorized to prescribe law through substantive rulemaking or adjudication, the agencies' determinations are accorded legislative effect, meaning that they are binding not only for the government but also for the public at large.<sup>73</sup> Not all agencies have the power to act with the force of law, however. Some agencies exercise investigatory or reporting powers without the authority to promulgate legally binding regulations or adjudicative decisions. Such agencies may engage in crusades of public persuasion or may recommend that other agencies pursue a preferred course of action.<sup>74</sup> Even where Congress does delegate regulatory authority to a particular agency, it may choose to cabin the agency's discretion by prescribing narrow principles for implementation such as the specific qualification criteria for government benefits.<sup>75</sup>

However an administrative agency's responsibilities are defined, the fiduciary model emphasizes that agencies bear a solemn responsibility to honor the terms and spirit of their entrusted authority. Like private-law fiduciaries, agencies are expected to manifest fidelity to the trust reposed in them. Courts have come to recognize over time that agencies must not only satisfy

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72. 15 U.S.C. § 45(a)(2) (2000).

73. See, e.g., *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect [upon state law] than federal statutes."); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981) (holding that the Secretary of Health and Human Services' interpretive rules are "entitled to 'legislative effect' because, '[in] a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term.'") (quoting *Batterton v. Francis*, 432 U.S. 416, 425 (1977)).

74. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2169 (2004) (citing the Equal Employment Opportunity Commission's authority under 42 U.S.C. § 2000e-12(a) to resolve complaints by conciliation).

75. WILLIAM F. FOX, JR., *UNDERSTANDING ADMINISTRATIVE LAW* § 1.01 (4th ed. 2000); see also 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.3, at 234 (3d ed. 1994) ("[A]n agency has the power to issue binding legislative rules only if and to the extent Congress has authorized it to do so.").

the strict terms of their statutory mandates (as prescribed in the transmission-belt model) and investigate public preferences (as dictated by the interest-representation model), but also assume responsibility as fiduciaries for the broader interests of their statutory beneficiaries. "While retaining the interest representation model's concern with protecting regulatory beneficiaries, courts have recognized that merely ensuring the *participation* of all affected interests will not ensure the *protection* of those for whom Congress has expressed special solicitude," Judge Merrick Garland of the D.C. Circuit has observed.<sup>76</sup> Hence,

the courts have turned instead to an expanded notion of fidelity, one that requires not only that the agencies not *exceed* their congressionally authorized powers, but also that they *use* those powers as Congress intended. In short, the courts have reached back to the oldest of administrative law values—maintaining agency constancy to congressional purpose—in order to extend protection to a new class of legislative beneficiaries.<sup>77</sup>

Agencies' "fidelity to congressional intent" is the "central concern of administrative law"<sup>78</sup> because legislative directives typically represent the conditions upon which agency policymaking is predicated. Where legislative directives leave gaps for agencies to fill or speak in terms so broad as to "give little hint of the congressional intent to which the agency must be faithful,"<sup>79</sup> agencies look beyond Congress's specific intent to the broader public interest. This expanded emphasis on agency fidelity reflects the fiduciary model's vision of administrative agencies as fiduciary institutions endowed with authority from the sovereign people to perform services for their statutory beneficiaries.

Because the initial "entrustors" and ultimate "beneficiaries" of agency authority are frequently one and the same—the people as a whole—there is a natural tendency to conflate these categories. But this is a mistake. While all government authority might emanate in the first instance from the people, many agencies service a discrete subset of the U.S. population (for example, welfare recipients), aid persons outside U.S. territory (for example, recipients of international humanitarian assistance), or protect private interests that cut across national boundaries (as in, for example, international-trade regulation).<sup>80</sup>

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76. Garland, *supra* note 5, at 512.

77. *Id.* (citation omitted).

78. *Id.*; cf. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. c (2003) ("Even under the broadest grant of fiduciary discretion, a trustee must act honestly and in a state of mind contemplated by the settlor.").

79. Garland, *supra* note 5, at 590.

80. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, The Emergence of Global Administrative Law 22 (Inst. for Int'l Law and Justice, Working Paper No. 2004/1, 2004), *available*

Agencies bear duties of fidelity not only to the terms of their statutory entrustment but also to the best interests of their statutory beneficiaries, however defined. Therefore, the tension in fiduciary law between a settlor's ex ante expectations and beneficiaries' ex post preferences also reverberates throughout administrative law. In both spheres, a central "theme is flexibility and efficiency in the pursuit of the best interests of . . . beneficiaries within the settlor's legally permissible objectives."<sup>81</sup> The fiduciary model thus clarifies administrative law's approach to agency entrustment in the following respects.

### 1. Agency Entrustment: Institutional and Individual

First, the fiduciary model offers a useful starting point for explaining why the Constitution divides the incorporation power for administrative agencies between the three branches rather than committing this power exclusively to a single branch. As fiduciaries for the people as a whole, administrative agencies' fiduciary obligations do not run solely to the chief executive or the legislature per se, but rather to the agencies' statutory beneficiaries, who are often, but not always, the sovereign people as a whole. To minimize the risk that either branch will unilaterally dominate public administration to beneficiaries' detriment, the Constitution divides the tasks of agency entrustment. Congress may entrust regulatory authority to administrative *institutions*, but only the executive or judiciary has the power to populate these institutions by vesting regulatory authority in individual *administrators*.<sup>82</sup>

For its part, Congress designs administrative agencies and sets the terms of agency entrustment. Agencies trace their authority to enabling legislation, popularly referred to as its "enabling act" or "organic act." Like a corporation's articles of incorporation, the enabling act outlines an agency's basic structure and pinpoints the agency's coordinates within the firmament of federal

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at <http://www.iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf> (observing that "domestic regulatory bodies and officials" increasingly act as agents of global regulatory regimes, with duties to "other states . . . individuals and firms subject to regulation, [and] broader social and economic interests").

81. Halbach, *supra* note 46, at 1881.

82. See *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 269 (1991) (holding that Congress may not delegate regulatory power to an institution in which "membership . . . is restricted to congressional officials"). Not all agencies have been created by Congress. See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1387 n.4 (2004) (noting that the Environmental Protection Agency was established first by executive action) (citing Richard Nixon, *Special Message from the President to the Congress About Reorganization Plans to Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration* (July 9, 1970), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON, 1970, at 578 (1971), available at <http://www.hti.umich.edu/p/ppotpus>).

bureaucracy. For example, an enabling act may charge an agency with oversight of a particular industry or public resource, fix the agency's basic modus operandi, decide whether the agency will be led by a cabinet-level or subordinate officer, assign the agency to a particular station within the executive branch's organizational chart, and determine to what degree the agency's decisionmaking processes will be insulated from presidential control. Perhaps most importantly, Congress defines the overarching principles or objectives that should govern the agency's exercise of discretion.

Although Congress sets the terms of entrustment for administrative agencies, "in the business of appointments" the executive branch serves as the people's "principal agent."<sup>83</sup> The Appointments Clause of Article II empowers the president to select all "Officers of the United States" with the "Advice and Consent of the Senate."<sup>84</sup> The Appointments Clause screens Congress from participating directly in agency appointments, as the Supreme Court stressed in *Buckley v. Valeo*<sup>85</sup> and *Bowsher v. Synar*.<sup>86</sup> Congress may choose whether to assign the appointment power for "inferior Officers" to "the President alone," to "the Courts of Law," or to "the Heads of Departments."<sup>87</sup> However, it "may not direct that its laws be implemented through persons who are its agents in the sense that it chose them."<sup>88</sup>

The bifurcation of entrustment power between Congress and the president operates not only as "a bulwark against one branch aggrandizing its power at the expense of another,"<sup>89</sup> but also as a safeguard against either branch hijacking agency policymaking for personal gain. The Appointments Clause thus reflects the fiduciary model's vision of administrative agencies as stewards for the people as a whole rather than as mere institutional appendages of Congress or the president.

## 2. Legislative Subdelegation

A second area where the fiduciary model clarifies administrative law is the so-called "nondelegation doctrine," which theoretically prohibits Congress

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83. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

84. U.S. CONST. art. II, § 2, cl. 2.

85. 424 U.S. 1 (1976).

86. 478 U.S. 714 (1986).

87. U.S. CONST. art. II, § 2, cl. 2.

88. *Bowsher v. Synar*, 478 U.S. 714, 766 (1986) (White, J., dissenting) (describing the Court's holding in *Buckley*).

89. *Ryder v. United States*, 515 U.S. 177, 182 (1995); see also THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) (implying that the Appointments Clause was designed "to provide some practical security for each, against the invasion of the others").



from delegating “legislative power” to the executive and legislative branches. The nondelegation doctrine traces its ancestry to a venerable maxim of fiduciary law, *delegata potestas non potest delegari* (he who holds a delegated power lacks the power to delegate it). In Locke’s words:

The power of the Legislat[ure], being derived from the People by a positive voluntary Grant . . . can be no other than what that positive grant conveyed, which being only to make Laws, and not to make Legislators, the Legislat[ure] can have no power to transfer their Authority of making Laws, and place it in other hands.<sup>90</sup>

While some have characterized the nondelegation doctrine as “essential to the integrity and maintenance of the system of government ordained by the Constitution,”<sup>91</sup> the doctrine’s formalistic approach to “lawmaking power” has proven to be unworkable in practice. Congress has neither the time nor the specialized expertise to set every emissions standard, review every new consumer drug, or assess the merits of every proposed modification to the endangered species list. Even if Congress could perform these services, the glacial pace of legislative action would prevent it from responding effectively in an era of rapid economic, technological, and social change. As the Supreme Court acknowledged in *Mistretta v. United States*,<sup>92</sup> “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>93</sup> Bowing to these practical constraints, the Court has allowed Congress to subdelegate the details of federal regulation to agencies provided that Congress provides an “intelligible principle” to guide agency discretion.<sup>94</sup>

The Court’s anemic enforcement of the nondelegation doctrine has prompted some scholars to characterize the doctrine as a failed experiment, a historical aberration that has fallen into desuetude.<sup>95</sup> Over sixty years have passed since the Court last struck down federal legislation on nondelegation

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90. LOCKE, *supra* note 15, bk. II, § 141; *see also* *Shankland v. Mayor of Washington*, 30 U.S. (5 Pet.) 390, 395 (1831) (“[T]he general rule of law is, that a delegated authority cannot be delegated.”).

91. *Field v. Clark*, 143 U.S. 649, 697 (1892) (Lamar, J., dissenting).

92. 488 U.S. 361 (1989).

93. *Id.* at 372; *see also* *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (explaining that the nondelegation doctrine’s application should be consistent with “common sense and the inherent necessities of the governmental co-ordination”).

94. *Mistretta*, 488 U.S. at 372–73.

95. This question has been debated most recently by Eric Posner, Adrian Vermeule, Larry Alexander, and Saikrishna Prakash. Compare Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) [hereinafter Posner & Vermeule, *Interring*] (arguing that a statutory grant of authority to the executive branch does not effect a delegation of legislative power), and Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331 (2003) (same), with Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (challenging the Posner-Vermeule thesis).

grounds.<sup>96</sup> In the meantime, it has approved numerous delegations with vacuous “intelligible principle[s]” such as the instructions to set “fair and equitable” prices or to award broadcast licenses in “the public interest.”<sup>97</sup> While the Court has not formally abandoned the nondelegation doctrine,<sup>98</sup> the emergence of the intelligible-principle rule has left the doctrine with a menacing bark, but no real bite.

This defanged nondelegation doctrine might seem, at first glance, to bear little resemblance to the *delegata potestas* maxim passed down from fiduciary law. But *delegata potestas* was never the monolithic rule that Locke envisioned. As Justice Story recognized in a private-law case, “the true doctrine” was far more nuanced and contextual: Delegated authority is “exclusively personal, unless from the express language used, or from the fair presumptions, growing out of the particular transaction, or of the usage of trade, a broader power was intended to be conferred on the agent.”<sup>99</sup> The presumption against fiduciary subdelegation could be rebutted by evidence of industry custom or of a different expectation between the parties. Over time, these exceptions have eclipsed the nondelegation presumption. Trustees today commonly enlist professional financial consultants for assistance with asset management.<sup>100</sup> Stockholders expect corporate directors to subdelegate administrative duties within corporations to expert managers. As economic and social change have eroded the assumptions upon which the nondelegation canon once rested, courts have permitted greater fiduciary subdelegation to further beneficiaries’ interests and honor entrustors’ presumed intent.<sup>101</sup> Thus, private law and administrative law have both

96. See *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating a delegation under the National Industrial Recovery Act (NIRA) to establish codes of fair competition); *Pan. Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (invalidating a delegation to the president under NIRA to prohibit interstate shipment of certain oil).

97. Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 724–25 & nn.57–59 (1994) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993)).

98. See, e.g., *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457 (2001).

99. Posner & Vermeule, *Interring*, *supra* note 95, at 1733 (quoting JOSEPH STORY, *COMMENTARIES ON THE LAW OF AGENCY* § 14, at 14–16 (Boston, Charles P. Greenough ed., Little, Brown & Co., 9th ed. 1882) (1839)).

100. Indeed, some have suggested that current law might require amateur trustees to subdelegate investment authority to professionals. See Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 640 n.91 (2004) (citing *inter alia* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 171 & cmt. f (1992); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 665–66 (1996)).

101. See 2A SCOTT & FRATCHER, *supra* note 19, § 171, at 438 (“[The duty not to delegate] does not mean, of course, that the trustee must personally perform every act that may be necessary or proper in the execution of the trust. He can properly permit others to perform acts he cannot reasonably be required personally to perform.”). Congress also has given the president substantial discretion to subdelegate authority to “the head of any department or agency in the executive

drifted toward a more flexible nondelegation doctrine, one that reflects popular expectations about the propriety of fiduciary subdelegation.

The “prudent-investor” rule in private law and the “intelligible-principle” rule in administrative law each operate as weak constraints on fiduciary subdelegation, permitting all but the most flagrant and exhaustive abdications of responsibility. For example, trustees bear a “duty not to delegate the doing of acts [that they] can reasonably be required personally to perform,”<sup>102</sup> but they also “ha[ve] power, and may sometimes have a duty, to delegate such functions and in such manner as a prudent investor would delegate under the circumstances.”<sup>103</sup> Under the prudent-investor rule, courts defer to a trustee’s determination regarding the propriety of a subdelegation except under extreme circumstances, such as where the subdelegation effectively “transfer[s] to another the whole responsibility for the administration of the trust.”<sup>104</sup> The co-evolution of these rules over the past century parallels shifting public expectations and reflects the conceptual linkages between private fiduciary law and administrative law.

### 3. Delegation and Deference

The standards for judicial deference to administrative agencies also closely parallel principles of private fiduciary entrustment. Federal courts have “long given considerable and in some cases decisive weight” to agency actions and routinely defer to agency interpretations of ambiguous statutes.<sup>105</sup> This tradition of judicial deference to agency discretion builds upon a theory of agency entrustment that has its roots in the fiduciary concept.

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branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate.” 3 U.S.C. § 301 (2000); *see also* 5 U.S.C. § 903(a)(5) (2000) (empowering the president to authorize subordinates to delegate authority); 28 U.S.C. § 510 (2000) (authorizing the attorney general to subdelegate authority).

102. 2A SCOTT & FRATCHER, *supra* note 19, § 171.2, at 442.

103. Halbach, *supra* note 46, at 1910 (explaining that a trustee need only “act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents”) (quoting RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227(c)(2) (1992)).

104. 2A SCOTT & FRATCHER, *supra* note 19, § 171.1, at 439. The prudent-investor rule may also help to explain why the Court has permitted Congress to delegate certain regulatory activities to private parties. *See, e.g.,* INS v. Chadha, 462 U.S. 919, 987 (1983) (White, J., dissenting) (“While most authority to issue rules and regulations is given to the Executive Branch and the independent regulatory agencies, statutory delegations to private persons have also passed this Court’s scrutiny.”); United States v. Rock Royal Coop. Inc., 307 U.S. 533, 577–78 (1939) (upholding an act that gave private parties a veto power over agency marketing orders); Currin v. Wallace, 306 U.S. 1 (1939) (upholding an act allowing farmers affected by agency action to vote on prospective regulations).

105. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

The natural starting point for exploring judicial deference to agency decisionmaking is Justice Stevens's classic two-step analysis in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>106</sup> First, federal courts do not defer to agency decisions that contravene the "unambiguously expressed intent of Congress."<sup>107</sup> Second, where Congress leaves "a gap" in the statutory scheme "for the agency to fill," courts construe the gap as "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" and will defer to the agency's reasonable constructions of the statute.<sup>108</sup> To these two steps, recent Court decisions add a third piece to the puzzle, popularly known as *Skidmore* deference: Where administrative agencies seek to regulate an area beyond the scope of their statutorily delegated authority, their interpretation of a statute is not conclusive, but may be accorded considerable weight "depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."<sup>109</sup> Thus, administrative law currently posits at least three scenarios where judicial deference to agency administration may be appropriate: (1) the agency implements an unambiguous statutory instruction; (2) the agency exercises delegated rulemaking authority to resolve an ambiguity or fill a gap in a statutory regime; or (3) the agency's interpretation of the statute is otherwise persuasive.

Although the expertise, interest-representation, and presidential-control models offer supporting policy rationales for *Chevron* deference,<sup>110</sup> the Court

106. 467 U.S. 837 (1984).

107. *Id.* at 843 (citations omitted).

108. *Id.* at 843-44. This is true even if a court has previously spoken to the question resolved by the agency. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). Courts are similarly deferential to an agency's interpretation of its own rules. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that courts should give an agency interpretation of its own regulation "controlling weight unless it is plainly erroneous or inconsistent with the regulation").

109. *Skidmore*, 323 U.S. at 140.

110. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (observing that generalist federal judges lack administrators' special expertise and "greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated") (citing *Rust v. Sullivan*, 500 U.S. 173, 187 (1991)), *abrogated by* *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992); *Chevron*, 467 U.S. at 865-66 (suggesting that agency policymaking enhances democratic accountability by placing regulatory policy more firmly within an "incumbent administration's" sphere of influence); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. (forthcoming 2006) (arguing that *Chevron* deference reflects the executive branch's superior expertise and accountability); Richard J. Pierce, Jr., *Democratizing the Administrative State* 3 (George Wash. Univ. Law Sch., Pub. Law Research

has stressed on numerous occasions that *Chevron* rests principally upon a theory of legislative entrustment: Federal courts presume that Congress delegates lawmaking power to administrative agencies to clarify ambiguities and fill gaps in the statutes they administer. Justice Scalia explained in *Smiley v. Citibank*<sup>111</sup>:

[Courts] accord deference to agencies under *Chevron*, not because . . . they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.<sup>112</sup>

If statutory ambiguity represents Congress's implicit delegation of lawmaking authority, statutory clarity demarcates the outer limits of an agency's *Chevron* authority. An agency's statutory interpretation commands *Chevron* deference only if Congress has charged the agency with administrative responsibility for the relevant statute;<sup>113</sup> when another agency administers the relevant statute, the proffered interpretations are "not controlling upon the courts by reason of their authority," though they could still qualify as persuasive authority under the weaker *Skidmore* standard.<sup>114</sup> Similarly, *Chevron* does not permit agencies to construe statutory provisions in a manner that would raise significant constitutional concerns<sup>115</sup> or expand the agency's discretionary authority outside the fields contemplated by Congress.<sup>116</sup> *Chevron*'s logic of legislative entrustment thus preserves agency discretion within

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Paper No. 173, 2005), available at <http://ssrn.com/abstract=839227> (arguing that the *Chevron* Court "anchored *Chevron* deference in the relationship between agencies and the President").

111. See 517 U.S. 735 (1996).

112. *Id.* at 740–41; cf. Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 746–47 (2002) ("[I]n *Mead* the Supreme Court squarely located the requirement of *Chevron* deference on a theory of an implied delegation of lawmaking power. Under *Mead* federal courts should afford *Chevron* deference to agency interpretations of ambiguous statutory texts only when the agency enjoys congressionally-delegated power to make quasi-statutory interpretations.").

113. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990), *superseded by statute*, 29 U.S.C. § 1854(d)(1) (2000).

114. *Skidmore*, 323 U.S. at 140.

115. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps. of Eng'rs*, 531 U.S. 159 (2001).

116. See *Gonzales v. Oregon*, 126 S. Ct. 904, 916–17 (2006); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that courts may require stronger evidence of legislative entrustment when agencies assert authority to make decisions of great "economic and political magnitude"). *But see* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000) ("[U]nder *Chevron*, agencies are not merely given authority that is often open-ended; they are also permitted to interpret the scope of their own authority, at least in the face of ambiguity.").

the scope of legislative delegations (express, implied, or imputed) without licensing agencies to expand their delegated authority beyond its intended scope.

The Court has vacillated over the appropriate methodology for discerning agency entrustment. In most cases, the Court has construed *Chevron* as a presumption "that ambiguities in statutes within an agency's jurisdiction to administer are delegations of [lawmaking] authority to the agency to fill the statutory gap in [a] reasonable fashion."<sup>117</sup> In *United States v. Mead Corp.*,<sup>118</sup> however, eight justices cast doubt upon this strong presumption by denying *Chevron* deference to a U.S. Customs Services' tariff classification. According to *Mead*, tariff classifications do not warrant *Chevron* deference because "the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law."<sup>119</sup> On its face, *Mead*'s rationale encourages courts to pierce *Chevron*'s presumption of ambiguity-qua-delegation in search of particularized evidence "that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."<sup>120</sup>

At present, it is unclear how the Court will resolve this tension between *Chevron*'s blanket presumption of legislative delegation and *Mead*'s contingent, contextual approach. Yet, however this question is resolved, the mere fact that all nine justices appear to accept legislative delegation as the touchstone for *Chevron* deference is itself remarkable. The Court defers to agency interpretations of ambiguous statutes to honor agencies' entrusted lawmaking

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117. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005); see also Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 490-91 (1996) (observing that courts prefer to infer entrustment based on the formation of a relationship of trust rather than look for discrete acts of delegation, thereby bypassing the "fictional" aspect of legislative intent); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (same).

118. 533 U.S. 218 (2001).

119. *Id.* at 231-32. The Court proceeded to argue that "express congressional authorizations to engage in the process of rulemaking or adjudication" would be "a very good indicator of delegation meriting *Chevron* treatment." *Id.* at 229. But see *id.* at 239 (Scalia, J., dissenting) ("What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary.").

120. *Id.* at 229. Despite its rationale, *Mead* is probably better understood in reference to Congress's expectations for how agencies will exercise delegated lawmaking powers rather than whether Congress has delegated lawmaking powers in the first place. When agencies interpret statutes informally without invoking their entrusted lawmaking authority, these interpretations are not necessarily binding on courts. See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("[Agency] interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law . . . do not warrant *Chevron*-style deference."); *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 157 (1991) (stating that interpretive rules are "not entitled to the same deference as norms that derive from the exercise of [an agency]'s delegated lawmaking powers").

authority, not merely to vindicate the executive branch's constitutional powers, expertise, or electoral accountability (although these factors clearly strengthen the case for deference). In fairness, it must be conceded that this notion of legislative delegation is usually a thinly veiled fiction—though it is no greater fiction than private fiduciary law's attribution of entrusted authority to parents, guardians, and other noncontractual fiduciaries. Courts treat agencies as possessing authority to resolve ambiguities and fill gaps wherever agencies have administrative responsibility for a statutory scheme; whether Congress actually intended to delegate lawmaking authority “matters not.”<sup>121</sup> *Chevron* and its progeny thus rest firmly on a fiduciary theory of administrative entrustment.

## B. Agency Accountability

Implicit in the *Chevron* doctrine and other principles of agency entrustment is the expectation that agencies will exercise their authority in a manner that honors the delegation's purpose and serves the agency's beneficiaries. As in private fiduciary relations, trust lies at the heart of the public's social contract with the administrative state. The rapid growth of federal bureaucracy during the New Deal can be traced to the public's shaken faith in unregulated markets and enhanced confidence in the federal government during the 1930s and 1940s.<sup>122</sup> While recent decades have been marked by greater cynicism regarding the trustworthiness of federal regulators and the desirability of federal regulation, public trust remains the keystone of administrative governance. The federal government's regulatory role in areas ranging from education to natural resources to homeland security is made possible by the public's general acceptance of administrative agencies as fiduciary institutions capable of following legislative directives in good faith, suppressing self-interest, and resisting the distorting pressures of pork-barrel politics. The expansion of the modern administrative state over the twentieth century can be viewed, therefore, as a burgeoning fiduciary compact between federal agencies and the American people.

At the same time, however, the delicate framework of regulatory governance can easily decay into corruption, cronyism, factionalism, capriciousness, and waste. As stewards over vast public resources and powerful regulatory regimes, administrative agencies face extraordinary pressures from both within and outside government—not all of which are conducive to conscientious

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

122. See Garland, *supra* note 5, at 577.

administration, to put it mildly. For decades, political scientists have decried the so-called "iron triangles" between private industry, agency administrators, and congressional committees, which institutionalize factionalism, entrenching narrow interests in opposition to broad-based progressive reforms.<sup>123</sup> Public resources pooled under agency control may also become breeding grounds for rent-seeking bureaucrats and unscrupulous lobbyists. Bureaucratic mismanagement can be equally insidious, leading to arbitrary, uninformed, and wasteful policies. In many instances, asymmetries in expertise and information can frustrate efforts by the president, Congress, and nongovernmental watchdogs to monitor agency performance. While agency entrustment is predicated upon public trust, the threat of agency mismanagement presents an equally compelling case for distrust.

Distrust of representative government was perhaps the dominant preoccupation of the founding generation, as evidenced during the Constitutional Convention debates,<sup>124</sup> and this legacy lingers as a recurring motif in contemporary administrative law. Administrative law addresses the threats posed by agency discretion through the same mechanisms as private fiduciary law: residual control and fiduciary duties. Courts enforce these bonding mechanisms to complement preexisting social norms and to maximize the efficiencies of agency specialization.

### 1. Executive and Legislative Control

When regulatory authority vests in an administrative agency, the political branches each retain a measure of residual control over the agency's performance. For instance, Congress may enact new legislation to modify an agency's substantive mandate or *modus operandi*. The president likewise has a duty to "take Care that the Laws be faithfully executed,"<sup>125</sup> and he may demand that agency heads make a fiduciary accounting of their activities at any time by rendering an opinion in writing "upon any Subject relating to the Duties of their . . . Offices."<sup>126</sup> The president also exerts indirect control over agency policy through executive orders requiring interagency coordination and

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123. See CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW & POLICY* § 7.12 (2d ed. 1997); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 22 (2d ed. 1979); JEFFREY WORSHAM, *OTHER PEOPLE'S MONEY: POLICY CHANGE, CONGRESS, AND BANK REGULATION* 1 (1997).

124. See Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 810 (1999) (describing the Constitutional Convention as a veritable "feast of distrust").

125. U.S. CONST. art. II, § 3.

126. *Id.* art. II, § 2, cl. 1.



preregulation agenda setting,<sup>127</sup> and he may remove administrators under appropriate circumstances.

What is particularly striking about the political branches' control over the administrative process, however, is the extent to which this control is cabined by separation of powers principles and other legal and practical constraints. For example, although Congress sets the terms of agency entrustment, Congress possesses no power to influence agency decisionmaking outside the bicameral requirements of Article I. Congress cannot reserve to itself the prerogative to revoke agency regulations by "legislative veto"<sup>128</sup> or to remove administrators who deviate from statutory instructions.<sup>129</sup> Nor can it appoint its own members or agents as ex officio members of agency commissions<sup>130</sup> or authorize the president to "cancel" discrete provisions of statutes that have been signed into law.<sup>131</sup> Indeed, even Congress's indisputable authority to curtail agency discretion through legislation has limited practical effect due to the extraordinary amount of time, coordination, and political capital needed for bicameral lawmaking.

Legal and practical constraints also restrict the president's influence over agency administration. The president, like entrustors in private fiduciary relations, often influences agency behavior through informal means—for instance, by making recommendations to the administrators he has appointed. Certain executive orders also provide for agencies to furnish cost-benefit analyses of proposed regulations and alternatives to the Office of Management and Budget (OMB), facilitating the president's review of agency regulations.<sup>132</sup>

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127. See 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.9, at 498–99 (4th ed. 2002) (describing Executive Orders 12,291 and 12,498); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (discussing efforts by the White House to make administrative agencies more responsive to the president's political and policy agendas); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 443 (2003) (terming these processes of executive review "analytic management").

128. *INS v. Chadha*, 462 U.S. 919, 954–55 (1983); see also *id.* at 955 ("Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.").

129. See *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) ("Once the appointment has been made and confirmed, . . . the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate . . . on 'Treason, Bribery[,] or other high Crimes and Misdemeanors.'") (quoting U.S. CONST. art. II, § 4); see also *id.* at 737 (Stevens, J., concurring) ("[W]hen Congress . . . seeks to make policy that will bind the Nation, it must follow the procedures mandated by Article I of the Constitution—through passage by both Houses and presentment to the President.").

130. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

131. See *Clinton v. City of New York*, 524 U.S. 417, 436–37 (1998).

132. See Stewart, *supra* note 127, at 443 (describing the rationale behind Executive Order 12,291); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995) (same).

But the president lacks formal authority to prescribe regulatory policy in instances where statutes expressly assign decisionmaking to another executive officer, and he is ordinarily powerless to alter or abrogate the statutory standards for agency discretion.<sup>133</sup> To the extent that agencies set policy through adjudicatory processes, due process prevents the president from intervening to override decisions by administrative law judges. While it is certainly true that the president may remove some errant officers based on policy disagreements, Congress has limited this removal authority for most executive appointments,<sup>134</sup> and the president lacks formal legal authority to compel these officers to follow a prescribed course of conduct. Even where the president possesses removal power, the political ramifications of removal and the information asymmetries between the president and agencies may frustrate executive control.<sup>135</sup>

If one accepts the premise that the administrative state's legitimacy hinges upon executive or legislative control of agency policy (as posited in the transmission-belt and unitary-executive models), the gaping holes in the political branches' power to control regulatory decisionmaking strike at the heart of agency legitimacy.<sup>136</sup> The fiduciary model, in contrast, views these constraints as essential to effective agency administration. When Congress entrusts critical rights or resources to an administrative agency, it usually does so to harness the expertise and efficiencies of institutional specialization. Just as corporate boards may inadvertently stymie productivity by attempting to micromanage corporate administration, so too may Congress and the president stymie regulatory policymaking by maintaining too tight a grip on the

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133. See 1 PIERCE, *supra* note 127, § 7.9, at 501.

134. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that Congress may provide for removal of the independent counsel by the attorney general rather than the president); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) (stressing that Congress's authority to limit the president's removal power for certain agencies "cannot well be doubted"); Shapiro, *supra* note 11, at 6 (noting that Congress "can limit the President's authority to remove administrators because of policy disagreements" and that "it has done so in the 'independent agencies'"); cf. RESTATEMENT (SECOND) OF AGENCY § 409 (1958) ("A principal is privileged to discharge before the time fixed by the contract of employment an agent who has committed such a violation of duty that his conduct constitutes a material breach of contract . . ."); RESTATEMENT (THIRD) OF TRUSTS § 37 (2003) (noting that discharge of a trustee is appropriate "(a) in accordance with the terms of the trust; or (b) for cause by a proper court").

135. As Richard J. Pierce, Jr. has argued, "The greatest constraints on presidential power to control agency policymaking are purely practical. It is simply impossible for the President even to be aware of all of the policy decisions agencies make." 1 PIERCE, *supra* note 127, § 7.9, at 502-03.

136. See, e.g., Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 115-16 (1988) (arguing that administrative agencies' relative autonomy deprives the president of "the independent will that the Founders had in mind when they called for an executive with greater energy").

reins of agency rulemaking. Indeed, in contexts where agencies adjudicate individual claims or mediate between conflicting factions, one might argue that the political branches—like trust settlors—should retain only the limited residual control necessary to prevent flagrant malfeasance. Agency discretion has its dangers, to be sure, but excessive intermeddling in the regulatory process systematically dilutes agency expertise and plunges agency discretion more deeply into the mire of partisan politics.

Whether contemporary administrative law strikes an optimal balance between residual control and agency discretion is highly debatable, to be sure. There might be good reasons, constitutional or otherwise, for strengthening or weakening the political branches' control over certain aspects of the administrative process. The more significant point for present purposes, however, is that the public interest may be best served by a legal regime where neither the president nor Congress exercises unqualified control over agency action.

## 2. Fiduciary Duties

The wisdom of constraining executive and legislative residual control over the administrative process becomes more apparent when one takes into account the other accountability mechanisms embedded in administrative law. As in private fiduciary law, administrative agencies owe fiduciary duties to their statutory beneficiaries, the ultimate stakeholders in agency action, and courts enforce these duties by requiring agencies to discharge them with absolute loyalty and reasonable care.<sup>137</sup> The parallels between private fiduciary duties and agency duties are striking. Agencies are bound to exercise reasonable prudence when exercising delegated powers, and they are forbidden from entering self-interested transactions or arbitrarily discriminating between similarly situated beneficiaries. Courts enforce these fiduciary duties as minimal standards of rationality, consistency, transparency, public deliberation, and thoroughness in investigating alternatives. Rather than extract agency duties of loyalty and care from the primordial soup of federal common

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137. Cf. RESTATEMENT (SECOND) OF AGENCY § 428 ("Unless otherwise agreed, a subagent who knows of the existence of the ultimate principal owes him the duties owed by an agent to a principal, except the duties dependent upon the existence of a contract."). Some have suggested that fiduciaries also owe duties of loyalty and care to persons other than their beneficiaries. See Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2761–62 (2006) (noting the tension between fidelity to the settlor and fidelity to beneficiaries); Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. CORP. L. 333 (2002) (arguing that under current law, corporate directors may owe fiduciary duties to community interests in addition to shareholders).

law, however, courts have drawn these fidelity norms from the Constitution, the APA, and other transsubstantive procedural statutes.<sup>138</sup>

Courts do not necessarily characterize agencies' constitutional and statutory obligations as fiduciary duties, of course. In practice, however, judicial "hard look" review of agency rulemaking, "substantial-evidence" review of agency adjudication, and other standards of judicial review closely track courts' standards for private fiduciary duties. The purpose is not to substitute judicial discretion for agency discretion, but rather merely to ensure that agencies exercise their discretion through a process that ensures reasonable care, loyalty, and transparency. Administrative law calls upon courts to enforce agency duties in order to promote fidelity to agencies' statutorily defined missions and the best interests of their beneficiaries.

#### a. Informal Rulemaking

The fiduciary duties of care and loyalty play an important, if underappreciated, role in structuring the procedural requirements for informal rulemaking. The APA authorizes agencies to issue legislative rules through a three-step process consisting of (1) public notice of the proposed rule; (2) solicitation of public comments; and (3) issuance of a final rule containing "a concise general statement of [the rule's] basis and purpose."<sup>139</sup> Proposed rules must be published in the Federal Register at least thirty days before their effective date with a description of the legal and factual basis for the agency's decision to give the public an adequate opportunity to respond to the proposed rule.<sup>140</sup> Over time, courts have stretched the "concise general statement" language to require increasingly detailed statements of the rule's purposes, factual predicates, and anticipated effects, as well as responses to major criticisms and alternatives elicited during the notice-and-comment process.

Traditionally, the APA's notice-and-comment rulemaking requirements have been understood as tools for democratizing administrative rulemaking, but this vision is largely chimerical. Notice-and-comment procedures may

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138. See Peter H. Schuck, *The Administrative Procedure Act*, in FOUNDATIONS OF ADMINISTRATIVE LAW, *supra* note 4, at 53 ("The APA has been called a quasi-constitutional statute, with good reason. If there were no APA, the courts . . . would certainly have invented something like it in order to implement the constitutional safeguards of the Fifth Amendment's due process clause.").

139. 5 U.S.C. § 553(c) (2000).

140. *Id.* § 553(b), (d); see also *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994) (holding that failure to comply with APA procedural requirements is a ground for remanding a regulation to the agency); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) (holding that an agency's notice was insufficient because the rules were based on "inadequate data, or on data that [was] known only to the agency"); *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972) (same).

compel agencies to engage interest-group preferences, but interest groups have no formal voting rights or veto power in agency rulemaking. Once the window for public notice and comment has closed, an agency is free to proceed with its proposed course of action despite persistent public objection so long as its grounds for rejecting the objections meets minimal standards of rationality. Indeed, a strong argument can be made that the notice-and-comment process *decreases* interest-group influence by channeling factional pressures into public fora where they are subject to heightened public scrutiny.<sup>141</sup> Satisfying these minimal procedural requirements might force agencies to consider a broad spectrum of perspectives and public values, but the APA does not ensure that regulations reflect interest groups' aggregate preferences.

A more persuasive explanation for notice-and-comment rulemaking comes from the fiduciary model: The APA employs notice-and-comment procedures as minimalist procedural safeguards akin to the fiduciary duties of care and loyalty in private law. As the Supreme Court explained, the APA's notice-and-comment procedures are best understood as "the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."<sup>142</sup> Courts may only "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>143</sup> To satisfy judicial review under these standards, agencies must show they exercised due care by furnishing a full, contemporaneous administrative record, explaining in detail the rationale for their decisions, and validating departures from past decisions.<sup>144</sup> Agencies' explanations must address

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141. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63 (1985) (arguing that "judicial efforts to require disclosure of *ex parte* contacts . . . reflect[] a belief that the pluralist understanding of administration threatens to subvert statutory goals by reflecting private whim") (citations omitted).

142. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978); see also *FCC v. Schreiber*, 381 U.S. 279, 290 (1965) ("To permit federal district courts to establish administrative procedures *de novo* would, of course, render nugatory Congress' effort to insure that administrative procedures be designed by those most familiar with the regulatory problems involved.").

143. 5 U.S.C. § 706(2).

144. See *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (holding that an agency's act of announcing and then changing "an irrational departure from that policy . . . could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the [APA]"); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971) (remanding to consider whether an alternative approach would be "feasible and prudent" (quoting 23 U.S.C. § 138 (1964 & Supp. V); 49 U.S.C. § 1653(f) (1964 & Supp. V))); *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977) ("This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."); cf. 1 SCOTT & FRATCHER, *supra* note 19, § 2.5, at 43 ("If the fiduciary enters into a transaction with the beneficiary and fails to make a full disclosure of all circumstances known to him affecting the transaction, or if the transaction is unfair to the beneficiary, it can be set aside by him. These are characteristics of all fiduciary relations . . .").

all salient aspects of a problem, including the relative costs and benefits of reasonable alternatives, and persuade courts that the final rule is not inconsistent with the empirical evidence before the agency.<sup>145</sup> Under limited circumstances, courts may also set aside agency decisions that are not supported by “substantial evidence” or are “unwarranted by the facts.”<sup>146</sup> The APA thus provides that administrative agencies, like private fiduciaries, bear the initial burden to produce a record demonstrating that their decision was “the product of reasoned decisionmaking.”<sup>147</sup>

#### b. Adjudication

When administrative agencies act through adjudication rather than informal rulemaking, courts also enforce the fiduciary duties of loyalty and care through constitutional due process and the APA’s procedural requirements. As in fiduciary law, courts have been known to wax eloquent on the importance of affording agency petitioners a rigorously thorough and impartial hearing. In practice, however, courts are usually highly deferential to agency adjudicatory proceedings, overturning agency decisions only where the procedures applied do not meet minimum procedural requirements or the agency’s factual findings are either not supported by “substantial evidence” for formal adjudication or “arbitrary” and “capricious” for informal adjudication.<sup>148</sup> Although courts may emphasize agencies’ nonderogable duties of reasonable care and impartiality, they give agency adjudicators broad discretion to fashion procedures and remedies appropriate to their particular context. Judicial deference to agency adjudicators thus reflects an understanding that “Congress places a premium on agency expertise, and [that], for the sake of uniformity, it is better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency.”<sup>149</sup>

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145. See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); Pierce, *supra* note 11, at 1263 (explaining the significance of *State Farm*); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) (“To have any realistic chance of upholding a major rule on judicial review, an agency’s statement of basis and purpose now must discuss in detail each of scores of policy disputes, data disputes, and alternatives to the rule adopted by the agency.”); Sunstein, *supra* note 144, at 61 (describing the “hard look” doctrine’s requirements).

146. 5 U.S.C. § 706(2)(E), (F).

147. *State Farm*, 463 U.S. at 52; cf. DeMott, *supra* note 63, at 900 (observing that a fiduciary bears the burden to establish that he or she has “dealt candidly and fairly with” beneficiaries). But cf. Scott & Scott, *supra* note 23, at 2423–24 (observing that the business-judgment rule in corporate law creates “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company”) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

148. 5 U.S.C. § 706(2)(A), (E).

149. *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 621 (1966).

In administrative hearings, due process requires that administrative tribunals exercise reasonable prudence in affording procedural safeguards during a hearing. These safeguards may include notice of the proposed action and the grounds asserted, an opportunity to present reasons why the agency should not take a proposed action, the right to present evidence and receive notice of opposing evidence, and the right to written findings of fact and a rational explanation for the agency's decision.<sup>150</sup> What reasonable prudence demands will vary, however, depending upon the exigencies of each case. As Justice Powell reasoned for the majority in *Mathews v. Eldridge*,<sup>151</sup> "[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."<sup>152</sup> Agencies' hearings therefore "need not take the form of a judicial or quasi-judicial trial" so long as they entail "minimal procedural safeguards, adapted to the particular [circumstances] . . . and to the limited nature of the controversies to be resolved."<sup>153</sup> While agencies are often encouraged to offer more generous procedural protections, agencies can survive judicial review by satisfying the Due Process Clause's minimal requirements.

The APA provides for courts to defer to formal agency findings that are supported by "substantial evidence." In practice, this substantial-evidence standard is remarkably similar to the hard-look standard of review for agency rulemaking. Courts "consider the whole record" and evaluate the agency's rationale in light of "whatever in the record detracts from its weight."<sup>154</sup> Courts also greet agency findings of fact or conclusions of law with greater skepticism if they contradict the agency's previous findings or holdings. When such inconsistencies arise, the onus falls on agency adjudicators to come up with a rational explanation for the agency's departure from precedent.<sup>155</sup> An agency's failure to consider salient facts also may be viewed as grounds for vacating the agency's judgment. These principles have little to do with the "substantiality" of the evidence before the agency, but they have everything to do with whether the agency exercised reasonable prudence in reaching its final determination.

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150. See 2 PIERCE, *supra* note 127, § 9.5, at 617 (citing Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975)); see also 5 U.S.C. § 557(c)(3)(A) (requiring a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record" for formal adjudications); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (holding that a reviewing court can demand that an agency provide an explanation for an action taken during informal adjudication).

151. 424 U.S. 319 (1976).

152. *Id.* at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

153. *Goldberg v. Kelly*, 397 U.S. 254, 266–67 (1970).

154. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

155. See 2 PIERCE, *supra* note 127, § 11.2, at 785–88 (citing *inter alia* *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970); *ITT Cont'l Banking Co. v. FTC*, 532 F.2d 207, 219 (2d Cir. 1976)).

In at least one context, however, even “substantial evidence” will not protect an agency’s formal adjudication from judicial censure: where the record suggests that the agency adjudicator had a unique personal stake in the decision. Federal law prohibits officers and employees of the executive branch from participating in a determination in which he or a relative has a direct and substantial financial interest.<sup>156</sup> Where agency adjudicators are found to have a particularized pecuniary interest in an adjudicatory proceeding or to have a unique personal bias against a petitioner, federal courts may override the agency determination as fruit of the poisonous tree.<sup>157</sup> Like the duty of loyalty in private fiduciary law, these prohibitions against self-interested adjudication have a prophylactic effect, resulting in the vacatur and remand of agency determinations that have the appearance of opportunism or bias—even if the petitioner cannot demonstrate actual harm.

Similarly, due process prohibits courts from granting deference to an administrative agency’s judgment if there is a possibility that idiosyncratic institutional interests could compromise the agency’s impartiality.<sup>158</sup> An exemplary case is *Gutierrez de Martinez v. Lamagno*,<sup>159</sup> where the Supreme Court held that a U.S. Attorney lacked authority to certify to a court that an employee “was acting within the scope of his office or employment” for torts arising under the Federal Tort Claims Act (FTCA).<sup>160</sup> The problem with the FTCA’s certification procedure, the Court explained, was that in cases where the alleged tort took place on foreign soil, the U.S. Attorney’s certification would effectively immunize the defendant officer from civil liability under the FTCA.<sup>161</sup> The “impetus to certify becomes overwhelming in a case like this one,” the Court observed, because “the United States Attorney will feel a strong tug to certify, even when the merits are cloudy, and thereby ‘do a favor,’ . . . both for the employee and for the United States as well, at a cost

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156. See 18 U.S.C. § 208(a) (2000) (forbidding executive officials from participating in actions in which they or persons or entities closely associated with them have “a financial interest”); Exec. Order No. 11,222, 30 Fed. Reg. 6469, 6470 (May 8, 1965) (“Employees may not . . . have direct or indirect financial interests that conflict substantially . . . with their responsibilities and duties as Federal employees . . .”).

157. See, e.g., *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam) (invalidating a search warrant because the justice of the peace received a fee for each warrant issued); *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183 (4th Cir. 1994) (constitutional rights violated where a school board was biased against a teacher for critical remarks aimed at board members).

158. See generally Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203 (2004).

159. 515 U.S. 417 (1995).

160. *Id.* at 421–22 (quoting 28 U.S.C. § 2679(d)(1)).

161. *Id.* at 422.



borne solely, and perhaps quite unfairly, by the plaintiff.”<sup>162</sup> Hence, “[r]ecognizing that a U.S. Attorney, in cases of this order, is hardly positioned to act impartially,” the Court held that the U.S. Attorney’s certification order was subject to judicial review and remanded for the Fourth Circuit Court of Appeals to conduct a full, de novo review of the underlying merits.

The duty of loyalty also may manifest itself in administrative law not as a prohibition against self-dealing but rather as a nondiscrimination norm: Absent statutory authorization, agencies may not exercise their discretion in a manner that arbitrarily advances or undermines the interests of one faction vis-à-vis another. For agency adjudication, no less than for agency rulemaking, “outside review is still necessary to keep organizational insiders honest.”<sup>163</sup>

### c. Choice of Policymaking Procedures

Although rarely acknowledged in contemporary case law, the fiduciary duties of care and loyalty also apply to administrative agencies’ choice of policymaking procedures. In addition to informal rulemaking and adjudication, agencies may employ a variety of other procedures to deal with novel regulatory problems. Examples include regulatory negotiation, licensing, and judicial-enforcement actions. The fiduciary duties of care and loyalty apply not only to agencies’ use of these regulatory tools but also to their choice between these tools.<sup>164</sup>

The principle that administrative agencies have broad discretion to select their own modus operandi traces its origins to the Supreme Court’s 1947 decision, *SEC v. Chenery Corp. (Chenery II)*.<sup>165</sup> In *Chenery II*, the Court held that the Securities and Exchange Commission (SEC) could announce new policies in the course of an adjudicatory proceeding “regardless of whether those standards previously had been spelled out in a general rule or regulation.”<sup>166</sup> Although the Court stressed that it would be preferable for the SEC to fill holes in the Holding Company Act through “quasi-legislative promulgation of rules” rather than adjudication, it declined to require rulemaking procedures

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162. *Id.* at 427–28.

163. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1335 (1984).

164. Agencies must choose between the discrete policymaking forms permitted by statute. Once they have chosen a form for a particular action, they are obliged to honor the form’s procedural requirements. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (“There is no warrant in law for [an agency] to replace the [APA’s] statutory scheme with a rule-making procedure of its own invention.”).

165. 332 U.S. 194 (1947); see also Magill, *supra* note 82, at 1405 (describing *Chenery II* as “the fountainhead of this doctrine”).

166. *Chenery II*, 332 U.S. at 201.

in the instant case, reasoning that “any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.”<sup>167</sup> To preserve the flexibility necessary for effective agency action, the Court concluded that “the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”<sup>168</sup> Subsequent Court cases have reaffirmed *Chenery II*’s basic principle that federal courts should not readily second guess an agency’s choice of policymaking procedures.

Embedded within this dominant tradition of judicial deference to agency choice of procedures is an underappreciated countertradition: Not only is an agency’s choice of policymaking procedures *reviewable*, the choice may also be *reversible* if the selected procedures clearly transgress the agency’s duties of care or loyalty. In *NLRB v. Bell Aerospace Co.*,<sup>169</sup> the Court speculated that “there may be situations where the [agency]’s reliance on adjudication would amount to an abuse of discretion.”<sup>170</sup> Some lower courts have seized upon this “abuse of discretion” language, together with the APA’s arbitrary and capricious standard and the principles of due process, to invalidate agencies’ choice of adjudicatory procedures in contexts where retroactive application would give individuals insufficient notice of potential deprivations or pose other special burdens.<sup>171</sup> An agency’s decision to employ ex ante legislative rules rather than ex post adjudication also can be set aside in situations where procedural due process mandates an individualized hearing in connection with a deprivation of life, liberty, or property.<sup>172</sup> Furthermore, courts may not change course from adjudication to rulemaking or vice versa without giving notice to interested parties and making reasonable accommodation for reliance

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167. *Id.* at 202.

168. *Id.* at 203 (citing *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 421 (1942)).

169. 416 U.S. 267 (1974).

170. *Id.* at 294. The Court also cautioned, however, that “the choice between rulemaking and adjudication lies in the first instance within [an agency]’s discretion.” *Id.*

171. See 1 *PIERCE*, *supra* note 127, § 6.9, at 387 (noting that the Due Process Clause and the “arbitrary and capricious” standard of APA § 706(2)(A) have this effect); Magill, *supra* note 82, at 1408–10 nn.86–88 & 92; see also *White v. Roughton*, 530 F.2d 750, 754 (7th Cir. 1976) (“Fair and consistent application of such requirements requires that [agencies] establish written standards and regulations.”); *Holmes v. N.Y. City Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968) (“[D]ue process requires that selections among applicants [for public housing] be made in accordance with ‘ascertainable standards.’”) (citation omitted).

172. See Magill, *supra* note 82, at 1409; Russell L. Weaver, *Chenery II: A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161 (1988).

interests.<sup>173</sup> Anchoring these decisions is the principle that courts must perform some review of an agency's choice of policymaking procedures to ensure that agency discretion does not inordinately "increase the likelihood of favoritism, partiality, and arbitrariness" in violation of agency duties of care and loyalty.<sup>174</sup>

Regrettably, the principle that courts may review an agency's choice of policymaking procedures under the APA and the Due Process Clause for reasonable prudence and loyalty remains a shadowy outlier doctrine on the periphery of administrative law. Courts rarely entertain invitations to scrutinize agencies' choice of procedures where a statute does not prescribe specific procedural requirements. If the dangers of agency arbitrariness and opportunism are to be taken seriously, however, courts must apply the APA's arbitrary and capricious test and the Due Process Clause more vigorously as default restraints on agencies' choice of policymaking procedures.

#### d. Public Accounting

To facilitate public monitoring, administrative law also compels agencies to satisfy several subsidiary recordkeeping duties. Like private fiduciaries, agencies bear nonnegotiable duties to make a timely accounting of their activities and produce documents upon request. The president's power to demand that agencies give an account of their stewardship for "any Subject relating to the Duties of their . . . Offices" falls within this category.<sup>175</sup> So too does the Statement and Account Clause requirement that the executive publish "a regular Statement and Account of the Receipts and Expenditures of all public Money."<sup>176</sup> The Freedom of Information Act permits public access to a variety of documents and information, including published descriptions of the agencies' methods of operations, procedures, substantive rules, and statements of policy.<sup>177</sup> Agencies are also obliged to release copies of all final opinions and adjudications, staff instructions that affect the public, and records of votes by agency officials.<sup>178</sup> The Government in the Sunshine Act

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173. See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 540–42 (4th ed. 1999) (listing cases); Bressman, *supra* note 9, at 535 n.348 (describing this as a "judicial check for arbitrariness").

174. *Holmes*, 398 F.2d at 264.

175. U.S. CONST. art. II, § 2, cl. 1. Individual agency officers must also make extensive representations concerning "financial disclosure, conflict of interest, and ethics." 5 U.S.C. app. § 404 (2000).

176. U.S. CONST. art. I, § 9, cl. 7.

177. 5 U.S.C. § 552(a)(1).

178. *Id.* § 552(a)(2)–(5).

provides for agencies to give advance public notice “of the time, place, and subject matter” of certain agency meetings.<sup>179</sup> Likewise, FACA requires advisory committee meetings to be open to the public and transcribed, and provides for disclosure of virtually all documents used in these meetings.<sup>180</sup> Where applicable, courts enforce these statutory-disclosure duties to facilitate both intergovernmental and public monitoring of agency performance.

e. Remedies

In private law, courts may choose from a diverse assortment of equitable remedies for breach of fiduciary duty, including specific performance, injunction from future breach, compelled compensation, accounting, appointing a receiver, suspending or removing a fiduciary, denying compensation, imposing a constructive trust, or voiding the fiduciary's act.<sup>181</sup> When administrative agencies violate their fiduciary obligations, however, courts' remedial options are far more limited. Courts ordinarily enforce the Due Process Clause, the APA, FACA, and other agency obligations only by declaratory judgment or prospective injunction, voiding or enjoining agency actions that are procedurally defective, arbitrary and capricious in substance, or manifestly contrary to statutory authority.<sup>182</sup> Damages, the typical remedy for fiduciary misappropriations, are only available against agencies or agency officials under limited circumstances.<sup>183</sup> To the extent plaintiffs might seek more invasive forms of relief such as the suspension or removal of an agency official or a constructive trust on agency resources, they must pursue these goals through the political

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179. *Id.* § 552b(e)(1).

180. *Id.* § 552b(f).

181. See Rounds, *supra* note 21, at A-5; see also RESTATEMENT (SECOND) OF TRUSTS § 199 (1959) (observing that trust beneficiaries may seek equitable relief to compel performance, enjoin a breach of trust, compel the trustee to redress a breach, and, in cases of severe and persistent breach, request that the court remove the trustee and appoint a receiver to receive and administer the trust property); Cooter & Freedman, *supra* note 50, at 1074 (“Disgorgement, the usual remedy for misappropriation, merely aims to return the agent to a situation similar to the one that she would have been in without appropriation.”); DeMott, *supra* note 63, at 900 (“[A beneficiary may obtain] restitution of any benefit realized by the fiduciary through the breach, or alternatively may recover any loss suffered as a result of the breach.”).

182. The Declaratory Judgment Act authorizes a federal court to “declare the rights and other legal relations of any interested party seeking such a declaration” in cases (other than tax) “of actual controversy within its jurisdiction.” 28 U.S.C. § 2201(a) (2000).

183. These include suits under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (authorizing the U.S. Court of Federal Claims to consider tort claims based on the conduct of federal officials), the Civil Rights Act, 42 U.S.C. § 1983 (2000) (authorizing tort actions against state or local officials who deprive citizens of rights, privileges, or immunities secured by the Constitution under color of state law), and implied constitutional causes of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny.

process rather than the courts. These limits on judicial relief are not necessarily inconsistent with a fiduciary theory of administrative law, though an argument can be made that the demands of equity, popular sovereignty, and fiduciary obligation favor giving courts a larger set of tools for remedying agency malfeasance.

### C. Administrative Law and Social Norms

Notwithstanding the many critical executive, legislative, and judicial restraints on agency action, the fact remains that the vast majority of agency decisions are made with little direct oversight or input from the White House. Few agency regulations or adjudicatory determinations are reviewed or overturned by the judiciary, and fewer still by Congress or the president. Indeed, as discussed previously, administrative law deliberately reinforces agency autonomy by restricting the political branches' residual control over the administrative process. While agencies' duties of care and loyalty cabin agency discretion to a certain extent, they do not displace agencies' discretion to choose between reasonable alternatives.

Viewed from the perspective of the political-control model, which currently dominates administrative law scholarship, agencies' discretion represents an unsettling accountability gap that undermines agency legitimacy. The emerging fiduciary model, on the other hand, suggests that the apparent accountability gap may be more complex than critics ordinarily suppose. Like private fiduciary law, the fiduciary model considers legal restraints to be just one strand in the intricate web of institutional relations, bureaucratic constraints, and social norms that influence agency behavior. In most contexts, the extralegal forces that inform agency action have a far more potent effect for good or ill than hard legal norms. For example, the president may promote a culture of administrative fidelity by appointing agency heads with compatible regulatory philosophies, maintaining informal lines of communication with agencies, and fostering constructive public discourse about the administrative process.<sup>184</sup> Congress shapes the social norms surrounding agency identity not only through legislation, but also through formal and informal debate over pending legislation, formal congressional oversight of the administrative process, informal dialogue with agency administrators, and committee hearings on regulatory issues. Foreign regulators and nongovernmental organizations

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184. See 1 PIERCE, *supra* note 127, § 7.9, at 500 ("Presidential reluctance to assert the power to implement formal, systematic controls on independent agency policymaking can . . . be explained in part as a function of the President's knowledge that he can exercise control over policymaking . . . through less formal, less systematic means.").

also play influential roles as evangelists and watchdogs of agency professionalism, diligence, and fidelity.<sup>185</sup> To this list one might add the multifarious voices of scientists, industrialists, academics, political parties, news media, international organizations, and innumerable others.

The idea that socialization processes serve as the first and most important line of defense against agency mismanagement is not unrealistic. Organizational theorists observe that cultural and professional socialization processes exert a profound influence upon individual and collective behavior, particularly for public-service professions where the norms of loyalty, care, and fidelity are deeply engrained in the public conscious. Indeed, one likely explanation for administrative law's inattention to the emerging fiduciary model of administrative law may be that the fiduciary model is simply taken for granted because it is so deeply embedded in public discourse.

Reputation matters deeply to administrative agencies and the individual administrators at their helms. Most agency administrators, like private fiduciaries, accept the call to service in no small part because they consider the appointment a mark of personal distinction, and they have powerful incentives to preserve the honor of their office. Indeed, administrators may care a good deal more about the reputational harms that flow from public censure than the legal consequences of an adverse judgment (for which they are not usually personally liable). An administrator's perceived failure to act with reasonable prudence can have devastating reputational costs, as illustrated in the wake of Hurricane Katrina by the news media's excoriation of Federal Emergency Management Agency (FEMA) director, Michael Brown.<sup>186</sup> In short, the influence of extralegal norms and social networks can hardly be overestimated.

Administrative law seeks to complement these extralegal socialization processes by walking a fine line between vigilance and deference. The perils of underenforcing agency duties are obvious to all, but the effects of overenforcement can be equally destructive. Incessant judicial fault finding can breed cynicism about the administrative process, make public office less attractive to high-quality candidates, decrease the marginal reputational costs of administrator malfeasance, and ultimately undermine the trust upon which

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185. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 55 (2004) (observing that international regulatory networks give national agencies "an incentive 'to maintain their reputation in the eyes of other members of the network'" (quoting Giandomenico Majone, *The New European Agencies: Regulation by Information*, 4 J. ENVTL. PUB. POL'Y 262, 272 (1997)).

186. See, e.g., ABC News, *FEMA Director Removed from Katrina Duty* (Sept. 9, 2005), <http://abcnews.go.com/Politics/HurricaneKatrina/story?id=1111074&page=1> (reviewing press and congressional criticism of Michael Brown's performance, competency, and qualifications).

the administrative state itself depends.<sup>187</sup> Thus, while courts extol soft norms such as loyalty, diligence, impartiality, rationality, and procedural fairness, they moderate the political branches' residual control and judicial review in reliance on the broader web of institutions, networks, and social norms that constitute the administrative state.

#### D. Agency Discretion and Public Trust

The foregoing discussion, sweeping and impressionistic though it might be, offers a provocative glimpse of the fiduciary model's quiet ascendancy in administrative law, as well as the model's potential to revitalize critical discourse concerning agency legitimacy. To examine the administrative state through the lens of fiduciary obligation is to see administrative agencies as institutions suspended in an intricate web of legal, social, and political constraints that inform and delimit agency discretion. On the one hand, administrative law empowers the political branches to exercise residual control over agency activities and enforces agencies' fiduciary duties as safeguards against arbitrariness, opportunism, and waste. But administrative law also places restrictions on these accountability mechanisms, entrusting agencies with policymaking discretion in order to maximize the benefits from agency specialization. While legal theorists have tended in the past to treat agency expertise, interest representation, and political accountability as competing approaches to the problem of agency discretion,<sup>188</sup> the fiduciary model suggests that these elements should be integrated and coordinated to maximize agency fidelity.

The fiduciary model's vision of agency discretion as public trust might strike some as a perilously utopian conception of the administrative state. To expect virtue, however, is not necessarily to turn a blind eye to vice. Like private fiduciary law, administrative law girds the soft norms of fiduciary obligation with the steely realism of residual political control and judicial review. The fiduciary norms embodied in the Due Process Clause, the APA, and other procedural statutes give courts the flexibility to counter agency opportunism, factionalism, arbitrariness, and waste in whatever novel form they

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187. See Larry E. Ribstein, *The Structure of the Fiduciary Relationship* 45 (Univ. of Ill. Law & Econ. Research Paper No. LE03-003, 2003), available at <http://ssrn.com/abstract=397641> ("[Overuse of fiduciary duties] increases litigation and contracting costs, decreases the effectiveness of owners' governance rights, and dilutes true fiduciaries' legal and extralegal incentives.").

188. See, e.g., Stewart, *supra* note 127, at 439 (reviewing five legal "approaches" to restraining agency discretion).

might arise.<sup>189</sup> By balancing agency discretion, political control, and fiduciary duties, administrative law seeks to enhance agency productivity while at the same time cultivating a legal, political, and social climate conducive to conscientious governance.

### III. DISAGGREGATING THE FIDUCIARY MODEL

Thus far, this Article has explored the fiduciary model's nuanced response to the dilemma of agency discretion without pausing to reflect upon agencies' diverse forms and functions. Conventional wisdom assumes that agency discretion differs only in degree,<sup>190</sup> but this assumption does not withstand close scrutiny. Agencies perform diverse functions, from the conduct of national diplomacy, to the management of public lands and property, to the licensing of private parties for television and radio broadcasting. Some agencies manage public goods, while others regulate private conduct; some are under the president's direct command and control, while others are designated "independent" and insulated from executive management; some have the power to issue legally binding rules, but others play a purely investigatory or consultative role. This impressive functional diversity suggests that the delegation of authority to administrative agencies may be best understood not as a linear continuum but rather as a heterogeneous family of distinct but interrelated species.

One virtue of the fiduciary model is that it offers a flexible framework for preserving administrative law from the centripetal forces of agency diversity.<sup>191</sup> Like private fiduciary law, administrative law calibrates entrustment, residual control, and fiduciary duties in different ways for different types of legal relations. Courts typically take for granted that administrative agencies

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189. See Markham, *supra* note 19, at 256 ("The [fiduciary] concept . . . allows the courts . . . to proscribe socially undesirable activities that were not anticipated by the legislature or which are too novel for application of the strict confines of the common law. It assures that those who may engage in sharp practices and prey on the unwary do not escape retribution through legal loopholes.").

190. See Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1, 6 (2000) (citing *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting)).

191. See E. Donald Elliot, *The Dis-Integration of Administrative Law: A Comment on Shapiro*, in FOUNDATIONS OF ADMINISTRATIVE LAW, *supra* note 4, at 380 (questioning "whether the traditional conception of administrative law as 'embrac[ing] all governmental machinery for carrying out government programs' remains viable (if it ever was)"); Stewart, *supra* note 5, at 1670-71 n.5 ("The conception of administrative law as a unified body of doctrine with general applicability risks papering over significant differences in administrative functions, agency forms, and the sources and operative foci of various administrative law doctrines."); Mark Seidenfeld, *The Quixotic Quest for a "Unified" Theory of the Administrative State*, in ISSUES IN LEGAL SCHOLARSHIP (2005), <http://www.bepress.com/ils/iss6/art2>.



are agents of the executive branch, Congress, or the people as a whole,<sup>192</sup> but the fiduciary model suggests that other fiduciary relations such as trusts, corporations, and guardianships may also serve as illuminating analogs for administrative agencies' roles in public governance.

#### A. The Principal-Agent Paradigm

The traditional principal-agent paradigm posits that administrative agencies represent the people or their representatives (the principal) and are expected to conform their behavior to the principal's current preferences. Agencies receive specific statutory directions and are expected to exercise discretion only to respond to complex or unforeseen circumstances. Even where circumstances compel agencies to exercise discretion, agencies' choices are not intended to be fully discretionary; rather, agencies are expected to anticipate how the principal would decide the question under consideration.<sup>193</sup> Viewed from this perspective, delegation to administrative agencies empowers the government as a whole to act more effectively in more areas while maximizing the principal's control over agency performance.

This principal-agent paradigm, which has been embraced in various iterations by adherents of the political-control model, fits some administrative agencies fairly comfortably. Agencies that are subject to direct presidential control and closely linked to the president's constitutional powers (for example, foreign affairs and national defense) arguably operate in a relationship with the political branches that closely parallels traditional principal-agent relations. The State and Defense Departments, for example, have cabinet-level administrators who report directly to the president and may be dismissed and replaced at the president's pleasure. In theory, the president has authority to set agency policy and to discipline administrators who refuse to follow the administration's policy. For such agencies, at least, administrative law fashions a fiduciary relationship in which the president and Congress exercise managerial authority over agencies as proxies for the sovereign people.

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192. See, e.g., *United States v. Grimaud*, 220 U.S. 506, 516 (1911) (asserting that "in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent"); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) (using a principal-agent model to examine the roles of Congress and the president in oversight of the administrative process); Pierce, *supra* note 11, at 1239–40 (positing agencies as agents of "the people"); Shapiro, *supra* note 11, at 1 (modeling "the relationship between an agency and its political overseers—the president and Congress—as one of 'principal' and 'agent'").

193. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 258–59 (1999).

Strong policy arguments support the principal-agent model where administrative agencies discharge core executive functions. As the one elected official chosen by and answerable to the entire voting citizenry, the president is uniquely situated “to hear and act upon the voice of all the people.”<sup>194</sup> Allowing the president to stand in with Congress as a principal for the people centralizes administrative policy under executive control, streamlines agency decisionmaking, and facilitates agency accountability.<sup>195</sup> The president’s heightened role arguably energizes and focuses public administration, improves inter-agency coordination, and “enable[s] the President to defend himself from constitutional encroachments on his powers by the legislature.”<sup>196</sup> Conventional wisdom holds that the president also stands above the fray of regional politics and thus is better positioned than Congress to withstand factional pressures.<sup>197</sup>

For pure executive agencies, the president’s strong residual-control rights may also soothe anxiety about agency countermajoritarianism.<sup>198</sup> When Congress delegates authority to an agency rather than resolve the disputed issue itself, it distances regulatory policy from majoritarian democratic processes. Administrative agencies that have a national agenda and regulate a diffuse nationwide class may face strong temptations to abuse their authority to advance narrow interests—for example, by awarding government contracts

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194. Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 990–91 (1997).

195. See Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 845, 847 (1996).

196. Calabresi, *supra* note 8, at 37; see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 103 (1995) (“In order to be faithful to the original design . . . the interpreter must see as part of the constitutional structure a constraint not explicitly stated in that design, requiring that certain kinds of [administrative] policymaking remain within the control of the executive.”).

197. See Kagan, *supra* note 127, at 2335 (“[B]ecause the President has a national constituency, he is likely to consider in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.”). But see Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006) (describing and critiquing this conventional wisdom).

198. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 19–20 (1962); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 553 (1998) (reviewing the countermajoritarian difficulty in administrative law). Some scholars argue that administrative agencies are, in fact, fundamentally promajoritarian institutions because notice-and-comment procedures make them more accessible to the public input than the president or Congress. See, e.g., JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE* 144 (1997) (arguing that vague delegations reduce legislative logrolling by taking issues out of Congress’s hands); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, in *FOUNDATIONS OF ADMINISTRATIVE LAW*, *supra* note 4, at 180 (“Strangely enough it may make sense to imagine the delegation of political authority to administrators as a device for improving the responsiveness of government to the desires of the electorate.”).

to favored contractors outside fair and open bidding processes<sup>199</sup>—and they are therefore good candidates for strong residual control.

Fitting within the principal-agent paradigm are such diverse institutions as the Defense Department, the Federal Bureau of Investigation, the Internal Revenue Service, and the National Aeronautics and Space Agency. Direct presidential control over these and other agencies enhances the energy of government, improves interagency coordination, and places agency action more firmly within the realm of electoral accountability. While the president may also face regional or factional pressures, White House review at least provides a second tier of oversight, decreasing the danger of agency capture. The president's heightened residual control thus helps to ensure that legislative appropriations for national purposes or charitable causes do not become hot spots for rent seekers, industry insiders, and other opportunists.

The principal-agent paradigm is far less compelling both descriptively and prescriptively, however, when the spotlight moves from core executive agencies, such as the State Department and the Defense Department, to other species of agencies within the administrative state. Many administrative agencies perform roles that bear little resemblance to traditional principal-agent relations but mirror trusts, corporations, guardianships, or other fiduciary relations. For every agency headed by cabinet-level administrators who report directly to the president, there is an independent regulatory commission or quasi-independent federal corporation that breaks the principal-agent mold.<sup>200</sup> Many administrative agencies exercise authority by delegation from Congress with relatively little presidential control. If the administrative state must be viewed solely from a principal-agent perspective, the administrative state's legitimacy would be in serious jeopardy.

Even ardent supporters of the political-control model acknowledge that heightened political control is not desirable in all contexts. Excessive political intermeddling in fields such as environmental regulation or federal interest rates could significantly diminish the returns from agencies' special expertise and result in distorted policies that do not reflect the public's long-term

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199. See, e.g., Mary Curtis & Joel Havemann, *A Long Road to Recovery: FEMA Reopening Its No-Bid Contracts*, L.A. TIMES, Oct. 7, 2005, at A21; CBS News, *Pentagon Probes Halliburton Bid* (Oct. 25, 2004), <http://www.cbsnews.com/stories/2004/08/11/national/main635356.shtml> (describing claims by "a top Army contracting official that a Halliburton Co. subsidiary unfairly won no-bid contracts worth billions of dollars for support services in Iraq and the Balkans").

200. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583–84 (1984). The Freedom of Information Act defines the term "agency" to "include[] any executive department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency." 5 U.S.C. § 552(f)(1) (2000).

priorities.<sup>201</sup> As the president's control over an agency increases, the potential efficiency and expertise gains from the fiduciary relation decrease, weakening Congress's incentive to delegate in the first place.<sup>202</sup> Moreover, few would dispute that certain forms of agency action, such as the Veterans Administration's adjudication of individual disability claims or the Social Security Administration's adjudication of social security benefits, should be decided on a case-by-case basis by neutral administrative law judges rather than by elected officials through traditional political processes.<sup>203</sup> Nor would it seem wise to replace the trustees of the Social Security and Medicare trust funds with agents who could be dismissed at the president's pleasure.<sup>204</sup> For agencies such as these, it might be appropriate to look beyond the principal-agent paradigm.

#### B. Alternative Paradigms: Trust, Corporation, and Guardianship

Where administrative agencies exercise independent rulemaking or adjudicatory functions, administrative law tracks trust law more closely than agency law. Consider, for example, so-called independent agencies such as the FTC and the Equal Employment Opportunity Commission (EEOC), which manage public resources and regulate private interests for the people as a whole. When these agencies exercise rulemaking authority pursuant to an implicit delegation from Congress, they are not necessarily expected to anticipate how Congress or the president would respond to novel regulatory

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201. See Merrill, *supra* note 74, at 2153 ("Broad delegation is necessary . . . to leverage up the lawmaking function of government in order to generate the volume of regulations necessary to carry out the wide-ranging functions of modern government."); Shapiro, *supra* note 11, at 20 ("[O]versight by generalists is more likely to improve the rationality of regulatory policy when it supplies the general preferences or values that an agency should follow. In other words, overseers are unlikely to improve the regulatory process when they engage in micromanagement.") (footnote omitted).

202. See David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 963 (1999) ("[D]elegation implies surrendering at least some control over policy, and legislators will be loathe to relinquish authority in politically sensitive policy areas where they cannot be assured that the executive branch will carry out their intent."); Krent, *supra* note 97, at 748 ("Presumably, the more that courts require the President to exercise control over all agencies, the less attractive that delegation becomes from Congress' standpoint. Congress would be less able to influence the exercise of delegated authority and thereby earn the gratitude of constituents.").

203. See Fitts, *supra* note 195, at 852.

204. The Social Security and Medicare trust funds are administered by a board of trustees comprised of the Secretary of the Treasury, the Secretary of Labor, the Secretary of Health and Human Services, the Commissioner of Social Security, and two additional members appointed by the president and confirmed by the Senate. See SOCIAL SEC. & MEDICARE BDS. OF TRS., STATUS OF THE SOCIAL SECURITY AND MEDICARE PROGRAMS: A SUMMARY OF THE 2006 ANNUAL REPORTS (2006), available at <http://www.ssa.gov/OACT/TRSUM/trsummary.html>.

problems. Instead, these agencies have broad discretion to exercise their discretion according to their own perception of the public interest, as informed by their unique expertise and experience.<sup>205</sup> Congress deliberately insulates these agencies from the president's "coercive influence" by providing that the president may remove administrators only "for good cause"—the same standard applicable to trustees.<sup>206</sup>

For independent regulatory agencies, the trustee analogy has an additional advantage: It accounts for the pluralistic interests that are implicated in agency entrustment. Whereas the principal-agent paradigm envisions a binary relation between agencies and the political branches, the trust paradigm treats administrative agencies' beneficiaries as distinct stakeholders in administrative regulation. As discussed previously, many agencies direct their services at a subset of the voting citizenry, noncitizens, or groups that cut across national allegiances. For agency activities that affect Indian tribes, for example, the Supreme Court has proclaimed this trustee-beneficiary relationship explicitly, stating that the federal government "has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards."<sup>207</sup> The agency and trust paradigms thus entail distinct roles and relations (bilateral vs. multilateral) and emphasize different types of discretion (implementation vs. policymaking) and different values (public will vs. public welfare, flexibility vs. commitment).

Congress typically designs administrative agencies according to the trust paradigm rather than the agency paradigm when it wishes to enhance the

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205. See, e.g., *Yakus v. United States*, 321 U.S. 414, 420 (1944) (upholding a delegation to the Price Administrator to set prices that "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act") (quoting Emergency Price Control Act, ch. 26, § 2(a), 56 Stat. 23, 24 (1942) (emphasis added)).

206. *Mistretta v. United States*, 488 U.S. 361, 410–11 (1989) (citation omitted); see also *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) (discussing the "for cause" standard); cf. RESTATEMENT (THIRD) OF TRUSTS § 37 (2003) (providing that trustees may be removed "(a) in accordance with the terms of the trust; or (b) for cause by a proper court"). The Court indicated in *Humphrey's Executor* that the president would have broader constitutional removal authority over "purely executive officers" based on the general principle that "[w]hether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power . . . will depend upon the character of the office." *Humphrey's Ex'r*, 295 U.S. at 631–32 (emphasis added).

207. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); see also *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) ("It is true that agencies of the federal government owe a fiduciary responsibility to Indian tribes.") (citations omitted); Leonard M. Baynes, *Deregulatory Injustice and Electronic Redlining: The Color of Access to Telecommunications*, 56 ADMIN. L. REV. 263, 308 (2004) ("[P]ursuant to their trust responsibility, federal administrative agencies have to meet strong fiduciary standards in their dealings with American Indians unless Congress, through its plenary power, has expressly authorized the agency to depart from them.").

credibility of regulatory decisions and forge commitment.<sup>208</sup> Agency independence arguably enhances the credibility of agencies' adjudicatory and rulemaking proceedings by distancing agency decisions from the political process. Establishing independent administrative agencies also promotes continuity of policy from administration to administration, since independent agencies are bound to perform their statutory functions in good faith even if the statutory standards set by Congress become politically unpalatable to the current administration. The cadre of commitment-reinforcing agencies might include such diverse institutions as the Department of Veterans Affairs, the FTC, and the National Labor Relations Board. Insulating these agencies from presidential control increases the likelihood that federal agencies will identify appropriate beneficiaries through rational, legalistic processes rather than based on political preferences. While Congress's decision to entrust authority to these independent agencies might dilute Congress's accountability and diminish the president's ability to shepherd regulatory policy, agency autonomy also reduces the risk that majoritarian political pressures will undermine statutory objectives and thereby enhances the perceived credibility of agency decisionmaking. Indeed, one reason why Congress insulates independent agencies from the president's control is precisely to prevent short-term majoritarian pressures (to which the president may be uniquely vulnerable) from compromising enduring statutory or constitutional commitments.

Other private fiduciary relations might also serve as useful paradigms for conceptualizing certain types of administrative agencies. Where legislation tasks administrative agencies (generally at the state level) with fulfilling the state's *parens patriae* responsibilities for juveniles or the mentally disabled, the fiduciary law of guardianship might also serve as a useful model for agency authority. Federal corporations such as the Federal Depositary Insurance Corporation hew to the corporate form more closely than the principal-agent or trust paradigms. Certain independent regulatory commissions such as the Federal Election Commission (FEC), the FTC, and the U.S. Sentencing Commission arguably perform a "mediating hierarchy" role analogous to corporate directors by intermediating conflicts between political parties, government bodies, voters, interest groups, and other groups in order to maximize value for the state as a whole.<sup>209</sup> These corporate law paradigms

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208. See ELY, *supra* note 4, at 87–88; Brown, *supra* note 198, at 550 (reviewing the countermajoritarian difficulty in administrative law).

209. For an introduction to the "mediating hierarchy" conception of corporate directors, see Blair & Stout, *supra* note 193, at 284–85. In contrast to the agency and trust paradigms, corporate paradigms tend to view administrative agencies as stakeholders in the regulatory process. See Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 624 (1997) ("In the

draw upon Robert Reich's vision of agency administrators as quasi-independent "interest-group intermediators" who may maximize social welfare and advance social learning about the stakes of regulation.<sup>210</sup> In contrast to pure executive agencies, independent agencies that stand apart from partisan politics and set the ground rules for the political branches' exercise of political power serve as process-reinforcing or pluralism-reinforcing referees rather than reflexive servants of the president's majoritarian will.<sup>211</sup>

### C. Disaggregating Agency Fidelity

In proposing trusts, corporations, guardianships, and other private fiduciary relations as alternatives to the agency paradigm, I do not intend to suggest that all administrative agencies can, or should, be pigeon-holed within one of these private-law paradigms. Analogies between administrative agencies and particular fiduciary relations become artificial, constrictive, and ultimately absurd if stretched too far. As with any metaphor that bears a kernel of truth, however, comparisons between administrative law and the various branches of fiduciary law are useful for highlighting distinctions that might otherwise elude detection.

Perhaps most important, the emerging fiduciary model in administrative law reveals the competing visions of public trust that are implicit in agency diversity. The principal-agent model focuses on agencies' fidelity to majority will by placing agencies firmly under the management of the incumbent president—the one elected official who is accountable to a national constituency and therefore uniquely sensitive to evolving national preferences. The trustee paradigm, in contrast, calls upon independent agencies to honor fixed legislative commitments so as to enhance the credibility of administrative policy over time. For the corporation and corporate-director paradigms, agency fidelity might be measured against a different set of metrics such as the degree of public participation in interest-group deliberation or the agency's objective efficiency and productivity. The fiduciary model does not necessarily privilege any particular vision of agency fidelity, nor does it offer guidance as to which fiduciary paradigm Congress should employ in any particular context.

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case of trusts or principal and agent relationships (and *pro tanto* of corporate management), the fiduciary must act for the beneficiary's exclusive benefit, and, in the case of partnership or corporate controllers for their shared benefit in proportions designated *ex ante*.").

210. Reich, *supra* note 5, at 1626–27.

211. William Eskridge offers pluralism facilitation as a refinement of John Hart Ely's representation-reinforcement model in William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005).

Instead, the fiduciary model honors Congress's autonomy as proxy settlor for the people to select the type of agency entrustment and the corresponding vision of agency fidelity that best matches the public's own conception of the public good.<sup>212</sup>

#### IV. FIDELITY BY DESIGN

By highlighting the fiduciary norms implicit in administrative law, the interpretivist fiduciary model also reveals areas where administrative law fails to accomplish its purposes and provides strategies for refining the law to enhance agency fidelity. By way of illustration, this part examines two areas where the model pushes administrative law in new directions: (1) beneficiary standing to challenge agency action; and (2) due process restraints on agency action.<sup>213</sup>

##### A. Standing and Representation

If administrative agencies serve as fiduciaries by delegation from the people, how should this understanding inform standing doctrine? Some scholars have suggested that agencies' representative role militates in favor of a sweeping expansion to citizen standing. Others have advocated scrapping standing as an analytic step independent of the cause of action.<sup>214</sup> The fiduciary model offers an intermediate solution: Courts should preserve standing doctrine's "zone-of-interests" test but expand the set of Article III "injuries in fact" to embrace abstract injuries that undermine agency accountability.

The fiduciary model posits standing as an inquiry into the plaintiff's interest, injury, and ability to represent the beneficiary class. In private fiduciary law, beneficiaries and their representatives are the only parties who have standing to bring suit for breach of fiduciary duty. Principals may sue their agents to recover property lost to self-interested transactions. Trust beneficiaries may sue trustees for breach of fiduciary duty once they demonstrate their individual beneficial interest to the court.<sup>215</sup> Likewise, corporate derivative

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212. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) ("The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted . . .").

213. Clearly, these two proposals are mere starting points for future investigation of the fiduciary model's neglected normative dimensions. I suspect that other valuable insights could be gained, for example, by subjecting administrative law to more rigorous linguistic and economic analysis.

214. See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

215. See 3 SCOTT & FRATCHER, *supra* note 19, § 214, at 318.



suits are premised on the notion that corporate officers owe fiduciary duties to shareholder beneficiaries. In fiduciary relations where no particular beneficiaries have a justiciable interest in the fiduciary's performance (for example, charitable trusts), the state attorney general or another designated public official may represent the inchoate class of beneficiaries in a suit to enforce the fiduciary's duties.<sup>216</sup> Courts generally grant standing liberally to those who can establish a discrete injury arising from a beneficial interest, provided that the prospective litigant establishes that he will adequately represent the interests of his similarly situated co-beneficiaries. Fiduciary law thus grants standing liberally to those who have a justiciable interest, but it also seeks "to protect the interests of the other beneficiaries" from inadequate representation.

Standing in administrative law is similar to private fiduciary law in many respects. Where individuals seek to vindicate rights conferred by federal statute, courts examine "whether the interest sought to be protected by the complainant is arguably within the *zone of interests* to be protected or regulated by the statute or constitutional guarantee in question."<sup>217</sup> Many federal statutes, like trusts, create beneficial interests or impose special burdens upon limited classes rather than the people as a whole. The Natural Gas Policy Act of 1978<sup>218</sup> expressly prohibits judicial review except for actions initiated by gas producers. The Federal Communications Act, for its part, takes a more liberal approach, granting standing to "any . . . person aggrieved or whose interests are adversely affected by any [agency] decision."<sup>219</sup> Absent an express provision for judicial review, courts look to the statutory scheme as a whole for signs as to whether Congress intended to draw a particular class of plaintiffs within the statute's zone of interests. When in doubt, courts tend to resolve ambiguities in favor of inclusion in the zone of interests.<sup>220</sup> The zone-of-interests test thus aims to identify the parties whom Congress has identified as interested stakeholders in the regulatory process.

Aside from the prudential zone-of-interests test, the Supreme Court has held that the Case or Controversy Clause of Article III limits standing to

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216. See 4A *id.* § 348, at 5.

217. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (emphasis added). Within the confines of Article III, Congress may expand or narrow "the class of people who may protest administrative action." *Id.* at 154.

218. Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified in scattered sections of 15 U.S.C.).

219. 3 PIERCE, *supra* note 127, § 16.9, at 1189 (citation omitted).

220. See, e.g., *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 498 (1998) (holding that the applicable test is whether a particular plaintiff is *arguably* within the "zone of interests," not whether Congress "specifically intended to benefit a particular class of plaintiffs"); *Camp*, 397 U.S. at 154 ("[T]he trend is toward enlargement of the class of people who may protest administrative action.").

plaintiffs who can establish that “the challenged action has caused him *injury in fact*.”<sup>221</sup> This “irreducible constitutional minimum of standing”<sup>222</sup> demands that a plaintiff’s injury be “concrete,” “particularized,”<sup>223</sup> or “distinct and palpable.”<sup>224</sup> Put simply, “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”<sup>225</sup> Article III thus prevents federal courts from dispensing advisory opinions on abstract legal questions and ensures that a litigant’s personal stake in the litigation will be sufficient “to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.”<sup>226</sup>

Applying the injury-in-fact requirement, the Supreme Court has stressed repeatedly that individuals’ “abstract” interest in the federal government’s fidelity to constitutional and statutory norms does not give rise to private standing. This principle, like the zone-of-interests test, has prudential undertones: Allowing a private citizen to air “general grievances” against administrative agencies in federal court would “convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government.”<sup>227</sup> “The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries,” the Court has warned.<sup>228</sup> Implicit in this justification are two assumptions: (1) Agencies are otherwise accountable to the people for their performance through the political branches; and (2) selective enforcement of agency duties by Congress and the president is more likely to reflect the will of the people as a whole than private “special-interest”

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221. *Camp*, 397 U.S. at 152 (emphasis added); see generally 3 PIERCE, *supra* note 127, § 16.3, at 1118–21. The APA likewise grants standing to persons “suffering legal wrong because of agency action, or adversely affected or aggrieved by the agency action within the meaning of a relevant statute.” 5 U.S.C. § 702 (2000).

222. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

223. *Allen v. Wright*, 468 U.S. 737, 756 (1984).

224. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); see also *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 894 (1990) (“[W]e intervene in the administration of the laws only when, and to the extent that, a specific ‘final agency action’ has an actual or immediately threatened effect.”) (citation omitted).

225. *Allen*, 468 U.S. at 751 (citation omitted); see also *Lujan*, 504 U.S. at 560–61.

226. *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); see also *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974) (“Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.”).

227. *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

228. *Schlesinger*, 418 U.S. at 227.

litigation.<sup>229</sup> Viewed from this perspective, the Court's prudential approach toward abstract injuries can be seen as a promajoritarian approach to standing.

This vision of Article III's injury-in-fact requirement is consistent with—if not necessarily compelled by—the fiduciary model of the administrative state. In private law, beneficiaries commonly enforce their interests in fiduciary performance through intermediators. For example, principals typically rely on their direct agents to monitor and enforce subagents' fiduciary duties as “the subagent's principal and the guarantor of his performance.”<sup>230</sup> When subagents violate their fiduciary duties to principals, principals ordinarily enforce fiduciary duties by seeking relief in the first instance from their direct agents rather than their subagents. Corporate law takes this preference a step further, requiring aggrieved shareholders to ask the corporation as a whole to take action before filing their own independent derivative suit against management. Fiduciary law permits private enforcement actions under limited circumstances, but it treats suits by individual beneficiaries as, at best, a second-class mechanism for remedying breaches of fiduciary duty.

In contrast to fiduciary law, the Court's prudential approach to abstract injuries in the administrative law context generates enforcement loopholes in situations where beneficiaries' discrete and insular status or agency actions undermine their ability to enforce fiduciary duties through the political process. This problem is likely to arise in the context of independent agencies; where the president's control over agencies is weak, the incumbent administration may struggle to hold independent agencies accountable for breaching the duties of care and loyalty. More troubling still are agency actions that interfere with the political process directly by, for example, restricting voting rights or concealing agency activity from public scrutiny. If the Court's antipathy toward abstract or “generalized” injuries reflects a commitment to democratic representation, its heavy prudential gloss should dissolve when agency actions threaten the democratic process itself.<sup>231</sup>

The Court has taken some small steps toward recognizing the need for broader citizen standing in cases where the political process could not effectively

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229. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *see also* *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 488–90 (1982) (arguing against a departure from the requirement of a concrete injury in fact because this would treat “[t]he existence of injured parties who might not wish to bring suit [as] irrelevant”).

230. W. EDWARD SELL, *SELL ON AGENCY* 130–31 (1975).

231. Once again, these observations from the fiduciary model dovetail nicely with representation-reinforcement responses to agency countermajoritarianism. According to Ely's famous formula, democratic institutions may delegate decisions to institutions that are not directly accountable to the people where necessary to safeguard the rights of discrete and insular minorities. *See* Anupam Chander, *Globalization and Distrust*, 114 *YALE L.J.* 1193, 1203 (2005) (outlining “Ely's syllogism”).

remedy abstract or general injuries. In *FEC v. Akins*,<sup>232</sup> for instance, the Court held that a group of U.S. citizens had standing as voters to enforce the Federal Election Campaign Act's (FECA)<sup>233</sup> recordkeeping and disclosure requirements for groups that qualify as "political committee[s]."<sup>234</sup> Justice Breyer, writing for the majority, held that plaintiffs' "injury in fact" was "their inability to obtain information-lists of [political committee] donors . . . and campaign-related contributions and expenditures" allegedly required by law.<sup>235</sup> Although such "informational" injuries are not ordinarily considered to have the "concrete" character necessary to survive Article III, the case for private standing becomes more compelling when coupled with Justice Breyer's observation that the "injury at issue [is] directly related to voting, the most basic of political rights."<sup>236</sup> Since the FEC's failure to enforce the FECA's recordkeeping and disclosure requirements eviscerated the public's right to monitor activity that could potentially prejudice the electoral system as a whole, the Court acted reasonably in setting aside its prudential antipathy toward abstract injuries under Article III.

This representation-reinforcement conception of Article III standing has not always prevailed. In *United States v. Richardson*,<sup>237</sup> the Court held 5-4 that individual U.S. citizens and taxpayers lack standing to challenge the Central Intelligence Agency's (CIA) refusal to disclose its expenditures as required under the Statement and Account Clause.<sup>238</sup> In the majority opinion authored by Chief Justice Burger, the Court did not deny that the plaintiffs had an interest in the CIA's prospective disclosure but concluded that the interest was nonjusticiable because it was "plainly undifferentiated and 'common to all members of the public.'"<sup>239</sup> The majority reasoned that the duty to enforce the CIA's disclosure duties "is committed to the surveillance of Congress, and ultimately to the political process" because "[a]ny other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts."<sup>240</sup>

232. 524 U.S. 11 (1998).

233. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-455 (2000)).

234. *Akins*, 524 U.S. at 13.

235. *Id.* at 21.

236. *Id.* at 24-25 (emphasis added).

237. 418 U.S. 166 (1974).

238. *Id.* at 167-68.

239. *Id.* at 177 (citing *Ex parte Lévit*, 302 U.S. 633, 634 (1937) (per curiam); *Laird v. Tatum*, 408 U.S. 1, 13 (1972)).

240. *Id.* at 179.

Although spurned by the *Richardson* majority, the representation-reinforcement theory of Article III finds eloquent expression in *Richardson*'s four dissents. Consider Justice Douglas's rebuttal:

History shows that the curse of government is not always venality; secrecy is one of the most tempting coverups to save regimes from criticism. . . .

. . . .

The sovereign in this Nation is the people, not the bureaucracy. The statement of accounts of public expenditures goes to the heart of the problem of sovereignty. If taxpayers may not ask that rudimentary question, their sovereignty becomes an empty symbol and a secret bureaucracy is allowed to run our affairs. . . . The mandate [of Article I, Section 9, clause 7] runs to the Congress and to the agencies it creates to make "a regular Statement and Account of the Receipts and Expenditures of all public Money." The beneficiary—as is abundantly clear from the constitutional history—is the public. The public cannot intelligently know how to exercise the franchise unless it has a basic knowledge concerning at least the generality of the accounts under every head of government.<sup>241</sup>

Justice Stewart's complementary dissent links this vision of popular sovereignty to principles of private legal obligation:

When a party is seeking a judicial determination that a defendant owes him an affirmative duty, it seems clear to me that he has standing to litigate the issue of the existence *vel non* of this duty once he shows that the defendant has declined to honor his claim. . . .

. . . It seems to me that when the asserted duty is, as here, as particularized, palpable, and explicit as those which courts regularly recognize in private contexts, it should make no difference that the obligor is the Government and the duty is embodied in our organic law.<sup>242</sup>

The common threads interlacing *FEC* and the *Richardson* dissents are the corollary principles that administrative agencies bear a duty of solemn fidelity to the law, and that the beneficiaries of agency action must have an adequate opportunity to monitor and redress agency lawlessness—if not through the political process, then through civil actions in federal courts. These principles apply not only to so-called "informational harms" such as those alleged in *FEC* and *Richardson*, but also to political harms related to voting rights, free speech and press rights, and other violations of administrative

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241. *Id.* at 198, 201 (Douglas, J., dissenting).

242. *Id.* at 203–04 (Stewart, J., dissenting).

agencies' general duties of loyalty or care.<sup>243</sup> The principles may also apply where independent agencies exercise discretion with little executive or legislative oversight or control. If agencies abuse their discretion in a context where citizens cannot vindicate their interests through the political process, individual citizens' abstract or generalized interests in agency legality should satisfy the Article III injury-in-fact requirement.

Of course, expanding federal jurisdiction under Article III to allow private enforcement actions in cases such as *FEC* and *Richardson* merely exchanges one representation dilemma for another. Private parties who sue administrative agencies to enforce the agencies' constitutional or statutory duties step into the agencies' shoes as a "representative of the public interest" or "private attorney general."<sup>244</sup> Granting individuals standing to enforce agency duties thus raises the same dangers of opportunism, collusion, and carelessness that haunt administrative law generally, and courts should take appropriate action to ensure that private litigants adequately discharge their fiduciary responsibilities. As in derivative actions, courts could demand that private litigants not only exhaust all available administrative remedies but also file formal grievance notices with the White House or Congress. Better still, courts could require prospective plaintiffs to demonstrate that they will adequately represent the public interest as a whole. Petitions to participate as amicus curiae in representative citizen suits could be granted liberally. Courts could also emphasize plaintiffs' fiduciary duties to the public in suits to enforce general constitutional and statutory norms.<sup>245</sup> These measures would ensure that agencies are accountable for breaches of their fiduciary duties while protecting the public from arbitrary, wasteful, or opportunistic behavior by the private attorneys general who litigate on its behalf.

## B. Recalibrating Agency Duties

A second proposal that arises from the fiduciary model addresses the delicate balance between administrative agencies' discretion and accountability: Administrative law should apply agencies' procedural duties of care and

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243. Cf. *United States v. Hays*, 515 U.S. 737 (1995) (holding that individuals who reside in a district that is the subject of a racial-gerrymandering claim do not have standing to challenge legislation creating that district unless they were personally subjected to racial classification).

244. *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972).

245. See Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 541 (1949) (noting that stockholders in derivative lawsuits sue as fiduciaries for other stockholders) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)).

loyalty more rigorously in contexts where the political branches' formal constraints on agency behavior are weak.

In private fiduciary law, courts calibrate fiduciary duties differently for different types of fiduciary relations to account for the variability of beneficiary control. "The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty," Austin Scott explains.<sup>246</sup> "Thus, a trustee is under a stricter duty of loyalty than is an agent upon whom limited authority is conferred or a corporate director who can act only as a member of the board of directors . . . ."<sup>247</sup> The scope and potency of a fiduciary's duties to beneficiaries is directly related to the vulnerability of beneficiaries. Trustees are subject to broader duties of care and loyalty than agents because they enjoy more autonomy than most other fiduciaries and are not subject to the market forces that protect shareholders in public corporations, both of which heighten the dangers of trustee mismanagement. Trust beneficiaries cannot readily trade their beneficial interests for interests in other trusts if they are dissatisfied with the trustee's performance. Because beneficiaries are more vulnerable to trustee shirking or cheating, courts tend to enforce trustees' fiduciary duties more strictly than the fiduciary duties of agents or directors.<sup>248</sup>

Administrative law should internalize the lessons of private fiduciary law and enforce administrative agencies' duties more strictly in contexts where agencies operate at a greater remove from executive control. Consider, for example, the respective roles of ordinary U.S. Attorneys offices within the Department of Justice (DOJ) and the office of independent or special counsel, as designated for ad hoc investigations of high-ranking government officials.<sup>249</sup> Both U.S. Attorneys and special counsel are federal prosecutors. Both are vested with discretion to determine the amount of resources devoted to a particular investigation, how the investigation will be conducted, whether to close the investigation or seek an indictment, the persons against whom indictments will be sought and on what charges, whether to accept a guilty plea, and what recommendations the government will make for sentencing. However, because the special counsel enjoys greater autonomy from executive oversight, the

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246. Scott, *supra* note 245, at 541.

247. *Id.*; see also Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 319 (1989) (observing that fiduciary obligations depend on the nature of the trust reposed in the entity).

248. See Scott & Scott, *supra* note 23, at 2423.

249. The Ethics in Government Act, 28 U.S.C. §§ 591–599 (2000), which previously governed the appointment of independent counsel for investigation of executive officials, expired in July 1999 but remains in effect with respect to matters pending before previously appointed independent counsel. See *id.* § 599.

fiduciary duties of loyalty and care should exert an even stronger gravitational pull upon the special counsel than they do upon ordinary federal prosecutors.

For ordinary federal prosecutions, concerns about the dangers of prosecutorial discretion are mitigated by strong political and social controls. The attorney general, U.S. Attorneys, and inferior officers operate under the White House's oversight and serve at the president's pleasure. Congress also monitors the DOJ's activities and influences the DOJ's performance through oversight hearings and its firm grip on the DOJ's purse strings. Budgetary constraints ordinarily force the DOJ to concentrate its limited resources on cases where criminal charges are most likely to stick. Concerns for institutional reputation and the preservation of an amicable working relationship with courts may also deter federal prosecutors from abusing their prosecutorial discretion. Perhaps most important, the adversarial testing of federal prosecutions before impartial courts has a powerful sanitizing effect upon prosecutorial discretion, dramatically reducing the threat of arbitrary or vindictive prosecutions. These checks do not necessarily guarantee that federal prosecutors will do their job well, but they do diminish the risk that they will squander public resources, arbitrarily single out individuals for investigation, or abuse their discretion in pursuit of personal interest.

Few of these political and institutional constraints apply to an independent counsel or special counsel. Traditionally, the independent counsel's purpose under the Ethics in Government Act was "to investigate, and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws."<sup>250</sup> An independent counsel could "be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability or any other condition that substantially impairs the performance of such independent counsel's duties."<sup>251</sup> Following the Ethics in Government Act's expiration in 1999, the DOJ replaced the independent counsel with an ad hoc special counsel. U.S. Attorney Patrick J. Fitzgerald, the special counsel currently investigating the leak of CIA agent Valerie Plame's identity, "exercise[s] . . . authority as Special Counsel independent of the supervision or control of any officer of the [Justice] Department."<sup>252</sup> In effect,

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250. *Morrison v. Olson*, 487 U.S. 654, 660 (1988).

251. 28 U.S.C. § 596(a). The attorney general must simultaneously file a report with the Special Division and Congress "specifying the facts found and the ultimate grounds for such removal," *id.* § 596(a)(2), and the independent counsel can obtain judicial review of his removal, *id.* § 596(a)(3).

252. Letter from James B. Comey, Acting Attorney Gen., to Patrick J. Fitzgerald, U.S. Attorney (Dec. 30, 2003) (on file with author); *see also* Letter from James B. Comey, Acting Attorney Gen., to Patrick J. Fitzgerald, U.S. Attorney (Feb. 6, 2004) (on file with author) (clarifying



the office of special counsel constitutes a miniature DOJ with only tenuous ties to the White House. Barring extraordinary circumstances, an independent or special counsel's tenure runs until he or she concludes that the investigation is complete.<sup>253</sup>

In widely publicized investigations, a special counsel may face tremendous pressure to indict on insubstantial evidence or to use the prosecutorial machinery as a partisan tool to embarrass and harass the object of investigation.<sup>254</sup> Adversarial testing and jury deliberation arguably have a weaker salutary effect for special counsel investigations of high-level governmental officials, because pre-indictment decisions regarding the investigation's scope can deliver crippling political blows long before a grand jury or petit jury ever enters the picture. Indeed, the dangers of prosecutorial discretion are particularly acute for independent and special-counsel investigations precisely because the political costs associated with these investigations frequently equal or exceed individual criminal penalties. In the eyes of many critics, this combination of prosecutorial independence, discretion, and pressure to indict makes the special counsel the poster child for agency illegitimacy.<sup>255</sup>

Since the special counsel enjoys greater independence from presidential control than regular federal prosecutors, ordinary due process restraints on prosecutorial discretion may be insufficient to ensure fidelity to the purpose of

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that the special counsel's authority over the investigation is plenary); 28 U.S.C. §§ 593, 594(a) (providing for appointment of independent counsel by a panel of circuit court judges, and delegating "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice").

253. See 28 U.S.C. § 596(b)(1)–(2); see also *Morrison*, 487 U.S. at 712–15 (1988) (Scalia, J., dissenting) (asserting that this unconstrained discretion comes at a high financial and political cost).

254. See Erwin Chemerinsky, *Learning the Wrong Lessons from History: Why There Must Be an Independent Counsel Law*, 5 WIDENER L. SYMP. J. 1, 4 (2000) (arguing that Kenneth Starr's role in the first Bush administration made it "inevitable" that the Monica Lewinsky investigation would be viewed as a "partisan" vendetta).

255. For representative criticism of the independent-counsel office, see, for example, Carter, *supra* note 136, at 112–13 & n.27 (arguing that the independent counsel is accountable to no one but itself) (citing Alexander M. Bickel, *Alexander M. Bickel on the Special Prosecutor*, YALE L. REP., Winter 1974, at 24); Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601 (1998); Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309 (1999); Thomas S. Martin & David E. Zerhusen, *Independent Counsel—Checks and Balances*, 58 GEO. WASH. L. REV. 536 (1990); see also David Johnston & Neil A. Lewis, *Inquiry on Clinton Official Ends with Accusations of Cover-up*, N.Y. TIMES, Jan. 19, 2006, at A1 (observing that independent counsel David M. Barrett's investigation of former Housing Secretary Henry G. Cisneros "lasted more than a decade, consumed some \$21 million and came to be a symbol of the flawed effort to prosecute high-level corruption through the use of independent prosecutors").

the special-counsel investigation.<sup>256</sup> Therefore, courts should take their cue from private fiduciary law and hold that due process requires the special counsel to meet a higher standard of care, loyalty, and transparency than rank-and-file federal prosecutors. In addition, federal legislation or DOJ regulations could be adopted to ensure that each special counsel keeps detailed records, makes targeted public disclosures, and provides the court and the target of investigation with a reasoned explanation for key discretionary judgments, such as the decision to focus an investigation on particular individuals or to seek indictments for specific offenses. These discretionary decisions might then be subject to challenge at trial under an “arbitrary-and-capricious” test or an equivalent standard. If the record produced by the special counsel should reveal that the investigatory process had been exploited for private or partisan advantage, courts could dismiss the indictment as an abuse of discretion pending the appointment of a new special counsel. These and other enhanced restraints on the special counsel’s exercise of discretion would help to compensate for diminished political accountability by cementing the social norms of rationality, impartiality, and transparency as effective constraints on prosecutorial discretion.

In short, the fiduciary model strongly supports strengthening administrative agencies’ constitutional and statutory duties of care, loyalty, and transparency to enhance agency legitimacy in contexts where the political branches’ residual control over agency performance is at its weakest. How

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256. Recognizing that prosecutorial discretion “carries with it the potential for both individual and institutional abuse,” *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978), courts apply the Due Process Clause as a prohibition against vindictive, retaliatory, facially discriminatory, or other flagrantly abusive exercises of prosecutorial discretion. See *Heckler v. Chaney*, 470 U.S. 821, 842–43 (1985) (Marshall, J., concurring) (citations omitted). Prosecutors are expected to recuse themselves from cases in which they have a personal interest. See *Ganger v. Peyton*, 379 F.2d 709, 713 (4th Cir. 1967) (“At common law, a prosecuting attorney ‘is the representative of the public in whom is lodged a discretion . . . , which is not to be controlled by the courts or by an interested individual.’”) (citation omitted). Due process also proscribes facially irrational or bad-faith exercises of prosecutorial discretion. See, e.g., *Giglio v. United States*, 405 U.S. 150, 153–55 (1972) (holding that failure to disclose a promise of immunity to a cooperating witness requires reversal); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that suppression of material evidence justifies a new trial “irrespective of the good faith or bad faith of the prosecution”); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (holding that due process violated “when the State, although not soliciting false evidence, allows it to go uncorrected when it appears”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”). In practice, these constitutional restraints on prosecutorial discretion—which address only the most egregious abuses—perform a function similar to the duties of care and loyalty in private fiduciary law.

administrative law should define and enforce these fiduciary duties in any particular context will naturally depend upon a host of factors, not the least of which are the scope of the agency's authority, residual political controls, and social norms. The fiduciary model's overarching theme, however, is that the political branches' residual control and agencies' duties of care and loyalty are mutually reinforcing forces, which must be harmonized to realize administrative law's ultimate goal—agency fidelity.

### CONCLUSION

This Article has excavated administrative law's fiduciary foundations to explore how the rhetoric and theory of fiduciary obligation shape administrative law. The fiduciary model envisions administrative law as resting upon a foundation of entrustment, residual control, and fiduciary duties. In contrast to prevailing theories of administrative law such as the interest-representation model and unitary-executive model, the fiduciary model does not pin its hopes for agency fidelity on any single facet of the law, whether it be expertise, legislative delegation, executive control, interest representation, or procedural rationality. Instead, the fiduciary model incorporates each and every one of these elements as mutually reinforcing supports in the administrative state's open-textured legal architecture.

By the same token, the fiduciary model does not shy away from administrative agencies' diversity. While some agencies wield core executive powers and perform roles akin to agents in private law, other agencies function more like trustees, corporate directors, guardians, or other fiduciary relations. The fiduciary model shows that the diverse species of agency discretion reflect competing visions of agency fidelity, from majoritarian pluralism to communitarian commitment reinforcement. Although the fiduciary model does not dictate how policymakers should choose from among these competing visions, it does furnish a useful conceptual framework for negotiating the enduring tensions shared by all agencies—trust and distrust, legal rules and social norms, public will and public interest, independence and accountability.

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