

# FIDUCIARY VOTERS?

D. THEODORE RAVE<sup>†</sup>

## ABSTRACT

*What does the majority owe the minority when issues are put to a vote? This question is central to direct democracy, where voters bypass the legislature and enact law directly. Some scholars have argued that voters in direct democracy bear fiduciary-like duties because they act as representatives when casting their ballots. The Supreme Court, by contrast, has suggested that voters are not agents of the people and thus have no fiduciary obligation. By focusing on whether direct-democracy voters are representatives who bear duties, both sides have framed the issue incorrectly. They have imported a legal tool—fiduciary duty—from private law designed to combat a governance problem absent from direct democracy: a principal–agent problem.*

*The real governance problem in direct democracy is the tyranny of the majority. Once we focus on the right problem, private law—specifically corporate law—provides useful insights. Corporate law imposes duties—sometimes confusingly also called “fiduciary”—on shareholder majorities to consider minority interests when voting. Although these duties do not require the majority to subordinate its own interests like a true duty of loyalty, courts recognize the need to police for opportunism when the minority is vulnerable to exploitation. Looking to these private-law voter duties can help explain a puzzling line of Supreme Court cases reviewing the constitutionality of ballot initiatives that rolled back legislation benefitting minority groups. In*

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<sup>†</sup> Assistant Professor, University of Houston Law Center. Thanks to Stephen Bainbridge, Emily Berman, Matt Bodie, Andrew Bradt, Zachary Bray, Richard Brooks, Erwin Chemerinsky, Evan Criddle, Seth Davis, Deborah DeMott, Chris Elmendorf, Lisa Fairfax, David Fagundes, Edward Foley, Evan Fox-Decent, Stephen Galoob, Michael Gilbert, Andrew Gold, Jim Hawkins, Jennifer Hill, Lonny Hoffman, Christine Hurt, Samuel Issacharoff, Michael Kang, Sung Hui Kim, David Kwok, Ethan Leib, Peter Linzer, Brendan Maher, Carrie Menkel-Meadow, Paul Miller, Douglas Moll, Donna Nagy, James Nelson, Elizabeth Pollman, Jessica Roberts, Joseph Sanders, Ganesh Sitaraman, Mila Sohoni, Gordon Smith, Lionel Smith, Dru Stevenson, Dan Tokaji, Andrew Tuch, Julian Velasco, and Kellen Zale as well as participants in the 2015 Fiduciary Law Workshop, 2015 Law & Society Annual Meeting, 2015 Texas Legal Scholars Workshop, 2015 Junior Faculty Federal Courts Workshop, 2014 ACS Scholars Schmooze, and faculty workshops at the University of Houston Law Center and South Texas College of Law for helpful comments. Matt Harper and Peyton Craig provided excellent research assistance. This project was supported by generous funding through the University of Houston’s New Faculty Research Grant program.

*direct democracy, where structural protections for the minority are lacking, courts may be playing a familiar institutional role from corporate law: keeping the majority from exploiting the minority.*

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#### INTRODUCTION

What does the majority owe the minority when issues are put to a vote? In 2014, the Supreme Court faced that question in *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*.<sup>1</sup> Having failed to persuade their elected officials (and the Supreme Court in *Grutter v. Bollinger*<sup>2</sup>) to roll back affirmative action, a majority of Michigan voters took matters into their own hands. They used a ballot initiative to amend the state constitution to ban racial preferences in public education.<sup>3</sup> Civil rights groups challenged the amendment on equal protection grounds. On one hand, as Justice Sotomayor argued

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1. *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014).

2. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

3. *Schuette*, 134 S. Ct. at 1629 (plurality opinion).

in dissent, this looked like a power play by the voters in the majority. After losing in the legislative process, the majority used a majoritarian tool—a ballot initiative—to place decisions over a policy favored by minorities at a level of government where it is harder for minorities to win.<sup>4</sup> On the other hand, as Justice Kennedy argued for the plurality, the voters merely took away a “grant of favored status” that the state had no obligation to extend in the first place.<sup>5</sup> They resorted to direct democracy in order to “bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences.”<sup>6</sup> In upholding the amendment, the Court reasoned that prohibiting voters from making this sort of decision at a constitutional level because it affects a racial minority would almost be tantamount to giving the minority a right to leverage its minority status.<sup>7</sup>

The debate in *Schuette* over whether the majority can restructure the political process in ways that disadvantage a racial minority is only one aspect of the complicated relationship between majorities and minorities more generally in a democracy. But it highlights a fundamental question for direct (as opposed to representative) democracy, some form of which is available in twenty-four states and more than half of American cities<sup>8</sup>: What do voters owe each other when issues are put to a vote?

In 2013, the Supreme Court suggested that the answer is “nothing.” The Court in *Hollingsworth v. Perry*<sup>9</sup> held that the voters who sponsored California’s ballot initiative banning same-sex marriage were “plainly not agents of the State” of California<sup>10</sup> and did not owe

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4. *See id.* at 1654, 1667–71 (Sotomayor, J., dissenting).

5. *Id.* at 1638 (plurality opinion).

6. *Id.* at 1636.

7. *See id.* at 1635 (explaining that those representing the interests of racial minority groups “could attempt to advance th[eir] aims by demanding an equal protection ruling that any number of matters be foreclosed from voter review or participation”).

8. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 694 (2010). The umbrella term “direct democracy” includes both ballot initiatives, where citizens initiate the process by petitioning to place proposed legislation or state constitutional amendments directly on the ballot, and referenda, where the legislature refers a bill to the voters for ratification or rejection. *Id.* In this Article, I am focusing on the problems raised by, and duties of voters in, ballot initiatives, where voters make law directly without any input from the legislature.

9. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

10. *Id.* at 2666–67.

Californians any “fiduciary obligation.”<sup>11</sup> These private parties thus lacked standing to defend the initiative’s constitutionality on appeal when state officials decided not to.<sup>12</sup> Unlike California’s elected representatives—who are fiduciaries—the Court treated the proponents as ordinary voters who were free to pursue their own narrow interests without considering any impact on others.<sup>13</sup>

Some legal scholars, by contrast, have recently argued that voters in direct democracy owe fiduciary or fiduciary-like duties to the public because they act in a “representative” capacity when they make law directly.<sup>14</sup> They would, accordingly, require voters to vote in the interests of those they represent (whether conceived of as society as a whole or some smaller political community) and not in their own self-interest.<sup>15</sup>

The question I want to explore in this Article is whether it is appropriate or useful to think of voters in direct democracy as “fiduciaries.”<sup>16</sup> So when, if ever, do voters owe duties to other voters or to the public as a whole? And if they do, what is the proper institutional and legal response? In trying to answer these questions, I

11. *Id.* at 2667 (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (AM. LAW INST. 2006)).

12. *See id.* at 2667–68.

13. *Id.* (implying that state officials have fiduciary obligations because, unlike private parties who “answer to no one,” state officials have been elected and have taken the oath of office). For an argument that elected representatives have fiduciary obligations to the people they represent, see D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 707–13 (2013).

14. *See* Edward B. Foley, *Voters as Fiduciaries*, 2015 U. CHI. LEGAL F. 153, 157–58, 181–82; Michael Serota & Ethan J. Leib, *The Political Morality of Voting in Direct Democracy*, 97 MINN. L. REV. 1596, 1596, 1611–20 (2013).

15. *See* Foley, *supra* note 14, at 153, 162–63. Foley notes:

Just as any other trustee breaches his or her fiduciary duty when using the trust’s assets to promote the trustee’s own personal self-interest, so too voters breach their fiduciary duties to society as a whole, present and future, if they exploit the electorate’s power over the assets of commonwealth to promote their own personal self-interest.

*Id.* at 163; *see also* Serota & Leib, *supra* note 14, at 1596–98, 1605–11 (discussing the direct democracy voter’s authority to make binding law, which “establishes a structural relationship of political representation”).

16. Professor Edward Foley argues that voters are fiduciaries in both candidate elections and direct democracy. Foley, *supra* note 14, at 157–58. Professors Michael Serota and Ethan Leib, on the other hand, limit their claims about voter obligations to direct democracy. Serota & Leib, *supra* note 14, at 1596. In this Article, I want to set aside the question of whether voters in candidate elections are fiduciaries because, as Foley acknowledges, the argument for treating voters as fiduciaries when they make law directly is more straightforward than for treating them as fiduciaries when they delegate that task to legislators. *See* Foley, *supra* note 14, at 181–82. If voters are not fiduciary representatives in direct democracy, then a fortiori they are not fiduciary representatives in candidate elections. And candidate elections do not raise the distinctive risks of minority oppression that direct democracy presents. *See infra* Part I.B.

look to several areas of private law as a guide because—though the tradition of fiduciary obligation in public law is long and distinguished<sup>17</sup>—the contours of, and justifications for, fiduciary duties are more fully worked out in private-law theory and doctrine. Additionally, private law can serve as a nice model for analyzing similarly structured governance problems in constitutional law because there is often an actual social contract instead of just a hypothetical one.

By focusing on whether or not direct-democracy voters are representatives and thus bear corresponding fiduciary duties, both sides of this debate have framed the issue incorrectly. They have imported a legal tool from private law aimed at a governance problem that is absent from direct democracy. The classic role that fiduciary duties play in private-law representative relationships is to address a principal–agent problem. The fiduciary duty of loyalty aims to align the interests of an agent with those of the principal on whose behalf she acts (to minimize “agency costs,” in economic parlance).<sup>18</sup> I will refer

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17. E.g., J.W. GOUGH, *Political Trusteeship*, in JOHN LOCKE’S POLITICAL PHILOSOPHY 136, 183 (2d ed. 1973) (“[A] patriot king ‘will make one, and but one, distinction between his rights and those of his people: he will look on his to be a trust and theirs a property.’” (quoting Henry St. John Bolingbroke)); JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 74, (J.W. Gough ed., Basil, Blackwell & Mott Ltd. 1948) (1690) (arguing that the legislative power “was only a fiduciary power to act for certain ends”). Professor Robert Natelson has chronicled the fiduciary views of the Framing generation. E.g., Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1124–68 (2004). For more contemporary work in this area, see generally EVAN FOX-DECENT, SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY (2011); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295 (2013); Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer From Fiduciary Theory*, 1996 U. ILL. L. REV. 57; Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006); Paul Finn, *Public Trust and Public Accountability*, 3 GRIFFITH L. REV. 224 (1994); Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEENS L.J. 259 (2005); Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845 (2013); Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820 (2016); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013); Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 GEO. WASH. L. REV. 1 (2010); Donna M. Nagy, *Owning Stock While Making Law: An Agency Problem and a Fiduciary Solution*, 48 WAKE FOREST L. REV. 567 (2013); David L. Ponet & Ethan J. Leib, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249 (2011).

18. See, e.g., Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 980–82 (2013); cf. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 517–

to this classic form of fiduciary duty as an “agent-to-principal duty.” In direct democracy, however, there is no representative relationship—no clear principal or agent—to trigger such fiduciary duties. The whole point of direct democracy is to *eliminate* the principal–agent problem inherent in political representation.

At the same time, the Supreme Court in *Hollingsworth* seemed too quick to relieve voters of any obligation simply because they did not meet the requirements of the *Restatement (Third) of Agency*<sup>19</sup>—an oddly narrow criterion given the diversity of fiduciary relationships in private law. The absence of a principal–agent problem does not necessarily mean that voters have no duties. In several contexts, private law imposes duties—which are sometimes confusingly also called “fiduciary”—on voters outside any representative relationship. For example, majority shareholders owe duties to the minority when voting on a corporate freezeout merger.<sup>20</sup> Similar duties crop up in votes on private bond restructurings and oil and gas unitization.<sup>21</sup> But these duties—which I will refer to as “principal-to-principal duties”—are not aimed at controlling agency costs. They are aimed at a different governance problem: preventing the majority from oppressing the minority. And this problem is of particular concern in direct democracy, which lacks many of the structural features that protect and empower minorities in representative democracy.

Once we are focused on the right governance problem—the tyranny of the majority—looking at the principal-to-principal duties that private law places on voters can help us better understand approaches to the same type of problem in direct democracy, whether or not those duties are properly termed “fiduciary.”

Private law recognizes the tension between voters’ rights to “selfish ownership” and the risk that the majority may use its power vis-à-vis the minority to opportunistically direct disproportionate

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18 (2015) (arguing that fiduciaries may be charged with pursuing “purposes” and not only the interests of persons).

19. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666–67 (2013) (explaining that the basic features of an agency relationship were missing).

20. See, e.g., *Weinberger v. UOP, Inc.*, 457 A.2d 701, 712 (Del. 1983) (concluding that the merger did not meet the requisite standard of fairness because “[m]aterial information, necessary to acquaint those shareholders with the bargaining positions of [the merging companies], was withheld under circumstances amounting to a breach of fiduciary duty”).

21. See, e.g., *Hackettstown Nat’l Bank v. D.G. Yuengling Brewing Co.*, 74 F. 110, 112–14 (2d Cir. 1896); *Trees Oil Co. v. State Corp. Comm’n*, 105 P.3d 1269, 1282 (Kan. 2005).

benefits to itself at the minority's expense.<sup>22</sup> For investors to be willing to commit their capital to a venture governed by majority rule, there must be some assurance to those who may find themselves in the minority that they will not be exploited when they are outvoted. And that role has largely fallen to courts. Thus we can see an equitable streak running through diverse areas of private law where courts step in to enforce duties running from the majority to the minority when issues are put to a vote, not because of any representative relationship, but rather as a corollary to the use of voting to overcome a collective-action problem.<sup>23</sup>

But what is the content of these principal-to-principal duties? Teasing this out is important because courts often use "fiduciary" language loosely without being precise about the governance problem they are addressing or the scope of the duty they are imposing. As I explain below in a novel taxonomy, potential voter duties can be mapped onto a spectrum ranging from purely self-interested voting to weak and strong forms of equitable antiexploitation obligations to a "true" fiduciary duty of loyalty.<sup>24</sup> The trend in private law is to stay away from the poles. Even where parties could have protected themselves through ex ante contracting, courts are reluctant to stand aside when the majority acts opportunistically toward the minority. But on the other end, although courts sometimes use the language of "fiduciary duty" in describing the majority's obligations toward the minority, they do not tend to impose the full brunt of the true fiduciary duty of loyalty; the majority need not subordinate its own interests to those of the minority in the way an agent would to a principal. Instead, courts tend to enforce a good-faith duty not to oppress or exploit the minority. Although the precise content of this duty may be hard to specify, the important part is that courts recognize the need to police for opportunism ex post when the minority is vulnerable to the majority.

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22. *E.g.*, *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976) ("The majority, concededly, have certain rights to what has been termed 'selfish ownership' in the corporation which should be balanced against the concept of their fiduciary obligation to the minority.").

23. I focus primarily on corporate law because it is the area where this case law is most developed, but courts exhibit a similar institutional response in many areas of private law where they are tasked with overseeing long-term relational contracting. *See* John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1621 (1989).

24. *See infra* Part II.B.

Turning back to public law, the equitable role that private-law courts play in policing for opportunism when an issue is put to a vote can be a useful lens for understanding the Supreme Court's sometimes puzzling approach to equal protection in direct democracy. As Justice Thomas recently noted in his dissent in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,<sup>25</sup> the Court has been all over the map when it comes to direct democracy, sometimes "offer[ing] a paean to the ballot initiative" and other times treating ballot initiatives with "disdain."<sup>26</sup> But perhaps private law can be a guide for understanding (and evaluating) the intuition behind the Court's approach to direct democracy in cases ranging from *Romer v. Evans*,<sup>27</sup> which struck down a ballot initiative barring claims of discrimination on the basis of sexual orientation, to *Schuette*, which upheld an initiative banning affirmative action.<sup>28</sup>

The Court does not seem to treat voters as fiduciaries in the classic sense when it reviews the output of ballot initiatives; it does not require the majority to put the minority's interests ahead of its own. But it does not seem to take a hands-off, no-duty approach either. Instead, the Court may be filling the same institutional role in reviewing the output of direct democracy as the courts play in reviewing votes in private law—policing for minority exploitation and acting as an equitable brake on majoritarian excess where the structural protections for the minority are weakest.

Part I of this Article explores the governance problem in direct democracy. Although direct democracy eliminates the principal-agent problem—the primary justification for fiduciary duties in private law—by allowing voters to make law directly, it leaves minorities particularly vulnerable to exploitation. Part II then looks at the duties of voters in private law, with a particular focus on the relationship between majorities and minorities in closely held corporations, and maps potential voter duties onto a spectrum. As I explain below, the law governing closely held corporations is a useful lens for analyzing minority vulnerability in direct democracy because several structural features of direct democracy are—perhaps surprisingly—more analogous to closely held corporations than publicly traded ones. Part

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25. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

26. *Id.* at 2697 (Thomas, J., dissenting).

27. *Romer v. Evans*, 517 U.S. 620 (1996).

28. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1639 (2014) (plurality opinion).

III turns back to public law and uses these private-law approaches to try to better understand the intuitions behind the Supreme Court's approach to equal protection in direct democracy. Part IV addresses some potential objections and disanalogies.

### I. THE GOVERNANCE PROBLEM IN DIRECT DEMOCRACY

James Madison identified two governance challenges for any democracy: First, it must control the “mischiefs of faction”; that is, it must prevent a majority of the people from ganging up on the minority and opportunistically directing benefits to themselves at the minority's expense.<sup>29</sup> Second, it must ensure the loyalty of the rulers to those they rule; in other words, it must address the principal–agent problem that arises when the representatives who are chosen to govern might pursue their own interests instead of the interests of the people who put them in office (let alone the ones who voted against them).<sup>30</sup> In direct democracy, the second concern is inapplicable—there are no representatives<sup>31</sup>—but, as Madison warned in *Federalist 10*, the first concern about the tyranny of the majority is acute.

#### A. *Voters Are Principals, Not Agents*

In contrast to the Supreme Court's apparent position that voters have no fiduciary duties in ballot initiatives, some scholars have argued that direct-democracy voters owe fiduciary or fiduciary-like duties to the public when they vote. As the following discussion indicates, however, the duties that these scholars advocate are designed to combat a principal–agent problem and do not fit well when applied to direct-democracy voters, who are not agents, but principals.

For example, Professors Michael Serota and Ethan Leib argue that voters in ballot initiatives (though not candidate elections) act in a “representative” capacity because the product of their vote is

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29. THE FEDERALIST NO. 10, at 58 (James Madison) (Jacob Ernest Cooke, ed., 1982).

30. THE FEDERALIST NO. 51, at 350–51 (James Madison).

31. Indeed, direct democracy can actually be an effective tool for dealing with problems of incumbent self-dealing in representative democracy. One need not look further than states like California and Arizona's use of ballot initiatives to take the task of drawing legislative districts out of the hands of the legislators who will run for reelection in those districts. See Rave, *supra* note 13, at 730–35; see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2675–77 (2015) (upholding an independent redistricting commission created by ballot initiative).

coercive law that binds other citizens.<sup>32</sup> Accordingly, Serota and Leib say, voters in direct democracy bear a duty “to pursue vigorously the interests of the represented and refuse to self-deal”—an agent-to-principal duty that sounds almost fiduciary in nature.<sup>33</sup> Although they are careful to limit their claim to a moral obligation, not a legally enforceable one, they would require direct-democracy voters to vote in pursuit of a credible and good-faith conception of the public interest, not their own private interests.<sup>34</sup>

Professor Edward Foley goes even further. He argues that voters are in fact fiduciaries, not only in direct democracy, but in all elections.<sup>35</sup> Foley claims that voters “represent, not themselves, but the totality of residents in their community,”<sup>36</sup> and thus bear a fiduciary duty to act “on behalf of society as a whole, both now and into the future”<sup>37</sup> when they make law directly through ballot initiatives and also when they elect legislators to make law.<sup>38</sup>

Foley and Serota and Leib derive their duties from direct-democracy voters’ position in a “structural relationship of political representation” and, in doing so, describe duties that are aimed at solving a principal-agent problem.<sup>39</sup> But it is difficult to see whom voters represent when they vote in a plebiscite (let alone in a candidate election where the voters are deciding who should represent *them*). When citizens can vote directly on a particular issue (instead of delegating that task to legislators), it is not clear how voters act on behalf of or “represent” anyone but themselves. In other words, there is no obvious principal or agent.

Serota and Leib suggest that voters act on behalf of nonvoters—“the too-young, too-infirm, too-lazy, and too-felonious”<sup>40</sup>—but that

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32. Serota & Leib, *supra* note 14, at 1596–98, 1603–11; *see also id.* at 1611 n.53 (equating “voters acting in direct democracy” with “[agents] acting on behalf of others”).

33. *Id.* at 1611. Serota and Leib have elsewhere described the requirements of the fiduciary duty of loyalty as follows: “The fiduciary is prohibited from self-dealing and is required to pursue the interests of her beneficiary above her own.” Ethan J. Leib, Michael Serota & David L. Ponet, *Fiduciary Principles and the Jury*, 55 WM. & MARY L. REV. 1109, 1135 (2014).

34. Serota & Leib, *supra* note 14, at 1598, 1612–13.

35. Foley, *supra* note 14, at 153, 160–63.

36. *Id.* at 153.

37. *Id.* at 183.

38. *Id.* at 157–58, 162–63, 175–82.

39. Serota & Leib, *supra* note 14, at 1605; *see* Foley, *supra* note 14, at 158 n.16.

40. Serota & Leib, *supra* note 14, at 1605. Children may present a special case, and it is not implausible to think that they are virtually represented by citizens who are old enough to vote. But very often children will have actual representatives—their parents—who act as recognized

idea seems quite close to discarded notions of virtual representation (that is, that white male property owners acted on behalf of nonvoting women, slaves, and tenants). “[M]ore important[ly],” Serota and Leib argue, “the winners must represent the losers.”<sup>41</sup> But on a fundamental level, it is difficult to see how such a form of representation could work in a plebiscite, where a single issue is put to a one-time vote. The interests of the winners and losers on that issue and at that moment are diametrically opposed. How could the winners faithfully represent the losers in the very act of expressing their opposing interests through voting?<sup>42</sup>

Foley is not precise on the issue of whom voters are supposed to represent. At times he suggests that it is “the totality of residents in their community,”<sup>43</sup> and at other times it is “society as a whole, present and future.”<sup>44</sup> But simply defining the beneficiary of voters’ fiduciary duties as “society as a whole” cannot solve the problem. Unless

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(though perhaps *sui generis*) fiduciaries on their behalf and accordingly should take their interests into account when voting. *See, e.g.,* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2401–03 (1995).

41. Serota & Leib, *supra* note 14, at 1605.

42. This issue has been well ventilated in class action law. The same type of problem arises when one plaintiff seeks to represent a larger class, but we worry that a collective choice (for example, to accept a group settlement) will be imposed upon class members with divergent interests in a single-shot transaction. Class action law solves this problem, not by saying that class members with one set of interests represent those with divergent interests, but by defining the class such that interests are aligned class-wide. *See, e.g.,* *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997); *Hansberry v. Lee*, 311 U.S. 32, 40–42 (1940). Such an alignment is not an option in a plebiscite. Madison recognized as much in *Federalist 10*. He said that one way to cure the mischiefs of faction would be to give everyone the same interests; but that, of course, is impossible in a polity. *See* THE FEDERALIST NO. 10, *supra* note 29, at 58 (James Madison).

43. Foley, *supra* note 14, at 153.

44. *Id.* at 162–63, 188. This imprecision leads to confusion when Foley talks about the implications of his voters-as-fiduciaries approach for the issue the Supreme Court considered in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016): whether legislative districts should be drawn to equalize total population or number of voters. Foley, *supra* note 14, at 187–90. If voters represent “the totality of residents in their community,” *id.* at 153, then districting by total population (Foley’s preferred course) makes sense. Each resident will have equal “say” in the legislature through his or her (virtual) representatives—the fiduciary voters. If, on the other hand, voters represent “society as a whole,” *id.* at 162–63, then geographical districting does not matter because voters will have no allegiance to their districts. If we are going to have districts, then it actually seems like they should be drawn to equalize voters, not population, so that all voters will have an equal chance to exercise their fiduciary obligation to get their view of the public good enacted and to take maximum advantage of “crowdsourcing” (that is, the Condorcet Jury Theorem) in determining what that good is. *Cf. id.* at 179–80. The Court in *Evenwel* ultimately decided that states are permitted to draw districts to equalize total population without deciding whether that is the only permissible basis for apportionment. *See Evenwel*, 136 S. Ct. at 1132–33.

interests are uniform across society, there will always be winners and losers in a vote.

Perhaps more importantly, the types of duties these scholars describe are aimed at a principal–agent problem and are not well suited to the act of voting among principals. The core of this classic form of fiduciary duty (the agent-to-principal duty) is the duty of loyalty, which requires the fiduciary to act for the exclusive benefit of the beneficiary—to put the beneficiary’s interests ahead of his own.<sup>45</sup> But the law does not trust the fiduciary to do that when his own interests are at stake, so fiduciary law adopts a prophylactic rule against self-dealing: the fiduciary must avoid situations where his interests conflict with the beneficiary’s (or be prepared to defend the fairness of the dealing before a skeptical court).<sup>46</sup> The point is to eliminate, or at least minimize, situations where the interests of the fiduciary diverge from the interests of the beneficiary—to maximize the agent’s faithfulness to the principal he represents.

These agent-to-principal fiduciary duties do not fit well in the absence of any obvious representative relationship. They are designed to regulate the relationship between principals and agents, not interactions among voters, who are all principals themselves. Thus their tools make little sense in the voting context, where the sorts of conflicts of interest that those prophylactic rules are designed to prevent are inherent. Trying to impose a true fiduciary duty of loyalty on voters would be to ask them to act selflessly in the very type of situation where fiduciary law does not trust fiduciaries.

The Supreme Court was right in *Hollingsworth*: voters are not agents of the people. But that does not necessarily mean that direct-democracy voters have no duties. It simply means that the discussion of direct-democracy voters’ duties to date has focused on the wrong governance problem. The governance problem in direct democracy is not a principal–agent problem that can be addressed through a conventional fiduciary duty of loyalty. Instead, it is a tyranny-of-the-majority problem.

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45. See, e.g., Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 601–02 (1997); Miller, *supra* note 18, at 976.

46. See, e.g., *Birnbaum v. Birnbaum*, 539 N.E.2d 574, 576 (N.Y. 1989) (“[A] fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect . . . . [This] requir[es] avoidance of situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty.” (citations omitted)).

### B. *The Plight of the Minority*

Direct democracy is ripe for minority exploitation because it lacks many of the structural protections for minorities that are built into a representative democracy (about which Madison waxed so eloquently in *Federalist 10*).<sup>47</sup> At least four features of representative democracy that minorities depend on for protection are lacking in direct democracy: intermediation, veto points, deliberation, and repeat play.

First, minorities cannot depend on the intermediation of representatives with (even judicially unenforced) fiduciary duties running to the polity as a whole.<sup>48</sup> In a ballot initiative, there is no opportunity, in Madison's words, "to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."<sup>49</sup> Instead the voters act directly.

Second, direct democracy lacks the various veto points that a system of divided power creates (such as bicameralism, the presidential veto, federalism, and the filibuster), which can sometimes give minorities effective control, or at least significant leverage, over a decision.<sup>50</sup> A minority group need only control one of these levers to block, or extract concessions for, disadvantageous legislation, even if it

47. See, e.g., Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 13–15 (1978); Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 295–97; Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522–30 (1990); see also *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1651 (2013) (Sotomayor, J., dissenting) (“[W]ithout checks, democratically approved legislation can oppress minority groups.”). Political scientists have demonstrated that racial, ethnic, and sexual minorities have fared poorly in direct democracy. See, e.g., Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1743–45 (2013); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 262 (1997); Donald P. Haider-Markel, Alana Querze & Kara Lindaman, *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 307 (2007); cf. Todd Donovan & Shaun Bowler, *Direct Democracy and Minority Rights: An Extension*, 42 AM. J. POL. SCI. 1020, 1023–24 (1998) (arguing that minority oppression stemming from direct democracy is more prevalent in smaller jurisdictions and may go away as size increases). But see Zoltan L. Hajnal, Elisabeth R. Gerber & Hugh Louch, *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. POL. 154, 169–70 (2002) (finding that minorities are usually on the winning side of initiatives, except when those initiatives explicitly target minority rights).

48. See Eule, *supra* note 47, at 1526–27; Rave, *supra* note 13, at 706–22 (arguing that political representatives owe a fiduciary duty of loyalty to voters, though it often goes unenforced).

49. THE FEDERALIST NO. 10, *supra* note 29, at 62 (James Madison).

50. See Bell, *supra* note 47, at 14; Eule, *supra* note 47, at 1557–58.

does not have the votes to run the same gauntlet with its own policies. In a ballot initiative, by contrast, a bare majority wins.

Third, in modern ballot initiatives, there is less opportunity for the minority to persuade the majority through deliberation.<sup>51</sup> After all, the voters cannot all get together in a room to discuss the issue before the vote.<sup>52</sup> And the quality of mass discourse, through advertising and sound bites aimed at harried voters with many other things on their minds, can leave much to be desired from a deliberative standpoint. As Professor Lawrence Sager put it, “Legislation by plebiscite is not and cannot be a deliberative process.”<sup>53</sup>

Fourth—and perhaps most importantly—votes on ballot initiatives are single-shot transactions, so minorities cannot protect themselves through logrolling or coalition building.<sup>54</sup> Without repeat play, minorities cannot trade their support on a number of broader measures toward which they are relatively indifferent for others’ support on the few issues that are most critical to the minority. Effective vote trading requires a series of votes over time among repeat players with the opportunity to build up enough trust to be confident that the counterparties will be there when the time comes and to punish them later if they defect. In that sort of environment (for example, in a legislature), a cohesive minority can do quite well by building up political capital through bargains and spending it to make sure its most critical issues are taken care of.<sup>55</sup> A plebiscite, by contrast, is just a one-time, up-or-down vote on a single issue.

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51. See Eule, *supra* note 47, at 1527 (“In contrast [to direct democracy], the deliberative process offers time for reflection, exposure to competing needs, and occasions for transforming preferences.”); Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 911 (2006) (“[D]irect democracy’s reliance on ‘naked’ preferences is potentially troublesome because it makes little effort to educate citizens on the issues upon which they are voting and gives them no well-suited forum to deliberate about those issues.”).

52. The same might not have been true of ancient Greek city-states or New England town meetings.

53. Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1414 (1978). *But see* Leib, *supra* note 51, at 914 (laying out a proposal for making direct democracy more deliberative through a “popular branch of government”).

54. See Eule, *supra* note 47, at 1527, 1556–58; Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 636, 667–68 (1994).

55. This is a central insight of public-choice theory. See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 213–16, 220–22 (1962). Note that there is no guarantee that minorities will do better in representative democracy, though public-choice theory tends to predict that they will. See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–24 (1985). Minorities may be the victims of majority logrolls and even with repeat

Further, state laws regulating direct democracy have certain features that exacerbate the risk of minority exploitation. Single-subject rules prevent even less effective attempts at logrolling.<sup>56</sup> In theory, even without repeat play, one minority group could cut a deal with others to combine unrelated issues into a single omnibus ballot initiative, which could pass with their combined support.<sup>57</sup> But the laws of most states take away even this more limited opportunity for logrolling by restricting ballot initiatives to a single subject.<sup>58</sup> And this focus on a single issue may also serve to create cohesion among a majority faction even when its preferences on that particular issue are not strongly held.

Similarly, the use of secret ballots in direct democracy makes it difficult to monitor or enforce any sort of political bargain over time; voters cannot punish each other for defecting.<sup>59</sup> And, knowing that their votes are secret, voters may feel freer to vote on their baser impulses.<sup>60</sup> At the same time, voters in direct democracy often lack adequate information or signals from moderating intermediaries like political parties on the issues they are asked to decide, and they, quite rationally, fail to invest in obtaining that information.<sup>61</sup>

Finally, the minority typically lacks an easy exit option.<sup>62</sup> Unlike, say, minority shareholders in a publicly traded corporation, voters dissatisfied with the outcome of a ballot initiative cannot simply sell their shares. Their only choice is to pick up and move. Although some

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play might not have enough political capital to trade to protect their interests. See Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 835–36 (2006). And discrete and insular minorities might be unable to find allies due to irrational prejudice. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980). But minorities are undoubtedly more vulnerable in direct democracy, where bargaining is not possible.

56. See Gilbert, *supra* note 55, at 858; Daniel Hays Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 957–59 (1983).

57. See Cooter & Gilbert, *supra* note 8, at 700.

58. See *id.* at 689. Cooter and Gilbert caution that this form of logrolling through omnibus ballot initiatives can be even more harmful to minorities who have no opportunity to bargain with the majority not to pass it, no matter how much harm it does to them. *Id.* at 689, 700 n.60.

59. See *id.* at 701–03.

60. See, e.g., Bell, *supra* note 47, at 14–15; Eule, *supra* note 47, at 1556.

61. See, e.g., Eule, *supra* note 47, at 1557; Jonathan R. Macey, *The Role of the Democratic and Republican Parties as Organizers of Shadow Interest Groups*, 89 MICH. L. REV. 1, 23–24 (1990). For a discussion of the role of intermediary institutions, see Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

62. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 17 (1970).

degree of sorting is, of course, possible as people move to localities where neighbors share their preferences,<sup>63</sup> moving to a different jurisdiction may entail significant costs that the minority is unwilling or unable to bear.<sup>64</sup> In short, the minority is very vulnerable to the majority.

This is not to say that the vulnerability of minorities makes direct democracy an anathema. The whole point is that it is a *majoritarian* institution.<sup>65</sup> Direct democracy empowers the majority to break the hold of powerful cohesive minorities that might capture the legislative process. And it can serve as an important check on unfaithful agents who may manage to ignore the majority will by either catering to powerful minorities in a series of bargains that are obscured to the voters<sup>66</sup> or, worse, manipulating the laws governing the political process to entrench themselves.<sup>67</sup> It was only through the ballot initiative, for example, that voters in California and Arizona were able to limit gerrymandering by taking the power to draw legislative

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63. See William A. Fischel, *Public Goods and Property Rights: Of Coase, Tiebout, and Just Compensation*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 343, 347–48 (Terry L. Anderson & Fred S. McChesney eds., 2003); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419 (1956).

64. See, e.g., David Hume, *Of the Original Contract*, in SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 147, 156 (Oxford Univ. Press 1962) (1748) (“Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires?”).

65. Cooter & Gilbert, *supra* note 57, at 702 (“A primary purpose of direct democracy is to ascertain the [majority] will of the people.”); see also Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 712 (1992) (“By definition, a minority group will not itself have enough plebiscite votes either to pass laws that would advantage it or to stop legislation that would disadvantage it.”).

66. See Cooter & Gilbert, *supra* note 57, at 699; cf. Kellen Zale, *Changing the Plan: The Challenge of Applying Environmental Review to Land Use Initiatives*, 40 ECOLOGY L.Q. 833, 866–67 (2013) (discussing how land-use initiatives can serve as a structural counterbalance to prodevelopment special interests in cities).

67. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 712 (1998); see also BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA’S POLITICAL REFORM QUANDARY* 25–29 (2015) (discussing the value of pluralism in political mechanisms and reform). Even Professor Bruce Cain, who is generally skeptical of direct democracy where it can trump the legislature through constitutional amendments, explains that “if the direct popular initiative is to have a role, it should be limited to reforms where elected official[s] have a conflict of interest and decided by supermajority rules.” CAIN, *supra*, at 210.

districts out of the hands of self-interested incumbent legislators and creating independent redistricting commissions.<sup>68</sup>

Madison's governance concerns are interrelated, and there is an inherent tradeoff in choosing direct or representative democracy. The structural features of the legislative process designed to protect minorities also enable minorities to capture the process and insulate representatives from accountability to the majority. And the features of direct democracy that can break this stranglehold come at a risk to minorities, who have no opportunity to bargain and logroll to protect their interests.

## II. FIDUCIARY(?) DUTIES OF VOTERS IN PRIVATE LAW

Several areas of private law recognize that minorities are vulnerable when decisions are put to a vote. In corporate law, for example, there is a strong norm of majority rule.<sup>69</sup> Yet corporate law recognizes a tension between the rights of majority shareholders to pursue its own selfish interests<sup>70</sup> and the risk that the majority will use their control over corporate affairs to gain disproportionate benefits at the expense of the minority.<sup>71</sup> And in some circumstances, corporate law recognizes a duty running from the majority to the minority—a principal-to-principal duty. For example, a majority shareholder with the ability to control the outcome of a shareholder vote cannot use a merger, sale of assets, dissolution, or reverse stock split to “squeeze out” the minority for less than the fair value of its shares.<sup>72</sup>

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68. ARIZ. CONST. art. IV, pt. 2, § 1 (amended by Ariz. Proposition 106 (2000)); CAL. CONST. art. XXI (amended by Cal. Proposition 11 (2008) and Cal. Proposition 20 (2010)); *see also* Rave, *supra* note 13, at 730–32 (discussing the Arizona and California commissions).

69. *See* DOUGLAS K. MOLL & ROBERT A. RAGAZZO, CLOSELY HELD CORPORATIONS § 7.01[B][1], Lexis Advance (database updated 2015).

70. *E.g.*, Thorpe v. CERBCO, Inc., 676 A.2d 436, 437, 444 (Del. 1996) (noting that the controlling shareholders “were entitled to pursue their own interests in voting their shares” and acknowledging “their entitlement as shareholders to act in their self-interest”); *see also* Ringling Bros.–Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441, 447 (Del. 1947) (“Generally speaking, a shareholder may exercise wide liberality of judgment in the matter of voting, and it is not objectionable that his motives may be for personal profit, or determined by whims or caprice . . .”); Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584, 598 (Del. Ch. 1986) (observing that the law “does not . . . require . . . controlling shareholders [to] sacrifice their own financial interest in the enterprise for the sake of the corporation or its minority shareholders”).

71. Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976).

72. *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983); Coggins v. New England Patriots Football Club, Inc., 492 N.E.2d 1112, 1117–18 (Mass. 1986); Grato v. Grato, 639 A.2d 390, 397–98 (N.J. Super. Ct. App. Div. 1994).

Likewise, in partnerships, most day-to-day decisions are governed by majority rule.<sup>73</sup> But that arrangement leaves minority partners vulnerable, particularly given that partners (unlike corporate shareholders) are not protected by limited liability; they are personally responsible for all partnership debts incurred at the majority's direction.<sup>74</sup> As a result, partners are fiduciaries, not only for the partnership, but also for each other, and are required at all times to act in good faith toward each other.<sup>75</sup>

Courts have recognized similar principal-to-principal duties when a majority of bondholders vote under a collective-action clause to "cram down" a debt-restructuring plan over the objection of a minority.<sup>76</sup> In order to facilitate restructuring when a debtor becomes insolvent (which could leave both debtor and creditors better off than a default), some bond contracts allow a majority of bondholders to agree to postpone payments or reduce the principal on all of the bonds, even those held by dissenters, thereby reducing the likelihood of holdouts wrecking the deal. But because of the risk that the majority will collude with the debtor to direct disproportionate benefits to itself at the minority's expense, courts have conditioned enforcement of these clauses on the majority's compliance with an intercreditor duty of "utmost good faith."<sup>77</sup>

We can see a similar move in compulsory oil and gas unitization, where property owners can be compelled by majority vote to participate in joint operations to extract oil and gas from a common reservoir in the hopes of reducing waste and increasing total production.<sup>78</sup> But enforcement of the unitization plan is conditioned on

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73. *E.g.*, UNIF. P'SHIP ACT § 401(j) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1997).

74. *Id.* § 306(a).

75. *E.g.*, *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); *see also* UNIF. P'SHIP ACT, *supra* note 73, § 404(a)–(d) (listing partners' duties).

76. William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 70–71 (2004); Lee C. Buchheit & G. Mitu Gulati, *Sovereign Bonds and the Collective Will*, 51 EMORY L.J. 1317, 1336–37 (2002).

77. *Hackettstown Nat'l Bank v. D.G. Yuengling Brewing Co.*, 74 F. 110, 113 (2d Cir. 1896); *see, e.g.*, *Sage v. Cent. R.R. Co.*, 99 U.S. 334, 341 (1879); *Redwood Master Fund Ltd. v. TD Bank Eur. Ltd.* [2002] EWHC (Ch) 2703, [105] (Eng.). For a more detailed discussion, *see* D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1235–38 (2013).

78. Gary D. Libecap & James L. Smith, *The Economic Evolution of Petroleum Property Rights in the United States*, 31 J. LEGAL STUD. 589, 596 (2002).

the good faith of the majority and fair and equitable treatment of the minority in allocating the proceeds from the joint operation.<sup>79</sup>

In short, there is an equitable streak running through diverse areas of private law requiring the majority to treat the minority “fairly” when an issue is put to a vote. The majority’s principal-to-principal duty is sometimes called “fiduciary,”<sup>80</sup> but its justification differs from the agent-to-principal duty in quintessentially fiduciary relationships.

#### A. *The Source of Private-Law Voter Duties*

“True” fiduciary duties, like the duty of loyalty, are a tool (one of many) to control agency costs in principal–agent relationships.<sup>81</sup> The duty of loyalty requires the fiduciary to subordinate his or her interests to the beneficiary’s, and it is typically enforced through prophylactic rules against self-dealing.<sup>82</sup> But the majority’s duty in the examples above is not aimed at aligning the interests of the majority with those of the minority and ensuring that the majority faithfully executes the minority’s wishes. In other words, it is not aimed at a principal–agent problem.

Instead, the majority’s duty is a corollary to the use of voting to solve a collective-action problem. Running a corporation, a partnership, or even a debt restructuring by unanimous consent leaves the collective vulnerable to strategic holdouts, who can threaten to block beneficial actions unless they are paid off. Adopting a majority voting rule disables would-be holdouts, but, at the same time, it leaves the minority vulnerable to the majority. After all, the power to hold out is the power to avoid exploitation.<sup>83</sup>

This is a distinct governance problem. By placing principal-to-principal duties on majority voters, the law aims to reassure individuals who, in search of joint gains, surrender their autonomy to joint

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79. *E.g.*, *Trees Oil Co. v. State Corp.* Comm’n, 105 P.3d 1269, 1282 (Kan. 2005) (recognizing a state law requiring courts to ensure “that the [compulsory unitization] is fair and equitable to all interest owners.” (citing KAN. STAT. ANN. § 55-1304(c) (2003))).

80. *See, e.g.*, *Pepper v. Litton*, 308 U.S. 295, 306 (1939) (“A director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders.” (citations omitted)); *Perlman v. Feldmann*, 219 F.2d 173, 175 (2d Cir. 1955); *see also* MOLL & RAGAZZO, *supra* note 69, § 6.07[A] (“[T]he duties owed by a controlling shareholder are typically characterized as ‘fiduciary’ in nature . . .”).

81. *See, e.g.*, *Miller*, *supra* note 18, at 981.

82. *See id.* at 983 (“In fiduciary law . . . it is assumed that the parties are interacting for the exclusive benefit of . . . the beneficiary.”); *Miller & Gold*, *supra* note 18, at 547.

83. *See Rave*, *supra* note 77, at 1213–19.

decisionmaking processes that they will not be exploited if they are outvoted.<sup>84</sup> The majority's duty is what the minority demands in exchange for leaving itself vulnerable to a majority vote. It is the minority's assurance against a tyranny of the majority. Indeed, as Professor John Coffee has explained, as corporate law shifted away from unanimity requirements for fundamental corporate changes in the nineteenth century and toward majority rule, shareholders' ability to protect themselves from exploitation by holding out "was replaced by the idea that those controlling the corporation owed a duty of fairness to the minority."<sup>85</sup>

The source of this duty is thus fundamentally contractarian. As one court put it in the corporate context, there is an implicit term in the corporate contract "that corporate machinery may not be manipulated so as to injure minority stockholders."<sup>86</sup> But because the costs of contractual specificity are high—it is hard at the time the cooperative venture is formed to anticipate all of the creative means by which the majority might take advantage of the minority—the law supplies default terms.<sup>87</sup>

Courts play an important institutional role in this story. When the voters' "social contract" (for example, the corporate charter, partnership agreement, or bond contract) is incomplete, it effectively delegates to courts the role of policing for opportunism. Indeed, as Coffee has argued, what matters most in corporate law "is not the specific substantive content of any rule, but rather the institution of

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84. *See id.* at 1215–19, 1234.

85. Coffee, *supra* note 23, at 1635. The dissenting shareholder's right of appraisal, which, under certain circumstances, allows shareholders to force the corporation to buy back their shares at a judicially determined "fair value," also arose in response to minority vulnerability when state legislatures amended the rules to allow fundamental corporate changes to go forward on less than unanimous consent. *See, e.g.,* Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535–36 (1941) (recounting the history of the Ohio statute); William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 AM. B. FOUND. RES. J. 69, 81–82 (recounting shifts in American law).

86. *Condec Corp. v. Lunkenheimer Co.*, 230 A.2d 769, 775 (Del. Ch. 1967).

87. *See* Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 283 (1986) [hereinafter Easterbrook & Fischel, *Close Corporations*]; *cf.* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 445 (1993) (explaining how establishing default rules can reduce transaction costs). Even if private parties can contract around default rules imposing duties on the majority, the content of those default rules tells us something important. Presumably the default rules are set to reflect the terms to which most parties would agree most of the time (thus minimizing transaction costs because few parties would want to depart from them). *See* Victor Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 CALIF. L. REV. 1072, 1087–88 (1983). Thus they are the implicit terms of a contract when the contract is silent on those points.

judicial oversight.”<sup>88</sup> Coffee explains that in any form of long-term relational contracting (such as a corporation) the parties know that disagreements will inevitably arise.<sup>89</sup> Seeing as they cannot possibly anticipate and provide for all of them in advance, they specify a governance mechanism to resolve future disputes, subject to some judicial oversight *ex post*.<sup>90</sup> The hope, of course, is that the governance mechanism (whether it is majority rule, board authority, or something else) will determine the best course of action; it is not always clear what is in the collective interest, and courts are not necessarily the best institutions to figure it out.<sup>91</sup> But any governance mechanism has its weaknesses, and corporate law critically depends on courts *ex post* to ensure that all parties continue to act in good faith, not opportunistically, when using that mechanism.<sup>92</sup> Courts recognize this intuitively.<sup>93</sup> Thus it is no surprise that, across a broad range of private-law contexts where voting is used to resolve disagreements and facilitate collective action, courts recognize that voters have some duties to their fellow voters, and step in to prevent one side “from taking ‘opportunistic’ advantage of the other.”<sup>94</sup>

### *B. The Content of Private-Law Voter Duties*

It is clear that voters in the majority owe some sort of duty to the minority across a wide range of private-law contexts. But what is the content of this duty? Unfortunately, this area is plagued by linguistic imprecision that can conflate the tyranny-of-the-majority problem with the principal-agent problem. Courts often use “fiduciary” language loosely and are not always clear about which of the two governance

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88. Coffee, *supra* note 23, at 1621.

89. *Id.* at 1681.

90. *Id.*

91. This relative lack of institutional competence is a motivation for the business judgment rule. See *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986); D. Theodore Rave, *Institutional Competence in Fiduciary Government*, in *RESEARCH HANDBOOK ON FIDUCIARY LAW* (Andrew S. Gold & D. Gordon Smith eds.) (forthcoming 2017) (manuscript at 5–6) (on file with the *Duke Law Journal*).

92. Coffee, *supra* note 23, at 1621, 1681.

93. Even in limited liabilities companies (LLCs), which allow far more flexibility for parties to contract around default rules (even the duty of loyalty), courts see a role for themselves policing for opportunism *ex post*. See, e.g., *Allentown Ambassadors, Inc. v. Ne. Am. Baseball, Inc.* (*In re Allentown Ambassadors, Inc.*), 361 B.R. 422, 461–62 (Bankr. E.D. Pa. 2007); *VGS, Inc. v. Castiel*, No. C.A. 17995, 2000 WL 1277372, at \*4 (Del. Ch. Aug. 31, 2000); *Anderson v. Wilder*, No. E2003-00460-COA-R3-CV, 2003 WL 22768666, at \*4 (Tenn. Ct. App. Nov. 21, 2003).

94. Coffee, *supra* note 23, at 1621.

problems they are addressing. In what follows, I attempt to tease out what courts mean when they impose duties on voters. For simplicity's sake I focus on examples from corporate law (particularly cases involving closely held corporations), but the analytical framework could be applied to other areas of law as well.

We might think of the possibilities for voter duties along a spectrum:

- (1) **No Duty:** The voter is free to act in his or her own self-interest regardless of the consequences to others.
- (2) **Kaldor-Hicks:** The voter must act in the best interests of the collective, regardless of how the benefits and burdens are distributed.
- (3) **Pareto:** The voter may act in his or her own interest, but must refrain from harming the minority.
- (4) **True Loyalty:** The voter must subordinate his or her own interests to those of the minority.

The spectrum is shown in Figure 1 below.

*Figure 1: Potential Voter Duties Spectrum*



1. *No Duty.* At the purely liberal end of the spectrum, voters bear no duties to others. They are free to act in their own self-interest without regard to the consequences that a vote may have upon others. Courts, accordingly, would take a hands-off approach with respect to the actions of the majority, recognizing their right to selfish ownership. Minority investors must protect themselves *ex ante* through contractual provisions, and courts will not step in to save them if they fail to bargain for sufficient protections.

Despite academic calls to respect private ordering,<sup>95</sup> as the examples discussed above demonstrate, courts have shown some

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95. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 243–52 (1991).

reluctance to take a hands-off approach when majorities use their superior voting power to take advantage of minorities.<sup>96</sup>

Corporate law comes closest to this no-duty pole in the context of publicly traded corporations, where exit is easy. In a publicly traded corporation, dissatisfied minority shareholders can readily sell their shares on the market, and thus have the ability to protect themselves. And the threat of exit acts as an alternative governance mechanism for disciplining the majority (which is often sensitive to the market price for stock).<sup>97</sup> For this reason, courts are typically more deferential to what might look like opportunistic actions by the majority when the minority can easily protect itself through exit.<sup>98</sup> Thus in publicly traded corporations, most states do not afford the minority appraisal rights or impose duties as strict as those borne by majority shareholders in closely held corporations, where there is no market for minority shares.<sup>99</sup>

Some scholars have argued for a more hands-off approach even in closely held corporations, where exit is much more difficult.<sup>100</sup> They argue that minority investors who fail to contract for protections, like dissolution provisions, may be trying to signal that *they* will not engage in opportunistic behavior by, for example, threatening to block beneficial corporate actions unless they are given a disproportionate

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96. See *supra* notes 72–79 and accompanying text.

97. See, e.g., MOLL & RAGAZZO, *supra* note 69, § 7.01[A] n.13 (“In a publicly held corporation, the presence of a well-functioning market also exerts some discipline on those in control.”); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target’s Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1196 (1981) (identifying the threat of exit as “the most powerful check on agency costs”); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965). See generally HIRSCHMAN, *supra* note 62 (describing exit as one important lever of governance).

98. *Mendel v. Carroll* is an interesting example, in which a controlling shareholder of a publicly traded company proposed a freezeout merger to cash out the minority shares. *Mendel v. Carroll*, 651 A.2d 297, 298–99 (Del. Ch. 1994). When a third party made a competing offer for two dollars more per share, the controlling shareholder withdrew its merger proposal and announced that it had no interest in selling to the third party, effectively killing the deal and preventing the minority from selling at a premium. *Id.* at 300–02. The court held that the controlling shareholder had no duty to facilitate the sale. *Id.* at 306. In other words, the controlling shareholder was free to selfishly deny the corporation a benefit, so long as it did not disproportionately hurt the minority shareholders. See Stephen M. Bainbridge, *There Is No Affirmative Action for Minorities, Shareholder and Otherwise, in Corporate Law*, 118 YALE L.J. POCKET PART 71, 75 (2008).

99. See, e.g., MODEL BUS. CORP. ACT § 13.02(b) (AM. BAR ASS’N 2002); MOLL & RAGAZZO, *supra* note 69, § 7.01[A], [D][1][a]–[b].

100. See EASTERBROOK & FISCHEL, *supra* note 95, at 243–52 (highlighting several faults with the position that strict fiduciary standards, which are fundamental principles of partnership law, should be applied to closely held corporations); Easterbrook & Fischel, *Close Corporations*, *supra* note 87, at 301.

share of the profits.<sup>101</sup> The parties are thus precommitting that they will not withdraw their capital at a time when the corporation might be vulnerable. But courts in most states require more of the majority in closely held corporations.<sup>102</sup> Even where the corporate charter is silent, the default rule is an implicit delegation to courts of at least some power to police for majority opportunism.<sup>103</sup>

2. *Kaldor-Hicks-Style Duty*. The next point on the spectrum of potential voter duties, which I am calling Kaldor-Hicks, would require voters to act in the best interests of the collective, regardless of how the benefits and burdens are distributed.<sup>104</sup> Whatever duty the voters bear runs to the collective organization, not to other voters. In other words, the majority would be allowed to impose costs on the minority, as long as doing so would benefit the collective as a whole.

The classic case, *Wilkes v. Springside Nursing Home, Inc.*,<sup>105</sup> comes close to the Kaldor-Hicks approach. The court held that the majority shareholders had breached their duty to a minority shareholder by removing him from the payroll of a closely held corporation. Because there was no market for his shares and the corporation distributed all of its profits through salaries to its shareholder-employees, not through dividends, this effectively cut the minority shareholder out of any economic benefit of ownership.

The court in *Wilkes* recognized that the majority's duty to the minority must be balanced against its right to "'selfish ownership' in the corporation," permitting it "room to maneuver" and "a large

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101. Easterbrook & Fischel, *Close Corporations*, *supra* note 87, at 287.

102. See *MOLL & RAGAZZO*, *supra* note 69, § 7.01[D][1][a]–[b]. It is worth noting that Delaware does not impose any sort of heightened duty on majority shareholders in closely held corporations. See, e.g., *Nixon v. Blackwell*, 626 A.2d 1366, 1380–81 (Del. 1993); *Blaustein v. Lord Baltimore Capital Corp.*, C.A. No. 6685–VCN, 2013 WL 1810956, at \*14 nn.83–84 (Del. Ch. Apr. 30, 2013), *aff'd* 84 A.3d 954 (Del. 2014). This is, perhaps, because Delaware has no interest in attracting closely held corporations and does not want these sorts of duties to pollute its law governing public corporations, which it very actively tries to attract. See Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 724–26 (2002) (acknowledging Delaware's corporate-law dominance amongst the states and its economic interest in maintaining the status quo).

103. See *Coffee*, *supra* note 23, at 1620.

104. I draw this label from the economic concept of Kaldor-Hicks efficiency. A change in the state of affairs is said to be a Kaldor-Hicks improvement if the people who benefit from the change could hypothetically compensate those who are made worse off; in other words, it does more good than harm in the aggregate. But no actual compensation is required, so some people can be left worse off, so long as the welfare of the group as a whole improves. See 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 417 (Peter Newman ed., 1998).

105. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976).

measure of discretion” in making decisions for the company.<sup>106</sup> The court went on to explain that the majority *could* vote to disadvantage the minority in pursuit of a “legitimate business purpose” (that is, something reasonably calculated to benefit the corporation as a whole) that could not practicably be accomplished through means less harmful to the minority.<sup>107</sup> There simply was no legitimate business purpose for terminating the minority shareholder on the facts of this case—the majority fired him because of a personal falling out. *Wilkes*, and the cases that have followed it,<sup>108</sup> thus placed primary emphasis on the reasonableness of the majority’s conduct with respect to the corporation as a whole rather than its effect on the minority.<sup>109</sup>

But *Wilkes*, and corporate law more generally, do not fully embrace the Kaldor-Hicks approach because they are never completely indifferent to the distribution of benefits and burdens. A fundamental principle of corporate law is that any distribution of profits to shareholders must be pro rata.<sup>110</sup> Thus, even under the *Wilkes* approach where the majority’s duty would not prevent it from harming the minority, it can never deny the minority shareholders their proportional share of distributed profits. The majority cannot go below this pro rata floor created by the minority’s mere status as a

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106. *Id.* at 663–64.

107. *Id.*

108. *See, e.g.,* McCann v. McCann, 275 P.3d 824, 832 (Idaho 2012) (“[I]t is possible for courts to find [legitimate uses of corporate power] harmful if the end result could have been achieved with less injury to the minority shareholder.”); G&N Aircraft, Inc. v. Boehm, 743 N.E.2d 227, 242 (Ind. 2001) (“If this was done for legitimate business reasons, it is protected by the business judgment rule.”); Toner v. Baltimore Envelope Co., 498 A.2d 642, 653 (Md. 1985) (citing with approval the reasoning in *Wilkes*); Pointer v. Castellani, 918 N.E.2d 805, 816 (Mass. 2009) (citing *Wilkes*’s “selfish ownership” principle while upholding the lower court’s ruling that the majority shareholders breached a fiduciary duty in a “freeze-out” of the president); Daniels v. Thomas, Dean, & Hoskins, Inc., 804 P.2d 359, 366 (Mont. 1990) (“[T]he controlling group should not be stymied by a minority stockholder’s grievances if the controlling group can demonstrate a legitimate business purpose and the minority stockholder cannot demonstrate a less harmful alternative.”); Crosby v. Beam, 548 N.E.2d 217, 221 (Ohio 1989) (holding that a breach of the fiduciary duty by majority shareholders, “absent a legitimate business purpose, is actionable”); Long v. Atlantic PBS, Inc., 681 A.2d 249, 256 n.8 (R.I. 1996); Nelson v. Martin, 958 S.W.2d 643, 650 (Tenn. 1997).

109. *See* Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 762–63 (2000); *see also* MOLL & RAGAZZO, *supra* note 69, § 7.01[D][1][c] (discussing majority versus minority perspectives of oppression).

110. *See, e.g.,* Twenty Seven Tr. v. Realty Growth Inv’rs, 533 F. Supp. 1028, 1040 (D. Md. 1982). Different classes of stock, of course, might be entitled to different distributions, but here I am only talking about common stockholders, who are the residual claimants of the corporation and the ones typically endowed with voting rights.

shareholder, even if doing so would benefit the corporation as a whole.<sup>111</sup>

One additional feature of *Wilkes* also deviated from a pure Kaldor-Hicks approach. *Wilkes* appeared to require the majority to minimize the harm to the minority. When taking actions that would harm the minority's interests, the majority must show that there are no practicable alternatives that would achieve the same business purposes while doing less harm to the minority.<sup>112</sup>

A pure Kaldor-Hicks style duty would require voters in the majority to attempt to maximize collective gains for the corporate venture regardless of how the benefits and burdens are distributed. But corporate law places a limit on the extent to which majority shareholders can impose costs on the minority for the benefit of the corporation. Although the majority can impose burdens on the minority for legitimate business purposes up to a point, it must afford the minority its pro rata shares of distributed profits.

3. *Pareto-Style Duty*. Further along the spectrum is what I am calling a Pareto-style duty, which would generally allow voters to act in their own interests, but would require them to refrain from harming the minority.<sup>113</sup> The majority would not have to put the minority's interests ahead of its own and vote to disadvantage itself to benefit the minority like a true fiduciary duty of loyalty would require, but neither could it harm the minority just because doing so would benefit the collective more.

Another classic, *In re Kemp & Beatley, Inc.*,<sup>114</sup> appears to take the Pareto approach. There, the majority shareholders in a closely held corporation ceased paying de facto dividends (in the form of "bonuses" paid in proportion to the number of shares held) to two shareholders after they stopped working for the company.<sup>115</sup> The court held that the majority shareholders breached their duties (allowing the minority to

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111. See, e.g., *Gimpel v. Bolstein*, 477 N.Y.S.2d 1017, 1022–23 (N.Y. Sup. Ct. 1984) (holding that majority shareholders were justified in firing a minority shareholder who was embezzling money from a corporation, but that they had to "either alter the corporate financial structure so as to commence payment of dividends, or else make a reasonable offer to buy out [his] interest").

112. *Wilkes*, 353 N.E.2d at 663.

113. I draw this label from the economic concept of Pareto efficiency. A change in the state of affairs is said to be a Pareto improvement if it leaves at least one person better off without making anyone worse off. See 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 6–9 (Peter Newman ed., 1998).

114. *In re Kemp & Beatley, Inc.*, 473 N.E.2d 1173 (N.Y. 1984).

115. *Id.* at 1176.

force an involuntary dissolution for oppression) by frustrating the minority shareholders' "reasonable expectations" about what they would receive for committing their capital to a closely held corporation.<sup>116</sup> Unlike the Kaldor-Hicks approach in *Wilkes*, which primarily asked about the effects on the corporation as a whole, the focus in *Kemp* was squarely on how the majority's actions affected *the minority*.<sup>117</sup>

A pure Pareto-style duty would prohibit the majority from using its voting power to harm the minority's interests, even if doing so would further legitimate business purposes and benefit the corporation as a whole. *Kemp* itself may not have gone quite this far (and, indeed, the court backed off earlier cases that had embraced a purer version of the Pareto-style duty<sup>118</sup>). The court in *Kemp* emphasized that it is the minority's reasonable expectations "objectively viewed" that matter.<sup>119</sup> The majority does not violate its duty simply because the minority's

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116. *Id.*; see also *Stefano v. Coppock*, 705 P.2d 443, 446 n.3 (Alaska 1985) ("Oppressive conduct . . . can be . . . difficult to discern. We favor the view recently expressed by the New York Court of Appeals [in *Kemp*] . . ."); *Smith v. Leonard*, 876 S.W.2d 266, 272 (Ark. 1994) ("We have not previously addressed either 'oppression' or 'reasonable expectations' . . . but [*In re Kemp*] . . . is instructive."); *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 674 (Iowa 2013) (holding the minority's reasonable expectations as the touchstone of oppression analysis); *In re Dissolution of Clever Innovations, Inc.*, 941 N.Y.S.2d 777, 779–80 (N.Y. App. Div. 2012) ("Oppression has been defined as conduct of a controlling shareholder that substantially defeats expectations that, viewed objectively, 'were both reasonable under the circumstances and . . . central to the [oppressed shareholder's] decision to join the venture.'" (quoting *In re Kemp*, 473 N.E.2d at 1179)); *Balvik v. Sylvester*, 411 N.W.2d 383, 388 n.3 (N.D. 1987) (noting that reasonable expectations was the test laid out by the legislature); *Landstrom v. Shaver*, 561 N.W.2d 1, 8 (S.D. 1997) (balancing minority's "reasonable expectations" against corporations' business judgment); *McLaughlin v. Schenk*, 220 P.3d 146, 157 (Utah 2009) ("[T]he court must consider . . . whether or not a shareholder's reasonable expectations were thwarted.").

117. See *MOLL & RAGAZZO*, *supra* note 69, § 7.01[D][1][c]; *Moll*, *supra* note 109, at 764–65.

118. *In re Topper*, 433 N.Y.S.2d 359, 362 (N.Y. Sup. Ct. 1980) (holding that it was irrelevant whether the majority shareholders had good cause to fire an incompetent minority shareholder; they breached their duty if they frustrated the minority shareholder's expectation that he would be employed by the corporation and share in profits distributed as salary); see *Moll*, *supra* note 109, at 768 (noting that *In re Kemp* backs off this approach). Professor Douglas Moll explains that under the "pure minority perspective" in *In re Topper*, "[a]ny majority actions that harm [the minority's] expectations—even actions justified by a legitimate business purpose—will trigger oppression liability." *Id.* at 767. Along similar lines, in *Donahue v. Rodd Electrotype Co.*, the majority caused the corporation to offer to buy back the retiring founder's stock at a favorable price, and the Massachusetts Supreme Judicial Court held that the majority breached its fiduciary duty to the minority by failing to offer them an equal opportunity to sell their stock back at the same price. *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 520 (Mass. 1975). The same court backed off this Pareto-style rule in *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663–64 (Mass. 1976).

119. *In re Kemp*, 473 N.E.2d at 1179.

“subjective hopes and desires in joining the venture are not fulfilled.”<sup>120</sup> In any event, even under a purer conception of a Pareto-style duty, the majority *need not* subordinate its interests to those of the minority like a truly loyal fiduciary would.

4. *True Duty of Loyalty.* At the “true loyalty” end of the spectrum, voters in the majority would have to act for the exclusive benefit of those in the minority and subordinate their own interests. This form of duty is much more suited to the principal–agent situation, where the fiduciary acts on behalf of the beneficiary, than to the context of a group of principals deciding on a course of action through voting.

Voting among principals is a way to identify and aggregate preferences.<sup>121</sup> To require the majority to act for the exclusive benefit of the minority when an issue is put to a vote would deny the majority any right to selfish ownership and beg the question: Why hold a vote in the first place if the winning side will have to do what the losing side wants? Further, the classic legal tools of the fiduciary duty of loyalty—its prophylactic prohibitions on self-dealing and conflicts of interest—are not designed for this type of situation. A true-loyalty obligation would put voters in precisely the type of conundrum that fiduciary law tries to avoid: a position where they must balance their own interests against the beneficiary’s interests.

It is hard to find private-law examples of a true-loyalty voter duty. As Professor Stephen Bainbridge has argued, there is no affirmative action in corporate law; voters in the majority generally need not subordinate their interests to those of the minority as a true fiduciary would.<sup>122</sup> Even in partnerships, where the black-letter law is that partners are fiduciaries for other partners,<sup>123</sup> the duty that partners owe each other, principal-to-principal, does not look like a true duty of

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120. *Id.*

121. See, e.g., Grant M. Hayden & Matthew T. Bodie, *The Bizarre Law & Economics of Business Roundtable v. SEC*, 38 J. CORP. L. 101, 120 (2012) (“The function of a voting procedure, for political and corporate entities, is to aggregate . . . preferences.”).

122. Bainbridge, *supra* note 98, at 75 (“[W]hile corporate law ensures that the majority may not benefit itself at the expense and to the exclusion of the minority, corporate law does not require the majority affirmatively to benefit the minority at its own expense.”); see also Deborah A. DeMott, *Agency Principles and Large Block Shareholders*, 19 CARDOZO L. REV. 321, 323 (1997) (contrasting constraints that would apply to large block shareholders if they were agents for other shareholders with current doctrine in which no such duty exists).

123. E.g., *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (describing the partner’s fiduciary duty as “the punctilio of an honor the most sensitive”).

loyalty: the majority need not subordinate its interests to the minority's.<sup>124</sup>

Other countries may come closer to this true-loyalty approach for voters. In the controversial case *Gambotto v. WCP Ltd.*,<sup>125</sup> for example, the High Court of Australia held that the majority shareholders of a publicly held corporation could not cash out the minority's shares (even at a premium) except to avoid significant detriment or harm to the company.<sup>126</sup> This approach goes beyond a Pareto-style duty; it appears to empower the minority to not only block actions that might benefit the corporation, but even to impose costs on the corporation—up to the point of “significant detriment.”<sup>127</sup> But it is inconsistent with the approach taken by U.S. corporate law.<sup>128</sup>

5. *Summary.* Although some cases refer to shareholders' right to vote selfishly and others to the “fiduciary” obligations of majority shareholders, voter duties tend not to fall at either the no-duty or true-loyalty poles. Instead, corporate-law voter duties tend to fall mostly in the Kaldor-Hicks or Pareto categories—or somewhere in between (as illustrated in Figure 2).

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124. See UNIF. P'SHIP ACT, *supra* note 73, § 404(e) cmt. 5. As the comment to § 404(e) explains:

[T]he partner's rights as an owner and principal in the enterprise . . . must always be balanced against his duties and obligations as an agent and fiduciary. For example, a partner who, with consent, owns a shopping center may . . . legitimately vote against a proposal by the partnership to open a competing shopping center.

*Id.*; see also *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992) (holding that although a fiduciary relationship gives rise to a duty to “deal fairly,” it does not require the party to place the interest of the other party above her own).

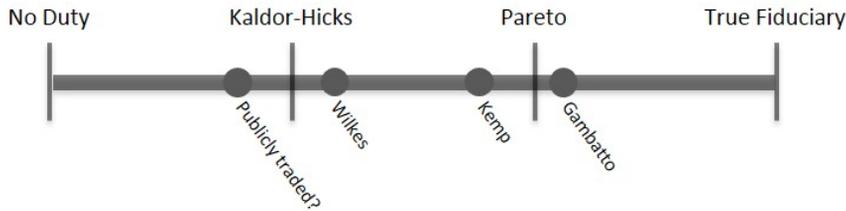
125. *Gambotto v WCP Ltd* (1995) 182 CLR 432 (Austl.).

126. *Id.* at 459–60.

127. See Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMP. L. 39, 65 (2000).

128. See *id.* at 41.

Figure 2: Voter Duty Spectrum with Examples



At first glance it might seem like investors would insist on at least a Pareto-style voting duty before they surrender their autonomy and commit their capital to a venture. Otherwise they leave themselves open to unfavorable treatment in the event that they find themselves outvoted. But shareholders might rationally accept something closer to a Kaldor-Hicks-style voting duty *with a pro rata floor* under conditions of uncertainty.<sup>129</sup> They might prefer the majority to direct its efforts towards maximizing the value of the corporation rather than ensuring that no individual shareholders are left worse off if they do not know whether they will be in the majority or minority on any given issue, their proportional shares of the expected gains from such efforts are great, or both.

It is quite plausible that a Kaldor-Hicks-style duty could lead to significant collective gains over a Pareto-style duty. A pure Pareto-style voter duty running to all other shareholders could saddle the corporation with counterproductive pet projects of minority shareholders and potentially lead to paralysis. For example, the majority would violate a pure Pareto-style duty by firing even a clearly incompetent minority shareholder employed by the corporation.<sup>130</sup> It is not difficult to see how such a duty could undercut productivity. (A true duty of loyalty, of course, raises even more difficulties.<sup>131</sup>)

But a pure Kaldor-Hicks-style duty does too little to protect the minority for investors to be likely to agree to it *ex ante*—particularly

129. See Gillette, *supra* note 54, at 629; *supra* notes 110–11 and accompanying text; Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 629 (1994).

130. See *supra* note 118.

131. See *supra* Part II.B.4.

where exit is difficult, as it is in a closely held corporation.<sup>132</sup> Under a pure Kaldor-Hicks-style duty, the majority could simply expropriate the minority's share of the profits, so long as it led to some benefit for the corporation as a whole. Thus investors' willingness to gamble on the chance of greater gains from a duty running primarily to the collective instead of the minority depends, at a minimum, on the guarantee of a pro rata distribution. They need at least some backstop against exploitation.<sup>133</sup>

A pro rata guarantee standing alone, however, is not enough. Even with a pro rata guarantee, investors would be unlikely to agree to a rule allowing the majority to vote benefits to itself at the *expense* of the corporation as a whole; that is, they would be unlikely to accept the hands-off, no-duty approach. Such a rule would leave them vulnerable to exploitation, as the majority could capture all of the private gain of looting the corporation, leaving the dispossessed minority only the cold comfort of knowing that the majority shared the resulting corporate losses pro rata.

It is not always clear what is in the best interests of the corporation, and courts are not necessarily the best institutions to figure that out.<sup>134</sup> As a result, courts tend not to second-guess business judgments arrived at through the ordinary governance mechanisms of the corporation.<sup>135</sup> But the business judgment rule is not a license for exploitation. And courts continue to play an essential role in policing for opportunistic abuses of corporate collective-choice mechanisms

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132. See Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 296 (2004) (explaining the difficulty of liquidating close-corporation shares because there is not a "ready market").

133. Professors J.A.C. Hetherington and Michael Dooley define "exploitation" as the following: "[O]ne shareholder exploits another when he uses his position to capture a significant portion of the other's 'share' of the firm's income and profits; the other's share may be defined as the portion of income and profits the parties would agree, through arms-length negotiation, belonged to that shareholder." J.A.C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 4 (1977).

134. *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986); *Auerbach v. Bennett*, 393 N.E.2d 994, 1001 (N.Y. 1979); cf. Rave, *supra* note 13, at 673 (noting the similar problem of institutional competence in constitutional law).

135. See, e.g., *Orman v. Cullman*, 794 A.2d 5, 20 (Del. 2002) ("[A]bsent an abuse of discretion, [business judgment] will be respected by the courts." (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984))); *Auerbach*, 393 N.E.2d at 1000; D. Gordon Smith, *The Modern Business Judgment Rule 3* (BYU Law Research Paper Series, No. 15-09, 2015), <http://ssrn.com/abstract=2620536> [<https://perma.cc/H2JJ-2SAN>].

and making sure that all parties act in good faith.<sup>136</sup> Even if investors may not always demand Pareto-style protections, without the assurance that courts will require the majority to have at least a rational, good-faith explanation for how its actions benefit the collective and a promise that profits will be distributed pro rata, investors are unlikely to contribute their capital to ventures governed by majority rule—at least not without extensive (and costly) ex ante contractual protections.

### III. FIDUCIARY VOTERS IN PUBLIC LAW?

Why do we decide things by voting? Well, to paraphrase Winston Churchill, it is the least bad of a bunch of lousy options.<sup>137</sup> Organizing a political society runs into the same problem of collective action as forming a business organization. As Hobbes explained, in a world where each person has complete autonomy, cooperation in pursuit of joint gains is nearly impossible; any individual can threaten to hold out.<sup>138</sup> The solution is also the same. In order to realize the gains from cooperation, individuals—whether investors or citizens—must surrender their autonomy to some institution empowered to make collective decisions for the group (and to cram them down over the objection of holdouts). Majority rule, as Professor Adam Przeworski explained, works well as that collective-choice institution because the outcome of a vote is a reasonable proxy for the result of a violent struggle, should it come to that.<sup>139</sup>

Of course, majority rule leaves the minority vulnerable. But so long as the minority has a realistic hope of joining a ruling coalition in the future and some assurance that by surrendering its autonomy it has not left itself open to exploitation at the hands of the majority or the newly empowered ruling class, it will be content to go along until the next cycle.<sup>140</sup> Thus providing institutional responses to these risks (competitive elections, repeat play, structural minority protections, independent judicial review, etc.) is essential to getting the minority to buy into either a business or political venture.

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136. See, e.g., Coffee, *supra* note 23, at 1621, 1681.

137. 444 Parl Deb HC (5th ser.) (1947) col. 207 (UK) (“[D]emocracy is the worst form of Government except all those other forms that have been tried from time to time.”).

138. See generally THOMAS HOBBS, *LEVIATHAN* (1651).

139. Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in *DEMOCRACY’S VALUE* 23, 23–55 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

140. See *id.* at 31–39.

Given their similarities at the most fundamental level, looking at private-law approaches to governance problems can be illuminating for problems in constitutional law, as there is often an actual social contract instead of just a hypothetical one. Operating a collective business venture presents the same governance challenges that Madison identified in a democracy: checking self-dealing agents and preventing the tyranny of the majority. The legal and institutional responses to these problems in contexts where investors must sign on through consensual transactions can shed light on strategies for dealing with similar challenges in the public sphere where actual consent is not possible.

The translation is not perfect, to be sure. There are strong equitable norms running through private law and relatively clear rules on how joint gains should be distributed.<sup>141</sup> Constitutional law, by contrast, has only a less clearly defined equal protection norm.<sup>142</sup> And there is far more consensus that the goal of private business organizations is wealth maximization than there will ever be on what counts as the “public interest.”

Still, the fundamental problems of collective action are quite similar. And examining areas where the private law imposes duties on voters may help us understand the intuition behind the Supreme Court’s sometimes puzzling approach to equal protection in direct democracy. It may also help provide guidance for future decisions.

#### A. *The Analogy*

The duties that corporate law imposes on majority shareholders in closely held corporations may be particularly useful models for analyzing direct democracy. The more obvious analogue for representative democracy might be a publicly traded corporation, with its centralized management and large and diffuse body of shareholders.<sup>143</sup> But several features of direct democracy make it look more like a closely held corporation, even though there are far more

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141. See, e.g., Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 125–27 (2003) (highlighting corporate law’s concern that “insiders [not] simply maximize shareholder wealth, but that they must do so equitably”).

142. See *id.* at 179.

143. See Rave, *supra* note 13, at 708 (drawing the analogy between legislators and directors in public corporations); cf. Bainbridge, *supra* note 98, at 73 (“[T]he analogy between close corporations and the body politic seems weak, at best . . . . [T]he body politic most closely resembles the public corporation . . .”).

voters in the typical ballot initiative than the typical closely held corporation.

First, the difficulty of exit in the political process can make voting scenarios look more like closely held corporations, where there is typically no market for shares, than publicly traded corporations, where the market is robust. The costs of picking up and moving out of a jurisdiction can be high and even prohibitive for some.<sup>144</sup>

Second, direct democracy lacks the intermediation of elected agents with duties to represent the political unit as a whole.<sup>145</sup> It is the principals themselves who vote in a plebiscite. Similarly, in closely held corporations the shareholders themselves are typically also the directors (or at least dominate the board).<sup>146</sup> Thus it is the relationships among the shareholders that really matter, not the relationship between the shareholders and intermediaries like directors (as is the case in publicly traded corporations where ownership and control are separated).

And third, the lack of repeat play in direct democracy leaves minorities particularly vulnerable in a way that they are not in either representative democracy or a public corporation.<sup>147</sup> Indeed, without repeat play, minorities may be even more vulnerable in direct democracy than in closely held corporations, though many corporate oppression cases arise at the end of the parties' relationship, when the majority has no intention of "playing" with the minority in the future.

There are obviously dissimilarities as well (the size of the body and the cohesiveness of their interests, to name a few). But still, the analogy may be able to tell us something useful about the strategies that the law has found to address situations where collective action is desirable, but interests diverge. A duty of fair dealing running from the majority to the minority might be at least a partial substitute for the structural protections that direct democracy lacks. On the view that the minority would not willingly leave itself so vulnerable in the hypothetical social contract, the lack of structural protections might trigger such a duty on the part of voters in the majority.

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144. See *supra* notes 62–64 and accompanying text.

145. See *supra* notes 48–49 and accompanying text.

146. See *Hollis v. Hill*, 232 F.3d 460, 463 (5th Cir. 2000); *MOLL & RAGAZZO*, *supra* note 69, § 2.01[A][2].

147. See *supra* notes 54–55.

*B. Voter Duties Clarify Equal Protection Review of Direct Democracy*

One way to understand the intuition behind equal protection doctrine in this area is to think of the Supreme Court as applying a duty running from the majority to the minority when it reviews the output of direct democracy. Despite its statement in *Hollingsworth v. Perry* that voters have no “fiduciary obligation,”<sup>148</sup> the Court appears unwilling to take the completely hands-off view that direct-democracy voters have no duties and can vote in their narrow self-interest. So it steps in to police for opportunism.

Indeed, in several cases, the Court has stepped in when the majority used a ballot initiative to exploit a minority. In *Reitman v. Mulkey*<sup>149</sup> and *Hunter v. Erickson*,<sup>150</sup> for example, the Court struck down the results of ballot initiatives that targeted racial minorities by rolling back antidiscrimination statutes and making it harder to enact antidiscrimination legislation in the future.<sup>151</sup> And in *Romer v. Evans*, the Court struck down a state constitutional amendment passed by ballot initiative that targeted gay people by barring any claims of discrimination on the basis of sexual orientation.<sup>152</sup>

None of these cases is easily explained by traditional equal protection analysis. *Reitman* pushed the state-action doctrine into questionable territory by finding that the state “encouraged” private racial discrimination by repealing a fair-housing law, and it is hard to reconcile with later cases.<sup>153</sup> *Hunter* relied on a “political process” doctrine—that a state violates equal protection when it shifts policymaking authority on a racial issue to a different level of government where it is harder for racial minorities to win—which the Court later disavowed.<sup>154</sup> And *Romer* refused to treat sexual

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148. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666–67 (2013).

149. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

150. *Hunter v. Erickson*, 393 U.S. 385 (1969).

151. *Id.* at 393; *Reitman*, 387 U.S. at 381.

152. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

153. *E.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1006–12 (1982) (holding that state regulation and funding did not convert a private nursing home into a state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840–43 (1982) (holding that a private school’s public function and state funding did not make it a state actor).

154. *See Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1634–37 (2014) (plurality opinion) (rejecting political-process doctrine and reinterpreting *Hunter*).

orientation as a suspect classification yet still applied a heightened form of rational-basis review to strike down the law.<sup>155</sup>

But what these three cases have in common is the fact that they all involved instances where a majority of the voters used a ballot initiative to roll back protections that minority groups had won through the legislative process. Justice Douglas recognized as much in his concurrence in *Reitman*, where he stressed the danger that direct democracy poses to minorities, citing James Madison.<sup>156</sup>

In this sense, the Court is playing the same institutional role in reviewing the output of direct democracy that courts play in corporate law: policing for opportunism. And constitutional law presents many of the same institutional tradeoffs as corporate law. Courts are not likely to be any better at figuring out what is in the public interest than they are at making business judgments.<sup>157</sup> As Judge Hand said, “[I]t would be most irksome to be ruled by a bevy of Platonic Guardians.”<sup>158</sup> So we try to design institutions that will be better at making collective choices and to adopt governance structures that will be self-correcting. When they work, those institutions get a lot of leeway to exercise discretion.<sup>159</sup> We also try to specify in advance some limitations on what the majority can do through those institutions, and so, for example, the Constitution includes a Bill of Rights.

But the costs of specificity are high, so, as in corporate law, we end up delegating some power to the courts to police for opportunism after the fact. And the risk of opportunism is greatest where the structural protections for minorities are weakest. Thus we allow states to experiment with direct democracy, despite the Republican Guarantee

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155. *Romer*, 517 U.S. at 630–36.

156. *Reitman*, 387 U.S. at 387 (Douglas, J., concurring) (“Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.” (quoting 5 THE WRITINGS OF JAMES MADISON 272 (Gaillard Hunt ed., 1904))).

157. See Rave, *supra* note 13, at 694–95; Rave, *supra* note 91, at 1–2.

158. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

159. This is, of course, the justification in *Carolene Products* for the presumption of constitutionality and deferential rational-basis review of the output of a well-functioning political process. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); see also Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 584 (2014) (arguing that “well-ordered republican process is due process” and thus exempt from judicial scrutiny but that the same may not hold true of direct democracy).

Clause<sup>160</sup> and the Framers' skepticism toward the institution,<sup>161</sup> only because we have the safety valve of ex post judicial review. Courts intuitively know that they have to rein in the excesses of direct democracy for the same reasons they have to check shareholder majorities.

So what kind of duty is the Court applying to direct-democracy voters? It does not appear to be a true fiduciary duty of loyalty. The Court does not require the majority to subordinate its interests to those of the minority. This much is clear from its decision in *Schuette* to uphold the Michigan ballot initiative banning affirmative action.<sup>162</sup> Affirmative action—at least in the plurality's view—extended a benefit to the minority at the majority's expense. And the Court refused to step in when the majority decided to take that benefit away.<sup>163</sup>

The duty that the Court applied appears to be one of antiexploitation—the majority must deal fairly and equitably with the minority but need not subordinate its own interests. But where on the spectrum of potential voter duties does this duty fall? Do majority voters owe a duty not to impose any burdens on the minority (Pareto)? Or just a duty not to impose burdens on the minority for no reason, that is, unless it is reasonably calculated to benefit the public as a whole (Kaldor-Hicks)? The answer is not entirely clear.

*Schuette* might have come out differently if the majority voters had borne a Pareto-style duty to refrain from harming the minority, but it would have depended on the baseline. Affording admissions preferences to racial minorities might reasonably be viewed as the majority subordinating its interests to the minority's and extending a benefit to the minority at its own expense—something a Pareto-style

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160. U.S. CONST. art. IV, § 4; *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 149–51 (1912) (stating that whether citizen lawmaking qualifies as a “republican form of government” is a nonjusticiable political question); see also Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 31 (1993) (arguing that some exercises of citizen lawmaking can violate the Republican Guarantee Clause). But see Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 814 (2002) (arguing on originalist grounds that “[c]itizen lawmaking as practiced in the United States today does not violate the Guarantee Clause”).

161. See, e.g., THE FEDERALIST NO. 10, *supra* note 29, at 61 (James Madison).

162. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1638 (2014) (plurality opinion).

163. *Id.*

duty would not require.<sup>164</sup> But once that benefit is extended, the baseline shifts and taking it away hurts the minority, which voters would not be allowed to do under a Pareto-style duty. Justice Sotomayor, in her dissent, took this Pareto view with existing affirmative-action programs as the baseline. But the Court rejected it.<sup>165</sup>

The baseline's importance can be seen in the debate between Justice Scalia and Justice Sotomayor over whether the political-process doctrine ossifies the preexisting allocation of decisionmaking authority over racial issues.<sup>166</sup> Sotomayor viewed the majority as using a majoritarian tool to take something away from the minority and make it difficult for it to win back in the future; to reinstate affirmative action, they would have to amend the Michigan constitution.<sup>167</sup> This violated the Fourteenth Amendment, according to Sotomayor, because it "alter[ed] the political process in a manner that uniquely burdened racial minorities' ability to achieve their goals through that process."<sup>168</sup> Scalia protested that this approach would lock in the status quo and prevent the majority from using a ballot initiative to undo earlier legislative capture by a powerful rent-seeking minority.<sup>169</sup> The Justices

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164. Set aside the debates over whether affirmative action actually benefits minorities and whether it is needed to remedy past harms. *Compare id.* at 1675–83 (Sotomayor, J., dissenting) (arguing that "race matters," that affirmative action is necessary to address persistent inequality, and that eliminating it hurts minority students), *with Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part) (arguing that affirmative action "stamp[s] minorities with a badge of inferiority and may cause them to develop dependencies").

165. The Court came much closer to embracing a Pareto approach in *Washington v. Seattle School District No. 1*, which struck down a ballot initiative that rolled back a voluntary busing scheme aimed at combating de facto segregation. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982). But the Court's ambivalence toward the result in *Seattle School* is evident in its decision in *Schuette. Schuette*, 134 S. Ct. at 1633 (plurality opinion).

166. *Compare Schuette*, 134 S. Ct. at 1645 (Scalia, J., concurring) (contrasting the process of amending Michigan's constitution with electing a preferred university governing board), *with id.* at 1662–63, 1673–74 (Sotomayor, J., dissenting) (arguing that minorities would face an uphill battle in amending Michigan's constitution). The baseline is always a problem with a Pareto approach. See Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152, 156 (1970).

167. *Schuette*, 134 S. Ct. at 1662–63 (Sotomayor, J., dissenting).

168. *Id.* at 1659.

169. *Id.* at 1646 (Scalia, J., concurring); *accord id.* at 1636 (plurality opinion). Scalia took a similar position in his dissent in *Romer v. Evans*, where he argued that the powerful "homosexual" lobby had captured local governments and, under the logic of *Federalist 10*, only a statewide ballot initiative could overcome those local factions. *Romer v. Evans*, 517 U.S. 620, 644–47 (1996) (Scalia, J., dissenting). Scalia did not fully embrace the Madisonian position, however, as he admitted that statewide elected officials were sympathetic, and it was only an appeal to the people

were talking past each other in part because Sotomayor focused on how hard it is for minorities (and how easy it is for the majority) to win in direct democracy, while Scalia focused on how hard it is for the majority (and how easy it is for cohesive minorities) to win in representative democracy.<sup>170</sup>

This debate also reveals a difficulty with a Pareto-style voter duty: it arguably gives the *majority* a claim when the minority uses structural protections (like supermajority voting rules or other veto points) to block actions supported by the majority. Indeed, corporate law recognizes oppression claims brought by the majority against the minority, though they are rare.<sup>171</sup> The potential for either the majority or minority to invoke a Pareto-style duty could lead to paralysis. And it could undermine the balance struck in the constitutional design between majoritarianism and minority protection.

Further, a strict application of a Pareto-style duty might block voters from using a ballot initiative to adopt beneficial policies. Consider a progressive income-tax system. Even if high marginal tax rates could be shown to significantly benefit the public as a whole, they would hurt a minority (rich people). Now maybe direct democracy should not be used to set tax policy (Madison would certainly have been troubled by it), but equal protection doctrine has not gone so far.<sup>172</sup> And, as noted above, it is quite plausible under a contractarian theory that individuals would not insist on a Pareto-style duty and would agree to a lesser duty under conditions of uncertainty.<sup>173</sup>

So perhaps the Court's direct-democracy cases are more consistent with a Kaldor-Hicks-style duty that would allow voters to

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themselves—the very sort of majority faction that Madison feared—that reversed policies favoring gay people. *Id.* at 646.

170. Compare *Schuetz*, 134 S. Ct. at 1661–62 (Sotomayor, J., dissenting) (explaining that “[m]inority groups face an especially uphill battle” in amending the Michigan constitution, getting an amendment passed is “no small task,” and the “costs of qualifying for an amendment are significant”), with *id.* at 1645 (Scalia, J., concurring) (stating that “[a]mending the Constitution requires the approval of only ‘a majority of the electors voting on the question,’” but that voting in a favorable board of regents requires prevailing in a series of elections over different election cycles (quoting MICH. CONST., art. XII, § 2)).

171. See, e.g., *Smith v. Atl. Props., Inc.*, 422 N.E.2d 798, 803 (Mass. App. Ct. 1981) (holding that a minority shareholder who sought to avoid personal tax liability violated a duty to the majority by using a supermajority voting rule to block dividend distribution, which caused the corporation to incur a tax penalty).

172. See *Nordlinger v. Hahn*, 505 U.S. 1, 17–18 (1992) (upholding a property-tax scheme passed by ballot initiative that imposed a greater burden on recent land purchasers than on long-term owners).

173. See *supra* notes 129–36 and accompanying text.

impose a burden on the minority so long as it is reasonably calculated to advance the interests of the polity as a whole. *Romer* could certainly be read in this manner. The Court found no rational basis for barring protections from sexual-orientation discrimination.<sup>174</sup> It was not designed to further the public interest; the burden imposed on the minority was gratuitous. This approach might not be so different from the duty to vote in the public interest that Foley and Serota and Leib advocate, though it is obviously differently derived.

But the equitable streak running through the private-law doctrines of voter duty would seem to require more. Even the most hands-off views of voter duties in corporate law do not allow the majority to deprive the minority of its pro rata share in the profits of the corporation.<sup>175</sup> Proportional distribution is a floor beneath which the majority cannot go, even in pursuit of the corporation's interests as a whole. Perhaps the public-law analogue to this floor is equal protection. Individuals' status as persons guarantees them at least some backstop protection from oppression at the hands of the majority, just as shareholders' status as shareholders guarantees that the majority cannot deny them their pro rata share of corporate profits.

The majority obviously cannot use a ballot initiative to impose policies on the minority that violate equal protection. And the initiative in *Schuette* did not go below this floor. The affirmative-action policies that it rolled back were not constitutionally required (indeed the Roberts Court has treated affirmative action as barely constitutionally permissible).<sup>176</sup> Justice Kennedy saw what the majority did not as imposing a special cost on the minority but rather as taking away a special benefit—a “grant of favored status.”<sup>177</sup> If the minority had been getting more than its pro rata share in the first place through race-based admissions preferences, taking away a benefit might violate a Pareto-style duty, but it would not go below a pro rata floor. Merely taking away an extra benefit would not violate a Kaldor-Hicks-style duty.

But the bans on private discrimination at issue in *Reitman*, *Hunter*, and *Romer* were not constitutionally required either. The difference?

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174. *Romer*, 517 U.S. at 631–36 (1996); accord *Perry v. Brown*, 671 F.3d 1052, 1086 (9th Cir. 2012) (striking down California a ballot initiative banning same-sex marriage because it lacked a rational basis), *vacated sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

175. See *supra* notes 110–11 and accompanying text.

176. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

177. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1636–38 (2014) (plurality opinion).

Perhaps the Court was unwilling to believe that the majority was acting in good-faith pursuit of the collective good in rolling back antidiscrimination statutes. At best, in *Reitman* and *Hunter*, it was a selfish attempt to preserve property values in white neighborhoods; at worst, it was race hatred. And even if there were collective gains to be had from allowing private housing discrimination, the minority would not share in any of those gains and would bear the brunt of the costs. In *Romer*, likewise, the benefits were questionable and the burdens concentrated on the minority. In *Schuette*, by contrast, the Court was much more willing to believe that the majority acted in good-faith pursuit of the public interest. And the minority would share in what Justice Kennedy viewed as the collective benefits of doing away with affirmative action, with “its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it.”<sup>178</sup> So the initiative in *Schuette* satisfied a Kaldor-Hicks-style duty, while those in *Reitman*, *Hunter*, and *Romer* did not.

Teasing out where the “pro rata baseline” is and what counts as a special benefit or cost in any given case will inevitably be difficult and imprecise. But perhaps in constitutional law, as in corporate law, it is not the precise content of the substantive standard but rather the “institution of judicial oversight” that really matters.<sup>179</sup> It may be enough to say that the duties of voters in direct democracy fall somewhere on the spectrum between Pareto and Kaldor-Hicks and to count on the courts to employ equitable judgments to root out opportunism after the fact on a case-by-case basis.<sup>180</sup>

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178. *Id.* at 1638. Note that this result depends on Justice Kennedy’s view on the substantive merits of affirmative action. If one thinks that affirmative action is necessary to remedy the effects of past discrimination, then the burdens of eliminating it fall clearly on the minority, while the benefits rebound primarily to the majority. If, on the other hand, one thinks that affirmative action is only justified by the educational benefits of diversity shared by all races, then the benefits and burdens of eliminating it are more evenly distributed among the majority and minority. This observation may help explain Justice Kennedy’s effective rewriting of *Seattle School* based on newly discovered evidence that the busing scheme eliminated by ballot initiative there may have been remedying prior de jure segregation. *Id.* at 1633. On this revised account, the busing was not aimed at diversifying neighborhood primary and secondary schools, the benefits and burden of which are shared by all; it was necessary to remedy past unconstitutional segregation. And the ballot initiative that put a stop to it hurt the minority.

179. Coffee, *supra* note 23, at 1621.

180. See Henry E. Smith, *Why Fiduciary Law Is Equitable*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 261, 264, 282 (Andrew S. Gold & Paul B. Miller eds., 2014) (explaining the importance of ex post flexibility).

C. *Heightened Rationality Review for Direct Democracy*

If we think of the Supreme Court as applying a duty to direct-democracy voters that falls somewhere in between Pareto and Kaldor-Hicks, then the analogy to corporate law may support a form of heightened rationality review for the output of direct democracy.

Recall that in *Wilkes*, where the court imposed a Kaldor-Hicks-style duty, the voters' duties ran primarily to the collective; the majority could pursue legitimate business purposes for the benefit of the corporation, even if they worked to the detriment of particular shareholders. But the majority also had a duty to minimize the harm to the minority. Thus if there were practicable alternative means to achieve the legitimate business purpose that would cause less harm to the minority, the majority had a duty to adopt them.<sup>181</sup>

Although a similar voter duty applied in the public sphere would not demand strict scrutiny across the board—*Wilkes* does not call for a “compelling” purpose, just a “legitimate” one—its “least restrictive means” analysis would support a much greater degree of means-ends testing than is typically associated with rational-basis scrutiny.<sup>182</sup> Judicial review of whether the ends were legitimate would necessarily be limited and could not demand much more than a loose conception of how the measure furthers the public good. In *Wilkes* itself, the court stressed the “large measure of discretion” that majority shareholders have in determining the “business policy of the corporation.”<sup>183</sup> And courts are not likely to be any better at determining what is in the public interest than in making business judgments.<sup>184</sup> But it could demand more in terms of means-ends fit than the “anything goes” approach of standard rationality review; in other words, a sort of rational-basis-with-bite approach.<sup>185</sup>

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181. See *Wilkes v. Springside Nursing Home, Inc.* 353 N.E.2d 657, 663 (Mass. 1976); see also *Pointer v. Castellani*, 918 N.E.2d 805, 816 (Mass. 2009) (following *Wilkes* and holding that the majority breached its duty in part because alternatives less harmful to the minority were available).

182. E.g., *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

183. *Wilkes*, 353 N.E.2d at 663.

184. See *Rave*, *supra* note 13, at 723.

185. Cf. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (striking down as irrational an easement requirement that applied only to one property owner and not others similarly situated); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n*, 488 U.S. 336, 345 (1989) (applying rational basis with bite to strike down a tax assessment system that disfavored recent purchasers); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1949) (Jackson, J., concurring) (arguing that rational basis should have more teeth for equal protection than due process).

*Romer*, of course, is consistent with this view, though the Court was focused more on the illegitimacy of the ends (the ballot measure was motivated by animus) than the choice of means. The Supreme Court has not adopted an across-the-board rational-basis-with-bite approach to the outputs of direct democracy, but if we were to take this sort of voter duty seriously, perhaps it should.<sup>186</sup>

This suggestion echoes Professor Julian Eule’s argument from more than twenty-five years ago that courts should give a “hard look” to laws passed through ballot initiatives.<sup>187</sup> Eule argued that because many of the structural features that justify judicial deference to the legislative process under the *United States v. Carolene Products Co.*<sup>188</sup> footnote four framework—most notably, structural protections for minorities—are absent in direct democracy, courts should apply “heightened ends-means review” to its output.<sup>189</sup>

The analogy to corporate law, however, adds several things. Eule’s argument for hard-look review of ballot initiatives has a sort of “I know it when I see it” quality.<sup>190</sup> The corporate analogy tells us what “it” is: opportunism. And the analogy provides some additional theoretical grounding from an area of law that focuses intently on the problem of minority oppression.<sup>191</sup>

Further, it casts courts in a familiar role, one they are comfortable playing in the private sphere across many contexts: policing for opportunism. And acknowledging that role may be more fruitful than focusing on discriminatory intent—the relentless search for a constitutional bad actor—as Justice Kennedy tried to do in reinterpreting *Reitman*, *Hunter*, and *Seattle* to be about targeting racial minorities because of their race.

The content of corporate-law voter duties offers some limiting principles on what courts should be looking for when reviewing direct democracy for minority exploitation. The majority’s duty toward the

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186. *But see* Nordlinger v. Hahn, 505 U.S. 1, 17–18 (1992) (upholding under rational-basis scrutiny a property tax passed by ballot initiative that imposed disproportionate tax on more recent purchasers).

187. Eule, *supra* note 47, at 1558–73.

188. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

189. Eule, *supra* note 47, at 1568.

190. *Id.* at 1573 (“Sometimes a hard judicial look will take the form . . . of a candid ‘We know what’s going on here and we won’t allow any of it.’”).

191. *Cf.* Chander, *supra* note 141, at 119 (discussing how corporate law concerns itself with minority investors). *See generally* MOLL & RAGAZZO, *supra* note 69, § 7.01 (discussing the oppression doctrine); F. HODGE O’NEAL & ROBERT B. THOMPSON, *OPPRESSION OF MINORITY SHAREHOLDERS & LLC MEMBERS* (2d ed. 2004) (same).

minority in corporate law does not deny the majority the right to vote in its own interests or say that the minority can never be harmed; it is not a true loyalty or pure Pareto-style duty. But it does require the majority to vote in pursuit of a good-faith conception of the collective good and, where possible, avoid visiting disproportionate harm on the minority.

Finally, thinking about judicial protection of minorities in terms of voter duties may actually strengthen the primary governance mechanisms of direct democracy. If voters internalize the idea that they bear a duty to the minority and think about others' interests when they vote, that may improve the preference-aggregation function of voting.<sup>192</sup> If enough voters take this duty seriously, it could reduce the chances of minority exploitation in the first place. And aggregating voters' opinions about their own other-regarding preferences may be better than having courts guess at what those preferences would be.

To be clear, I am not advocating a duty that would be enforceable against individual voters in damages suits but rather for courts to play an institutional role that reacts to opportunism and exploitation, much like they police for opportunism in private law. And, in fact, courts already instinctively play this role in many cases reviewing the output of direct democracy, though they are not always clear about the intuition that is driving it.

But just as we need more than mere status-based protections in closely held corporations because the ordinary protections for minorities (exit, intermediation, etc.) do not work in that context, we may need more than ordinary equal protection review in direct democracy where the structural protections for minorities (such as intermediation, veto points, repeat play, and logrolling) are absent. A rational-basis-with-bite test—one that requires a good-faith and plausible explanation for how a law that hurts some minority actually serves some legitimate public purpose—can serve as a vital institutional check on a governance process that is necessarily incomplete in its protection of minorities.

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192. In this sense I am sympathetic to Foley and Serota and Leib's projects, even if I disagree with their treatment of voters as representatives. See Foley, *supra* note 14, at 163; Serota & Leib, *supra* note 14, at 1601–02.

## IV. SOME POTENTIAL OBJECTIONS AND DISANALOGIES

Some potential objections remain. First, looking to private law to derive equitable duties for voters in direct democracy does not answer the hard questions in equal protection law. It does not tell us how to define the “majority” and the “minority” or which sorts of classifications should be suspect. We still need the classic tools of equal protection theory, such as historical analysis and the *Carolene Products* footnote, to grapple with these questions. But it can perhaps help highlight areas where additional judicial scrutiny might be warranted because structural protections for minorities are inadequate.

Second, and related to the definitional challenges, there is a substantial difference in the cohesiveness of majority and minority groups in private law and majority and minority groups in the public sphere. A shareholder majority, for example, can be a small group or even a single investor whose interests may be perfectly cohesive across all issues.<sup>193</sup> When the majority is cohesive, the risk of minority oppression is acute. Coordination is simple and there is little internal discord standing in the way of action. The majority in the public sphere will almost always be larger, encompass more diverse interests across a much broader range of issues, and face a more significant collective-action problem when imposing its will.<sup>194</sup> After all, each person only gets one vote.<sup>195</sup> And there may be nothing tying the members of the majority together except their coincidence of interests on a particular issue. Yet the majority must constitute itself and find a way to work together if it is to oppress the minority.

A cohesive minority is also harder to define in the public sphere than in the private. Of course, a diffuse minority is also vulnerable to exploitation at the hands of the majority,<sup>196</sup> though it may be more difficult to apply a duty running to the minority without being able to identify the relevant minority.<sup>197</sup> And race or other characteristics that trigger irrational prejudices might motivate the majority itself to define

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193. See, e.g., Chander, *supra* note 141, at 125 (noting that Henry Ford alone represented the shareholder majority in Ford Motor Company).

194. This is Madison’s central insight in *Federalist 10*’s “go bigger” strategy for controlling faction by expanding the size of the Republic to encompass more people and factions so that no single faction could make up a cohesive majority. See THE FEDERALIST NO. 10, *supra* note 29, at 64 (James Madison).

195. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

196. See Ackerman, *supra* note 55, at 723–24.

197. But see Miller & Gold, *supra* note 18, at 517–18 (arguing that fiduciary duties can be directed to purposes, not only people).

the relevant minority by treating individuals with those characteristics as a disfavored group.

Still, there are reasons to believe that direct democracy in particular may produce cohesive majorities out of a large citizenry with diverse interests. Because ballot initiatives are limited to a single subject, they may allow the sort of cohesive faction that Madison so feared to come together, motivated by a shared passion on a single issue. And because the vote is a single-shot deal with secret ballots, the majority may feel little need to restrain itself in the hopes of building future coalitions on other issues where its members may be less cohesive.<sup>198</sup> Although it may never be as cohesive as a single controlling shareholder, the majority in direct democracy may be cohesive enough to pose a real threat to the minority.

Third, deriving voter-specific duties from corporate law can be risky business because the controlling shareholder is often also a director (or at least has control over the directors) and thus bears an independent source of fiduciary duty.<sup>199</sup> It can thus be difficult in any given case to tease out which duties derive from being a voting shareholder (one of the principals) and which derive from being a director (an agent). But trying too hard to distinguish these duties may be elevating form over substance. The majority shareholder has control over the board of directors because it has the majority of the votes on all issues, including those that would require a direct shareholder vote, like a merger. Thus the important relationship is the principal-to-principal relationship between the majority and minority shareholders, not the principal-agent relationship between the shareholders and the board. Further, the fact that other areas of private law impose similar equitable principal-to-principal duties on partners, bondholders, and oil and gas interest holders when they vote helps reinforce the notion that majority shareholder duties can be considered voter duties.

## CONCLUSION

Voters are not fiduciaries in the classic sense. They do not represent anyone other than themselves; they are not agents and need not subordinate their own interests to any principal. But agency costs

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198. See Eule, *supra* note 47, at 1555–56.

199. See Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1269 (2008) (“[T]he degree to which a shareholder controls the board has become the judicial touchstone of shareholder fiduciary duty.”).

are only half the problem in a democracy and no problem at all in direct democracy.

How to control the tyranny of the majority is a far more pressing concern for direct democracy. And public law has much to learn from the approaches that private law takes to similarly structured governance problems. The duties that private law places on voters and the role that courts play in policing for opportunism can help explain the Supreme Court's sometimes erratic approach to direct democracy. The Court plays a familiar equitable role and steps in to protect minorities from exploitation at the hands of the majority where the structural protections for minorities are weakest. And applying similar duties to voters in the public sphere may suggest that the courts should take a more skeptical view toward ballot initiatives that affect minorities and subject them to a heightened form of rationality review.

The Supreme Court's recent decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission* provides a nice counterpoint. There, the Court upheld Arizona voters' use of a ballot initiative to take the power to draw state legislative and congressional districts out of the hands of state legislators and give it to an appointed commission.<sup>200</sup> In dissent, Justice Thomas was puzzled by the majority's "glowing" description of direct democracy and its "paean to the ballot initiative" when, as he pointed out, the Court has so often shown "disdain for state ballot initiatives" in the past.<sup>201</sup>

But the majority was right. This was an example of "direct democracy at its best."<sup>202</sup> Unlike the examples that Thomas cited, the Arizona redistricting case did not involve a majority using a plebiscite to impose costs on, or withdraw a benefit from, a minority. Rather, it was an attempt by the majority to rein in the self-dealing activities of its agents—the legislators who were gerrymandering district lines to entrench themselves. Thus this case did not present the tyranny-of-the-majority problem that we depend on courts to police in direct democracy; rather it shows how the presence of an alternative majoritarian institution can be a useful safety valve for the other

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200. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659 (2015).

201. *Id.* at 2697 (Thomas, J., dissenting).

202. *Id.* at 2698.

governance problem Madison identified in representative institutions: self-dealing agents.<sup>203</sup>

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203. See Rave, *supra* note 13, at 686; accord Eule, *supra* note 47, at 1559–60 (noting that governmental reform through ballot initiative “pose[s] no distinctive threat of majoritarian tyranny”). Eule did add the proviso that he was skeptical of “reapportionment efforts” through direct democracy, which he said are often a “façade for disenfranchising minorities.” *Id.* at 1560. Here I part ways with Eule, as the primary alternative—leaving redistricting in the hands of self-interested incumbents—strikes me as far worse. See Rave, *supra* note 13, at 678.