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Fiduciary Law's Lessons for Deliberative Democracy

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INTRODUCTION

One of the ascendant understandings of democracy in contemporary political theory is that democratic societies ought to be deliberative.[1] The precise requirements for "deliberative democracy" are contested both as a matter of normative theory and institutional design; but most deliberative democrats see deliberation as essential to the legitimation of decision-making within the polity. Yet deliberative democrats have expended most of their efforts mapping what deliberation should look like at two different levels of decision-making: the deliberation among citizens themselves in exercises of direct and participatory democracy – and the deliberation among legislators or other official actors within the organs of state government. Although it is likely the case that most deliberative democrats would see an important role for deliberation as between legislator and citizen, this deliberative space is underexplored. It is easy to understand why this would be so: deliberative democrats usually require that deliberation take place among free and equals, and there is a very real sense in which legislators who deliberate with their constituents do so from a position of political superiority and expertise. It thus seems to us that a separate account of deliberation between legislators and those they rule is necessary. In the Essay that follows, we suggest that features of fiduciary law usefully model how deliberation can be understood between political unequals, in particular when the individual with more political power

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[1] For a recent orientation to the state of the field, see Symposium, *Democracy and Deliberation*, 22 CRITICAL REV. 117 (2010).

is supposed to be holding the interests of the individual with less power in trust. If our elected political leaders are, after all, our public fiduciaries, they may be bound by fiduciary duties that underwrite a dialogic imperative with their constituents. Yet, most essentially, fiduciary law's lesson for deliberative democracy is that a specialized kind of deliberation is possible and desirable between unequals – between fiduciary and beneficiary.

I. DELIBERATIVE DEMOCRATIC THEORY IN A NUTSHELL

The theory of deliberative democracy focuses attention not on the kinds of electoral or aggregative institutions necessary for democratic decision-making but on the deliberative quality of a polity's decision-making process. The theory holds that the legitimacy of democratic decisions can be increased if such decisions are preceded by deliberation that is as free as possible from distortions associated with unequal power between deliberators.[2] There are many versions of deliberative democracy, but at their core they all share a commitment to deliberation over ways of measuring preferences that are not preceded by deliberation.[3] Deliberation is routinely seen as valuable because (1) it is conducive to better decisions;[4] (2) it can reinforce citizens' equality, dignity, and capacities for self-governance;[5] (3) it has educative value for society collectively and citizens individually;[6] (4) it has epistemic value because the deliberative process – when well-organized – can reveal or help form consensual preferences that large majorities could not reasonably reject;[7] and (5) even when deliberation turns adversarial, it has value for social integration and social solidarity: it can enable cross-cutting discourse in a safe and regime-stabilizing way,[8] facilitating a public airing of many views and subjecting them to requirements of public reason. None of these values is guaranteed, of course;[9] but deliberative democrats have convinced most

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[2] *See, e.g.*, DAVID HELD, MODELS OF DEMOCRACY 231-58 (3d ed. 2006); Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 67, 72-73 (James Bohman & William Rehg eds., 1997).

[3] *See* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 3 (2004); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 106-07 (2003).

[4] *See* GUTMANN & THOMPSON, *supra* note 3, at 23. *But see* Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 11-12 (2006).

[5] *See* GUTMANN & THOMPSON, *supra* note 3, at 47.

[6] *See* John Elster, *The Market and the Forum: Three Varieties of Political Theory*, *in* DELIBERATIVE DEMOCRACY, *supra* note 2, at 3, 23.

[7] *See* GUTMANN & THOMPSON, *supra* note 3, at 102.

[8] *But see* DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY 9 (2006).

[9] For a review of various empirical challenges to the predictions by normative theorists, see Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 498-500 (2008).

political theorists that something important can be gained by enhancing the opportunities for deliberation in democracies. In short, "[a]t the heart of the deliberative conception of democracy is the view that collective decisionmaking is to proceed deliberatively – by citizens advancing proposals and defending them with considerations that others, who are themselves free and equal, can acknowledge as reasons."[10]

In part because deliberative democratic theory has been so successful in gaining adherents, it has become increasingly difficult to map the expanding set of arguments that fall within its ambit. However, some general patterns have emerged that divide thinkers in intramural disputes within the deliberative democratic umbrella. Some deliberative democrats seek to create or expand specialized institutions to cohere better with deliberative aspirations, even while recognizing that many democratic decisions will be made through aggregative procedures that do not allow many opportunities for deep deliberation.[11] Others have a much more thorough-going conception that requires all political institutions to engage in deliberative democratization.[12] Some find that theorists focus too much on deliberation within formal institutions, unnecessarily downgrading the important deliberative work that can happen within civil society and associational life.[13] Others argue about whether deliberative institutions should be designed to form a binding public *will* ("will-formation," in the parlance) or merely to distill a better public *opinion* (focusing on "opinion-formation").[14] Many believe that striving for deliberation in the context of opinion-formation is sufficient;[15] others emphasize the importance of having deliberative institutions that are given the task of making binding law – forming a public will.[16] The latter focuses

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[10] Joshua Cohen & Charles Sabel, *Directly Democratic Polyarchy*, 3 EUR. L.J. 313, 327 (1997).

[11] *See, e.g.*, ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT 4 (2004); Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 686 (2004).

[12] *See, e.g.*, Bernard Manin, *On Legitimacy and Political Deliberation*, *in* NEW FRENCH THOUGHT, POLITICAL PHILOSOPHY 186, 186-200 (Mark Lilla ed., 1994).

[13] *See* John Dryzek, *Deliberative Democracy in Different Places*, *in* THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA 23, 23 (Ethan J. Leib & Baogang He eds., 2d ed. 2010).

[14] *See* Ethan J. Leib, *Pragmatism in Designing Popular Deliberative Institutions in the United States and China*, *in* THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA, *supra* note 13, at 113, 124.

[15] *See, e.g.*, BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 3-16 (2004). James Fishkin is among the most well-known defenders of the opinion-formation model of deliberative democracy. *See* JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION 2 (2009).

[16] *See* Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 914 (2006).

deliberators on a practical task at hand (deliberation should be about doing something) and serves to empower them and deliberation itself.[17]

Most central to our concerns here, however, is the clear divide between the deliberative democrats who focus principally on deliberation among political elites and those who have a more populist orientation, concerning themselves with the deliberations of lay citizens. The "elitists" urge deliberation among and within the class of judges, legislators, and, potentially, interest groups.[18] Populists, by contrast, believe that the benefits deliberation offers must be pursued through popular institutions, and that deliberation should take place, first and foremost, among citizens themselves.[19] To be sure, there have been "two-track" theorists that have always sought to deepen deliberation at both levels of politics: Bruce Ackerman and Jürgen Habermas self-identify as such and have done the most to disrupt deliberative democratic theory's bifurcated personality.[20]

Yet there is a salient critique of this dualism that has never been adequately addressed: the deliberative circuit of citizen power that usually resides in public opinion and civil society really is routinely conceived to operate parallel to – rather than intersecting with – the more decisionistic and legislative circuits of power in the organs of the state. Although dualists imagine that citizen "discourse power" or "communicative power" is somehow to influence the formal political system, the mechanisms of how the parallel deliberations are supposed to converge or usefully interact is never specified well within deliberative theories. Although dualists understand the gap between the political system and civil society, they struggle to find points of contact.

For example, in *Between Facts and Norms*, Habermas offers a "sociological" model for understanding the way power should be distributed within any legitimate political order.[21] He is emphatic that one of the central tests for the legitimacy of a state "depends primarily on whether civil society, through resonant and autonomous public spheres, develops impulses with enough vitality to bring conflicts from the periphery into the center of the

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[17] *See* Leib, *supra* note 16, at 905-06; Leib, *supra* note 14, at 124; Chris Elmendorf & Ethan J. Leib, *Budgets by the People, for the People*, N.Y. TIMES, July 28, 2009, at A25.

[18] *See, e.g.*, JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 3 (1994); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 8 (1996); JOHN RAWLS, POLITICAL LIBERALISM 231-40 (1993) (focusing on the U.S. Supreme Court as a deliberative institution); JOHN UHR, DELIBERATIVE DEMOCRACY IN AUSTRALIA 35-233 (1998); JEREMY WALDRON, THE DIGNITY OF LEGISLATION 1 (1999).

[19] One of us mapped this terrain early – and sided with the populists. *See* LEIB, *supra* note 11, at 31-35.

[20] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6-7 (1991); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 288 (William Rehg trans., 1996) (1992).

[21] HABERMAS, *supra* note 20, at 356.

political system."[22] Habermas calls failures to translate the deliberative impulses of civil society into content for the state "autism."[23] A legitimate political system must not "bypass[] the communicative power of the public of citizens."[24] He therefore aspires to create better pathways between civil society and the state.[25] He is interested in the political system being "shaped by deliberative politics, that is, shaped by the publicly organized contest of opinions between experts and counterexperts and monitored by public opinion."[26] Yet how can we envision, if at all, the interactions between the two systems of discourse, one among lay citizens and the other among political elites within the political system?

Ultimately, Habermas is far too sanguine about civil societies' "signaling," "thematizing," and "problematizing" functions.[27] While a few civil associations may occasionally be successful in steering the deliberations of the state (and they often turn out to be those principally organized for "special interests"), Habermas is too ready to allow civil society's influence to be wholly indirect most of the time: civil society's impact on politics for Habermas is almost always oblique.[28] When he does allow for direction, Habermas envisions an emergency: "For our purposes, it suffices to make it plausible that in a perceived crisis situation, the actors in civil society . . . *can* assume a surprisingly active and momentous role."[29] In the final analysis, Habermas imagines no necessary interaction between civil society and the political system but only requires that it be possible for civil society to exert direct and directive power in a crisis situation. Notwithstanding the reality that crisis situations may be just the kinds of cases where we hope our rulers can react responsibly and on their own, he leaves many questions open about how the political system can generally recalibrate with civil society. Yet there must be a way for dualists – who pursue deliberative development of elites within the political system as well as of citizens in civil society – to envision more

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[22] *Id.* at 330.

[23] *Id.* at 335.

[24] *Id.* at 352.

[25] *Id.* at 356 ("This sociological translation of the discourse theory of democracy implies that binding decisions, to be legitimate, must be steered by communication flows that start at the periphery and pass through the sluices of democratic and constitutional procedures situated at the entrance to the parliamentary complex or the courts . . . .").

[26] *Id.* at 351.

[27] *Id.* at 359.

[28] *Id.* at 372 ("Civil society can directly transform only itself, and it can have at most an indirect effect on the self-transformation of the political system; generally, it has an influence only on the personnel and programming of this system.").

[29] *Id.* at 380. Habermas invokes Cohen's and Arato's theory of civil society; Cohen and Arato also suggest that its communicative power is limited to moments of crisis. *See* JEAN COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY 587 (1992). While this may have empirical and sociological resonance, in our view, it is normatively too complacent.

direct deliberation between these spheres to bring concerns from the peripheral systems of non-binding deliberation among citizens to the core decision-making organs of state government.

We don't imagine that dualism's failure to envision deep and regularized interaction between elitist and populist deliberative spheres is mere path-dependence. Rather, something about the theory challenges the interaction of spheres. From its very early formulations, deliberative democratic theory has required that deliberation take place between only "free" and "equal" deliberators; distortions through any form of unequal power are highly disfavored. [30] Some have suggested that there is no difference in freedom and equality as between legislator and lay citizen.[31] However, we suspect that deliberative democrats have given deliberation *between* legislator and citizen – a perfect mechanism to bring the periphery of deliberating citizens to the core of deliberating elites[32] – very little attention because it is difficult to imagine citizens seeing themselves as political equals with those who rule over them. Empirical studies of deliberation teach us that deference to perceived political superiors is common and can subvert deliberation.[33] Surely it doesn't take too much imagination to see the challenges associated with actual deliberation between rulers and ruled.

Yet as difficult as it may be to imagine ruler and ruled coming together to deliberate in a manner consistent with the aspirations of deliberative democracy, we think understanding democratic rulers as *fiduciaries* illuminates the nature of the dialogic possibilities for deliberation between political unequals. Indeed, John Locke and our nation's founders already understood that public officials are fundamentally fiduciaries for the people[34] – and some recent work in legal theory seeks to develop what might be entailed if we

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[30] Cohen, *supra* note 2, at 72. This requirement is further reinforced in Cohen's essay in another of the major books that cannonized the deliberative democracy movement. *See* Joshua Cohen, *Democracy and Liberty*, *in* DELIBERATIVE DEMOCRACY 185 (Jon Elster ed., 1998).

[31] *See* James Bohman, *Deliberative Democracy and Effective Social Freedom: Capabilities, Resources, and Opportunities*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, *supra* note 2, at 321, 343.

[32] Although we try to remain consistent with Habermasian rhetoric here, our metaphorical preference would be more eccentric: popular deliberation is not merely peripheral to democracy's core, in our view.

[33] *See* Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 349 (1997).

[34] *See* JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 68-73 (Tom Crawford ed., Dover Publ'ns 2002); THE FEDERALIST, Nos. 14, 53 (James Madison), No. 35 (Alexander Hamilton); Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 245 (2007). This lineage traces through Rousseau as well. *See* Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 388 (2008).

started thinking about public officers as being bound by the fiduciary duties rooted in private law.[35]

In this spirit, Part II of this Essay reviews the standard fiduciary duties in the private law context and tries to translate what they might mean for public fiduciaries. Our hope is that seeing how to think about public officials as fiduciaries reveals a mechanism by which we can sensibly understand deliberation between political unequals. This mechanism may fill the gap within dualist accounts of deliberative democracy. When rulers are supposed to be responsive and democratically accountable to the ruled – whose interests rulers are supposed to be holding in trust – they may be required to deliberate with those whom they govern. Deliberative democratic theory can learn from fiduciary law how to imagine deliberation in such asymmetrical power contexts.

II. THE FIDUCIARY DUTIES OF ELECTED AGENTS AND TRUSTEES

Fiduciaries under private law manage the affairs and assets of beneficiaries within strict legal and ethical requirements that demand fidelity to beneficiary interests.[36] In the fiduciary relationship, the beneficiary is dependent on the fiduciary to act after her interests and the fiduciary is, accordingly, obligated to use her entrusted discretionary power in pursuit of the beneficiary's interests.[37] Because they are difficult to monitor and have wide access to power over beneficiary resources and assets, fiduciaries are under rigorous obligations that ensure compliance with their role responsibilities.[38] Here, we pursue the content of these obligations in the private context and seek to translate what they might include in a public fiduciary context.

First, however, a word about why this translation is viable in the first place. Ultimately, thinking of public officials as fiduciaries is not only an historical inheritance but is also indicated by functional and structural considerations of the relationship between ruler and ruled. A distinctive feature of the fiduciary relationship – the inequality and asymmetry between fiduciary and beneficiary – maps well onto the relationship between rulers and ruled.[39] The inequality

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[35] *See, e.g.*, Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 443-49 (2008) (focusing on agency personnel); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 120-23 (2006) (same); Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN'S L.J. 259, 260-61 (2005) (focusing more broadly on state authority).

[36] *See* Criddle, *Fiduciary Administration*, *supra* note 35, at 468.

[37] *See id.*

[38] *See id.*

[39] Tamar Frankel, in her new book on fiduciary law, observes that elected office holders hold a type of entrusted power and, therefore, that the relationship between elected ruler and ruled is a type of fiduciary relationship. *See* TAMAR T. FRANKEL, FIDUCIARY LAW 22-23 (2011).

and asymmetry within the relationship usually flows from the fiduciary's possession of greater expertise or greater information than the beneficiary, leaving the beneficiary vulnerable to the fiduciary's predation.[40] And rulers usually have access to information and law-making expertise that lay citizens do not.[41] Legislators have control over citizens by being able to criminalize their conduct, take their money for taxes, take their property for "public use," and spend public resources in their name.

The fiduciary is also often described as being in a position of "superiority" to beneficiaries.[42] In the context of democratically-elected public servants, there is conventionally considered to be a vertical gap that separates ruler and ruled. As Bernard Manin has compellingly argued, election confers an irreducible dimension of superiority on the elected ruler; the logic of election demands that the ruler is she who stands out and above from the rest on some relevant dimension.[43] With elections, we select rulers who are extra-ordinary; while the act of voting may be broadly democratic, the fact of being ruled by someone in possession of superiority marks the ineliminable aristocratic element of the ruler relative to the ruled. This superiority reinforces the utility of thinking about democratic rulers as fiduciaries, who need strict ethical parameters to control how they hold beneficiaries' interests in trust.

Once it no longer seems disorienting to think about elected officials in democracies as fiduciaries, it becomes reasonable to assess how to think about the concomitant duties that fiduciaries owe their beneficiaries. Although it is common knowledge within fiduciary law that the strictness with which the fiduciary duties are enforced varies greatly with context,[44] there are some general duties that are seen as essential to help monitor for fiduciary default that we think can be brought to bear on the public fiduciary. In particular, within fiduciary law we identify a constellation of obligations that can be read to require "deliberative engagement" when applied to democratic rulers:

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[40] *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1413-15 (2002).

[41] The "voter ignorance" problem is at the core of some scholars' challenge to deliberative democracy. *See, e.g.*, Ilya Somin, *Deliberative Democracy and Political Ignorance*, 22 CRITICAL REV. 253, 253 (2010); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 413 (1998).

[42] *See* Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 673-78 (2009).

[43] BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 139-40 (1997) ("[A] quality that is favorably judged in a given culture or environment and is not possessed by others constitutes a superiority: those who possess it are different from and superior to those who do not. Thus, an elective system leads to the self-selection and selection of candidates who are deemed superior, on one dimension or another, to the rest of the population, and hence to voters. It is no accident that the terms 'election' and 'elite' have the same etymology and that in a number of languages the same adjective denotes a person of distinction and a person who has been chosen.").

[44] *See* Leib, *supra* note 42, at 678.

elected rulers or legislators must deliberatively engage the ruled on account of their fiduciary status in their unequal relationships with their beneficiaries.[45]

We explain briefly below how to tease a deliberative engagement requirement out of the traditional fiduciary duties. Our aim is to examine the legal requirements of the fiduciary selectively in the private law context and to derive a principle of political morality that we can apply to elected rulers, which can help bridge the chasm between the two deliberative spheres we explored in Part I. The fiduciary duties are routinely described as a duty of loyalty and a duty of care – as well as duties of candor, disclosure, and utmost good faith.[46] We take them up in turn. Note that for the purposes of our specific argument here, it isn't quite necessary to show that public officials are under a fiduciary duty of deliberative engagement – only to reveal that deliberative democrats have missed out on a structural possibility for deliberation between spheres of "unequals" that fiduciary law makes visible.

Most centrally, fiduciaries have a *duty of loyalty* which prohibits them from acting in a self-interested manner. The duty requires that fiduciaries act for the sole benefit of the beneficiary and prohibits their acting in any manner where their interests conflict with the interests of the beneficiary.[47] Fiduciaries must "act solely for the benefit of the principal in all matters connected with his agency."[48] Indeed, the command of loyalty is so strong that even if a self-interested transaction by a fiduciary produces no harm to a beneficiary whatsoever, the duty of loyalty will be regarded as violated.[49] However, *informed consent* – dialogue between fiduciary and beneficiary – can relax this stricture and protect the fiduciary against accusations of breach.[50] Dialogue and deliberation between fiduciary and beneficiary thus function to exempt the

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[45] We've pursued the political duty of deliberative engagement elsewhere. *See generally* Ethan J. Leib & David L. Ponet, *Representation in America: Some Thoughts on Nancy Pelosi, Gavin Newsom, Tim Johnson, and Deliberative Engagement*, 16 GOOD SOCIETY 1 (2007); Ethan J. Leib & David Ponet, *The Ethics of Representative-Constituent Relations*, FINDLAW'S WRIT (July 26, 2007), http://writ.news.findlaw.com/commentary/20070726_ponet.html. But we didn't appreciate how the fiduciary obligations that rulers owe the ruled underwrite their ethical obligations.

[46] *See* Leib, *supra* note 42, at 673-78. Here, we steer clear of the debates about whether all the duties flow out of only the duties of loyalty and care. Although a duty of confidentiality is often discussed as a fiduciary obligation, it doesn't translate – so we ignore it in what follows.

[47] *See* FRANKEL, *supra* note 39, at 121-31; *see also* Birnbaum v. Birnbaum, 539 N.E.2d 574, 576 (N.Y. 1989); Lynn A. Stout, *On the Export of U.S.-Style Corporate Fiduciary Duties to Other Cultures: Can a Transplant Take?*, *in* GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNMENT IN A NEW ERA OF CROSS-BORDER DEALS 46, 55 (Curtis J. Milhaupt ed., 2003).

[48] RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

[49] *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 655-56 (1995).

[50] FRANKEL, *supra* note 39, at 200-04.

fiduciary from the extreme proscriptions otherwise suggested by the duty of loyalty.

Several deliberative conditions must be met for informed consent to obtain: (1) There must be fiduciary notification to a beneficiary about a conflict even if it will result in no harm – and could in fact benefit – the principal; (2) beneficiaries are entitled to full information about the conflict and potential self-dealing; and (3) the beneficiary's expression of informed consent, when and if it comes, should be clear and precise.[51] Of course, this potential route for insulation from the duty of loyalty does not translate into an affirmative duty to consult with beneficiaries. Nevertheless, it does create an incentive for fiduciaries to deliberate with beneficiaries if they wish to remain beyond reproach. Additionally, the type of deliberation required focuses on full information and the solicitation of a lucid reaction,[52] which probably requires some authentic engagement between fiduciary and beneficiary. It may be going too far to say that the fiduciary is obligated to engage in dialogue with the beneficiary from the private duty of loyalty alone. However, translating the duty into a command of political morality would suggest such a dialogue.

Applied to the political context from its private law roots, these deliberative maxims suggest that rulers – while always retaining some discretion over how to act[53] – only remain beyond censure when seeking the informed consent of the governed. The duty of loyalty creates an affirmative incentive on the part of the ruler to deliberatively engage constituents; only through dialogue and exchange is the elected fiduciary shielded from the charge that she acted after her own private good or the good of her funding patrons rather than the public good dictated by her office. Moreover, the authorization that elections confer upon legislators may very well be circumscribed by the implied duty to check back in from time to time to reinforce loyalty. After all, citizens can often change their interests after election season, and the public fiduciary ought to be under an obligation to engage and discern what those interests are.

The *duty of care* includes deliberative or dialogic elements that also help model the relationship between political unequals in a deliberative democracy. In a word, the duty of care demands that the fiduciary performs her tasks in a responsible, prudent, and diligent manner such that duties are not only carried out, but executed well.[54] To be sure, in order for a fiduciary to act with care,

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[51] *Id.*

[52] *Id.*

[53] After all, in order to be rulers they usually must hold the authorization to decide in representative lawmaking.

[54] *See* Smith v. Van Gorkom, 488 A.2d 858, 872-73 (Del. 1985); ROBERT CHARLES CLARK, CORPORATE LAW 123-36 (1986); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1047, 1049 & n.8 (1991). Fox-Decent has this as a general "duty of reasonableness," though it seems that he classifies it as part of the duty of loyalty. *See* Fox-Decent, *supra* note 35, at 264-65.

she must weigh the range of alternative actions against the balance of her expertise and superior information, following a rationally considered course of action.[55]

When transposed to the political context, the duty to act with care can be understood as an obligation to consult with and deliberatively engage constituents as part of the process of rationally considering their preferences and assessing the full panoply of potential courses of action within the public fiduciary's authorization. Deliberation with constituents does not deny the expertise and discretion accorded the elected fiduciary, but recognizes that there is a critical space for dialogue (even among unequals). Authentic exchange between rulers and governed can indeed contribute to the elected fiduciary's ability to act with care as her office demands. While not bound by her constituents' preferences and interests, exercising her presumptively superior wisdom and expertise with care counsels that she act in manner respectful and responsive to them. Authentic deliberation between the rulers and the ruled is the most apt way to achieve such care.

The *duty to account* flows from the *duties of candor* and *disclosure*,[56] whose dialogic components are quite evident. Without disclosure and candor, beneficiaries would be unable to monitor fiduciaries in any meaningful sense.[57] Accounting includes a duty to inform beneficiaries of past behavior and to take responsibility – show accountability – for activities undertaken pursuant to the power and discretion fiduciaries hold.[58] Whereas the duty to disclose and be candid has a prospective component, the duty to account has a retrospective valence.

It is necessary to impose a duty to account and a duty to be candid upon public fiduciaries such that accountability to the governed is not limited to electoral competition. Indeed, incumbency, campaign financing, and term limits substantially impair electoral accountability mechanisms, so the ruled need greater access to information to monitor their fiduciaries.[59] Just as some

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[55] *See* Fox-Decent, *supra* note 35, at 264-65.

[56] FRANKEL, *supra* note 39, at 101-83 (discussing the duties of fiduciaries); Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 814 (1983).

[57] *See, e.g.*, Jordan v. Duffs & Phelps, 815 F.2d 429, 436 (7th Cir. 1987); Libby v. L.J. Corp., 247 F.2d 78, 81 (D.C. Cir. 1957); Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 483 (Cal. 1990); Rosenthal v. Rosenthal, 543 A.2d 348, 352 (Me. 1988); Herring v. Offutt, 295 A.2d 876, 879 (Md. 1972); Wendt v. Fischer, 154 N.E. 303, 304 (N.Y. 1926) (Cardozo, J.) ("If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance." (citations omitted)); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 882 (stressing that fiduciaries "must be candid").

[58] FRANKEL, *supra* note 39, at 130.

[59] *See* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1127, 1136 (1997); Robert P. Beard, Note, *Whacking the Political Money "Mole" Without Whacking Speech: Accounting for Congressional Self-Dealing in Campaign Finance Reform After* Wisconsin

principals can fire their fiduciaries but are still entitled to an accounting and candor, so too are political principals – the people – owed a range of fiduciary duties from their elected officials so they can monitor their conduct over time, even in the middle of a term in office.[60] One of the central features of proper deliberation according to the architects of deliberative democracy is that it must be ongoing and its members "expect it to continue into the . . . future."[61] Accordingly, public fiduciaries' duties of candor, disclosure, and accounting are deliberative requirements that are applicable throughout an elective term.[62]

The final fiduciary obligation that we think supports our deliberative lens into fiduciary law is the *duty of utmost good faith*. This duty is, of course, not unrelated to the duty of loyalty and the duties of disclosure and candor. [63] As applied to the legislator-fiduciary, it might reinforce the idea that democratic rulers cannot pursue their vision of the good without some attempt to connect their policy initiatives to the preferences of the governed. Moreover, the good faith duty may pertain to the frequency required of political fiduciaries to check back in with their constituents.[64] Indeed, the good faith requirement in fiduciary law underscores the fact that preferences and interests are not fixed in time but can undergo revision and reformulation. The political relationship between ruler and ruled is ongoing and extends beyond bookend election days. It must consist of opinion and preference exchange, rational argumentation, and enduring dialogue and deliberation that stretch over time to make the relationship work properly.[65] The good faith requirement of the public fiduciary necessitates that she be honest, transparent, and communicative in an ongoing way – or she risks default.

When viewing the multiple fiduciary duties with an eye toward their convergence around a deliberative mandate, it becomes clear how the relationship between fiduciary and beneficiary – one between presumptive unequals – models the relationship between elected officials and their

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Right to Life, 2008 U. ILL. L. REV. 731, 752-53.

[60] For an argument that citizens are owed a duty of candor, see JEFFREY EDWARD GREEN, THE EYES OF THE PEOPLE: DEMOCRACY IN AN AGE OF SPECTATORSHIP 3 (2009). Green doesn't derive his duty of candor from the fiduciary principle, however.

[61] Cohen, *supra* note 2, at 72. Although Cohen requires deliberation to be projected into the "indefinite" future, that condition may be too stringent: some legislators operate under term limits, which obviously is an outer bound on the length of deliberation. *Id.*

[62] *Id.*

[63] This is a way, consistent with *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) and *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 753-57 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006), to render the duty of good faith as a gloss on and clarification of the duty of loyalty. This duty shows the duty of loyalty to "encompass[] more than the negative duty to refrain from unconsented-to self-dealing." Letter from Deborah A. DeMott to Ethan J. Leib (Sept. 12, 2007) (on file with author); *see also* Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 582-88 (2008).

[64] FRANKEL, *supra* note 39, at 130.

[65] *See* Leib & Ponet, *Representation in America*, *supra* note 45.

constituents. Once we expose this deliberative command, it becomes easier to envision how the dualist spheres of deliberation can be brought into contact: through direct deliberative engagement by public officials with their lay citizen beneficiaries.

CONCLUSION

By specifying the duty of what we term deliberative engagement as one owed to the ruled by the rulers, we show that deliberation should not be confined to separate classes of rulers and ruled but structurally must unfold between these classes. It is insufficient for elected trustees and agents to deliberate amongst themselves about those they govern or represent without actually consulting their constituents. Fiduciary law and legislators' fiduciary status brings this command to light.[66] Politically unequal though they may be, legislators and lay citizens must engage in real deliberation, with legislators subject to the stringent loyalty, care, accounting, candor, disclosure, and good faith requirements appropriate to their fiduciary role. Fiduciary law, as we have explored its basic contours here, reveals just how important deliberation among unequals is and helps provide a conceptual apparatus – otherwise lacking in the reigning models of deliberative democracy – for how to model deliberation between political unequals.

In summary, understanding elected rulers as public fiduciaries offers lessons for deliberative democracy by envisaging a deliberative space for rulers and ruled to interact. Of course, political morality is very difficult to enforce; even if we thought the actual private law fiduciary duties created legal obligations on elected officials, courts only rarely impose fiduciary duties directly. Especially in the political context, substantial default cannot easily trigger a remedy: recall is very rare and generally citizens must wait until the next election to "throw the rascals out." Still, the fiduciary model can marshal social norms that can help shape and police the deliberative relationship that must unfold between citizens and their elected leaders. While proponents of deliberative democracy continue to pay much attention to designing institutions wherein lay citizens can deliberate with each other, bringing the public fiduciary principle into deliberative democracy's ambit suggests that future research should be dedicated to thinking more deeply about how to design institutions for lay citizens to deliberate with their elected fiduciaries.

[66] We tend to think that Criddle's vision of the public fiduciary is too sanguine about elites deliberating amongst themselves on behalf of the people without a further requirement that they deliberate with the people. *See* Criddle, *Fiduciary Administration*, *supra* note 35, at 470-73.