

# The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm against Corruption

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# THE LAST TEMPTATION OF CONGRESS: LEGISLATOR INSIDER TRADING AND THE FIDUCIARY NORM AGAINST CORRUPTION

*Sung Hui Kim*†

*On April 4, 2012, Congress passed the STOCK Act, which officially banned the practice of insider trading by members of Congress and formally declared them to be fiduciaries for purposes of federal insider trading law. The impetus for the legislation was the perception, held by a majority of commentators, that insider trading by members of Congress did not violate federal securities law because they were not fiduciaries to anyone. In this Article, I make the case that the majority view was and continues to be wrong, and why that matters. Specifically, I argue that even if the STOCK Act had not passed and even if it were to be repealed, judges could build on existing precedents and employ unextraordinary judicial reasoning to impose the requisite fiduciary duties on legislators. In Part I, I provide a succinct summary of federal insider trading law, focusing on the controversial element as applied to legislators—the existence and breach of fiduciary duty. I then explore the standard approach taken by courts in resolving novel instances of potentially fiduciary relationships: traditional analogical reasoning to well-established cases. In Part II, I employ this standard approach to make the case that judges could find legislators to be fiduciaries under federal insider trading law. In Part III, I more deeply justify the analogical reasoning employed in Part II. Specifically, I show that one core purpose of fiduciary law has been to fight public corruption and that legislator insider trading could be classified as a form of public corruption. This analysis helps reveal an organic alignment between recognizing legislator insider trading as a breach of fiduciary duty and an important goal of the common law of fiduciaries—that of deterring corruption. Part IV addresses various objections.*

INTRODUCTION ..... 846

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† Assistant Professor of Law, UCLA School of Law. I am grateful for the advice of many generous colleagues and for the valuable comments on prior drafts from the following: Norm Abrams, Iman Anabtawi, Steve Bainbridge, Sam Bray, Ingrid Eagly, Laura Gómez, Stephen Galoob, Mitu Gulati, Thomas Hazen, Allison Hoffman, Jerry Kang, Don Langevoort, Jon Michaels, Hiroshi Motomura, Charles O’Kelley, Robert Prentice, Ronald Rotunda, Joanna Schwartz, Michael Small, Alexander Stremitzer, Steve Yeazell, Noah Zatz, and participants at the U.C. Berkeley School of Law and the U.N.C. School of Law faculty workshops. Excellent research assistance was provided by Evan Lee, Grace Lo, Robert Smith, Jihee Yoo, Sepehr Zangeneh, and the research librarians of the Hugh & Hazel Darling Library at the UCLA School of Law.

I. FEDERAL INSIDER TRADING LAW .....	854
A. Federal Insider Trading Doctrine .....	854
1. <i>Trading on (or Tipping) Material Nonpublic Information</i> .....	856
2. <i>In Breach of a Fiduciary (or Fiduciary-Like) Duty</i> ....	859
a. <i>Classical Theory</i> .....	860
b. <i>Misappropriation Theory</i> .....	863
B. The Modus Operandi of Courts .....	866
II. LEGISLATORS AS FIDUCIARIES .....	870
A. Theoretical Outlines .....	870
B. Fiduciary to Citizens .....	871
1. <i>Analogy: Private Trustee</i> .....	872
2. <i>Analogy: Director (to Shareholders)</i> .....	875
3. <i>Cases</i> .....	877
C. Fiduciary to Legislature .....	880
1. <i>Rule 10b5-2(b) Analysis</i> .....	881
2. <i>Analogy: Partner</i> .....	885
D. Fiduciary to Government .....	887
1. <i>Analogy: Director (to Corporation)</i> .....	887
2. <i>Cases</i> .....	889
III. AGAINST CORRUPTION .....	892
A. Deepening Analogies .....	892
B. Corruption .....	894
C. Fiduciary Law's Norm Against Corruption .....	903
IV. OBJECTIONS .....	909
A. Judicial Activism .....	909
B. Federalism.....	913
C. Speech or Debate Clause .....	915
CONCLUSION .....	919

#### INTRODUCTION

On September 18, 2008, at 7 p.m., Treasury Secretary Henry Paulson and Federal Reserve Board Chairman Ben Bernanke met with members of Congress in a closed-door briefing that was so secretive even cell phones were banned.<sup>1</sup> Among those attending was Representative Spencer Bachus, the ranking Republican on the House Financial Services Committee.<sup>2</sup> As Paulson recounts:

Ben [Bernanke] emphasized how the financial crisis could spill into the real economy. As stocks dropped perhaps a further twenty percent, General Motors would go bankrupt, and unemployment

<sup>1</sup> *60 Minutes: Congress: Trading Stock on Inside Information?* (CBS television broadcast Nov. 13, 2011), available at <http://www.cbsnews.com/video/watch/?id=7388130n>.

<sup>2</sup> Bachus became Committee Chairman following the Republican congressional victories of 2010. PETER SCHWEIZER, *THROW THEM ALL OUT* 24 (2011).

would rise . . . if we did nothing. . . . It [was] a matter of days, [Bernanke] said, before there [would be] a meltdown in the global financial system.<sup>3</sup>

According to Paulson, these dire predictions left members of Congress “ashen-faced.”<sup>4</sup> The very next day, Representative Bachus invested in option funds designed to rise in value when markets fall.<sup>5</sup> Just four days later, he sold, making more than \$5,000 in profit, nearly doubling his investment.<sup>6</sup> As a *60 Minutes* television report put it: “While Congressman Bachus was publicly trying to keep the economy from cratering, he was privately betting that it would . . . .”<sup>7</sup>

Did Representative Bachus engage in what I refer to as “legislator insider trading”—the trading by members of federal or state legislatures on the basis of material nonpublic information acquired through their positions? Did he trade on information learned in the closed-door briefing? Or was the timing of his trade mere coincidence? Although he was cleared of ethical wrongdoing by the Office of Congressional Ethics,<sup>8</sup> we may never know the truth behind Bachus’s suspicious trades.

Publicity surrounding Bachus’s trades, however, did focus public attention to what was widely perceived as a gaping loophole in the federal securities laws. That loophole, according to a majority of commentators opining on the issue,<sup>9</sup> was that federal insider trading laws generally did not reach members of Congress.<sup>10</sup> For example, as for-

<sup>3</sup> HENRY M. PAULSON, JR., *ON THE BRINK* 259 (2010) (internal quotation marks omitted).

<sup>4</sup> *Id.*

<sup>5</sup> SCHWEIZER, *supra* note 2, at 28.

<sup>6</sup> *Id.*

<sup>7</sup> *Congress: Trading Stock on Inside Information?*, *supra* note 1.

<sup>8</sup> Mary Orndorff, *U.S. Rep. Spencer Bachus Cleared in Ethics Investigation*, AL.COM (Apr. 30, 2012, 6:42 PM), [http://blog.al.com/sweethome/2012/04/us\\_rep\\_spencer\\_bachus\\_cleared.html](http://blog.al.com/sweethome/2012/04/us_rep_spencer_bachus_cleared.html). Although Bachus defended his trade by noting that information about the dire state of the economy was generally known to the public, in my view, that is surely not the relevant market-moving information in question. The relevant market-moving information was the fact that both the Treasury Secretary and Chair of the Federal Reserve Board convened a secret emergency meeting proposing unprecedented governmental intervention to avert economic disaster.

<sup>9</sup> See Stephen M. Bainbridge, *Insider Trading Inside the Beltway*, 36 J. CORP. L. 281, 295–96 (2011) [hereinafter Bainbridge, *Inside the Beltway*] (describing the “predominant view”); Andrew George, Note, *Public (Self-)Service: Illegal Trading on Confidential Congressional Information*, 2 HARV. L. & POL’Y REV. 161, 163 (2008) (describing the “conventional wisdom”); *infra* note 10.

<sup>10</sup> For examples of the majority view, see RICHARD W. PAINTER, *GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE* 163 (2009) (“Insider trading law . . . may not be sufficiently rigorous to prevent abuses by government officials.”); Bainbridge, *Inside the Beltway*, *supra* note 9, at 285 (“[T]he quirks of the relevant laws almost certainly would prevent members of Congress from being successfully prosecuted.”); *Insider Trading and Congressional Accountability: Hearing Before the S. Comm. on Homeland Sec. & Gov’t Affairs*, 112th Cong. 4 (2011) (statement of John C. Coffee, Jr., Professor

mer Chairman of the Securities and Exchange Commission (SEC) Arthur Levitt maintained, members of Congress “benefit from an exemption that the average investor doesn’t benefit from. They’re immune from insider trading laws.”<sup>11</sup>

To be clear, Levitt was not referring to an explicit statutory exemption like the one that was drafted in Title VII.<sup>12</sup> Rather, this so-called immunity flowed from the difficulty of establishing the breach of a fiduciary (or fiduciary-like)<sup>13</sup> duty, a required element of an in-

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of Law, Columbia Univ.) [hereinafter Coffee Testimony] (agreeing with Professor Bainbridge): Matthew Barbabella et al., *Insider Trading in Congress: The Need for Regulation*, 9 J. BUS. & SEC. L. 199, 200 (2009) (noting that legislator insider trading that looks the same as corporate insider trading is nonetheless legal); Bud W. Jerke, Comment, *Cashing in on Capitol Hill: Insider Trading and the Use of Political Intelligence for Profit*, 158 U. PA. L. REV. 1451, 1483 (2010) (concluding that “current law does not support holding government insiders . . . liable for insider trading without substantially manipulating current doctrine”); Alan J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of the U.S. Senate*, 39 J. FIN. & QUANTITATIVE ANALYSIS 661, 676 (2004) (“Current law does not prohibit Senators from trading stock on the basis of information acquired in the course of performing their normal Senatorial functions.”).

For examples of the minority view, see *Insider Trading and Congressional Accountability: Hearing Before the S. Comm. on Homeland Sec. & Gov’t Affairs*, 112th Cong. 4 (2011) (statement of Donald C. Langevoort, Professor of Law, Georgetown Univ. Law Ctr.) (arguing that federal insider trading law does not exempt legislators or anyone else); Jonathan R. Macey & Maureen O’Hara, Essay, *Regulation and Scholarship: Constant Companions or Occasional Bedfellows?*, 26 YALE J. ON REG. 89, 107 (2009) (arguing that a prohibition on legislator insider trading is legally plausible and intuitively appealing); Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105, 1138 (2011) (arguing that the majority view is rooted in “twin misconceptions”) [hereinafter Nagy, *Congressional Officials*]; George, *supra* note 9, at 163 (arguing that congressional insider trading is illegal under misappropriation theory).

To be sure, there is earlier scholarship that concludes that government officials are covered by federal insider trading laws. However, those articles did not focus on the distinction between elected and appointed officials, which distinction is critical to the majority view. See, e.g., Herbert T. Krimmel, *The Government Insider and Rule 10b-5: A New Application for an Expanding Doctrine*, 47 S. CAL. L. REV. 1491, 1492, 1503–04 (1974); Donald C. Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement*, 70 CALIF. L. REV. 1, 34–35 (1982) [hereinafter Langevoort, *A Post-Chiarella Restatement*].

<sup>11</sup> *Bloomberg Surveillance: Arthur Levitt, Board Member, Bloomberg LP* (Bloomberg Radio broadcast Oct. 13, 2010) (transcript available through Analyst Wire, 2010 WLNR 20471195).

<sup>12</sup> Originally, Title VII exempted Congress from anti-discrimination and other workforce protection laws. See 42 U.S.C. § 2000e(b) (2006) (excluding the “United States” from the definition of “employer”). Subsequent statutes have closed this loophole. See 42 U.S.C. § 2000e-16 (“Employment by Federal Government”).

In addition, Section 3(c) of the Exchange Act, which grants immunity from the federal securities laws to certain government entities, only applies to an employee or official when such employee or official is “acting in the course of his official duty.” See Krimmel, *supra* note 10, at 1492. As such, legislator insider trading, which is clearly not an exercise of office, is not covered by the immunity. *Id.*

<sup>13</sup> As explained in Part I.A.2.a. below, the breach of a fiduciary or other duty arising out of a similar relation of trust and confidence, the latter of which I refer to as a “fiduciary-like duty,” will satisfy this element. Throughout this Article, when referring to “fiduciary duty,” I also include analogous duties imposed due to a relation of trust and confidence.

sider trading violation. According to this majority view, unlike employees of the three branches of federal government, who are agents and thus unquestionably subject to federal insider trading laws,<sup>14</sup> members of Congress are fiduciaries to no one.<sup>15</sup> Members are “neither employees nor agents of any larger entity.”<sup>16</sup>

Because of this majority understanding, President Obama called for a new law banning insider trading by members of Congress in his 2012 State of the Union address.<sup>17</sup> And Congress, after dragging its feet for years,<sup>18</sup> responded to public pressure and finally enacted the

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<sup>14</sup> There is almost no disagreement that employees of the three branches of federal government are fiduciaries and thus subject to federal insider trading laws. See, e.g., PAINTER, *supra* note 10, at 166 (discussing the application of insider trading laws to Executive Branch employees); Bainbridge, *Inside the Beltway*, *supra* note 9, at 297 (“Under current law, no serious doctrinal obstacle precludes applying misappropriation theory to employees of Congress, the Executive Branch, and other governmental agencies.”).

<sup>15</sup> See Coffee Testimony, *supra* note 10, at 4 (“Members of Congress do not clearly owe a fiduciary duty (or any similar duty requiring them to be loyal and hold information in confidence) either to their trading partners in a securities (or commodities) transaction or to the source of the material, nonpublic information.”); PAINTER, *supra* note 10, at 175 (“Today, federal securities law prohibits securities trading on information misappropriated from most other workplaces, including government workplaces, yet Congress has apparently managed to create sufficient ambiguity around fiduciary obligations of members and their employees that the rules may not apply to them.”); Bainbridge, *Inside the Beltway*, *supra* note 9, at 295 (ultimately rejecting the suggestion that “the electorate” is the beneficiary of a fiduciary obligation by members of Congress because “[w]hat is needed under insider trading law is either a duty to the person with whom one trades or to the source of the information, not some generalized duty to members of the public in the abstract”); Barbabella et al., *supra* note 10, at 215, 217 (“In the case of Congressional insider trading, . . . it is not clear that congressmen or their aides owe any party such a duty in more than a vague sense. . . . One imagines that this lack of a concrete duty, rather than the vague sense that congressional representatives ought to place public interests first, might control if a congressional representative were sued for trading on material nonpublic legislative information under the current legal regime.”); Jerke, *supra* note 10, at 1483–88 (arguing that government insiders lack the requisite fiduciary duty under classical theory and noting the lack of consensus about whether members of Congress are employees of the federal government for purposes of misappropriation theory).

The same “non-fiduciary” argument could be made about any elected official—e.g., president, vice president, governors, elected city officials, elected judges—as well as certain appointed officials—e.g., state and federal judges. This Article, however, focuses on federal and state legislators, although it cites to precedent establishing the fiduciary status of other elected officials. See *infra* Part II.D.2. As a general matter, presidents and vice presidents tend to voluntarily comply with the financial conflicts of interest statutes, which require divestment of holdings in certain situations. See PAINTER, *supra* note 10, at 61–62. For an argument that judges are fiduciaries, see Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. (forthcoming 2013) (manuscript at 15) [hereinafter Leib et. al, *Fiduciary Theory of Judging*], available at <http://ssrn.com/abstract=2029001>.

<sup>16</sup> Coffee Testimony, *supra* note 10, at 5.

<sup>17</sup> See *President Barack Obama’s State of the Union Address*, N.Y. TIMES, Jan. 24, 2012, at 9, <http://www.nytimes.com/2012/01/25/us/politics/state-of-the-union-2012-transcript.html?ref=stateoftheunionmessageus> (“Send me a bill that bans insider trading by members of Congress; I will sign it tomorrow.”).

<sup>18</sup> Representatives Brian Baird (Democrat, Washington) and Louise Slaughter (Democrat, New York) previously introduced versions of the Stop Trading On Congressional

Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act),<sup>19</sup> which affirmed Congress's nonexemption from federal insider trading laws<sup>20</sup> and declared that members owe the requisite fiduciary duties to Congress, the federal government, and US citizens.<sup>21</sup> In other words, members and employees of Congress are fiduciaries for purposes of insider trading law, and trading on material nonpublic information acquired in the course of official duties is deemed a breach of fiduciary duty.

Given this legislative intervention, one might think that nothing interesting remains to be said about legislator insider trading or the fiduciary status of legislators. But we should not overread the Act's significance and scope. First, the STOCK Act did not address the fiduciary status of elected officials at the state or local level. There are 7,382 members of state legislatures<sup>22</sup> who are not covered by the STOCK Act and may be trading on inside information right now. If the majority view remains intact for state legislators,<sup>23</sup> then they are not violating federal securities law because they are not breaching any fiduciary duty. Indeed, a Minnesota state legislator recently blogged: "It is, in fact, completely legal for a state lawmaker to use confidential information gained at the [state] Capitol for personal gain."<sup>24</sup>

Although members of Congress may have more access to juicier nonpublic information than "mere" state legislators, we should not

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Knowledge Act in the 109th, *see* H.R. 5015, 109th Cong. (2d Sess. 2006); 110th, *see* H.R. 2341, 110th Cong. (1st Sess. 2007); and 111th Congresses, *see* H.R. 682, 111th Cong. (1st Sess. 2009).

<sup>19</sup> STOCK Act, Pub. L. No. 112-105, 126 Stat. 291 (2012) (to be codified in scattered sections of 5 U.S.C. app.). The STOCK Act passed in the Senate on a 96-to-3 vote on Feb. 2, 2012. Scott Wong, *STOCK Act Passes Senate by Vote of 96-3*, POLITICO (Feb. 3, 2012, 3:31 PM), <http://www.politico.com/news/stories/0212/72391.html>. The House passed their version of the STOCK Act by a 417-to-2 vote on Feb. 9, 2012. Seung Min Kim, *STOCK Act Passed by House by Vote of 417-2*, POLITICO (Feb. 9, 2012, 3:39 PM), <http://www.politico.com/news/stories/0212/72670.html>. On April 4, 2012, President Obama signed the STOCK Act into law. Matt Compton, *President Obama Signs the STOCK Act*, THE WHITE HOUSE BLOG (Apr. 4, 2012, 5:16 PM), <http://www.whitehouse.gov/blog/2012/04/04/president-obama-signs-stock-act>.

<sup>20</sup> STOCK Act § 4(a).

<sup>21</sup> *See id.* § 4(g)(1); *see also id.* § 4(b)(1) (stating the purpose of the amendment); *id.* § 4(b)(2) (codifying a duty of "trust and confidence" for members and employees of Congress by amending 15 U.S.C. § 78u-1). Corresponding provisions cover executive and judicial branch officers and employees. For simplicity, I use the term "fiduciary duty" to include similar duties arising out of a relationship of trust and confidence.

<sup>22</sup> *See Number of State Legislators and Length of Terms (in Years)*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/legislators-legislative-staff-data/number-of-legislators-and-length-of-terms.aspx> (last visited Mar. 16, 2013).

<sup>23</sup> Not only did the STOCK Act fail to address state legislators, but the Act itself makes clear that it shall not "impair or limit the construction of" the existing securities antifraud provisions. STOCK Act §§ 4(g)(3), 10.

<sup>24</sup> Joe Atkins, *Insider Trading: It's Time to Close a Surprising Loophole*, INVERGROVEHEIGHTSPATCH (Dec. 16, 2011, 12:30 PM), [http://invergroveheights.patch.com/blog\\_posts/insider-trading-its-time-to-close-a-surprising-loophole](http://invergroveheights.patch.com/blog_posts/insider-trading-its-time-to-close-a-surprising-loophole).

discount the opportunities that legislators of states with influential economies and important corporate domiciliaries might exploit. For example, consider a California state legislator who hears that a new state bill forcing internet retailers (such as Amazon.com and Overstock.com) to collect sales taxes will soon be introduced.<sup>25</sup> Or consider a Minnesota state legislator who learns about a bill that would authorize the operation of gaming machines by Canterbury Park Holding Corporation, a publicly traded gaming corporation based in Minnesota.<sup>26</sup> Might a legislator trade on such nonpublic information? Given the great number of state legislators, it would be foolish to dismiss the risk of their trading.

Second, the relevant provisions of the STOCK Act only addressed federal insider trading laws. As a result, the majority view, if left uncorrected, could influence the judicial interpretations of other federal or state laws that are similarly premised on the breach of fiduciary obligation. For example, the majority of circuits currently require that the defendant must have breached a fiduciary obligation<sup>27</sup> to the defrauded person or entity in order to be found guilty under the honest services mail fraud statutes: 18 U.S.C. §§ 1341 and 1346.<sup>28</sup> If the logic of the majority view is correct, then elected officials in those circuits cannot be prosecuted for honest services mail fraud. By contrast, if the logic of the majority view is wrong, then elected officials would be subject to prosecution, which result would be more consistent with precedents that do not sharply distinguish between elected and appointed officials.<sup>29</sup>

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<sup>25</sup> Cf. Marc Lifsher, *Internet Sales Tax Bill Advances in California Legislature*, LOS ANGELES TIMES (May 31, 2011, 4:41 PM), [http://latimesblogs.latimes.com/money\\_co/2011/05/internet-sales-tax-bill-advances-in-california-legislature.html](http://latimesblogs.latimes.com/money_co/2011/05/internet-sales-tax-bill-advances-in-california-legislature.html) (reporting the advancement of just such a bill).

<sup>26</sup> Cf. Atkins, *supra* note 24 (noting that Canterbury Park Holding Company “has seen its stock suddenly soar and swoon based on action at the State Capitol”).

<sup>27</sup> See Samantha Hunter, *Honest Services Fraud and the Fiduciary Relationship Requirement: How the Ninth Circuit Got It Wrong in United States v. Milovanovic*, 2012 BYU L. REV. 509, 514–15 (2012) (“The Third, Fourth, Fifth, Sixth, and Eleventh Circuits have all held that honest services fraud requires the defendant to have breached a fiduciary duty to the victim, while the Second and Eighth Circuits have rejected such a requirement. The Ninth Circuit [also rejects the requirement] . . .” (citations omitted)).

<sup>28</sup> Honest services fraud refers to “any scheme or artifice to defraud” by “depriv[ing] another of the intangible right of honest services” through the use of the mails. 18 U.S.C. §§ 1341, 1346 (2006).

<sup>29</sup> For examples of these precedents, see *United States v. Weyhrauch*, 548 F.3d 1237, 1248 (9th Cir. 2008) (reversing the district court’s exclusion of evidence against a member of the Alaska House of Representatives and holding that the honest services mail fraud statute “establishes a uniform standard for ‘honest services’ that governs every public official”), *vacated* 130 S. Ct. 2971 (2010); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (reversing the district court’s exclusion of evidence against an elected member of the Board of County Commissioners and noting that “[e]lected officials generally owe a fiduciary duty to the electorate”); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974) (per curiam) (upholding conviction of former Governor of Illinois); *Shushan v.*



In sum, the STOCK Act makes an important statutory clarification that members of Congress are fiduciaries who owe the requisite duties under federal insider trading law. However, we should not misread the STOCK Act as contradicting the majority view or rendering it entirely moot. Indeed, the Act could be cited as support for the correctness of the majority view—that legislators are not fiduciaries and thus not covered by the federal ban on insider trading, absent some statutory override. After all, if the majority view were not seen as correct, why would it have been necessary for Congress to enact the STOCK Act at all? If, however, the majority view is wrong, it remains important not to canonize a mistaken understanding of the law.

To that end, I argue that the majority view—that judges could not recognize legislators as fiduciaries under federal insider trading law—has been and continues to be wrong.<sup>30</sup> Even if the STOCK Act had not passed and even if it were to be repealed, judges could build on existing precedents and employ unextraordinary judicial reasoning to impose the relevant fiduciary duties on both state and federal legislators as required under federal insider trading law.

In Part I, I provide a clean distillation of federal insider trading law that focuses on the critical element of the violation: the breach of fiduciary duty. I then explore courts' standard approach in resolving novel instances of potentially fiduciary relationships: applying traditional analogical reasoning to well-established cases. For centuries, courts have invoked—either explicitly or implicitly—analogies to more established fiduciaries as the primary means of deciding hard cases.

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United States, 117 F.2d 110, 115 (5th Cir. 1941) (upholding mail fraud prosecution of a member of a Louisiana parish levee board for receiving kickbacks and noting that "[n]o trustee has more sacred duties than a public official").

<sup>30</sup> When I refer to the "majority view," I am referring to the opinion or implication that judges must take extraordinary measures (e.g., ignore or overrule existing judicial precedent, or use novel or unusual judicial methods) in order to find legislators actionable under pre-STOCK Act federal insider trading law. Stated another way, the majority view that I am challenging is one that suggests that there are greater obstacles to holding legislators liable under federal insider trading law than the mere lack of direct "on point" precedent—the fact that no other court has yet found a legislator to be a fiduciary in an insider trading case. At the same time, I acknowledge that any attempt to ascribe a "majority view" label to any cluster of commentators whose characterizations and conclusions are diverse will be vulnerable to a "straw-man" criticism. No doubt some commentators, which I have categorized as falling under the "majority view," did not address the precise issue as I have framed it and were instead asking and answering a slightly different question (e.g., whether members of Congress were "clear" or "established" fiduciaries). Regardless of the how the issue has been framed by various commentators, my Article emphasizes two important points that can't be ignored in the debate. First, the fiduciary category has never been a fixed one with precise boundaries. Second, the Supreme Court has long referred to analogous duties imposed due to a relation of trust and confidence. This recognition of fiduciary-like relationships signals flexibility in defining the reach of the insider trading prohibition.

In Part II, I employ analogical reasoning to make the case that a fiduciary duty could be found to apply to both federal and state legislators. This would have been true for members of Congress prior to the passage of the STOCK Act, but more importantly, it remains true for state legislators who are not now covered by the STOCK Act. My target audience is the judiciary who may be confronted with just such a question in a lawsuit. In addition to analogical reasoning, I summon an impressive body of judicial precedent which has recognized public officials, including state and federal legislators, as fiduciaries outside of the insider trading context.<sup>31</sup>

Deeper thinkers, whether they be judges or academic commentators, may find the analysis in Part II to be unsatisfyingly thin. They will likely object that the problem with analogical reasoning is that it is often conclusory and indeterminate. For example, there is no widely accepted rule that tells us which of the myriad attributes of a person, object, or concept are relevant for comparison and how much weight should be given them.<sup>32</sup> Even a zebra and a barber pole are analogous if we are focused on being “striped.”<sup>33</sup> To make analogies not merely rhetorically persuasive but also well reasoned, there must be some appeal, explicit or implicit, to the underlying purpose of the analogical reasoning.

Part III provides a thicker rationale for recognizing legislators as fiduciaries for purposes of insider trading law. It more deeply justifies the analogies made in Part II by identifying a core purpose of fiduciary duty law. Although wildly heterogeneous, fiduciary law holds, as one of its central principles, an anti-corruption norm, with corruption (in the public sector) defined as the “use of public office for private gain.”<sup>34</sup> After explaining why legislator insider trading should be classified as a form of public corruption, I demonstrate the existence of this anti-corruption norm in fiduciary law by exploring judicial opinions which have proscribed public fiduciaries from using their public office for private gain. In the end, this analysis reveals an organic alignment between recognizing legislator insider trading as a breach of fiduciary duty and one core purpose of the common law of fiduciaries—deterring corruption.

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<sup>31</sup> Also, I perform an analysis of SEC Rule 10b5-2(b). See *infra* Part II.C.1.

<sup>32</sup> See Gregory L. Murphy & Douglas L. Medin, *The Role of Theories in Conceptual Coherence*, 92 *PSYCHOL. REV.* 289, 292 (1985) (“The point is that any two entities can be arbitrarily similar or dissimilar by changing the criterion of what counts as a relevant attribute. Unless one can specify such criteria, then the claim that categorization is based on attribute matching is almost entirely vacuous . . .”).

<sup>33</sup> *Id.*

<sup>34</sup> Part III.B duplicates Part II of Sung Hui Kim, *What Governmental Insider Trading Teaches Us About Corporate Insider Trading*, in *RESEARCH HANDBOOK ON INSIDER TRADING* (Stephen M. Bainbridge ed., forthcoming 2013) (manuscript at 1, 14–27) [hereinafter Kim, *Governmental Insider Trading*] (on file with author).

In Part IV, I answer objections that the judicial extension of a federal securities cause of action against legislators would be unwise or unconstitutional. Specifically, I discuss whether doing so would amount to judicial activism, violate principles of federalism (with respect to state legislators), or violate the Speech or Debate Clause.<sup>35</sup>

To clarify, this Article's primary purpose is to determine whether judges *can* rely on ordinary judicial reasoning to impose the relevant fiduciary duties on state and federal legislators under federal insider trading law and *how* this might be done. It is not to inquire, on some blank slate, whether legislator insider trading *should* be banned on policy grounds, which is a matter considered in a separate piece.<sup>36</sup> For curious readers, I can share that I believe that legislator insider trading is normatively problematic on consequentialist grounds. But these policy views are not logically germane to the arguments I make here.<sup>37</sup>

## I

### FEDERAL INSIDER TRADING LAW

#### A. Federal Insider Trading Doctrine

Section 10(b) of the Securities Exchange Act of 1934 (Section 10(b))<sup>38</sup> and SEC Rule 10b-5 (Rule 10b-5)<sup>39</sup> promulgated thereunder by the SEC proscribe fraud "in connection with the purchase or sale of any security."<sup>40</sup> Although neither the text of Section 10(b) nor that

<sup>35</sup> Due to the space constraints of this Article, the objections sounding in separation of powers or the First Amendment are explored in a separate appendix, which is available online at the Social Science Research Network. See Sung Hui Kim, *Appendix to The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption* (Nov. 5, 2012), available at <http://ssrn.com/abstract=2171336>.

<sup>36</sup> See generally Kim, *Governmental Insider Trading*, *supra* note 34, at 61 (arguing that governmental insider trading—including such trading by legislators—inflicts temptation, distraction, and legitimacy costs, thereby militating in favor of its banning).

<sup>37</sup> To clarify this point with an analogy, suppose that I am a chef who wants to publish a recipe to show how home cooks can make a decadent Southern Chicken Fried Steak. It is entirely possible for me to write a clear, concise, and delicious recipe, regardless of my personal views about whether or not people should eat steak prepared in this manner. Indeed, I can be perfectly agnostic about whether any individual—for health or other reasons—should cook or eat steak without necessarily undermining the quality of the recipe. In fact, I can rule out steak in my own diet and still write a useful recipe. In short, my personal normative views about whether anyone *should* consume steak are *not* logically germane to the usefulness of my recipe. Further, I can answer objections to the recipe (e.g., Why did you include safflower oil in the recipe when coconut oil has a better smoking point?) with reasons based on policies widely accepted by most chefs, regardless of my own normative views. For readers curious about my normative views on steak, I can share that I am a "pescetarian," which is neither here nor there.

<sup>38</sup> 15 U.S.C. § 78j(b) (2006).

<sup>39</sup> 17 C.F.R. § 240.10b-5 (2012).

<sup>40</sup> Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) makes it unlawful for any person purchasing or selling securities "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contri-

of Rule 10b-5 specifically mentions “insider trading,” courts and administrative agencies have, for decades, interpreted these provisions to ban the practice.<sup>41</sup> In rough terms,<sup>42</sup> the elements of an insider trading cause of action include: (1) trading on (or tipping) (2) material, (3) nonpublic information (4) in breach of a fiduciary (or fiduciary-like) duty.<sup>43</sup> These elements, including the fiduciary requirement, appear nowhere in a statute or administrative regulation. They have

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vance.” 15 U.S.C. § 78j(b). Similarly, Rule 10b-5, which was promulgated by the SEC under its regulatory authority granted by Congress under the Exchange Act, provides, *inter alia*, that no person may “employ any device, scheme, or artifice to defraud . . . or . . . engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.” 17 C.F.R. § 240.10b-5.

<sup>41</sup> See, e.g., *United States v. O’Hagan*, 521 U.S. 642, 651–56 (1997) (discussing theories of insider trading liability under Section 10(b) and the case law surrounding them).

<sup>42</sup> There are, of course, exceptions. The Supreme Court has not strictly adhered to the idea that the defendant must already be in a fiduciary or fiduciary-like relationship in order to state a violation. See *Langevoort, A Post-Chiarella Restatement*, *supra* note 10, at 28 (“Unlike the trading or tipping insider, the tippee bears no pre-existing fiduciary relationship to the person with whom he trades. The Supreme Court’s apparent endorsement of some tippee liability is an indication that it will not adhere strictly to the idea that only fiduciaries are obligated to make disclosures when trading.”); see also *infra* text accompanying notes 383–85 (describing corporate insiders’ duty to purchasers of the corporation’s stock). Also, although the Supreme Court has yet to signify its agreement, recent case law has created a small number of exceptions to the fiduciary duty requirement where the deception element of Rule 10b-5 is otherwise satisfied. See, e.g., *SEC v. Dorozhko*, 574 F.3d 42, 43 (2d Cir. 2009) (holding that breach of fiduciary duty is not necessary in a Section 10(b) enforcement action for computer hacking); Thomas Lee Hazen, *Identifying the Duty Prohibiting Outsider Trading on Material Nonpublic Information*, 61 HASTINGS L.J. 881, 885–87 (2010) (discussing “outsider trading” cases where the fiduciary duty requirement has been relaxed); Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1336–52 (2009) [hereinafter Nagy, *Gradual Demise*] (discussing the “casting aside” of fiduciary duty principles); see also DONALD C. LANGEVOORT, *INSIDER TRADING: REGULATION, ENFORCEMENT & PREVENTION* § 6:14, at 6-50 to -52 (2012) (summarizing exceptions in the case law).

<sup>43</sup> Under misappropriation theory, there is an additional element for establishing a violation—that the defendant failed to disclose to the source the defendant’s intention to trade on the nonpublic information. See *O’Hagan*, 521 U.S. at 655. To be sure, pretrading disclosure also precludes liability under the classical theory, but the fact of nondisclosure under classical theory is redundant to the other elements. Under classical theory, pretrading disclosure to counterparties automatically negates the “breach of fiduciary duty” and “nonpublic” elements of the cause of action. Under misappropriation theory, pretrading disclosure to the source does not negate those other elements. Compare Richard W. Painter, Kimberly D. Krawiec & Cynthia A. Williams, *Don’t Ask, Just Tell: Insider Trading After United States v. O’Hagan*, 84 VA. L. REV. 153, 180 (1998) (arguing that disclosure of one’s plan to trade on material, nonpublic information might be enough to negate liability under classical theory but suggesting that disclosure must include the *content* of nonpublic information in order to do so), with Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV. 1491, 1491 (1999) (arguing that mere disclosure of one’s *plan* to trade on material, nonpublic information negates liability under the classical theory by negating the deception element).

been almost entirely judicially manufactured, albeit with considerable congressional endorsement, if not ratification.<sup>44</sup>

What follows is a simplified review of the elements of an insider trading cause of action under Section 10(b) and Rule 10b-5.<sup>45</sup> The first three elements pose no special hurdle if the defendant happens to be a legislator. It is the fourth element that is controversial.

### 1. *Trading on (or Tipping) Material Nonpublic Information*

The *first* element—that the defendant “traded on the information” in question—requires a showing that the defendant possessed the material nonpublic information at the time he or she made the securities trade.<sup>46</sup> Possession at the time of trading is often difficult to establish, but, once proven, there is usually no further question that the defendant traded in order to exploit the informational advantage vis-à-vis other marketplace traders.<sup>47</sup>

In the typical case, the required mens rea for liability—scienter<sup>48</sup>—is not difficult to establish.<sup>49</sup> To prove scienter, the complainant must show that the “defendant knew that the information was material and nonpublic or recklessly disregarded facts that would indicate that the information in his possession was material and nonpublic.”<sup>50</sup> For criminal prosecutions, which are brought by the Department of Justice, the defendant must have “willfully” committed the offense.<sup>51</sup> Courts have construed “willfully” to refer to violations that occur with some “realization on the defendant’s part that he was

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<sup>44</sup> Legislative histories of the Insider Trading Sanctions Act of 1984 and the Insider Trading and Securities Fraud Enforcement Act of 1988 suggest that Congress had endorsed (if not ratified) the multiple bases of liability pursued by the SEC and approved by the courts. See Donald C. Langevoort, Commentary, *The Insider Trading Sanctions Act of 1984 and Its Effect on Existing Law*, 37 VAND. L. REV. 1273, 1274 (1984); Steve Thel, *Statutory Findings and Insider Trading Regulation*, 50 VAND. L. REV. 1091, 1118–21 (1997).

<sup>45</sup> This Article does not cover two areas of regulation commonly associated with the goal of deterring insider trading: section 16(b) (the “short swing” profits rule) and SEC Rule 14e-3 of the Exchange Act (relating to tender offers).

<sup>46</sup> See, e.g., SEC v. Adler, 137 F.3d 1325, 1340 (11th Cir. 1998) (“Scienter necessarily requires that the insider have possession of material nonpublic information at the time the insider trades.”).

<sup>47</sup> LANGEVOORT, *supra* note 42, § 3:13, at 3-32.

<sup>48</sup> Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976) (defining “scienter” as “a mental state embracing intent to deceive, manipulate, or defraud”).

<sup>49</sup> LANGEVOORT, *supra* note 42, § 3:13, at 3-32. In 2000, in order to resolve confusion in the case law about motivation and state of mind, the SEC adopted Rule 10b5-1, which clarified that trading on material, nonpublic information was unlawful where the defendant trades “on the basis of” material, nonpublic information, defined as trading “when the person in question was aware of the material nonpublic information when the person made the purchase or sale.” *Id.* § 3:14, at 3-38 (quotations omitted). That said, some courts have not deferred much to the Rule. *Id.* § 3:14, at 3-39.

<sup>50</sup> *Id.* § 5:5, at 5-25.

<sup>51</sup> *Id.* § 8:13, at 8-42 to -43.

doing a wrongful act . . . and that the knowingly wrongful act involved a significant risk of effecting the violation that occurred.”<sup>52</sup>

The defendant can, of course, argue that the trade in question was made for reasons unrelated to the information in question. For example, the defendant might insist that the trade would have happened regardless of the information because it was necessary to liquidate assets to pay upcoming bills. If the defendant makes such a showing, courts may not find liability, especially in those jurisdictions requiring that the defendant *use* (and not merely possess) the information.<sup>53</sup>

The prohibition covers not only trading but also the practice of tipping, as well as trading on the tip, as detailed below. For the most part, how this element gets resolved is substantively no different because the defendant happens to bear the title of Senator or Representative.<sup>54</sup>

The *second* element—that the confidential information be “material”—also presents no new legal issues. Information is deemed “material” if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision.<sup>55</sup> In effect, any information the disclosure of which would likely change an issuer’s securities prices will generally be regarded as material.

With respect to contingent or forward-looking information, materiality is judged by “a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.”<sup>56</sup> Accordingly, if a legislator trades to profit from an anticipated legislative development, the factfinder must assess the likelihood (at the time of the trade) that the legislative event would come to pass and the importance of that event to an issuer’s business (at the time of the trade).

In theory, this would be a difficult task because most legislative developments (such as the sudden passage of the STOCK Act bill in 2012) are tough to predict, given the dynamics and vicissitudes of law-making. In practice, however, assessing “materiality” is often not so arduous. The very fact of trading by the defendant may support a finding of materiality. If the factfinder is persuaded that the defendant traded in the hopes of profiting from the information in question and that the defendant resembles a “reasonable investor,” then

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<sup>52</sup> *Id.* § 8:13, at 8-43.

<sup>53</sup> See *id.* § 3:13, at 3-34 to -35, for a discussion of those jurisdictions which adhere to the “use” and not the “possession” standard.

<sup>54</sup> That said, there may be some evidentiary difficulties that arise from the Speech or Debate Clause. See *infra* Part IV.C.

<sup>55</sup> See *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

<sup>56</sup> *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968) (en banc)).

the test of materiality is effectively satisfied.<sup>57</sup> Finally, the defendant will generally have a hard time convincing the factfinder that the information in question is not material in the face of the actual occurrence of the legislative event and its resulting impact on the issuer's securities prices.<sup>58</sup> If securities prices change dramatically following the public release of the information in question, the element of materiality is presumptively satisfied.<sup>59</sup>

The *third* element—that the information in question must be “nonpublic”—also poses no novel issues. Information is considered nonpublic if it is not generally available to the investing public—that is, it has not been broadly disseminated.<sup>60</sup> This element is rarely seriously contested in insider trading cases. With respect to the securities of an issuer with a large analyst following, once the information in question gets into the hands of a large number of investors (or a smaller number of institutional investors who direct a large volume of trades), the security's market price will rapidly reflect the significance of that information, thereby extinguishing the opportunity to profit from insider trading. As a result, it is difficult to generate quick profits by trading in such a security unless one holds information that the general investing public does not know.<sup>61</sup>

To avoid any confusion, it is important to understand that the requisite nonpublic information is not narrowly circumscribed to “inside information”—information that emanates directly from within the corporation and specifically relates to the plans, operations, or assets of the issuer whose securities are being traded.<sup>62</sup> Nonpublic information also encompasses “market information,” which emanates from a source *outside* the issuer of the traded securities and tends to be about the supply of and demand for the company's securities.<sup>63</sup> Mar-

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<sup>57</sup> See LANGEVOORT, *supra* note 42, at § 5:2, 5-3 to -4.

<sup>58</sup> Naturally, judges and juries will have a tough time concluding that an event was improbable at the time of trading if they know that the event has in fact occurred. See Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud by Hindsight*, 98 Nw. U. L. Rev. 773, 774 (2004) (“Even in the absence of any misconduct, a bad outcome alone might lead people to believe that corporate managers committed securities fraud.”).

<sup>59</sup> Cf. LANGEVOORT, *supra* note 42, § 5:2, at 511 to -12 (“If a major market movement promptly follows the formal release to the public of the information in question, the materiality test is presumptively satisfied.”).

<sup>60</sup> *Id.* at § 5:4, at 5-19.

<sup>61</sup> *Id.*

<sup>62</sup> See Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 329 (1979) (discussing how “corporate” and “market” information both fall under the insider trading laws).

<sup>63</sup> *Id.* (defining “market information” as concerning outside “transactions in a corporation's securities that will have an impact on their future price quite apart from expected changes in the corporation's earnings or assets”). See Roberta S. Karmel, Book Review, *The Relationship Between Mandatory Disclosure and Prohibitions Against Insider Trading: Why a Property Rights Theory of Inside Information Is Untenable*, 59 BROOK. L. REV. 149, 154 (1993), for the distinction between “inside” and “market” information.

ket information may be information that impacts the prices of the *specific* security that is being traded (e.g., “information that an investment adviser will shortly issue a ‘buy’ recommendation or that a large stockholder is seeking to unload his shares or that a tender offer will soon be made for the company’s stock”).<sup>64</sup> But market information may also include more generalized information that impacts the share prices of an entire industry or the stock market as a whole (e.g., Ben Bernanke’s prediction that the entire economy will tank).

Of course, legislators have access to both types of nonpublic information. Through legislators’ subpoena power, they may gain access to *inside* information during the course of a legislative investigation into the matters of a particular publicly traded company. Even more easily, they can gain access to *market* information in the form of proposed legislation, anticipated criminal investigation, or anticipated governmental action, all of which may impact the securities prices of a single issuer or an entire industry.

Finally, it is important to emphasize that not all persons coming into contact with material, nonpublic information are potentially liable. For example, if, during my morning jog, I happen to stumble across some random trash containing a juicy stock tip and then proceeded to trade on the tip, I would *not* be liable for insider trading. Why? It is because of the *fourth* element, which requires a breach of fiduciary duty.<sup>65</sup> In my hypothetical, I have not violated any fiduciary duty by trading on a random stock tip.<sup>66</sup>

So, what about legislators? Do they owe a fiduciary duty and, if so, to whom?

## 2. *In Breach of a Fiduciary (or Fiduciary-Like) Duty*

To decide whether a fiduciary duty exists and has been breached requires us to distinguish between two accepted theories of insider trading liability—classical and misappropriation.

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<sup>64</sup> *United States v. Chiarella*, 588 F.2d 1358, 1365 n.8 (2d Cir. 1978), *rev'd on other grounds*, 445 U.S. 222 (1980); *see SEC v. Seibald*, No. 95 Civ. 2081(LLS), 1997 WL 605114, at \*4-6 (S.D.N.Y. Sept. 30, 1997) (denying defendants’ motion for summary judgment in an insider trading enforcement action concerning trades made based on an analyst’s report).

<sup>65</sup> *See Chiarella v. United States*, 445 U.S. 222, 232 (1980) (reversing defendant’s Section 10(b) conviction because no duty to disclose existed and noting that defendant was not an “agent [of the target company in a proposed transaction], he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence”).

<sup>66</sup> If, however, the tip relates to an anticipated tender offer and I purchase shares in the target company, there is potential liability under Rule 14e-3.



a. *Classical Theory*

Under the classical theory, affirmed in 1980 by the Supreme Court in *Chiarella v. United States*,<sup>67</sup> a person violates Rule 10b-5 and Section 10(b) by trading on material, nonpublic information if that person owes a fiduciary duty (of disclosure) to the counterparty of the trade (later redefined by statute to extend to one or more contemporaneous traders in the marketplace).<sup>68</sup> This fiduciary duty of disclosure (articulated as a “fiduciary duty to disclose or abstain”)<sup>69</sup> does not arise simply because the trader holds an informational advantage over the counterparty. After all, the *Chiarella* Court noted that “Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud. When an allegation of fraud is based upon nondisclosure [as would be the case with insider trading], there can be no fraud absent a duty to speak.”<sup>70</sup> Therefore, drawing from the common law tort of misrepresentation, the Court maintained that a duty to disclose material, nonpublic information prior to trading “arises when one party has information ‘that the other [party] is entitled to know because of a *fiduciary or other similar relation of trust and confidence* between them.’”<sup>71</sup>

The Court did not elaborate on what constitutes a “similar relation of trust and confidence.” However, courts have long used that and similar phrases to describe relationships that were not strictly fiduciary as a matter of law but nonetheless shared some of the characteristics of a fiduciary relationship (such as one party’s reposing of confidences in another)<sup>72</sup> and thus warranted some of the protections

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<sup>67</sup> 445 U.S. at 235.

<sup>68</sup> By passing section 20A of the Exchange Act, Congress granted an express private right of action to those investors trading contemporaneously with the insider trader. As a result, contemporaneous traders who bought or sold stock in the opposite position of the defendant trader may sue the insider trader for damages. Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78t-1 (2006). On Section 20A, see LANGEVOORT, *supra* note 42, § 9.3, at 9-9.

<sup>69</sup> The fiduciary duty of disclosure under classical theory has long been articulated as a duty to “disclose or abstain”—either to disclose the material nonpublic information to the investing public *before* trading or to abstain from trading while such nonpublic information remains undisclosed. See *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968). But because most defendants do not have a right to disclose confidential information, it is most often “the failure to abstain from trading, rather than the nondisclosure, which is the basis for imposing liability.” Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. REV. 1589, 1616 (1999) [hereinafter Bainbridge, *Path Dependent Choice*].

<sup>70</sup> *Chiarella*, 445 U.S. at 234–35.

<sup>71</sup> *Id.* at 228 (emphasis added); see *id.* at 230 (noting that silence in connection with the sale of securities is only actionable as fraud if there is already a duty to disclose).

<sup>72</sup> See, e.g., *Vai v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 364 P.2d 247, 252 (Cal. 1961) (“The prerequisite of a confidential relationship is the reposing of trust and confidence by one person in another who is cognizant of this fact.”).

generally applicable to fiduciary relationships.<sup>73</sup> In an influential opinion, *United States v. Chestman*,<sup>74</sup> the Second Circuit held that a “relationship of trust and confidence” must be the “functional equivalent of a fiduciary relationship” and must “share the essential characteristics of a fiduciary association.”<sup>75</sup> Because there is much overlap between fiduciary relationships and such other fiduciary-like relationships, and the distinction is relevant mostly for allocating burdens of proof,<sup>76</sup> whenever I refer to “fiduciary duty,” I mean to include analogous duties imposed due to a relation of trust and confidence.

Who owes a fiduciary duty to contemporaneous traders in the marketplace? The *Chiarella* Court suggested that those under a duty to place shareholder welfare before their own are covered by this fiduciary duty.<sup>77</sup> As a consequence, the duty applies uncontroversially to traditional corporate insiders (i.e., an issuer’s officers, directors, and controlling shareholders), as the Court specifically acknowledged.<sup>78</sup> The duty also applies uncontroversially to employees and to the corporate issuer itself.<sup>79</sup> Hence, courts and commentators commonly assumed that the classical theory espoused in *Chiarella* only concerned the trading by corporate insiders.

However, the Court never stated that *only* corporate insiders could be held liable.<sup>80</sup> Indeed, the *Chiarella* Court approvingly cited

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<sup>73</sup> See Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 906–07 (1993) (discussing the distinction between “fiduciary” relationships and nonfiduciary but confidential ones).

<sup>74</sup> 947 F.2d 551 (2d Cir. 1991).

<sup>75</sup> *Id.* at 568.

<sup>76</sup> See Scallen, *supra* note 73, at 907 (“[A] key distinction between confidential and fiduciary relationships appears to center on whether a party seeking redress must prove reliance on the other party.”).

<sup>77</sup> See *Chiarella v. United States*, 445 U.S. 222, 230 (1980) (“Application of a duty to disclose prior to trading guarantees that corporate insiders, who have an obligation to place the shareholder’s welfare before their own, will not benefit personally through fraudulent use of material, nonpublic information.”).

<sup>78</sup> *Id.* at 227 (noting that the duty “has been traditionally imposed on corporate ‘insiders,’ particularly officers, directors, or controlling stockholders” (quoting *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 911 (1961))).

<sup>79</sup> Therefore, if a legislator happens to be moonlighting as a corporate insider, then the duty would uncontroversially apply to him in his capacity as a corporate insider. Because many state legislative positions are part time, one would expect to find at least a few such cases. With respect to members of Congress, however, such situations would be rare because members of Congress are statutorily prohibited from “serv[ing] for compensation as an officer or member of the board of any association, corporation, or other entity.” 5 U.S.C. § 502 (2006); Bainbridge, *Inside the Beltway*, *supra* note 9, at 290.

<sup>80</sup> See *Chiarella*, 445 U.S. at 228 (stating only that there is “a relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation”).

*Affiliated Ute Citizens of Utah v. United States*,<sup>81</sup> an earlier Supreme Court opinion which imposed Rule 10b-5 liability on defendants who were not corporate insiders of the issuer of the traded securities. Moreover, as Chief Justice Burger pointed out in his dissent in *Chiarella*, Section 10(b) and Rule 10b-5 literally reach "any person" who engages "in any fraudulent scheme"<sup>82</sup> in connection with a securities transaction. Accordingly, no one—not even a member of Congress—is categorically exempt from liability under these provisions.

In 1983, the Supreme Court in *Dirks v. SEC* made two important extensions. First, it announced that this fiduciary duty may apply to certain confidential advisers of the issuer, such as underwriters, attorneys, accountants, or consultants, who are classified as "temporary" or "constructive" insiders.<sup>83</sup> "The basis for recognizing this fiduciary duty," the Court clarified, "is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes."<sup>84</sup> The Court further clarified that "[f]or such a duty to be imposed . . . the corporation must expect the outsider to keep the disclosed[,] nonpublic information confidential, and the relationship at least must imply such a duty."<sup>85</sup> Therefore, if a legislator happens to be advising a corporation in a manner that would imply a duty to keep confidences, then the fiduciary duty to disclose (prior to trading) would uncontroversially apply to that legislator, who would be regarded as a fiduciary vis-à-vis the corporation's shareholders.

Second, *Dirks* extended insider trading liability to cover the practice of tipping and trading on the tip.<sup>86</sup> But it did so by predicating the tipper's and tippee's liability on the tipper's breach of the fiduciary duty of loyalty, which includes the duty not to use entrusted information for personal gain.<sup>87</sup> Specifically, if the tipper breaches the fiduciary duty of loyalty by passing on information to the tippee in anticipation of a personal benefit (broadly defined)<sup>88</sup> and the tippee

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<sup>81</sup> 406 U.S. 128 (1972) (holding that two bank managers violated Rule 10b-5 for buying and re-selling stock in their individual capacities and based on the implicit undertaking to act in the best interest of the selling shareholders). *Affiliated Ute Citizens* is cited in *Chiarella*. See *Chiarella*, 445 U.S. at 229-30.

<sup>82</sup> *Chiarella*, 445 U.S. at 240.

<sup>83</sup> See *Dirks v. SEC*, 463 U.S. 646, 655 n.14 (1983).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 659.

<sup>87</sup> *Id.* at 659-60.

<sup>88</sup> The type of personal benefit that may satisfy the *Dirks* test includes pecuniary benefit, reputational benefit, and the benefit that accrues to oneself when making a gift. See LANGEVOORT, *supra* note 42, § 4:3, at 4-5 to -6.

knows or has reason to know of the tipper's breach,<sup>89</sup> then the tippee inherits the duty owed by the tipper. As the Court explained, "[t]he tippee's obligation has been viewed as arising from his role as a participant after the fact in the [tipper's] breach of a fiduciary duty."<sup>90</sup> As a result, any subsequent trading by the tippee will subject both the tippee and the tipper to liability.

To be clear, there is no liability for either the tipper or tippee unless the *tipper* is already in a fiduciary relationship with the corporation's shareholders and thus owes the requisite fiduciary duty. Hence, the tipper's duty uncontroversially applies to corporate insiders and temporary insiders (as *Dirks* expressly contemplated). In addition, any person to whom the insider improperly passes information inherits that duty. Therefore, if a legislator knowingly receives an improper tip from a corporate insider, then the legislator inherits the fiduciary duty owed by the corporate insider. Consequently, the legislator may not then trade on the tip or tip the information to someone else.

As in *Chiarella*, the *Dirks* Court did not foreclose the possibility of classifying legislators as fiduciaries. It noted:

We were explicit in *Chiarella* in saying that there can be no duty to disclose where the person who has traded on inside information "was not [the corporation's] agent, . . . was not a fiduciary, [or] was not a person in whom the sellers [of the securities] had placed their trust and confidence."<sup>91</sup>

In this passage, the Court separately catalogues the corporation's agent, fiduciary, and the person in whom trust and confidence had been placed. This separately itemized list clarifies that "agents" and "fiduciaries" are not redundant or coextensive categories under the classical theory. Therefore, legislators, who are neither the corporation's nor its shareholders' agents, are not categorically excluded.

#### b. *Misappropriation Theory*

Under the alternative "misappropriation theory," which the Supreme Court endorsed in 1997 in *United States v. O'Hagan*,<sup>92</sup> a person may not trade on material, nonpublic information entrusted to that person by the source of that information without disclosing to that source the person's intention to trade on that information.<sup>93</sup> Drawing on the common law of agency,<sup>94</sup> the Court held that "a fiduciary's

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<sup>89</sup> *Dirks*, 463 U.S. at 659–61.

<sup>90</sup> *Id.* at 659 (quoting *Chiarella v. United States*, 445 U.S. 222, 230 n.12 (1980)).

<sup>91</sup> *Dirks*, 463 U.S. at 654 (alterations in original) (quoting *Chiarella*, 445 U.S. at 222).

<sup>92</sup> 521 U.S. 642, 665 (1997).

<sup>93</sup> *Id.* at 652.

<sup>94</sup> See *id.* at 654–55 (referring to the RESTATEMENT (SECOND) OF AGENCY §§ 390, 395 (1958), on an "agent's disclosure obligation regarding use of confidential information").

undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality," constitutes deception under Section 10(b) and Rule 10b-5 because such trading "defrauds the principal of the exclusive use of that information."<sup>95</sup> Thus, liability under the misappropriation theory is premised on a preexisting fiduciary relationship between the trader and the source "who entrusted him with access to confidential information,"<sup>96</sup> regardless of whether the source bought or sold securities or was even a market participant at all.

In addition, lower courts have extended insider trading liability to ban the practice of tipping and trading on the tip under the misappropriation theory, although the law is not entirely settled in this area.<sup>97</sup> Therefore, if a corporate lawyer improperly tips to a legislator confidential client information that impacts the securities of the client's competitor, then the legislator inherits the fiduciary duty owed by the lawyer to his firm's client. As a result, the legislator may not then trade (in the competitor's securities)<sup>98</sup> on the tip or tip the information to someone else.

Now that I have introduced both classical and misappropriation theories, notice the critical difference between them as to whom the requisite duty is owed. Under classical theory, the defendant (as buyer or seller) owes the requisite fiduciary duty to the counterparty to the trade (as seller or buyer). By contrast, under the misappropriation theory, the defendant owes the requisite fiduciary duty to the source—the person or entity who entrusted the defendant with access to the confidential information.

There is also an important difference in the *nature* of the duty implicated. Under *Chiarella's* classical theory, the relevant duty is the duty to disclose,<sup>99</sup> which courts have routinely and widely imposed on all fiduciaries. By contrast, in both tipping<sup>100</sup> and misappropriation

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<sup>95</sup> *Id.* at 652.

<sup>96</sup> *Id.* For the source to "entrust" a person with access to confidential information does not strictly require that the source place the information in the fiduciary's hands or even authorize access to the confidential information. *LANGEVOORT*, *supra* note 42, § 6:4, at 6-13 n.1.

<sup>97</sup> Courts have differed on whether all of the *Dirks* elements (relating to tipping and trading on the tip) apply in the misappropriation context. Compare *SEC v. Yun*, 327 F.3d 1263, 1276 (11th Cir. 2003) (insisting that standards for tipper-tippee liability are the same under misappropriation theory as under classical theory), with *SEC v. Musella*, 748 F. Supp. 1028, 1038 n.4 (1989) ("The misappropriation theory of liability does not require a showing of a benefit to the tipper . . .").

<sup>98</sup> To be sure, the legislator is also proscribed from trading in the law firm's client's securities, but that issue is easily handled by the classical theory (as extended by *Dirks*).

<sup>99</sup> See *supra* text accompanying notes 67-71.

<sup>100</sup> *Bainbridge, Path Dependent Choice*, *supra* note 69, at 1615 ("[T]he duty at issue in tipping cases is not a duty to disclose, but rather a duty to refrain from self-dealing in confidential information owed by the tipper to the source of the information.").

theory cases,<sup>101</sup> the relevant obligation is the duty not to use entrusted information for personal gain,<sup>102</sup> the precise scope of which has varied among different courts and different fiduciary contexts.<sup>103</sup>

Also, I should clarify the positive law source of the requisite fiduciary duty. Although there was once much debate and uncertainty about this issue,<sup>104</sup> it is now clear that the federal insider trading prohibition, which may be “classified within the genus of federal common law,”<sup>105</sup> has a federal source.<sup>106</sup> That said, as with other questions arising under the federal laws, state common law is relevant to and has informed the task of identifying the requisite federal fiduciary duty under federal insider trading law.<sup>107</sup>

Finally, it is worth noting the implications of tying federal insider trading law to the fiduciary principle. By choosing to condition liabil-

<sup>101</sup> See Nagy, *Gradual Demise*, *supra* note 42, at 1360–61 (“*O’Hagan*, however, made clear that it is the insider trader’s undisclosed breach of trust and loyalty—and not merely his breach of confidentiality—that constitutes the fraud under Rule 10b-5.”).

<sup>102</sup> This duty has different articulations and can be found in the penumbrae of other explicit duties. See RESTATEMENT (THIRD) OF AGENCY §§ 8.01, 8.02 & cmts. c, d, 8.04, 8.05 (2006); RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. a, illus. g (2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(2) & cmt. j (1998); AM. LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 5.04 (1992); RESTATEMENT (SECOND) OF AGENCY §§ 387, 388 & cmt. c, 393, 395 (1958); 1 FLOYD R. MECHEM, LAW OF AGENCY §§ 1189, 1191, 1209, 1224 (2d ed. 1914).

<sup>103</sup> See, e.g., *Freeman v. Decio*, 584 F.2d 186, 188–96 (7th Cir. 1978) (discussing the jurisdictions’ differing holdings before ultimately holding that there is no recovery unless the corporation can show injury from insider trading); *Schein v. Chasen*, 313 So. 2d 739, 741–46 (Fla. 1975) (same); *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969) (stating that a corporate fiduciary entrusted with valuable information may not appropriate that information for the fiduciary’s own use even when doing so causes no injury to the corporation); *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 7–8 (Del. Ch. 1948) (noting that loss to the employer need not be alleged where the employee breached fiduciary duty for trading on confidential information about employer corporation).

<sup>104</sup> See generally Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1192 (1995); Theresa A. Cabaldon, *State Answers to Federal Questions: The Common Law of Federal Securities Regulation*, 20 J. CORP. L. 155, 212–13 (1994).

<sup>105</sup> STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 556 (2002).

<sup>106</sup> Cf. Iman Anabtawi, *Secret Compensation*, 82 N.C. L. REV. 835, 863–64 (2004) (observing that the Supreme Court suggested a federal fiduciary law source underlying the federal insider trading prohibition).

<sup>107</sup> See BAINBRIDGE, *supra* note 105, at 556 (reviewing cases in which courts relied upon state law to resolve questions arising under federal securities laws and concluding that “the question is not whether state law is relevant to the task of defining insider trading, but rather the extent to which it should be incorporated into the federal prohibition”).

For insider trading cases where federal courts expressly consulted state law on the fiduciary issue, see, for example, *SEC v. Talbot*, 530 F.3d 1085, 1095 (9th Cir. 2008) (looking to Delaware state law to support the proposition that a director owes a fiduciary duty to the director’s corporation); *SEC v. Sargent*, 229 F.3d 68, 76 (1st Cir. 2000) (looking to Massachusetts state law to support the proposition that sole shareholders of a closely held corporation owe fiduciary duties to each other); *United States v. Chestman*, 947 F.2d 551, 571 (2d Cir. 1991) (holding that marriage does not create a per se fiduciary relationship in New York).

ity on the breach of fiduciary duty, the *Chiarella* Court selected "an evolving, dynamic concept which [by its nature] . . . cannot be rigidly categorized."<sup>108</sup> In 1982, Donald Langevoort presciently observed: "[W]ithin the broad outlines of the [*Chiarella*] Court's rationale, there is room for creative interpretation, permitting the law to continue to develop in accord with perceptions about fairness in the securities marketplace. The flexibility of the fiduciary principle should not be underestimated."<sup>109</sup> With these clarifications, the fundamental question becomes: is a legislator in a fiduciary relationship to either the counterparties of the trade (as under classical theory) or to the person who entrusted the nonpublic information to him (as under the misappropriation theory)? To make this case, we must first understand how courts have determined who is a fiduciary.

### B. The Modus Operandi of Courts

Whether a particular defendant falls into the category "fiduciary" will often be an easy question, given clear precedent on point. For example, under the classical theory, courts regard officers, directors, controlling shareholders, employees, and the corporation itself as fiduciaries vis-à-vis shareholders based on well-established precedents.<sup>110</sup> Under the misappropriation theory, courts treat defendants involved in "hornbook fiduciary relations,"<sup>111</sup> such as employer-employee, principal-agent, or client-attorney, as fiduciaries. But what about harder, novel cases?

Recall that in *Chiarella*, the Court predicated insider trading liability under the classical theory on the finding of a duty to disclose, which arises out of a "fiduciary or other similar relation of trust and confidence" between the parties to a transaction.<sup>112</sup> While the phrase "trust and confidence" signaled the Court's intention to recognize a broader class of relationships than strictly fiduciary ones, it regrettably told us little more.

Three years later, in *Dirks*, the Supreme Court extended the fiduciary category to cover certain recipients of confidential information as temporary insiders. But the Court did so not by identifying key attributes of fiduciaries generally. Instead, it emphasized that there must be an implicit understanding on the part of the issuer of the traded securities that the recipient of the information will use that

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<sup>108</sup> See Scallen, *supra* note 73, at 902.

<sup>109</sup> Langevoort, *A Post-Chiarella Restatement*, *supra* note 10, at 53.

<sup>110</sup> See, e.g., *Chiarella v. United States*, 445 U.S. 222, 227-30 (1980) (summarizing precedents).

<sup>111</sup> *Chestman*, 947 F.2d at 568.

<sup>112</sup> *Chiarella*, 445 U.S. at 228.

information solely for the issuer's benefit and will keep it confidential.<sup>113</sup>

Finally, fourteen years later, in *O'Hagan*, the Supreme Court embraced the misappropriation theory but did so without any further elaboration of how to identify the existence of a fiduciary relationship.<sup>114</sup> Although it "referenced the term 'fiduciary' seventeen times,"<sup>115</sup> it did little more than point out that the misappropriation theory "is limited to those who breach a recognized duty."<sup>116</sup>

Given minimal guidance from the Supreme Court, lower federal courts have produced decisions that run the gamut. Some courts have examined the "reasonable and legitimate" expectations of the parties and have inquired as to whether those parties had "a history or practice of sharing business confidences, and [whether] those confidences generally were maintained."<sup>117</sup> Some courts have recognized a relationship of trust and confidence where the trader has "expressly agreed" to keep the information in question confidential;<sup>118</sup> others have concluded that such an agreement of confidentiality, standing alone, is not enough.<sup>119</sup>

Some courts have highlighted factors emphasizing imbalance in the relationship, such as "dominance" and "superior influence,"<sup>120</sup> or

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<sup>113</sup> See *supra* text accompanying notes 84–85. Subsequent lower courts interpreting *Dirks* have clarified that the *recipient* must have expressly or impliedly assented to such duties. See, e.g., *SEC v. Talbot*, 430 F. Supp. 2d 1029, 1050–51 (C.D. Cal. 2006) (noting that mere receipt of nonpublic information is not enough to establish insider trading liability if the recipient is not in a fiduciary relationship), *rev'd and remanded*, 530 F.3d 1085 (9th Cir. 2008); *SEC v. Ingram*, 694 F. Supp. 1437, 1440 n.3 (C.D. Cal. 1988) (interpreting *Dirks* as requiring that the recipient "must have expressly or impliedly entered into a fiduciary relationship with the issuer"). But see *SEC v. Lund*, 570 F. Supp. 1397, 1403 (C.D. Cal. 1983) (suggesting—more liberally—that a fiduciary relationship *vis-à-vis* the issuer's shareholders is created when the recipient of confidential information "knew or should have known that the information he received was confidential and that it had been disclosed to him solely for legitimate corporate purposes").

<sup>114</sup> See *United States v. O'Hagan*, 521 U.S. 642, 650, 652 (1997).

<sup>115</sup> Nagy, *Gradual Demise*, *supra* note 42, at 1332.

<sup>116</sup> *O'Hagan*, 521 U.S. at 666.

<sup>117</sup> *SEC v. Yun*, 327 F.3d 1263, 1272–73 (11th Cir. 2003).

<sup>118</sup> See, e.g., *SEC v. Nothern*, 598 F. Supp. 2d 167, 175 (D. Mass. 2009); *SEC v. Lyon*, 529 F. Supp. 2d, 444, 452 (S.D.N.Y. 2008); *SEC v. Kirch*, 263 F. Supp. 2d 1144, 1147 (N.D. Ill. 2003).

<sup>119</sup> See, e.g., *SEC v. Cuban*, 634 F. Supp. 2d 713, 725 (N.D. Tex. 2009) (stating that "an express or implied promise merely to keep information confidential" is not enough to create a relationship of trust and confidence; rather, the agreement should also "impose on the party who receives the information the legal duty to refrain from trading on or otherwise using the information for personal gain"), *vacated and remanded*, 620 F.3d 551 (5th Cir. 2010); *United States v. Kim*, 184 F. Supp. 2d 1006, 1013 (N.D. Cal. 2002).

<sup>120</sup> *Kim*, 184 F. Supp. 2d at 1011 (citing *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991)) (rejecting the finding of a fiduciary-like relationship for relationships among equals); see *United States v. Cassese*, 273 F. Supp. 2d 481, 486 (S.D.N.Y. 2003).



“de facto control and dominance.”<sup>121</sup> Still others have focused more broadly on the granting of some form of “discretionary authority” and a resulting “dependency” or reliance,<sup>122</sup> and so on. With such vagueness and variance in working definitions, it should not be surprising to find that federal courts have recognized a strikingly diverse array of persons as fiduciaries, including an electrician who traded on information overheard on the job,<sup>123</sup> a member of a business round table who traded on information learned from a fellow member,<sup>124</sup> and a government affairs consultant who tipped information learned from a Treasury Department briefing.<sup>125</sup> In sum, in deciding whether to impose a fiduciary duty for purposes of federal insider trading law, federal courts tend to invoke an ad hoc list of imprecise factors with no clear weightings and no clear explanation as to why the posited factors are relevant.

This approach is largely consistent with how state courts have for centuries determined new fiduciaries. Instead of deploying a widely accepted, precise, and rule-like definition, state courts also invoke an ad hoc list of vague factors. Not surprisingly, the universe of fiduciaries has gradually expanded to include such strange bedfellows as marriage brokerage agencies,<sup>126</sup> commercial developers of inventions,<sup>127</sup> psychiatrists,<sup>128</sup> life tenants of property,<sup>129</sup> and private hospitals.<sup>130</sup> As a consequence, experts have described fiduciary law as

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<sup>121</sup> *Chestman*, 947 F.2d at 568 (quoting *United States v. Margiotta*, 688 F.2d 108, 125 (2d Cir. 1982)).

<sup>122</sup> See, e.g., *SEC v. Falbo*, 14 F. Supp. 2d 508, 523 (S.D.N.Y. 1998) (citing *Chestman*, 947 F.2d at 569); *United States v. Victor Teicher & Co., L.P.*, 785 F. Supp. 1137, 1148 (S.D.N.Y. 1992) (citing *Chestman*, 947 F.2d at 567).

<sup>123</sup> *Falbo*, 14 F. Supp. 2d at 513.

<sup>124</sup> *SEC v. Kirch*, 263 F. Supp. 2d 1144, 1147 (N.D. Ill. 2003).

<sup>125</sup> *SEC v. Nothorn*, 598 F. Supp. 2d 167, 170 (D. Mass. 2009).

<sup>126</sup> *Fox v. Encounters Int'l*, No. 05-1139, No. 05-1404, 2006 WL 952317, at \*5-6 (4th Cir. Apr. 13, 2006) (upholding a jury finding that a marriage brokerage agency who recommended a physically abusive husband was a fiduciary of the woman).

<sup>127</sup> *Roberts v. Sears, Roebuck & Co.*, 573 F.3d 976, 983-84 (7th Cir. 1978) (recognizing sufficient evidence of a confidential relationship between the commercial developer/employer and the inventor/employee); *Stevens v. Marco*, 305 P.2d 669, 678-79 (Cal. Dist. Ct. App. 1956) (recognizing a fiduciary relationship between the inventor and commercial developer of the invention). But see *City of Hope Nat. Med. Ctr. v. Genentech, Inc.*, 181 P.3d 142, 150 (Cal. 2008) (finding no fiduciary relationship between a medical research center and a biotechnology company despite the parties having entered a contract); *Wolf v. Superior Court*, 130 Cal. Rptr. 2d 860, 865 (Cal. Ct. App. 2003) (finding no fiduciary relationship between a movie studio and a novelist despite the parties having entered a contract).

<sup>128</sup> *MacDonald v. Clinger*, 84 A.D. 2d 482, 482 (N.Y. App. Div. 1982) (holding psychiatrists to be fiduciaries in regards to confidential information).

<sup>129</sup> *Leonard S. Sealy, Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69, 77-78 (1962).

<sup>130</sup> *Greisman v. Newcomb Hosp.*, 192 A.2d 817, 823 (N.J. 1963) (holding that a hospital's power to exclude a physician from user-privileges was to “be viewed judicially as a fiduciary power to be exercised in reasonable and lawful manner for the advancement of

“amorphous,”<sup>131</sup> “intrinsically non-rational,”<sup>132</sup> “ill-defined,”<sup>133</sup> “messy,”<sup>134</sup> “atomistic,”<sup>135</sup> “slippery,”<sup>136</sup> “protean,”<sup>137</sup> “confused,”<sup>138</sup> “problematic,”<sup>139</sup> “result-oriented,”<sup>140</sup> and “elusive.”<sup>141</sup>

In highlighting the indeterminacy of the judicial task of identifying fiduciaries, I am not suggesting that courts are reaching conclusions without reasoning. In fact, courts often rely on forms of analogical reasoning and compare—either implicitly<sup>142</sup> or explicitly—the defendant’s situation to instances where fiduciary status is well established. For example, when courts originally encountered members of a corporation’s board of directors, they explicitly analogized the directors to private trustees,<sup>143</sup> agents,<sup>144</sup> or partners<sup>145</sup>—familiar instances of fiduciaries. Of course, over time, courts came to regard directors themselves as uncontroversial fiduciaries.<sup>146</sup> As fiduciary law

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the interests of the medical profession and the public generally” (quoting *Falcone v. Middlesex Cnty. Med. Serv.*, 170 A.2d 791, 799 (N.J. 1961))).

<sup>131</sup> Scallen, *supra* note 73, at 902.

<sup>132</sup> J. C. SHEPHERD, *THE LAW OF FIDUCIARIES* 3 (1981).

<sup>133</sup> P. D. FINN, *FIDUCIARY OBLIGATIONS* 1 (1977).

<sup>134</sup> D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 *VAND. L. REV.* 1399, 1400 (2002).

<sup>135</sup> Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 *DUKE L.J.* 879, 915 [hereinafter DeMott, *Beyond Metaphor*].

<sup>136</sup> Peter J. Hammer, Pegram v. Herdrich: *On Peritonitis, Preemption, and the Elusive Goal of Managed Care Accountability*, 26 *J. HEALTH POL. POL'Y & L.* 767, 771 n.6 (2001).

<sup>137</sup> LEONARD I. ROTMAN, *FIDUCIARY LAW* 2 (2005).

<sup>138</sup> Leonard I. Rotman, *Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 *B.U. L. REV.* 921, 922 (2011).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 924.

<sup>141</sup> DeMott, *Beyond Metaphor*, *supra* note 135, at 879.

<sup>142</sup> Courts *implicitly* invoke analogies when referring to an ad hoc list of factors or attributes deemed to be relevant for determining whether the defendant is a fiduciary.

<sup>143</sup> See, e.g., Jill E. Fisch, *Start Making Sense: An Analysis and Proposal for Insider Trading Regulation*, 26 *GA. L. REV.* 179, 193 (1991) (noting that “in older cases, the position of a corporate insider has been analogized to that of a trustee” and citing cases); see also *Farwell v. Pyle-Nat'l Electric Headlight Co.*, 124 N.E. 449, 452 (Ill. 1919) (holding that the director was not entitled to retain profits from a self-dealing transaction because directors “occupy the position of trustees for the collective body of stockholders”); *People ex rel. Manice v. Powell*, 94 N.E. 634, 637 (N.Y. 1911) (“The relation of the directors to the stockholders is essentially that of trustee and cestui que trust.”).

<sup>144</sup> See *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame*, [1906] 2 A. 34 (Ch.) at 42–43 (discussing how directors are agents for certain purposes).

<sup>145</sup> See *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (noting that stockholders and directors in a close corporation owe each other a duty of loyalty as rigorous as that of partners).

<sup>146</sup> See, e.g., *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 907 (Del. Ch. 1999) (“[D]irectors of corporations organized under Delaware law owe a fiduciary duty to the corporations upon whose boards they serve and to the stockholders of those corporations.” (quoting 1 DAVID A. DREXLER ET AL., *DELAWARE CORPORATION LAW AND PRACTICE* § 15.02 (1997) (alteration in original))); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (“Corporate officers and directors . . . stand in a fiduciary relation to the corporation and its stockholders.”); *Schaffhauser v. Arnholt & Schaefer Brewing Co.*, 67 A. 417, 417 (Pa. 1907)

scholars have observed, analogies have played an especially crucial role in the development of fiduciary law.<sup>147</sup> Indeed, the most cited case in fiduciary law, *Meinhard v. Salmon*, involved an explicit analogy to partners.<sup>148</sup> As Deborah DeMott has noted, the “pervasiveness and persistence” of the use of analogies in the fiduciary context “suggest that it is an inevitable aspect of fiduciary analysis.”<sup>149</sup>

So, if a judge is presented with the question, “Are legislators fiduciaries?,” how might that judge approach it? One way is to invoke plausible analogies.

## II

### LEGISLATORS AS FIDUCIARIES

#### A. Theoretical Outlines

The question of whether a legislator is a “fiduciary” always embeds an ancillary question: fiduciary to whom? Consider the following potential beneficiaries: citizens, the legislature (and fellow legislators), and the government that the legislator serves.<sup>150</sup> Depending on the beneficiary, a particular theory of liability applies. For example, suppose that the beneficiaries are the citizens whom the legislator represents but with whom the legislator has no personal contact. As a general matter, it is unlikely that legislators are receiving juicy stock tips from ordinary citizens. However, when legislators trade on material, nonpublic information, some of those trading counterparties will be citizens. This suggests that for citizens, the classical theory of liability is relevant. One can then analogize the legislator-citizen relationship to more established fiduciary relationships, for example, the relationship between a trustee and beneficiaries of the trust. The following schematic summarizes the potential fiduciary relationships and potential analogies that judges could employ:

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(“[T]here can be no doubt [that the director] does occupy such a fiduciary relation . . . that he shall manage the business of the company in such a manner as to promote . . . the common interests of all the shareholders.”).

<sup>147</sup> See Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 125 (2006) (“Courts have eschewed formalistic criteria for identifying fiduciary relations and instead reason by analogy to paradigmatic relations . . . .”); DeMott, *Beyond Metaphor*, *supra* note 135, at 879, 891 (“The evolution of the law of fiduciary obligation illustrates, perhaps more powerfully than most bodies of law, the power of analogy in legal argumentation.”); Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 804 (1983) (discussing courts’ practice of analogizing new fiduciary relations to existing prototypes); Scallen, *supra* note 73, at 905 (“[T]he use of analogy is the means by which most innovations in fiduciary law ‘traditionally’ have been created.”).

<sup>148</sup> *Meinhard*, 164 N.E. at 546 (“Joint adventurers, like copartners, owe to one another . . . the duty of the finest loyalty.”).

<sup>149</sup> DeMott, *Beyond Metaphor*, *supra* note 135, at 891.

<sup>150</sup> Notice that the STOCK Act explicitly states that members of Congress owe a fiduciary duty “to the Congress, the United States Government, and the citizens of the United States.” 15 U.S.C. § 78u-1(g)(1) (2011).

TABLE 1: POTENTIAL FIDUCIARY RELATIONSHIPS

#	BENEFICIARY	THEORY OF LIABILITY	ANALOGY
1	citizens	classical	private trustee; director (to shareholders)
2	legislature, fellow legislators	misappropriation	partner
3	government	misappropriation	director (to corporation)

### B. Fiduciary to Citizens

Are legislators fiduciaries to citizens under classical theory? If so, then a legislator who trades on material, nonpublic information may be breaching a duty to disclose to those “citizen-investors” on the other side of the trade.<sup>151</sup> Alternatively, under *Dirks*, a legislator who

<sup>151</sup> Some counterparties will be citizens of the nation (for members of Congress) or domiciled in a particular state (for that state’s legislators). Of course, not every counterparty will have a special relationship to the legislator. For example, the counterparties of federal legislators could be foreign investors to whom no fiduciary duty is owed or the counterparties of state legislators could be investors domiciled in other states. However, at least some counterparties will be fellow citizens of the legislator. The notion that government officials are fiduciaries to citizens in the context of insider trading has been suggested by other scholars. See LANGEVOORT, *supra* note 42, § 3-9, 3-20 to -22; Krimmel, *supra* note 10, at 1503-04; Nagy, *Congressional Officials*, *supra* note 10, at 1140-47.

Nagy proposes two theories by which members of Congress could be deemed fiduciaries under classical theory: constructive insiders and public fiduciaries to “citizen-investors.” In my view, the first theory is limited and unpersuasive, which Nagy partially concedes. Recall that in *Dirks*, the Supreme Court extended who counts as a fiduciary beyond traditional insiders to “constructive insiders,” such as lawyers, accountants, or underwriters. *Dirks v. SEC*, 463 U.S. 646, 655 n.14 (1983). Pointing to legislative history of the Insider Trading Sanctions Act of 1984, Nagy suggests that Congress happily acknowledged the *Dirks* extension and listed “government officials” as a potential category that could be pursued, in addition to the “underwriter, accountant, lawyer or consultant.” Nagy, *Congressional Officials*, *supra* note 10, at 1140. Nagy concludes that adding members of Congress to this list “fits well within the classical framework” and that it would “be quite reasonable to impute a disclosure obligation” to members of Congress. *Id.*

This “constructive insider” theory suffers from two weaknesses. First, as Nagy acknowledges, *id.* at 1142, this theory cannot apply to various instances of legislator insider trading. For example, if a member of Congress trades based on his nonpublic knowledge of imminent tax code changes, it would be folly to suggest that somehow that member has become a constructive insider of all those firms whose stock price is thereby affected. Second—and this is a point not made by Nagy—all the temporary or constructive insiders identified in *Dirks* were in clear principal-agent relationships, often of a textbook nature: hired lawyers, investment bankers, and accountants. Put another way, these constructive insiders were paid to give advice to the issuer. One cannot suggest that legislators are literally hired in this manner or figuratively stand in some similar consulting relationship. Regardless of how generously one weights verbiage in Committee Reports, a casual insertion of the term “government officials” cannot counter this fundamental difference. For these reasons, legislators cannot be considered to be constructive insiders on the authority of *Dirks*.

By contrast, Nagy’s second theory regarding “citizen-investors” holds promise, although my defense is based on different grounds.

tips such information to friends or relatives may be breaching the duty not to use information entrusted to that legislator to benefit citizens for personal gain.<sup>152</sup>

### 1. *Analogy: Private Trustee*

We can analogize the relationship between the legislator and citizens to the relationship between the trustee and beneficiaries of a private trust.<sup>153</sup> In the prototypical Anglo-American trust, the settlor contracts with the trustee to manage a portfolio of assets in the best interests of the beneficiaries, subject to *ex ante* conditions imposed by the settlor in the deed of trust.<sup>154</sup> Accordingly, three important features of a trust are (1) its creation through a manifestation of consent by the settlor,<sup>155</sup> (2) the delegation of broad managerial authority to the trustee over entrusted property,<sup>156</sup> and (3) the imposition of limitations on the trustee's authority through the instrument that created the trust.<sup>157</sup>

We see analogous features in the context of the legislator-citizen relationship. First, just as the trustee-beneficiary relationship is established through an act of consent, the legislator-citizen relationship arises from an act of consent by the electorate. Conventional democratic theory posits that the legitimacy of our republic is based on the consent of the governed.<sup>158</sup> Of course, as Ethan Leib and his colleagues have argued, the "citizenry of even the most liberal and democratic of states rarely consent meaningfully to the state's authority. Simply casting a ballot—or not voting-with-one's-feet-through-emigration—is hardly a conferral of consent to those individuals or institutions ruling over citizens' daily lives."<sup>159</sup> While consent in the electoral context may not be as robust as a settlor's consent in the private trust context, both sets of relationships (legislator-citizen and trustee-beneficiary) can nonetheless be characterized as involving a

<sup>152</sup> Nagy, *Congressional Officials*, *supra* note 10, at 1147.

<sup>153</sup> Cf. Deborah A. DeMott, *Agency by Analogy: A Comment on Odious Debt*, 70 L. & CONTEMP. PROBS. 157, 166–67 (2007) (comparing government officers to private trustees in the odious debt context).

<sup>154</sup> See RESTATEMENT (THIRD) OF TRUSTS § 2 (2003); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 624 (2004); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438 (1998).

<sup>155</sup> RESTATEMENT (THIRD) OF TRUSTS § 13 (2003) ("A trust is created only if the settlor properly manifests an intention to create a trust relationship.")

<sup>156</sup> *Id.* § 2.

<sup>157</sup> Cf. *id.* (defining a trust as arising from the parties' intentions with respect to certain property).

<sup>158</sup> See Leib et al., *Fiduciary Theory of Judging*, *supra* note 15, at 14.

<sup>159</sup> *Id.*

voluntary expression of willingness by a person or group of persons to entrust responsibility to another person.<sup>160</sup>

Second, just as the private trustee is delegated broad authority to manage the trust assets to benefit the beneficiaries, legislators have been delegated broad legislative authority over the assets of their government, including the public fisc, to benefit citizens. At the federal level, this delegation is signified by the first provision of the Constitution, Article I, Section 1, which established the U.S. Congress and refers to the “legislative Powers herein granted.”<sup>161</sup>

Third, just as the deed of trust defines the constraints of a trustee’s authority, the federal or state constitutions define the constraints of legislative authority, either directly through express substantive provisions or indirectly by setting up procedures and institutions empowered to establish them. Of course, these constraints on the fiduciary are not all encompassing. Although the purpose of the deed of trust is to protect the interests of the beneficiaries in accordance with the settlor’s intention, the beneficiaries actually remain quite vulnerable to a trustee’s predation. Unlike in principal-agent relationships where the principal can ordinarily intervene freely and dismiss agents at will, the trust beneficiaries ordinarily must request judicial intervention in order to dismiss a trustee for malfeasance.<sup>162</sup> Similarly, citizens have limited means of redress against legislators and exercise no meaningful control over them.

If this analogy to the trustee strikes one as odd, consider that a growing body of scholarship recognizes not only that the Framers intended to impose fiduciary standards on government officials,<sup>163</sup> in-

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<sup>160</sup> In the alternative, one could refer to the theory of popular sovereignty to argue that the consent of “the people” of the thirteen revolutionary states, as expressed through popular ratification in accordance with Article VII of the Constitution, constitutes the relevant consent on which the federal legislator-citizen relationship rests. For discussions of the relationship between popular sovereignty and the legitimacy of our republic, see, for example, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 5 (2004); Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 *HASTINGS CONST. L.Q.* 287, 306–08 (1997); James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 *U. PITT. L. REV.* 189, 192 (1990); Sung Hui Kim, “We the (Supermajority of) the People”: *The Development of a Rationale for Written Higher Law in North American Constitutions*, 137 *PROC. AM. PHIL. SOC’Y* 364, 388–89 (1993).

<sup>161</sup> U.S. CONST. art. I, § 1.

<sup>162</sup> Leib et. al, *Fiduciary Theory of Judging*, *supra* note 15, at 9.

<sup>163</sup> See, e.g., 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, 244 (2007) (“[T]he ‘general Welfare’ limitation [in the Taxing and Spending Clause] was one of a number of provisions inserted to impose fiduciary-style rules on the new federal government . . . .”); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 *CASE W. RES. L. REV.* 243, 248 (2004) (arguing that the Necessary and Proper Clause was intended to incorporate “the limitations of fiduciary duty”); Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1087 (2004) [hereinafter Natelson, *The*

cluding legislators,<sup>164</sup> but also that the fiduciary concept most commonly invoked during the revolutionary era was trusteeship and “public trust.”<sup>165</sup> For example, the Federalist Papers repeatedly characterizes public officials, including legislators, as trustees,<sup>166</sup> and the U.S. Constitution refers to “public Trust”<sup>167</sup> and describes public offices as being of “Trust.”<sup>168</sup> In invoking the analogy to the trustee, the Framers were merely continuing a tradition dating back to Cicero, who famously opined that “[t]he guardianship of the state is a kind of trusteeship.”<sup>169</sup> Most of the English colonies were expressly founded on the basis of trust—that the King had granted a charter for the benefit of the settlers residing in the colonies.<sup>170</sup>

Moreover, these references to public trust were not just empty metaphor. Recent legal-historical work supports the view that the Framers intended even noncriminal breaches of trust by public offi-

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*Constitution and the Public Trust*] (“[I]t really was the ‘general purpose’ of the founders to impose fiduciary standards on the federal government.”); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 50 (2003) (“Public officials were seen as the people’s agents and trustees, and bound by something akin to private trust standards.”); E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1026 (1975).

An impressive and growing body of scholarship calls for imposing fiduciary standards on government. See, e.g., EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY* 4 (2011) (the state itself as a fiduciary); Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 63 (1996) (congressmen need stricter fiduciary duties); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448 (2010) (administrative agencies as fiduciaries); Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN’S L.J. 259, 260–61 (2005) (same as FOX-DECENT, *supra*); Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POLIT. PHIL. 178, 179 (2012) [hereinafter, Leib & Ponet, *Fiduciary Representation*] (discussing recent work on government actors as fiduciaries); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677 (2013) (“political representatives” as fiduciaries).

<sup>164</sup> See Leib et al., *Fiduciary Theory of Judging*, *supra* note 15, at 17 (observing that John Locke, “whose writings heavily influenced the U.S. founders,” viewed legislators as fiduciary trustees); *supra* note 163.

<sup>165</sup> Natelson, *The Constitution and the Public Trust*, *supra* note 163, at 1086–87.

<sup>166</sup> See, e.g., THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961) (“The federal and state governments are in fact but different agents and trustees of the people . . . .”); *id.* at 316 (“The nature of [legislators’] public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people.”); *id.* at 344 (“solemn trust”); *id.* at 350 (describing elected officials as holding the people’s “public trust”); THE FEDERALIST NO. 59, at 366 (Alexander Hamilton) (“guardianship” and “trust”); *id.* at 396 (describing impeachable offenses as “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust”).

<sup>167</sup> U.S. CONST. art. VI, cl. 3.

<sup>168</sup> U.S. CONST. art. I, § 3, cl. 7; *id.* art. I, § 9, cl. 8; *id.* art. II, § 1, cl. 2.

<sup>169</sup> MARCUS TULLIUS CICERO, ON MORAL OBLIGATION 69 (John Higginbotham trans., University of California Press 1967).

<sup>170</sup> See Natelson, *The Constitution and the Public Trust*, *supra* note 163, at 1134–36.

cial to be remediable by impeachment and removal.<sup>171</sup> Also, the tradition of analogizing public officials to trustees continues on in modern judicial opinions. For example, the Sixth Circuit Court of Appeals stated in a case affirming the conviction of a public official under the federal mail fraud statute: “[A] public official acts as ‘trustee for the citizens and the State . . . and thus owes the normal fiduciary duties of a trustee, *e.g.*, honesty and loyalty’ to the citizens and the State.”<sup>172</sup> Even the Senate’s Standing Orders employ the trustee analogy to define senators’ duties:

The ideal concept of public office, expressed by the words, ‘A public office is a public trust’, signifies that the officer has been entrusted with public power by the people; that the officer holds this power in trust to be used only for their benefit and never for the benefit of himself or of a few . . . .<sup>173</sup>

In short, in deciding whether legislators are fiduciaries, judges can find a plausible analogy to the private trust. Just as trustees owe fiduciary duties to beneficiaries, legislators owe fiduciary duties to citizens, some of whom will be counterparties to their trades.

## 2. *Analogy: Director (to Shareholders)*

Besides the analogy to the private trust, might there be an analogy to the corporation? It is axiomatic that directors of a corporation are fiduciaries of its shareholders under federal insider trading law,<sup>174</sup> even though directors are neither trustees<sup>175</sup> nor agents of the corporation or its shareholders.<sup>176</sup> Might we analogize the legislator to a director and the citizens whom the legislator represents to the corporation’s shareholders?<sup>177</sup> For purposes of this analogy, I focus on paradigmatic public corporations held by numerous and dispersed shareholders.

<sup>171</sup> See *id.* at 1170–71; Leib et. al, *Fiduciary Theory of Judging*, *supra* note 15, at 17–18.

<sup>172</sup> *United States v. Gray*, 790 F.2d 1290, 1294 (6th Cir. 1986) (quoting in part *United States v. Mandel*, 591 F.2d 1347, 1363 (4th Cir. 1979)), *rev’d*, *McNally v. United States*, *superseded by statute*, 18 U.S.C. § 1346 (2006); see *infra* Part II.B.3.

<sup>173</sup> Standing Orders of the Senate Manual, 87 S. Doc. 107-1, at 118–19 (2002).

<sup>174</sup> See, *e.g.*, *SEC v. Blackwell*, 291 F. Supp. 2d 673, 687 (S.D. Ohio 2003) (noting that a director may be liable for insider trading violations for breaching the fiduciary duty to the corporation and its shareholders); *SEC v. Lenfest*, 949 F. Supp. 341, 345 (E.D. Pa. 1996) (noting that a director has a fiduciary duty to shareholders).

<sup>175</sup> See RESTATEMENT (THIRD) OF TRUSTS § 5(g) cmt. g (2003) (“Corporate . . . directors . . . do not hold title to the property of the corporation and therefore are not trustees . . .”).

<sup>176</sup> See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(2) (2006) (“[Corporate] directors are neither the shareholders’ nor the corporation’s agents . . .”).

<sup>177</sup> Cf. *LANGENDOORT*, *supra* note 42, § 6:6, at 6-21 n.5 (“An intriguing question is whether elected officials can properly be treated as fiduciaries. Certainly, they are not employees; there is no identifiable principal to whom they are responsible. . . . In this sense, the analogy to a corporation’s board of directors is apt.”).



An important feature of a widely held public corporation is the separation of ownership from control.<sup>178</sup> Shareholders are traditionally regarded as owners of the corporation, and they do possess a residual claim on the corporation's assets and earnings.<sup>179</sup> But, unlike other common forms of ownership, shareholders do not exercise any meaningful control over how corporate assets are managed. The law in most states severely restricts shareholder power and accords broad discretion over corporate affairs to a collective decision-making body of specialists—the board of directors, which either alone or through its delegates makes the vast majority of corporate decisions.<sup>180</sup> While directors are charged with exercising their authority in the best interests of shareholders,<sup>181</sup> shareholders have limited means of holding directors accountable. Shareholders ordinarily cannot compel directors to undertake corporate actions or even to terminate underperforming directors. They can cast a ballot at director elections, but in most cases this will be ineffective. Shareholders have no direct access to corporate information, relying almost entirely on mandatory disclosures filed with the SEC. Shareholders are diffuse, dispersed, and face collective action problems in monitoring director actions. As a result, many shareholders are rationally ignorant about corporate affairs.<sup>182</sup>

Our government also features separation of ownership from control. As Richard Painter has observed, “[a] republican form of govern-

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<sup>178</sup> See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 5–6 (1933). For an illuminating examination of Berle and Means's contribution, see generally William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 754–56 (2001) (noting that Berle and Means were influential in that they “hit the issue” of separation in entrepreneurial functioning).

<sup>179</sup> See William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 662–65 (2010) (discussing the shareholders' traditional role and critiques of that role).

<sup>180</sup> See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (2011) (stating that the corporation's business and affairs are “managed by or under the direction of a board of directors”). As the leading state of incorporation for large corporations, Delaware's law on this issue is the most important.

<sup>181</sup> I do not revisit the age-old debate over the proper purpose of the corporation because resolution of that debate is not critical to the purposes of this Article. For simplicity, this Article assumes the conventional, shareholder-value view of corporate purpose. For a recent exposition of this debate and a critique of the shareholder value model, see generally LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012). For my take on the law of corporate purposes as applied to corporate diversity, see Sung Hui Kim, *The Diversity Double Standard*, 89 N.C. L. REV. 945, 977–88 (2011).

<sup>182</sup> See Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 420 (1983) (“[T]here is no reason why shareholders . . . should have any interest or expertise in managing the firm's affairs. Because of the easy availability of the exit option through the stock market, the rational strategy for dissatisfied shareholders in most cases, given the collective action problem, is to disinvest rather than incur costs in attempting to bring about change through the voting process.”).

ment departs from direct democracy by separating citizen ownership of government from the politician's control of the process of governing.<sup>183</sup> Similar to directors, legislators are, in essence, a collective decision-making body of law-making specialists who have been accorded broad discretion to use government power and assets. Although legislators are charged with exercising their authority in the best interests of citizens, citizens (like shareholders) have limited means of holding their representatives accountable. Citizens cannot compel their representatives to adhere to their platforms and cannot revoke their cast votes.<sup>184</sup> Their primary means of residual control is to vote their representatives out of office in periodic elections. Like shareholders, citizens are also diffuse, dispersed, and face collective action problems in monitoring their representatives. They can only judge the performance of their representatives at a distance and only with the imperfect assistance of the media. As a result, many choose to remain rationally ignorant about their representatives' performance.<sup>185</sup>

In sum, directors are to shareholders as legislators are to citizens. If there is a fiduciary relationship recognized in the former, it is reasonable to recognize a fiduciary relationship in the latter.

### 3. Cases

Analogies to trustees or directors are nice, but if a judge wants to recognize legislators as fiduciaries, he or she will feel more comfortable citing to cases, at least as persuasive authority. It is not difficult to locate cases in which government officials, defined broadly, are rhetorically called public trustees or held to be entrusted with public responsibilities.<sup>186</sup> And there are many cases in which courts hold government officials to be fiduciaries of citizens.<sup>187</sup> Not surprisingly,

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<sup>183</sup> PAINTER, *supra* note 10, at 2.

<sup>184</sup> See Leib & Ponet, *Fiduciary Representation*, *supra* note 163, at 187.

<sup>185</sup> Cf. DONALD GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* 94–95 (1994) (discussing the literature on the “rational ignorance hypothesis”).

<sup>186</sup> See, e.g., *Trist v. Child*, 88 U.S. 441, 450 (1874) (“The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good.”); *Providence Tool Co. v. Norris*, 69 U.S. 45, 55 (1864) (“These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee.”); *Nuesse v. Camp*, 385 F.2d 694, 706 (D.C. Cir. 1967) (“It is a living tenet of our society and not mere rhetoric that a public office is a public trust.”).

<sup>187</sup> See, e.g., *United States v. Bryan*, 58 F.3d 933, 942, 961 (4th Cir. 1995) (affirming mail and wire fraud convictions of state lottery director and noting that state officials owe a “fiduciary duty . . . to the state and its citizens” (quoting *United States v. Barber*, 668 F.2d 778, 784 n.4 (4th Cir. 1982) (affirming mail fraud conviction and noting that the Alcoholic Beverage Control commissioner breached a fiduciary duty “owed to the state and its citizens”)); *United States v. Rebrook*, 842 F. Supp. 891, 893–94 (S.D.W. Va. 1994) (holding

there are fewer cases in which the government officials at issue are *elected* and held to owe fiduciary duties to citizens who elected them, as required under classical theory. In those cases, courts have recognized a governor,<sup>188</sup> mayors,<sup>189</sup> an elected county clerk,<sup>190</sup> elected county officials,<sup>191</sup> and state legislators<sup>192</sup> as fiduciaries of citizens.

For example, in *Driscoll v. Burlington-Bristol Bridge Co.*,<sup>193</sup> a unanimous Supreme Court of New Jersey announced that a cause of action could lie against elected county officials for "abuse of discretion and breach of trust"<sup>194</sup> in rubber-stamping a \$12 million transaction "under the influence of prominent persons seeking to further their private interests."<sup>195</sup> Although the remedy granted did not depend on a specific finding of a breach of duty, the court nevertheless trumpeted the fiduciary obligations of *both* elected and appointed officials: "[Elected and appointed officials] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity."<sup>196</sup>

The basis for enforcing these obligations, according to the court, rested on the sovereign power of the people of the State of New Jersey:

These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office. The enforce-

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that attorney for West Virginia Lottery breached fiduciary duty owed to Lottery (a public entity) and citizens of West Virginia by trading on material, nonpublic information relating to contracts with third party vendors), *rev'd*, 58 F.3d 961 (4th Cir. 1995).

<sup>188</sup> See, e.g., *United States v. Mandel*, 591 F.2d 1347, 1363 (4th Cir. 1979) (holding that the governor of Maryland owes fiduciary duties to Maryland citizens and the State of Maryland). After a series of vacations and rehearings, the *Mandel* decision was superseded by 18 U.S.C. § 1346 (2006).

<sup>189</sup> See, e.g., *Jersey City v. Hague*, 115 A.2d 8, 11 (N.J. 1955) (recognizing two mayors and one deputy mayor as fiduciaries of the people whom they have been elected or appointed to serve).

<sup>190</sup> See *Cnty. of Cook v. Barrett*, 344 N.E.2d 540, 545 (Ill. App. Ct. 1975) (holding that the county clerk, as "an elected public official," was the fiduciary of the people of Cook County).

<sup>191</sup> See *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 221 (N.J. 1952) ("The members of the board . . . are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been elected . . . to serve.")

<sup>192</sup> See *Fuchs v. Bidwill*, 334 N.E.2d 117, 119-20 (Ill. App. Ct. 1975) (discussing cases treating state officials as trustees of the people), *rev'd on other grounds*, 359 N.E.2d 158 (Ill. 1977).

<sup>193</sup> 86 A.2d 201 (N.J. 1952).

<sup>194</sup> *Id.* at 222-23. The court also noted that an official was not deserving "of the trust imposed upon him by the people of Burlington County when they elected him as a member of their board of chosen freeholders." *Id.* at 212.

<sup>195</sup> *Id.* at 207.

<sup>196</sup> *Id.* at 221 (citations omitted).

ment of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people who are its sovereign.<sup>197</sup>

Just as important, the court clarified that the governor, the attorney general, and even *private citizens* all had standing to sue public officials for breaching their obligations.<sup>198</sup>

In *Fuchs v. Bidwill*,<sup>199</sup> the Illinois Appellate Court upheld a complaint alleging that Illinois state legislators violated their fiduciary duty to use their public office solely in the best interest of the people of Illinois and not for private gain.<sup>200</sup> The plaintiffs alleged that state legislators secretly profited from unique investment opportunities offered by a racetrack tycoon in an attempt to influence legislation relating to the licensing, regulating, and taxing of horse racing.<sup>201</sup>

The Court noted that “[i]t has long been agreed that public officials occupy positions of public trust” and that they “cannot use [their office] directly or indirectly for personal profit.”<sup>202</sup> Moreover, “[t]hey stand in a fiduciary relationship to the people [by] whom they have been elected or appointed to serve.”<sup>203</sup> Finally, the Court held that private plaintiffs had standing to sue for their breach.<sup>204</sup> It explained:

If the “public trust” doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often effectual denial of the right for all time.<sup>205</sup>

On appeal, in a deeply divided four-to-three decision, the Illinois Supreme Court reversed on the issue of private rights of action.<sup>206</sup> However, the majority did *not* dispute the notion that state legislators were fiduciaries of the citizens of Illinois. Indeed, notwithstanding

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<sup>197</sup> *Id.* at 222.

<sup>198</sup> *Id.* at 222 (“The citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations except through the medium of the ballot, the pressure of public opinion or criminal prosecution. He may secure relief in the civil courts either through an action brought in his own name, or through proceedings instituted on his behalf by the Governor . . . or by the Attorney General . . . .” (citations omitted)).

<sup>199</sup> 334 N.E.2d 117 (Ill. App. Ct. 1975).

<sup>200</sup> The Illinois Supreme Court, in reversing the appellate court, quoted the complaint, which specifically mentions the fiduciary duty. See *Fuchs v. Bidwill*, 359 N.E.2d 158, 160 (Ill. 1976).

<sup>201</sup> *Fuchs*, 334 N.E.2d at 118–19.

<sup>202</sup> *Id.* at 119.

<sup>203</sup> *Id.* at 120 (quoting *Jersey City v. Hague*, 115 A.2d 8, 11 (N.J. 1955)).

<sup>204</sup> *Id.* at 122.

<sup>205</sup> *Id.* (quoting *Paepcke v. Pub. Bldg. Comm’n of Chicago*, 263 N.E.2d 11, 18 (1970)).

<sup>206</sup> *Fuchs v. Bidwill*, 359 N.E.2d 158, 162 (Ill. 1976) (“[T]he public interest will not be served in permitting persons, without limitation, to institute actions of this nature against public officials when the Attorney General has declined to act.”).

the holding, the majority declared that the Attorney General was entitled to prosecute a breach of fiduciary duty action on behalf of the State.<sup>207</sup>

To be sure, strictly speaking, it is not enough that the courts recognize elected officials as fiduciaries. After all, one's status as a fiduciary does not mean that one is a fiduciary for all purposes.<sup>208</sup> To create a cognizable claim, courts must also find that such a relationship implies the requisite fiduciary duty under federal insider trading law. Since *Chiarella*, courts have held that a defendant's failure to disclose material, nonpublic information satisfies the necessary fraud element of Rule 10b-5.<sup>209</sup> Thus, the requisite duty is the duty to disclose. Once fiduciary status is found, imposing the duty to disclose in this context should not be controversial because courts routinely and widely place the duty to disclose on all fiduciaries. Judges can cite to cases like *United States v. Mandel*, in which the Fourth Circuit Court of Appeals held that the Governor of the State of Maryland breached his fiduciary duty to disclose his financial interest in a legislative matter and that such failure "defraud[ed] the public and pertinent public bodies of their intangible right to honest, loyal, faithful and disinterested government" under the federal mail fraud statute.<sup>210</sup>

As I have argued, judges can find legislators to be fiduciaries to the citizens who elected them. Support can be found in suggestive case law as well as two analogies: to private trustees and to corporate directors. And this is precisely what is needed under the classical theory: the finding of a breach of fiduciary duty between defendant trader (a legislator) and the counterparty of the trade (a citizen on the other side of the trade).

### C. Fiduciary to Legislature

Now let's switch beneficiaries from citizens to the legislature (and fellow legislators). This switch in beneficiaries requires a switch in theories of liability, away from classical to misappropriation. Under the misappropriation theory, the fiduciary relationship runs not to the trading counterparties but to the source of nonpublic information. If

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<sup>207</sup> See *id.* (noting the Attorney General's ability to prosecute state officials' ethics violations and to "seek an accounting or the imposition of a constructive trust").

<sup>208</sup> See, e.g., Agasha Mugasha, *Evolving Standards of Conduct (Fiduciary Duty, Good Faith and Reasonableness) and Commercial Certainty in Multi-Lender Contracts*, 45 WAYNE L. REV. 1789, 1795-96 (2000) ("[I]n any particular analysis concerning the fiduciary principle, one has to ascertain the subject matter over which fiduciary obligations extend. A fiduciary for certain purposes need not be a fiduciary for all purposes; equally, a person who is generally not a fiduciary can be a fiduciary for certain limited purposes." (footnote omitted)).

<sup>209</sup> See *supra* section 1.A.2.a.

<sup>210</sup> *United States v. Mandel*, 591 F.2d 1347, 1363-64 (4th Cir. 1979). For direct history of this case, see *supra* note 172.

a fiduciary relationship exists between the legislator and that source, there is a strong basis for imposing the duty not to use confidential information for personal gain.<sup>211</sup>

### 1. *Rule 10b5-2(b) Analysis*

In 2000, in an attempt to clarify and perhaps to expand the scope of the misappropriation theory, the SEC promulgated Rule 10b5-2. Subsection (b) established three nonexclusive categories of relationships that give rise to a fiduciary-like duty for purposes of the misappropriation theory. It provides that a duty of “trust or confidence” exists where (1) there is an agreement to maintain confidentiality; (2) parties sharing material, nonpublic information have a “history, pattern, or practice of sharing confidences” that leads to an actual or reasonable expectation of nondisclosure; or (3) a person receives confidential information from a close family member (i.e., one’s “spouse, parent, child or sibling”) unless the recipient shows that there was no actual or reasonable expectation of nondisclosure.<sup>212</sup>

It is not clear the SEC achieved the clarification that it sought because not all courts have deferred to the SEC’s rule. For example, in *SEC v. Cuban*, a federal district court rejected Rule 10b5-2(b)(1) as going beyond the scope of Section 10(b).<sup>213</sup> Also, in *United States v. Kim*, another federal district court raised questions about the validity of Rule 10b5-2(b)(2), although it did not directly rule on the issue.<sup>214</sup> But other courts have responded more positively. For example, in *SEC v. Yun*,<sup>215</sup> the Eleventh Circuit Court of Appeals approved in dicta of both Rule 10b5-2(b)(1) and (2), although it signaled skepticism about the reach of (3).<sup>216</sup> Given this mixed judicial track record, Rule 10b5-2(b) should not be given talismanic significance in deciding whether a fiduciary-like duty exists. That said, the rule provides some guidance on factors possibly relevant to the fiduciary question.

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<sup>211</sup> There is no requirement that those owed a fiduciary obligation expressly proscribe the exploitation of confidential information. *LANGEVOORT*, *supra* note 42, § 6:6, at 6-20.

<sup>212</sup> SEC Rule 10b5-2, 17 C.F.R. § 240.10b5-2(b) (2011).

<sup>213</sup> 634 F. Supp. 2d 713, 730–31 (N.D. Tex. 2009) (holding that Rule 10b5-2(b)(1) exceeds the SEC’s statutory authority). On appeal, the judgment was vacated on other grounds, with the Fifth Circuit clarifying that it was not reaching the validity of Rule 10b5-2(b)(1). *SEC v. Cuban*, 620 F.3d 551, 558 n.40 (5th Cir. 2010).

<sup>214</sup> 184 F. Supp. 2d 1006, 1014–15 (N.D. Cal. 2002).

<sup>215</sup> 327 F.3d 1263 (11th Cir. 2003).

<sup>216</sup> *Id.* at 1273 n.23 (noting that “the SEC’s new rule goes farther than we do in finding a relationship of trust and confidence (e.g., the new rule creates a presumption of a relationship of trust and confidentiality in the case of close family members)” and finding that prior case law did not go that far). It should be noted that the case was technically not governed by Rule 10b5-2. *See id.* at 1281–82 (vacating the district court’s judgment on the basis of a prejudicial error in the jury instructions).

What, then, does a straightforward application of Rule 10b5-2(b) say about legislators? Recall that SEC Rule 10b5-2(b)(1) emphasizes the existence of an agreement of confidentiality. For Congress, one can find such an agreement in the Code of Ethics for Government Service,<sup>217</sup> which provides, inter alia, that “[a]ny person in Government Service should . . . [n]ever use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.”<sup>218</sup> For state legislators, similar obligations may appear in state government ethics codes.

That said, basing a relationship of trust and confidence on a mere confidentiality agreement remains deeply controversial<sup>219</sup> and thus may be the least likely of Rule 10b5-2(b)’s three categories to survive further judicial scrutiny. As various commentators have noted, an agreement to maintain the information’s confidentiality is simply not the same as a duty not to use such information for personal gain,<sup>220</sup> which is the relevant duty under misappropriation theory. Moreover, nondisclosure agreements are often concluded by parties that are negotiating at arms’ length and clearly are not in any relation of trust and confidence.<sup>221</sup> Such concerns explain the district court’s holding in *SEC v. Cuban*.<sup>222</sup>

However, legislators are not *merely* bound by an agreement of confidentiality. Indeed, it seems highly probable that they have an actual or reasonable expectation of nondisclosure arising out of a history or pattern of sharing confidences, in accordance with Rule 10b5-2(b)(2). How do we know whether such an expectation exists? Aside from in-

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<sup>217</sup> CODE OF ETHICS FOR GOVERNMENT SERVICE, 72 Stat. B12 (1958), H. Cong. Res. 175, 85th Cong., 104 Cong. Rec. 13556-57 (1958) [hereinafter CODE OF ETHICS]. The Code of Ethics, which applies to “all Government employees, including officeholders,” *id.* at B12, has been incorporated into the House Ethics Manual. H. COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110th Cong., HOUSE ETHICS MANUAL 20, 355 (2008) [hereinafter HOUSE ETHICS MANUAL], [http://ethics.house.gov/Media/PDF/2008\\_House\\_Ethics\\_Manual.pdf](http://ethics.house.gov/Media/PDF/2008_House_Ethics_Manual.pdf). The Senate Ethics Manual lists the Code of Ethics as a source of jurisdiction for the Senate Ethics Committee. S. SELECT COMM’N ON ETHICS, 108th Cong., SENATE ETHICS MANUAL 7-8 (2003), available at <http://ethics.senate.gov/downloads/pdffiles/manual.pdf>.

<sup>218</sup> CODE OF ETHICS, *supra* note 217, at B12, ¶ 8; see George, *supra* note 9, at 167 (recounting the reprimand (based on Code of Ethics paragraph 8) of Representative Robert Sikes “on charges including the purchase of stock in the privately-held First Navy Bank, whose establishment he was also actively promoting at a Naval Air Station”).

<sup>219</sup> For example, some commentators have argued that congressional ethics rules prescribing confidentiality are distinguishable from ethics rules commonly found in employee policy manuals. See Bainbridge, *Inside the Beltway*, *supra* note 9, at 296. The implication is that congressional ethics rules may not be enforceable contractual provisions.

<sup>220</sup> See, e.g., Nagy, *Gradual Demise*, *supra* note 42, at 1362.

<sup>221</sup> *Id.*

<sup>222</sup> *SEC v. Cuban*, 634 F. Supp. 2d 713, 724, 730-31 (N.D. Tex. 2009) (holding that misappropriation theory required that the trader agree both to keep the information confidential *and* to not use the information for personal gain). On *Cuban*, see *supra* note 213 and accompanying text.

formal, anecdotal evidence,<sup>223</sup> written internal procedures suggest that legislators observe a norm of confidentiality at least with respect to certain sensitive information.

For example, for Congress, the Senate's Standing Rules strongly suggest a pattern of sharing confidences and an internally enforceable norm of confidentiality. Rule 29.5 provides:

Any Senator, officer or employee of the Senate who shall disclose the secret or confidential business or proceedings of the Senate, including the business and proceedings of the committees, subcommittees[,] and offices of the Senate shall be liable, if a Senator, to suffer expulsion from the body; and if an officer or employee, to dismissal from the service of the Senate, and to punishment for contempt.<sup>224</sup>

When the Senate was debating the 1992 Amendment to Rule 29.5, one senator referred to norms of both trust and confidentiality among senators:

[C]andid discussions among Members depend upon a trust that is based, in part, on a willingness of all Members to abide by the practices of the Senate. . . . The unilateral decision by a Member or employee to release confidential committee information is inconsistent with the Senate's practice of making such decisions openly and collectively. Arrogation of this responsibility by individuals can destroy mutual trust among Members and be harmful to this institution.<sup>225</sup>

The Standing Rules also provide that committee proceedings may be closed to the public if the matters to be discussed fall under one of several listed categories where the need for preserving confidentiality is great.<sup>226</sup> One of those enumerated categories covers trade secrets and other highly confidential financial information,<sup>227</sup> suggesting that

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<sup>223</sup> See Barbabella et al., *supra* note 10, at 221–22 (reporting evidence that “legislators may feel that trading on information obtained through their positions is inappropriate, even if they do not believe it is illegal”).

<sup>224</sup> STANDING RULES OF THE SENATE, S. DOC. NO. 106–15, 106th Cong., 1st Sess., Rule XXIX, cl. 5 (2000) [hereinafter SENATE STANDING RULES]; see George, *supra* note 9, at 167–68 (interpreting this Rule).

<sup>225</sup> 138 CONG. REC. S17835, S17836 (daily ed. Oct. 8, 1992) (statement of Sen. Mitchell). This testimony is also recounted in George, *supra* note 9, at 168–69.

<sup>226</sup> The categories include “matters necessary to be kept secret in the interests of national defense or the confidential conduct of the foreign relations of the United States,” SENATE STANDING RULES, Rule XXVI, cl. 5(b)(1) (2000), matters which “will represent a clearly unwarranted invasion of the privacy of an individual,” *id.* at cl. 5(b)(3), matters which “will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement,” *id.* at cl. 5(b)(4), and “matters required to be kept confidential under other provisions of law or Government regulations,” *id.* at cl. 5(b)(6).

<sup>227</sup> *Id.* at cl. 5(b)(5).



senators do have ready access to inside information and not just market information.

Turning to the House of Representatives, various House rules suggest that representatives observe a norm of confidentiality with respect to certain communications.<sup>228</sup> Although official committee and subcommittee meetings “for the transaction of business” are generally open to the public,<sup>229</sup> other communications may remain hidden from public view. These other communications are governed by Jefferson’s Manual of Parliamentary Procedure,<sup>230</sup> which provides that “it is entirely within rule and usage for a committee to conduct its proceedings in secret, and the House itself may not abrogate the secrecy of a committee’s proceedings except by suspending the rule” governing secrecy.<sup>231</sup>

Also, the House has an internal set of guidelines on what information is confidential.<sup>232</sup> According to these guidelines, confidential information includes: information, the “inappropriate disclosure of” which would “adversely reflect on the credibility of the House or of office”; information relating to “specific legislative action taken or considered by the office”; information “provided to the House in confidence or with restrictions on its use (i.e., trade secrets, commercial or financial information) from an individual, private entity, or state or federal entity”; and “intra-[H]ouse” communications.<sup>233</sup>

The above evidence suggests that federal legislators observe a norm of secrecy with respect to certain information, including financial or commercial information, obtained on a confidential basis. State legislative procedures might also provide evidence of confidentiality norms among state legislators. To the extent that a court agrees

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<sup>228</sup> See, e.g., RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 108-241, 108th Cong. 2d Sess., Rule XVII, cl. 9 (2005) (“[W]hen the Speaker or a Member . . . informs the House that he has communications that he believes ought to be kept secret for the present, the House shall be cleared of all persons except the Members . . . for the reading of such communications, and debates and proceedings thereon . . .”).

<sup>229</sup> *Id.* at Rule XI, cl. 2(g)(1) (open meetings and hearings). Closed door meetings are allowed for meetings of the Committee on Ethics or its subcommittees and where disclosure of information would, among other things, (i) “endanger national security,” (ii) “compromise sensitive law enforcement information,” or (iii) “violate a law or rule of the House.” *Id.*

<sup>230</sup> THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE (1801), reprinted in H.R. Doc. No. 107-284, 107th Cong., 2d Sess. (2003), available at [http://www.gpoaccess.gov/him/browuse\\_108.html](http://www.gpoaccess.gov/him/browuse_108.html) [hereinafter JEFFERSON, MANUAL]; see also Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 827–28 n.128 (2005) (noting that the Manual still governs the House today).

<sup>231</sup> JEFFERSON, MANUAL, *supra* note 230, at sec. XI (annotation) (citation omitted).

<sup>232</sup> See UNITED STATES HOUSE OF REPRESENTATIVES INFORMATION SECURITY PUBLICATION, GUIDELINES FOR DETERMINING INFORMATION SENSITIVITY, available at <http://web.archive.org/web/20061215031815/http://www.house.gov/cao-opp/PDF/Solicitations/HISPUB008.pdf> [hereinafter House Information Sensitivity Guidelines].

<sup>233</sup> George *supra* note 9, at 169 (quoting House Information Sensitivity Guidelines).

with the SEC about the relevance of the factors listed in Rule 10b5-2(b)(1) and (2), those factors cut in favor of finding a duty of trust and confidence between legislators and fellow legislators on the one hand, and between legislators and the legislature on the other.

## 2. *Analogy: Partner*

Regardless of Rule 10b5-2(b), a court could recognize legislators as fiduciaries by analogizing to the relationships among fellow partners to one another and to the partnership itself. Of course, there are different types of partnerships with different attributes to be compared. For purposes of this analogy, I am concerned only with the oldest form of partnership—the general partnership. Under the Revised Uniform Partnership Act (RUPA), which thirty-seven states have adopted,<sup>234</sup> partners are both agents and principals of the partnership and thereby owe fiduciary duties of care and loyalty to one another and to the partnership itself, whether or not they are acting as managers or agents.<sup>235</sup>

Accordingly, in *SEC v. Peters*,<sup>236</sup> a federal district court found that a partner potentially violated federal insider trading laws under the misappropriation theory by trading on confidential information entrusted to him by his partner.<sup>237</sup> And in *O'Hagan*, the federal insider trading case in which the Supreme Court affirmed the misappropriation theory itself, the Court held that the defendant, a partner of the law firm of Dorsey & Whitney, breached his fiduciary duty owed to the partnership.<sup>238</sup> The fiduciary nature of the partner-partner/partner-partnership relationship is so well established that courts often refer to it as the touchstone of comparison in resolving novel cases. For example, in an insider trading case, *SEC v. Sargent*, the First Circuit Court of Appeals declared that the two sole shareholders of a closely held corporation were fiduciaries of each other because their mutual duties “mirror[ed] those owed between partners in a partnership.”<sup>239</sup>

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<sup>234</sup> *Partnership Act*, UNIFORM LAW COMMISSION, available at <http://www.uniformlaws.org/Act.aspx?title=Partnership+Act> (last visited Feb. 16, 2013) (showing a map of states that have adopted RUPA).

<sup>235</sup> See RUPA § 404(a) (2006). *But cf.* Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 251 (2005) (arguing that partners *should* be subject to fiduciary duties “only as agents or as managers of centrally managed firms”).

<sup>236</sup> 735 F. Supp. 1505 (D. Kan. 1990).

<sup>237</sup> *Id.* at 1521 (finding enough evidence of a violation to withstand summary judgment, although relevant information did not relate to the partnership business but to a side business of the partner who confided information); see *SEC v. Michel*, 521 F. Supp. 2d 795, 826 (N.D. Ill. 2007) (finding that a partner-partner relationship constituted the relevant relationship of trust and confidence under misappropriation theory).

<sup>238</sup> *United States v. O'Hagan*, 521 U.S. 642, 655 & n.7 (1997).

<sup>239</sup> *SEC v. Sargent*, 229 F.3d 68, 76 (1st Cir. 2000) (citing *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 512 (Mass. 1975)).

What are the important partnership characteristics? Under RUPA, a partnership is an “association of two or more persons to carry on as co-owners a business for profit . . . whether or not the persons intend to form a partnership.”<sup>240</sup> In most jurisdictions, co-ownership requires a mutual undertaking of the parties to share in the profits and control of the business.<sup>241</sup> In some jurisdictions, the parties must also agree to share losses.<sup>242</sup>

Can we analogize the legislature to a partnership? Let us take Congress as the example, although the analysis is similar for state legislatures. At first glance, we notice that Congress is not (at least not ostensibly) a profit-making enterprise, so the requirement that partners agree to share in the profits or losses of the business seems not to be met. But if we look beyond the technical expression of the rule, we see that the broader purpose of an agreement to share profits or losses is for the parties to link their economic fates (and thus their future livelihoods) with the fate of the enterprise as a whole and to one another. If we relax the profit-making assumption, we see that members of Congress, too, have undertaken a common venture—that of legislating for our nation. Members have left their districts and voluntarily tied their careers to those of other members and that of Congress as a whole. Legislation that is passed by both chambers of Congress and not vetoed by the President is binding on individual members, Congress itself, and the federal government. Also, the general reputation of Congress will impact the fate of the individual legislator come reelection. In this sense, the fates of members are linked together in the common enterprise of lawmaking.

Further, members of Congress share in the control of the legislature just as partners share in the control of the business. As a result, in both cases, a division of labor necessarily arises, as no single member or partner can perform all the tasks required of their common undertaking. For partnerships, some partners will contribute the capital while others contribute their labor. The default rule for partnerships, however, is that they all vote on partnership matters.<sup>243</sup>

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<sup>240</sup> RUPA § 202(a).

<sup>241</sup> For an example of the traditional approach, see *Ziegler v. Dahl*, 691 N.W.2d 271, 275–77 (N.D. 2005); DANIEL S. KLEINBERGER, *AGENCY, PARTNERSHIPS, AND LLCs: EXAMPLES AND EXPLANATIONS* 220–21 (3d ed. 2008) (describing the “key characteristics” of a partnership in most jurisdictions).

<sup>242</sup> See, e.g., *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 403–04 (S.D.N.Y. 2010) (requiring a showing of “the parties’ sharing of profits and losses”); *Ingram v. Deere*, 288 S.W.3d 886, 894 (Tex. 2009) (requiring an agreement to share losses); *Gates v. Houston*, 897 N.E.2d 532 (Ind. Ct. App. 2008) (requiring a voluntary contract of association for the purpose of sharing “profits and losses”).

<sup>243</sup> See, e.g., Larry E. Ribstein, *The Evolving Partnership* 24 (Univ. of Ill. Law & Econ. Working Paper No. LE06-025, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=940653](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=940653) (summarizing the default rules).

Similarly, for Congress, members are assigned to and spend much of their time deliberating in various congressional committees or subcommittees.<sup>244</sup> But all members participate in floor debates and vote on legislation.

None of the above is to say that members of Congress are as a factual matter cordial and collegial to one another. Just as a partnership can be discordant and dysfunctional, Congress can be and has been discordant and dysfunctional. But harmony in fact has never been a required element for imposing fiduciary duties. For example, courts have imposed fiduciary duties on partners already in strained relations<sup>245</sup> and on couples on the brink of divorce.<sup>246</sup> Indeed, a major purpose of fiduciary law is to protect against abuses arising in such antagonistic contexts. Also, despite popular perceptions to the contrary, members of Congress are in a nontrivial sense engaged in a joint undertaking and must come together in order to discuss and pass legislation. Moreover, as the evidence of norms summoned in Part II.C.1 above suggests, members actually do cooperate with one another in keeping certain information confidential.

Under the misappropriation theory, judges can classify legislators as fiduciaries to fellow legislators and to the legislature itself. The SEC's Rules 10b5-2(b)(1) and (2) provide some support. More importantly, for purposes of this Article, judges can draw an analogy to a paradigm example of a fiduciary relationship: fellow partners and the partnership.<sup>247</sup>

#### D. Fiduciary to Government

Let's switch beneficiaries one final time. Under the misappropriation theory, are legislators fiduciaries to the government they serve?

##### 1. *Analogy: Director (to Corporation)*

Recall that I've already analogized legislators to directors for purposes of the classical theory. In that discussion, I argued that just as

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<sup>244</sup> For example, in trial testimony, Congressman Barney Frank once testified that "members of the House of Representatives tend to specialize and often trust the judgment of colleagues about the contents of noncontroversial bills" and that "a typical Representative might know the contents of less than ten percent of the bills considered by the House." *United States v. Swindall*, 971 F.2d 1531, 1541 (11th Cir. 1992).

<sup>245</sup> See, e.g., *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938).

<sup>246</sup> *Vai v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 364 P.2d 247, 252 (Cal. 1961) ("[B]ut the husband's fiduciary duties in respect to his wife's interest in the community property continue as long as his control of that property continues, notwithstanding the complete absence of confidence and trust, and the consequent termination of the confidential relationship.").

<sup>247</sup> Even if one rejects this line of argument as being too facile, the analogy to partners serves as an important reminder that oft-cited factors—such as "superiority" and "domination"—are not essential to all fiduciary relationships.

directors are fiduciaries to their shareholders, legislators can be seen as fiduciaries to the citizenry. Here, under the misappropriation theory, I argue that legislators are fiduciaries to the government they serve, from which they receive material, nonpublic information. The corporate analogy is that directors are fiduciaries to the corporation. Accordingly, in *SEC v. Talbot*,<sup>248</sup> the Ninth Circuit Court of Appeals held that a director could violate federal insider trading laws under the misappropriation theory by trading on confidential information relating to another company in breach of a fiduciary duty owed to the corporation, which was the “immediate source and rightful owner of the information.”<sup>249</sup>

Because it is well established that directors have a fiduciary obligation to the corporation, the task here is to explain why we should compare legislators with directors. Under the theory of director primacy,<sup>250</sup> directors reign supreme over corporate actions. To be sure, on a daily basis, officers make the operational decisions. But, as a formal legal matter, directors have the ultimate power to make decisions on behalf of the corporation. Legislators arguably stand in a similar position vis-à-vis the government they serve. Especially relevant is the fact that legislatures tend to have broad jurisdiction to legislate in the public interest.<sup>251</sup> Moreover, they typically enjoy the power of the purse and control the funding of government projects.<sup>252</sup>

The strongest objection comes from the fact that both federal and state governments separate powers among three coequal branches of government—not only the legislative but also the judicial and executive. To take Congress as an example, it is hard to say that Congress reigns supreme over the actions of the federal government when the judiciary can strike down statutes as unconstitutional. Also, the executive branch in various domains enjoys de jure and de facto power that rivals Congress’s.

That said, it is difficult to suggest that judges and executive officials are *more* like directors than legislators are. Judges, even the judges of the highest court, do not fit the mold. Their power is too sharply delimited in terms of jurisdiction, while their decision-making process is too narrowly cabined by precedent and stare decisis. The President and high-level executive branch officials also behave more

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<sup>248</sup> 530 F.3d 1085 (9th Cir. 2008).

<sup>249</sup> *Id.* at 1094.

<sup>250</sup> See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. REV. 547, 550–51 (2003) (describing the director-primacy model).

<sup>251</sup> Congress has wide-ranging authority under the Commerce Clause. U.S. CONST. art. I, § 8. State legislatures generally enjoy a wide-ranging police power to legislate in the public interest. See U.S. CONST. amend. X.

<sup>252</sup> Congress’s power here stems from the Taxing and Spending Clause, U.S. CONST. art. I, § 8, cl. 1.

like corporate officers than directors. On the other hand, executive branch officials often do not and need not answer to Congress in the way that a corporate officer must (at least formally) answer to the board. In the end, I can defend only a weaker position—that no other body (including the other two coequal branches of government) stands in a clearly *superior* position to the legislature with respect to its claim to “direct” the nation or the state. If judges are persuaded, then they can analogize a legislator’s duty to the government to a director’s duty to the corporation.<sup>253</sup>

## 2. Cases

In addition to this analogy, there are some relevant precedents. Myriad opinions find public officials to be fiduciaries of their federal, state, or municipal government, or, in some cases, the government agency that employed them. For example, at the federal level, courts have imposed fiduciary obligations on an army engineer,<sup>254</sup> an employee of the Department of Agriculture,<sup>255</sup> a foreign service officer,<sup>256</sup> a civilian employee of the United States Engineers,<sup>257</sup> a real estate appraiser for the Federal Housing Administration,<sup>258</sup> a president and vice president of Export-Import Bank of the United States,<sup>259</sup> a CIA agent,<sup>260</sup> and an Interior Secretary.<sup>261</sup> At the state and local level, courts have imposed fiduciary obligations on an attorney and director of the state lottery,<sup>262</sup> a state alcoholic beverage commis-

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<sup>253</sup> One can also argue that members are fiduciaries to the government by virtue of being employees of their government. Nagy makes just this argument, although she concedes that members of Congress are not quite like the employees working on their staffs, a point with which I agree. See Nagy, *Congressional Officials*, *supra* note 10, at 1156–57. I would add that there are many other reasons to think that legislators are not mere employees and, in fact, look much more like employers. As I have already argued, there is more than a passing resemblance between legislators and corporate directors, and directors are not generally treated as employees, for example under Title VII. See, e.g., *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 450–51 (2003) (holding that physicians who were both directors and shareholders of a corporation should not be counted as employees). More generally, “[d]irectors are traditionally employer rather than employee positions.” *Chavero v. Local 241, Div. of the Amalgamated Transit Union*, 787 F.2d 1154, 1157 (7th Cir. 1986).

<sup>254</sup> *United States v. Carter*, 217 U.S. 286, 305 (1910).

<sup>255</sup> *United States v. Drisko*, 303 F. Supp. 858, 860 (E.D. Va. 1969).

<sup>256</sup> *United States v. King*, 469 F. Supp. 167, 167 (D.S.C. 1979).

<sup>257</sup> *United States v. Bowen*, 290 F.2d 40, 42 (5th Cir. 1961).

<sup>258</sup> *United States v. Kenealy*, 487 F. Supp. 1379, 1379 (D. Mass. 1980), *aff’d*, 646 F.2d 699 (1st Cir. 1981).

<sup>259</sup> *United States v. Kearns*, 595 F.2d 729, 729 (D.C. Cir. 1978).

<sup>260</sup> *Snepp v. United States*, 444 U.S. 507, 510 (1980).

<sup>261</sup> *United States v. Pan-Am. Petroleum Co.*, 55 F.2d 753, 756, 782–83 (9th Cir. 1932).

<sup>262</sup> *United States v. Bryan*, 58 F.3d 933, 936 (4th Cir. 1995) (director of state lottery); *United States v. Rebrook*, 842 F. Supp. 891, 893–94 (S.D.W. Va. 1994) (attorney of state lottery).

sioner,<sup>263</sup> a state land commissioner,<sup>264</sup> a fire department chief,<sup>265</sup> a city treasurer,<sup>266</sup> a city press secretary and director of public relations,<sup>267</sup> and a city attorney.<sup>268</sup>

Moreover, courts have not reserved the fiduciary status solely for appointed officials. Elected officials, such as a mayor,<sup>269</sup> a governor,<sup>270</sup> and a city councilman,<sup>271</sup> have also been recognized as fiduciaries of their state or municipality.

If we focus on Congress, the case of *United States v. Podell*<sup>272</sup>—which has never been cited in the scholarly commentary on insider trading<sup>273</sup>—provides clear authority for the proposition that members of Congress are fiduciaries of the United States. In this case, Congressman Podell pled guilty to federal bribery charges under 18 U.S.C. § 203,<sup>274</sup> after which the federal government filed a civil action to recover the improper payments he had received.<sup>275</sup>

In granting the government's summary judgment motion, the federal district court carefully clarified that this civil action was *not* grounded in Podell's criminal violation but rather was based on a breach of fiduciary duty "as evidenced by [the criminal violation]"<sup>276</sup> and "not on any federal statutory authority."<sup>277</sup> The court declared that Podell was a fiduciary of the US government and, interestingly, did so by invoking an analogy to the master-servant relationship:

A public official stands in a fiduciary relationship *with the United States*, through those by whom he is appointed or elected. If he secretly advances interests adverse to those of the *government* which he serves, it is a breach of confidence and he must account to his

<sup>263</sup> *United States v. Barber*, 668 F.2d 778, 780, 784 n.4 (4th Cir. 1982).

<sup>264</sup> *Williams v. State ex rel. Morrison*, 315 P.2d 981, 981 (Ariz. 1957).

<sup>265</sup> *City of Minneapolis v. Canterbury*, 142 N.W. 812, 813–14 (Minn. 1913).

<sup>266</sup> *City of Boston v. Dolan*, 10 N.E.2d 275, 278, 281 (Mass. 1937).

<sup>267</sup> *United States v. Bush*, 522 F.2d 641, 641, 643 (1975).

<sup>268</sup> *City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc.*, 322 N.W.2d 369, 369 (Neb. 1982).

<sup>269</sup> *City of Boston v. Santosuoso*, 30 N.E.2d 278, 306 (Mass. 1940).

<sup>270</sup> *United States v. Mandel*, 591 F.2d 1347, 1362–63 (4th Cir. 1979); *Agnew v. State*, 446 A.2d 425, 440–41 (Md. Ct. Spec. App. 1982).

<sup>271</sup> *United States v. Keane*, 522 F.2d 534, 538, 545 (7th Cir. 1975).

<sup>272</sup> 436 F. Supp. 1039 (S.D.N.Y. 1977).

<sup>273</sup> While not cited in the scholarly literature, this case was mentioned in congressional testimony. See *Stop Trading on Congressional Knowledge Act: Hearing on H.R. 1148 Before the H. Comm. on Fin. Serv.*, 112th Cong. 2 (2011) (statement of Jack Maskell, Legislative Att'y, Cong. Research Serv.).

<sup>274</sup> The statute prohibits members of Congress from accepting compensation for "any representational services . . . in relation to any . . . matter in which the United States is a party." 18 U.S.C. § 203(a)(1) (2006).

<sup>275</sup> See *Podell*, 436 F. Supp. at 1040.

<sup>276</sup> *Id.* at 1042.

<sup>277</sup> *Id.*

“master” for the benefits received as a result, irrespective of consideration of fraud or damage.<sup>278</sup>

In sum, under the misappropriation theory, judges can classify legislators as fiduciaries of the government that they serve. Support can be found in numerous judicial opinions recognizing public officials, including elected officials, as fiduciaries. As for members of Congress, *Podell* provides direct precedent for classifying members as fiduciaries of the US government. More importantly, judges can draw an analogy to the fiduciary relationship between a director and the corporation that he serves.

Now that I’ve marshaled support for finding legislators to be fiduciaries of their legislature, of fellow legislators, and of their government under the misappropriation theory, the task is to justify imposing the specific duty not to use entrusted confidential information for personal gain, which is the relevant duty for the misappropriation theory and tipping cases. Unlike the fiduciary duty to disclose, which is routinely applied to all fiduciaries, the scope of the duty not to use entrusted information for personal gain may vary from one fiduciary context to another. While it is uncontroversial to proscribe the exploitation of information that harms or injures the beneficiary, it is slightly more controversial to proscribe the exploitation of information regardless of whether injury can be demonstrated.<sup>279</sup> The question about harms is relevant because whether insider trading harms anyone has been the subject of intense scholarly debate.<sup>280</sup> That debate will not be settled here, although I have discussed the harms of insider trading elsewhere.<sup>281</sup> For purposes of this Article, suffice it to say that courts have regularly imposed duties on public fiduciaries without requiring any showing of harm.<sup>282</sup> Moreover,

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<sup>278</sup> *Id.* (emphasis added) (citation omitted).

<sup>279</sup> That said, under federal insider trading law, a demonstration of *potential* injury should be enough. LANGEVOORT, *supra* note 42, § 6:8, at 6-34.1. Also, the *O’Hagan* Court’s lack of significant discussion about harms—apart from the harms to the integrity of the securities markets—might be read to suggest that harmfulness of this type of breach of the duty of loyalty is presumed. *See id.* § 6:8, at 6-34.1 to -35.

<sup>280</sup> *See, e.g.*, Stephen M. Bainbridge, *The Insider Trading Prohibition: A Legal and Economic Enigma*, 38 U. FLA. L. REV. 35, 36–37 (1986) (summarizing the debate on whether the insider trading prohibition has a “rational basis” at all); William K.S. Wang, *Trading on Material Nonpublic Information on Impersonal Stock Markets: Who Is Harmed, and Who Can Sue Whom Under SEC Rule 10b-5?*, 54 S. CALIF. L. REV. 1217, 1225–29 (1981) (summarizing the respective cases for and against regulating insider trading).

<sup>281</sup> *See supra* note 36 and accompanying text.

<sup>282</sup> *See, e.g.*, *United States v. Carter*, 217 U.S. 286, 305 (1910) (“It is immaterial . . . whether the complainant was able to show that it had suffered any actual loss . . . .”); *Cnty. of Cook v. Barrett*, 344 N.E.2d 540, 548 (Ill. App. 1975) (“The absence of an allegation of damage is immaterial.”); *Jersey City v. Hague*, 115 A.2d 8, 12 (N.J. 1955) (“It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit . . . out of his agency.” (quoting *Carter*, 217 U.S. at 306)); *see also* cases discussed *infra* Part III.C.



courts have found liability based on the public fiduciary's use of entrusted information for personal gain, without requiring that harm be demonstrated.<sup>283</sup>

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I have argued that the majority view—that judges could not recognize legislators as fiduciaries under federal insider trading law—is wrong and continues to be wrong. Legislators can be deemed fiduciaries to citizens, the legislature (and fellow legislators), and the government that they serve. By analyzing congressional ethics rules, citing relevant cases, and analogizing to trustees, partners, and directors, courts could classify legislators as fiduciaries and impose the requisite fiduciary duties under federal insider trading law. Courts could do so regardless of and in addition to the STOCK Act. They could do so through ordinary legal reasoning.

### III

#### AGAINST CORRUPTION

##### A. Deepening Analogies

Part II was mostly an extended exercise in analogical reasoning. The question presented was whether legislators could be deemed “fiduciaries” under pre-STOCK Act federal insider trading law and how this might be done. The way that I answered that question was to cite relevant cases—such as *Driscoll*, *Fuchs*, and *Podell*—and also to elaborate point-by-point analogies to private trustees, corporate directors, and partners. This sort of analogical reasoning is what judges and lawyers do every day. Its persuasiveness is often intuitive and aesthetic: is there some flash of recognition between legislators and, say, corporate directors?

But the fact that analogies somehow “click” does not necessarily mean that they are well reasoned. For example, Tamar Frankel has criticized fiduciary law's reliance on analogies as “uninstructive, be-

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<sup>283</sup> See, e.g., *United States v. Keane*, 522 F.2d 534, 545 (7th Cir. 1975) (finding that use of governmental information by city councilman for personal gain amounts to a breach of fiduciary duty which is actionable under mail fraud statute); *United States v. Rebrook*, 842 F. Supp. 891, 893–94 (S.D.W. Va. 1994) (rejecting defendant's argument that loss must be alleged in order to state a claim under the wire fraud statute and finding liability under such statute for misuse of confidential information gained by virtue of one's position); *Williams v. State ex rel. Morrison*, 315 P.2d 981, 984–85 (Ariz. 1957) (noting that the commissioner “used the information obtained from such examination for his personal profit” and thus “did not truly and faithfully perform all of his official duties and consequently breached the conditions of his bond, and the surety is liable”); *City of Minneapolis v. Canterbury*, 142 N.W. 812, 814 (Minn. 1913) (holding that the fire department chief, as agent of the city, must disgorge profits accrued from sale of land to the city when he purchased such land based on information gleaned by virtue of his position, regardless of whether the principal is or is not benefited thereby).

cause the courts do not explain why some similarities . . . are relevant and others not."<sup>284</sup> In recent legal academic discussion, various schools of thought have surfaced on the nature of analogical reasoning.<sup>285</sup> I concur with Judge Richard Posner, who understands analogies as ultimately rhetorical acts that can be justified only by looking to some underlying policy or purpose of the law that is to be applied and extended.<sup>286</sup> Accordingly, in order to provide a deeper justification for the analogies offered above, I need to unpack the underlying policy or purpose that animates fiduciary law.

In this Part, my basic claim is that it is entirely appropriate and consistent with the law of fiduciary obligation to recognize legislators as fiduciaries and to impose on them the requisite duties. To support this claim, I defend a plausible definition of (public) corruption as the "use of public office for private gain," and I show how legislator insider trading fits that definition. I then demonstrate that one core purpose behind the common law of fiduciaries is to deter corruption. Although prior commentary has casually observed some link between fiduciary principles and preventing corruption,<sup>287</sup> this is the first systematic demonstration of that connection. To make this showing, I explore one strand of cases in fiduciary law targeting corruption in the public sector. These cases forbid the public fiduciaries in question from using their public positions for private gain. In the end, I show an organic alignment between recognizing legislator insider trading as a breach of fiduciary duty and one core purpose of the common law of fiduciaries. This alignment provides a deeper justification for the analogies offered above.<sup>288</sup>

In discussing the purposes and policies undergirding fiduciary law and in classifying legislator insider trading as a form of corrup-

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<sup>284</sup> Frankel, *supra* note 147, at 805.

<sup>285</sup> See, e.g., Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 962–66 (1996) (discussing different forms of analogical reasoning); Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 761–65 (2006) (reviewing LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY AND LEGAL ARGUMENT* (2005)) (concluding that reasoning by analogy is just a form of judicial and lawyerly rhetoric rather than a substantive statement of law); Cass R. Sunstein, *Commentary, On Analogical Reasoning*, 106 HARV. L. REV. 741, 742 (1993) (defending analogical reasoning over various other methods of legal thought).

<sup>286</sup> As Judge Posner puts it:

There is no such thing as an "analogical argument" in any but a rhetorical sense; you need *reasons* to determine whether one case should be thought relevantly similar to another. Analogies are not reasons; reasons are what is necessary to determine whether a similarity shall be treated as a ground for action, an analogy guiding decision.

Posner, *supra* note 285, at 768.

<sup>287</sup> See, e.g., FINN, *supra* note 133, at 214 (observing that fiduciary law's objection to bribes and secret commissions "lies in their corrupting tendency").

<sup>288</sup> Part III is severable from Part II. If the reader needs nothing more to be convinced to find the fiduciary duty, the reader should skip to Part IV, where I address objections.

tion, readers may jump to the conclusion that I am making some global, untethered evaluation that legislator insider trading is bad and thus should be banned. Although I believe this to be true and have argued the point elsewhere,<sup>289</sup> that is *not* my task here. As noted in the Introduction, my ultimate task is to ask whether judges, if confronted with a case of legislator insider trading, could find legislators to be fiduciaries within the meaning of federal insider trading law using ordinary judicial reasoning. Above, I answered that question in the affirmative. Below, I make an even stronger case by showing that the analogies invoked did not trade on trivial, coincidental, or arbitrary similarities like the fact that zebras and barber poles both have stripes. Instead, judges can justify the analogies on the ground that extending the category of fiduciary to encompass legislators promotes an underlying policy of fiduciary law, which is to combat corruption.<sup>290</sup>

## B. Corruption

As Justice Potter Stewart said of obscenity, people seem to know public corruption when they see it, but it is hard to define.<sup>291</sup> One source of difficulty lies in the fact that what counts as corruption is historically contingent. For example, today it is uncontroversial to say that a legislator accepting a bribe is corrupt. But in the nineteenth century, members of Congress openly accepted payments from companies lobbying to obstruct or advance particular legislation. For in-

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<sup>289</sup> See Kim, *Governmental Insider Trading*, *supra* note 34.

<sup>290</sup> Careful readers might object that I have lost track of what is really important, that the relevant policy consideration is not of fiduciary law generally but of insider trading law, which happens to bar such trading only when it breaches a fiduciary-like duty. But such an objection implicitly assumes that insider trading law and fiduciary law have substantially different goals. To the contrary, as I have argued below, one of the important goals of fiduciary law is to stop corruption. And, as I argue in a companion piece, insider trading law can best be theoretically rationalized as an attempt to stop one form of private corruption. See Sung Hui Kim, *Insider Trading as Private Corruption* (Mar. 22, 2013) (unpublished manuscript) (on file with author). Accordingly, extending the fiduciary category to include legislators in a manner consistent with a core purpose of fiduciary law (anti-corruption) will be consistent with the purpose of federal insider trading law (also anti-corruption). Finally, it is my view that when the Supreme Court in *Chiarrella* expressly predicated insider trading liability on a breach of fiduciary duty, it intended to incorporate the purposes of fiduciary law.

<sup>291</sup> See, e.g., Michael A. Genovese, *Presidential Corruption: A Longitudinal Analysis*, in *CORRUPTION AND AMERICAN POLITICS* 135, 136 (Michael A. Genovese & Victoria Farrar-Myers eds., 2010) [hereinafter *CORRUPTION AND AMERICAN POLITICS*] (“[T]here is no commonly accepted definition of what constitutes corruption.”); Michael Johnston, *The Definitions Debate: Old Conflicts in New Guises*, in *THE POLITICAL ECONOMY OF CORRUPTION* 11, 12 (Arvind K. Jain ed., 2001) (“No one has ever devised a universally satisfying ‘one-line definition’ of corruption.”); Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 126–27 (2004) (noting that corruption means different things to the different Supreme Court Justices).

stance, Daniel Webster was on retainer from the Bank of the United States to represent the bank's interests, and he unabashedly sent written reminders to replenish his bank account.<sup>292</sup> Indeed, it was not until 1853 that congressional bribery was formally banned.<sup>293</sup> And even after the ban, bribed members went undisciplined until public outrage erupted over the Credit Mobilier bribery scandal in the 1870s, which impelled Congress to begin censuring them.<sup>294</sup> Not until more than a century later, in 1980, did the House finally expel a member for bribery.<sup>295</sup>

Also, what counts as corruption is culturally contingent.<sup>296</sup> Societies maintain different political systems with differing notions of accountability, cultivate different institutions of power with varying degrees of maturity and legitimacy, negotiate different boundaries between public and private domains, and draw on diverse relationships between power and wealth. Accordingly, societies necessarily experience corruption in diverse ways, making it difficult to define both precisely and universally. As John Kleinig and William C. Heffernan have concluded: "Both historically and cross-culturally, instantiations of corruption have been contested, not only with respect to their identity but also, in certain instances, with respect to their undesirability."<sup>297</sup>

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<sup>292</sup> Daniel Webster, who served in the House and Senate and as Secretary of State, once reminded the President of the Bank of the United States: "If it be wished that my relation to the Bank should be continued, it may be well to send me the usual retainers." THE CORRESPONDENCE OF NICHOLAS BIDDLE 218 (Reginald C. McGrane ed., 1919) (Webster to Biddle, Dec. 21, 1833).

<sup>293</sup> See DENNIS F. THOMPSON, *ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION* 2 (1995).

<sup>294</sup> See *id.*

<sup>295</sup> The House voted unanimously to expel Michael J. "Ozzie" Myers, a Pennsylvania Democrat who accepted bribes in an undercover ABSCAM investigation. This was the House's first expulsion for corruption. *Id.* Four years earlier, the House failed to expel Andrew J. Hinshaw, a California Republican who had been convicted of accepting a bribe. *Id.*

<sup>296</sup> See JENS CHR. ANDVIG & ODD-HELGE FJELDSTAD WITH INGE AMUNDSEN, TONE SÏSSENER & TINA SÏREIDE, *CORRUPTION: A REVIEW OF CONTEMPORARY RESEARCH* 46 (2001) ("[W]hat is seen as corruption varies from one country to another."). That said, as Robert Klitgaard notes, "[o]ver a wide range of 'corrupt' activities, there is little argument that they are wrong and socially harmful," even across societies. ROBERT KLITGAARD, *CONTROLLING CORRUPTION* 4 (1988).

<sup>297</sup> John Kleinig & William C. Heffernan, *The Corruptibility of Corruption*, in *PRIVATE AND PUBLIC CORRUPTION* 3, 3 (William C. Heffernan & John Kleinig eds., 2004). The authors note:

Even if we confine ourselves to what we now familiarly speak of as public corruption, it soon becomes clear that what "we" consider to be corrupt is often contentiously so. One group's perquisite is another's corruption; one group's tradition of patronage is another's nepotism; one group's campaign contribution is another's bribery; one group's just rectification is another's misappropriation.

*Id.*

And even within a single society at a particular moment in time, there will be disagreement about what counts as corruption. For example, elites differ from the general public in what they regard as corrupt.<sup>298</sup> Also, factors such as race, education, and income affect the likelihood of perceiving the government to be corrupt.<sup>299</sup>

Given such contingencies and controversies, my goal is not to proffer and defend some best definition of public corruption, which would attempt to specify a strict set of necessary and sufficient conditions that capture all instances of what people regard as corruption with no over- or under-inclusiveness. Indeed, the cognitive science of categorization casts serious doubt on the success of any such project.<sup>300</sup> Instead, I offer something more modest: a definition that draws on rough consensus in the political science and political economy literatures, incorporates less contested cultural understandings, and performs useful analytic work in the narrow context of insider trading.

I start with the “classical” understanding of public corruption in political science. As Dennis Thompson explains:

In the tradition of political theory, corruption is a disease of the body politic. Like a virus invading the physical body, hostile forces spread through the political body, enfeebling the spirit of the laws and undermining the principles of the regime. The form the virus takes depends on the form of government it attacks. In regimes of a more popular cast, such as republics and democracies, the virus shows itself as private interests. Its agents are greedy individuals, contentious factions, and mass movements that seek to control collective authority for their own purposes. *The essence of corruption in this conception is the pollution of the public by the private.*<sup>301</sup>

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<sup>298</sup> See Matthew J. Streb & April K. Clark, *The Public and Political Corruption*, in CORRUPTION AND AMERICAN POLITICS, *supra* note 291, at 278, 281 (discussing the perception gap in the views of the elites versus the public on corruption).

<sup>299</sup> These factors, however, are less predictive than a respondent's political attitudes. See Persily & Lammie, *supra* note 291, at 153–67.

<sup>300</sup> Since the 1970s, advances in the fields of cognitive psychology, cognitive linguistics, artificial intelligence, and anthropology have provided a persuasive account of how humans categorize people, things, and abstract concepts. Such an account discounts the role of deductive reasoning from abstracted principles. See generally GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987) (discussing the importance of categorization and describing the variety of ways in which humans categorize). Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Straus and Cain*, 1995 U. CHI. LEGAL F. 163, 164 (“[C]oncepts such as corruption cannot be applied satisfactorily to political life by deduction from general theoretical propositions.”). For a specific exploration of these insights onto the legal profession, see Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 95–111 (2010).

<sup>301</sup> THOMPSON, *supra* note 293, at 28 (emphasis added) (footnote omitted). For explorations of alternative, more intuitive understandings of corruption, including those definitions that emphasize the underlying psychological condition rather than the outward behavior, see generally Kleinig & Heffernan, *supra* note 297; Laura S. Underkuffler, Cap-

Thus, the classical understanding of public corruption is grounded in the notion that private interests somehow taint the public good. More modern definitions of corruption build on this understanding but tend to drop the organic metaphors of disease, degeneration, or decay.<sup>302</sup> They also tend to replace substance with procedure—the notion of substantive public good is replaced by the democratic process, which purifies private interests into legitimate public purposes.<sup>303</sup> Under most modern definitions, corruption involves an abuse of trust occasioned by an improper commingling of one's public role and private gain in derogation of predetermined democratic processes—essentially, an act that disrespects the sacred border between public and private. At minimum, there seems to be an academic consensus that public corruption entails an “abuse of public roles or resources for private benefit.”<sup>304</sup> In short, public corruption is the use of public office for private gain.<sup>305</sup> Reflecting this

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tured by Evil: The Idea of Corruption in Law (2011) (unpublished manuscript) (on file with the author).

<sup>302</sup> On the modern definitions of corruption, see THOMPSON, *supra* note 293, at 29.

<sup>303</sup> See THOMPSON, *supra* note 293, at 28 (noting that the modern conception of corruption retains the notion of the “pollution of the public by the private” but replaces the “consensus on the public good” with the “democratic process”).

<sup>304</sup> Michael Johnston, *Democracy Without Politics? Hidden Costs of Corruption and Reform in America*, in CORRUPTION AND AMERICAN POLITICS, *supra* note 291, at 13, 16 (emphasis omitted).

<sup>305</sup> See, e.g., SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 91 (1999) (defining corruption as the “misuse of public power for private gain”); Kleinig & Heffernan, *supra* note 297, at 3 (“If there is an orthodox account of corruption, it is that it consists in the improper use of public office for private gain.”); Mark E. Warren, *Political Corruption as Duplicious Exclusion*, 37 POL. SCI. & POL. 803, 803 (2006) (noting the “received conception of political corruption” as “the abuse of public office for private gain”); WORLD BANK INSTITUTE, CONTROL OF CORRUPTION INDEX, <http://info.worldbank.org/governance/wgi/pdf/cc.pdf> (last visited Oct. 22, 2012) (“Control of corruption captures perceptions of the extent to which public power is exercised for private gain . . .”).

Three definitional issues are worth noting at the outset. First, many definitions of corruption emphasize the “misuse” (or “abuse”) of public office for private gain. That, of course, raises the question of what counts as “misuse” versus acceptable “use.” The same concern can be alternatively reframed as involving the distinction between “improper personal gain” (which I call “private gain”) and “proper personal gain,” e.g., one’s standard salary and approved perquisites. For simplicity’s sake, I would rather locate the disapprobation inherent in the term “misuse” in the term “private gain” and the critical nexus to “public office.” Hence, I define corruption simply as the *use* of public office for private gain.

Second, the definition of corruption adopted here is *in certain respects* a narrow one—what political scientists would categorize as *individual* corruption. But academics also refer to a broader *institutional* (or “systemic” form of) corruption. See, e.g., THOMPSON, *supra* note 293, at 25 (distinguishing individual and institutional corruption); Michael A. Genovesi, *The Politics of Corruption and the Corruption of Politics*, in CORRUPTION AND AMERICAN POLITICS, *supra* note 291, at 1, 3 (distinguishing individual and systemic corruption, in which public office is used not for private gain, such as lining one’s own pockets, but *political* gain, such as furthering one’s ideological causes, political party’s fate, or even personal political ambitions). The notion of institutional (or systemic) corruption certainly

simple core understanding, the very first page of the House Ethics Manual commands that members, officers, and employees of the House “should not in any way use their office for private gain.”<sup>306</sup>

*Private gain.* Since at least the time of Cicero, it has been “beyond debate that officials of the government are relied upon to act for the public interest not their own enrichment.”<sup>307</sup> But not all forms of personal enrichment are dubious. After all, members are not required to make a vow of poverty before holding office.<sup>308</sup> Indeed, the Framers endorsed the idea that members of Congress should be paid salaries on the view that being independently wealthy should not be a qualification for elected office.<sup>309</sup> Therefore, the notion of private gain must recognize that some forms of personal gain<sup>310</sup> are necessary or incidental, and thus appropriate, to performing one’s political role.

As proposed by Andrew Stark, “private gain” signifies that the public officials are enjoying the gain in question *outside* of their official roles. “The modifier *private* suggests a kind of gain—a trip on a corporate jet, attending an association meeting at a resort, an all-expense paid trip to a charity event—that does not, or ought not, or need not, redound to the official as part of his or her job.”<sup>311</sup> Thus,

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resonates with much of the electorate (e.g., the popular rhetoric on “corrupting” but lawful campaign contributions). However, there is much less consensus about what constitutes institutional corruption and whether anything should be done about it. Compare Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 112 (criticizing the notion of institutional corruption), and David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 142, with LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 226–47 (2011) (highlighting the importance of focusing on more systemic forms of corruption, referred to as “dependence corruption”). Consequently, trying to draw a bright line between institutional corruption and hardball politics is difficult. Thankfully, legislator insider trading falls squarely in the more easily defined category of individual corruption. For purposes of my analysis, I mean to emphasize private gain (as defined here) and not political gain, which raises another set of complex questions about what constitutes the proper (and improper) pursuit of political gain. See *infra* text accompanying notes 310–18.

Third, the definition of corruption advanced here is not coextensive with illegality. Indeed, there may be conduct falling under my definition that is not currently illegal but nonetheless arguably corrupt. This makes sense in light of the fact that there is almost always a gap between prevailing cultural understandings and what the law contemporaneously proscribes.

<sup>306</sup> HOUSE ETHICS MANUAL, *supra* note 217, at 1; see *id.* at 185 (citing Rule 23, cl. 3 for the proposition that the House Code of Official Conduct prohibits a House member or other employee “from using his or her official position for personal gain”).

<sup>307</sup> JOHN T. NOONAN, JR., BRIBES 704 (1984).

<sup>308</sup> Cf. THOMPSON, *supra* note 293, at 50 (noting that a governor convicted of political corruption was nevertheless “right in assuming public office is not like entering a monastery”).

<sup>309</sup> *Id.*

<sup>310</sup> By “personal gain,” I mean to include gain that not only directly benefits the official in question but also inures to the official’s family or friends.

<sup>311</sup> ANDREW STARK, CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE 76 (2000) (defining the term “private gain from public office”).

private gain is a form of personal gain that is *supererogatory*—neither part of the explicit compensation allocated to the public official nor culturally viewed as an acceptable or unavoidable perquisite of the role.<sup>312</sup> In other words, only if the personal gain in question is neither necessary nor incidental to one's official role can the gain qualify as private gain.<sup>313</sup> Conversely, “[i]f the official's responsibilities required the official to board the corporate aircraft, or be present at the association meeting, or attend the charity event, then there would be no ‘private’ gain, just the exercise of office.”<sup>314</sup>

*From Public Office.* It is not enough, however, that the gain be private in order for the underlying act to constitute an abuse of public office. The gain must also somehow flow from the official's *public office*. In other words, there must be a proximate causal nexus between the public role and the private enrichment. At minimum, it must be shown that the official would never have received the invitation to ride the corporate jet, attend the association meeting at the resort, or participate in the all-expenses paid charity event *but for* her public role. If the causal nexus is absent, the official's conduct is not improper because the opportunity did not flow from the public role. For example, if the official can demonstrate that prior to becoming a public official she had routinely received the same invitation to attend the all-expenses paid charity event, the causal link would arguably be severed and the alleged private gain would not be viewed as improper.<sup>315</sup> In addition, the official must have somehow intended<sup>316</sup> to receive the gain in question in order for her conduct to be deemed improper.<sup>317</sup>

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<sup>312</sup> Two clarifications are in order. First, by referring to private gain as being “supererogatory,” I do not suggest that private gain is in any sense virtuous, which is a common connotation of that term. Second, the definition of “private gain” that I adopt would generally exclude longstanding explicit perquisites of congressional office because they ordinarily serve an important political function. For example, the proper purpose of the franking privilege is to aid communication with constituents. However, if the franking privilege is misused by members for personal purposes in contravention of rules, it would amount to “private gain” under this definition. For discussion of the franking privilege, see THOMPSON, *supra* note 293, at 73. Also, my definition of “private gain” would exclude certain noneconomic forms of personal gain, such as enhanced prestige or increased name recognition, because they are unavoidable consequences of, and thus incidental to, holding office and for those reasons deemed unobjectionable.

<sup>313</sup> For simplicity, I have chosen to locate the disapprobation that attaches to “corruption” within the definition of “private gain” and the nexus to “public office.” For a further explanation, see *supra* note 305.

<sup>314</sup> Cf. STARK, *supra* note 311, at 76 (“To then say that such private gain flows from *public office* implies that the official enjoys such gain *only* because she happens to occupy that official role.” (emphasis added)).

<sup>315</sup> *Id.* at 76.

<sup>316</sup> Cf. Underkuffler, *supra* note 301, at 9 (arguing that corruption requires “intentional misconduct” (emphasis omitted)).

<sup>317</sup> A de minimis level of intention is implied by the intentionality-laden word “use” in the phrase “use of one's public office for private gain.”



This is merely to acknowledge that inadvertent or accidental accruals of alleged private gain can hardly be regarded as “corrupt.”<sup>318</sup>

Even if this “private gain from public office” definition seems plausible, some readers might object that it remains formalistic without some deeper justification. After all, what is so wrong about using one’s public office for private gain such that it deserves the pejorative label of “corruption”? Why should a public official respect the border between public and private? What is the harm that is captured by the phrase, “the pollution of the public by the private”?<sup>319</sup>

In some cases, the harm to the government or to the general public will not be so clear. Take, for example, bribery in the public procurement context—the classic case of private gain from public office. One common argument that bribed officials assert is that there is no victim.<sup>320</sup> After all, it is certainly plausible that the bribed official would have awarded the contract to the briber anyway, even without the bribe.<sup>321</sup> However, as has been extensively documented in the corruption literature, private gain from public office generates certain important but sometimes indirect harms. A full explication of the kinds of harms is beyond the scope of this Article, but I have discussed them elsewhere.<sup>322</sup> For purposes of this Article, I will briefly summarize one important set of harms—the “temptation costs” incurred by the use of public office for private gain.

When public officials—whether elected or appointed—pursue private gain from public office, they are invariably tempted to make decisions to advance their own financial interests without regard to the interests of the public. This distortion of incentives risks a serious

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<sup>318</sup> Because my definition of corruption is not coextensive with civil or criminal illegality, I do not wish to further specify any mens rea conditions attaching to the intentionality of conduct, as those conditions will differ depending on whether the case is civil or criminal. Moreover, it is possible that conduct can be regarded as corrupt but not unlawful.

<sup>319</sup> The phrase comes from THOMPSON, *supra* note 293, at 28. This is not to say that private gain from public office is normatively problematic for consequentialist reasons only. There may also be deontological objections to private gain from public office, which may not be well captured by terms such as “costs” or “harms.”

<sup>320</sup> Omar Azfar et al., *The Causes and Consequences of Corruption*, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 47 (2001).

<sup>321</sup> Under federal law, acceptance of a bribe is illegal, regardless of whether the bribe actually influenced the official’s conduct. See, e.g., *United States v. Valle*, 538 F.3d 341, 346 (2008); *United States v. Quinn*, 359 F.3d 666, 675 (2004); see also *United States v. Muhammad*, 120 F.3d 688, 693 (1997) (“[A] defendant violates [the federal antibribery statute] by merely seeking or demanding a bribe, regardless of whether he accepts or even agrees to accept it.”).

<sup>322</sup> See Kim, *Governmental Insider Trading*, *supra* note 34, at 60–61 (discussing the “temptation, distraction and legitimacy costs” of public corruption in the form of governmental insider trading and drawing linkages with findings in the political science and economic literatures).

misallocation of government financial resources.<sup>323</sup> For example, empirical work has found high levels of corruption to be associated with underinvestment in education and overinvestment in public infrastructure.<sup>324</sup> This stems from the fact that education provides fewer opportunities for bribes. As a result, public officials in responsible positions tend to channel their energies toward public infrastructure projects, where the opportunities for self enrichment are greater.<sup>325</sup> Gradually and incrementally, the pursuit of private gain from public office facilitates the pollution of the public by the private.

Having justified this basic definition of corruption, we can now apply it to legislator insider trading. First, any gain arising out of trading on material, nonpublic information acquired through one's legislative position clearly constitutes supererogatory financial gain—private gain. Profits earned from insider trading are not part of the explicit compensation allocated to members. Nor is there anything in the job description of legislators or in the nature of their legislative tasks that requires them to use their own personal funds to trade in any stocks, let alone based on information gleaned through their work in the legislature. Further, overwhelming public opinion against legislator insider trading suggests that such trading is not culturally viewed as one of the acceptable perquisites of legislators' jobs.<sup>326</sup> Moreover, no federal or state legislator has publicly defended this practice. In fact, when members of Congress were directly confronted by the press with allegations of insider trading, they reacted defensively and evasively.<sup>327</sup> Second, such trading opportunities flow from their public office (i.e., they would not have such lucrative trading opportunities *but for* the information gained by virtue of their office). Thus, legislator insider trading fits squarely within the definition of public corruption—the use of public office for private gain.

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<sup>323</sup> See, e.g., KLITGAARD, *supra* note 296, at 38 (summarizing studies of harms of public corruption); TANJA RABL, PRIVATE CORRUPTION AND ITS ACTORS: INSIGHTS INTO THE SUBJECTIVE DECISION MAKING PROCESSES 62–64 (2008) (discussing studies on the harms of corrupt procurements).

<sup>324</sup> See ROSE-ACKERMAN, *supra* note 305, at 2–3 (summarizing findings).

<sup>325</sup> See *id.*

<sup>326</sup> A recent public opinion poll reports that the “vast majority of Americans (86%) believe insider trading laws should be enforced against members of Congress.” *New Judicial Watch-Harris Interactive Poll Sends Warning to Washington Politicians*, JUDICIAL WATCH (Jan. 20, 2012), <http://www.judicialwatch.org/press-room/weekly-updates/new-poll-and-stealing-democracy/>.

<sup>327</sup> See, e.g., *Confronting Pelosi on Insider Trading*, CBSNEWS (June 17, 2012, 3:55 PM), [http://www.cbsnews.com/8301-504803\\_162-57323518-10391709/confronting-pelosi-on-insider-trading/?tag=segmentExtraScroller;housing](http://www.cbsnews.com/8301-504803_162-57323518-10391709/confronting-pelosi-on-insider-trading/?tag=segmentExtraScroller;housing) (discussing how no congressmen were willing to meet with *60 Minutes* reporters to discuss insider-motivated investments and showing Representatives John Boehner and Nancy Pelosi actively avoiding questions on the issue).

Moreover, this definitional fit is neither accidental nor merely formal. The temptation costs that justify the basic definition clearly apply in this domain. For example, suppose that the Chair of the House Appropriations Committee believes that a particular military vehicle, manufactured by a small publicly traded corporation, is ultimately unsuitable for the Defense Department's purposes. But suppose that he thinks it is a close call because there is no obviously better alternative in the marketplace. Suppose further that his four children, who are each one year apart in age, will soon be attending college. If he advocates strongly in favor of the military vehicle, there is a good chance that the expenditure will be approved. And if he also purchases stock in advance, he stands to gain a hefty profit, which could help pay for college tuition. Because of his personal financial situation, he will be sorely tempted to advocate in favor of the military expenditure, notwithstanding his understanding of the merits.

The above hypothetical makes clear that legislator insider trading risks distorting the legislator's incentives and misallocating government financial resources. And it is not just that legislators will be tempted to cast a bad *vote*. Temptations, unchecked by law, are likely to pervade all forms of legislative activity, such as making phone calls, setting agendas, giving speeches, subpoenaing witnesses, asking questions in hearings, and so on. Indeed, entrepreneurial legislators might more proactively<sup>328</sup> try to hustle up trading opportunities by redirecting research resources, reorganizing their offices, and rewriting the rules of legislative ethics.<sup>329</sup>

In sum, public corruption can plausibly be defined as the use of public office for private gain. This definition makes sense in light of the temptation costs incurred because of private gain from public office. And legislator insider trading not only fits the definition but also generates these same costs. As a result, we can view and classify legislator insider trading as a form of public corruption. Now that I've defended a plausible definition of (public) corruption and shown that legislator insider trading falls within that definition, the task is to demonstrate that one core purpose of the common law of fiduciaries is to deter corruption.

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<sup>328</sup> For example, with respect to bribery, economic research indicates that once bribery becomes pervasive in a society, government officials do not remain passive recipients of cash but rather become active extortionists of fees. KLITGAARD, *supra* note 296, at 41–42. Citizens, too, increasingly “invest their energies in the pursuit of illicit favors.” *Id.* at 44.

<sup>329</sup> Cf. Susan Rose-Ackerman, *Corruption: Greed, Culture, and the State*, 120 YALE L.J. ONLINE 125, 135 (2010) (describing the potential effects of unchecked corruption).

### C. Fiduciary Law's Norm Against Corruption

Fiduciary law encompasses myriad contexts. As I've pointed out, its ad hoc development and resulting fuzzy boundaries have frustrated the legal scholars who study it. In response, scholars have earnestly searched for unifying principles that coherently explain why certain relationships are subject to fiduciary obligations<sup>330</sup>—to partial success. Like others,<sup>331</sup> I doubt that a single set of principles could successfully rationalize the various species of fiduciaries<sup>332</sup> without resorting to extreme imprecision and risking overinclusiveness.<sup>333</sup> As Deborah DeMott has explained: "The evolution of fiduciary obligation . . . owed much to the situation-specificity and flexibility that were Equity's hallmarks. . . . [A]s Equity developed to correct and supplement the common law, the interstitial nature of Equity's doctrines and functions made these doctrines and functions resistant to precise definition."<sup>334</sup> Cognizant of these difficulties, my goal is not to propose any grand theory of fiduciary law. All that I seek to demonstrate is that one core purpose of fiduciary law is anti-corruption.

Although numerous doctrines within fiduciary law appear to target corruption in the private sector,<sup>335</sup> one particular doctrine best illustrates an anti-corruption norm for the public context (although certainly not limited to the public sector). In several cases, only a few

<sup>330</sup> See, e.g., FOX-DECENT, *supra* note 163, at 4; TAMAR FRANKEL, FIDUCIARY LAW 4–6 (2011); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993); Leib & Ponet, *Fiduciary Representation*, *supra* note 163, at 183; Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1684 (1990).

<sup>331</sup> See, e.g., FINN, *supra* note 133, at 1 (arguing that use of the term "fiduciary" merely provides "a veil behind which individual rules and principles have been developed" and that it is "meaningless to talk of fiduciary relationships as such"); DeMott, *Beyond Metaphor*, *supra* note 135, at 915 ("Described instrumentally, the fiduciary obligation is a device that enables the law to respond to a range of situations in which, for a variety of reasons, one person's discretion ought to be controlled because of characteristics of that person's relationship with another. This instrumental description is the only general assertion about fiduciary obligation that can be sustained."); Sealy, *supra* note 129, at 73 (noting that "we cannot proceed any further in our search for a general definition of fiduciary relationships," suggesting that fiduciary relationships must be defined "class by class," and positing four categories of fiduciary relationships).

<sup>332</sup> See Sealy, *supra* note 129, at 74–79, for a description of four categories of fiduciary relationships.

<sup>333</sup> See Frankel, *supra* note 147, at 797 ("The differences among fiduciaries may be so great that treating them as a group would require a very high level of generality, rendering a unified examination of little use.")

<sup>334</sup> DeMott, *Beyond Metaphor*, *supra* note 135, at 881 (footnote omitted).

<sup>335</sup> An anti-corruption norm (as applied to the private sector) is apparent in cases which illustrate a judicial impulse against pursuing selfish gain through one's fiduciary position. For cases restricting the fiduciary's ability to obtain or use lease renewals and reversions, opportunities, and confidential information for selfish gain, see, for example, *Irving Trust Co. v. Deutsch*, 73 F.2d 121 (2d Cir. 1934); *Zeiden v. Oliphant*, 54 N.Y.S.2d 27 (N.Y. Sup. Ct. 1945); *Keech v. Sanford*, (1726) 25 Eng. Rep. 223 (Ch.) 223. For a definition of private corruption, see Kim, *Governmental Insider Trading*, *supra* note 34, at 46–48.

of which are discussed below, courts have proscribed the use of public office for private gain. They have done so by applying the so-called rule against secret profits,<sup>336</sup> which forbids fiduciaries from accepting bribes or secret commissions.<sup>337</sup>

The rule against secret profits (or the rule against bribes and secret commissions) emanates from the “exclusive benefit principle,”<sup>338</sup> which generally requires the fiduciary “not to use her discretionary power to arrogate to herself personal benefits from her position—even if such benefits do not directly harm the beneficiary.”<sup>339</sup> To assure this fidelity, the law provides that it is appropriate to structure the fiduciary’s compensation to promote the proper alignment of the fiduciary’s incentives with the beneficiary’s interest.<sup>340</sup> Since a fiduciary’s *overt* compensation represents the amount thought to be sufficient to induce the desired performance, there would be “no need to permit an indeterminate amount of additional, *covert* compensation.”<sup>341</sup> And not only are covert rewards viewed as unnecessary, they are also risky to the beneficiary’s interests. Therefore, it is important “to deter those fiduciaries from even approaching the borders of self-aggrandizing behavior.”<sup>342</sup>

The following three cases nicely illustrate the anti-corruption norm for the public context. First, consider a paradigmatic bribe in which there is “an explicit exchange of a specific benefit for a specific official action (or inaction).”<sup>343</sup> *Attorney-General v. Goddard*, for in-

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<sup>336</sup> See Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, in *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* 55, 73–74 (John W. Pratt & Richard J. Zeckhauser eds., 1985) (noting that in older case law on corporate managers, courts expressed this rule as a duty not to take “secret profits,” i.e., compensation that is not “expressly provided to the manager in the governing statutes, charter and bylaws, and employment contracts (if any)”).

<sup>337</sup> See, e.g., RESTATEMENT (THIRD) OF AGENCY § 8.02 (2006) (prohibiting an agent from acquiring “a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent’s use of the agent’s position”).

<sup>338</sup> Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. Rev. 595, 601 (1997) [hereinafter Brudney, *Fiduciary Duty*] (defining the “exclusive benefit principle” as the notion “that the fiduciary’s duty of loyalty requires the trustee or agent to act as the beneficiary’s (or principal’s) alter ego and act only as the latter would act for himself”); see RESTATEMENT (THIRD) OF AGENCY § 8.01, (2006) (“An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship”); RESTATEMENT (FIRST) OF TRUSTS § 170 (1935) (noting that the duty of a trustee is “to administer the trust solely in the interest of the beneficiary”).

<sup>339</sup> Leib & Ponet, *Fiduciary Representation*, *supra* note 163, at 188–89.

<sup>340</sup> See RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. b (2006) (“A principal may choose to structure the basis on which an agent will be compensated so that the agent’s interests are concurrent with those of the principal.”).

<sup>341</sup> Victor Brudney & Robert Charles Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997, 999 (1981) (emphasis added).

<sup>342</sup> Brudney, *Fiduciary Duty*, *supra* note 338, at 602.

<sup>343</sup> Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 787 (1985).

stance, involved the case of an English police sergeant who was convicted of accepting bribes to ignore crimes that he was responsible for monitoring.<sup>344</sup> In the civil case, the Crown sued to recover the payments, and the sergeant demurred.<sup>345</sup>

According to the court, the question presented was whether the rule against secret profits in agency law applied to this case, even though the sergeant was not entrusted with a pecuniary interest—i.e., the sergeant was not employed in a commercial or financial capacity—and there was no pecuniary harm to the Crown.<sup>346</sup> The court concluded that the rule applied “because it is contrary to equity that the agent or servant should retain money so received without the knowledge of his master.”<sup>347</sup> After all, “this officer was employed at this time as an agent to make inquiries and got this money in the course of those inquiries.”<sup>348</sup> In other words, the officer received the bribe (private gain) by reason of his position (public office). According to the court, it did not matter whether there was “any injury in fact” or, more specifically, whether the principal’s “pecuniary interest is damaged in fact or not.”<sup>349</sup>

In overruling the demurrer, the court emphasized that the sergeant’s position was a fiduciary one. Specifically, the court noted that there was a fiduciary relationship “not because he received into his hands any property of his employers or did not, but because he was under an obligation to use the information which he got for the purpose of his employer, certainly not to use it for his own profit.”<sup>350</sup> In other words, there was an expectation that the sergeant would use his public office for the exclusive benefit of the Crown and not for private gain.

*Goddard* involved a case of payment (private gain) in exchange for an official action or, more accurately, official police *inaction* (from public office). But courts have extended liability to payment in exchange not for any official action but simply the use of one’s official *status*. The frequently cited case of *Reading v. Attorney-General*<sup>351</sup> is illustrative. In *Reading*, a smuggling ring paid a British army sergeant in the Royal Army Medical Corps (stationed in Egypt) to escort contraband around the city of Cairo. By sitting—in full military uniform—on the front seat of a civilian lorry loaded with the illicit cargo, the

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<sup>344</sup> *Attorney-General v. Goddard*, [1929] 98 L.J.K.B. 743 at 744 (Eng.).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 745.

<sup>347</sup> *Id.* at 746.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 745.

<sup>350</sup> *Id.*

<sup>351</sup> [1951] A.C. 507 (Eng.); see *Reading v. The King*, [1948] 2 K.B. 268 (Eng.) (prior history).

sergeant enabled the smugglers to pass Egyptian police lines and avoid arrest.<sup>352</sup> The sergeant was subsequently apprehended, court-martialed, and imprisoned for two years.<sup>353</sup> After his release from prison, he brazenly brought a petition to recover the money that the Crown seized from his apartment.<sup>354</sup> On appeal, the court held that the Crown was entitled to retain the sums confiscated.<sup>355</sup>

In granting the Crown's requested remedy, the court pointed to a pattern of cases that had employed the rule against secret profits to recover an agent's or servant's sums, regardless of whether the master had suffered any detriment in fact.<sup>356</sup> This was important because "the Crown in this case . . . has lost no profits [and] suffered no damage."<sup>357</sup>

The court went on to apply the rule to the particular facts presented. Addressing the issue of whether the nexus to the sergeant's position was sufficient to warrant the remedy, the court noted that it did not matter that the sergeant was acting outside the scope of his employment and thus outside his official capacity when he earned the money. Rather, what mattered was that the sergeant *used* his official position to earn it:

He nevertheless was using his position as sergeant in His Majesty's Army and the uniform to which his rank entitled him to obtain the money which he received. In my opinion any official position, whether marked by a uniform or not, which enables the holder to earn money by its use gives his master a right to receive the money so earned even though it was earned by a criminal act.<sup>358</sup>

In sum, the plurality of the court premised its holding on the sergeant's official status, which enabled him to accept the bribe.<sup>359</sup> Interestingly, the plurality stopped just short of expressly requiring a fiduciary relationship to justify the remedy granted. However, it acknowledged that the relationship in question was a fiduciary one in "a wide and loose sense"<sup>360</sup> and, on that basis, the Crown was alternatively entitled to the money.<sup>361</sup> The concurrence was less equivocal on this issue. It expressed agreement with the lower court that the sergeant "owes to the Crown a duty as fully fiduciary as the duty of a servant to his master or of an agent to his principal,"<sup>362</sup> despite the

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<sup>352</sup> Reading v. The King, [1948] 2 K.B. 268 at 268.

<sup>353</sup> *Id.* at 269.

<sup>354</sup> Reading v. Attorney General, [1951] A.C. 507 at 508.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 515.

<sup>357</sup> *Id.* at 516.

<sup>358</sup> *Id.* at 514.

<sup>359</sup> *Id.* at 508.

<sup>360</sup> *Id.* at 516.

<sup>361</sup> *Id.* at 508.

<sup>362</sup> *Id.* at 517.

fact that the sergeant was technically neither an agent nor a servant under the law.<sup>363</sup>

Recall that the first case I described, *Goddard*, was an example of money in exchange for an official's inaction. The second case, *Reading*, was an example of money (private gain) in exchange for an unofficial action that nevertheless exploited some official status (from public office), as signaled by the uniform. Finally, consider, *United States v. Drumm*,<sup>364</sup> a case in which a breach of fiduciary duty was found when the fiduciary neither took official action nor exploited his official status. In *Drumm*, a United States Department of Agriculture (USDA) poultry inspector surreptitiously moonlighted by doing part-time consulting for a private poultry processing plant in violation of USDA policy.<sup>365</sup> The federal government sued for breach of fiduciary duty. The district court directed a verdict in favor of the defendant, but the appellate court vacated the district court's judgment and remanded the case.<sup>366</sup>

In explaining its holding, the appellate court complained that "the defendant had secretly placed himself in a position of conflicting interests and loyalties. This he had no right to do."<sup>367</sup> The court then went on to highlight the potential harms that might arise from this conflict of interest: by secretly accepting this second employment "involving duties adverse to those he owed the government," the defendant "compromised to a great extent his position as an impartial poultry inspector and his usefulness to the government."<sup>368</sup>

Although the court claimed that the defendant's outside private employment carried duties adverse to those owed to the government, there was no evidence of adverseness. Indeed, the reported facts strongly suggest that the private company was genuinely interested in improving the quality of its poultry and hired the USDA employee to further that purpose.<sup>369</sup> Nothing in the factual record suggested that the defendant was discouraged from discharging his main responsibility as a government poultry inspector—to ensure that federal standards of sanitation and wholesomeness were met by all companies who voluntarily enrolled in the USDA's inspection program.<sup>370</sup> The defendant had simply earned some secret money "on the side."

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<sup>363</sup> *Id.* at 517 (Lord Normand, concurring).

<sup>364</sup> 329 F.2d 109 (1st Cir. 1964).

<sup>365</sup> *Id.* at 109.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 112.

<sup>368</sup> *Id.*

<sup>369</sup> For example, the employee advised the company on how to handle chickens after delivery so as to reduce contamination. "He assisted [the company] in tracking down and eliminating the source of discoloration of ducks received by producers . . . ." *Id.* at 111.

<sup>370</sup> *See id.* at 110–11 (describing the voluntary nature of program).



Nevertheless, according to the court, “[t]he fact that there is no evidence that defendant passed bad poultry or that the reputation of the government’s inspection program was damaged by defendant’s conduct would not bar recovery.”<sup>371</sup> After all, the court went on, the “agent has the power to conceal his fraud and hide the injury done his principal.”<sup>372</sup> Accordingly, it would be unwise to require a showing of actual harm where an agent acquired a “secret benefit . . . out of his agency”<sup>373</sup> (that is, a private gain from his public office). The court then noted the crucial importance of holding public officials to account:

The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.<sup>374</sup>

As the above three cases demonstrate—along a single, consistent doctrinal strand—fiduciary law prohibits public fiduciaries from taking secret profits. It does so prophylactically, regardless of whether any actual harm to the beneficiary can be shown, so long as there is a nexus to the fiduciary’s position. The underlying policy is anti-corruption, preventing private gain from public office.

If we join this insight (that fiduciary law contains an anti-corruption norm) with the prior analysis (concluding that legislator insider trading counts as corruption), we see the appropriateness of interpreting fiduciary law in a way that reaches legislators, without regard to whether actual harm to the relevant beneficiaries can be shown. This appeal to anti-corruption deepens the justification for analogizing legislators to private trustees, directors, and partners. Moreover, this analysis helps us see that *Fuchs* and *Podell*, two cases that have recognized legislators—state and federal—as fiduciaries, were also targeting corruption. In employing traditional analogical reasoning to find legislators to be fiduciaries for purposes of federal insider trading law, judges can rest assured that they are not stretching fiduciary law unrecognizably or arbitrarily to pursue some objective that is alien to the doctrine.

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<sup>371</sup> *Id.* at 113.

<sup>372</sup> *Id.* (quoting *United States v. Carter*, 217 U.S. 286, 305 (1910)).

<sup>373</sup> *Id.* (quoting *Carter*, 217 U.S. at 305).

<sup>374</sup> *Id.* (quoting *Carter*, 217 U.S. at 305).

#### IV OBJECTIONS

I have argued that courts could find that legislators owe fiduciary duties to certain beneficiaries for purposes of federal insider trading law. If courts impose such duties, then legislators who trade on material, nonpublic information could be held liable under classical and misappropriation theories. Now I will answer some objections to my argument.<sup>375</sup>

##### A. Judicial Activism

Some readers may worry that this common-law-like extension of who counts as a “fiduciary” amounts to unwarranted judicial activism. For example, it’s one thing to say that corporate insiders are fiduciaries of their own shareholders who happen to be on the other side of their trades. It’s quite another thing to say (as the objection goes) that state legislators are fiduciaries of citizen-investors on the other side of their trades. The latter seems to be a far more radical extension of fiduciary law than the former.

This concern, although understandable, loses much force when one takes a historical view of insider trading law, examines its evolution, and appreciates how equally radical prior judicial extensions have been. Put another way, including legislators under a “fiduciary” label is no more activist than various other extensions that courts made long ago and now view as uncontroversial, black-letter insider trading law.

Consider, for example, the Supreme Court’s original affirmation of the classical theory of insider trading in *Chiarella* in 1980. At the time, the common law tort of misrepresentation—the basis for Justice Powell’s opinion in *Chiarella*—provided meager support for the proposition that a corporate insider owes a fiduciary duty to the

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<sup>375</sup> Some of the following objections are constitutional in nature. In answering them, I remain focused on the doctrine because the relevant constitutional objections appear not to be overwhelming. In this type of discussion, one can always “go deeper,” for example, by interrogating competing constitutional values and policies that undergird the doctrine. However, exploring such arguments may mislead readers into thinking that judges will rely on policy considerations untethered to doctrine when evaluating these constitutional objections, which is unlikely to be the case. Moreover, exploring constitutional policy arguments in depth goes far beyond the scope (and strict space constraints) of this already lengthy Article. Suffice it to say that, for purposes of this Part, if one were inclined to explore the underlying constitutional policies, one must take into account the perspective that the Constitution may also contain strong anti-corruption principles. For just such an argument, see Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009). For a critique of that argument, see Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 Nw. U. L. REV. 1 (2012).

counterparty in an open-market transaction.<sup>376</sup> Prior to *Chiarella*, the weight of authority found no such duty to investors trading in the impersonal securities markets.<sup>377</sup> Indeed, the majority rule at the time found no liability for insider trading executed over an anonymous exchange.<sup>378</sup> At the time, courts opining on this issue distinguished between face-to-face transactions where, they thought, investors were justified in relying on an insider's duty to disclose<sup>379</sup> and open-market transactions where, they thought, no such justification existed because it was impossible to know whether an insider was on the other side of the trade. On an anonymous exchange like the New York Stock Exchange, there is no bargaining, and the decision to buy and the decision to sell are completely independent. As a result, in such a transaction, it is impossible to show any reliance or injury stemming from the insider's nondisclosure.<sup>380</sup>

Moreover, if we go further back in time, say, to 1951, we see that the majority rule at the time did not even impose fiduciary obligations in many face-to-face transactions. As Richard Painter and his colleagues have pointed out, the so-called "majority" rule at the time held that "officers and directors [were] subject to a fiduciary duty to the corporation and its shareholders only in dealings with or on behalf of the corporation."<sup>381</sup> Hence, in most jurisdictions, officers and directors could "trade freely in the stock of their own corporation *in*

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<sup>376</sup> See A.C. Pritchard, *United States v. O'Hagan: Agency Law and Justice Powell's Legacy for the Law of Insider Trading*, 78 B.U. L. Rev. 13, 22 (1998) (noting that "the common law of deceit provides scant support for [the position in *Chiarella*] that a corporate insider defrauds a shareholder" when the insider simply trades on the open market); see also *Goodwin v. Agassiz*, 186 N.E. 659, 660 (Mass. 1933) (holding that directors do not "occupy the position of trustee toward individual stockholders" and that there was "no fiduciary relation between them and the plaintiff in the matter of the sale of his stock" (quoting *Blabon v. Hay*, 169 N.E. 268, 271 (Mass. 1929))).

<sup>377</sup> See Pritchard, *supra* note 376, at 23.

<sup>378</sup> To be sure, a minority of courts eventually came to adopt the "special facts" doctrine, in which special circumstances can render an insider's silence in a face-to-face transaction unconscionable and thus warrant the imposition of a duty of full disclosure. That said, cases adopting this doctrine are easily distinguishable from transactions over impersonal exchanges. See *id.* at 25 (distinguishing special facts doctrine from other cases); see also *Strong v. Repide*, 213 U.S. 419, 434 (1909) (creating the special facts doctrine). While there were a few states which required disclosure of nonpublic information to shareholders even in the absence of special circumstances, they did so only for face-to-face transactions, which are thus distinguishable from stock market transactions. See *Anabtawi*, *supra* note 106, at 865 (citing *Oliver v. Oliver*, 45 S.E. 232 (Ga. 1903)).

<sup>379</sup> See Alison Grey Anderson, *Fraud, Fiduciaries, and Insider Trading*, 10 HOFSTRA L. REV. 341, 366-67 (1982) ("Silence by a fiduciary is fraudulent primarily because the beneficiary is likely to interpret that silence in a face-to-face transaction as meaning that the fiduciary is aware of no additional material information.").

<sup>380</sup> LANGEVOORT, *supra* note 42, § 2:3, at 2-6 ("Given the essential independence of buyer and seller decisions, causation and injury flowing from any nondisclosure are difficult to trace.").

<sup>381</sup> Painter, Krawiec & Williams, *supra* note 43, at 162 n.34 (citing LOUIS LOSS, *SECURITIES REGULATION* 824 (1st ed. 1951)).

*an individual capacity* without any affirmative disclosure obligation, so long as they did not engage in active misrepresentations or half-truths.<sup>382</sup> Therefore, as long as they traded stock *in their own account* and not in their representative capacities, officers and directors did not owe fiduciary duties of disclosure to the shareholders of their corporation.<sup>383</sup>

Even if we accept as uncontroversial the proposition that corporate insiders owe fiduciary duties to individual shareholders when trading on an exchange, there was almost no common law support for the proposition that a corporate insider owed a special duty to *purchasers* and not just sellers of the company's shares.<sup>384</sup> Unless purchasing investors already own company shares, they are not current but *prospective* shareholders of the company. Therefore, it is the consummation of the particular transaction with the insider that brings the investor into a fiduciary relation with the insider. Accordingly, before that transaction is completed, purchasers are mere strangers to the corporate insider.

The Supreme Court's only response to the problem presented by the common law was to quote Judge Learned Hand:

[T]he director or officer assumed a fiduciary relation to the buyer by the very sale; for it would be a sorry distinction to allow him to use the advantage of his position to induce the buyer into the position of a beneficiary although he was forbidden to do so once the buyer had become one.<sup>385</sup>

Judge Hand's statement, although characteristically eloquent, is not an argument. After all, the "sorry distinction" is grounded in corporate law, which has historically treated shareholders and nonshareholders differently. Moreover, this "sorry distinction" was the prevailing law of the day.<sup>386</sup>

There are more examples of judicial extensions that we currently view to be normal, indeed banal, but that at one time may have been controversial. For example, for centuries, courts did not regard ordinary employees as fiduciaries because they exercised very little discretionary authority and did not ordinarily occupy positions of trust and

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<sup>382</sup> *Id.* (emphasis added).

<sup>383</sup> Of course, even at the time, this majority rule was slowly giving way to the minority view that "corporate insiders are subject to a fiduciary duty when dealing with shareholders of their corporation and thus must make full disclosure of all material facts." *Id.* Also, according to Louis Loss, the majority rule had merged into the "special facts" doctrine. *Id.*

<sup>384</sup> See Pritchard, *supra* note 376, at 26.

<sup>385</sup> *Chiarella v. United States*, 445 U.S. 222, 227 n.8 (quoting *Gratz v. Claughton*, 187 F.2d 46, 49 (2d Cir. 1951)).

<sup>386</sup> As Adam Pritchard notes, "[a]lthough this distinction may be 'sorry,' it is the common law rule." Pritchard, *supra* note 376, at 26.

confidence toward their employer.<sup>387</sup> This changed somewhat in the twentieth century when a number of cases began extending the fiduciary status to mere employees,<sup>388</sup> although even today not all states hold that employees are presumptively fiduciaries.<sup>389</sup> However, it is now clear that courts deem administrative employees to be fiduciaries for purposes of federal insider trading law.<sup>390</sup> Indeed, courts have held a secretary,<sup>391</sup> a copyholder for a financial printer,<sup>392</sup> and an aide in the audio-visual department<sup>393</sup> to be fiduciaries under insider trading law.

Of course, one could flip this evidence around to lament that we are on a slippery slope towards ever-expanding insider trading liability and that we must draw the proverbial line in the sand here and now, with legislators. But such a plea presumes that the expansions in the past and the expansion at issue here have been bad ones. Until that substantive case has been made, suffice it to say that, for purposes of this objection, legislator insider trading is normatively problematic for

<sup>387</sup> See, e.g., *Irving Trust Co. v. Deutsch*, 73 F.2d 121, 125 (2d Cir. 1934) ("A mere employee of a corporation does not ordinarily occupy a position of trust or confidence toward his employer unless he is also an agent in respect to the matter under consideration."); *Palmer v. Cypress Hill Cemetery*, 25 N.E. 983, 985 (N.Y. 1890) ("The plaintiff was not a trustee at the time the contract with him was made, and his relation . . . was not fiduciary, but was that of an employe[e] . . .").

<sup>388</sup> See, e.g., *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 7 (Del. Ch. 1949) (holding that when an employee obtains secret information, the employee assumes a position of trust within the company); *Essex Trust Co. v. Enwright*, 102 N.E. 441, 443 (Mass. 1913) (compelling employee to assign a lease to detriment of his employer).

<sup>389</sup> See, e.g., *ATC Distrib. Grp. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 715 (6th Cir. 2004) ("[U]nlike 'mere' employees, officers of a company may be presumed to have a fiduciary relationship to the company on that basis alone . . ."); *TalentBurst, Inc. v. Collabera, Inc.*, 567 F. Supp. 2d 261, 265–66 (D. Mass. 2008) (noting that in Massachusetts, an employee must occupy a position of trust and confidence in order to warrant fiduciary duties); *Atlanta Mkt. Ctr. Mgmt. Co. v. McLane*, 503 S.E.2d 278, 281 (Ga. 1998) ("The employee-employer relationship is not one from which the law will necessarily imply fiduciary obligations . . ."). Some states require that an employee be a "key employee" in order to be fiduciary. See, e.g., *Burbank Grease Servs. v. Sokolowski*, 717 N.W.2d 781, 796 (Wis. 2005) ("If the employee is a 'key employee,' then a fiduciary duty of loyalty will exist.").

<sup>390</sup> See, e.g., *United States v. Larrabee*, 240 F.3d 18, 19 (1st Cir. 2001) (affirming liability of law firm's director of fiduciary services under misappropriation theory); *SEC v. Musella*, 578 F. Supp. 425, 438–39 (S.D.N.Y. 1984) (finding law firm's office-services manager to be a fiduciary for purposes of tipping liability).

<sup>391</sup> See *SEC v. Falbo*, 14 F. Supp. 2d 508, 522–23 (S.D.N.Y. 1998) (finding an executive's secretary to be a fiduciary under misappropriation theory); *Brophy*, 70 A.2d at 7 (holding that a secretary occupies "a position of trust and confidence toward the corporation, with respect to the information so acquired, and the purchase of its stock for his own account was a breach of the duty he owed to" the corporation).

<sup>392</sup> *SEC v. Matera*, No. 82 Civ. 6225, 1983 WL 1396, at \*2–3 (S.D.N.Y. 1983), *aff'd*, 745 F.2d 197 (2d Cir. 1984).

<sup>393</sup> *SEC v. Trikilis*, No. CV 92-1336-RSWL(EEX), 1992 WL 301398, at \*3 (C.D. Cal. July 28, 1992), *vacated*, Civ. A. No. 92 1336-RSWL(EEX), 1993 WL 43571 (C.D. Cal. Jan. 22, 1993).

the same reasons that public corruption is problematic, as I have argued more extensively elsewhere.<sup>394</sup> As for general anxiety about judicial activism, I explained in Part III.C that we can justify extending the category of “fiduciary” to include legislators by reference to a policy that is central to fiduciary law.<sup>395</sup>

In sum, the extension that I am calling for is no more radical than prior extensions made under Rule 10b-5, which the Supreme Court once referred to as a “judicial oak which has grown from little more than a legislative acorn.”<sup>396</sup> It is certainly no more radical than the judicially implied private cause of action under Rule 10b-5 or the judicial creation of the insider trading causes of actions under the classical and misappropriation theories. I am not asking for the creation of a brand new cause of action against legislators. I am merely advocating that, should a court find itself in the position to so hold, legislators could be recognized as fiduciaries under the already existing insider trading cause of action.

#### B. Federalism

Nevertheless, is there something especially problematic—perhaps constitutionally—with applying federal insider trading law to state legislators? One might object that applying the federal securities laws to target the public corruption of *state* legislators (even if it is in the form of legislator insider trading) represents an unconstitutional exercise of federal power—an invalid federal “incursion on traditional state power”<sup>397</sup> (i.e., the power to police the conduct of its own officials). But, as a doctrinal matter, this objection is not tenable given the fact that since the 1980s, the federal government has successfully prosecuted thousands of state and local officials for acts of corruption.<sup>398</sup> Further, many such prosecutions were based on federal statutes that have not only survived constitutional scrutiny<sup>399</sup> but also were jurisdictionally rooted in the Commerce Clause<sup>400</sup>—the same constitutional

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<sup>394</sup> See Kim, *Governmental Insider Trading*, *supra* note 34, at 61.

<sup>395</sup> See *supra* note 36 and accompanying text.

<sup>396</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

<sup>397</sup> George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 250 (1997) (discussing the *United States v. Lopez* Court’s concern with protecting traditional state police power).

<sup>398</sup> See George D. Brown, *New Federalism’s Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 WASH. & LEE L. REV. 417, 421 (2003).

<sup>399</sup> See Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 370 (1989) (stating that the constitutionality of statutes prosecuting state and local officials for corruption is well established).

<sup>400</sup> See *id.* (noting that Racketeer Influenced and Corrupt Organizations statute, the Travel Act, and the Hobbs Act were all grounded in the Commerce Clause and survived constitutional challenge). Public officials are also prosecuted under the federal mail fraud statutes, which are grounded in the postal power.

grounding for the federal securities laws, including the insider trading prohibition.

And there should be little doubt that the federal insider trading prohibition rests on constitutionally secure footing. First, unlike the few federal statutes that have been invalidated on federalism grounds,<sup>401</sup> Section 10(b) and Rule 10b-5 (as does the whole of federal securities laws)<sup>402</sup> regulate what is clearly economic activity involving “instrumentalities of interstate commerce”<sup>403</sup> and thus substantially relates to interstate commerce.<sup>404</sup> Hence, the relevant statute indisputably falls within the federal commerce power. Second, Section 10(b) and Rule 10b-5 both contain express jurisdictional elements that require the trier of fact to find a nexus with interstate commerce.<sup>405</sup> This ensures, through a case-by-case inquiry, that the activity in question is connected to interstate commerce.<sup>406</sup> Third, the insider trading prohibition does not commandeer state resources, which would be intrusive to state power; “it neither requires the states to do anything nor imposes any financial burden on them.”<sup>407</sup> Fourth, as my arguments have suggested, the federal ban on insider trading is nondiscriminatory and generally applicable; the same legislation applies equally to public officials and private parties.<sup>408</sup> Therefore, the use of federal securities laws to target legislator insider

<sup>401</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (civil damages provision of the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (Gun-Free School Zones Act).

<sup>402</sup> See Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1585 n.29 (2005), for a discussion on the constitutionality of a hypothetical complete federal displacement of state corporate law. It goes without saying that if Congress has the power to displace state corporate law in its entirety, Congress certainly has the power to regulate insider trading in its entirety.

<sup>403</sup> Ryan K. Stumphauzer, Note, *Electronic Impulses, Digital Signals, and Federal Jurisdiction: Congress's Commerce Clause Power in the Twenty-First Century*, 56 VAND. L. REV. 277, 289 (2003). For a discussion of some lower courts' broad readings of the phrase “instrumentality of interstate commerce,” see *id.* at 312–13.

<sup>404</sup> *Lopez*, 514 U.S. at 558–59 (“Congress’ commerce authority includes the power to regulate those activities having a substantial relationship to interstate commerce . . .”).

<sup>405</sup> Section 10(b)'s prohibitions apply when a defendant uses “any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange.” 15 U.S.C. § 78j. Likewise, Rule 10b-5 provides that it is unlawful “for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce . . . .” 17 C.F.R. § 240.10b5.

<sup>406</sup> *Cf. Lopez*, 514 U.S. at 561 (striking down part of the statute because “it contains no jurisdictional element which would ensure” that the prohibited activity affects interstate commerce).

<sup>407</sup> John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 454–55 (1998) (observing that federal anti-corruption legislation does not easily offend the anti-commandeering principle of *New York v. United States*).

<sup>408</sup> See *id.* at 455 (suggesting that Justice O'Connor created an exception to the federalism limits imposed in *New York v. United States* for legislation that “subjected a state to the same legislation applicable to private parties”).

trading at the subnational level should survive federalism-based challenges.

### C. Speech or Debate Clause

The final major objection, which applies only to members of Congress and is relevant notwithstanding the STOCK Act, concerns the Speech or Debate Clause, which reads in part: “for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place.”<sup>409</sup> This Clause immunizes members of Congress from civil or criminal liability for “conduct necessary to perform their duties within the sphere of legitimate legislative activity.”<sup>410</sup> Such activity includes, for example, speech or debate in either House, voting, drafting committee reports, and conduct at legislative committee hearings.<sup>411</sup> This Clause was designed to foster legislative independence and to avoid coercion or intimidation from the executive or judicial branches of government.<sup>412</sup> In addition to securing the independence of the legislature, the Clause “serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.”<sup>413</sup>

The scope of the liability immunity is, however, not all encompassing. And the Speech or Debate Clause was not intended “simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process.”<sup>414</sup> As such, the immunity only “protects Members against prosecutions that directly impinge upon or threaten the legislative process.”<sup>415</sup> Thus, the actions that are protected “must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage

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<sup>409</sup> U.S. CONST. art. I, § 6, cl. 1; see JOHN E. NOWAK & RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW 305–12 (8th ed. 2010) (explaining the history of the Speech or Debate Clause and the cases interpreting it). Of course, if a state constitution has a similar clause, some of this analysis may cross-apply. *Cf., e.g., Wilkins v. Gagliardi*, 556 N.W.2d 171, 176–77 (Mich. App. 1996) (“The Speech or Debate Clause of the Michigan Constitution is substantially similar to that of the United States Constitution . . .”).

<sup>410</sup> *Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979) (quoting *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 501 (1975)) (internal quotation marks omitted).

<sup>411</sup> *Gravel v. United States*, 408 U.S. 606, 624–25 (1972).

<sup>412</sup> See, e.g., *United States v. Brewster*, 408 U.S. 501, 508 (1972) (noting that the Founders designed the Clause to foster legislative independence); *Gravel*, 408 U.S. at 616 (“The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.”); *United States v. Johnson*, 383 U.S. 169, 180–81 (1966) (“[The Clause] prevent[s] intimidation by the executive . . .”).

<sup>413</sup> *Johnson*, 383 U.S. at 178. For separate exploration of general separation of powers principles, see *supra* note 35.

<sup>414</sup> *Brewster*, 408 U.S. at 507.

<sup>415</sup> *Gravel*, 408 U.S. at 616.



or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."<sup>416</sup>

To be clear, the Speech or Debate Clause does not grant blanket immunity to members of Congress and does not convert them into "super-citizens" above the law.<sup>417</sup> As the Supreme Court explained:

Article I, § 6, cl. 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts.<sup>418</sup>

Accordingly, notwithstanding the Clause, members of Congress have been prosecuted for fraud,<sup>419</sup> bribery,<sup>420</sup> extortion,<sup>421</sup> violation of honorarium laws,<sup>422</sup> and embezzlement.<sup>423</sup>

There is no reason to treat the trading of securities (in violation of federal law) any differently. Such trades are not integral to the legislative process and thus do not constitute any part of "legitimate legislative activity" that warrants protection under the Speech or Debate Clause. In most cases, legislator insider trading will not involve the making of any speech in Congress, the casting of any vote, or the writing of any report—core legislative actions that the Constitution shields from prosecutorial scrutiny. Instead, insider trading will involve a market trade made privately, intentionally without fanfare, and on the basis of material, nonpublic information. The fact that such

<sup>416</sup> *Id.* at 625.

<sup>417</sup> *Brewster*, 408 U.S. at 516; *see id.* at 520 (rejecting "sweeping claims [that] would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office").

<sup>418</sup> *Grauel*, 408 U.S. at 626.

<sup>419</sup> *United States v. Johnson*, 383 U.S. 169, 172 (1966) ("No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to [illegally] influence the Department of Justice [and thereby defraud the United States], that is in no wise related to the due functioning of the legislative process."). The Court did hold, however, that with respect to a conspiracy charge that turned on dissecting both the text and motivation for a speech that Johnson made during the legislative process, the Speech or Debate Clause would prevent prosecution. *Id.* at 173–77. The Court was careful to guard against overreading. It explained, "[o]ur decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *Id.* at 185.

<sup>420</sup> *Brewster*, 408 U.S. at 501 (prosecution under 18 U.S.C. §§ 201(c)(1), (g)); *United States v. McDade*, 28 F.3d 283, 283 (3d Cir. 1994).

<sup>421</sup> *United States v. Renzi*, 651 F.3d 1012, 1012 (9th Cir. 2011).

<sup>422</sup> *Fed. Election Comm'n v. Wright*, 777 F. Supp. 525, 527 (N.D. Tex. 1991).

<sup>423</sup> *United States v. Rostenkowski*, 59 F.3d 1291, 1302–04 (D.C. Cir. 1995).

information is obtained *through* some connection to Congress does not mean that trading on such information suddenly becomes a legitimate or official act of Congress.<sup>424</sup>

*United States v. Brewster*<sup>425</sup> provides a useful precedent.<sup>426</sup> Brewster, a former Senator, was prosecuted for violating various federal anti-bribery laws. The Supreme Court wrote:

Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an act resulting from the nature, and in the execution, of the office. Nor is it a thing said or done by him, as a representative, in the exercise of the functions of that office . . . .<sup>427</sup>

Just as a bribe is not a legislative act, neither is insider trading. The Court also wisely observed that if the goal of the Speech or Debate Clause is legislative independence, then allowing bribes would threaten independence far more than permitting criminal prosecutions.<sup>428</sup>

In addition to providing liability immunity for legislative acts, however, the Speech or Debate Clause provides a testimonial and an evidentiary privilege.<sup>429</sup> So, even if liability immunity is not available to a member, a member could decline to testify<sup>430</sup> based on the privilege, and evidence regarding legislative acts or their underlying moti-

<sup>424</sup> Cf. *Brewster*, 408 U.S. at 528 (“The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions.”)

<sup>425</sup> 408 U.S. 501 (1972).

<sup>426</sup> Cf. Bainbridge, *Inside the Beltway*, *supra* note 9, at 303 n.153 (comparing legislator insider trading to legislator bribery under *Brewster* and stressing that both fall outside the scope of legislative activity).

<sup>427</sup> *Brewster*, 408 U.S. at 526 (internal quotation marks omitted); *see id.* at 512 (“A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it.”).

<sup>428</sup> *See id.* at 524–25 (“But financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.”); Bainbridge, *Inside the Beltway*, *supra* note 9, at 303 (“[B]y removing the perverse incentives such trading opportunities create, the legislative process would be enhanced.”).

<sup>429</sup> *United States v. Renzi*, 651 F.3d 1012, 1031 (9th Cir. 2011) (holding that certain exhibits and emails that discussed status of actual legislation should have been excluded from the grand jury based on these privileges). For the justification of this holding, *see generally id.* at 1020, 1035 n.27 (describing three distinct protections—liability immunity, testimonial privilege, and evidentiary privilege). Whether the Clause creates also a nondisclosure privilege applicable against the Executive Branch is in dispute. *Compare United States v. Rayburn House*, 497 F.3d 654, 663 (D.C. Cir. 2007) (finding the privilege), *with Renzi*, 651 F.3d at 1034 (rejecting the privilege).

<sup>430</sup> *See Gravel v. United States*, 408 U.S. 606, 616 (1972) (recognizing testimonial privilege).

vation could be excluded from grand and petit juries or at trial.<sup>431</sup> This could impede prosecutorial efforts because proof of a breach of fiduciary duty would ordinarily require some showing that the member somehow obtained the nonpublic information in question by reason of the member's connection to Congress. That, in turn, could require tracing the provenance of the information to the member's performance of a legislative act,<sup>432</sup> e.g., the member's attendance at a subcommittee briefing in which the information in question was conveyed. Thus, a court could exclude evidence establishing the member's presence at a critical briefing (e.g., a transcript of the briefing) on the grounds that such evidence refers to a legislative act that is protected by the Speech or Debate Clause.<sup>433</sup> Indeed, in *United States v. Swindall*, the Eleventh Circuit Court of Appeals dismissed certain indictments against a congressman where the evidence solicited by the prosecution attempted to establish the congressman's *membership* in certain congressional committees.<sup>434</sup>

That said, there will be many occasions in which the relevant information will not have been obtained in the course of a member's performance of a legislative act. For example, the member may acquire the information while the member was engaged in so-called political activities, which do not fall within the core conduct protected by the Speech or Debate Clause. These activities include a "wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Govern-

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<sup>431</sup> See *United States v. Helstoski*, 442 U.S. 477, 487–88 (1979) (holding that evidence that refers to a member's legislative act or inquiries into the motivation behind a legislative act may not be introduced in a government prosecution). It is not entirely clear whether a member can waive the Speech or Debate Clause. See *id.* at 490–91 (holding that if waiver is possible, it "can be found only after explicit and unequivocal renunciation of the protection," but not deciding the question of its possibility).

<sup>432</sup> See *United States v. Renzi*, 686 F. Supp. 2d 956, 971 (D. Ariz. 2010) (referring to the definition of "legislative act" as "an act generally done in Congress in relation to the business before it . . . or things said or done . . . as a representative, in the exercise of the functions of that office" (quoting *Brewster*, 408 U.S. at 512) (internal quotation marks omitted)).

<sup>433</sup> Although neither pure *speech* nor *debate*, a member's attendance at congressional hearings, briefings, or debates nonetheless is necessary to performing all other legislative functions that are clearly protected by the Clause, such as voting or preparing committee reports. Accordingly, the Supreme Court has acknowledged that "congressional efforts to inform itself through committee hearings are part of the legislative function." *Hutchinson v. Proxmire*, 443 U.S. 111, 132–133 (1979).

<sup>434</sup> *United States v. Swindall*, 971 F.2d 1531, 1543 (11th Cir. 1992). The prosecution presented the evidence relating to the Congressman's membership status in certain committees for the purpose of supporting an inference that the Congressman had "unique and specific knowledge" of certain statutory provisions. The establishment of such knowledge was critical to the prosecution's case of perjury. See *id.* at 1542. It should be noted, however, that the Court declined to dismiss the other indictments, where the prosecution established the requisite evidence with reference to a legislative act. See *id.* (declining to dismiss Count Five).

ment contracts, preparing [newsletters] to constituents, news releases, and speeches delivered outside the Congress."<sup>435</sup>

To take a concrete example, imagine that a member meets with a Food and Drug Administration (FDA) official on behalf of a constituent to discuss the agency's dealings with the constituent. During the meeting, the FDA official tells the member in confidence that the FDA intends to approve a potential blockbuster drug, manufactured by a particular publicly held pharmaceutical company. If the member trades on such information, the Speech or Debate Clause should pose no obstacle for the prosecution's case. Of course, the resolution of any particular case will turn on the specific facts. Suffice it to say that there will be many cases in which the member obtained the information via a sufficiently close nexus to the member's official position to justify imposing the insider trading prohibition.

Finally, it should be noted that the Speech or Debate Clause does not immunize members of Congress from ordinary criminal process, including properly issued search warrants, even of congressional offices.<sup>436</sup> In sum, the Speech or Debate Clause creates no substantive liability immunity because insider trading is not a legitimate legislative activity. It may, however, create some evidentiary difficulties, depending on the type of evidence sought.<sup>437</sup>

#### CONCLUSION

Legislators, federal and state, are not statutorily exempted from federal insider trading law. Instead, the reason why federal insider trading law is thought not to apply to them is because legislators are thought not to be fiduciaries to anyone. But as I have argued, that majority view is mistaken. Judges could have and still can find legislators to be fiduciaries to the people, the legislature (and fellow legislators), and the government that they serve. In support, I have provided relevant cases and also plausible analogies to the private trustee, the director, and the partner. Even more, I have explained that those analogies are justified because they further an underlying policy of fiduciary law: stopping corruption. Finally, I have demonstrated that there are no overwhelming objections, although prosecutors may

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<sup>435</sup> *Brewster*, 408 U.S. at 512. Also, in *Gravel*, the Court held that the lobbying of executive branch officials, though generally done, was not protected by the Speech or Debate Clause because such activity was "beyond the legislative sphere." 408 U.S. at 625-26. In addition, *promises* to perform a legislative act are not protected by the Clause. See *Helstoski*, 442 U.S. at 489.

<sup>436</sup> See NOWAK & ROTUNDA, *supra* note 409, at 312-13.

<sup>437</sup> In addition, the Privilege from Arrest Clause, U.S. CONST. art. I, § 6, is inapplicable because the privilege is limited to protection from civil arrest, which is now an obsolete practice. See NOWAK & ROTUNDA, *supra* note 409, at 312; Bainbridge, *Inside the Beltway*, *supra* note 9, at 302.

face evidentiary obstacles in making their case, as posed by the Speech or Debate Clause.

It is tempting to think that all of this is academic given the passage of the STOCK Act. But that Act addresses the majority view only for members of Congress. The conventional wisdom that legislators are not fiduciaries remains intact for the more than seven thousand state legislators in service. Worse, the Act's passage may solidify and canonize this mistaken understanding of fiduciary law and thereby of federal insider trading law, with unintended consequences. Thus, it still matters that judges get federal insider trading law right.