INTRODUCTION

EACH election day, some of us dutifully march off to the polls to vote. The more we care and are excited, the more we tend to think of electoral politics in quite simple terms: Individual voters choose candidates to represent them. Full stop. End of picture. The act of choice is direct and unmediated. By pulling levers in the voting booth, voters establish such a close relationship to those they elect that the laws and actions that subsequently flow from them are legitimated, even when many voters disagree with the outcomes. Democratic political legitimacy, in most views, rests on
this immediacy and transparency of representation.\textsuperscript{1} By contrast, the power lodged in the judicial and administrative branches of the government can be viewed with some suspicion, not because those branches lie beyond the control of the electoral process—both branches are, after all, subject to political discipline through appointment, budget, discharge, and legislative overruling—but because electoral influence over them is too strongly mediated.\textsuperscript{2} To many, the presence of the legislative and executive branches between the voters and agencies makes agencies less, not more, legitimate.

Such a simple conception of politics has many weaknesses, chief among them an inability to account well for many of the actors that enliven our electoral scene. Although individuals cast the ultimate vote, other actors, like political parties, political action committees, civic groups, corporations, and unions, help choose the candidates, promote those candidates, and fund their campaigns.\textsuperscript{3} In fact, these other actors often control these activities even more than individuals do. Much money contributed to the national political parties, for example, comes from corporations and unions, not individuals.\textsuperscript{4}

Under the simple view, however, these political intermediaries

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\textsuperscript{1}This simple story underlies much of the United States Supreme Court's effort to police the political process. See Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.").

\textsuperscript{2}See generally Theodore J. Lowi, The End of Liberalism: Ideology, Policy and the Crisis of Public Authority (1969) (outlining proposals through which judicial and administrative power could be legitimized).


\textsuperscript{4}In the 1997–98 election cycle, businesses contributed $105,694,151 in soft money and labor organizations contributed $7,796,053. See Public Disclosure, Inc., Soft Money Summary (last modified Dec. 28, 1998) <http://www.tray.com/feeinfo/_smrpt.htm> (listing soft money totals). Individuals, on the other hand, contributed only $42,883,722 in soft money, and many of these individuals were tied closely to business interests. See id. Individual hard money contributions must also be considered. In 1998, individuals contributed $24,881,477.31 to the Democratic National Committee, see F.E.C. IMAGE 99034242263 (Page 2 of 684) (visited Aug. 18, 1999) <http://herndon1.srdrc.com/cgi-bin/fecimg>, and $46,801,543.81 to the Republican National Committee, see F.E.C. IMAGE 99034230221 (Page 2 of 1476) (visited Aug. 18, 1999) <http://herndon1.srdrc.com/cgi-bin/fecimg>.
represent an embarrassment to democratic theory. They get in the way of pure democratic politics. By standing between the individual voter and elected officials, they would seem to attenuate the connection between voters and policy that ultimately legitimates political outcomes.

There is a simple story that helps overcome this embarrassment. Political intermediaries increase the meaningfulness of individual political participation, and their role may be explained as a way of branding otherwise hard to understand political merchandise. Just as the mark of Underwriter's Laboratories signals that an electrical good can be counted on to work safely when an ordinary consumer could not determine that from simple inspection, so too the mark of a political party signals that a particular candidate bears some relationship to a bundle of particular political positions. Such brand name identification, this explanation has it, helps some political consumers make choices more easily and effectively. Political parties, in other words, stand between voters and candidates to help bring the two closer together.

This insight allows democratic theory to put what would otherwise be an embarrassment to good democratic use. And, better yet, this insight is even partly true. Political intermediation can promote democracy by helping to overcome the deep principal-agent problems inherent in representation. Instead of further distancing the principal (voter) and agent (elected official) from each other and making the lines of authority between them less clear, intermediation can enable the principal better to choose its agents and then better to monitor and control those agents' activi-

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6 See Tashjian v. Republican Party, 479 U.S. 208, 220 (1986) ("[T]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.").

7 See Aldrich, supra note 5, at 49 (noting that party affiliation provides a brand name to a candidate).

ties. In this view, political intermediaries intervene in order to make representation more direct and transparent, or, in economic lingo, to bring down the direct agency costs that would ensue if a principal had to assume the immediate task of overseeing and evaluating the work of an agent.

Part I of this Article discusses agency problems inherent in representation and how political intermediaries can help lessen them. It draws on both agency law and corporate law to show that voters have fewer means than do other kinds of principals to prevent their primary agents from misbehaving. Intermediation thus plays a crucial role in politics. Without intermediaries to help manage their primary agents, voters would wield dangerously little control over the officials they elect. Intermediaries take up some slack and help us to better monitor our representatives' actions, evaluate their behavior, and reward or punish them appropriately. This is true, moreover, whatever our view of political representation.9

If we believe that our agents should act as trustees, transcend our narrow private interests, and seek the public good—a civic republican conception of representation—intermediaries can work to keep them to those tasks. If, on the other hand, we believe that our agents should pursue our narrow private interests—a pluralist conception of representation—intermediaries can work to focus them on this task too. Interestingly, our discussion of intermediation stands independent of any particular conception of representation. The benefits and dangers we point out depend on the agents and intermediaries deviating from the role the principals see for them—whatever that role may be.

Yet the insight that political intermediation can boost democratic legitimacy is only partly right, for reasons that a comparison to the law of corporate governance helps make clear. Political intermediaries in the public domain pose two new kinds of problems: superagency costs and rent-seeking. Part II discusses the first of these problems. It argues that political intermediaries cannot ease the traditional principal-agent problem in representation without creating another. They add yet another level of agency to representation itself. Political intermediaries are second-order agents

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9 For a general discussion of the various theories of representation, see Hanna Fenichel Pitkin, The Concept of Representation (1967).
who help manage the first-order agency relationship between voter and elected official. They are, in economic terms, superagents, who work to minimize the direct agency costs inherent in representation. But superagents are still agents—particularly powerful ones, in fact—and they introduce a whole new set of possible agency costs. Sometimes the superagents, just like the first-order representational agents they help manage, may have their own, rather than their principals', interests at heart. They may then encourage elected officials to deviate from the voters' interests in order to further those of the intermediaries. Moreover, such superagents pose unique problems for political legitimacy since they are less directly accountable to the principals (the electorate) than the elected agents they superintend.

Also, not all political intermediaries are equal. Because of advantages unconnected to their political activities, some intermediaries may perform much better than others. A corporation, for example, may better promote the economic interest of a small single shareholder than a civic organization may promote that same person's civic interests; that may be the case even though the individual may care much more about her civic than about her economic well-being. Under this scenario, to the extent that the corporation is the better superagent, the voter's representatives will pursue more vigorously the interest the voter herself holds less dear, thus compromising the principal's overall ambitions. When extended across different principals, some of whom have more effective superagents than others, this problem deepens. Because some voters will wield more effective political power than others, superagents threaten the democratic norm of equal political empowerment—part of the bedrock of our political culture. Superagents, moreover, do not have to treat their many principals equally. Since few duties of impartiality or neutrality apply within

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This danger presses particularly hard when the intermediary not only monitors but also rewards and disciplines primary agents. If intermediaries only monitored for us, we might expect competition among intermediaries to keep them honest and principals would slowly abandon those who monitored poorly. Monitoring, by itself, moreover, gives an intermediary relatively little power to steer an agent against the principals' objectives. Rewarding and disciplining, on the other hand, do give intermediaries that power. As this Article later suggests, intermediaries have little incentive to monitor the behavior of agents in the absence of some ability to alter or direct the primary conduct of those agents. See infra Section I.B.
these intermediaries, they can manage primary agents for the benefit of some principals more than others. Knowing this, some principals may try to commandeer the superagents to promote interests that may conflict with those of the superagents’ other principals. This is an issue that is well developed in the private law of corporate governance.\(^\text{11}\) Although private law, particularly corporate law, has many features to control such rent-seeking within an organization, public law has few and the import of this issue is scantily addressed.\(^\text{12}\)

From an agency cost perspective, then, political intermediaries are a mixed bag. Although they may reduce traditional agency costs in representation, they create new superagency costs in their place. The law overlooks this exchange at its peril. Whenever the added costs of superagency exceed the reduced costs of agency, voters are harmed. To them, it does not matter whether agents or superagents do the misbehaving. The overall representational costs are the same.

Part III discusses the other danger that intermediation creates: enhanced rent-seeking. While a superagent’s own principals will not complain about rent-seeking, of course, such activity is socially disadvantageous. By advocating an interest more powerfully than any of their individual principals could, superagents can more effectively exert pressure on representatives to enact legislation furthering the particular principals’ narrow interests. An individual shareholder, for example, may not care greatly about the benefit the corporation receives from increased protection from competition—indeed, this might harm the shareholder overall if she consumes much of the corporation’s product—but because the


corporation superintends only a narrow range of the shareholder’s interests, the corporation may seek such protective legislation.

Full-purpose intermediaries, like political parties, enable rent-seeking of a different type. To the extent they manage a majority of legislators, they can—bill after bill—steer benefits to their principals while steering the costs to others. If political parties were completely stable, for example, a bare majority could continually reap economic and policy windfalls at the expense of the minority. So long as the majority party distributed the gains fairly enough among its own principals such that few of them were tempted to defect at the next election, the majority could continually enrich itself without fear of retribution.

In essence, then, both narrow and general-purpose superagents may undo the central insight of James Madison’s *The Federalist* No. 10. Factions will no longer cancel each other out. Those that employ the more powerful superagents or that can hold together a minimally winning stable group of primary agents will pluck the public purse. More dangerously, they may also seek "cultural" rents and try to impose their particular vision of the good on everyone else. It is, unfortunately, in the narrow interest of every superagent to become a Taliban of politics, for then its principals are happiest. From an individual principal’s perspective, the only dangers are that other principals may have more powerful rent-seekers and that the superagents may sometimes compound superagency costs by turning on their principals and seeking rents for themselves.

The Conclusion asks what we should do. If agency costs and rent-seeking are endemic to politics, how do we best manage them? We offer a few observations. First, we should improve avenues of formal accountability of agents, particularly superagents. In the governance context, this means, at a minimum, having to stand for reelection in a significantly fair and open process. The flip side is the need for vigilance against lockups, a concept which is

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13 The Federalist No. 10 (James Madison); see infra notes 93–96, 102, and accompanying text.

14 For background on Taliban, please see Taliban Online (visited Aug. 14, 1999) <http://www.ummah.net/taliban>.
reasonably well articulated in the law of private governance but has been absent in the public domain. Second, we should focus more on monitoring strategies. These can take two forms: (a) formal disclosure rules (open meetings, board minutes, and reporting requirements for certain types of spending) and (b) more use of superagents to monitor each other. Third, we might consider limiting the use and activities of certain kinds of superagents. Some may create political costs greater than their benefits—even to their own principals. Any suggestions, of course, will necessarily be extremely controversial. But even if good readers reject them, we will be happy if readers look at political intermediaries a little differently than before. Intermediation works—sometimes perhaps too well—and raises new issues even as it seems to solve others.

Before we proceed, however, a note of caution. If anything, our analysis suggests that superagency is a many-splendored thing. We have different superagents for different reasons. Some, like corporations, unions, churches, and nonprofits, exist for reasons independent of politics but find that serving as political intermediaries may further the aims of their stakeholders. Some, like political parties, exist because they help directly address agency costs in politics. These intermediaries first help voters choose the best agents, then help monitor and discipline the agents chosen and help those voters seek rents. At the same time, these agents assist voters in joining together to express their political will, provide an organizational forum through which voters may speak, and overcome the inertia of the voters themselves in turning out to vote and participating in the time-consuming affairs of politics. Some others, like political action committees, exist largely as artifacts of legal rules.


See Lupia & McCubbins, supra note 3, at 35, 205–07 (noting that political parties help provide information about agents to voters).

were limited but now serve also to superintend the relationship between voter and elected official.

Also, different intermediaries have different functions and pose different kinds of dangers. Some, like rating organizations, serve only to monitor agents' behavior, and, to the extent they do affect it, they do so through the way the principals vote. They have little independent power to steer agents against the principals' wishes. Some intermediaries, however, reward and punish agents and can entice them to work against their principals' aims. We must therefore be careful to analyze each kind of intermediary on its own terms. Every superagent is different.

That said, we focus primarily on three types of superagents in this Article: corporations, unions, and political parties. We choose them for two reasons. First, they illustrate the full range of concerns political intermediation can pose. Corporations and unions best show the dangers of superagency costs, particularly the danger of fractionated supervision of interests, whereas political parties best show the dangers of majoritarian rent-seeking. Second, the law has focused mostly on these three particular intermediaries. By focusing on them ourselves, we hope to shed light on some of the puzzling distinctions the law has drawn.

I. IN PRAISE OF AGENTS

A. The Benefits and Costs of Agents

Agents are everywhere around us. They invest our money, help us work, and plan our lives. No matter where we turn, they are working. Even our agents have agents and we ourselves probably act as agents for others. The web of agency enmeshes us all. Why is it so ubiquitous?

Agency allows us to live better in three different ways. First, we may not have time to pursue our own interests as vigorously as we

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19 For example, the Americans for Democratic Action ("ADA") regularly publishes The Legislative Newsletter, which ranks members of Congress according to the ADA's criteria. See Edward L. Schapsmeier & Frederick H. Schapsmeier, Political Parties and Civic Action Groups 56-58 (1981).

20 The breadth of common definitions of agency encompasses many people. John W. Pratt and Richard J. Zeckhauser, for example, invoke a standard definition when they write, "Whenever one individual depends on the action of another, an agency relationship arises." Pratt & Zeckhauser, supra note 8, at 2 (emphasis omitted).
would like. Many possibilities go unexplored and many of those we do explore go unexploited. Hiring an agent simply allows us to do more. Like an able research assistant or law firm associate, an agent can take advantage of opportunities that we ourselves would never have time to identify, evaluate, or enjoy. Two or more people—the right people, anyway—can simply do more than one.

Second, even if we have the time, we may not have the knowledge and skills we need to pursue our own interests effectively. We may know what we want to do but not how to do it. Many of us, for example, engage others to invest our money not because we are pressed for time, but because we fear that we would make poor investment decisions. The right professional, we hope, will improve and steady our returns. In this way, a well-chosen agent may carry out our aims more effectively than we ourselves could. Just think of the difference between representing yourself in court and having an attorney represent you. Your attorney can not only make better legal decisions but can also make them more quickly. Unlike you, your attorney has a background of professional skills, knowledge, and experience to draw on. Even attorneys, in fact, know to hire attorneys to represent them.

Third, agents can allow us to pursue our activities more cheaply. If we compartmentalize our projects, we can engage others to work on them who do not need the broad range of skills necessary to complete the overall projects. Such division of labor permits specialization, which brings its own returns and frees actors from having to master a wider range of knowledge than is necessary. Actors can thus focus more directly on serving us than on acquiring skills. Additionally, if our agents save us money, we ourselves will have more resources to devote to more of our own pursuits.

Representatives, our primary political agents, help us in all three of these ways. First, as even ancient Athenians complained, direct democracy takes time and energy that we could productively devote to our primary activities. \(^2\) Whenever we participate in the

\(^2\) Robert Dahl describes "direct democracy" in the words of an imaginary, but representative, classical Athenian:

I have heard some Athenian citizens complain that it is an excessive burden to trudge up Pnyx hill forty times a year, as we are expected to do, starting our meeting in the early morning and staying often until darkness falls, especially
much-vaunted town meeting, our jobs and hobbies go untended and our friends and families go ignored. Direct democracy requires work. Worse yet, the town meeting itself can often turn nasty and unpleasant. Despite the hopes of civic republicans, the agora is no great fun for most people. We bicker more than we transcend our private interests. It is no accident, then, that we revere direct democracy much more than we employ it. The initiative and referendum operate in only some states, decide relatively few questions in them, and oftentimes produce results of truly questionable value. If anything, experiments in direct democracy confirm Madison’s conviction that political agents are simply irresistible. They allow us to focus on our primary activities, insulate ourselves from the nastiness of politics, and, hopefully, achieve better results than would issue from our partially informed impulses.

Second, politics, like any other specialized activity, relies on unique skills and knowledge that dedicated agents can better master. Our representatives, for example, know better than us how to make the legislative process work, how to cut deals, whom to trust,

when some of us must make our way here from the distant parts of Attica the night before and make our way back to our farms the night after.


See, e.g., Frank Michelman, Law’s Republic, 97 Yale L.J. 1493, 1495 (1988) (stating that modern civic republicanism is “the ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members”); Michael J. Sandel, Democracy’s Discontent (1996) (maintaining that civic republicanism can invigorate political debate); Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1548–51 (1988) (arguing that deliberation is a substantive good in and of itself).

Interestingly, civic republicans are overwhelmingly academics. From their descriptions of deliberation, however, one wonders how many faculty meetings they have attended.


Between 1950 and 1992, 951 statewide initiatives and referenda were qualified. See David B. Magleby, Let the Voters Decide? An Assessment of the Initiative and Referendum Process, 66 U. Colo. L. Rev. 13, 22 (1994) (listing totals for each jurisdiction). This averages less than one initiative or referendum per jurisdiction per year.


Cf. infra notes 93–96, 102, and accompanying text (discussing Madison’s views concerning “the violence of faction”).
and how to evaluate legislative proposals. They also may have a better sense of what is politically feasible and how best to spend available political capital. A representative can nearly always carry out a particular goal more effectively than we ourselves can. Other agents in the political process, such as political parties, provide unique skills in organizing voters, turning out the vote, and disseminating information to the voting public.

Third, representatives certainly reduce the cost of overall political decisionmaking. Since representatives are much fewer in number than the voting population generally, most politics will take up many fewer people's time and energy. And, regardless of whether politics is civic republican or pluralist, the fewer the players, the more cheaply negotiation, deliberation, and logrolling can proceed. The less money we must spend on politics, the more we can devote to our other activities. The savings to the individual voters are then reproduced in the area of governance. Without further agents, again such as political parties, that are able to broker deals and to enforce discipline over individual representatives, it is difficult to hold together a political coalition and difficult even for a majority to govern effectively.

Agents do have costs, however. They seldom work for free, they require continuing supervision, and, worst of all, they often serve themselves at the expense of their principals. This last cost, called "shirking" or "self-dealing" by economists, occurs when agents either ignore or actually act contrary to the interests of their principals.29 It is the most dangerous cost of all, for an agent who violates his principals' trust may cost his principals not just wages and lost opportunities, but all the world.30 Agency thus involves an important tradeoff. While it allows us to accomplish more things more cheaply, it carries its own costs and dangers, particularly the risk that our agents will shirk and work against our interests in pursuing

29 See Saul Levmore, Monitors and Freeriders in Commercial and Corporate Settings, 92 Yale L.J. 49, 60 nn.45-49 (1982); see also Melvin A. Eisenberg, The Structure of Corporation Law, 89 Colum. L. Rev. 1461, 1471 (1989) (defining "shirking" as agents "working at a slack pace and... avoiding the effort and discomfort involved in adapting to changed circumstances, such as the emergence of new technologies").

30 Othello's end as a result of his ensign's treachery is perhaps the most notable literary example. See William Shakespeare, The Tragedy of Othello, The Moor of Venice.
their own. Our goal, then, should be to maximize the benefits of agency while minimizing its costs.

But how? First, we must monitor our agents' behavior. Unless we know what they are doing, we cannot tell whether—let alone how well—our agents are acting on our behalf. Unfortunately, monitoring itself may be expensive. We must spend time that we would prefer to devote to our primary activities just seeing whether our agents are acting as they should, and the information we need often proves costly or difficult to obtain. How does a Hollywood actor, for example, tell whether her agent is working hard on her behalf? She could ask how often and with whom he has lunched, but that provides little helpful information. He could be an over-fed gourmand rather than a hungry agent. To get the necessary information, the actor might have to interview the people with whom her agent dined, and these people may prefer to say nothing at all. Monitoring, in fact, may backfire. Just asking these people questions may jeopardize any contacts the agent has made. When the contacts ask the agent why his client is behaving so unusually, the agent may drop her lest she destroy his reputational capital. Often, as here, professional cultures themselves resist monitoring, perhaps because its intrusiveness threatens some necessary play in a well-functioning professional relationship, or perhaps because it lessens the power of the professional agents overall. Monitoring, moreover, may require specialized knowledge or skills that most of us do not possess. Many of us, for example, would need to hire a lawyer just to evaluate how well our own primary lawyer is representing us. As Kenneth Arrow has noted in the corporate context, "The stockholders are principals, who certainly cannot observe in detail whether the management, their agent, is making appropriate decisions."

31 Saul Levmore explores how the presence of these costs deeply structures much commercial and corporate law. See Levmore, supra note 29; see also Lupia & McCubbins, supra note 3, at 8, 17 (discussing monitoring costs in politics).

32 One example of this intrusion into the principal-agent relationship in the professional culture is the resistance of some doctors to health maintenance organizations ("HMOs") and other forms of insurance supervision. See, e.g., Diane Lewis, Doctors Unite to Form Union, Boston Globe, Mar. 8, 1999, at C12; Julie Marquis, Doctors Who Lose Patience, L.A. Times, Mar. 3, 1999, at A1; Dunstan McNichol, The Void is Costly as HMOs Die Off, Newark Star-Ledger, Mar. 8, 1999, at A1.

33 Arrow, supra note 8, at 39.
B. Strategies for Managing Agents

Whenever interests are widely dispersed across many principals, as in the case of a public corporation's many shareholders or an elected official's many constituents, collective action problems, particularly free-riding, make monitoring more difficult. The more shareholders or constituents there are, the less reason any one of them has to invest in information that would benefit them all. Unless other principals can be made to pay their share of the costs of acquiring information, too little monitoring will occur. Many corporate charters and state corporate default rules thus require formal oversight by a board of directors. Corporate charters, like constitutional compacts, represent, among other things, an institutional precommitment to check agents' capacity for misbehavior. By requiring formal oversight from a board of directors, the corporate charter attempts to overcome the collective action barrier to shareholders having to rely on their own monitoring of improper managerial conduct. The corporate charter distributes the cost of monitoring among all the shareholder principals by having the firm engage the services of a board of directors that will have an express duty of monitoring on behalf of all the shareholders. It is precisely because principals are ordinarily unable to look after the extraordinary web of relationships that alternative institutional arrangements, such as monitoring, are critical.

To make things worse, monitoring, though necessary, is hardly sufficient. The key problem is the diminished ability or incentive of participants in mass institutions to guide their agents effec-

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34 See Jesse H. Choper et al., Cases and Materials on Corporations 528 (4th ed. 1995) (noting that the tendency of small-stake investors in a corporation to free-ride on the efforts of larger-stake investors can result in underinvestment in monitoring); see also Easterbrook & Fischel, supra note 11, at 172 (noting that free-riding problems complicate monitoring); Eisenberg, supra note 29, at 1478 (noting that shareholders may rationally decide not to vote).


36 Indeed, the formation of a corporation through its charter may be seen as directly analogous to the creation of a constitutional compact. See Melvin A. Eisenberg, The Structure of the Corporation: A Legal Analysis 1 (1976) (describing corporate law in constitutional terms).
Governing Through Intermediaries

To be effective, monitoring must lead to some action. Even a well-monitored agent may shirk if he feels that his good efforts will go unrewarded and his failures unpunished. We must use the information we gain through monitoring to create incentives for our agents to pursue our own goals rather than their own, and both legal and extralegal means stand available for this purpose. The law of private governance, for example, offers four different strategies for controlling agent misbehavior.

First and most direct, the principal can reward the agent according to how well the principal’s objectives are met or penalize the agent for deviating from those goals. Performance-based compensation, such as an attorney’s contingency fee or an executive’s profit-sharing agreement, represents the classic form of this approach. This approach works best, however, in cases of clear-cut and relatively simple shared objectives, as when an attorney seeks to recover damages in a personal injury claim. Even in these limited contexts, this strategy may backfire by creating disincentives for the agent to invest in longer-term future rewards. Executives paid in relation to firm profits may, for example, underinvest in research and development the potential return to the firm of which will not show up in a short-term balance sheet. Similarly, lawyers may not invest in additional experts or further discovery when sure-fire quick returns can be gotten. In any event, performance-based compensation schemes are clearly not transferable to the public sector where agents rarely have such clear-cut definition of a mission.

37 See id. at 1471 (noting that shareholders do not monitor publicly-held corporations directly, but through agents); Levmore, supra note 29, at 49, 60 (discussing how the free-riding problem leads to ineffective monitoring and enforcement, which depends on monitoring).


Second, the law can directly limit agents' activities. Such formal strictures are indispensable when effective monitoring is unlikely to occur. To draw on the distinction formulated by Oliver Williamson, this is the substitution of constitution for contract in circumstances where the dispersion of relationships makes direct agreement and monitoring impossible.\footnote{See Oliver E. Williamson, The Mechanisms of Governance 306 (1996).}

A direct application of this method is found in the domain of private governance. One of the distinct features of American corporate ownership is the dispersion of firm ownership among nonconcentrated shareholders. This dispersion coincides with a smaller degree of shareholder activism—a phenomenon readily explained by the reduced incentives any particular part-owner of the firm has to invest in monitoring the actual operation of the firm.\footnote{See Robert C. Clark, Corporate Law 391 (1986); Stephen M. Bainbridge, The Politics of Corporate Governance, 18 Harv. J.L. & Pub. Pol’y 671, 676 (1995).} As Professor John Coffee argues,\footnote{See John C. Coffee, Jr., The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications, 93 Nw. U. L. Rev. 641, 661–63 (1999).} one of the necessary preconditions to dispersion of ownership is strong legal protection of the rights of minority shareholders against majoritarian oppression. Most simply, the ability to secure investment from those without any capacity to direct the operation of the firm must depend on the inability of larger shareholders to use their superior voting strength to reward themselves at the expense of powerless minority shareholders.\footnote{See Bernard S. Black, Agents Watching Agents: The Promise of Institutional Investor Voice, 39 UCLA L. Rev. 811, 817 (1992).} Ironically, the very legal regime that ensures the capacity of minority shareholders to receive equitable treatment within the firm also disempowers shareholders as a class from controlling management. It is possible to think of the formal protection of minority shareholders against unequal treatment as a rights-based regime that guarantees a corporate form of equal protection among various groups of shareholders.

This formal rights approach is further reflected in the many legal duties placed on agents, chief among them the duty of loyalty, which requires an agent "to act solely for the benefit of the principal in all matters connected with [the] agency."\footnote{Restatement (Second) of Agency § 387 (1958).} An agent chosen
to invest a principal’s money, for example, cannot churn the account in order to maximize the agent’s own trading commissions. The agent must seek only to attain the greatest expected return for the principal herself. If the agent does shirk, the law provides various penalties. The principal may recover any actual loss under contract or tort and she may, regardless of any loss, force the agent to disgorge any gain obtained in violation of his duty. Such disgorgement works to keep the agent’s eye more focused on the principal’s interests. Corporate law has elaborated on and proliferated these duties, creating “rights” that shareholders can enforce through judicial and administrative remedies.

The difficulty with rights-based regimes is that they are rigid and they command only a limited domain of negative liberties. In the corporate governance arena, these rights may prevent one group of principals from rewarding themselves at the expense of another. Thus, shareholder rights are most clearly successful in preventing majoritarian blocs from rewarding themselves. The flip-side of this protection is that the incentive for active monitoring of managerial agents and participation in firm governance is reduced by the dispersion of interests in the firm, by the ability to diversify portfolios in more mature capital markets, by the need to maintain liquidity in a large portfolio, and (quite crudely) by the diminished ability to obtain returns for individual participation in the internal life of the firm. In those countries where monitoring of corporate management is far greater, as in Germany and Japan, that monitoring is generally done through a central banking authority that holds or represents a dominant share of the enterprise.
Further, as much corporate law illustrates, the law can directly restrict what agents can do. State law places some limits on agent behavior by default, and principals can precommit to restrict agent behavior further either through articles of incorporation or through debt agreements. Thus, if the shareholders or debtholders believe that a certain activity will present tempting opportunities for agent misbehavior, they can simply prohibit agents from engaging in it. The principals will also, of course, prevent their agents from engaging in these activities for good reasons, but the principals may reason that, on balance, such restrictions foreclose more bad behavior than good and avoid the cost of ongoing supervision. Still, such categorical restraints represent a crude and clumsy control mechanism. These kinds of rules are rigid and insufficiently responsive to the complexities of market behavior. The principals may throw out the baby with the bathwater.

Third, in the absence of a dominant outside body that has sufficient incentives to monitor and discipline managerial agents, the corporate governance debates of the past decade have largely focused on substitutes that could play an equivalent monitoring role—in our terms, on the creation of effective superagents. The debates range across the spectrum of possible institutional agents, from independent directors, to larger numbers of outside directors, to institutional shareholders, to true third-party entities such as liability insurers. What each of these proposals share is

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51 See, e.g., Bainbridge, supra note 38 (supporting the American Law Institute’s provisions regarding monitoring by independent directors); John Pound, The Rise of the Political Model of Corporate Governance and Corporate Control, 68 N.Y.U. L. Rev. 1003 (1993) (arguing that certain mechanisms like proxy fights and informal discussions have replaced takeovers as the dominant corporate monitoring mechanism).
52 See Lynne L. Dallas, Proposals for Reform of Corporate Boards of Directors: The Dual Board and Board Ombudsperson, 54 Wash. & Lee L. Rev. 91 (1997).
54 See Ronald J. Gilson & Reinier Kraakman, Reinventing the Outside Director: An Agenda for Institutional Investors, 43 Stan. L. Rev. 863 (1991). But see Roberta Romano, Empowering Investors: A Market Approach to Securities Regulation, 107 Yale L.J. 2359 (1998) (arguing that large institutional investors, such as public pension funds, may have self-serving agendas that can compromise their role as intermediaries).
the commitment to governance through intermediaries, each less formally accountable to the shareholder principals than the direct agents they are to oversee, yet each charged with providing an important oversight role that is unavailable in reality to the diffuse shareholders.

An interesting analogy emerges to the dissenting opinions of Justice Lewis Powell in the political patronage cases. Although the analogy is not entirely direct, a similar question may be asked about why people would give their time and energy to make political parties actually function. The most noble answer is that it is undoubtedly a selfless combination of public duty and partisan principle. While that may explain some of the internal functioning of political parties, it does not address the reality that the prospect of more direct rewards is what often fuels the political system. Thus, Justice Powell strongly argued that allowing political victors to reward personally their backers partially overcomes the collective action problems that would otherwise dampen participation. He argued:

It is naive to think that these types of political activities [campaigning, voter registration, etc.] are motivated at these levels by some academic interest in "democracy" or other public service impulse. For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties.

Without some personal rewards, Powell argued, people have too little incentive to make sure that the political process actually works. In this view, the grand democratic vision of pure, selfless politics insufficiently encourages actual people from participating in the necessary but unglamorous daily work of political campaigns.

The political patronage cases also demonstrate the limitations of a rights-based inquiry in structuring institutional incentives to address problems of agency. Rights-based regimes can work well to ensure equal treatment among similarly situated individuals. This

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57 See Aldrich, supra note 5, at 163–69 (describing the pull of activists on the party platform for both ideological and self-interested reasons).

58 Elrod, 427 U.S. at 385 (Powell, J., dissenting).
can take the form of either formal equality, as with pro rata distribution of dividends among all shareholders of the same class of stock, or in some form of equal concern, as with the fiduciary obligations requiring corporate officers to act in the best interest of all shareholders. But rights-based regimes work clumsily when attempting to create incentives for specialized investment of time and resources in order to overcome the subsequent lack of interest in the undifferentiated mass of potentially interested parties actually overseeing the operation of this now-rights-regarding firm. In the capital markets domain, the conditions of equality among shareholders paradoxically disable the special interests necessary for successful monitoring of agents. In the public domain, given the absence of market discipline and the dramatically larger capacity for self-dealing, the empowering of intermediaries as monitoring agents carries with it the unfortunate temptation for self-rewarding policies at the heart of the political process.

Finally, a principal can use nonlegal “carrots and sticks” to structure her agent’s incentives. Discharge and reputation, for example, can work effectively to align the agent’s interests with the principal’s. To the extent an agent wants to remain an agent—either for the same principal or another—he will be sensitive to how principals view his loyalty. He knows that if he misbehaves, he is less likely to work as an agent for any principal. The market for corporate control works similarly to discipline corporate management. Outsiders who see a corporation underperforming because its managers are running it for themselves rather than for the shareholders can buy the corporation and throw out the management. The market, in other words, will itself deter some misbehavior by rogue agents.

C. The Problem of Politics

Politics, however, is unique. While we all agree that representatives owe a duty of loyalty to their constituents, few legal means ensure it. Both contract and tort, for example, the two primary sources of legal liability for other kinds of agents, do not regulate political representation at all. Although candidates may campaign on a “Contract With America” or take a pledge, voters cannot legally enforce either. Nor can voters sue in tort for any breach of loyalty or for any other type of representational malpractice. The
law regulates only the margins of political agency. It prohibits bribery and extortion—the worst types of agent misbehavior—but that is all. Interestingly, the law acts as if campaign finance can seldom lead to agent shirking. While federal law limits individual contributions to federal candidates for fear of quid-pro-quo corruption, it permits unlimited individual expenditures on the rationale that they cannot distract the agent from the voters' goals. And while the law completely prohibits corporate and union expenditures for federal candidates, it allows unlimited soft money contributions and issue advocacy by these groups. In short, political representatives, unlike nearly all other agents, can act against their principals' interests without fear of legal sanction.

Just as none of the agents' usual legal duties attaches to political agents, neither do many of the categorical restrictions that principals often place on agent behavior restrain them. The Constitution, of course, places some limits on legislative output. But with the exception of First Amendment prohibitions against the regulation of political dissent and the Twenty-Seventh Amendment prohibition against members of the United States Senate and House of Representatives raising their own salaries within a particular Congress, most restrictions aim more at curbing rent-seeking by the principals themselves, which we address later, than at curbing agent

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60 See Buckley v. Valeo, 424 U.S. 1 (1976) (striking down expenditure limits and holding that corruption was the only valid constitutional reason for campaign finance restrictions); Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (giving political parties the right to make expenditures so long as the expenditures are not coordinated with the candidate, on the ground that the parties cannot corrupt candidates).
64 See U.S. Const. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.").
65 See infra Part III.
misbehavior. This is perfectly understandable since there are significant costs in using the Constitution to cast in stone much of political behavior and thereby placing much of public life categorically outside the bounds of legislation and the democratic process. Instead, most constitutional theorists increasingly look to process rather than to rights to steer agents from misbehavior.66

That leaves monitoring and carrots and sticks. Voters must rely on extralegal means to structure their agents' incentives. Elections, of course, represent the most powerful way voters regulate their representatives' behavior.67 Like the market for corporate control, we reward the loyal agent with continued incumbency; we throw out the disloyal or ineffectual agent. This strategy works best, however, as a sword of Damocles. In the private sector, for example, there is growing recognition that disciplining through periodic palace coups results in significant turnover and transaction costs.68 Our best hope is that representatives understand the real threat of discharge and continually anticipate future electoral reactions as they decide how to act. The possibility of a primary challenge several years away can wonderfully focus a representative's attention.69

In both the private and public sectors, great reliance on elections to supervise the agency relationship makes monitoring centrally important. Representatives who feel that we will not know whether to reward or punish them will be tempted to serve their interests rather than our own. The political process is, of course, to some degree self-monitoring. It creates incentives for both challengers

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67 See Robert A. Dahl, A Preface to Democratic Theory 125 (1956) (noting that the election is the critical process for ensuring that governmental leaders will be relatively responsive to the people).

68 See Jeffrey Gordon, "Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffet, 19 Cardozo L. Rev. 511, 513 (1997) ("[T]he potential dissipation of organizational capital, the misallocation of assets, and the social demoralization from an ill-conceived takeover impose social costs that may be consequential, at least in the aggregate of such transactions.").

and incumbents to tell voters how their existing agents are behaving. Much of this information, however, is likely to be self-serving and unreliable. Challengers have no reason to give a full and fair account of incumbents' behavior, but only of that behavior tending to discredit the agent. Incumbents, of course, have no reason to give a full, fair account either. They will highlight only those parts of their records that will help them in the election. Both sides, moreover, will tend to focus on only a few issues. The political process itself thus generates only partial and somewhat skewed information.  

**D. Monitoring Agents Through Agents: The Role of Superagents**

At this point the central paradox of agency relationships reveals itself. For the very reason that we need agents in the first place, we need a new set of agents to tell us how to assess the performance of our initial set of agents. Thus, to use elections as a credible mechanism for controlling representatives, voters must actively acquire additional information about their agents' behavior and carefully evaluate it. For an individual voter, this task is costly and difficult. She must expend time and resources that she would prefer to dedicate to personal activities rather than to figuring out what her agent has been up to. A thorough inquiry would require her to investigate, among other things, how her representative has voted (perhaps even in committee), how he has sought to control the agenda, how he has worked to oversee other branches of government, and how he has used the bully-pulpit—just a few of the ways representatives shape policy outcomes.

Once she has acquired all of the necessary information, moreover, the voter must analyze it. Does a minor vote which by itself appears contrary to the voter's interests represent shirking or was that vote necessary in order for her representative to secure another representative's support on something more important to the voter herself? What were all those confusing procedural motions in committee about anyway? No voter has the time, money, or understanding to answer all these questions. C-SPAN may run

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70 For example, negative advertising is a growing proportion of all political advertising, and some campaigns rely almost completely on it. See Michael L. Young, The American Dictionary of Campaigns and Elections 60 (1987).
twenty-four hours a day, but humans do not. Yet no voter can truly evaluate a representative's performance without trying to answer many of these questions.

Political intermediaries help voters overcome these monitoring difficulties. Political parties, for example, can repudiate candidates who deviate too far from the party line and thus send a powerful, if simple, signal to voters about their candidates' behavior. They play the role that some believe independent directors and institutional investors play in monitoring corporate agents. These corporate intermediaries, we hope, have the expertise and incentives to overcome the collective action problems that prevent effective individual monitoring. Political groups of all kinds, moreover, publish voting guides and ratings that allow voters to locate their representatives and candidates in some policy space. Likewise, corporations and unions regularly report to their employees and members on the activities of political actors who affect their interests. And the news media not only report votes and other actions but also analyze them extensively.

Many political intermediaries go even further. They not only monitor agents but reward and punish them as well. In fact, the monitoring and reward/punish functions often blend together, as in the case of an endorsement, when an organization provides information in the expectation that some people will vote on it. While a newspaper's endorsement may provide information but few actual

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votes, a union's or political party's endorsement may more straightforwardly reward a candidate with votes at the polls.\footnote{For example, unions include over 15 million union members, who with their families represent a great number of votes and a significant source of campaign resources and contributions. See Young, supra note 70, at 137.}

Votes are just one means, however, for rewarding and punishing agents. Money works too, if only because agents believe it helps them win elections. And since representatives value it so highly, political intermediaries eagerly employ it to sway agent behavior. Political parties, for example, contribute money to the candidates,\footnote{See 2 U.S.C. § 441 (1994).} make independent and coordinated expenditures on the candidates' behalf,\footnote{See id.} and conduct issue advocacy campaigns designed not only to win a majority in the legislature but also to exert discipline.\footnote{See Potter, supra note 62, at 227-39.} Corporations and unions can create and pay for the administration of political action committees ("PACs") to which employees and members can "voluntarily" contribute.\footnote{See 2 U.S.C. § 431 (1994).} These PACs can then contribute to candidates, while the corporations and unions themselves make soft money contributions to national political party committees and conduct issue advocacy campaigns to help some candidates and to defeat others. Money, whatever else it does, represents discipline.\footnote{See Lillian R. BeVier, Campaign Finance Reform: Specious Arguments, Intractable Dilemmas, 94 Colum. L. Rev. 1258, 1271-76 (1994).}

Much of this activity, particularly soft money contributions and issue advocacy, has come under recent attack.\footnote{See, for example, the Brennan Center for Democracy Program, Campaign Finance Reform (visited Aug. 14, 1999) <http://www.brennancenter.org/index.html> for a sample of this attack.} Critics loudly contend that such activity corrupts the political process. Whatever its overall merits, however, political spending does serve one good. It aligns the political agents' interests more closely with the interests of those whom the intermediaries represent: some voters. Although we often speak of corporations, for example, as contributing soft money to further their own interests, those interests actually belong to the corporations' stakeholders—primarily shareholders, but also employees, management, and others. Like-
wise, PACs spend to promote their own goals, but those goals belong in large part to the individuals whose contributions make up the PACs' war chests. All these entities, in other words, work to align representatives with the interests of voters who make up or have a stake in the intermediary. Their intermediation tightens certain primary agency relationships. These political intermediaries serve, in short, as superagents who monitor and discipline primary political agents on behalf of some principals. They stand between those voters and their representatives in order to bring their interests closer together.

II. THE DANGERS OF SUPERAGENCY

A. The Problem of Multiple Intermediaries

Superagents do pose certain risks to the agency relationship they superintend. For one thing, superagents, just like the primary agents they supervise, can shirk. They too have interests that diverge from their principals' and will be tempted to pursue them. Theirs is, moreover, a particularly dangerous form of shirking. When they shirk, they may take all the primary agents with them. They threaten to commandeer the principals' own primary agents to work for them at the principals' expense. The danger, then, is that, instead of solving the problem of primary agent shirking, superagents may merely add another problem to it: that of primary agents following false principals. The more effectively superagents supervise primary agents, the more help and danger the superagents offer to the principals. Do superagents reduce agency problems or merely compound them?

Here, the added danger of what may be termed superagent self-serving behavior rises to the fore. Political parties, for example, provide many helpful services to voters. They help voters understand where candidates stand and serve to discipline those candidates once elected. Parties also have their own interests, however. As several commentators have pointed out, both major parties have an interest in limiting the field of electoral competition. See Richard L. Hasen, Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Com-
Duopoly serves both major parties better than a freer market would. Without fear of outside competition, they can jointly extract duopoly rents from the political system. They can be less responsive to political consumers overall and remain more free to pursue their own agendas. Recognizing this, they have cooperated in erecting barriers to entry. Through ballot access restrictions, some campaign finance provisions, winner-take-all rules, and requirements for participation in public debate, the two major parties have effectively submerged third parties—at the voters' expense.

Corporations and unions may behave similarly. They support candidates who support the economic interests of their shareholders or members and consequently encourage representatives to follow some of the desires of the principals these superagents represent. At the same time, however, corporate management and union leadership have interests that vary from those of shareholders and union members. Management, for example, may want to divert shareholder earnings into salary; labor unions may want to increase dues and promote dues checkoffs.

Normally, and luckily, the operation of markets frustrates agents rewarding themselves. On the business side, the market for corporate control frustrates management greed. Management fears diverting shareholder profits to itself because depressing earnings would make the company a more attractive takeover target, which

petition, 1997 Sup. Ct. Rev. 331, 343 ("[V]irtually all the legislators who [favor the two-party system in their votes] are members of one of the two major parties, and the choice may be less the product of reason than interest.") (citations omitted); Issacharoff & Pildes, supra note 15, at 682–83; Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 Geo. L.J. 491, 521 (1997); Daniel Ortiz, Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself, 4 J.L. & Pol. 653, 672–81 (1988) (discussing the interest of individual legislators in both parties in limiting competition).


See id.

For a description of various electoral mechanisms used to shut off challenges to incumbent party power alignments, see id. at 652–68 (discussing restrictions on who could vote in the primaries); id. at 670–74 (discussing bans on write-in voting); id. at 674–80 (discussing first-past-the-post voting systems); id. at 683–87 (discussing ballot access restrictions); id. at 688–90 (discussing campaign finance regulation).

See Benfield, supra note 40, at 624 (noting that the market for corporate control is the most effective monitor of American managerial performance and the primary external source of pressure on management).
in turn would threaten management jobs. If managers could protect the company from takeover, however, they could more freely divert shareholder wealth into management salary without such fear. Similarly, if unions could limit the possibility of decertification or restrict liability for the duty of fair representation, then internal constraints on self-serving union leadership behavior would fall. Hence the attraction of politics. If managers can convince political actors to approve an anti-takeover device, for example, they can partly escape the discipline of the market for corporate control. But this type of political activity represents superagent self-dealing. The superagents here are leaning on the shareholders' primary political agents to benefit themselves at the shareholders' direct expense.

The particular ways we use our superagents can also lead to special agency problems. One of the most important stems from what we term "fractionated supervision." Either intentionally or inadvertently, each of us empowers a large number of intermediaries to speak for us in the political process. Some of this may be direct, such as with contributions to political parties, PACs, or other groups who claim a distinct political niche. Some may be quite indirect, as when our annual credit card fees or professional dues are used to advance the "interests" shared by all Visa cardholders or all lawyers. By using multiple superagents to superintend different interests, we create new types of concern. We tend, for example, to rely on corporations to supervise our representatives' actions affecting our interest as shareholders and rely on public interest groups to supervise our representatives' actions affecting our interests in things like the environment. We expect each superagent, moreover, to represent whole-heartedly the particular interests we assign it. Allocating responsibility this way, however, can lead our


87 This is akin to the argument advanced by Henry Hu as to why specialized firms that have a clear market niche (e.g., a high-tech firm or a gold mining operation) should not hedge outside of their areas of specialization. Such a hedge would deprive investors of a clear market signal when choosing among market options. See Henry
superagents to work against each other and ultimately against us as they disrupt the complex balance of interests we ourselves hold.

Consider the individual case: A single person owns stock in a corporation and contributes to an environmental group. He cares about both his economic well-being and the environment. Presumably, if asked, he would say he wants the corporation to make more money but not at great cost to the environment. Politically, he wants the government to protect the environment but at the same time not to overregulate industry. What signals do his representatives receive?

First, he may write them all and tell them exactly what he wishes to be done. If he feels very strongly, he may even threaten them with the loss of his financial support or his vote in the next election (when they represent him individually) if they do not heed his counsel. Few people, however, actually bother to write. Doing so costs time and money and too many letters need to be written. Instead, people rely on their superagents to send signals for them. In this example, the corporation’s connected PAC might contribute to candidates who support its interests, while the corporation itself might give soft money to one or both major parties and engage in issue advocacy on behalf of some candidates and against others. Through all these means, the corporation can work to align political actors’ interests with the interests its shareholder has in the corporation itself. At the same time, however, the environmental group will work hard to promote this same person’s environmental interests. Although barred, as a tax-exempt entity, from establishing a connected PAC and contributing soft money, it can still wage issue advocacy for or against candidates. Through somewhat dif-


different patterns of spending, then, the environmental group can work to align representatives' interests with the environmental interests of the group's supporter.

The overall result of these two superagents' work may surprise the principal. Although both work individually to supervise the primary agents better than the voter himself could, they are working somewhat at cross-purposes. Whatever the principal's balance between earnings and environmentalism, he would never have advocated each interest full-throttle in the hope that the balance of dissonance would signal his overall desires. Rather, he would have modulated his message and fine-tuned it so that it would more accurately reflect where he stood. The superagents, however, are clumsy messengers. Because they represent narrower, more specific interests than do their principals, each argues without compromise. It would be an odd corporation or public interest group indeed that seriously tempered its message to reflect interests other than its own. And even if it wanted to, how could a corporation begin to find out what all its shareholders' other interests were, let alone represent them?

The end result, however, may dismay the principal. Not only have the corporation and the environmental group wasted some of the principal's money fighting against each other on his behalf, but the balance between their positions probably will not reflect the balance he would strike between these two competing interests. In fact, the balance between the corporation's and the environmental group's positions will probably better reflect these superagents' relative economic strength and their structural and legal advantages than the principal's overall position. That a successful corporation can draw on its economic activities to support its political activities while an environmental group cannot—nature calendars excepted—will make much difference in how well representatives hear them.

B. Superagent Independence

Fractionated superagency, then, can distort an individual principal's goals. Unfortunately, the principal can do little to prevent this. Apart from selling all his shares in the corporation or refusing to contribute at all to the environmental group, he cannot modulate his superagents' advocacy. Neither entity will likely listen to
the wishes of an individual shareholder or member as to how strenuously to advocate its central goals. Such decisions will reflect the entity's resources, the campaign finance and tax laws, and the limits of what various kinds of political action can realistically achieve. Fractionated political superagency thus presents a paradox: Although it can well promote a principal's various goals individually, it likely distorts their balance overall. Does this improve things?

Avoiding fractionated superagency creates different difficulties. Full-service superagents—those, like political parties, that represent a broad range of interests—pose little danger of uncoordinated conflict among different interests of the principal. The full-purpose superagent will itself coordinate the representation of these interests and decide how to reconcile them and how hard to argue each one. Because each full-service superagent represents many principals, however, its coordinated message likely misrepresents the overall balance of interests of most of its principals. A political party, for example, intermediates on behalf of many different people and probably does not express the actual mixture of views of more than a few of them. Even more limited-purpose intermediaries, like some public interest groups, clumsily reflect any particular principal's balance of the specific interests they represent. Full-service political superagents, moreover, owe no duty of impartiality to their principals. They can pursue the interests of some to the exclusion of others' with impunity. Ultimately, only the market for superagents constrains them. Their fear of losing members to other groups ensures that they pay some attention to most members' interests. The superagency market, however, is far from efficient. Because of both structural barriers stemming from first-past-the-post elections and more express discriminatory regulation, for example, new political parties face very high barriers to entry. Without any real ability to field successful candidates, they make weak and unattractive superagents, and few voters will be tempted to defect to them even when they better embody those voters' interests.

Superagents pose yet another danger. Just as they can disrupt the complex balance of interests each individual principal holds, they can also disrupt the balance of power across principals.

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Unlike the private market in which shareholders are deemed to hold fundamentally compatible interests, the disagreement among principals is a central problem in public governance. Indeed, principals often employ superagents in order to enhance their positions relative to other principals. Just as principals realize that superagents can help further the principals’ aims, they also realize that not all superagents are equal. Some can discipline primary agents much more effectively than others. A large corporation, for example, can typically guarantee more money than can a civic group. If all principals employed the same mix of powerful and weak superagents, of course, few problems would arise. Each principal would still have about the same amount of power over primary agents as would every other. But this is not the case. People have very different interests, and very different types of superagents represent those interests—some powerful, some not. The sole-owner of a large business, for example, will have a much more powerful superagent than will a poor person on public assistance. Inequalities of power among superagents, then, can exacerbate inequalities of power among principals, further eroding the democratic norm of equal political empowerment.

One might hope that the market for superagency would work to ease such imbalances. If a superagent fails to perform, after all, the principal will go looking for another. In some sense, this allows for competition and for the eventual development of an equilibrium, however imperfect. But not all superagents operate in the market in the same way, and, as already discussed, that market is less than efficient. Some superagents, like corporations and unions, exercise superagency in aid of their other activities; some, like political parties, exist mostly to superintend political agency; and others, like churches and some public interest groups, perform primarily non-economic, nonpolitical work but sometimes want to draw politics to their side. For someone whose church best embodies her overall

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90 See Gordon, supra note 72, at 368 (noting that shareholders have the same preference, namely, maximizing shareholder wealth); Jeffrey N. Gordon, Institutions as Relational Investors: A New Look at Cumulative Voting, 94 Colum. L. Rev. 124, 180 (1994) (noting that shareholders are likely to be better-off, on average, if managers can be disciplined to maximize share price); see also Easterbrook & Fischel, supra note 11, at 119–24 (arguing that investors prefer legal rules that create a larger pie even though everyone may not have a larger slice).
interests, switching to a corporate superagent represents a very poor choice. Although the corporation may speak more loudly than the church, it may often speak against the church’s positions. Churches, public interest groups, unions, corporations, and political parties simply do not compete in a single market. The superagency market is highly segmented by type of interest, and superagents in some segments have distinct structural advantages over superagents in others. Even within each segment, great structural differences can exist. A major industry with just a few major players, like the tobacco industry, will carry much more clout than a similarly sized industry with many smaller participants because collective action costs will pose greater difficulties to the latter group.  

III. SUPERAGENT RENT-SEEKING AND POLITICAL THEORY

Superagents also threaten to aggravate one of the most central problems of politics: rent-seeking. In *The Federalist* No. 10, James Madison famously identified “the violence of faction” as one of the most serious dangers democracy can face. By “faction” he meant a group “of citizens, whether amounting to majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” Today we struggle with the same problem but in a different vocabulary. As good economists, we identify factions with interest groups and much of their “violence” or mischief with rent-seeking. And, indeed, Madison traced the dangers of faction down to many of the same areas that economists today think particularly ripe for rent-seeking: regulation and distribution of property, regulation of

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9 See Mancur Olson, *The Logic of Collective Action* 3 (1971) (concluding that smaller groups are often more efficient and viable than larger ones).

9 Rent-seeking is usually defined as the political activity of individuals and groups who use up scarce resources in the pursuit of monopoly rights granted by governments. The basic propositions of rent-seeking theory are (1) that the expenditure of resources to gain a transfer is itself a social cost and (2) that the resulting market privileges or rents represent a welfare loss to consumers and taxpayers. See William C. Mitchell & Michael C. Munger, *Economic Models of Interest Groups: An Introductory Survey*, 35 Am. J. Pol. Sci. 512, 525 (1991).

9 The *Federalist* No. 10, at 54 (James Madison) (The Heritage Press 1945) [hereinafter *The Federalist* No. 10].

9 Id. at 55.
As threatening as factions are, however, Madison did not despair. He believed that the size and structure of the national government provided a unique means to control faction's ill effects. "The smaller the society," Madison wrote,

[T]he fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.  

Madison's hope rested on two insights. First, the more we diversify and diffuse interests, the less likely a majority of them will conjoin into a "common motive" against others. Second, the more actors needed to make up a majority, the more collective action problems will frustrate them from discovering that they have a common motive and from carrying it out. Diversity, numerosness, and diffuseness thus work to prevent grand factions from forming and, if they do, from commandeering government. As Larry Kramer convincingly argues, this argument against faction was key to Madison's thinking as he came to the Constitutional Convention.  

Superagents undermine both of these insights. First, superagents effectively focus and concentrate interests. The corpora-

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95 See id. at 57-58.
96 Id. at 61.
97 See Olson, supra note 91, at 35, 45 (noting that the larger the group, the less well it will provide optimal amounts of collective goods).
Governing Through Intermediaries

...tion, for example, allows its numerous shareholders to overcome the collective action problems they would encounter if they tried to voice their interests in the corporation on their own. By herself, an individual shareholder would have little reason to say anything. Pressing her corporate interest would probably make only a small difference to her overall well-being, and she could not tax other shareholders for the cost of her efforts. The corporation, however, overcomes both difficulties. By aggregating all the individual corporate interests of its shareholders, it has great reason to speak and can fairly tax all of its shareholders for its efforts on their behalf. Whether it contributes soft money or engages in issue advocacy, its spending will decrease shareholder earnings pro rata. No free-riders here. Second, superagency also undercuts the numerousness of politics, which Madison believed was central to controlling faction. The more we have superagents represent us, the less we ourselves directly participate, and the fewer the players on the stage of politics, the more prone politics becomes to faction. Our superagents’ ability to reduce collective action problems, then, is both bane and blessing. As a result of making representatives more attentive to some voter interests, it promotes rent-seeking.

Not all superagents are equally powerful rent-seekers, moreover. If they were, the clash of interests might maintain at least a degraded form of Madisonian equilibrium among interest groups. The structural features of some superagents give them powerful rent-seeking advantages. Because a corporation, for example, can tax its shareholders for the cost of representing them, it can overcome collective action problems more effectively than can most public interest groups. Thus, intermediaries like big tobacco companies can persuade Congress to grant them a $50 billion tax credit (amounting to over $180 per person) without major difficulty. It

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91 Indeed, it was the nascent form of political party to which Madison and others of the founding generation turned once they had to mobilize supporters for the heated elections of 1796 and 1800. See John R. Sharp, American Politics in the Early Republic: The New Nation In Crisis 156–58 (1993).

100 The now-notorious tax credit provision was written by a tobacco lobbyist. See Sam Fulwood III, House Repeals Tax Break for Tobacco, L.A. Times, Sept. 18, 1997, at D3. Regarding the pro rata allocation of this tax credit, the most current estimate of the U.S. population is 271,188,000. See U.S. Bureau of the Census, Monthly Estimates of the United States Population (last modified Dec. 29, 1998) <http://
is inconceivable that the same companies' shareholders could have gotten this credit directly if they had asked for it themselves. Even if they somehow overcame the collective action problems working against their banding together, the publicity surrounding the activities of so many people would have inevitably defeated them.10

Full-purpose intermediaries pose a different and perhaps more serious rent-seeking problem. Although we view them as less susceptible to capture by the kinds of narrow interests single-purpose superagents often represent—which is true, of course—they can, when successful, be the most frightening of rent-seekers. Because of the majority decision rule, a political party, if it controls a stable coalition of at least half the members of the legislature, has complete control over legislative power. It can leverage the will of a stable majority into the "will" of all. Subject to executive veto and judicial review, members of this group can pass whatever laws they want and so steer benefits to themselves and costs onto the minority.

This not only creates unfairness, but it also leads to a severe misallocation of social resources. Because the majority is no longer sensitive to overall costs and benefits, it will create programs that lead to net social losses so long as each member of the majority receives at least a small net benefit. The majority may vote, for example, to pass legislation that creates a one-dollar benefit for each member of the majority while creating a ten-dollar cost for every member of the minority. So long as each member of the majority comes out ahead, little holds it back—no matter how great the social inefficiency. Unless somehow forced to internalize some of the costs as well as the benefits, the party will act to reap the greatest gains for its principals regardless of their net social effect. A loyal superagent, in fact, would not even think of doing otherwise.

These dangers become greater still when we think of "cultural" rent-seeking. Madison himself was keenly aware that factions would seek to control not only economic benefits but also culture itself. In The Federalist No. 10, for example, he wrote of how "[a] religious sect may degenerate into a political faction," just as "[a] rage for paper money, for an abolition of debts, for an equal divi-

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10 The tobacco tax credit itself, of course, was ultimately repealed, but only after great publicity. See Fulwood, supra note 100.
sion of property, or for any other improper or wicked project” may set one group of people against others in politics. In this respect, culture is no different from economics. If one stable group captures the political process, it can steer cultural benefits to itself and costs to everyone else by imposing its own view of the good on everyone. This kind of rent-seeking should not surprise us. To some degree, this is what every party strives for. In fact, we usually praise it. This is what having vision and carrying out an agenda are all about. We often like the kinds of social transformation it makes possible. But it does have a dark side. Every full-service super-agent strives to be a Taliban of politics. That is what being loyal to its principals amounts to. Paradoxically, then, superagents’ virtue is also their vice: Loyalty to principals endangers the rest of us.

Our hope, of course, is that full-service superagents will not remain stable, but rather, that principals will defect from one party to another so that no single party can control politics over time. As Barry Weingast has shown, if representatives cannot tell ahead of time whether they will be in a winning or a losing coalition, their legislative product will reflect a norm of universalism benefiting all. But parties aim to be stable, not ad hoc. To the extent they succeed as parties, they promise exactly the kind of behavior we fear. Only their failures save us from socially oppressive rent-seeking. Once again, our superagents sting as they serve us.

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102 The Federalist No. 10, supra note 93, at 62.
103 Once again comparison to corporate governance reveals the extent of the problem. When a group of investors seeks to take over a firm, they must buy out minority shareholders. Political buyouts, however, are impossible. A faction that takes over the political process cannot limit the reach of government to itself and, indeed, would not want to. The lack of buyout, then, aggravates the problem of control by faction.
105 See Aldrich, supra note 5.
106 This is consistent with the view expressed in Rawlsian theory. See John Rawls, A Theory of Justice 136 (1971) (noting that “[s]omehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general consideration.”).
CONCLUSION

What to do? If principal-agent problems are endemic to democracy, how do we solve them? Unfortunately, we have no magic solutions. We do, however, have one broad prescription and several specific applications of our analysis. We should first increase the transparency and accountability of superagents who operate primarily in the public domain to both their particular principals and voters at large. Transparency and accountability to their principals are necessary to overcome superagents' temptation to shirk. With respect to political parties, for example, this means ensuring that party officials should stand for reelection in a fair and open process in which all voters affiliated with the party can easily participate. It also means we should be ever vigilant to the danger of party "lock-ups" of the political process, when major parties work to create legal barriers to entry for minor parties. Although much private law scholarship has well addressed this danger in the corporate context, only a little public law scholarship has addressed it in the context of elections.¹⁰⁷

Unfortunately, once we move beyond political parties and PACs, transparency and accountability to principals become thorny indeed. The difficulty stems from the impossibility of isolating these superagents' political activities from their other activities. How does one encourage a church to be transparent and accountable to its flock when the church is organized to be accountable to a higher authority? With respect to these other superagents, larger issues tend to subsume concerns of transparency and accountability for politics. So, for example, a public interest organization must make periodic charity and tax disclosures and is to that extent transparent and accountable to regulatory authorities. But these disclosures typically do not reach the individual givers and would furnish little helpful information if they did. We can beef up formal disclosure requirements, require open meetings, and enforce record-keeping and stringent access requirements, thus enabling better monitoring by principals, but not without cost. As a general matter, such requirements might unduly burden these entities, and

¹⁰⁷ There have been a few recent notable exceptions. See Hasen, supra note 81; Issacharoff & Pildes, supra note 15; Jamin Raskin, The Debate Gerrymander, 77 Tex. L. Rev. 1943 (1999).
such sunshine requirements would be awkward to enforce just for political decisions. Indeed, a significant branch of First Amendment law was forged in an effort to protect the autonomy and privacy of dissident groups.\textsuperscript{108} Even in the less overtly political domain, the issue persists. Would a corporation’s board of directors have to hold a separate, open meeting to discuss its political spending strategy?

Promoting transparency and accountability to voters generally poses different issues. Why, some will ask, should superagents pay any heed to people other than their principals? Doing so would seem to violate any real notion of agency. Under this view, rent-seeking on behalf of principals would simply be an unavoidable consequence of empowering voters in politics. We could, of course, simply expand our notion of who counts as a principal to cover voters generally, but at that point agency analysis loses nearly all of its bite. Perhaps we should complicate the notion so that political superagents have different kinds of principals for different purposes. Thus, one could say, a political party should only be transparent and accountable to voters of the party for certain of its activities, like picking party officers, and transparent and accountable to all voters to some degree for other activities, like election campaigns.\textsuperscript{109} Continually shifting from one set of principals to another, however, threatens to make the analysis too "sophisticated" to help, but perhaps that is unavoidable.

If we heed our early admonition to analyze each type of superagent on its own terms, things quickly become even more complicated. Even though political parties, for example, are imperfectly transparent and accountable to voters generally, they are much more sensitive to oversight and discipline than are other types of superagents who participate in politics as a "sideline." The further we move from formal political channels, the more attenuated


\textsuperscript{109} This is the issue posed by the California requirement that all parties submit their primary processes to a blanket primary in which voters may cross-over, office-by-office, to select their favorite candidates, regardless of party affiliation. This voter-initiative was upheld against constitutional challenge on the grounds that a political party should be transparent not only to its own membership but to the electorate as a whole, and that the party officials and volunteers had no particular claim on the party’s nomination processes. See California Democratic Party v. Jones, 169 F.3d 646 (9th Cir. 1998).
transparency and accountability to voters become. Moving down the chain from political parties to PACs (which are organized around money), to unions (which are organized around workplace representation), to professional and business associations (which are organized around a combination of money and specific issue representation), transparency and accountability to the public become increasingly strained. And, in general, this is appropriate. To open some of these entities up to scrutiny and discipline by nonmembers would destroy them. Just think of the problems of holding an unpopular church accountable to society at large. Many of these organizations would not be able to accomplish the many great goods we want of them if they were held too closely to account. But we can try to hold them more closely to account for some range of largely political activities.

Apart from increased transparency and accountability, where does our analysis lead? If nothing else, we hope it changes how people think of specific issues in this area. If it throws new light on old debates, it may well open up new avenues of resolution. We think it fruitful to think of the central issues of the field in these terms. Consider the longstanding debate of whether and to what extent corporations should be allowed to spend money in politics. Right now that debate, like many of those over campaign finance, seems pretty sterile. On the one hand, reformers talk about corporations drowning out other points of view and buying desired policy outcomes from politicians. On the other hand, deregulationists talk about getting more political information to voters and deny any "bribery" effect on politicians. To deregulationists, if the corporate position wins, it is either because the corporation has persuaded voters of its point of view, which the representative's ultimate votes should then properly reflect, or because voters simply do not care. In either case, where is the problem?

Our analysis helps explain a central feature of the Supreme Court's jurisprudence in this area. In Austin v. Michigan Chamber of Commerce, the Court held that the government can bar for-
profit corporations and certain business groups from contributing to and making independent expenditures on behalf of candidates but cannot similarly bar nonprofits that meet certain conditions.\textsuperscript{13} The Court reasoned that "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" justify the prohibition.\textsuperscript{14} In anticipating criticism, the Court insisted:

The Act does not attempt to equalize the relative influence of speakers on elections; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations. We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the prohibition]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.\textsuperscript{15}

One can attack the Court's reasoning on two obvious grounds. First, expenditures by wealthy individuals, not just by for-profit corporations, may fail to "reflect actual public support for the political ideas" expressed.\textsuperscript{16} Why should Michael Eisner's expenditures track public opinion any more than Disney's? If anything, we might expect the opposite to be true since the corporation more directly registers public reaction to its positions. Second, if diverging from public support is the problem, why does "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrant[] the limit" rather than "the mere fact that corporations may accumulate large amounts of wealth"?\textsuperscript{17}

The Court's reasoning is unclear and unconvincing. The Court is, however, pursuing an important intuition even if it never quite manages to flesh it out. Two major concerns animate the Court at this crucial point in its opinion: First, a corporation's speech may overrepresent some views in the marketplace of ideas, and second, its "state-conferred corporate structure" poses some special danger. The first concern, by itself, fails to do much work in the opin-

\textsuperscript{13} See id. at 652–54.
\textsuperscript{14} Id. at 660.
\textsuperscript{15} Id. (internal quotation marks and citations omitted).
\textsuperscript{16} Id. at 684–85 (Scalia, J., dissenting) (citing Buckley v. Valeo, 424 U.S. 1 (1975)).
\textsuperscript{17} Id. at 660.
ion. It simply fails to offer any explanation as to why corporations are different from wealthy individuals, whose expenditures are protected by *Buckley v. Valeo.*\(^{118}\) The second concern, however, does offer a reason for why the first is particularly worrying in the corporate context. Although critics of *Austin* may scoff at the idea that "state-conferred corporate structure" matters,\(^{119}\) our analysis of superagency shows how it does make a difference—an important one, in fact. Because the corporation aggregates its shareholders' small individual stakes and can allocate pro rata the cost of voicing their interests in the corporation, it can go far toward overcoming the collective action problems that would frustrate direct action by the shareholders themselves for, say, tax breaks. Its relatively focused set of interests, moreover, makes it easier for the corporation to argue its concerns effectively. But these facts appear to make the corporation a particularly good intermediary. What is not to like?

For one thing, there is the fractionation problem. By hiving off some interests to such an effective and powerful superagent, the shareholder's overall balance of interests may be disrupted. For another, there is the worry about equality among superagents. If some types of people have access to this particular, powerful type of superagent and others do not, have we not undercut the norm of equal political empowerment among principals? Finally, there is the danger of rent-seeking. To the extent that the corporation serves its shareholders, it will seek rents for them. These ultimately have to come at the expense of everyone else and will decrease overall social welfare.

Critics, then, are right to question the Court's stated justifications for distinguishing corporations and individuals. They simply do not work. Our analysis shows, however, that these justifications do—though admittedly awkwardly—point to a real difference: "corporate structure" itself. This structure is what makes the corporation a uniquely effective superagent and one that poses great concerns about fractionated supervision of interests—even in the case of a single principal.\(^{120}\) Our analysis suggests, moreover, that

\(^{118}\) 424 U.S. 1 (1975).

\(^{119}\) *Austin*, 494 U.S. at 680–82 (Scalia, J., dissenting).

\(^{120}\) See supra notes 87–88 and accompanying text.
the distinction between corporations and individuals could appropriately extend beyond contributions and expenditures to other types of political spending, like soft money contributions and issue advocacy.

What about unions? Many campaign finance regimes treat them in most respects the same as corporations. Under federal law, for example, unions, like corporations, cannot contribute to or make expenditures on behalf of federal candidates but can make unlimited soft money contributions to political parties and engage in unlimited issue advocacy. Does this equivalence of treatment make sense? Should we regulate unions the same way we do corporations or should we treat them differently, perhaps more like individuals? Although our analysis does not come to a bottom-line answer, it does point to the factors upon which any differences in treatment should turn.

First, the similarities. Like corporations, unions solve the collective action problems that hem in principals themselves and many other superagents. By aggregating the small individual interests of many union members, unions ease the transaction costs of political activity, and by spending out of the general union treasury they effectively tax their members pro rata for their share of the political activity. Thus, unions overcome the collective action problems that afflict the principals themselves. Because of these structural advantages, which they share with corporations, unions can act more effectively than can principals and most superagents. In this respect, then, unions raise the same kinds of concerns that corporations do and should thus be treated similarly.

There are, however, two differences. First, corporations and unions promote different kinds of interests. Although both seek to promote the economic interests of their shareholders or members, some have traditionally viewed these interests as quite different. Capital versus labor is a classic dispute in our culture and our laws have often intervened in their battles. Federal campaign finance law, for example, prohibited corporate contributions long before it

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122 See Olson, supra note 91, at 88 (noting that labor unions that promote right-to-work laws behave differently from profit-based private businesses).
prohibited union ones.\textsuperscript{123} If we thought one type of interest substantively more worthy of representation than the other, we could treat corporations and unions differently. But, of course, structurally privileging one set of views would run straight into First Amendment concerns.

Second, corporations and unions might pose somewhat different concerns as to fractionation of principals’ interests. If it is the case that union members as a group identify more closely with the set of interests the union represents on their behalf than shareholders do with the set of interests that the corporation represents on theirs, then unions pose relatively less of a fractionation problem. A superagent that represents a wider set of interests of greater importance to its principals than another superagent does for its principals will pose less of a potential conflict when advocating those interests against the principals’ other superagents. This is not to say, of course, that there will be no fractionation problem, just that it will be less. Whether it is less enough to warrant a difference in treatment and how large that difference should be we cannot say without extensive empirical work. But we do feel confident that the debate over whether unions should be treated differently from corporations ultimately comes down to these two factors—one substantive, one structural.

Our analysis does not aim to transform the landscape. That would be far too ambitious. Rather, we hope only to offer up some new ideas, unsettle some old, stalemated fights, create a few new disputes, and view some old issues in a new light. To the extent any of our suggestions accomplish this, we will be happy.