WHAT EQUITY, THE PROMISE ECONOMY, AND COGNITION MEAN FOR HOW FIDUCIARY LAW SHOULD DEVELOP

H. Justin Pace*

Scholarship on fiduciary law has long been divided into two camps: traditionalist and contractarian. Those two camps have largely been talking past each other, however, because each fails to appreciate that there are really two distinct, coherent bodies of fiduciary law. There are traditional fiduciary relationships rooted in equity and modern fiduciary relationships rooted in statute and contract. Much of the confusion in the case law can be attributed to judges attempting to apply assumptions developed for traditional, equitable fiduciary relationships to statutory and contractual fiduciary relationships better suited for a modern economy built on promises.

Scholars and judges should appreciate that there are two bodies of fiduciary law and that they require different approaches. Rather than the top-down analysis that has typically been applied to traditional fiduciary obligations, judges should apply a bottom-up analysis to modern, statutory and contractual obligations. That is, judges should perform a data-driven analysis that closely examines the relative statutory and contractual language. This will better fit the needs of legislatures in providing for those fiduciary relationships and the needs of parties in entering into them. The modern, statutory and contractual form of fiduciary obligation is a rational response to a design problem stemming from changes in the law and in the economy.

* Assistant Professor of Law, Western Michigan University, Haworth College of Business.
Many thanks for helpful comments by Gregory Alexander, Jim Lindgren, Jake Linford, Manuel A. Utset, Kelli Alces Williams, and participants at the Central States Law Schools Association Scholarship Conference, the Northwestern Pritzker School of Law Legal Scholarship Workshop, the Florida State University College of Law Faculty Enrichment Speaker Series, the Southeastern Academy of Legal Studies in Business Annual Meeting, and the AALS Annual Meeting Work-in-Progress Panel.

INTRODUCTION

Fiduciary obligation[1] has a long history in the law. Its roots are in equity dating back several centuries. And that original conception of fiduciary obligation persists in recognizable form in, for example, the law of trusts, one of the original sources of fiduciary obligation. But fiduciary obligation has spread into a diverse and large array of bodies of law as the economy has come to largely be made up of promises. Where fiduciary obligation at its roots was equitable and judge-made, its modern iterations are typically created and defined by statute and by contract. Questions of fiduciary obligation now most often come up in the context of business organization law. In that context, the statutory and contractual roots and nature of the relevant fiduciary obligations are particularly important.

Those equitable roots, though, continue to exercise a powerful influence over fiduciary law. Although modern fiduciary obligation in the business organization context is a very different sort of animal, judges continue to *talk* about fiduciary obligation in much the same way. The language used reflects how judges think about fiduciary obligation. Too often a single set of assumptions are applied to what are in fact two distinct, coherent bodies of law. This, in part, explains why existing arguments regarding fiduciary law are incomplete and unsatisfying, whether made by traditionalists who talk about fiduciary obligation in moral terms, focus on fiduciary obligation more broadly, and found their work in philosophy, or made by contractarians who talk about fiduciary obligation in contractual terms, focus on the business

1. *Fiduciary*, BLACK'S LAW DICTIONARY (8th ed. 2004) (defining a fiduciary as "1. A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor [ ]. 2. One who must exercise a high standard of care in managing another's money or property [ ].")

organization law context, and found their work in economics.

Fiduciary obligation grew from its narrow, equitable roots to extend to a wide variety of types of relationships. Those relationships have included, among others, trustee-beneficiary, agent-principal, guardian-ward, attorney-client, corporate manager-corporation, majority shareholder-minority shareholder, partner-partner and partnership, bank-borrower, franchisor-franchisee, investment advisor- and broker-client, ERISA plan administrator- and trustee-plan participants,[2] executor- and administrator-estate,[3] physician- and psychiatrist-patient, union representative-union and -union membership, and even husband-community property.[4]

That growth, in part, came from the application by judges of equitable principles to new types of relationships, but it is also the result of expansion by statute and contract. Fiduciary concepts have been borrowed from equity and "bolted on" to various bodies of law using statute and contract, and often redefined in the process. This has given the flexibility needed to keep fiduciary obligation relevant in a changing economy where promises are more important than property. These two distinct sources of fiduciary law have resulted in separate bodies of fiduciary law, a dichotomy that is underappreciated.

In order to better understand why judges talk about fiduciary obligations the way they do and why it matters, it is helpful to understand not just the equitable roots of fiduciary obligation but also the concept of a "schema." In psychology literature, schemas are "knowledge structures that are comprised of assumptions, expectations, and generic prior understandings."[5] Despite the two sources of fiduciary law, judges tend to hold a single schema for fiduciary obligation that is only valid for equitable fiduciaries. This is visible in the frequent appearance of morally inflected language, equitable reasoning, and reasoning by analogy in opinions by judges deciding questions of fiduciary obligation. Contra to the assertions of contractarian scholars, those words matter. The schema influences judicial decision-making (as do other cognitive limitations). However, because there are two distinct bodies of fiduciary obligation, the application of the schema where fiduciary obligation is created and defined by statute, contract, or both — especially in the business organization context — results in a judicial error rate that is higher than it should or could be.

2. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 429–34 (1993) (discussing the duty of loyalty and fiduciary duty in the context of trustee relationships).

3. Gregory S. Alexander, *Essay: A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 768 (1999).

4. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 796, 807, 817 (1983).

5. Alexander, *supra* note 3, at 770.

I assert that a schema poorly suited for the second, modern type of fiduciary obligation is frequently used and that it should be discarded in analyzing those obligations to be replaced by "bottom-up" analysis. I also argue that the modern statutory and contractual form of fiduciary obligation is a rational response to changes in the law and in the economy and to problems of design. As the economy continues to grow and change, legislatures have and will continue to expand the relationships to which fiduciary obligations apply, and to customize those obligations. This threatens to add cost associated with complexity; legislatures can mitigate this cost by leveraging existing fiduciary law. And doing so is not in irreconcilable conflict with moral considerations.

This paper is agnostic on the question of what the proper fiduciary duties in any given fiduciary relationship are. Rather, the focus is on what schema judges use and how it affects their decision making and whether, from a 10,000-foot view, the modern statutory and contractual form of fiduciary obligation is a rational approach to modern needs. This paper also brackets discussion of possible implications of some of the issues raised, such as the role of equity and remedies and the consequences in bankruptcy that classifying a claim as fiduciary or contractual may have. Rather than trying to delineate a precise definition of what fiduciary relationships should be, this Article accepts that fiduciary obligations have been applied very broadly. Finally, this article relies on a theoretical and doctrinal argument for the schema that judges apply to fiduciaries. Empirical research using survey and experimental methods is warranted.

Part I of this Article will explore the equitable roots of traditional fiduciary obligation and how that has shaped fiduciary law. Part II will explore the increasing role of statute and contract in creating, defining, and limiting fiduciary obligations. Part III will show why both traditionalist and contractarian explanations for fiduciary law are unsatisfactory. Part IV will identify and critique the "schema" that judges apply when analyzing questions of fiduciary obligation and discuss other issues of cognition. Part V will evaluate the modern, statutory and contractual form of fiduciary obligation in light of changes in the law and the economy and in light of design issues.

I. HOW EQUITY SHAPED FIDUCIARY OBLIGATION

Fiduciary obligation is one of the oldest concepts in American law to survive today in recognizable form. The original fiduciaries — trustees, administrators, and bailees — have origins stretching back hundreds of years.[6] "The 'use' emerged during the twelfth and thirteenth centuries in England, and the trust developed over the fourteenth through seventeenth centuries."[7] Fiduciary obligations date back at least to the fifteenth century and were originally principally applied in what came to be the trust context.[8] Early trust law development was heavily influenced by the needs of a device used for holding and transferring land within families because that was the source of most wealth at the time.[9] Trusteeship was viewed as an honorary, not a mercenary, position.[10] Langbein characterizes the trustees of the time as "gentlemen trustees" with few powers, few skills, and few duties beyond "lending their names for a conveyancing device."[11] This was feasible because of the relatively simplicity of trust assets and administration, again because trusts held real property.

It was courts of equity, not of law, that originally developed fiduciary law. The English Court of Chancery was originally not a court in the sense that it did not decide cases.[12] Rather, it issued writs needed to sue in royal courts.[13] But the Court of Chancery over time increasingly became viewed as an alternative to the royal courts when relief through those courts was not available.[14] Accordingly, a body of procedure grew up around the Chancellor and Court of the Chancery, but it was a much more limited

6. Frankel, *supra* note 4, at 795 (first citing 1 A. SCOTT, THE LAW OF TRUSTS §1 (3d ed. 1967); then citing 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 155 (2d ed. 1898); and then citing 2 WILLIAM BLACKSTONE, COMMENTARIES *395–96).

7. *Id.* at 805 (citing 1 A. SCOTT, THE LAW OF TRUSTS §§1.3–1.4 (3d ed. 1967)).

8. *See* Henry E. Smith, *Why Fiduciary Law is Equitable*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 263, 263 (Andrew S. Gold & Paul B. Miller eds., 2014) ("In particular by the fifteenth century many of the complaints were against "foeffees," persons who held legal title for the benefit of another in a proto-trust (a "use," usually for the purpose of avoiding the tax-like feudal incidents that would be owed the lord on an intergenerational transfer).").

9. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 940 (2005).

10. FRANCIS WILLIAMS SANDERS, AN ESSAY ON THE NATURE AND LAWS OF USES AND TRUSTS 256 (London, E. & R. Brooke 1791).

11. Langbein, *supra* note 9, at 940–41 (citing John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 632–42 (1995)).

12. Sam Bray, *A Student's Guide to the Meanings of "Equity,"* OPEN SCIENCE FRAMEWORK, 4 (2016), https://osf.io/9vrjx/ [https://perma.cc/ZL4S-58NQ].

13. *Id.* at 4.

14. *See* 6 SIR JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483–1558 174 (2003) ("[A] party sometimes required a remedy in conscience when none was available at common law."). *But see* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1005 (2015) ("[P]laintiffs, in order to obtain an equitable remedy, must first show that they have 'no adequate remedy at law,' sometimes called the 'irreparable injury rule.' The adequacy requirement is old, and it once served at least one clear purpose: when there was only a single English chancellor, he could avoid being overwhelmed by refusing to give relief where the law courts could do so adequately.") (citations omitted).

procedure than that available in royal, or common law, courts.[15] "[C]ase specificity" and "moral reasoning" were hallmarks of Court of Chancery reasoning.[16] Moral reasoning was so central to its reasoning that equity courts were referred to as "courts of conscience" and the chancellor was referred to as "the keeper of the king's conscience."[17]

Because equitable courts had little to no fact-finding ability, fiduciary rules were tailored to avoid the need for fact-finding.[18] Hence, for example, the "no further inquiry" rule in trust administration.[19] Under the no further inquiry rule, courts will not examine the fairness or benefit to the beneficiary of a conflicted transaction by the trustee.[20] Once it is determined that the transaction is conflicted, there will be no further inquiry. The rationale behind a refusal to examine whether conflicted transactions are in the beneficiary's best interest becomes apparent when you consider that equity courts did not have any real ability to *perform* a further inquiry.

Those procedural limitations persisted for centuries. The English Court of Chancery's fact-finding procedures were "profoundly defective" into the nineteenth century, with no provisions for confrontation or cross-examination of witnesses or for demeanor evidence.[21] The efforts to reform equitable procedure stretched from the 1820s to the 1930s and occurred both in England and in the United States.[22]

Equity courts crossed the Atlantic. The Delaware Constitution, for example, prohibits the Delaware legislature from limiting its equity court's jurisdiction to less than that of the High Court of Chancery of Great Britain.[23]

15. *Cf.* Langbein, *supra* note 9, at 945–47 (describing the limitations of early equitable fact-finding and reform efforts) (citations omitted).

16. Bray, *supra* note 12, at 5.

17. Henry Smith, *supra* note 8, at 263.

18. *Cf. id.* at 276 ("[T]he no further inquiry rule has a purpose beyond making up for historically bad fact finding procedures.").

19. *Cf.* Langbein, *supra* note 9, at 945–47 (describing the limitations of early equitable fact-finding and reform efforts) (citations omitted).

20. *Id.* at 931–32.

21. *Id.* at 945–46 (relying on 3 WILLIAM BLACKSTONE, COMMENTARIES *373, *442–55; JOHN P. DAWSON, A HISTORY OF LAY JUDGES 154-59 (1960); 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 353–69 (3d ed. 1944); A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 90–91 (1914); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 59 (1980)).

22. *Id.* at 947 (relying on Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I*, 22 LAW & HIST. REV. 389, 409–14 (2004); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987)).

23. DEL. CONST. art. IV, § 10. *See also DuPont v. DuPont*, 8 A.2d 724, 729 (Del. 1951) ("We think the Constitutions of 1792, 1831 and 1897 intended to establish for the benefit of

A moral, rather than economic, view of trustees crossed with them. Early U.S. courts expressed the view that trustees will wrong beneficiaries absent judicial intervention. In 1844, the Illinois Supreme Court declared that "[b]etween two conflicting interests, it is easy to foresee, and all experience has shown whose interests will be neglected and sacrificed."[24] U.S. courts also continued to independently develop fiduciary law. For example, the Supreme Judicial Court of Massachusetts replaced the existing "'legal-list' rule" governing trustee investment of trust assets with "a more flexible 'prudent-investor' standard."[25]

From trusts, fiduciary obligation spread to many different types of relationships. Fiduciary obligations in the trustee-beneficiary relationship date back at least to 1536.[26] Fiduciary obligations in the principal-agent relationship date back to the end of the eighteenth century.[27] Fiduciary obligations in the executor- and administrator-estate, conservator- and legal guardian-ward, and lawyer-client contexts all have a long history.[28] In Delaware, corporate derivative actions are a "judicially-created doctrine" and "creature[s] of equity."[29] Both the corporate form and corporate derivative standing in Delaware pre-date the Delaware General Corporation Law statutes.[30]

Even for fiduciary relationships with their roots in equity, judges have upheld some types of modifications or restrictions of fiduciary obligations. For example, an express provision in a trust agreement governs over the duty of loyalty, an express provision in a partnership agreement may waive the duty not to compete with the partnership, and an attorney's client may waive

---

the people of the state a tribunal to administer the remedies and principles of equity. . . . Its result is to establish by the Judiciary Article of the Constitution the irreducible minimum of the judiciary.").

24. *Thorp v. McCullum*, 6 Ill. 614, 626 (1844).

25. Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaption?*, 79 OR. L. REV. 61, 74-75 (2000) (citing *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446 (1830)).

26. 1 A. SCOTT, THE LAW OF TRUSTS §1 (4th ed. 1987) (discussing the enactment of the Statute of Uses, which prohibited uses that did not impose a duty on the trustee).

27. Frankel, *supra* note 4, at 795 (citing Charles Claflin Allen, *Agent and Servant Essentially Identical*, 28 AM. L. REV. 9, 18 n.1 (1894)).

28. *See, e.g.*, *Weksler v. Collins*, 317 Ill. 132, 145 (1925) (labeling executors, administrators, guardians, and conservators as fiduciaries); *Shearman v. Cooper*, 294 Ill. 314, 318 (1920) (categorizing administrators, executors, and attorneys as fiduciaries); *Hull v. Burr*, 63 Fla. 440, 441 (1912) (quoting Florida statute that lists executors and guardians among types of fiduciaries); *Fisher v. Bishop*, 63 Sickels 25, 28 (N.Y. 1888) (categorizing attorneys, guardians, and trustees as fiduciaries).

29. *Schoon v. Smith*, 953 A.2d 196, 201–02 (citing 13 FLETCHER ENCYCLOPEDIA OF THE LAW OF PRIVATE CORPS. § 940, at 30 (2004); R. Franklin Balotti & Jess A. Finkelstein, 1 THE DELAWARE LAW OF CORPS. & BUS. ORGS. §13.10, at 13–20 (3d ed. 2008)).

30. *CML V, LLC v. Bax*, 28 A.3d 1037, 1044 (Del. 2011).

the right to conflict-free representation.[31]

It is also important to recognize that judges do continue to find fiduciary obligations based on the status and relationship of the parties. The addition of fiduciary obligations to the physician-patient relationship, for example, is more modern.[32] Similar fiduciary obligations were later applied to psychiatrists.[33] In 1991, the Delaware Court of Chancery found that the directors of a corporation serving as the general partner of a limited partnership owed fiduciary duties to the limited partnership.[34] In doing so, the Court of Chancery did not engage in statutory analysis, but instead applied "general principles" and analogized to trust law.[35] And, in 2001, a judge ruled that a professor owed fiduciary duties to one of his students on the basis of the authority of the professor and the vulnerability of the student, despite the presence of an agreement between the two.[36] Some courts continue to suggest a very expansive application of fiduciary obligation where the relationship warrants it.[37] Thus, although modern fiduciary law is more a creature of statute than equity, equity continues to play a role, and, as I will show, should continue to play a role.

31. Easterbrook & Fischel, *supra* note 2, at 429. Of course, even fiduciary relationships such as these with equitable roots have come to be governed by statute, statutes that sometimes explicitly provide for waiver. And in all three parties rely heavily on agreements.

32. *See, e.g.*, *Hammonds v. Aetna Cas. & Sur. Co*., 237 F. Supp. 96, 102 (N.D. Ohio 1965) (stating that "[i]t is axiomatic that the physician-patient relationship is a fiduciary one" after, it should be noted, looking to the relevant state statutes for an expression of public policy); *Lockett v. Goodill*, 430 P.2d 589, 591 (1967) ("The relationship of patient and physician is a fiduciary one of the highest degree. It involves every element of trust, confidence and good faith.").

33. *See, e.g.*, *MacDonald v. Clinger*, 446 N.Y.S.2d 801, 805 (N.Y. App. Div. 1982) ("The relationship of the parties here was one of trust and confidence out of which sprang a duty not to disclose. Defendant's breach was not merely a broken contractual promise but a violation of a fiduciary responsibility to plaintiff implicit in and essential to the doctor-patient relation.").

34. *In re USACafes, L.P. Litig*., 600 A.2d 43, 48 (Del. Ch. 1991).

35. *Id.* at 48–49.

36. *Chou v. Univ. of Chicago*, 254 F.3d 1347, 1362–63 (Fed. Cir. 2001).

37. *See, e.g.*, *Charles v. Onondaga Cmty. Coll*., 418 N.Y.S.2d 718, 720 (N.Y. App. Div. 1979) ("A duty extraneous to the contract often exists where the contract results in or accompanies some relation between the parties out of which arises a duty of affirmative care as in cases involving bailor and bailee, public carrier and passenger, innkeeper and guest, lawyer and client, or principal and agent. Although in the case at bar there was concededly no relationship between plaintiff and defendants other than that of parties to the contract of employment, the absence of such relationship is not necessarily fatal to plaintiff's claim.") (citations omitted).

II. STATUTE AND CONTRACT'S INFLUENCE OVER FIDUCIARY OBLIGATION

Traditional, equitable fiduciary relationships remain quite common, but they have been overcome in importance in the economy, in case law, and in the literature by a different sort of fiduciary relationship. While early fiduciary obligations were primarily judge-made, as they expanded, they were increasingly created and defined by statute. Nowhere is this truer than in the limited liability company (LLC) context, but fiduciary obligations in the modern corporate and partnership context are also set and defined by statute, and statutory fiduciary relationships extend well beyond the business organization context. The economic importance of these relationships has surged as corporations have grown to mammoth proportions[38] and the popularity of the LLC has exploded.[39] With the advent of the promise economy, wealth transitioned from something that primarily took the form of land to something that primarily takes the form of financial instruments and contractual rights.[40] Business disputes and bankruptcies frequently lead to claims for breaches of fiduciary duties.[41] Many of the modern leading cases address such relationships, as does much of the modern literature.

Fiduciary obligation in the business organization context does have a long history, although its incorporation into statutory law has been a more recent phenomenon. Some fiduciary duties date back to the creation of

38. *But see* S.I. Strong, *Congress & Commercial Trusts: Dealing with Diversity Jurisdiction Post-Americold*, 69 FLA L. REV. 1023, 1023 (2017) (arguing that commercial trusts "operate as a functional equivalent to corporations[,] 'dominate certain types of modern business and financial transactions[,]' . . . and play a central role in the U.S. economy, holding trillions of dollars' worth of assets and generating billions of dollars' worth of annual income") (citations omitted).

39. *See, e.g.*, H. Justin Pace, *Contracting Out of Fiduciary Duties in LLCs: Delaware will Lead, but will Anyone Follow?*, 16 NEV. L. J. 1085, 1086 (2016) ("LLCs now account for more business filings than corporations in twenty-nine states.") (citing Sandra K. Miller, *The Duty of Care in the LLC: Maintaining Accountability While Minimizing Judicial Interference*, 87 NEB. L. REV. 125, 132 n.23 (2008)).

40. Langbein, *supra* note 9, at 940 n.42 (quoting ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922). *See also* Frankel, *supra* note 4, at 802 ("In our society, affluence is largely produced by interdependence . . . .") (footnote omitted).

41. *See* Russell C. Silberglied, *Litigating Fiduciary Duty Claims in Bankruptcy Court and Beyond: Theory and Practical Considerations in an Evolving Environment*, 10 J. BUS. & TECH. L. 181, 181 (2015) ("Litigation against directors and officers is ubiquitous in bankruptcy courts. Indeed, charges of director malfeasance and breach of fiduciary duty are leveled at the outset of many bankruptcy cases . . . . [D]irector and officer litigation claims have become 'bankruptcy litigation.' The reason is fairly straightforward: suits alleging breach of fiduciary duty and the like are much more likely to be filed when a business strategy has failed . . . .") (footnote omitted).

partnerships and corporations.[42] Partnerships date back at least to the thirteenth century.[43] Corporations, as we know them today, date back at least to the seventeenth century.[44] Some fiduciary duties came later.[45] And some only came with the creation of new entity forms.[46]

Fiduciary obligations in the business organization context were not originally created by statute.[47] And, indeed, Delaware was slow in providing explicitly for fiduciary duties in its business organization laws, only doing so in the LLC context in 2013.[48] Aspects such as the business judgment rule were created by courts, not legislatures.[49] But states steadily began to update their business organization statutes to include fiduciary obligations. As new entity forms were created providing for alternative business entities, including notably the LLC, fiduciary law in the business organization context broke free from equity and the common law and became a true body of statutory law.

What happened, in effect, is that statute and contract were used to "bolt-on" fiduciary obligation in a different context. That is, the source of fiduciary obligation did not arise from the nature of the relationship of the parties or the external status of the parties but from the statute or contract itself. And to extend the bolt-on analogy a bit further, the resulting law is not only customized by bolting-on fiduciary obligation but by modifying the contours of fiduciary obligation by statute and contract.

Courts were slow to account for the shift in fiduciary law from an equitable basis to a statutory and contractual basis. The famous teaching

42. Frankel, *supra* note 4, at 795 ("In the business realm, the fiduciary duties of partners, corporate directors, and officers originated with the formation of partnerships and corporations.") (footnote omitted). *See also* Wardell v. R.R. Co., 103 U.S. 651, 657–58 (1881) (stressing that directors owe a fiduciary duty to their company); Koehler v. Black River Falls Iron Co., 67 U.S. 715, 720–21 (1862) (holding that directors owe a fiduciary duty to stockholders).

43. ALAN R. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP 10-11 (1968).

44. WILLIAM MEADE FLETCHER, FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §1 (rev. perm. ed. 1974).

45. Frankel, *supra* note 4, at 795–96 ("[M]ajority shareholders were not subjected to fiduciary duties until this century.") (footnote omitted).

46. The LLC did not exist at common law and is a product of statute. CML V, LLC v. Bax, 28 A.3d 1037, 1045 (Del. 2011).

47. *See, e.g.*, *Guth v. Loft, Inc*., 5 A.2d 503, 510 (Del. 1939) ("While technically not trustees, [corporate officers and directors] stand in a fiduciary relation to the corporation and its stockholders.").

48. DEL. CODE ANN. tit. 6, § 18-1104 (West 2013) ("In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern.").

49. *See Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981) ("The 'business judgment' rule is a judicial creation . . . .").

case *Meinhard v. Salmon* is an apt example.[50] Meinhard and Salmon were partners, but then-Judge Cardozo explicitly referred to trustees and courts of equity in laying out the high duty owed. He said that a "*trustee* is held to something stricter than the morals of the market place," not a partner.[51] He referenced the "[u]ncompromising rigidity [that] has been the attitude of *courts of equity*," not courts of law.[52] Having drawn that connection, he layered on more morally inflected language. Partners owe a duty of "[n]ot honesty alone, but rather the punctilio of an honor the most sensitive."[53] "Joint adventurers . . . owe to one another," not the duty of loyalty, but "the duty of the *finest* loyalty."[54] That loyalty must be "undivided" and not subject to "the 'disintegrating erosion' of particular exception."[55] That high standard was necessary not only to differentiate fiduciary conduct from "forms of conduct permissible in a workaday world," but to keep it "at a level higher than that trodden by the crowd."[56] All of this was built on a "tradition that is unbending and inveterate."[57] And only by refusing to make an exception — equitable characterization notwithstanding — could Judge Cardozo avoid consciously lowering the standard of conduct for fiduciaries.[58] Meinhard and Salman had an agreement. Cardozo ignored it. Instead Cardozo analogized Salmon to a trustee and his own court to one of equity, while disclaiming equity's traditional discretion.[59]

Fiduciary obligations have been created by statute outside of the business organization context. The Exchange Act of 1934 and SEC rules made brokers and dealers the fiduciaries of their customers.[60] The Dodd-Frank Act authorized the SEC to promulgate a uniform fiduciary standard for investment advisors, brokers, and dealers when providing personalized investment advice.[61] The statutory power given to union leaders to represent workers in negotiations with management brought with it fiduciary obligations inferred by the courts.[62] The Landrum-Griffin Act of 1959

50. Meinhard v. Salmon, 249 N.Y. 458 (1928).
51. *Id.* at 464 (emphasis added).
52. *Id.* (emphasis added).
53. *Id.*
54. *Id.* at 463–64 (emphasis added).
55. *Id.* at 464 (citation omitted).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 463–68. *See also* Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFFALO L. REV. 99, 114 (2008) ("Cardozo was not hobbled by the shackles of contract—he disregarded the parties' agreement and imposed extra-contractual fiduciary duties instead.").
60. Easterbrook & Fischel, *supra* note 2, at 430.
61. 15 U.S.C. § 78o(k) (2012).
62. Frankel, *supra* note 4, at 796 (citing Steele v. Louisville & N.R.R. Co., 323 U.S. 192

explicitly established duties by "officers, agents, shop stewards, and other representatives of a labor organization" to the labor "organization and its members as a group."[63] In 1974, Congress created a statutory fiduciary scheme for pension and other employee benefit plans and trusts with the Employee Retirement Income Security Act (ERISA).[64] Regulators play a role as well. A recently vacated Department of Labor rule raised the standard for brokers handling retirement accounts to a "best interests" standard.[65]

States also began modifying traditional fiduciary law by statute, especially by adopting uniform acts. States shifted estate administration, even by conflicted administrators, away from heavy court supervision by statute with the adoption of the Uniform Probate Code of 1969.[66] States provided for conflicted surrogates to terminate life support by statute with the adoption of the Uniform Health-Care Decisions Act.[67] States abrogated common law fiduciary obligation and allowed limited waiver of fiduciary duties for agents operating under a durable power of attorney with the adoption of the 2006 Uniform Power of Attorney Act, already adopted by 24 states.[68] States abrogated the sole interest rule — allowing it to be abridged by the terms of the trust — by statute with the Uniform Trust Code.[69] State

(1944); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976)). *See also* Morrissey v. Curran, 423 F.2d 393, 398–99 (2d Cir. 1970) (holding that legitimizing a breach of duty by amending the union's constitution or bylaws was "inconsistent with the aims and purposes of the Fair Management Reporting and Disclosure Act.").

63. 29 U.S.C. §501(a) (2010).

64. 29 U.S.C. §§1001–1461 (2012). *See also* Langbein, *supra* note 9, at 950 ("Congress based ERISA on the law of trusts.").

65. Chamber of Commerce v. U.S. Dep't of Labor, No. 17-10238, at *26 (5th Cir. Mar. 15, 2018) (vacating the fiduciary rule because, for example, its "interpretation of 'investment advice fiduciary' fatally conflicts with the statutory text and contemporary understandings").

66. *See* Langbein, *supra* note 9, at 941 ("Across the second half of the twentieth century, there has been a strong movement away from such court-supervised wealth transfers on death, on account of the expense, nuisance, and delay inherent in the procedure. The animating reform of the Uniform Probate Code of 1969 was the shift to unsupervised probate administration.") (citations omitted).

67. *See id.* at 942 ("The Uniform Health-Care Decisions Act empowers the spouse or another near relative of an incapacitated person to serve as the so-called surrogate, who decides whether to terminate the person's life support. Although this surrogate is empowered to make a life-or-death decision to withhold treatment, he or she typically has an adverse financial interest in the patient's affairs . . . . The legislation reflects a cost-benefit determination that the danger of the conflicted surrogate using his or her authority to extinguish the patient prematurely is outweighed by the benefits of empowering the person most likely to know the patient's wishes and to have the patient's best interest at heart.") (citation omitted).

68. UNIF. POWER OF ATTORNEY ACT § 115 (2006). State enactment numbers per the Uniform Law Commission website, http://www.uniformlaws.org/Act.aspx?title=Power%20of%20Attorney [https://perma.cc/XR5V-V84K] (last visited on August 14, 2017).

69. Langbein, *supra* note 9, at 938; UNIF. TRUST CODE § 802(b)(1) (2010).

legislatures changed the rule regarding trustee investment of trust assets after the Great Depression by adopting the prudent investor rule[70] and then updated the rule again to incorporate modern portfolio theory with the Uniform Prudent Investor Act, promulgated in 1994 and adopted in all but seven states.[71]

Until recently, Delaware did not explicitly provide for whether LLC managers owed duties to the LLC.[72] The Delaware Court of Chancery addressed the issue in *Auriga Capital Corp. v. Gatz Props., LLC*.[73] Chancellor Strine looked to the language of Delaware's LLC Act.[74] But he also used equitable reasoning. He noted that "the rules of equity apply in the LLC context by *statutory mandate*," going on to look at the nature of the manager's relationship with the LLC, including the discretion invested in the manager.[75] Chancellor Strine ultimately concluded, albeit in dicta, that "default fiduciary duties do exist in the LLC context."[76]

As early as 1942, a court ruled that majority shareholders' and directors' duties to the corporation could be restricted by the corporate documents.[77] Legislatures have gone so far as to allow waiver of the duty of loyalty.[78] Most notably, the Delaware legislature amended the Delaware Corporation

70. Rachlinski, *supra* note 25, at 75.

71. *Id.* at 77 (citing UNIF. PRUDENT INVESTOR ACT 2(b) (1994); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 643 (1996)); State enactment numbers per the Uniform Law Commission website, http://www.uniformlaws.org/Act.aspx?title=Prudent%20Investor%20Act [https://perma.cc/8G93-Y33T] (last visited on Feb. 28, 2018). In at least one state, the community property statute made a husband "a fiduciary in respect to his wife's interest in the community . . . ." Vai v. Bank of Am. Nat'l Trust & Savings Ass'n, 56 Cal. 2d 329, 336–37 (1961).

72. DEL. CODE ANN. tit. 6, § 18-1104 (West 2013).

73. Auriga Capital Corp. v. Gatz Props., LLC, 40 A.3d 839, 849 (Del. Ch. 2012).

74. *Id.* at 850, 852.

75. *Id.* at 850–51. The Delaware Supreme Court criticized the Court of Chancery's opinion on the issue of default fiduciary duties as dicta. Gatz Props., LLC v. Auriga Capital Corp., 59 A.3d 1206, 1214, 1218 (Del. 2012).

76. Auriga Capital Corp., 40 A.3d at 849–56.

77. Everett v. Phillips, 288 N.Y. 227, 232–33 (1942) (holding that the majority shareholders/directors did not breach their duties to the corporation by causing and participating in an interested transaction, stressing that "in determining whether those who have power to control the corporation have committed a wrong either to the corporation or to its stockholders, the corporate capital structure, the certificate of incorporation, and the corporate constitution or by-laws may be factors of great weight; for, within limits prescribed by law, these define to whom the power of control is entrusted, its scope and the manner in which it must be exercised").

78. *See, e.g.*, UNIFORM POWER OF ATTORNEY ACT § 114(b) (2006); RESTATEMENT (THIRD) OF TRUSTS § 78, cmt. C(2) (2007); RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006) (allowing waivers of the duty of loyalty). *See also* Pace, *supra* 39, at 1095–133 (detailing LLC statutory provisions allowing waiver and LLC and LP case law upholding waiver provisions).

Act to allow waivers of the corporate opportunity doctrine.[79] Even where waiver was not allowed, the prohibition was typically rooted in the language of the statute, not in equity.[80] And when the Delaware Supreme Court suggested that the Delaware Limited Partnership (LP) Act did not allow the elimination, rather than just limitation, of fiduciary duties,[81] the Delaware legislature responded by amending the Delaware LP Act to add the word "eliminate."[82] Waivers have proven quite popular.[83] Principles of equity have, however, crept back into business organization law from time to time,[84] and shareholder suits for breach of fiduciary duty are still sometimes considered equitable[85] and in Delaware are still brought before a court of

79. DEL. CODE ANN. tit. 8, § 122(17) (2018). At least eight states have followed Delaware's lead. KAN. STAT. ANN. § 17-6102(q) (2017); MD. CODE ANN., CORPS. & ASS'NS § 2-103(15) (West 2014); MO. ANN. STAT. § 351.385(16) (2016); NEV. REV. STAT. ANN. § 78.070(8) (West 2017); N.J. STAT. ANN. 14A:3-1(q) (West 2017); OKLA. STAT. ANN. tit. 18, § 1016(17) (West 2017); TEX. BUS. ORGS. CODE ANN. § 2.101(21) (West 2017); WASH. REV. CODE ANN. § 23B.02.020(5)(k) (West 2017).

80. *See, e.g.*, Investment Company Act of 1940 § 17(i), 15 U.S.C. § 80a-17(i) (2010) (barring certain types of contractual protections against liability for investment advisors); Landrum-Griffin Act §501(a), 29 U.S.C. §501(a) (2010) ("A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."); ERISA, 29 U.S.C. § 1110(a) (2012) ("Except as [otherwise provided], any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.").

81. Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 167–68 (Del. 2002).

82. DEL. CODE ANN. tit. 6, § 17-1101(d) (2014). The Delaware legislature updated its LLC Act with the same language that year. DEL. CODE. ANN. tit. 6, § 18-1101(c) (2014).

83. *See* Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1123 (2017) (estimating from securities filings that over 6,000 of roughly 10,000 identified corporate filings disclose a limitation or waiver of the corporate opportunities doctrine); Michelle M. Harner & Jamie Marincic, *The Naked Fiduciary*, 54 ARIZ. L. REV. 879, 910 (2012) (finding the operating agreements of a majority of publicly traded LLCs modified or eliminated the duty of loyalty).

84. *See, e.g.*, Roland Int'l Corp. v. Najjar, 407 A.2d 1032, 1036 (Del. 1979) (holding that majority shareholder had a fiduciary obligation to minority shareholders that arose "from long-standing principles of equity and is superimposed on many sections of the Corporation Law . . . ."), *overruled by* Weinberger v. UPO, Inc., 457 A.2d 701, 715 (Del. 1983); Pappas v. Tzolis, 982 N.E.2d 576, 579 (N.Y. 2012) (ignoring a NY statute allowing for waiver in favor of a broader equitable rule that waivers of fiduciary duty are only enforceable where the releasing party is sophisticated and "the fiduciary relationship is no longer one of unquestioning trust") (citing Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 952 N.E.2d 995 (N.Y. 2011)).

85. *See* Rachlinski, *supra* note 25, at 95 ("In most jurisdictions, suits by shareholders against corporate officers must be brought in equity, just like actions by beneficiaries against trustees.").

equity.[86]

Parties have taken advantage of this new, greater freedom with court approval in many states. In *Fisk Ventures, L.L.C. v. Segal*, the Delaware Court of Chancery enforced an LLC operating agreement that disclaimed any fiduciary duties not expressly set forth elsewhere in the operating agreement and that did not provide for duties in any other provision.[87] In *Broussard v. Tipton*, a Louisiana court upheld the trial court's grant of summary judgment on a breach of fiduciary duty claim on the basis of the LLC's indemnity provision, which, in the court's view, clearly eliminated any liability defendants may have had.[88] In *Clancy v. King*, Maryland's highest court held that the relevant limited partnership agreement expressly allowed the author Tom Clancy (a general partner) to compete with the limited partnership.[89] In *Wayne County Employees' Retirement System v. Corti*, the Delaware Court of Chancery refused to grant declaratory judgment, rejecting, at least at that stage, the plaintiff's argument that a provision in the certificate of incorporation at issue was ineffective in limiting the corporate opportunity doctrine because it did not "specify" the renounced opportunities.[90]

Parties in various types of business relationships have taken advantage of the ability to create and define fiduciary duties as well as to restrict them. In *Gatz Properties, LLC v. Auriga Capital Corp.*, the LLC operating agreement provided that conflicted transactions must have terms comparable to an arms-length transaction.[91] In response to a conflicted transaction, the

86. *See, e.g.*, William T. Quillen and Michael Hanrahan, *A Short History of the Court of Chancery 1792–1992* (1993), http://courts.delaware.gov/chancery/history.aspx [https://perma.cc/G55X-X6Z6] (last visited Feb. 28, 2018) (discussing the Delaware Court of Chancery's history of deciding breach of fiduciary duty cases).

87. Fisk Ventures, L.L.C. v. Segal, No. 3017-CC, 2008 WL 1961156, at *9–10 (Del. Ch. May 7, 2008).

88. Broussard v. Tipton, No. 2013 CA 1268, 2014 WL 3559371, at *1–2 (La. Ct. App. Apr. 24, 2014).

89. Clancy v. King, 954 A.2d 1092, 1095, 1101 (Md. 2008).

90. Wayne County Employees' Retirement System v. Corti, No. 3534-CC, 2009 WL 2219260, at *18 (July 24, 2009) (unpublished). *See also In re* Morton's Restaurant Group, Inc. Shareholders Litig., 74 A.3d 656, 663–72 (Del. Ch. 2013) (holding that only a failure to act loyally or in good faith would preclude reliance on the exculpatory provision in the company's certificate of incorporation).

91. Gatz Properties, LLC v. Auriga Capital Corp., 59 A.3d 1206, 1212–13 (Del. 2012) (The relevant provision stated that "Neither the Manager nor any other Member shall be entitled to cause the Company to enter into any amendment of any of the Initial Affiliate Agreements which would increase the amounts paid by the Company pursuant thereto, or enter into any additional agreements with affiliates on terms and conditions which are less favorable to the Company than the terms and conditions of similar agreements which could then be entered into with arms-length third parties, without the consent of a majority of the non-affiliated Members (such majority to be deemed to be the holders of 66-2/3% of all

plaintiffs sued for both breach of contract and breach of fiduciary duties.[92] The Supreme Court of Delaware upheld the ruling by the Court of Chancery that the operating agreement imposed fiduciary duties, specifically the entire fairness standard, adding that "[t]o impose fiduciary standards of conduct as a contractual matter, there is no requirement in Delaware that an LLC agreement use magic words, such as 'entire fairness' or 'fiduciary duties.'"[93] Limited partners do not typically owe fiduciary duties to the respective limited partnership, but in *Cantor Fitzgerald, L.P. v. Cantor* the Delaware Court of Chancery enforced a provision in the limited partnership agreement establishing just such a duty.[94] Both the Delaware LLC Act and the Delaware LP Act explicitly provide for the expansion of fiduciary duties.[95]

These relationships have economic bases different from that of traditional fiduciary relationships. The former tend to be contractual, arms-length, bargained-for, and subject to market discipline. The latter tend to be information asymmetrical, involve large power disparities, and touch on important matters of public policy. That is, the needs and circumstances of fiduciary relationships in business organization law are very different than those of traditional fiduciary duties. Traditional fiduciary relationships have been depicted as vertical, with the beneficiary taking an inferior role and the fiduciary taking a dominant role.[96] Modern fiduciaries in the business organization context, on the other hand, occupy relationships relative to their firms that more closely resemble the horizontal relationships of non-

Interests which are not held by affiliates of the person or entity that would be a party to the proposed agreement).").

92. *Id.* at 1212.

93. *Id.* at 1213. *But see* D. Gordon Smith, *Contractually Adopted Fiduciary Duty*, U. ILL. L. REV. 1783, 1784 (2014) (arguing that "the Delaware Supreme Court was confused about the proper relationship between fiduciary and contractual duties" and that "the fiduciary duty of loyalty, properly understood, cannot be adopted contractually").

94. Canton Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 574, 582 (Del. Ch. 1998) (stating that upholding bargained-for fiduciary duties contained in limited partnership agreements is crucial to the orderly management and economic success of those limited partnerships).

95. DEL. CODE ANN. tit. 6, §18-1101(c) (2014) ("To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing."); § 17-1101(d) ("To the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, the partner's or other person's duties may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing.").

96. Alexander, *supra* note 3, at 775.

fiduciary contracting parties.[97]

Fiduciary law, then, has developed into two different bodies of law. Each is somewhat confusingly referred to as fiduciary law under the existing case law and literature. Not only are explanations of both the traditionalist and contractarian camps in the literature incomplete, the third camp that argues that fiduciary law is atomistic and forms no coherent body of law is incorrect.[98] Nor are these merely the same concept with different bases, but rather two distinct concepts. Much of the confusion in the literature and case law can be clarified by understanding the development of those two concepts and by examining them through the lens of cognitive theory. This Article will show how cognitive limitations hamper judges in evaluating questions of modern, statutory and contractual fiduciary obligation and why the modern, statutory and contractual approach is *usually* the best available approach.

III. UNSATISFYING EXISTING EXPLANATIONS

There is a large body of scholarly literature on fiduciary law. Fiduciary obligation has a reputation as one of the more elusive concepts in Anglo-American law,"[99] but scholars in the field can be roughly divided into two camps: traditionalist (or moralist or formalist or anti-contractarian) and contractarian (or contextualist).[100]

The traditionalists want business organization fiduciaries to act like traditional, equitable fiduciaries. They get the fiduciary concept right, but

97. *Id.*

98. *See, e.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 37 DUKE L.J. 879, 915 (1988) ("One could justifiably conclude that the law of fiduciary obligation is in significant respects atomistic.") (footnote omitted). Mistakenly labeling fiduciary law as atomistic is perhaps due to both a failure to appreciate the dual nature of fiduciary law and a failure to understand that its traditional roots are in equity, with all the flexibility that entails. The statutory and contractual basis of the other type of fiduciary law also allows for tremendous variation.

99. *See, e.g.*, Robert Sitkoff, *An Economic Theory of Fiduciary Law*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 19 (Andrew S. Gold & Paul B. Miller eds., 2014) ("This point explains the purported elusiveness of fiduciary doctrine").

100. *See, e.g.*, Smith, *supra* note 8, at 282 ("[C]ommentary is split between contextualizers and contractarians on the one hand and formalists and moralizers on the other."); Kelli A. Alces, *The Fiduciary Gap*, 40 J. OF CORP. L. 351, 353–54 (2016) (labeling the "two dominant perspectives" as contractarians and anti-contractarians). This article is limited to U.S. law and its English antecedents, but a similar debate is taking place among Canadian commentators. *Compare* John Howard, *Fiduciary Relations in Corporate Law*, 19 CANADIAN BUS. L. J. 1 (1991) (explaining contractarian views of fiduciary law) *with* Brian R. Cheffins, *Law, Economics, and Morality: Contracting Out of Corporate Law Fiduciary Duties*, 19 CANADIAN BUS. L. J. 28 (1991) (advocating a moralist view of fiduciary law by highlighting the limitations of the contractarian view).

apply it where it does not belong. The contractarians recognize that fiduciary duties in the business organization context are contractual in effect, if not in fact, but fail to appreciate the dissimilar nature of fiduciary obligations in different circumstances. Neither concept (equitable or statutory-contractual) can fully explain modern fiduciary law. There are fiduciary obligations that spring solely from equitable roots — i.e., based on the relationship of the parties and not any statutory or contractual basis. And there are fiduciary obligations that arise absent any source in equity. For example, directors of a corporation are fiduciaries of the corporation and its shareholders,[101] but are not the agents of either.[102] Thus, the traditionalist narrative is incomplete because fiduciary obligations often arise where there is no relationship of the sort creating fiduciary obligations in equity.[103] The contractarian narrative is incomplete because fiduciary obligations can and do arise without any contractual or statutory basis.[104]

A. *Limits of Traditionalist Arguments*

The traditionalists look more to the roots of fiduciary obligation. They tend to view fiduciary obligation in terms of equity or the common law. They think of and talk about fiduciary obligations in moral terms and argue they have a moral component. Additionally, they think of and talk about fiduciary obligation as its own body of law rather than a subset of another body of law, they are more likely to reject arguments that fiduciary obligations can or should be subject to limitation by agreement among the parties, and their literature tends to have its academic foundations in philosophy.

Relationship between parties over intent. DeMott defines fiduciary duties as "*conventionally* based on the existence of a relationship of trust and confidence when one party undertakes to give advice to another in more than

101. Marhart, Inc. v. Calmat Co., CA. No. 11,820, 1992 WL 212587 (Del. Ch. Apr. 22, 1992) (reported in 18 DEL. J. CORP. L. 330 (1992)) ("Delaware directors are fiduciaries.").

102. Mgmt. Techs., Inc. v. Morris, 961 F. Supp. 640, 651 (S.D.N.Y. 1997) (holding that corporate directors are not agents of the corporation); RESTATEMENT (THIRD) OF AGENCY §1.01 cmt. f(2) (Am. Law Inst. 2006) (stating that corporate directors are not agents of the corporation's shareholders). *But see* CAL. CORPS. CODE §317(a) (defining "agent" to include corporate directors).

103. *See, e.g.*, Alces, *supra* note 100, at 364 ("[P]arties can voluntarily import the body of fiduciary law to fill the gaps in their contracts.").

104. *See id.* at 363–64 ("Contractarians assert that all fiduciary relationships must be based on a voluntary interaction that at least resembles a contract, and anti-contractarians point out that such a strict model fails to explain the many cases where fiduciary duties are applied without an express agreement or a contract containing a fiduciary term."). *See also* Laby, *supra* note 59, at 110–29 (critiquing the limitations of the contractual approach); Frankel, *supra* note 4, at 813 ("[F]iduciary relations are not necessarily contractual.") (footnote omitted).

an incidental or casual manner."[105] In her article rooting fiduciary duties in expectations of loyalty, DeMott gives as an example where the nature of the fiduciary relationship or the role occupied by the fiduciary or entrustor prevents self-protection by the entrustor.[106] Moreover, DeMott sees entrustors' expectations of loyal conduct as justifiable on the basis of the similarity of their relationship with conventional fiduciary relationships.[107] Frankel argues that judges look not to the intent of the parties, but rather to "whether the arrangement formed by the parties meets the criteria for classification as fiduciary" in deciding if fiduciary duties apply.[108] Gordon Smith claims that judges usually impose the fiduciary duty of loyalty without regard to any contract.[109] And traditionalists accept that fiduciary relationships may be formed even absent the agreement and intent of the parties.[110]

Power imbalances. Those types of relationships tend to be marked by power imbalances, a major point of concern for traditionalist scholars. The trustee-beneficiary and executor-beneficiary are vertical relationships that resemble master-servant and parent-child relationships.[111] Those relationships involve structural power imbalances because the subordinate party is usually passive and their exit options are highly constrained and because the intimacy of the relationship disguises abuse by the dominant party.[112] There are often wildly different degrees of knowledge and sophistication between the parties.[113]

105. Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty & Their Consequences*, 48 ARIZ. L.R. 925, 950 (2006) (emphasis added). *See also* Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 B.U. L. Rev. 1289 (2011) (arguing fiduciary relationships are rooted in trust). *But see* Alces, *supra* note 100, at 377 ("[W]here there are no explicit fiduciary duties, and the parties have not arranged themselves in a kind of relationship that is traditionally considered fiduciary, it may be impossible to determine which party is the trusting party and which is the trusted party until one of them is disappointed.").

106. DeMott, *supra* note 105 at 945. There is no single term in general use for the counterpart to the fiduciary. Where a general term is needed, I will borrow "entrustor" from Tamar Frankel's *Fiduciary Law*, *supra* note 4.

107. Demott, *supra* note 105, at 945.

108. Frankel, *supra* note 4, at 821.

109. Gordon Smith, *supra* note 93, at 1787.

110. DeMott, *supra*, note 98, at 887 ("[O]nce a court concludes that a particular relationship has a fiduciary character, the parties' manifest intention does not control their obligations to each other as dispositively as it does under a contract analysis."). *See also* RESTATEMENT (SECOND) OF TORTS §874 cmt. a (1979) (defining a fiduciary relationship as existing "between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation.") (citing RESTATEMENT (SECOND) OF TRUSTS §2 (1959)).

111. Alexander, *supra* note 3, at 777.

112. *Id.*

113. Williams, *supra* note 100, at 361 (citing Tamar Frankel, *supra* note 4, at 833;

Potential for opportunism. With those power imbalances come the potential for opportunism. According to Weinrib, that the entrustor is at the mercy of the fiduciary's discretion is the hallmark of fiduciary relationships.[114] Henry Smith sees fiduciary relationships as carrying abnormal potential for opportunism.[115] Traditionalists fear that, absent judges taking a more equitable role, opportunists will take advantage of the judicial process.[116] They see that potential for opportunism as a justification for judicial intervention.[117] And they see this as endemic. For example, Frankel argues that "*all* fiduciary relations give rise to the problem of abuse of power,"[118] and Gordon Smith argues that entrustors "are *always* vulnerable to opportunism."[119]

Traditionalist scholars also tie judicial intervention very closely to that problem of abuse of power. For example, Frankel argues that judicial intervention in the union official-employee relationship should be calibrated based on union members' ability to control their officials and thus prevent abuse.[120] Traditionalists are leery of "loosening traditional stringent rules about fiduciary duties" — for example, by allowing for waiver in organizational documents — because of those equitable, anti-opportunism roots.[121]

Expression of social norms. Leslie characterizes fiduciary obligation as an expression of social norms that would be stripped of moral force in an opt-out scheme.[122] Those effects will in some circumstances be mitigated by

---

Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behav. Found, of Corp. L.*, 149 U. PA. L. REV. 1735, 1739–40 (2001)).

114. Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 7 (1975).

115. Smith, *supra* note 8, at 262.

116. *Id*. at 264.

117. Frankel, *supra* note 4, at 816 ("Because the entrustor cannot satisfactorily protect himself . . . the law must intervene to protect him from abuse of power[.]").

118. Frankel, *supra* note 4, at 807 (emphasis added).

119. Gordon Smith, *supra* note 93, at 1786 (citations omitted) (emphasis added).

120. Frankel, *supra* note 4, at 807.

121. Henry Smith, *supra* note 8, at 275.

122. *See* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L. J. 67, 89 (2005) ("[F]iduciary duty law supports and reinforces social norms that require trustees to act with care and to refrain from self-dealing. Characterizing fiduciary duties as optional strips fiduciary duties of moral force and would, over time, weaken the social norms embodied in those duties."). *See also* Alces, *supra* note 100, at 373 ("The Delaware Supreme Court's use of moral rhetoric to admonish corporate directors may indeed serve an expressive function of setting norms for best practices and ways in which those directors ought to behave.") (citing Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1696 (2001)). This view is not irreconcilable with a limited modification regime if we recognize that sometimes fiduciary obligations represent social norms and sometimes they do not. *See also supra* Part VI (discussing how the imperfect incentives provided by contractual penalties suggest that morality and social norms should still play a role in fiduciary law).

market forces.[123] Frankel, on the other hand, sees fiduciary obligation as replacing weakened social controls.[124] But Frankel also sees a direct tension between market pressures and moral intuition in the fiduciary context.[125]

Equitable roots. The traditionalists not only think of fiduciary obligation in moral-philosophical terms but also in terms of its equitable roots. What concerns us here is not the law-equity divide and attendant debate. But the remnants of the law-equity divide have ramifications for modern fiduciary obligation. Equity has a long, close history with moral language. Equity can fairly be defined not just as "[t]he doctrines and remedies developed in the English courts of equity" but also as "[a] moral reading of the law."[126] Henry Smith not only categorizes fiduciary law as equitable but as "perhaps the most important and characteristic branch" of equity.[127] To Smith, fiduciary law counters opportunism by acting as a "safety valve."[128]

The equitable roots of fiduciary obligation show in part why it is not an entirely incoherent, atomistic body of law, as some scholars have maintained.[129] On the contrary, according to Henry Smith, equity's approaches, which are status- or fact-based, will not produce "a single principle, let alone a rule," because different statuses and facts produce different types of opportunism.[130]

Moral Basis. Henry Smith, in explicitly tying fiduciary law to equity, also ties equity to "natural law and natural justice."[131] As such, it is infused with moral norms.[132] The danger of misbehavior is inherent because entrustment and vulnerability are part and parcel to the relationship.[133] But as Smith notes, fiduciary law is broader than general equity because a court will find a violation of fiduciary duty where there is no disproportionate hardship nor intent.[134] In other words, "fiduciary law is moral but not

123. Leslie, *supra* note 122, at 92.

124. Frankel, *supra* note 4, at 802–03.

125. *Id*. at 815 ("[A] market for fiduciary services reduces the moral stature and the public service image of professional fiduciaries.").

126. Bray, *supra* note 12, at 1.

127. Henry Smith, *supra* note 8, at 261.

128. *Id*. at 262.

129. *See, e.g.*, DeMott, *supra* note 98, at 915 ("One could justifiably conclude that the law of fiduciary obligation is in significant respects atomistic.").

130. Henry Smith, *supra* note 8, at 277. Smith's "fact-based approaches" look very much like the status-based approaches as used in this article. *E.g.*, "The facts in question usually relate to one party's vulnerability and the discretion wielded by the candidate for fiduciary." *Id.* at 278.

131. *Id.* at 263.

132. *Id.*

133. *Id.* at 272.

134. *Id.*

unboundedly so."[135]

The moral and the equitable are not unrelated. Henry Smith notes that, like equity, "fiduciary law is often untailored and morally inflected."[136] Smith points to Judge Cardozo's famous language in *Meinhard v. Salmon* as simply "a stronger version of the morals reflected in equity."[137] Not only are fiduciary obligations articulated in moral terms, scholars in the traditionalist camp see fiduciary law as both fixed and mandatory.[138] Frankel points to the jurisdictional authority that ecclesiastical and equity courts historically held over fiduciaries as a rationale for incorporating morality into fiduciary law.[139]

Laby views fiduciary obligation through the prism of deontological moral theory.[140] That is, whether a moral duty requires, permits, or prohibits an act, regardless of the consequences of that act.[141] Other scholars tie equity in closely with morality.[142] The potential for opportunism has been explicitly tied to morality. It is worse from a moral perspective to injure someone who cannot protect themselves than it is to injure someone who can.[143]

Limits of traditionalist arguments. Moral reasoning notwithstanding, the traditionalists acknowledge an importantly contractual component to fiduciary law.[144] And traditionalists have admitted many of the arguments of the contractarians. For example, there is a recognition that the entrustor and fiduciary do not typically, or at least necessarily, enter the relationship with unequal bargaining power — the entrustor's vulnerability arises after the relationship is formed.[145]

The strict approach that courts have traditionally taken to enforcing the duty of loyalty is based on the vertical character of the relationship between the property fiduciary and the beneficiary.[146] Given the typically horizontal character of fiduciary relationships in the business organization law context, that rationale erodes. Some traditionalists acknowledge this. Henry Smith admits that the rationale for tailoring presumptions to counter the danger of opportunism is weaker where the danger of opportunism is not as high,

135. *Id.* 281.
136. *Id.* at 272.
137. *Id.*
138. *Id.* at 1.
139. Frankel, *supra* note 4, at 831.
140. Laby, *supra* note 59, at 129.
141. *Id.* (citing Stephen Darwal, PHILOSOPHICAL ETHICS 81 (1998); Shelly Kagan, NORMATIVE ETHICS 73 (1998)).
142. *See* Henry Smith, *supra* note 8, at 279 ("Common sense morality goes some way toward cabining equity[.]").
143. Frankel, *supra* note 4, at 832.
144. *See*, *e.g.*, Henry Smith, *supra* note 8, at 24 ("[F]iduciary law is mostly but not entirely contractarian.").
145. Frankel, *supra* note 4, at 810.
146. Alexander, *supra* note 3, at 776.

giving as an example the business judgment rule.[147]

Traditionalists make economic arguments of their own. Gold argues that tying fiduciary obligation more closely to moral intuitions could increase efficiency and compliance.[148] Gold also argues that the much larger number of parties potentially involved in the business organization context make tying fiduciary obligations to moral intuitions more important because of coordination problems.[149] Variation or limits on fiduciary obligations may create negative externalities that are borne by all trusts,[150] thus restrictions on modification or waiver of fiduciary duties may be justified as necessary to limit negative externalities.[151]

That traditionalists feel compelled to make economic arguments of their own and to recognize the role of contract shows that the traditionalist view has incomplete explanatory power. The economic explanation of fiduciary law is more satisfactory than a philosophical explanation, especially regarding modern fiduciary law. The traditionalist approach is poorly suited for explaining fiduciaries in business organizations. It does not give a satisfactory explanation for why sophisticated parties dealing at arms-length should be restricted from modifying their fiduciary obligations to each other. And it fails to recognize the enormous role that statute plays in fiduciary law today and what that means.

B. *Limits of Contractarian Arguments*

Opposite the traditionalists stand the contractarians. The contractarians look more to the modern iterations of fiduciary obligation. They tend to view fiduciary obligation in terms of statutory law and contract. They think of and talk about fiduciary obligation in economic terms and reject any moral component to fiduciary obligation.[152] They tend to treat fiduciary obligation

147. Henry Smith, *supra* note 8, at 274.

148. Andrew S. Gold, *The New Concept of Loyalty in Corp. L.*, 43 U.C. DAVIS L. REV. 457, 503 (2009) (citing Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 713–19 (2007); Melvin A. Eisenberg, *Corp. L. and Social Norms*, 99 COLUM. L. REV. 1253, 1272–73 (1999); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1840–41 (1998); Paul Robinson & John Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997)).

149. *Id.* at 508.

150. Leslie, *supra* note 122, at 89.

151. *Id.* (citing Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the L. of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 25–34 (2000); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001); Jeffrey N. Gordon, *The Mandatory Structure of Corp. L.*, 89 COLUM. L. REV. 1549, 1568–70 (1989)).

152. Easterbrook & Fischel, *supra* note 2, at 427 ("Fiduciary duties . . . have no moral footing.").

as a subset of business organization law and to talk about it in that context. They are amenable to and proponents of limiting fiduciary obligation by contract. And the literature tends to have its academic foundations in economics.[153]

Economic, not moral, basis. Easterbrook and Fischel argue fiduciary duties are not special and have no moral footing but rather that "they are the same sorts of obligations, derived and enforced in the same way, as other contractual undertakings."[154] Easterbrook and Fischel see fiduciary relationships as contractual relationships with particularly high transaction costs.[155] Under this view, fiduciary law should be based on a cost-benefit analysis, looking in the aggregate and from an *ex ante* perspective.[156] Under economic rather than moral reasoning, some conflicts should not be prohibited because compliance costs of prohibition make prohibition too costly or because the conflicts are in fact benign.[157] Contractarians see evidence of economic reasoning in the development of modern fiduciary law.[158]

The contractarians argue that the morally inflected language so often found in fiduciary obligation cases is not only dicta but ignored and irrelevant.[159] The contractarians are critical of morally inflected language in court opinions dealing with fiduciary obligations. Simply put, contractarians accuse courts of failing to practice what they preach, instead analyzing fiduciary relationships just as they analyze nonfiduciary contractual relationships.[160] Contractarians also criticize the morally inflected rhetoric of judges and the traditionalists on other grounds. Two examples include, because it "encourages beneficiaries to over trust,"[161] and because offers of

153. The seminal works on the economics of fiduciary obligation are by Robert Cooter and Bradley J. Freedman and by Frank H. Easterbrook and Daniel R. Fischel. Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991); Easterbrook & Fischel, *supra* note 2.

154. Easterbrook & Fischel, *supra* note 2, at 427.

155. *Id.*

156. *See, e.g.*, Langbein, *supra* note 9, at 937 (arguing consumer protection authorities do not follow the sole interest rule used in trust law for just that reason).

157. *Id.* at 938.

158. *See, e.g.*, *Id.* at 939–43 (arguing that adoption of rules allowing reasonable trustee compensation, moving away from court supervised estate administration, and allowing conflicted persons to be appointed as health care surrogates empowered to terminate a person's life support all reflect cost-benefit judgments).

159. *See, e.g.*, Easterbrook & Fischel, *supra* note 2, at 429 ("[W]e seek knowledge of when fiduciary duties arise and what form they take, not a theory of rhetoric—a theory of what judges *do*, not of explanations they give."). *See also* Williams, *supra* note 100, at 373 ("[S]uch flowery descriptions of affirmative devotion are not the basis of liability.") (citation omitted).

160. Alexander, *supra* note 3, at 767.

161. Williams, *supra* note 100, at 370.

devotion by fiduciaries are not enforceable.[162]

Information asymmetries. Entrustors tend to rely on the discretion of the fiduciary.[163] Discretion is important in the literature. Ribstein argues that fiduciary obligation arises from the delegation of managerial discretion — without corresponding economic rights — by a property owner to a manager.[164] Gordon Smith uses a similar formulation, arguing that fiduciary obligation arises from one party giving another discretion and control over a "critical resource."[165] That discretion, though, creates information asymmetry between the fiduciary and the entrustor. Relying on the fiduciary's discretion, expertise, or likely both, the entrustor is not positioned to effectively monitor the fiduciary,[166] providing an economic justification for fiduciary obligation. That information asymmetry can only partly be mitigated by retention of counsel.[167]

Market constraints. Contractarians see market constraints as lessening the need for strict fiduciary obligations. Those constraints disincentivize corporations from deviating from standard terms if those deviations would reduce the corporation's share price.[168] Shareholders in publicly traded corporations have a powerful tool for market discipline — easy exit.[169] And, market constraints are not limited to post-formation market pressures. Contractarians put great weight on the fact that the fiduciary and entrustor typically enter into their relationship voluntarily and for gain through a contract or at least a contract-like process.[170] That is, of course, a form of market restraint.

---

162. *See id.* at 372 ("While fiduciaries may advertise their extreme care, dedication, expertise, and superior judgment and a beneficiary may rely on the expectation that the fiduciary will be devoted to her cause when entering the relationship, devotion is not an enforceable term.").

163. Williams, *supra* note 100, at 357 (The entrustor "relies heavily on the fiduciary's discretion.").

164. Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 901 (2011).

165. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402 (2002).

166. *See* Williams, *supra* note 100, at 357 ("The beneficiary is generally unable to monitor the fiduciary closely because she lacks the time and/or expertise to do so.") (citing Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 216 (2005)).

167. *See* Sandra K. Miller, *What Fiduciary Duties Should Apply to the LLC Manager After more than a Decade of Experimentation?*, 32 J. CORP. L. 565, 583–86 (2007) (using survey results to argue that majority investors are more often represented by counsel than minority investors, that LLC agreements are often not extensively negotiated, and that many attorneys have only a limited familiarity with the relevant statutory provisions).

168. Leslie, *supra* note 122, at 92–93.

169. Manuel Utset, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540, 571 (1995) ("[N]o agreement may be forced on either party, given that each party can choose to exit the corporation.").

170. Easterbrook & Fischel, *supra* note 2, at 426.

Agency costs. Fiduciary law is becoming more popular with regulators attempting to mitigate the agency problem.[171] One approach is disempowerment. Disempowering approaches include disallowing a trustee from engaging in market transactions over the trust property, terminating an agent's authority on the incapacity of the principal, and disabling a corporation from undertaking any activity beyond the limited purpose laid out in the corporate charter under the *ultra vires* doctrine.[172] We have already discussed one type of agency cost in the fiduciary obligation context — monitoring. According to Sitkoff, fiduciary law is a deterrence system that mitigates agency costs by providing a vehicle for courts to complete a contract after the fact; accordingly, "[f]iduciary duties yield to the contrary agreement of the parties."[173] The duties of loyalty and care are couched in open-ended, expansive terms because of the agency costs due to incomplete contracting.[174]

Gap-filling measure. Contractarians treat fiduciary duties as gap-fillers. Sitkoff describes fiduciary obligations as principles courts use to judge a fiduciary's actions against "what the parties *would have agreed* if they had been able to anticipate those facts and circumstances."[175] That is, fiduciary duties function as implicit contract terms that only apply where there is no explicit contractual provision. Contractarians view this as necessary because it is impossible for parties to write contracts that cover the universe of their intended obligations.[176] Fiduciary duties are presumptive contract terms that promote the parties' welfare where express provisions are absent.[177] This stands in stark contrast to the view that a fiduciary duty is a "pre-existing moral or ethical obligation."[178]

The traditionalists sometimes use gap-filling language as well.[179] For example, Leslie defines contractual fiduciary duties as a gap-filling measure that attempts to predict not just "the terms that the parties would have agreed to ex ante," but the terms they would have agreed to ex ante if bargaining

171. Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1042 (2011) (citations omitted).

172. *See id.* (describing disempowerment as a failed strategy for addressing agency problems).

173. *Id.* at 1045.

174. *Id.* at 1044.

175. *Id.* (emphasis added).

176. Easterbrook & Fischel, *supra* note 2, at 426 (citations omitted).

177. *Id.* at 431. Easterbrook and Fischel go so far as to label this as "all but inevitable" and any alternatives as "self-defeating."

178. Leslie, *supra* note 122, at 73.

179. *See, e.g.*, Frankel, *supra* note 4, at 825 ("The courts can provide protection to the entrustor by imposing . . . the fiduciary obligations the parties would have agreed upon if the cost of contracting or the nature of the relation had not precluded them from doing so.").

was costless and they anticipated the future conflict.[180] But, of course, bargaining is not costless.

If fiduciary obligations are gap fillers addressing transaction costs that lead to the problem of incomplete contract, then they are no longer necessary when the agreement covers the presumed gaps. The same logic applies where a statute fills the gaps.

Limits of the contractarian arguments. But fiduciary law in the business organization context cannot be viewed as entirely contractual. While initial corporate charters can be viewed as contracts, charter amendments cannot.[181] This would include charter amendments that modify fiduciary duties. Heminway questions whether LLC operating agreements can be properly characterized as contracts.[182] And even committed contractarians see a limit. Sitkoff, for example, puts it in economic terms: "[T]he mandatory core insulates fiduciary obligations that the law assumes would not be bargained away by a fully informed, sophisticated principal."[183] That view, though, invites judges and commentators to simply label any party that does bargain away core fiduciary duties as either ill-informed or unsophisticated.

The contractarian view is unsatisfying in that it fails to account for the historical and continuing role of equity in the development of fiduciary law. It is overly focused on contract at the expense of statute. And, most of all, the contractarian view does not give proper credence to the morally inflected language judges use when writing about fiduciaries. To properly appreciate the importance of that language we need to consider cognition.

IV. COGNITION AND FIDUCIARY OBLIGATIONS

Moving beyond the limited traditionalist and contractarian explanations, one way in which fiduciary law can be better understood is by considering issues of cognition, especially the "schema." Judges are human and subject to the same cognitive processes and limitations as any other human decision-maker. Accordingly, we can learn more about the development of the law by exploring human cognition.[184] Schemas are one

180. Leslie, *supra* note 122, at 79 (citing Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 92 (1991)).

181. Lucian Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1400 (1989).

182. Joan Heminway, *The Ties That Bind: LLC Operating Agreements as Binding Commitments*, 68 SMU L. REV. 811, 812 (2015) ("[A]n operating agreement may not constitute a contract at common law, and state LLC laws do not expressly label an operating agreement a statutory contract.").

183. Sitkoff, *supra* note 171, at 1047.

184. Rachlinski, *supra* note 25, at 62.

of those relevant cognitive processes. Schema "describe our expectations about, for example, people, entities, or social groups" and "represent knowledge about a concept . . . includ[ing] the concept's attributes and the relations among them."[185] In layman's terms, it is a preconceived notion.

I argue that a single schema is most typically associated with fiduciary obligation. That schema is in keeping with the traditional roots of fiduciary obligation. It is associated with hierarchical relationships. Fiduciary obligation was first concerned with relationships such as the trustee-beneficiary relationship, where the trustee was in a position of power relative to the beneficiary. I have identified three hallmarks of judicial decision-making driven by a schema for fiduciaries — morally inflected language, equitable reasoning, and reasoning by analogy. I will give examples of each showing up in cases where the judge made an error related to fiduciary obligation. We look first to the language used by judges in talking about fiduciary obligation.

Morally inflected language. Contractarians argue that judges' use of morally inflected language in cases such as *Meinhard v. Salman* does not square with the realities of fiduciary obligation. Why, then, has similar language so often appeared in cases discussing fiduciary obligation? There are innumerable examples. I will give a couple of the most famous examples before discussing a case in which morally inflected language appears alongside judicial error.

The Supreme Court of the United States spoke forcefully on the subject in 1939 in *Pepper v. Litton*.[186] The Court starts by referencing "rules of fair play and good conscience" before going on to reference "the standards of common decency and honesty."[187] In between, the Court expressly states that a fiduciary cannot serve two masters — they must put the needs of the entrustor before their own.[188] That which is "permitted outsiders in a race of creditors" acting at arms-length is barred to the fiduciary.[189] More specifically, the Court states that a corporate fiduciary cannot use inside information and their position for their own gain and cannot do "indirectly through the corporation what [they] could not do directly."[190] These limitations held, in the Court's eyes, "no matter how absolute in terms" the power of the fiduciary and "no matter how meticulous" the fiduciary is in

185. Susan T. Fiske & Shelley E. Taylor, SOCIAL COGNITION: FROM BRAINS TO CULTURE 104 (2d ed. 2013).
186. Pepper v. Litton, 308 U.S. 295, 310–11 (1939).
187. *Id.*
188. *Id.* at 311.
189. *Id.*
190. *Id.*

satisfying formal requirements.[191] And that limit was equitable.[192] The Court returned to equity in laying out the consequence: "Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation."[193]

The Supreme Court of Delaware used similar language in *Guth v. Loft, Inc.*, also issued in 1939.[194] The Court begins by stating flat out that "[c]orporate officers and directors are not permitted to use their position of trust and confidence to further their private interests."[195] The Court does note that corporate officers and directors are not trustees.[196] Much like Judge Cardozo in *Meinhard v. Salman*, the Court in *Guth* relies heavily on morally inflected language. The public policy in question has "exist[ed] through the years" and is "derived from a *profound* knowledge of human characteristics and motives."[197] The result was "a rule that demands . . . *peremptorily* and *inexorably*, the *most scrupulous* observance" of a corporate officer's or director's fiduciary duty and that is "inveterate and uncompromising in its rigidity."[198] Corporate officers and directors have both an affirmative duty to protect corporate interests and a duty to refrain from injuring the corporation or depriving it of profit.[199] The loyalty to the corporation must be "undivided and unselfish."[200] Failure to meet that standard is a "betrayal."[201]

The Court also makes nods toward equity. Per the Court, it cannot formulate a "hard and fast rule" because fiduciary obligations arise in "many and varied" contexts.[202] Accordingly, there is "no fixed scale" for the loyalty standard.[203] The Court characterized the rule as based on a broad "foundation of a wise public policy" rather than "the narrow ground of injury . . . to the corporation."[204] That broad approach, though, brought an ease of administrability: where there was breach of fiduciary duty, "a certain result

191. *Id.*
192. *Id.* ("For that power is at all times subject to the *equitable* limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the" entrustor.) (emphasis added).
193. *Id.*
194. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939), *superseded by statute*.
195. *Id.*
196. *Id.*
197. *Id.* (emphasis added).
198. *Id.* (emphasis added).
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*

follows."[205]

Let us turn to a more recent case to see the appearance of morally inflected language, in particular, alongside judicial error. *The Estate of Rothko* trial court opinion[206] is open to criticism for the failure to account for the estate's need to generate cash to pay estate taxes and cash bequests.[207] But it is also striking for its morally inflected language. An executor has a "selfish interest."[208] "Rigid adherence" is necessary to remove "all temptation."[209] "Divided loyalties" must be "obliterate[d]" and their effects "utterly. . .destroy[ed]."[210] The actions of the fiduciaries were "disheartening."[211]

This sort of language survives in contemporary judicial opinions and in the business organization context.[212] It shows up even where the applicable statute broadly allows for waiver of fiduciary duties and the relevant contract does just that.[213] And it leads to judges making errors in deciding fiduciary obligation cases.

Equitable reasoning. In *Pappas v. Tzolis*, the court ultimately enforced the fiduciary duty waiver at issue, but it did not do so on the basis of the New York LLC statute.[214] The parties had formed an LLC to hold the lease on a building in Manhattan, and their operating agreement allowed the three members of the LLC to "engage in business ventures and investments of any nature whatsoever, whether or not in competition with the LLC."[215] This is a common approach to waiver in the business organization context because it is often advantageous to recruit an investor with existing interests in the same line of business. The LLC was ill-fated and, after numerous

205. *Id.*

206. Estate of Rothko, 84 Misc. 2d 830 (N.Y. Surr. Ct. 1975).

207. *See, e.g.*, Alexander, *supra* note 3, at 778–82 (discussing criticisms of the decisions by each court).

208. *Rothko*, 84 Misc. 2d at 847.

209. *Id.*

210. *Id.* at 848.

211. *Id.* at 849.

212. *See, e.g.*, AB Group v. Wertin, 69 Cal. Rptr. 2d 652, 656 (Ct. App. 1997) ("Equity can hardly tolerate—much less impose as a duty—the deliberate attempt to deprive a contracting party of the fruits of his or her bargain . . . . [I]n the equitable matter of partnership fiduciary duties . . .).

213. *See, e.g.*, BT-I v. Equitable Life Assurance Soc'y of the U.S., 89 Cal. Rptr. 2d 811, 817–18 (Ct. App. 1999) ("But the fact that the act allows the parties to structure many aspects of their relationship is not a license to freely engage in self-dealing—it remains our responsibility to delimit the outer boundaries of permissible conduct by a fiduciary. In view of the rule against waiving fundamental fiduciary duties, we cannot stretch these general provisions to include giving Equitable a free hand to act for its own self-interest. Equitable was still a fiduciary, and its conduct must be measured by fiduciary standards.").

214. Pappas v. Tzolis, 982 N.E.2d 576 (N.Y. 2012).

215. *Id.* at 578.

disputes, Tzolis bought out the interests of the other two members.[216] The accompanying agreement provided that "Tzolis has no fiduciary duty to the undersigned Sellers in connection with [the] assignments."[217] Just seven months later Tzolis was able to assign the lease for over ten times as much as he paid the other members.[218]

The LLC in question was governed by the New York LLC Act. But the court did not interpret the NY LLC Act. Instead, the court relied on a judge-made — and equitable — rule that waivers are *only* enforceable if the releaser is sophisticated and the relationship is no longer one of unquestioning trust.[219] The court was correct in enforcing the release, but it did so for the wrong reason.

Reasoning by analogy. Judges also err in reasoning by analogy rather than interpreting the applicable statutory provision. For example, in *USAT Reorganization LLC v. Writer*, the managers of an LLC had signed a release after an earlier dispute.[220] Rather than look to the California LLC Act, the court relied on partnership precedent, despite the very different language used in the two statutes.[221]

The most famous statement on fiduciary obligation is from *Meinhard v. Salmon*.[222] All three hallmarks of schema-driven judicial decision-making are present. In *Meinhard*, then-Judge Cardozo declared that "[a] trustee is held to something stricter than the morals of the market place."[223] Honesty alone was not enough, but rather "the punctilio of an honor the most sensitive" is require.[224] Thus, "the level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd."[225] That was based on the "[u]ncompromising rigidity" that "has been the attitude of courts of equity."[226] We see morally inflected language. We see references to courts of equity. And Judge Cardozo analogizes partners and partnerships to

216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 579 (quoting Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 952 N.E.2d 995, 1001 (N.Y. 2011)). *See also* Pace, *supra* note 39 at 1110–11 (criticizing the court for applying an equitable rule rather than interpreting the relevant statute).
220. USAT Reorganization LLC v. Writer, No. D043230, 2004 WL 2538848, at *2, *16 (Nov. 10, 2004) (unpublished).
221. *Id.* at 16–17. *See also* Pace, *supra* note 39 at 1111–12 (criticizing the court for applying California partnership precedents rather than interpreting the distinct language of the California LLC act).
222. Meinhard v. Salmon, 164 N.E. 545 (1928).
223. *Id.* at 546.
224. *Id.*
225. *Id.*
226. *Id.*

trustees and trusts.

Scholarly response. Traditionalists argue that this language matters. DeMott argues that judges' use of a "moral obligation" rationale in fiduciary obligation cases shows that judges are employing high social values rather than simply attempting to fill a gap in the parties' agreement.[227] Judicial opinions communicate information to business-people, attorneys, and other judges.[228] Regarding moral behavior itself, Frankel argues that self-enforcing altruistic behavior is considered more moral because moral behavior is considered altruistic and voluntary.[229] Fiduciaries may not be inherently moral, but fiduciary law places fiduciaries "in the role of a moral person" and then pressures them to act selflessly.[230]

Others argue that the language is harmful or irrelevant. Williams, for example, argues that "[m]oralistic rhetoric" gives a false impression that the resulting high expectations are enforceable.[231] Other contractarians argue that this language does not matter, both because express contractual provisions prevail over implicit provisions and because, while "moralizing is cost free to judges," [232] morally inflected language does not "establish[ ] that ethics rather than economics best explains the legal rules."[233] But the psychology literature suggests otherwise, and too many decisions are otherwise unexplainable. And while economics may continue to better explain fiduciary law than ethics, that explanation is stronger if informed by behavioral economics and psychology.

The application of schemas to fiduciaries. Schemas are one of the many shortcuts that the brain uses to perform well despite its natural constraints.[234] One source for the development of schemas is concrete experiences.[235] This is troubling in the context of claims for breach of fiduciary duty. The primary concrete experiences with fiduciary obligation of a judge tasked with presiding over a claim for breach of fiduciary duty are the cases over which the judge has previously presided. This is troubling

227. DeMott, *supra* note 98, at 891–92.

228. *Cf.* Gold, *supra* note 148, at 505 ("One can view laws as communicating information to an audience.") (citing Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1108 (2003)).

229. Frankel, *supra* note 4, at 830.

230. *Id.* at 830.

231. Williams, *supra* note 100, at 369–70. *See also* Langbein, *supra* note 9, at 938 ("The very term 'conflict' is an epithet that prejudices our understanding.").

232. Easterbrook and Fischel, *supra* note 2, at 428.

233. *Id.* at 428 n.6.

234. *Accord* Rachlinski, *supra* note 25, at 61 (citing Daniel Kahneman & Amos Tversky, *On the Reality of Cognitive Illusions*, 103 PSYCHOL. REV. 582, 582 (1996); Daniel Kahneman & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974)).

235. Alexander, *supra* note 3, at 770.

because judges only see failed relationships in their courtrooms.[236] Evaluating a claim for breach of fiduciary duty requires a causal explanation. In seeking that explanation, social observers are quick to "go beyond constructing causal explanations and attribute blame to individuals."[237] A fiduciary owing explicit duties is an especially attractive scapegoat.[238]

Fiduciaries play their own role in developing a schema. For example, when trust administration largely shifted to large financial institutions, trust companies consciously sought to build a reputation for trustworthiness through marketing.[239] But reliance on schemas is not without a cost. Like other mental shortcuts, relying on schemas leaves judges susceptible to errors of judgment.[240]

Non-expert observers are quicker to blame "dominant role-occupants in hierarchal relationships" — such as the traditional fiduciary — than they are to blame either party to "nonhierarchical relationships."[241] Judges are no different, as they learn to view fiduciaries as subject to stricter legal norms than nonfiduciaries.[242] That explains one of the reasons fiduciaries will seek waivers of their duties *ex ante* — because "[b]laming the dominant role-occupant is the default norm for hierarchical relationships."[243] But while fiduciaries in the business organization context may superficially resemble a dominant role-occupant in a vertical relationship, they are often better characterized as parties to horizontal, non-hierarchical relationships. Thus false positive findings of culpability and liability by fiduciaries can be expected. Parties will seek to contract around recourse to the courts when they lack faith that the courts will come to the proper conclusion in deciding a dispute.

Schemas provide an explanatory factor as to why courts at least some of the time treat modern fiduciaries differently than traditional fiduciaries. Per Alexander, people use schemas to categorize a role as hierarchical or nonhierarchical.[244] The examples Alexander gives highlight the difference. Hierarchically structured relationships include "doctor-patient, lawyer-client, and parent-child relationships," while nonhierarchically structured

236. *See, e.g.,* Pace, *supra* note 39, at 1089 (noting that although contracts are performed successfully 95 percent of the time, judges only see agreements that have failed in some way).

237. Alexander, *supra* note 3, at 772 (citing Fiske & Taylor, *supra* note 83–86).

238. *Id.*

239. *Id.* at 775.

240. *Accord* Rachlinski, *supra* note 25, at 61 (citing Daniel Kahneman & Amos Tversky, On the Reality of Cognitive Illusions, 103 PSYCHOL. REV. 582, 582 (1996); Daniel Kahneman & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974))

241. Alexander, *supra* note 3, at 774.

242. *Id.*

243. *Id.*

244. *Id.*

relationships include "friends, *business partners*, and co-workers."[245] This provides a partial explanation both as to why courts have proven more open to limitations on and waivers of fiduciary duties in the business organization context and to why they sometimes have proven reticent to enforce such waivers.[246] Schemas, then, can both reinforce and muddle the divide within the law.

Top-down versus bottom-up analysis. The psychology literature differentiates between top-down and bottom-up modes of cognitive analysis.[247] Top-down modes of cognitive analysis are "heavily influenced by one's organized prior knowledge."[248] That is, a heavy influence is exerted by the "preconceived notions and expectations" of the analyst.[249] But where top-down modes of analysis are "theory-driven or image-driven," bottom-up modes are "data-driven."[250] As such, they are not as influenced by preconceived expectations as top-down processes.[251] Alexander further ascribes the tendency by judges to apply top-down modes of analysis to schemas.[252] Schemas also — as an "information gap-filler"[253] — fill a psychological role similar to that filled by fiduciary obligation in the law. Alexander argues that courts do not have a well-developed schema for contracting parties, unlike fiduciaries.[254] This is likely because contractual relationships are incredibly flexible and customizable; they can be extended to cover an almost infinite array of relationships. Courts are right not to shove such a broad-based tool into such a narrow box. Bottom-up processes are particularly superior to top-down processes in statutory and contractual interpretation.

Alexander argues that courts evaluate trustees, executors, and estate administrators (i.e., property fiduciaries) differently than parties to contractual relationships due to cognitive factors.[255] Accepting that judges analyze traditional fiduciary relationships in such a way, the question is how judges analyze fiduciary relationships in more modern contexts, particularly in the business organization context. The highly statutory and contractual nature of those relationships and obligations counsels for evaluating them

245. *Id.* (emphasis added).

246. *See, e.g.*, Pace, *supra* note 39, at 1095–109 (detailing case law upholding waivers of fiduciary duties in the LLC context).

247. Alexander, *supra* note 3, at 768.

248. Fiske & Taylor, *supra* note 185, at 104.

249. Alexander, *supra* note 3, at 768 (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 104 (2d ed. 2013).

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 771.

254. *Id.* at 769.

255. *Id.* at 768.

more like contractual relationships, but the language from cases like *Pepper v. Litton*, *Guth v. Loft, Inc.*, and *Meinhard v. Salmon* shows judges talking about them much like they would a traditional, equitable fiduciary relationship. This is in keeping with Alexander's application of cognitive theory, or behavioral decision theory, to fiduciary law.[256]

Cognitive biases. Judicial error stemming from applying schemas associated with traditional fiduciary relationships to modern fiduciary relationships is compounded by the close association of schemas with cognitive biases. Schemas are especially closely associated with the conservatism bias and thus highly resistant to cognitive change.[257] The conservatism bias is defined as the tendency to underestimate and undervalue the importance of new evidence.[258] Schemas have an anchoring effect that exacerbates the conservatism bias.[259] Commentators have noted that cognitive biases afflict parties to agreements curtailing fiduciary duties[260] and judges deciding breach of fiduciary duty cases.[261]

Schemas also operate in conjunction with cognitive phenomena such as hindsight bias.[262] Alexander defines hindsight bias as "individuals' tendency to consistently exaggerate what, in foresight, they could have anticipated"; that is, people persistently believe that they could and should have known ex ante what they know ex post.[263] To put it another way, after the fact, people greatly overrate the ease with which an event could have been anticipated.[264] Combatting hindsight bias is difficult because it is unnatural to ignore a known outcome.[265]

Hindsight bias is particularly dangerous for fiduciaries. To weigh a fiduciary's conduct, judges must often engage in the unnatural act of assessing "the predictability of past outcomes."[266] Rachlinksi has argued that

256. *Id.* (citing Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717 (2000); Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000)).

257. *Id.* at 772 (citing Ward Edwards, *Conservatism in Human Information Processing, Judgement Under Uncertainty: Heuristics and Biases* 359 (1982) ("An abundance of research has shown that human beings are conservative processors of fallible information.")).

258. Kahneman & Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. at 1125.

259. Alexander, *supra* note 3, at 772 (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. at 1128).

260. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 249–51 (1995).

261. Pace, *supra* note 39, at 1089.

262. Alexander, *supra* note 3, at 782.

263. *Id.*

264. Rachlinski, *supra* note 25, at 67.

265. *Id.* at 69.

266. *Id.* ("Few decisions in ordinary life require an assessment of the predictability of past

hindsight bias pervades judicial decisions on improper investment of trust assets by trustees.[267] The fiduciary schema reinforces hindsight bias.[268] No better example of hindsight bias in pernicious effect can be given than a court holding that a trustee's sale of stock from a diversified portfolio violated the trustee's fiduciary duties because he sold the stock "at the bottom of the market."[269] Bedrock principles of finance fell to hindsight bias.[270] There is no easy fix. Rachlinski argues that any effort to address hindsight bias by courts must recognize "there is *no effective strategy* to induce a judge . . . to make an unbiased ex post assessment of the ex ante probability of an adverse outcome."[271]

Legislatures have acted more than judges to address hindsight bias, both in general and in ways that specifically apply to fiduciaries. The burden of production and the standard of proof typically place a greater encumbrance on the plaintiff, the party most likely to benefit from hindsight bias.[272] Rachlinski frames the business judgment rule as in part a reaction to the deleterious effect of hindsight bias on determinations of liability.[273] He also sees bright-line rules as a sensible attempt at mitigating harm from hindsight bias.[274] In the context of trustee investments of trust assets, Rachlinski sees both the occasional application of what amounts to a strict liability standard and standards focused on "whether the trustee was adequately informed before investing" as such attempts.[275]

Hindsight bias has proven especially prevalent in regards to trustee investments of trust assets. Even after the advent of the prudent investor rule, judges "repeatedly condemned trustees for purchasing 'speculative' investments such as shares of stock bought on margin, 'bonds selling at a large discount because of uncertainty as to whether they will be paid at maturity,' junior mortgages, and real estate," even where held in well

outcomes, but such assessments are pervasive in legal contexts."). *See also* 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS 227, at 433 (4th ed. 1988) ("It is difficult for a judge . . . to disregard the lesson taught by subsequent events and to put himself in the position in which the trustee was when he acted.")

267. *Id.* at 73.

268. *See* Alexander, *supra* note 3, at 783 (arguing it does so in trust litigation).

269. First Alabama Bank v. Martin, 425 So. 2d 415, 428 (Ala. 1982).

270. *But see* Bevis Longstreth, *Modern Investment Mgt. and the Prudent Man Rule 18* (1986) (characterizing *Martin* as an exceptional case of judicial "backwardness and irrationality").

271. Rachlinski, *supra* note 25, at 70 (emphasis added).

272. *Id.* at 71.

273. *Id.* at 72–73.

274. *Id.* at 78 (citing Jeffrey J. Rachlinski, *Regulating in Foresight versus Judging Liability in Hindsight: The Case of Tobacco*, 33 GA. L. REV. 813, 830–31 (1999)).

275. *Id.*

diversified portfolios.[276] Judges have shown both financial illiteracy and hindsight bias. The Supreme Judicial Court of Massachusetts ruled against a trustee for investments making up just a small fraction of a diverse portfolio due to "disquieting information" in the relevant disclosures.[277] The Alabama Supreme Court did them one better, taking a trustee to task for selling "at the bottom of the market."[278]

It should come as no surprise, then, that judicial thinking has not kept up with the evolution of fiduciary law. The cognitive ability of policymakers, though, has been a grossly understudied topic in the existing literature.[279] This Article begins to address that imbalance, but considerably more attention is warranted, including empirical work utilizing both surveys and experimental methods.

V. OPTIMIZING MODERN STATUTORY AND CONTRACTUAL FIDUCIARY OBLIGATION

This divide in fiduciary law and the reasons for it have been underappreciated and have important implications for how we approach fiduciary law. Statute has largely come to supplant equity as the definer of fiduciary relationships and obligations. With this has come a greatly increased role for legislatures and a decreased role for judges. Business organizations, and especially alternative business entities, are particularly well suited for modern, statutory and contractual fiduciary obligation. Beyond the business organization context, the modern, statutory and contractual form of fiduciary obligation is better suited to meeting the needs of parties in a large array of new types of fiduciary relationships, because legislatures are better positioned to address those needs and because statutory and contractual definition allows for the flexibility to fit fiduciary obligation to such diverse relationships. Bolting on fiduciary obligation statutorily and customizing it as needed is a rational response to a basic design problem. And while moral considerations should not be discounted, it may that they, too, counsel in favor of this approach.

276. *See id.* at 76 (citing 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS 227.6, at 444; RESTATEMENT (SECOND) OF TRUSTS 227 cmt. F (1959); First Ala. Bank v. Martin, 425 So. 2d 415 (Ala. 1982); Estate of McCredy, 470 A.2d 585 (Pa. Super. 1983); Steiner v. Hawaiian Trust Co., 393 P.2d 96 (Haw. 1964)).

277. Chase v. Pevear, 419 N.E.2d 1358, 1368 (Mass. 1981).

278. First Ala. Bank v. Martin, 425 So. 2d 415, 428 (Ala. 1982).

279. Niclas Berggren, *Time for Behavioral Political Economy? An Analysis of Articles in Behavioral Economics* (finding that 95.5% of studied articles in behavioral economics fail to analyze the cognitive ability of policymakers), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1846184 [https://perma.cc/YG8M-CQZQ].

As we've seen, fiduciary law's roots are equitable.[280] It arose out of certain sorts of relationships. It was focused on the status of the fiduciary. It was focused on a relationship between the fiduciary and entrustor where the fiduciary was in a position of trust and given discretion by an entrustor not in a position to effectively monitor the fiduciary.

That can certainly be the case in the modern business organization context. But it is frequently not. And whether it is or is not is not relevant — fiduciary duties are owed nonetheless. The court will not look to whether the entrustor trusted the fiduciary, or whether the fiduciary was given discretion, or whether the entrustor was in a position to effectively monitor the fiduciary; the court will only look to whether the relevant statute provides that the first party was in a role such that they owed fiduciary duties to the second party. And then the court will look to any relevant contract.

Statutory rules regarding how fiduciary relationships may be defined are not at odds with the contractarian approach because they are "best understood as implicit contractual terms."[281] But to term fiduciary law contractarian is a bit of a misnomer because statutes, organizational documents, and contracts can combine to delineate the contours of the fiduciary relationship. Where the statute provides for it, organizational documents and contracts serve as gap-fillers where the statute either does not speak or devolves decision-making power.

Judges often apply the same schema for modern fiduciary obligations with statutory or contractual roots as they do for traditional fiduciary obligations. To put it another way, judges analogize the relationships of the former with the relationships of the latter.[282] But modern fiduciary obligations are different in kind than traditional fiduciary obligations.[283] Because the authority for the fiduciary obligation flows from a statutory or contractual source, the schema described above no longer fits. Judges should abandon the top-down approach to analyzing fiduciary obligations in favor of a bottom-up analysis.[284] What was once amenable to a single schema now may come in as many flavors as legislatures and entrepreneurs can devise.

280. *See supra* Part II (discussing how equity has shaped fiduciary obligations).

281. Easterbrook & Fischel, *supra* note 2, at 429 (citing Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991)).

282. Frankel, *supra* note 4, at 804.

283. *Cf.* Easterbrook & Fischel, *supra* note 2, at 425 ("During the last two centuries, courts have been adapting this duty of loyalty and its remedy to other agency relations, under the title 'fiduciary' duty. That is adaption, not extension.").

284. There is evidence that judges' interpretative methods can and do change over time. *See, e.g.*, Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1311 (2018) (identifying a divide between older judges—labeled "legal process institutionalists"—who view statutory interpretation as a "quasi-legislative activity" and younger judges—labeled "canonists"—who take a "more rule-oriented approach").

Attempting to shoehorn fiduciary duties from the trust or other traditional contexts without looking to the relevant statute, contract, or both, will result in unsatisfactory rules.[285]

There is a reflexive recoiling at the idea that fiduciary duties in, say, the LLC context may be waived. That reflex is based on thinking about fiduciary obligation in terms of its equitable roots. Part of getting away from that and properly understanding the role of fiduciary duties in the business organization context is a recognition that they are just a component that the parties to a contractual relationship within certain statutorily prescribed bounds take off or leave on the figurative shelf. They are just another piece in how the parties choose to define their relationships, not any sort of moral obligation.

The limitations of equity. Equity cannot fully explain fiduciary law because it is limited. For example, at the time of the American Revolution, the British Court of Chancery lacked "equitable jurisdiction to grant or extend derivative standing" in the corporate context unless there was a "threat to justice."[286] The LLC and other alternative business entities did not exist in 1792.[287] As creatures of statute, they did not even exist at common law.[288] Rules of equity have a place in Delaware LLC law, but only where not abrogated by statute.[289] Equity serves at the mercy of statute, not the other way around.

Equity itself is a gap-filler.[290] There is only a role for equity where remedies have not been provided for at law.[291] If the legislature has acted to define the remedy, even if in doing so it has limited that remedy or provided for private parties to limit that remedy by agreement, then there is no place for equity.[292] Because it provides for default fiduciary duties, allows for contractual limitation on the modification of those duties, and even allows

285. *Cf.* Frankel, *supra* note 4, at 797 (arguing that developing fiduciary law by analogizing to preexisting fiduciary relations often does not result in appropriate rules).

286. CML V, LLC v. Bax, 28 A.3d 1037, 1045 (Del. 2011).

287. *Id.*

288. *Id.* LLCs did not exist in the United States until 1977 (first in Wyoming) and in Delaware until 1992.

289. *Id.* ("[I]f the General Assembly has defined a right, remedy, or obligation with respect to an LLC, courts cannot interpret the common law to override the express provisions the General Assembly adopted.") (relying on 6 DEL. C. § 18-1104 ("In any case not provided for in this chapter, the rules of law and equity . . . shall govern.").

290. *Cf.* Prod. Res. Gp., LLC v. NCT Gp., Inc., 863 A.2d 772, 789–90 (Del. Ch. 2004) (criticizing the equitable use of fiduciary duty to "fill gaps that do not exist").

291. *Cf.* Chavin v. H.H. Rosin & Co., 246 A.2d 921, 922 (Del. 1968) ("It is, of course, axiomatic that Equity has no jurisdiction over a controversy for which there is a complete and adequate remedy at law.").

292. *See, e.g.*, CML V, LLC v. Bax, 28 A.3d 1037, 1046 (Del. 2011) (refusing to extend equitable remedies to a party that "could have negotiated its remedies by contract").

those duties to be expanded, the Delaware LLC Act, for example, provides ample means for LLC members to protect themselves at law.[293]

The case for continued aggressive extension of equitable fiduciary obligation is even weaker outside of Delaware. Other states do not retain separate equity courts as Delaware does[294] and do not have Delaware's constitutional protection of equitable jurisdiction.[295] In the federal context, the United States Constitution extended the federal judicial power to cover cases in equity,[296] and Congress, rather than establish separate courts of equity, gave federal courts jurisdiction over cases in law and equity.[297] Leading early commentators saw equity playing a gap-filling role in federal courts as well. Alexander Hamilton wrote in Federalist No. 83 that the equity courts' primary role "is to give relief in extraordinary cases, which are exceptions to general rules."[298] And Justice Joseph Story wrote in 1836 in his *Commentaries on Equity Jurisprudence* that there must be cases where the application of existing rules will either result in injustice or where those rules "cannot be applied at all."[299] In 1839 the Supreme Court held that federal courts sitting in equity were bound to follow state laws creating or eliminating substantive rights, regardless of whether the right existed in English chancery.[300] In 1945 the Supreme Court clarified that, under the *Erie* doctrine, federal courts' equitable powers should not change the outcome of a suit just because it was litigated in federal rather than state court.[301] While federal courts remain free to apply traditional federal equity rules to rights arising under federal statutes,[302] they remain limited by the general principle

293. *Cf. In Re* Carlisle, Etcetera LLC, 114 A.3d 592 (Del. Ch. 2015) ("The LLC Act provides even more means for a creditor to protect itself at law.") (citations omitted).

294. The only states that still have separate courts for law and equity are Delaware, Mississippi, and Tennessee.

295. DEL. CONST. art. IV, § 10. *See also* DuPont v. DuPont, 85 A.2d 724, 729 (Del. 1951) ("We think the Constitutions of 1792, 1831 and 1897 intended to establish for the benefit of the people of the state a tribunal to administer the remedies and principles of equity . . . . Its result is to establish by the Judiciary Article of the Constitution the irreducible minimum of the judiciary.").

296. U.S. CONST. art. III, § 2, cl. 1.

297. *See* Judiciary Act of 1789, §§ 11 ("[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in *equity*. . . ."), 25 ("[A] final judgment or decree in any suit, in the highest *court of law or equity* of a State in which a decision in the suit could be had, . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States. . . .") (emphases added).

298. THE FEDERALIST NO. 83 (Alexander Hamilton).

299. Joseph Story, *Commentaries on Equity Jurisprudence: as administered in England and America* 9 (W.H. Lyon, Jr. eds., 14th ed. 1918).

300. Clark v. Smith, 38 U.S. 195, 203–04 (1839).

301. Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 110–11 (1945).

302. Holmberg v. Ambrecht, 327 U.S. 392, 395 (1946).

of equity that equitable relief is not available where an adequate remedy at law is available.

Moreover, the source and authority for the application and enforcement of modern fiduciary obligations is not rooted in equity or based on the status or relationship of the parties alone, but flows from the relevant statute, contract, or both.[303] Equity has a long history placing great store in judicial discretion.[304] That same level of discretion is inappropriate in the statutory and contractual context. With the increasing importance of federal law, the equitable establishment of fiduciary obligation, as opposed to statutory obligation, is increasingly being foreclosed.[305]

A question best left for legislatures. Where courts have found fiduciary obligations, they have done so in the absence of a statutory directive by analogizing the relationship in question to a traditional relationship, typically that of a trustee to a trust.[306] But legislatures have now acted to extend fiduciary obligations by statute to a wide array of relationships.[307] No longer can judges assume that legislatures have left the establishment of fiduciary obligations to the courts. Legislatures are clearly aware of fiduciary obligation and provide for fiduciary obligations and relationships as they deem necessary.

An increased role by legislatures may also help to mitigate hindsight and other biases that have plagued adjudication of breach of fiduciary duty cases.[308] Of course they are not without biases and flaws of their own. In fact, legislatures serve as both an outside source of reform to mitigate judicial bias and as another source of cognitive bias.[309] The comparison between legislatures and judges in this context deserve its own full-length treatment, but legislatures are at most no worse than judges. More to the point, legislatures have taken advantage of their prerogative to supplant the courts as the definers of fiduciary obligation.

303. *But see* Smith, *supra* note 93, at 1792–94 (arguing contractually adopted fiduciary duties should be treated as contractual duties, not fiduciary duties).

304. Bray, *supra* note 12, at 5 (identifying discretion as one of the hallmarks of equity's distinctive mode of reasoning).

305. *Cf.* Frankel, *supra* note 4, at 820 n.79 (noting that, because the Supreme Court has curbed federal common law, federal courts must follow legislation more closely in developing fiduciary law).

306. *See, e.g.,* Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) ("While technically not trustees, [corporate officers and directors] stand in a fiduciary relation to the corporation and its stockholders."); Meinhard v. Salmon, 249 N.Y. 458, 464 (1928) ("A trustee is held to something stricter than the morals of the market place.").

307. *See, e.g.*, *supra* Part III (exploring the increasing role of statute and contract in creating, defining, and limiting fiduciary obligations).

308. *See supra* Part V (identifying and critiquing the "schema" that judges apply when analyzing questions of fiduciary obligation and discussing other issues of cognition).

309. Rachlinski, *supra* note 25, at 101.

It is also salutary to think of fiduciary law in statutory, rather than contractual, terms. The contractarians, as befits the name, tend to start at the contract, casting statutes and organizational documents as providing implied contractual terms. In this context, at least, it is more useful to think of it in the other direction. A legislature defines a fiduciary relationship by statute but may delegate some part of defining that relationship to private parties through organizational documents or contract.

Business organization context. Cases involving business organizations have come to dominate the case law. This has occurred as business organizations have both vastly increased in overall economic heft and proliferated in form.[310] In particular, the rise of alternative business entities has made equitable reasoning and analogies to traditional fiduciaries a poor fit in the business organization context, and nowhere less so than for LLCs. LLCs are products of statute and creatures of contract.[311] Given their flexibility, they are a poor fit for reasoning by analogy to trusts and for the top-down application of a schema better suited for such. Additionally, business organizations do not raise the same concerns as many traditional fiduciary relationships. Entrustors that can protect themselves from abuses of power obviate the need for judicial intervention through fiduciary law.[312] For publicly traded corporations, shareholders have the ultimate source of market protection: easy exit. Even for forms used for closely held businesses, the owners have the opportunity to protect themselves during an arms-length formation process. Viewed from that perspective, the traditionalist entrustor-fiduciary paradigm breaks down. Parties enter at arms-length and frequently risk opportunistic behavior from each other; but if contractual protections prove insufficient in the aggregate, legislatures can constrain waivers of fiduciary duties, as they have done with only a very few exceptions such as the Delaware LLC and LP Acts.[313]

Wide-ranging fiduciary obligations. Business organizations get more attention, but legislatures have acted to create or redefine fiduciary obligations in a wide array of situations.[314] Justification for analogy to trust or other traditional fiduciary relationships breaks down in light of the much broader range of relationships that now bring fiduciary obligations. Sitkoff points out that there is "a rich body of interpretative authority on fiduciary matters," but much of that case law interprets particular statutory language.

310. *See supra* Part III (discussing the expanding role of business organizations in defining fiduciary obligations).

311. Pace, *supra* note 39, at 1086.

312. Frankel, *supra* note 4, at 811.

313. DEL. CODE ANN. tit. 6, §§18-1101(c) (LLCs), 17-1101(d) (LPs).

314. *See supra* Part III (explaining the expansion of fiduciary obligations created and defined by statute).

[315] Fiduciary law has not only spread; it is increasingly customized to fit the needs of particular categories of relationships.

There are two conclusions to draw from this. One, legislatures are well aware of fiduciary obligation. Courts should first look to see if there is a relevant statute. If there is, there is no need for judge-made, equitable rules. Judges should appreciate that the different needs of diverse, modern relationships have led to different approaches to and refinements of fiduciary obligation. Two, only where the legislature has not spoken — including implicitly — and where no relief is available does a role remain for judge-made, equitable rules. This does not include situations where the legislature has provided for limited fiduciary duties or for the waiver of duties by the parties. Accordingly, it is most likely to arise in new types of relationships. This approach retains flexibility to suit fiduciary law to a modern, changing economy.

Rational approach to the design problem. The decision by legislatures to "bolt on" fiduciary obligation to new and diverse types of relationships has a sound rationale. Legal systems are complex.[316] The modern American legal system has grown into a sprawling, intricate system. This has come at a price — "the cognitive load of interacting with a system increases with the number of components."[317] Legislatures have a strong incentive to mitigate the legal system's complexity; but they also have an incentive to expand the system to meet the needs of a growing and changing economy. These are in tension but are not mutually exclusive.[318] One way to mitigate the costs associated with complexity while expanding the system is to use a modular design.[319] Modular design allows legislatures to bolt on legal components borrowed from part of the system onto another. In doing so, they "(1) reduce the cognitive load faced by both designers and users; (2) make it easier to modify the system by reducing the number of interdependencies, among its components, and (3) create 'standardized modules' that can be reused when creating new systems with similar functionality."[320]

315. Sitkoff, *supra* note 171, at 1044.

316. Herbert Simon defined a complex system as "one made up of a large number of parts that interact in a nonsimple way." HERBERT SIMON, THE SCIENCES OF THE ARTIFICIAL 86 (M.I.T. Press 1 ed. 1969). One piece of the American legal system, the Code of Federal Regulations, stood at 175,496 pages at year-end 2013.

317. Manuel A. Utset, *Financial System Engineering*, 32 REV. BANKING & FIN. L. 371, 410 (2013).

318. *Cf. id.* at 407 ("One can reduce the overall level of complexity without reducing the number of rules, or even by adding new ones, by making their interaction more transparent and easier to understand.").

319. *See generally id.* at 411-14 (describing modular design and its use).

320. *Id.* at 412.

Legislatures are mostly still part-time at the state level[321] and lack the time, resources, and expertise to design new additions to the legal system from scratch. They ease their cognitive load by borrowing components from existing laws in their own state and elsewhere. Fiduciary obligation is one of those components. We have discussed the cognitive limitations humans face in processing and responding to information.[322] These limitations manifest as bounded rationality, which leads humans to make sub-optimal decisions.[323] Because those limitations are in part due to "limited computational skills,"[324] reducing the complexity of a system users — here, fiduciaries and entrustors — are forced to interact with will mitigate the negative effects of cognitive limitations. Bolting fiduciary obligation onto a wide variety of types of relationships allows legislatures to meet their goals of providing a level of protection to entrustors while reducing the cognitive load on fiduciaries and entrustors. Using a standardized model of fiduciary obligation has allowed legislatures to bolt existing law onto new areas of the law from investment advisory services to labor unions to employee benefits plans.[325]

Customization to fit the particular needs of those disparate relationships does add complexity. Legislatures, then, have an incentive to limit the customization at the statutory level and to delegate defining the full contours of the fiduciary relationship where significant, individualized customization is expected to be beneficial. Such customization will frequently be beneficial because market constraints — including contractual constraints — are often more effective at a lower cost than regulatory constraints.[326] Ease of modification, both by legislatures and by private parties, is affected by interdependencies between fiduciary obligations and other components. The subject has received scant attention, but in at least one context, there is evidence parties are well aware of those interdependencies. A study of publicly traded LLCs found that modifications to the duty of loyalty were often paired with a unanimous consent requirement to amend the operating

321. The National Conference of State Legislatures only classifies legislatures in four states — California, New York, Michigan, and Pennsylvania — as having full-time, well paid legislators with large staff. *Full- and Part-time Legislatures*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 14, 2017), http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx [https://perma.cc/MXG8-B5XW].

322. *See supra* Part V (discussing the development of the law by exploring human cognition).

323. Christine Jolls, Cass Sunstein, Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–78 (1998).

324. *Id.* at 1477.

325. *See supra* Part III (explaining how the statutes and contracts were used to "bolt-on" fiduciary obligations in new areas of the law).

326. Utset, *supra* note 169, at 546.

agreement in the future.[327]

The advantages of this design approach, though, are threatened by judicial intervention. A top-down analysis burdened by an outdated cognitive schema[328] increases costs of customization by increasing uncertainty for both legislatures and private parties. This may have the effect of increasing the number of interdependencies among fiduciary obligation and other areas of the law. That uncertainty adds to the cost of continuing to bolt fiduciary obligation onto new areas of the law and types of relationships and of forming a relationship that bring fiduciary obligations with it, especially if the parties desire to modify those obligations. A bottom-up approach to analyzing issues of fiduciary obligation would only moderately add to the cognitive load of judges while allowing legislatures and private parties to reap the benefit of bolting on fiduciary obligation.[329]

Fiduciary obligation may crowd out actual morality. That is not to say that trust and morality do not have an important role to play in fiduciary relationships of all types. Rational choice theory would suggest that fiduciaries, especially in the business organization context, have a strong incentive to shirk and self-deal, because the benefits of doing so would inure to the fiduciary, the costs would be spread across the owners of the business, and the likelihood of discovery (and a subsequent judgment of culpability and liability) are low. This is one reason why traditionalists point to the role of fiduciary law in enforcing social norms. Contrary to their concerns, though, the case law reveals less rapacious behavior than we might expect from viewing actors as entirely self-interested.[330] And there is experimental evidence that cuts against the rational, self-interested presumption. For example, people are less likely to succumb to the Prisoner's Dilemma than game theory predicts.[331] People both trust and behave in a trustworthy manner to a greater extent than market or legal incentives alone would produce.[332] And one study suggests that a more market-based system may

327. Harner and Marincic, *supra* note 83, at 909, n.122 (finding a unanimity require-ment in 48.9% of agreements modifying or eliminating the duty of loyalty but in only 29.4% of the agreements not doing so).

328. *See supra* Part V (explaining the concept of a schema in psychology and cognitive science).

329. But of course both legislatures and private parties will make mistakes. *See* Rachlinski, *supra* note 25, at 63 ("Experts who design [complex systems or structures] commonly fail to foresee ways in which complicated processes can go awry.").

330. *See, e.g.*, Pace, *supra* note 39 (exhaustively surveying the applicable case law in 24 states that allow extensive or full waiver in the LLC context).

331. *See* Richard H. Thaler, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS 143–46 (1st ed. 2016) (giving real life examples and describing experiments showing more cooperation than suggested by the Prisoner's Dilemma).

332. Blair and Stout, *supra* note 113, at 1738.

better encourage honesty than a more centrally-planned system.[333]

That is a very good thing, because business organizations, in particular, cannot exist without cooperation and trust. Blair and Stout believe that trust plays a critical role not just in non-profit institutions but also in the business corporation.[334] Trust is even more important for privately held alternative business entities. Where market constraints post-formation are weaker, participants must deal with each other more frequently, and the availability of opportunism may be greater. But even in large, publicly held corporations, parties cooperate because of both internal and external constraints.[335]

In light of this, designing an optimal approach to the problems fiduciary law seeks to address is no easy task. The promise of reward and threat of punishment is not always the best way to promote cooperation.[336] In fact, a system of external threats and rewards can actually lead to *decreased* cooperation. Such attempts may "reduce levels of trust and trustworthiness within the firm by eroding corporate participants' *internal* motivations."[337] And external incentives may even lead to worse outcomes than if there were no external incentives.[338] Even a contractual penalty such as a liquidated damages provision may increase the likelihood of efficient breach.[339] Certainly in the business organization context, where fiduciary duties look and act much like contractual provisions, the possibility that fiduciary duties will increase the likelihood of a breach of those duties must be taken into account. It also suggests that the intuitive evaluation of the effect of waiver of fiduciary duties may be off-base.[340] All of this suggests that morality and social norms have a role to play in fiduciary law, but that the contours of that role are not as easily discerned as we may suspect. This counsels both in

333. *See* Dan Ariely et al., *The (True) Legacy of Two Really Existing Economic Systems*, Munich Discussion Paper No. 2014-26, at 9 (March 19, 2015), available at http://epub.ub.uni-muenchen.de/20974 [https://perma.cc/3CMQ-GHEF] (reporting a study finding that subjects with an East German background cheated twice as much in an experiment as subjects with a West German background).

334. Blair and Stout, *supra* note 113, at 1739.

335. *Id.* at 1737–38.

336. *Id.* at 1739.

337. *Id.*

338. *See generally*, SAMUEL BOWLES, THE MORAL ECONOMY: WHY GOOD INCENTIVES ARE NO SUBSTITUTE FOR GOOD CITIZENS 39–77 (Yale Univ. Press 2016) (reporting experiments where external incentives led to less optimal results than no external incentives).

339. *See generally* Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychology Experiment*, 108 MICH. L. REV. 633 (2010) (reporting experimental findings that liquidated damages provisions make breach of contract more likely).

340. What is even less clear is what the effect of just modifying, not waiving, fiduciary duties would be. It may be that it makes breach more likely, but it also may be that it makes breach less likely.

favor of caution and in favor of allowing legislatures to experiment with different approaches to fiduciary obligation.

CONCLUSION

To divide fiduciary obligation into two bodies of law instead of one is a simplification, but it is a necessary simplification.[341] Nor is it the only way to describe fiduciary law, but it is rooted in the historical development of fiduciary obligation and it bridges the divide between the traditionalist and contractarian camps in the literature. More importantly, it identifies the primary problem with the current approach — that judges too often apply a schema better suited for traditional, equitable fiduciary obligations top-down instead of engaging in a bottom-up analysis — and establishes that the modern, statutory and contractual approach is sensible in light of changes in the law and the economy and is advantageous from a design standpoint.

Fiduciary obligation has grown into two distinct bodies of law. But the language used over and over again by courts, reflecting the schema frequently applied by courts, remains rooted in only one of those two bodies of law. Reducing the rate of judicial error in breach of fiduciary duty cases requires a recognition that those two distinct bodies of law exist and the abandonment of schema-driven thinking in favor of bottom-up analysis. That will, in part, require a recognition that the definition and modification of fiduciary obligations by statute and contract is equally valid to equitable, relationship-based fiduciary obligation. Both Congress and state legislature can be expected to continue to expand fiduciary obligation to new relationships, define its contours, and delegate further definition of its contours to private parties. They should be encouraged to do so, in large part because borrowing traditional, equitable fiduciary obligation and bolting it onto new areas of the law is lower cost than creating a substitute from scratch. That cost will be further reduced by judges moving to a bottom-up analysis that will better account for value-added statutory and contractual modification.

341. *Cf.* Anne Tucker, *Jeffrey Lipshaw: Regarding Uncorporations, Is Contract a King or Mere Pretender to the Throne? (Micro-symposium)*, Bus. L. Prof Blog (Nov. 16, 2015), http://lawprofessors.typepad.com/business_law/2015/11/jeff-lipshaw-regarding-uncorporations-is-contract-a-king-or-mere-pretender-to-the-throne-micro-sympo.html [https://perma.cc/7M2Z-NU5X]. ("The contractual, corporate, and uncorporate models are always reductions in the bits and bytes of information from the complex reality, and that's what makes them useful, just as a map of Cambridge, Massachusetts that was as complex as the real Cambridge would be useless.").