

## INDEX

- Accounting for profits in connected
  - assets law
  - conflicts of interest and, 407–413
  - in corporate context, 390–392
  - historical evolution, 376–383
  - partnerships and, 383–385
  - property and, 388–402
  - scope or line of business restriction, 416–418
  - trust law and, 394–395
- Acheson, Dean, 475–476, 495
- Agency law, skills adjusted ordinary care and, 250
- “Akin to fraud” standard
  - in bailment law, 157–159, 190–191
  - duty of care and, 202–203, 205–206, 208–209, 211–213
- Alabama
  - bailment law in, 149
  - business judgment rule in, 69–70
  - connected assets law in, 435–440
- Allen, William T., 185, 208, 221
- American Law Institute, Principles of Corporate Governance, 77
- Ames, James Barr, 299
- Ames, Paul K., 350
- Ames, Samuel, 73, 178, 232, 297–298, 299, 300, 329–330
- Angell, Joseph K., 73, 178, 232, 297–298, 299, 300, 329–330
- Arizona, connected assets law in, 438–439
- Arneil, Barbara, 477
- Arsht, S. Samuel, 96–97, 104–106, 132–133
- Asset sales, business judgment rule and, 78–80
- Attenborough, D., 40
- Australia
  - business judgment rule in, 60
  - duty of care in, 269
  - good faith standard in, 60
  - misappropriation in, 493–494
  - trade secrets and confidential information in, 487
- Bailment law
  - in Alabama, 149
  - depositum*, 143–144
  - divergence in, 165–168
  - duty of care originating in
    - overview, 138–142, 196–197
    - in Delaware, 223
    - in New York, 175–176
    - in Pennsylvania, 186–189
    - in UK, 229–235, 246–255, 256
  - in Georgia, 158
  - gratuitous bailment, 146–147, 148, 160–163, 250
  - gross negligence standard in
    - overview, 150
    - “akin to fraud” standard, 157–159, 190–191
    - “conscious indifference” and, 157–159, 165
    - “deliberate disregard” and, 157–159, 165
    - “inattentive and thoughtless man,” 155–157, 177, 186–187
  - Jones on, 146–148
  - as situation specific ordinary care, 151–155, 163–165, 190–191
  - Story on, 148, 149–150
  - as subjective standard, 150–151
  - in UK, 143–144, 160–168
  - in US, 154–155
  - historical evolution, 143–150

- Bailment law (cont.)  
   in Illinois, 157  
   least neglect standard, 144  
   *mandatum*, 144–145  
   in Massachusetts, 150  
   in Missouri, 156–157  
   moral concepts in, 152, 166–168  
   in New York  
     overview, 153, 158  
     duty of care originating in, 175–176  
     objective standard of care in,  
       146, 165  
   in Ohio, 158–159  
   ordinary care standard in, 144–145,  
     146, 148  
   in Pennsylvania  
     overview, 149, 156, 159  
     duty of care originating in,  
       186–189  
   prudent man standard in, 148–149  
   rewarded bailment, 146, 148  
   situation specific ordinary care in,  
     151–155  
   skills adjusted ordinary care in,  
     246–255, 256  
   subjective standard of care in,  
     143–144, 148  
   “subject-skills” standard in, 163  
   in Tennessee, 159  
   in Texas, 153  
   trust law compared, 171  
 Bainbridge, Stephen, 87  
 Banking Act 1826 (UK), 290  
 Bates, Clement, 302  
 Beach, Charles Fisk, 73, 75–76  
 Bebhuk, Lucien A., 16–17  
 Berle, Adolf A., 94, 472  
 Beveridge, Norman, 138, 323–324, 328,  
   329, 350–351, 355  
 Black, Bernard S., 224–225  
 Blackstone, William, 298  
 Blocking mechanisms, 262–263  
 Blumm, Michael C., 472  
 Bone, Robert G., 491  
 Booth, Richard A., 123  
 Bratton, William W., 17, 18–19, 209,  
   222, 451, 467  
 Broughman, Brian J., 17–18, 224  
 Brudney, Victor, 323  
 Business judgment rule—generally  
   in Australia, 60  
   divergence in, 130–133  
   origins of law, 23–24  
 Business judgment rule—Delaware  
   overview, 130–133  
   abuse of discretion and, 95–97  
   asset sales, 78–80  
   bifurcation of rule, 90–92,  
     95–99  
   conscious disregard and, 80  
   corporate interest and, 120–121  
   “danger to corporate policy and  
     effectiveness” test, 121–124  
   duty of care and  
     Aronson rule, 95–100, 132–133  
     comparison, 81–88  
     merger with, 95  
     structural incongruence of  
       combining, 104–109  
     *Van Gorkom* rule, 87–88  
   duty of loyalty and  
     merger with, 95  
     structural incongruence of  
       combining, 104–109  
   early case law, 36  
   enhanced scrutiny, 113  
   foundational cases, 77–81  
   fraudulent abuse of discretion and,  
     89–90  
   good faith standard and  
     overview, 81–88, 90–92  
     detachment from, 95–99  
     pre-*Unocal* case law, 118–124  
     reasonableness versus, 90–92,  
       106–107, 126  
   gross abuse and, 80  
   indirect conflicts of interest and,  
     110–113  
   informed decision making, 81–88  
   judicial review of, 88  
   logical structure of rule, 88–92  
   positive obligations in, 99–104  
   proscriptive versus prescriptive duty,  
     99–104  
   rational business purpose test, 97–98  
   reckless disregard and, 78

- self-dealing and, 81, 106, 107–109
- “selfishness” and, 119–120
- statutory basis of, 93–94, 97–98
- takeover defences
  - authority component, 113–118
  - “green mail,” 118–124
  - poison pills, 113–116
  - pre-*Unocal* case law, 118–124
  - “proportionate voice and influence,” 116–118
  - reasonableness and, 126
  - shareholder rights plans, 113–116
  - Unocal* rule, 126
- tension in, 92
- UK compared, 3, 116
- Business judgment rule—UK
  - assessment of decision making by courts, 44–47
  - as blocking mechanism, 262–263
  - “bona fide for the end designed,” 24–28
  - collateral purpose and, 48
  - in corporate context, 26–28, 43–44
  - corporate interest and, 40–41, 50–51
  - corporate structure and, 40–41
  - crassa negligentia*, 43–44
  - Delaware compared, 3, 116
  - disguised distributions and, 49
  - duty of care and, 28, 260–262
  - early law, 24–33
  - fraud analysis, 45–46
  - good faith standard and
    - overview, 39–42, 48–49
    - reasonableness versus, 44–47, 51–57
  - indirect conflicts of interest and, 49–52, 55–58
  - intent and, 29–33
  - judicial deference, 28–29
  - likelihood of judicial interference, 46–47
  - limitations of courts and, 29
  - managerialism and, 57–58
  - modern standard, 47–58
  - in 19th Century, 39–47
  - “no reasonable director” standard, 44–47, 51–57
  - as objective duty, 57–58
  - partnerships and, 26
  - positive obligations in, 58–60, 65–66
  - proper purpose doctrine and, 48
  - proscriptive versus prescriptive duty, 58–67
  - self-dealing and, 53–54, 62–63
  - as subjective duty, 50–52
  - trusts and, 24–26, 41
  - US compared, 64–65
- Business judgment rule—US
  - in Alabama, 69–70
  - in Delaware (*See* Business judgment rule—Delaware)
  - early law, 33–38
  - equal protection and, 35
  - good faith standard and
    - overview, 68–74
    - reasonableness versus, 68–74
  - jurisdiction and, 69
  - in Louisiana, 37
  - in Maryland, 36–37
  - in Massachusetts, 37
  - in New Jersey, 70–72, 75, 76–77
  - in New York, 34, 37, 68–69, 75–76
  - in 19th Century, 68–74
  - in Pennsylvania, 34, 72–73, 75, 77
  - police power and, 35–38
  - in Tennessee, 34
  - in 20th Century, 75–77
  - UK compared, 64–65
  - variations in, 73–74
  - in Vermont, 34–35
- California, trademarks and trade names
  - in, 484
- Callmann, Rudolf, 486
- Canada, connected assets law in, 418–420
- Capability facts, 420–423, 448–451
- Care. *See* Duty of care headings
- Carney, William J., 340
- Carter, Stephen L., 486
- Cary, William L., 15, 323, 355
- Change in corporate fiduciary law
  - overview, 6

- Change in corporate fiduciary (cont.)  
   corporate legal federalism, 14–20  
     (See also Corporate legal federalism)  
   realist legal theory, 8–14 (See also Realist legal theory)  
   theories of, 6
- Charter competition  
   overview, 15–17, 18–19  
   connected assets law and, 451, 465–468  
   duty of care and, 199  
   self-dealing law and, 367
- Clark, Robert C., 64–65, 286, 323, 429
- Coffee, John C., Jr., 324
- Cohen, Felix, 485
- Collateral purpose, 48
- Colorado, connected assets law in, 441, 442–443
- Commentaries on Law of Bailments* (Story), 145, 153, 166, 178
- Commentaries on the Law of Private Corporations* (Thompson), 301
- Commons, John, 478
- Companies Act 1862 (UK), 292, 296, 301, 349
- Companies Act 1867 (UK), 294
- Companies Act 1890 (UK), 294
- Companies Act 1947 (UK), 296
- Companies Act 2006(UK)  
   generally, 39–40, 48, 64  
   connected assets law under, 373, 398, 405, 423–426, 462  
   corporations under, 292  
   duty of care under, 265, 277  
   self-dealing under, 318–320
- Companies Clauses Consolidation Act 1845 (UK), 313, 349
- Company Law* (Palmer), 296
- Competition among states  
   overview, 15–17, 18–19  
   connected assets law and, 451, 465–468  
   duty of care and, 199  
   self-dealing law and, 367
- Conaglen, Matthew, 66, 311, 345, 380, 382
- Confidential information  
   in UK, 487–489  
   in US, 487, 489–492
- Conflicts of interest  
   business judgment rule, indirect conflicts and  
   in Delaware, 110–113  
   in UK, 49–52, 55–58  
   in connected assets law  
   in Delaware, 452–453, 460  
   in UK, 397, 407–413, 415–416, 420–423  
   in self-dealing law (See Self-dealing headings)
- Conflicts of interest and duty in  
   connected assets law  
   in Delaware, 452–454, 461  
   in New York, 430–433  
   in UK  
     capability facts and, 420–423  
     codification of, 423–426  
     in corporate context, 390–391, 394–395, 397–398  
     first “no profit” rule, 374–375  
     modern position, 403–405, 415–416  
     partnerships and, 385–387  
     scope or line of business  
       restriction and, 416–418  
     second “no profit” rule, 381–383  
   in US, 430–433, 435, 437, 444–451
- Connected assets law—generally  
   in Canada, 418–420  
   charter competition, 451, 465–468  
   divergence in, 462–465  
     charter competition as reason, 465–468  
     policy reasons, 468–474  
     property analysis, 494–500  
   nature of problem, 371–372  
   as policy instrument, 468–474  
   realist legal theory and, 463
- Connected assets law—Delaware  
   borrowing of law in, 452  
   competition among states, 451

- conflicts of interest and duty in, 452–454, 461
- conflicts of interest in, 452–453, 460
- corporate capacity of directors, 456–457
- “corporate interest lens” in, 452–457, 458–461
- corporate legal federalism and, 451
- duty of loyalty and, 453–455
- good faith standard in, 453–455
- Guth* rule, 451–457
- personal capacity of directors, 455–456
- post-*Guth* case law, 458–461
- “property lens” in, 452–457, 458–461
- tie between corporation and asset, 458–461
- Connected assets law—UK
  - accounting for profits
    - conflicts of interest and, 407–413
    - in corporate context, 390–392
    - historical evolution, 376–383
    - partnerships and, 383–385
    - property and, 388–402
    - scope or line of business restriction, 416–418
    - trust law and, 394–395
  - anti-director bias in, 413–416, 497–498
  - capability facts and, 420–423
  - codification of, 423–426
  - conflicts of interest and duty in
    - capability facts and, 420–423
    - codification of, 423–426
    - in corporate context, 390–391, 394–395, 397–398
    - first “no profit” rule, 374–375
    - modern position, 403–405, 415–416
    - partnerships and, 385–387
    - scope or line of business restriction and, 416–418
    - second “no profit” rule, 381–383
  - conflicts of interest in, 397, 407–413, 415–416, 420–423
  - in corporate context, 388–402
  - execution of duty and, 372–375, 390–392
  - first “no profit” rule
    - capability facts and, 421–422
    - conflicts of interest and, 407–413
    - conflicts of interest and duty, 374–375
    - in corporate context, 390–392
    - historical evolution, 372–375
    - “no advantage” rule, 372–375
    - partnerships and, 383–385
    - scope or line of business restriction, 416–418
    - second “no profit” rule versus, 379–380, 381–383, 397–398
    - trust law and, 394–395
  - licenses and, 379–381
  - life tenancies and, 376–380
  - maturing business opportunity test, 418–420
  - “no advantage” rule, 372–375
  - partnerships and, 383–388, 399
  - “property lens” in
    - accounting for profits and, 388–402
    - in corporate context, 388–402
    - discarding of, 405–407
    - divergence from US law, analysis of, 495–498
    - information as property, 385–387, 395–397, 405
    - opportunity as property, 393–394
    - US compared, 474–475
  - as proscriptive duty, 398–400
  - resignation of directors and, 418–420
  - scope or line of business restriction, 416–418
  - second “no profit” rule
    - capability facts and, 421–422
    - conflicts of interest and duty, 381–383
    - in corporate context, 390–392
    - historical evolution, 376–383
    - “no advantage” rule versus, 379–380, 381–383, 397–398
    - partnerships and, 383–385
    - rejection of, 403–405
    - “right or interest,” 378–379
    - scope or line of business restriction, 416–418

- Connected assets law—UK (cont.)  
   trust law and, 394–395  
   self-dealing law compared, 373, 389, 420–421  
   trust law and, 376–383, 394–397, 495  
   US compared, 448–451, 462–465, 468–475, 494–500
- Connected assets law—US  
   overview, 429  
   in Alabama, 435–440  
   anti-monopoly sentiment and, 471–474  
   in Arizona, 438–439  
   in Colorado, 441  
   competition among states, 451  
   conflicts of interest and duty in, 430–433, 435, 437, 444–451  
   “corporate interest lens” in, 444–451  
     capability facts and, 448–451  
     conflicts of interest and duty, 444–451  
     in Delaware, 452–457, 458–461  
     equitable origins, 448–451  
     in New York, 445  
     “property lens” versus, 448  
     UK compared, 448–451  
   in Delaware (*See* Connected assets law—Delaware)  
   entrepreneurialism and, 468–471  
   first “no profit” rule, 430–433  
   in Iowa, 444  
   in Kentucky, 446–447  
   in Maine, 445–446  
   in Massachusetts, 444, 449  
   in Mississippi, 441–442  
   in New Jersey, 444  
   in New York  
     conflicts of interest and duty, 430–433  
     “corporate interest lens,” 445  
     first “no profit” rule, 430–433  
     historical evolution, 430–435  
     “property lens,” 443–444  
     second “no profit” rule, 433–435  
     pro-director bias in, 468–471  
     “property lens” in  
       in corporate context, 440  
       “corporate interest lens”  
       versus, 448  
     divergence from UK law, analysis of, 495–498  
     extension of, 441–444  
     in New York, 443–444  
     second “no profit” rule and, 440  
     UK compared, 474–475  
     second “no profit” rule  
     in New York, 433–435  
     “property lens” and, 440  
     UK compared, 462–465, 468–475, 494–500
- Conscious disregard, business judgment rule and, 80
- Constructive fraud  
   in Delaware, 364  
   in New York, 346
- Cook, William W., 299
- Corbin, William H., 305
- Corporate interest  
   business judgment rule and  
   in Delaware, 120–121  
   in UK, 40–41, 50–51  
   connected assets law, “corporate interest lens” in  
   capability facts and, 448–451  
   conflicts of interest and duty, 444–451  
   in Delaware, 452–457, 460–461  
   equitable origins, 448–451  
   in New York, 445  
   “property lens” versus, 448  
   UK compared, 448–451  
   in US, 444–451
- Corporate Law* (Clark), 64–65
- Corporate legal federalism  
   overview, 14–20  
   case law and, 17–18  
   charter competition (*See* Charter competition)  
   competition among states (*See* Competition among states)  
   in Delaware, 14–20, 227  
   detrimental effects of, 20

- duty of care and, 199
- self-dealing law and, 367
- UK compared, 19–20
- Corporate opportunity. *See* Connected assets law headings
- Corporations
  - business judgment rule (*See* Business judgment rule headings)
  - connected assets law (*See* Connected assets law headings)
  - defined, 298–299
  - duty of care (*See* Duty of care headings)
  - self-dealing law (*See* Self-dealing law headings)
  - in UK
    - ambiguity regarding, 292–293
    - contractual concept, 288, 289–297
    - corporate governance of, 295
    - deed of settlement companies versus, 289–290, 291–292
    - Delaware compared, 297
    - joint stock companies, 289–290
    - limited liability of, 294–295
    - partnerships versus, 290–291
    - powers of directors, 295–296
    - registration of, 289–290, 293–294, 296
    - removal of directors, 296
    - unincorporated companies versus, 289–290, 291–292
  - in US
    - inability to vary rules by contract, 302–308
    - non-contractibility of law, 302–308
    - partnerships versus, 299, 302, 308
    - powers of directors, 307
    - private action, incorporation as, 297–301
    - state action, incorporation as, 297–301
    - statutory basis for, 302–303
    - statutory charter concept, 288–289, 297–301
- Corpus Juris*, 441
- Cox, James D., 324
- Crassa negligentia*, 43–44, 237, 241–242
- Critical Legal Studies School, 11–12
- Cunningham, Lawrence A., 324, 466
- Cyclopedia of Corporations* (Fletcher), 454–455
- Davey Committee, 264
- Davies, Paul L., 62, 139, 272
- Deal, David W., 324
- Deed of settlement companies, 289–290, 291–292
- Delaware
  - attractiveness to corporations, 224–228
  - business judgment rule in (*See* Business judgment rule—Delaware)
  - connected assets law in (*See* Connected assets law—Delaware)
  - corporate legal federalism in, 14–20, 227
  - duty of care in (*See* Duty of care—Delaware)
  - General Corporation Law
    - business judgment rule and, 78, 94, 100, 103, 114–116
    - corporations under, 297, 303–304, 305–306
    - duty of care and, 207–208, 216–217, 219, 222, 227
  - presumption of good faith in, 79–80
  - self-dealing law in
    - overview, 286, 328
    - blank slate, law as, 361, 365
    - constructive fraud and, 364
    - disinterested directors, 362–363
    - fairness review, 362–365
    - fiduciary influence standard, 363–365
    - lack of significant law, 361, 365
- Di Guglielmo, Christine T., 221
- Directors
  - business judgment rule (*See* Business judgment rule headings)
  - connected assets law (*See* Connected assets law headings)

- Directors (cont.)  
   disinterested directors, 322, 337–338, 362–363  
   duty of care (*See* Duty of care headings)  
   indirectly interested directors, 318–319  
   “no reasonable director” standard, 44–47, 51–57  
   participating directors, 352–356  
   powers of, 295–296, 307  
   removal of, 296  
   self-dealing by (*See* Self-dealing headings)  
   as trustees, 309–310  
 Disguised distributions, business judgment rule and, 49  
 Disinterested directors, self-dealing by  
   in Delaware, 362–363  
   in New Jersey, 337–338  
   in US, 322  
 Dunn, T.L., 101  
 Duty of care—generally  
   overview, 137–142  
   in Australia, 269  
   bailment law, origins in, 138–142, 196–197 (*See also* Bailment law)  
   charter competition, 199  
   divergence in, 137  
   historical evolution, 137–142  
   legal “borrowing” in, 137–142  
   as moral concept, 139–141  
   realist legal theory and, 464  
   situation specific ordinary care (*See* Situation specific ordinary care)  
   skills adjusted ordinary care (*See* Skills adjusted ordinary care)  
   tort law and, 108  
   transactional fairness and, 109  
   trust law, origins in, 138–139, 141–142 (*See also* Trust law)  
 Duty of care—Delaware  
   overview, 198–200  
   attractiveness to corporations and, 224–228  
   bailment law, based on, 223  
   business judgment rule and  
     Aronson rule, 95–100, 132–133  
     comparison, 81–88  
     merger with, 95  
     structural incongruence of  
       combining with good faith standard, 104–109  
     *Van Gorkom* rule, 87–88  
   corporate legal federalism and, 199, 227  
   in decision making process  
     actual fraud and, 213  
     “akin to fraud” standard, 202–203, 205–206, 208–209, 211–213  
     Aronson rule, 201, 203–204, 205–206  
     “conscious indifference” and, 212–213  
     “deliberate disregard” and, 212–213  
     good faith standard compared, 213–216  
     gross negligence standard, 201–202, 203–212  
     process care standard, 200–201  
     recklessness and, 202–203, 205–206, 208–209, 211–212  
     *Revlon* duties, 209–211  
     situation specific ordinary care, 201–202  
     statutory provisions, 216–217  
     *Van Gorkom* rule, 201, 206–209  
   historical evolution, 198–200  
   lack of significant law, 223–224  
   in monitoring, 217–220  
   situation specific ordinary care, 201–202  
   standard of conduct versus standard of review, 220–223  
   in supervision, 217–220  
   UK compared, 3  
 Duty of care—UK  
   agency law and, 250  
   “akin to fraud” standard, 239–241  
   analogy elections in, 229–235  
   bailment law, based on, 229–235, 246–255, 256  
   business judgment rule and, 28, 260–262  
   codification of, 263–266



- corporate structure and, 233–235, 236–237
- criticism of, 263–266
- Delaware compared, 3
- good faith standard and
  - historical evolution, 237–239
  - ordinary care standard versus, 257–258
- gross negligence standard and
  - crassa negligentia*, 237, 241–242
  - historical evolution, 235, 237
  - ordinary care standard versus, 247–250
  - situation adjusted ordinary care, evolution into, 237–246
- managerialism and, 265–266
- modernist fallacy, 266–271
- “no man” standard, 257–258
- as objective standard, 275–276
- ordinary care standard
  - good faith standard versus, 257–258
  - gross negligence standard versus, 247–250
  - objective standard, 235–236
  - process care, 237–239, 242–243
  - situation adjusted ordinary care, 232, 237–246
  - skills adjusted ordinary care (*See* Skills adjusted ordinary care)
  - US compared, 255
- reasonableness and, 274–275
- reform of, 273–277
- structural dissonance in, 257–258
- “subjective” distortion of, 271–273
- as “subjective-plus” standard, 275–277
- trust law, based on, 229–235, 237, 254
- US compared, 229–235, 243–244, 255
- Duty of care—US
  - competition among states, 199
  - in Delaware (*See* Duty of care—Delaware)
  - gross negligence standard and in New York, 177–178, 180
  - in Pennsylvania, 188–189, 191–194
- information and, 87
- in New Jersey, 84, 194–196
- in New York
  - overview, 84
  - bailment law, based on, 175–176
  - conflicting strands of authority, 174–180
  - gross negligence standard, 177–178, 180
  - label, gross negligence as, 181–183
  - mediating devices, 184–186
  - ordinary care standard, 176, 179–180
  - trust law, based on, 175, 176–177
- ordinary care standard
  - in New York, 176, 179–180
  - in Pennsylvania, 188–189, 191–194
- in Pennsylvania
  - overview, 186
  - bailment law, based on, 186–189
  - gross negligence standard, 188–189, 191–194
  - ordinary care standard, 188–189, 191–194
- in Rhode Island, 84
- UK compared, 229–235, 243–244, 255
- Duty of loyalty
  - business judgment rule and merger with, 95
  - structural incongruence of combining, 104–109
- connected assets law and, 453–455
- good faith standard and
  - overview, 101, 124
  - merger with, 95
  - structural incongruence of combining, 104–109
- self-dealing and, 346–347
- Easterbrook, Frank H., 15
- Edmunds, Rod, 401, 463, 469
- Eisenberg, Melvin Aron, 103, 185, 208, 221, 323, 355
- Ellis, Richard J., 472–473

- Elson, Charles M., 209  
 Entrepreneurialism, 468–471  
 Equal protection, business judgment rule and, 35  
*Equity* (Story), 171  
 Evans, Lemuel D., 472
- Fairness review in self-dealing law  
   in corporate context, 327, 328  
   fiduciary influence standard and, 356–360  
   historical evolution, 322–328  
   in New Jersey, 332–337  
   in New York, 341–342, 356–360  
   remedial fairness and, 326–327  
   separate stand-alone fairness review, 337  
   strict voidability rule, coexistence with, 327–328  
   transition to, 322–323
- Federalism. *See* Corporate legal federalism
- Ferran, Elis, 272
- Fiduciary duties  
   business judgment rule (*See* Business judgment rule headings)  
   connected assets law (*See* Connected assets law headings)  
   duty of care (*See* Duty of care headings)  
   self-dealing law (*See* Self-dealing law headings)
- Fiduciary influence standard  
   in Delaware, 363–365  
   in New York, 352–360
- Financial Conduct Authority Listing Rules (UK), 321
- Finch, Vanessa, 267, 272
- First “no profit” rule. *See* Connected assets law headings
- Fischel, D.R., 15
- Fourteenth Amendment (US), 35, 476, 477–478
- Fox, Alan, 265
- Fraud  
   “akin to fraud” standard (*See* “Akin to fraud” standard)  
   business judgment rule and, 45–46  
   fraudulent abuse of discretion, 89–90  
   constructive fraud  
     in Delaware, 364  
     in New York, 346  
 Friedman, Lawrence M., 9–12, 324–325, 464  
 Front-loaded two-tier bids, 126  
 Funk, Kellen, 233
- Gelter, Martin, 414–415  
 Georgia, bailment law in, 158  
 Getzler, Joshua, 8–9, 139, 289–290, 380  
 Gibson, John Bannister, 10  
 Gilson, Ronald J., 123, 127  
 Gladstone, William, 290, 293
- Good faith standard. *See also* Business judgment rule headings  
   assessment of decision making versus, 44–47  
   in Australia, 60  
   in connected assets law, 453–455  
   in Delaware, 81–88, 90–92  
   detachment from business judgment rule, 95–99  
   duty of care and  
     in Delaware, 104–109, 213–216  
     structural incongruence of combining, 104–109  
     in UK, 237–239  
   duty of loyalty and  
     overview, 101, 124  
     merger with, 95  
     structural incongruence of combining, 104–109  
   no positive duty to disclose, 58–60, 65–66  
   presumption of good faith, 79–80  
   proscriptive versus prescriptive duty, 58–67  
   reasonableness versus  
     in Delaware, 90–92, 126  
     in UK, 44–47, 51–57  
     in US, 68–74  
     in UK, 39–42, 44–47, 48–49, 51–57  
     in US, 68–74  
 Gower, L.C.B., 62, 260, 267, 268  
 Grantham, Ross, 235

- Gratuitous bailment, 146–147, 148,  
 160–163, 250  
 Green, Frederick, 145  
 Greene Committee, 264  
 “Green mail,” 118–124  
 Grey, Thomas, 485  
 Gross negligence standard  
   in bailment law (*See* Bailment law)  
   duty of care and  
     in Delaware, 201–202, 203–212  
     in New York, 177–178, 180  
     in Pennsylvania, 188–189, 191–194  
     in UK (*See* Duty of care—UK)  
   situation specific ordinary care and,  
     151–155, 163–165, 190–191,  
     237–246
- Halbhauer, Harald, 116  
 Hand, Learned, 108  
 Hartz, Louis, 477  
 Hecker, Edwin W., Jr., 324  
 Helleringer, Genevieve, 414–415  
 Hicks, Andrew D., 261, 393  
 Hill, Jennifer G., 324  
 Hilliard, Francis, 484  
 History of corporate fiduciary law, 4  
 Hoffman, Samuel, 183–184  
 Holland, Randy J., 94–95  
 Holmes, Oliver Wendell, 1, 6, 14,  
 367, 496  
 Horsey, Henry R., 96, 105  
 Horwitz, Morton J., 11–12, 299,  
 325  
 Hurst, James Willard, 10, 297,  
 324–325, 469
- Ibrahim, Darian M., 17–18, 224  
 Illinois  
   bailment law in, 157  
   trade secrets and confidential  
   information in, 491  
 Improper purpose doctrine, 39–40  
 Indirect conflicts of interest  
   business judgment rule and  
     in Delaware, 110–113  
     in UK, 49–52, 55–58  
   self-dealing and (*See* Self-dealing law  
   headings)
- Indirectly interested directors, self-  
 dealing by, 318–319  
 Insolvency Act 1985 (UK), 273  
 Insolvency Act 1986 (UK), 273–277  
 Intent, business judgment rule and,  
 29–33  
 Iowa, connected assets law in, 444
- Jacobs, Jack B., 124, 208, 221  
 Jefferson, Thomas, 472  
 Jenkins Committee, 264  
 Jenson, Michael, 115–116  
 Johnson, Lyman, 87  
 Joint stock companies, 289–290  
 Joint Stock Companies Act 1844 (UK),  
 289–297, 312  
 Joint Stock Companies Act 1856  
 (UK), 312  
 Jones, Gareth, 406  
 Jones, Renee M., 323  
 Jones, William, 145–148, 150–152, 155,  
 157–158, 165–166, 177, 179,  
 186–187, 212–213, 251, 269  
 Judicial deference, business judgment  
 rule, 28–29  
 Jurisdiction, business judgment rule  
 and, 69
- Kahan, Marcel, 16  
 Kahn-Freund, Otto, 264–265  
 Kamar, Ehud, 16  
 Karsten, Peter, 10, 11–12, 73, 325  
 Katz, Claudio J., 477  
 Kent, James, 9, 68–69, 145  
 Kentucky, connected assets law in,  
 446–447  
 Kershaw, David, 116, 395  
 Klausner, Michael, 18, 225  
 Kraakman, Reinier, 123  
 Kynaston, David, 266
- Langbein, John, 323  
 Laster, J. Travis, 221  
*Law and the Conditions of Freedom in  
 the 19th Century United States*  
 (Hurst), 469  
 Law Commission (UK), 173, 257–258,  
 262–263, 265, 274, 277

- The Law of Torts or Private Wrongs* (Hilliard), 484  
 Leahy, J.K., 101  
 Legal federalism. *See* Corporate legal federalism  
 Lemley, Mark A., 486  
 Licenses, connected assets law and, 379–381  
 Life tenancies, connected assets law and, 376–380  
 Limited Liability Act 1855 (UK), 290  
 Lindley, Walter B., 290–291, 292–293, 308, 348, 384, 385  
 Lobban, Michael, 8–9, 289  
 Locke, John, 439–440, 472–473, 474–475, 476–478, 485, 486, 487, 489–490, 492, 493–494, 495  
 Loughrey, Joan, 267, 268  
 Louisiana, business judgment rule in, 37  
 Lowry, John, 401, 463, 469  
 Loyalty, duty of. *See* Duty of loyalty
- Macey, Jonathan R., 17  
 Mackensie, Allan L., 260, 272  
 Macnair, Michael, 289  
 Maine, connected assets law in, 445–446  
 Managerialism  
   business judgment rule and, 57–58  
   duty of care and, 265–266  
 Manning, William E., 104–106, 204–205, 208, 222  
 Marsh, Harold, 285, 286, 322–328, 329, 330, 337, 340, 342, 352, 355, 356, 359, 361, 365–366, 367, 368  
 Maryland  
   business judgment rule in, 36–37  
   self-dealing law in, 351  
 Massachusetts  
   bailment law in, 150  
   business judgment rule in, 37  
   connected assets law in, 444, 449  
   trademarks and trade names in, 480–481, 483  
   trade secrets and confidential information in, 489–490
- Maturing business opportunity test in connected assets law, 418–420  
 McCahery, Joseph A., 18, 209, 451, 467  
 McGinty, Park, 323  
 Means, Gardiner, 94, 472  
 Miller, Geoffrey P., 17  
 Misappropriation  
   in UK, 494  
   in US, 492–493  
 Mississippi, connected assets law in, 441–442  
 Missouri  
   bailment law in, 156–157  
   corporations in, 300  
 Mitchell, William C., 477  
 Mizruchi, M.S., 472  
 Monopolies, 471–474  
 Moore, Marc, 137  
 Morawetz, Victor, 73, 299–300, 350, 355–356  
 Munson, Edgar, 341–342, 353
- New Jersey  
   business judgment rule in, 70–72, 75, 76–77  
   connected assets law in, 444  
   corporations in, 300, 303–305  
   duty of care in, 84, 194–196  
   General Corporation Act, 72, 303–305  
   self-dealing law in  
     overview, 285, 286, 328  
     compensation cases, 335–337  
     in corporate context, 339–340  
     disinterested directors, 337–338  
     non-contractibility of, 339–341  
     paths to fairness review in, 332–337  
     separate stand-alone fairness review, 337  
     strict voidability plus remedial fairness, 329–339  
     strict voidability rule, 329–331  
     UK compared, 339–340  
     “Seven Sisters” legislation, 472

- New York  
 bailment law in  
   overview, 153, 158  
   duty of care originating in,  
     175–176  
 Business Corporations Law  
   corporations under, 303–304  
   duty of care under, 183  
   self-dealing under, 350  
 business judgment rule in, 34, 37,  
   68–69, 75–76  
 connected assets law in  
   conflicts of interest and duty,  
     430–433  
   “corporate interest lens,” 445  
   first “no profit” rule, 430–433  
   historical evolution, 430–435  
   “property lens,” 443–444  
   second “no profit” rule, 433–435  
 corporations in, 300–301  
 duty of care in  
   overview, 84  
   bailment law, based on, 175–176  
   conflicting strands of authority,  
     174–180  
   gross negligence standard,  
     177–178, 180  
   label, gross negligence as, 181–183  
   mediating devices, 184–186  
   ordinary care standard, 176,  
     179–180  
   trust law, based on, 175, 176–177  
 misappropriation in, 493  
 self-dealing law in  
   overview, 285, 286, 328  
   bilateral versus trilateral  
     relationships, 347  
   coexistence of strict voidability  
     and fairness, 341–342  
   constructive fraud and, 346  
   in corporate context, 347, 350–352  
   duty of loyalty and, 346–347  
   fairness review, 341–342, 356–360  
   fiduciary influence standard,  
     352–360  
   historical evolution, 341–352  
   participating directors, 352–356  
   strict voidability rule, 341–342  
   trust law, based in, 342–346,  
     347–349  
   UK compared, 342–346, 347–349  
 trademarks and trade names in,  
   483, 484  
 trade secrets and confidential  
   information in, 490–491  
 trust law in, 170  
 “No advantage” rule in connected  
   assets law, 372–375  
 Nolan, Richard, 391  
 “No man” standard, duty of care and,  
   257–258  
 Non-contractibility  
   of corporate fiduciary rules, 302–308  
   of self-dealing law, 339–341  
 Non-fiduciary duties, 66  
 “No profit” rules. *See* Connected assets  
   law headings  
 “No reasonable director” standard,  
   44–47, 51–57  
 Ohio  
   bailment law in, 158–159  
   trade secrets and confidential  
     information in, 491  
*On the Law of Bailments* (Jones),  
   145, 166  
 Ordinary care standard  
   in bailment law, 144–145, 146, 148  
   in New York, 176, 179–180  
   in Pennsylvania, 188–189, 191–194  
   situation specific ordinary care (*See*  
     Situation specific ordinary care)  
   skills adjusted ordinary care (*See*  
     Skills adjusted ordinary care)  
 in UK  
   good faith standard versus,  
     257–258  
   gross negligence standard versus,  
     247–250  
   objective standard, 235–236  
   process care, 237–239, 242–243  
   situation adjusted ordinary care,  
     232, 237–246  
   skills adjusted ordinary care (*See*  
     Skills adjusted ordinary care)  
   US compared, 255

- Paley, William, 140, 152  
 Palmer, Francis B., 291, 296  
 Participating directors, self-dealing by, 352–356  
 Partnerships  
   business judgment rule and, 26  
   connected assets law and, 383–388, 399  
   corporations versus  
     in UK, 290–291  
     in US, 299, 302, 308  
 Pennsylvania  
   bailment law in  
     overview, 149, 156, 159  
   duty of care originating in, 186–189  
   business judgment rule in, 34, 72–73, 75, 77  
   duty of care in  
     overview, 186  
   bailment law, based on, 186–189  
   gross negligence standard, 188–189, 191–194  
   ordinary care standard, 188–189, 191–194  
   trust law in, 169–170  
 Poison pills, 113–116  
 Police power, business judgment rule and, 35–38  
 Pope, Alexander, 325  
 Principles of Corporate Governance (ALI), 77  
*Principles of Moral and Political Philosophy* (Paley), 140, 152  
 Proper purpose doctrine, business judgment rule and, 48  
 Property  
   connected assets law and  
     analysis of divergence in, 494–500  
   “property lens” in (*See* Connected assets law headings)  
   constitutional law, 477–478  
   misappropriation  
     in UK, 494  
     in US, 492–493  
   philosophical attitudes toward, 475–478  
   trademarks and trade names  
     overview, 479  
     in UK, 479–482  
     in US, 482–486  
   trade secrets and confidential information  
     in UK, 487–489  
     in US, 487, 489–492  
 Prudent man standard in bailment law, 148–149  
 Rand, Ayn, 485  
 Rational business purpose test, business judgment rule and, 97–98  
 Realist legal theory, 8–14  
   connected assets law and, 463  
   Critical Legal Studies School and, 11–12  
   duty of care and, 464  
   judges and, 9–12  
   self-dealing law and, 367–368, 464  
   UK compared, 13–14  
   Wisconsin School and, 9–12  
 Reasonableness  
   business judgment rule and  
     in Delaware, 90–92, 106–107, 126  
     in UK, 44–47, 51–57  
     in US, 68–74  
   duty of care and, 274–275  
   good faith standard versus  
     in Delaware, 90–92, 126  
     in UK, 44–47, 51–57  
     in US, 68–74  
   takeover defences and, 126  
 Recklessness  
   business judgment rule, reckless disregard, 78  
   duty of care and, 202–203, 205–206, 208–209, 211–212  
 Rewarded bailment, 146, 148  
 Rhode Island, duty of care in, 84  
 Rickford, Jonathan, 272  
 Riley, Chris, 272  
 Rock, Edward B., 138  
 Roe, Mark, 17

- Romano, Roberta, 15–16, 17, 208, 224–225
- Rugby School and Alms Houses Act 1777 (UK), 27
- Sale, Hilary, 208
- Sale, Hillary A., 101
- Scope or line of business restriction in connected assets law, 416–418
- Scott-Crespi, Gregory, 221
- Scottish Law Commission (UK), 257–258, 262–263, 265, 274, 277
- Sealy, Leonard S., 234, 289
- Second “no profit” rule. *See* Connected assets law headings
- Second Treatise on Civil Government* (Locke), 439–440
- Self-dealing law—generally  
 charter competition, 199  
 divergence in, 286–287  
 realist legal theory and, 464  
 strict voidability rule, 285–286
- Self-dealing law—UK  
 authorization by shareholders, 315  
 business judgment rule and, 53–54, 62–63  
 conflicts of interest and, 314–315  
 connected assets law compared, 373, 389, 420–421  
 contracting out of fiduciary rules, 315–320  
 damages, 319  
 Delaware compared, 3–4  
 detachment of contractibility, 320–321  
 disclosure and, 317  
 indirectly interested directors, 318–319  
 New Jersey compared, 339–340  
 New York compared, 342–346, 347–349  
 stasis in, 286–287  
 trust law, origins in, 309–314
- Self-dealing law—US  
 business judgment rule and, 81, 106, 107–109  
 competing theories regarding, 323–326  
 competition among states, 199  
 corporate legal federalism and, 367  
 in Delaware  
 overview, 286, 328  
 blank slate, law as, 361, 365  
 constructive fraud and, 364  
 disinterested directors, 362–363  
 fairness review, 362–365  
 fiduciary influence standard, 363–365  
 lack of significant law, 361, 365  
 disinterested directors  
 overview, 322  
 in New Jersey, 337–338  
 dynamism in, 286–287  
 fairness review in  
 in corporate context, 327, 328  
 in Delaware, 362–365  
 fiduciary influence standard and, 356–360  
 historical evolution, 322–328  
 managerial preference for, 365–366  
 in New Jersey, 332–337  
 in New York, 341–342, 356–360  
 remedial fairness and, 326–327  
 separate stand-alone fairness review, 337  
 strict voidability rule, coexistence with, 327–328  
 transition to, 322–323  
 historical evolution, 322–328  
 incorporation of existing fiduciary law, 366–367  
 in Maryland, 351  
 in New Jersey  
 overview, 285, 286, 328  
 compensation cases, 335–337  
 in corporate context, 339–340  
 disinterested directors, 337–338  
 non-contractibility of, 339–341  
 paths to fairness review in, 332–337  
 separate stand-alone fairness review, 337

- Self-dealing law—US (cont.)  
   strict voidability plus remedial fairness, 329–339  
   strict voidability rule, 329–331  
   UK compared, 339–340  
 in New York  
   overview, 285, 286, 328  
   bilateral versus trilateral relationships, 347  
   coexistence of strict voidability and fairness, 341–342  
   constructive fraud and, 346  
   in corporate context, 347, 350–352  
   duty of loyalty and, 346–347  
   fairness review, 341–342, 356–360  
   fiduciary influence standard, 352–360  
   historical evolution, 341–352  
   participating directors, 352–356  
   strict voidability rule, 341–342  
   trust law, based in, 342–346, 347–349  
   UK compared, 342–346, 347–349  
 non-contractibility of, 339–341  
 realist legal theory and, 367–368  
 strict voidability rule in  
   overview, 322, 327–328  
   fairness review, coexistence with, 327–328  
   in New Jersey, 329–331  
   in New York, 341–342  
   plus remedial fairness, 329–339  
   UK compared, 3–4  
 Shared heritage, 4  
 Shareholder rights plans, 113–116  
 Shaw, Lemuel, 10  
 Shepherd, J.C., 343  
 Sherman Act (US), 472  
 Singer, Joseph, 8  
 Situation specific ordinary care  
   bailment law and, 151–155  
   in Delaware, 201–202  
   gross negligence standard and, 151–155, 163–165, 190–191, 237–246  
   in UK, 232, 237–246  
 Skeel, David A., Jr., 130, 324  
 Skills adjusted ordinary care  
   agency law and, 250  
   application of, 255–257  
   bailment law and, 246–255, 256  
   historical evolution, 246–255  
   as separate stand-alone duty, 258–260  
   skill defined, 249  
   “subjective-plus” standard and, 276–277  
 Smith, Adam, 474–475, 476–478  
 Smith, D. Gordon, 208  
 Smith, Lionel, 393  
 South Dakota, trade secrets and confidential information in, 490  
 Story, Joseph, 145, 148–151, 153, 155, 157–158, 165–166, 171, 179, 212–213  
 Strict voidability rule in self-dealing law  
   overview, 285–286  
   fairness review, coexistence with, 327–328  
   in New Jersey, 329–331  
   in New York, 341–342  
   plus remedial fairness, 329–339  
   in US, 322, 327–328  
 Strine, Leo E., Jr., 94, 103–104, 208, 221, 324  
 Supreme Court of Judicature Act 1873 (UK), 232  
 “Table A Articles” (UK), 295, 313, 349  
 Takeover Code (UK), 414  
 Takeover defences, business judgment rule and  
   authority component, 113–118  
   “green mail,” 118–124  
   poison pills, 113–116  
   pre-*Unocal* case law, 118–124  
   “proportionate voice and influence,” 116–118  
   reasonableness and, 126  
   shareholder rights plans, 113–116  
   *Unocal* rule, 126  
   in Wisconsin, 116–117  
 Taylor, Celia R., 323  
 Tebeau, Kar, 472



- Tennessee  
     bailment law in, 159  
     business judgment rule in, 34  
 Tenth Amendment (US), 35  
 Texas, bailment law in, 153  
*The Theory of the Business Enterprise*  
     (Veblen), 167  
 Thompson, Robert B., 209  
 Thompson, Seymour D., 70, 299, 301  
 Tocqueville, Alexis de, 475  
 Tomasi, John, 167  
 Tort law, duty of care and, 108  
 Trademarks and trade names  
     overview, 479  
     in UK, 479–482  
     in US, 482–486  
 Trade secrets  
     in UK, 487–489  
     in US, 487, 489–492  
 Transactional fairness, 109  
*A Treatise on the Law of Companies,*  
     *Considered as a Branch of the*  
     *Law of Partnership* (Lindley),  
     290–291, 308  
 Trebilcock, Michael, 262, 267, 268, 273  
 Trustee Act 2000 (UK), 173  
 Trust law  
     bailment law compared, 171  
     business judgment rule and,  
         24–26, 41  
     connected assets law and, 376–383,  
         394–397, 495  
     duty of care originating in  
         overview, 138–139, 141–142  
         in New York, 175, 176–177  
         in UK, 229–235, 237, 254  
     in New York, 170  
     objective standard of care, 168,  
         169–170  
     in Pennsylvania, 169–170  
     self-dealing law originating in,  
         342–346, 347–349  
     in UK, 171–173  
 Unincorporated companies, 289–290,  
     291–292  
 Veasey, E. Norman, 104–106, 204–205,  
     208, 221, 222  
 Veblen, Thorstein, 167  
 Vesco, Julian, 221, 323  
 Vermont, business judgment rule in,  
     34–35  
 Wachter, Michael L., 138  
 Wadlow, Christopher, 492  
 Wilson, Woodrow, 226, 472  
 Winter, Ralph, 15–16  
 Winthrop, John, 476–477  
 Wisconsin, takeover defences in,  
     116–117  
 Wisconsin School of Legal History,  
     9–12, 324–325  
 Witney, Simon, 411–412  
 Wood, Gordon S., 167  
 Worthington, Sarah, 260–262, 268,  
     411–412  
 Wright, Cecil A., 139–140,  
     150  
 Yablon, Charles M., 87, 226, 472  
 Yearbook of 1478, 30