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Introduction

The Decline and Rise of Fiduciary Obligations in Business

Jacob Hale Russell & Arthur B. Laby[*]

1 THE CONTRACTARIAN WAVE IN FIDUCIARY LAW AND SCHOLARSHIP

Recent years have seen a surge of scholarly interest in the fiduciary relationship. The collapse of Enron in 2001 and WorldCom and 2002 led to an explosion of scholarship on corporate law,[1] including scrutiny of the role fiduciary duties might play to enhance governance. The Sarbanes-Oxley Act of 2002 appeared to adopt some underlying logic from fiduciary law, particularly in its emphasis on the personal responsibility of senior corporate officers to certify their firms' financial statements. The 2008 financial crisis further trained the focus of scholars, regulators, lawyers, and courts on the failures of intermediaries, gatekeepers, and others who arguably breached their duties. New fiduciary rules have been proposed and implemented to govern investment intermediaries.

In addition—or perhaps in response—to these developments, a number of excellent books and articles have appeared on the doctrinal, philosophical, and historical aspects of fiduciary law.[2] Legal scholars have applied fiduciary theory to a growing number of actors, including voters,[3] government officials,[4] judges,[5] politicians,[6] parents,[7] and even friends.[8] They have drawn links between previously disparate doctrinal domains—from trust law to corporate law to family law to public law—through the lens of fiduciary theory.

In many ways, the law of business organizations would seem to be the obvious focal point for such work. Some of the most well-known statements of a fiduciary's obligation appear in the

[*] We are grateful to Vice Chancellor J. Travis Laster for helpful comments on a portion of this Introduction.

[1] The trajectory of corporate governance scholarship is chronicled by Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. Corp. L. 360, 361–3 (2016); *see also* Ronald J. Gilson, *From Corporate Law to Corporate Governance*, *in* Oxford Handbook of Corporate Law and Governance (Jeffrey N. Gordon & Wolf Georg Ringe eds., 2018) (tracing the history of how agency theory led to "a search for the organizational Holy Grail, a technique that bridges the separation of ownership and control").

[2] Representative examples include: Research Handbook on Fiduciary Law (D. Gordon Smith & Andrew S. Gold eds., 2018); Contract, Status, and Fiduciary Law (Paul B. Miller & Andrew S. Gold eds., 2016); Philosophical Foundations of Fiduciary Law (Andrew S. Gold & Paul B. Miller eds., 2014); The Oxford Handbook of Fiduciary Law (Evan J. Criddle, Paul B. Miller, & Robert H. Sitkoff eds., 2019).

[3] Edward B. Foley, *Voters as Fiduciaries*, 2015 U. Chi. Legal F. 153, 158, 181–82 (2015).

[4] Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 Stan. L. Rev. 565 (2018); *see generally* Fiduciary Government (Evan J. Criddle et al. eds., 2018).

[5] Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 Calif. L. Rev. 699 (2013).

[6] D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 706–11 (2013).

[7] Lionel Smith, *Parenthood is a Fiduciary Relationship*, 70 U. Toronto L. J. 395 (2020).

[8] Ethan J. Leib, *Friends as Fiduciaries*, 86 Wash. U. L. Rev. 665, 707–14 (2009).

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context of business organizations. Judge Cardozo's widely quoted elucidation of the fiduciary standard appeared in a 1928 case about partners (coadventurers, to be precise) in a real estate investment scheme.[9] The duty of care and the prudent person rule, broadly applicable to fiduciary management of property, derived from the trust case of *Harvard College* v. *Amory*, a hundred years before *Meinhard*.[10] Fiduciary duties in the trust context can be traced even further to England's law over 500 years ago.[11]

Fiduciary obligations pervade business law: from the duties owed by directors, officers, and controlling shareholders;[12] to duties regulating a host of intermediaries critical to business dealings,[13] and debates over the role of fiduciary duties in alternative entities. Sometimes these duties develop organically in the common law. Other times they develop through statutory interpretation. For example, a rich body of fiduciary case law has developed under the federal securities laws,[14] and another under the Employee Retirement Income Security Act (ERISA).[15] Courts apply these precedents in turn to other areas, much like *Meinhard* is often applied to contexts outside of partnership.[16]

But the business law scholarship on fiduciary duties has a Janus-faced character. Despite the close doctrinal relationship, the expressed attitude of much corporate law scholarship reflects several decades of disdain for the role of fiduciary duties. The wave of corporate law and economics scholarship that began in the 1980s could be openly scornful of fiduciary theory. This sentiment of Frank Easterbrook and Daniel Fischel is representative: "Fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings."[17]

The apparent marginalization of fiduciary duties in business law scholarship tracks, in part, developments in the substantive law. Since the mid-1980s, legislative and judicial developments in Delaware and other states have gradually lessened both the applicability and enforceability of fiduciary duties. For instance, following the famous 1985 decision in *Smith* v. *Van Gorkom*, Delaware amended its corporate statute to allow companies to eliminate personal financial liability for a director's breach of the duty of care.[18] Such provisions are now widespread in corporate charters. In 2000, Delaware amended its statute to permit corporations to limit the fiduciary duty of loyalty by waiving certain corporate opportunity claims.[19] All told, the likelihood of financial liability for a director stemming from a fiduciary breach is very low.[20]

In addition, the rise of alternative entities like limited liability companies, which now far outpace the formation of corporations, has brought with it nearly unlimited freedom to contract around fiduciary duties. A principal rule of construction in the Delaware alternative entity acts is "to give the maximum effect to the principle of freedom of contract," and fiduciary duties can be "expanded or restricted or eliminated" in operating agreements.[21]

[9] Meinhard v. Salmon, 164 N.E. 545 (1928).
[10] 26 Mass. 446 (1830).
[11] *See* David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U.L. Rev. 1011 (2011).
[12] *See* Lyman Johnson, *The Three Fiduciaries of Delaware Corporate Law*, ch. 3 (this volume).
[13] *See* Steven L. Schwarcz, *Examining Trustee Indenture* Duties, ch. 5 (this volume).
[14] *See* Howell E. Jackson, *New Challenges for Fiduciary Protections for Investors in Mutual Funds*, ch. 7 (this volume).
[15] *See* Arthur B. Laby, *Trust, Discretion, and ERISA Fiduciary Status*, ch. 4 (this volume).
[16] Knowles v. State ex rel. Lindeen, 222 P.3d 595, 598 (Mont. 2009) (state securities law); Bessemer Trust Co. v. Branin, 949 N.E.2d 462, 469 (N.Y. Ct. App. 2011) (restrictions on soliciting customers of a former employer).
[17] Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & Econ. 425, 427 (1993).
[18] 488 A.2d 858 (Del. 1985); Del. Gen. Corp. L. § 102(b)(7).
[19] Del. Gen. Corp. L. § 122(17).
[20] Bernard S. Black et al., *Outside Director Liability*, 58 Stan. L. Rev. 1055 (2006).
[21] 6 Del. Code § 18–1101(b) and (c) (LLCs); 6 Del. Code § 17–1101(c) and (d) (LPs).

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Beyond doctrinal developments, the erosion of fiduciary duties over the past three decades was also born of theoretical conviction. Early contractarians like Easterbrook and Fischel made two moves, one descriptive, and the other normative. Descriptively, since a corporation was simply a "nexus of contracts" among various constituents, fiduciary duty was conceptualized as a contract term between a principal (usually a shareholder) and its agent (usually a manager).[22] Normatively, contractarians tended to frame those duties as part of a freely chosen arm's-length bargain, which ought to be waivable, rather than a non-abrogable court-imposed duty stemming from the relationship between the parties or the firm's origins in trust.

When corporate charters and LLC agreements began narrowing fiduciary duties, this seemed further proof to contractarians of the inefficiency of mandatory fiduciary rules. To the extent fiduciary duties still existed in business ventures, at least as a default, their purpose was merely to remedy standard problems identified by information economics. Fiduciary duties might reduce the cost of contracting and fill gaps in contracts that, without implied fiduciary duties, would insufficiently constrain agency costs.

Easterbrook and Fischel famously emphasized this point. For them, fiduciary law was always subsidiary to contract. Corporate law existed to aid, not displace, actual bargains.[23] In 1993, they dismissed critics of the contractual view of fiduciary duties—scholars who felt that fiduciary duties carried moral significance, or even as a doctrinal matter that they occasionally required standards of conduct higher than would-have-been-bargained-for-terms—for having no theory whatsoever.[24] Easterbrook and Fischel could find nothing distinctive about fiduciary law. Simple maximization of the contractual bargain could always explain results across a wide range of topic areas, even in cases like *Meinhard* replete with moralizing language.[25]

Other law and economics scholars adopted and extended this line of argument. Many considered fiduciary duties so ancillary that they simply ignored them: as Easterbrook and Fischel noted in 1993, of the law and economics textbooks in print, only Richard Posner's so much as mentioned fiduciary duties in the index.[26] Others explicitly argued for further flexibility in these duties—that is, more enabling legislation that would allow parties to contract around them. Both Larry Ribstein and then-Delaware Chief Justice Myron Steele argued that fiduciary law should not even be the default stance for alternative entities—critiquing, as Steele contemptuously termed it, "the commonly accepted puritanical default fiduciary duty norm."[27]

Still, subsequent years have seen the erosion of various elements of what we term the "proto-contractarian" position. By proto-contractarian, we refer to the early views of authors like Easterbrook and Fischel, who made strong assumptions about the optimality of corporate governance on the belief that natural selection processes would inevitably lead to efficient results in firms' contracting decisions.[28] Although their work has had an enormous influence on business law scholarship, relatively few scholars or courts today hew exactly to the strongest

[22] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. Fin. Econ. 305 (1976).

[23] Frank Easterbrook & Daniel Fischel, The Economic Structure of Corporate Law 34 (1991).

[24] Easterbrook & Fischel, *supra* note 17, at 434.

[25] *Id.* at 440.

[26] *Id.* at 427 at n.4 (noting that "there is surprisingly little commentary from other scholars on the economics of fiduciary duty").

[27] Larry Ribstein, *Are Partners Fiduciaries?* 2005 U. Ill. L. Rev. 210; Myron Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 Am. Bus. L. J. 221 (2009).

[28] It is debatable whether those strong assumptions were more the result of their "proto" nature (i.e., these were early sketches of models, rough by necessity, that were later fleshed out) or because those authors held a normative agenda (i.e., more of an orthodoxy). The "second generation" of economic analysis of corporate law was both empirically and theoretically critical of the "first generation," which we term the proto-contractarians. *See* Robert Daines and

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descriptive and normative claims made by the early contributors. Rather, those claims have evolved within the law and economics tradition, resulting in more nuance and have been subject to heavy criticism from outside that tradition.

Likewise, doctrine has not given as much ground as hoped for by the strongest advocates for freedom of contract. For instance, the Delaware LLC statute was amended in 2013 to make it clear that fiduciary duties were the default for alternative entities in Delaware.[29] Though not technically part of fiduciary law, Delaware courts have also used equitable powers, as well as the contractual principle of the implied covenant of good faith and fair dealing, to provide for fiduciary-like remedies even when otherwise limited.[30] And the drafters of the Uniform Limited Liability Company Act explicitly rejected the strongly contractarian idea that fiduciary duties are "merely a set of default rules" in favor of a balance between freedom of contract and protection of vulnerable parties.[31] Meanwhile, duties that are sometimes seen as relatively marginal because they are so hard to enforce—such as *Caremark* claims for breach of the duty of oversight—have arguably been revitalized by Delaware decisions in 2019.[32]

These developments render the time ripe for a new collection of essays on the role of fiduciary duties in business, possibly the first such volume since the seminal *Principals and Agents: The Structure of Business* in 1985.[33] The authors in our collection come from a range of perspectives. Some argue for more limited approaches to fiduciary duties in particular contexts; others for more expansive ones. Nonetheless, all chapters point to important gaps in the current scholarship about fiduciary duties in business, which we hope this volume goes some way to addressing.

In the next section of this introduction, we explain some of the ways in which the proto-contractarian position on fiduciary duties has eroded, categorizing its demise into three key areas, and situating our contributors' works within that framework. We then provide a roadmap for the book and outline our contributors' arguments.

II THREE CHALLENGES TO PROTO-CONTRACTARIANISM

This section outlines the erosion in the proto-contractarian characterization of fiduciary duties. Although our authors did not develop their chapters within this framework, we situate aspects of

Michael Klausner, *Economic Analysis of Corporate Law*, *in* The New Palgrave Dictionary of Economics (Palgrave Macmillan 2008).

[29] The change to Sec. 18-1104 of the Delaware LLC Act, which added an explicit reference to the background rules of fiduciary duties, was adopted to eliminate confusion created by a Delaware Supreme Court decision, Gatz Properties LLC v. Auriga Capital Corp., 59 A.3d 1206 (Del. 2012). A series of Chancery rulings had consistently expressed the view that LLCs carried default fiduciary duties. In *Gatz*, the Delaware Supreme Court—whose Chief Justice, Steele, had expressed distaste for default duties, *see supra* note 27—affirmed one such Chancery ruling while expressly limiting its fiduciary discussion to dictum. *See also* Feeley v. NHAOCG, 62 A.3d 649 (Del. Ch. 2012) (finding default fiduciary duties in LLCs in the wake of *Gatz* and discussing the history of Chancery rulings on the topic).

[30] In re Carlisle Etcetera LLC, 114 A.3d 592 (Del. Ch. 2015) (extensive discussion of the role of equity, and the history of equitable jurisdiction, as a backstop).

[31] Drafters' Comments to § 105(d)(3), Uniform Limited Liability Company Act (last amended 2013).

[32] These are discussed in Jennifer G. Hill, *Corporations, Directors' Duties and the Public/Private Divide*, ch. 15 (this volume).

[33] Principals and Agents: The Structure of Business (John W. Pratt & Richard J. Zeckhauser eds., 1985). Featuring contributions from as many economists as law professors, *Principals and Agents* made the argument that the principal-agent relationship was the "recurrent pattern" of business that could "explain a great deal about how business is organized," based on the central principle of "enabl[ing] principals to exert an appropriate influence on the actions of agents." In a chapter focused on the legal contours of fiduciary duties, Robert Clark outlined key attributes of the fiduciary relationship. His contribution, like his later work, pushed back on what he called the "extreme contractualist viewpoint" of Jensen and Meckling, which he felt did not capture the complexity of the agency relationships within a corporation.

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their contributions within our taxonomy. In doing so, we shall sketch a rough account of three paths—which we call "market realist," "stakeholder/pluralist," and "fiduciary traditionalist"—that scholarship on fiduciary duties in business has followed since the proto-contractarian wave of the 1980s. Each of these poses a potential challenge to the view that fiduciary law is a mere contractual gap-filler between shareholders and managers, or that full freedom of contract is always warranted.

The first two paths accept many of the premises of contractarianism, but with modifications. What we term the "market realist" approach is often the most contractarian: it does not necessarily reject the premise of the contract metaphor, but it comes with more caveats and deeper empirical texture. The second position, "stakeholder/pluralism," can still be viewed as contractarian, but it widens the focus well beyond the narrow, stylized shareholder-manager contract. Although both of these positions can be quite critical of the early contractarians, they do not necessarily challenge the basic paradigm. The broad consequences of the contract paradigm, including how it refocused the key questions of corporate governance, are a primary concern of Jennifer Hill and Jacob Russell's contributions to this volume.

The third "fiduciary traditionalist" position comes closest to a full rejection of contractarian ideas and the presentation of a separable theory. Scholars termed fiduciary traditionalists, many of whom are part of a broader growth in scholarship on fiduciary duties outlined at the start of this introduction, rarely approach these questions from a law and economics or contractual framework. They are more likely to draw on earlier bodies of doctrine, including equity, agency law, and trust law, and on philosophical and moral justifications for the imposition of fiduciary duties.

As readers will note, although our focus is on fiduciary duties, these three paths track larger debates in corporate law theory. Market realism is part of the broader turn in law and economics scholarship to a more realistic, empirical portrayal of corporate governance. Stakeholderism, as the name suggests, invokes one of the most hotly contested topics in business law: the basic purpose and nature of the corporation. As noted earlier, fiduciary theorists have contributed in many ways to our understanding of the robust role fiduciary law plays across a range of business domains, from firm governance to investor protection.

We shall now briefly describe each of these three pathways. We make no pretense that this is an exhaustive literature review. Beyond sketching this taxonomy, our goal is to note some of the ways in which we believe the chapters in this volume connect to and extend these themes.

A *The Market Realist Path*

The market realist critique is part of a broader scholarly intervention that stemmed from the first wave of contractarianism. These scholars are often sympathetic to the contractarian position, and like the proto-contractarians, they draw primarily on economic approaches in analyzing business. Nonetheless, they typically reject the most stylized proto-contractarian claims. Early scholars assumed that evolutionary processes led to optimal results. Michael Jensen and William Meckling's article *Theory of the Firm*, which is one of the most cited social-science writings, is most often used today to support the proposition that the separation of ownership and control in the corporation leads to agency problems. Fewer recall their

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optimistic conclusion that the survival and dominance of the corporate form suggest that the corporation is well-suited to reducing agency costs.[34]

The challenges to the early assumption that individual firm design will be optimal proceed along both theoretical and empirical grounds.[35] One theoretical argument noted that economic forces, including network effects, could lead to the adoption of boilerplate whose specific terms may be suboptimal for individual firms.[36] Other scholars advanced empirical arguments buttressing the theoretical critiques. The earliest such work typically studied the corporate charter, which contractarians assumed were a major site of contracting behavior. Empiricists noted a high degree of uniformity in charters, both in the choice of jurisdiction (Delaware) and in content—which suggested that the real world saw little of the contractual bargaining assumed by proto-contractarians.[37]

Few people now dispute the relevance of a more textured approach to analyzing the firm. Such texture is characteristic today both in quantitative empirical work and in more theoretical and doctrinal descriptions. Kelli Alces Williams's contribution to this volume is an example. In rejecting the fiduciary regime as an inapt description of the publicly traded corporation, Williams draws attention to the practical reality of large firm governance—a group of diversified shareholders with different risk tolerances, making it nearly impossible to identify a singular set of goals for managers to pursue. This method tracks market realism, in that it draws on a mismatch between the nitty-gritty reality of public corporations, compared to the high-level stylized assumptions of those (both contractarians and noncontractarians) who use the fiduciary paradigm to describe the manager-shareholder relationship.

In a different context, ERISA law, Dana Muir makes a similar move, noting the difficulty of characterizing principals and agents along simplistic lines. Although it is more common to characterize only employees and plan participants as retirement plan "beneficiaries," Muir notes that employers are also beneficiaries; otherwise, they would not voluntarily create such plans. The concerns of Williams and Muir echo Robert Clark's 1985 warning that the "nexus of contracts" stylization runs the risk of obscuring the multitude of complex relationships that make a typical firm interesting and worthy of study.[38]

The proto-contractarians typically believed that fiduciary duties should be fully waivable. Nowhere was their goal achieved more than in the explosion of alternative entities, which has led some commentators to express alarm at practitioners' rush to limit or waive fiduciary duties.[39]

[34] Jensen & Meckling, *supra* note 22 (concluding that "whatever its shortcomings, the corporation has thus far survived the market test against potential alternatives").

[35] For a more extensive synthesis of this literature, *see* Daines & Klausner, *supra* note 28.

[36] The scholars who advanced this point noted two additional explanations—agency costs between law firms and their clients, and behavioral biases—that could also result in convergence on standard terms, without any guarantee that the "substantive content of a term maximizes firm value." Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 Wash. U. L. Q. 347, 348–49 (1996).

[37] *See, e.g.*, Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. Rev. 1559 (2002).

[38] Clark, *supra* note 33.

[39] For instance, two Delaware jurists argued strongly that contractual freedom was a "siren song," of questionable merit on theoretical grounds and demonstrably problematic in practice, given the many LLC cases with poorly written waivers. Leo Strine & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, *in* Elgar Handbook on Alternative Entities (Mark J. Lowenstein & Robert W. Hillman eds., 2004); *see also* Brent Horton, *Modifying Fiduciary Duties in Delaware: Observing Ten Years of Decisional Law*, 40 Del. J. Corp. L. 921 (2016) (studying real-world examples of such modifications and noting the problems that commonly arise). In one decision illustrating issues that arise when courts interpret fiduciary modifications, then-Chancellor Strine memorably described a "linguistically challenging" clause purporting to modify fiduciary duties as "prepared by a member of a cold-

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Still, most today accept that there is a role for at least some flexibility, for instance, in the context of appropriately drafted limitations on the corporate opportunity doctrine, part of the fiduciary duty of loyalty. The key questions on freedom of contract today are not usually binary choices, but rather a debate on where to draw the line.

The line-drawing problem is illustrated well in what Christine Hurt's chapter calls "extra large partnerships," such as publicly traded partnerships. This organizational form questions many of the premises that long distinguished small, closely held partnerships from large corporations and the laws that govern them. Unlike publicly traded corporations, publicly traded partnerships can limit fiduciary duties. Hurt notes the possibility that doing so may be less a policy decision and more simply the result of the drafters of the relevant uniform acts not anticipating the growth of partnerships to the extra large size.

Other market realists have challenged the standard proto-contractarian claim that evolutionary forces will lead to optimal outcomes both in contract decisions and governing law, including the right level of fiduciary protection.[40] Historical analysis can provide a corrective to this oversimplification, as evidenced by three historical chapters in this volume—Jared Ellias and Robert Stark on fiduciary duties near insolvency, Masayuki Tamaruya on the turn to fiduciary duties in Japanese nonprofit law, and Jacob Russell on the recasting of fiduciary obligations in American nonprofits. In each chapter, the authors draw attention to how fiduciary duties have evolved alongside a changing mix of other bodies of doctrine, including trust law. Fiduciary duties are rarely about optimizing one single element, and the level of duties has waxed and waned. For instance, Ellias and Stark note that judges have swung back and forth between arguing that contract sufficiently protects creditors and fearing that it does not. This history suggests the pendulum has not likely made its last swing. Path dependence, not just a teleological trend toward efficiency, plays an important role in all three historical chapters.

Even if rules did evolve to be optimal, sophisticated parties might still evade them through regulatory arbitrage. To the extent a large partnership chooses its organizational form primarily for fiduciary flexibility, and to the extent the drafters of the uniform partnership laws did not expect that, Hurt's chapter may provide one example. Howell Jackson's chapter provides another example in the mutual fund context. As he notes, the U.S. system for governing mutual funds is an elaborate investor protection regime based on fiduciary duties, and the U.S. Securities and Exchange Commission has repeatedly rejected a more contractual model used in Europe and elsewhere. Yet, certain investment vehicles with parallel policy implications are not always covered by the regime.

B *The Stakeholders/Pluralism Path*

A second line of critique has focused on the narrow shareholder-manager relationship generally emphasized by proto-contractarians. In fact, a range of players inhabit the corporation, and fiduciary duties may thus govern a multiplicity of principal-agent relationships in complex, interactive ways. The stakeholder critique has generally accepted the focus on managers and

blooded species, rather than a breathing, feeling member of our species trying to capture in words an actual human state of mind." Gelfman v. Weeden Investors, 859 A.2d 89, 112 (Del. Ch. 2004).

[40] Within corporate law, Easterbrook and Fischel, *supra* note 23, are probably the best known proponents of this view. Henry Hansmann's approach is also representative of this assumption, as he uses variations in firm structure—like nonprofits, employee-owned firms, and customer-owned cooperatives—to infer underlying contracting problems faced by each of these venture types. Henry Hansmann, The Ownership of Enterprise (2000). This is a standard move in law and economics scholarship generally, although, over time, the field has adopted more refined approaches for understanding when the law might evolve toward efficiency. Robert Cooter and Thomas Ulen, Law and Economics 419–53 (6th ed. 2016).

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directors as agents but has argued that understanding the principal to be "shareholders" is too narrow, both descriptively and normatively. The team production model advanced by Lynn Stout and Margaret Blair in 2003 provides a well-known focal point for this critique and directly assails the economic theory adopted by proto-contractarians.[41] Of course, today, fights over stakeholder and shareholder theory represent a central tension in corporate law—one that has spilled into major newspapers and political campaigns—a history that both Amir Licht and Jennifer Hill summarize in their chapters for this volume.

Beyond debates over how best to characterize the primary principle in corporate law, others—who we call pluralists—have widened the lens of the agency focus in other ways. The earliest proto-contractarians tended to focus especially on the manager-shareholder relationship. That focus meant relatively less attention was paid to the many other fiduciary or fiduciary-like relationships in the corporate galaxy, whether debt governance, controlling shareholders, or fiduciary relationship in other bodies of law like ERISA and investment management, often imposed on aspects of firm behavior.

For instance, in his chapter for this volume, Lyman Johnson suggests that even the characterization of Delaware as having a singular corporate "fiduciary law" is problematic. There are three distinct sets of fiduciary obligation regimes within the corporation with distinct beneficiaries, agents, and underlying paradigms. Kelli Alces Williams's intervention also falls squarely under this umbrella, given her argument that in public corporations, one cannot realistically describe a singular shareholder constituency to whom the board is beholden.

The stakeholder/pluralist critique notes that corporate law, and its fiduciary duty regime, is often called upon to solve broader social problems—thus taking the domain of fiduciary duties beyond the identifiable parties to the proto-contractarians' "nexus of contracts." Hill's chapter reminds us of the long shadow that corporate governance casts, particularly in the wake of financial scandals from Enron in 2000 onward, and that limiting harm to society may be a key purpose of fiduciary law. Similarly, Tamaruya's chapter explains how fiduciary principles were ported into Japanese nonprofit law with the goal of protecting societal interests. In a different domain—the fiduciary duties that govern various forms of retirement savings and investing—Quinn Curtis emphasizes a saver's overall retirement lifecycle planning process. In invoking this as the regulator's primary goal, Curtis's chapter implies that calibrating fiduciary regimes must consider goals far beyond the narrow domain of gap-filling individual contracts.

Two chapters advance suggestions about the practical implementation of more robust stakeholder consideration—in Amir Licht's case, a mechanism for adjudicating issues that arise when boards owe duties to multiple constituents, in Julian Velasco's case the implementation of benefit corporation statutes. Licht's proposed mechanism is rooted more in historical trust law doctrine, where the duty of impartiality that he proposes emerged, rather than in contract law. Likewise, although Velasco endorses shareholder primacy, his analysis extends beyond the proto-contractarians' conventional focus on shareholder profits.

Still, other chapters remind us of the many other ways fiduciary law may affect firm governance. Several analyze creditor relationships, drawing attention to the fact that the proto-contractarians may have given short shrift to tensions between creditors and shareholders.[42] Two

[41] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 248, 249, 254–5 (1999).

[42] There are, to be sure, exceptions among the proto-contractarians; for instance, much of Michael Jensen's work was focused on the interaction between debt and equity. Michael Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323 (1986). Nonetheless, the proto-contractarian position today is often characterized as emphasizing the shareholder-manager relationship to the exclusion of all else. *See* Hill, *supra* note 32.

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contributions, Ted Janger's and Ellias and Stark's, examine the moment where that tension comes into the sharpest relief: the zone of insolvency. Both analyze the ways in which fiduciary law has, can, and should solve tensions between shareholder and creditor needs in that complex moment. Steven Schwarcz's chapter, which analyzes the fiduciary paradigm in the context of indenture trustees, comes to a contract-focused conclusion—that no duties should be imposed beyond the contract. However, this framing explicitly challenges the proto-contractarian focus on shareholders, especially given the vast size of debt relative to equity.

Other chapters examine areas beyond creditor law where fiduciary law impacts governance, such as Tamaruya and Russell's not-for-profit chapters. Both Arthur Laby and Dana Muir focus on ERISA, a legal regime that affects nearly every business and draws heavily on fiduciary principles. Consistent with the pluralist critique, both draw attention to the complexity of identifying a precise principal and agent. For Muir, a key issue is that players in the ERISA context may wear multiple hats, as in her comment that employers are in an important sense, beneficiaries to the plans they create. For Laby, the key challenge revolves around identifying a fiduciary and, as discussed in the next sub-section, arguing for the role that fiduciary theory can play in drawing those lines.

C *The Fiduciary Traditionalist Path*

A third challenge to the proto-contractarians stems from the surge of scholarly interest in fiduciary duties over the past ten to fifteen years. Scholars have identified and debated what unifies fiduciary obligations across disciplines, giving rise to new insights about when heightened duties are warranted. Their method and approach are often at odds with proto-contractarians and draw on a wider range of doctrine—especially trust law and equity—more than contract law. Often these scholars do not engage the contractarians directly.[43] Instead, they present a different approach to thinking about fiduciary law. Intellectually, many contributors in this field come less from a law and economics background, and are more likely to draw on philosophy. The explosion of this scholarship in recent years is quite notable.[44] This work has created a scholarly community that transcends narrow doctrinal fields, one which hardly existed at the time of the proto-contractarians.

Laby's approach to ERISA is characteristic, in that he explicitly argues for how the interpretation of the statutory regime has failed to but can and should draw on first principles of fiduciary law. For instance, understanding the fiduciary nature of advice giving, which has been a topic of discussion within fiduciary theory, may help courts answer practical questions about how to identify fiduciaries under ERISA's thorny regime. Other authors in the volume emphasize the trust or agency law origins of particular fiduciary duties, which brings the non-contractual aspects into sharp relief. Muir, for instance, emphasizes the trust and fiduciary origins of ERISA in explaining why courts distinguish certain investment decisions as "inherent fiduciary functions" rather than discretionary choices under the settlor doctrine.

[43] There are prominent examples of fiduciary theorists directly tackling the question of whether fiduciary law is best seen as a contract, an argument raised not just by Easterbrook and Fischel but also subsequently by some trust law scholars, most notably John Langbein. *See, e.g.*, John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L. J. 625 (1995); Charlie Webb, *The Philosophy of Fiduciary Law*, *in* Oxford Handbook of Fiduciary Law, *supra* note 1, at 689–95; Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 Duke L. J. 879; Daniel Markovits, *Sharing* Ex Ante *and Sharing* Ex Post: *The Non-Contractual Basis of Fiduciary Relations*, *in* Philosophical Foundations of Fiduciary Law 209 (Andrew S. Gold & Paul B. Miller eds., 2014).

[44] *See supra* note 1.

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Deborah DeMott, long one of the staunchest critics of the overuse of the "contract metaphor,"[45] continues to unearth distinctive aspects of the fiduciary relationship in her contribution. These aspects are at odds with standard contract doctrine, and thus cannot easily be reconciled with the conception of fiduciary obligations as a mere species of contract. Paul Miller's emphasis on equity as the source of fiduciary constraints draws attention to other limits of the contract-based perspective on fiduciary law. By its nature, equity is designed to address conduct that is otherwise lawful, but that is inequitable and unfair. Christoph Kumpan likewise draws attention to the complex role of fairness, a consideration the proto-contractarians would likely put to the side. In assessments about director independence, Kumpan provides a comparative analysis of how courts could consider subtle ties, for instance, emotional ones: this analysis appears to be rooted in equity and fairness rather than contract.

Finally, several contributors who focus on the societal values that fiduciary law may serve, including Hill, Curtis, and Tamaruya, also indirectly challenge the idea that fiduciary duties are a mere species of contract.

III ROADMAP OF THE VOLUME

We could have taken several different approaches to organize the chapters in this volume. We chose to arrange the book along broad thematic lines that transcend specific subfields of business law. As more fully described in this section, there are four sets of challenges or aims discussed by these authors: (i) identifying fiduciaries and their duties, (ii) describing gaps in, and alternatives to, fiduciary regimes, (iii) assessing historical or comparative perspectives, and (iv) evaluating fiduciary law from the perspective of stakeholders and society. This section provides a roadmap to the chapters, with a brief précis of each.

We are mindful that we have not organized the volume along traditional doctrinal lines, although the collection certainly covers a wide array of fields. For example, readers interested in debt and bankruptcy should review the contributions by Steven Schwarcz, Ted Janger, and Jared Ellias and Robert Stark. Those interested in funds, advisors, and other aspects of investment management should focus on the chapters by Howell Jackson, Quinn Curtis, Dana Muir, and Arthur Laby. Jacob Russell, Masayuki Tamaruya, and Julian Velasco cover nonprofit organizations and benefit corporations. Corporate fiduciary duties are addressed by Lyman Johnson, Paul Miller, Kelli Alces Williams, Christoph Kumpan, Jennifer Hill, and Amir Licht. Partnership is the subject of Christine Hurt's chapter, and agency the subject of Deborah DeMott's. In our view, however, organizing the book along purely doctrinal lines would mask the depth of the contributions and insights they provide about fiduciary governance and fiduciary theory.

A *Identifying Fiduciaries and Their Duties*

The first set of challenges or aims the authors address is the difficulty of identifying fiduciaries and the duties they owe to principals. The first chapter, by Deborah DeMott, takes up this project not by considering whether a given party should be deemed a fiduciary, but rather by exploring situations when fiduciary duties do not run coterminously with the relationship itself. She assesses when agents and principals may owe duties to one another either before an agency relationship has formed or after it has ended, and the justification for imposing such duties. The

[45] DeMott, *supra* note 43.

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