School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ Georgia Law

Scholarly Works | Faculty Scholarship

1-1-2017

The Fiduciary Enterprise of Corporate Law

Christopher Bruner
Stembler Family Distinguished Professor in Business Law
University of Georgia School of Law, christopher.bruner@uga.edu

bepress
The frontier of scholarly publishing since 1999
SSRN

Repository Citation
Christopher Bruner, *The Fiduciary Enterprise of Corporate Law* , 74 Wash. & Lee l. Rev. 791 (2017),
Available at: https://digitalcommons.law.uga.edu/fac_artchop/1200

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Georgia Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Georgia Law. Please share how you have benefited from this access
For more information, please contact tstriepe@uga.edu.

The Fiduciary Enterprise of Corporate Law

Christopher M. Bruner*

Table of Contents

I. Introduction

A long-standing hallmark of the scholarship of Lyman Johnson and David Millon—both individually and as co-authors—has been their consistent focus on the social embeddedness of corporate law generally, and fiduciary duties in particular. By this I refer to their recognition that corporate law and fiduciary duties are deeply rooted in a complex of frameworks and institutions—legal, economic, institutional, professional, political, social, cultural, and moral—all of which impact one another collectively, and affect how people concretely behave and relate to one another in the marketplace.

There are several ways in which this recognition has manifested itself in their work on corporate fiduciary duties. Consistent with the traditional emphasis on how robust and affirmative fiduciary duties sustain the corporate form—both as a

* William Donald Bain Family Professor of Corporate Law and Director, Frances Lewis Law Center, Washington and Lee University. For helpful suggestions and comments, thanks to Andrew Gold.

means of establishing and preserving the trust and confidence that are vital to virtually any business organization, and by protecting vulnerable parties—Johnson and Millon have long remained quite critical of the contractual conception of the business corporation and the narrow focus on shareholders' interests often associated with this theoretical orientation.[1] Stated in fiduciary terminology, the issue of corporate purpose boils down to the question: "loyalty *to whom*?"[2] In response to that question, Johnson and Millon have long argued for a more embracing conception of corporate purpose and fiduciary loyalty that preserves some capacity for corporate decision-makers to show regard for the interests of others—be they employees, creditors, commercial counterparties, local communities, or society in general. Recognition of the social embeddedness of corporate law and fiduciary duties likewise animates their holistic exploration of a wide range of actors—both private and public—who all collectively impact how these duties are understood and how fiduciaries actually behave.

This relatively embracing perspective permits us to speak coherently of a "fiduciary enterprise" that is much broader than corporate directors and officers. I use the word "enterprise" in the sense of a broad collective undertaking,[3] including the legal, economic, institutional, professional, political, social, cultural, and moral frameworks that collectively articulate, translate, and enforce fiduciary norms and rules in various settings. In Johnson and Millon's work, this has most prominently taken the form of a comprehensive exploration of a much wider range of relevant

---

1. *See infra* note 36–38 (describing their recognition as prominent proponents of a broader conception of corporate purpose).

2. *See, e.g.*, WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 284 (5th ed. 2016) (styling the issue of corporate purpose as amounting to the question, "[t]o whom do directors owe loyalty?"). Note, however, that in certain circumstances loyalty could be said to be owed to an abstract purpose, and that certain theories of business corporations are arguably amenable to such characterization. *See* Paul B. Miller & Andrew S. Gold, *Fiduciary Governance,* 57 WM. & MARY L. REV. 513, 523–27, 537–39 (2015).

3. *See Enterprise n., 1.a, 3.* OXFORD ENGLISH DICTIONARY ONLINE (including "an undertaking" or "[t]he action of taking in hand; management, superintendence").

actors, all of whom play important roles in the articulation of these duties and their translation into concrete behaviors in corporate life, and all of whom ought to be held accountable for their impacts (if only indirectly in some instances, through recognition of their impacts).

This contribution to a symposium edition of the *Washington and Lee Law Review*, honoring Johnson and Millon's contributions to the field of corporate law, briefly sketches the contours of this broader "fiduciary enterprise" of corporate law and governance and identifies some of the underlying lessons and challenges that this perspective reveals—for scholars, practitioners, lawmakers, and judges alike. With respect to the institutional dimensions of fiduciary law and the equitable framework and orientation of corporate law, this Article places greater emphasis on some of Johnson's recent work. With respect to corporate purpose, then, and how various legal and market forces impact the way we conceptualize the legitimate aims of corporate decision-making, this Article places greater emphasis on some of Millon's recent work. It should be borne in mind, however, that there is nothing inevitable about these choices; while I believe that these respective contributions illuminate the fiduciary enterprise of corporate law in peculiarly powerful ways, both Johnson and Millon have each written on these various subjects throughout their careers.

II. Fiduciary Duties and Corporate Law's Fiduciary Enterprise

When we speak in holistic terms of corporate law reflecting and depending upon a broader "fiduciary enterprise," who are we talking about, specifically? Some of the relevant actors are straightforwardly associated with this topic, while others are less obviously so. Clearly the fiduciary enterprise of corporate law must begin with the board of directors who, according to the Delaware Supreme Court's archetypal statement in its 1939 *Guth v. Loft, Inc.*[4] opinion, are "technically not trustees," yet are said to "stand in a fiduciary relation to the corporation and its

4. 5 A.2d 503 (Del. 1939).

stockholders," requiring that they "not only affirmatively . . . protect the interests of the corporation," but also "refrain from doing anything that would work injury to the corporation."[5] The court's formulation in *Guth* clearly reflects the traditional aim of insulating "trust and confidence" against the abuse of discretionary power,[6] and suggests both a negative and affirmative thrust to the duty of loyalty—not merely avoiding conflicts of interest and clear abuses of their authority, but also affirmatively pursuing the corporation's best interests, a point that Johnson has emphasized of fiduciary duties generally.[7] This formulation is also noteworthy for its open-ended nature. The duty of loyalty described in *Guth* is said to be owed to "the corporation and its stockholders" simultaneously (creating an ambiguity regarding ultimate aims to which we will return to shortly), and the "occasions" for its application are recognized to be "many and varied," defying any "hard and fast rule"—presumably reflecting the "profound knowledge of human characteristics and motives" that the court identifies as prompting its creation.[8]

In addition to the board of directors, the fiduciary enterprise also straightforwardly includes the remaining categories of actors widely understood to occupy fiduciary roles in the corporation. While shareholders generally are not fiduciaries, a shareholder who "owns a majority interest in or exercises control over the business affairs of the corporation" will indeed owe fiduciary duties to the corporation and the minority shareholders.[9] This

---

5. *Id.* at 510.

6. *Id.*

7. *See, e.g.*, Lyman Johnson, *After* Enron*: Remembering Loyalty Discourse in Corporate Law,* 28 DEL. J. CORP. L. 27, 27, 38–41, 61–72 (2003) (advocating the concept of "due loyalty" to underscore "the affirmative thrust of loyalty"). For an argument that the "good faith" concept, as employed in corporate law, effectively represents an affirmative aspect of the duty of loyalty, see generally Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law*, 41 WAKE FOREST L. REV. 1131 (2006); *see also* Andrew S. Gold, *Purposive Loyalty*, 74 WASH. & LEE L. REV. 881 (2017) (building on Johnson's argument, while distinguishing between advancing a corporation's "purposes" and advancing that corporation's "best interests").

8. *Guth*, 5 A.2d at 510.

9. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987).

generally becomes significant in conflict transactions and sales of control, and the source of this duty generally builds upon the foregoing logic, in so far as fiduciary obligations are effectively imposed on the party who can actually exert discretionary control over the corporation's business and affairs.[10]

Officers, on the other hand, may occupy a different sort of fiduciary posture. The *Guth* formulation of fiduciary loyalty applied by its terms to officers as well,[11] to be sure, but Johnson and Millon have together argued that the basis for applying fiduciary duties to officers is their status as agents.[12] This is an underappreciated point that has important implications because it suggests, as they argue in a co-authored article, that "courts can and should scrutinize officer conduct more closely than they now review director performance."[13]

In sketching out the reach and consequences of fiduciary duties in the corporate governance context, the survey of relevant actors often stops here, with the parties to whom such duties apply. But Johnson and Millon have shown no inclination to let the rest of us off the hook so easily. So in this broadly conceived fiduciary enterprise of corporate law, who are the other actors who, individually and collectively, imbue fiduciary concepts with content and condition how the foregoing corporate actors actually understand and apply those concepts? Phrasing the matter in

---

10. *See, e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717, 719 (Del. 1971) ("Sinclair nominates all members of Sinven's board of directors. The Chancellor found . . . that the directors were not independent of Sinclair. Almost without exception, they were officers, directors, or employees of corporations in the Sinclair complex. By reason of Sinclair's domination . . . Sinclair owed Sinven a fiduciary duty."); *see also* ROBERT A. RAGAZZO & FRANCES S. FENDLER, CLOSELY HELD BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS 548–49 (2d ed. 2012).

11. *See* Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) ("Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders.").

12. *See generally* Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005).

13. *Id.* at 1603. For an in-depth discussion of Johnson and Millon's argument regarding officers' fiduciary duties flowing from their status as corporate agents, see Deborah A. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 847 (2017).

this way, one might be tempted to jump straight to public officials, and public actors do in fact loom large (as discussed below).[14] However, there are others who, although less obvious, are nevertheless highly consequential in conditioning how various categories of actors understand and deploy fiduciary concepts—corporate law professors. As Johnson emphasized in a provocative 2002 article titled *The Social Responsibility of Corporate Law Professors*, business people are advised by corporate lawyers and "[t]he people who introduce them to the language of corporate law are law professors."[15] This leads Johnson to ask, quite fairly, whether the academy itself has done enough to give students a thorough and textured understanding of concepts like "care," "loyalty," and "good faith" in their "significant social, literary, and moral meaning outside corporate law discourse," or whether corporate law professors have pedagogically defaulted to an atomistic, bargain-based, contractarian conception of corporate relations,[16] effectively sowing the seeds for future corporate policies and behaviors that many in the academy profess to disfavor.[17] As Johnson sums it up in another article on the subject, "[w]rongheaded ideas picked up in law school can critically shape how lawyers discharge their all-important role as legal counselors to business people."[18]

---

14. *See infra* notes 19–34 and accompanying text (discussing the respective roles of Delaware's legislature and judiciary).

15. *See* Lyman P.Q. Johnson, *The Social Responsibility of Corporate Law Professors*, 76 TUL. L. REV. 1483, 1493 (2002).

16. *Id.* at 1490.

17. *See id.* at 1487–90 ("How can we expect [students] to have, or reflect on whether they might desire, an alternative conception of corporate relations if we do not provide any?").

18. Lyman Johnson, *Corporate Law Professors as Gatekeepers*, 6 U. ST. THOMAS L.J. 447, 447 (2009); *see also* David Millon, *Shareholder Primacy in the Classroom After the Financial Crisis*, 8 J. BUS. & TECH. L. 191, 193–95 (2013):

> Given the widespread endorsement of the shareholder primacy idea in the academic and business arenas, it seems to me important that we law teachers do what we can to disabuse students of the assumption that corporate law requires that corporate activity prioritize shareholder interests. . . . One way to do this is to point out in the business organizations courses the fallacy of the view that shareholder primacy is a legal doctrine. . . . As corporate law teachers, our powers are limited but we can at least do our best to avoid perpetuating facile assumptions about shareholder primacy.

These foundational dynamics perhaps loom even larger with those who go on to practice in Delaware—not merely due to Delaware's significance in corporate law,[19] but also because of the direct role that the practicing bar plays in drafting Delaware's corporate statute, the Delaware General Corporation Law (DGCL). As one Delaware corporate lawyer has described it, the DGCL "is the great beneficiary of an unwritten compact between the bar and the state legislature," under which "the legislature will call upon the expertise of the Corporation Law Section of the Delaware Bar Association to recommend, review, and draft almost all amendments to the statute."[20]

At the same time, then, the training of Delaware's lawyers will naturally affect their inputs into the judicial process, in the form of the arguments that they develop and present to Delaware's courts.[21] And this, of course, is where the rubber truly meets the road in terms of the development of corporate fiduciary duties—the Delaware Court of Chancery. Many who do not study or practice corporate law are surprised to learn that corporate litigation in Delaware is heard in a true court of equity[22]—and here we can begin to perceive the more concrete institutional dimensions of the fiduciary enterprise of corporate law. Under Delaware's constitution, the Court of Chancery has general equity jurisdiction that (in the Supreme Court's words) "is defined as all the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of

---

19. *See About Agency*, DELAWARE DEP'T ST., DIVISION CORPS., http://www.corp.delaware.gov/aboutagency.shtml (last visited May 2, 2017) ("The State of Delaware is a leading domicile for U.S. and international corporations. More than 1,000,000 business entities have made Delaware their legal home. More than 66% of all publicly-traded companies in the United States including 66% of the Fortune 500 have chosen Delaware as their legal home.") (on file with the Washington and Lee Law Review).

20. LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 4 (2007).

21. *Cf. id.* at 1, 5–6 (observing that "Delaware cases are studied in almost every corporations course" in the United States and describing the experience of "out-of-town lawyers making their first appearance in Chancery").

22. *See Jurisdiction of the Court of Chancery*, DELAWARE COURTS, http://courts.delaware.gov/chancery/jurisdiction.aspx (last visited May 2, 2017) (explaining that the "Court of Chancery has jurisdiction to hear and determine all matters and causes in equity") (on file with the Washington and Lee Law Review).

the colonies," generally keyed to the 1792 vesting of authority in the court, to the extent that there is no adequate remedy at law.[23] As Johnson has emphasized, "[a] key creation of judge-made equity is the concept of fiduciary duties," and on both conceptual levels—equity writ large, and fiduciary duties in particular—Delaware corporate law, and the Court of Chancery itself, are accordingly rooted in very deep legal, intellectual, and moral traditions.[24]

Aristotle himself observed the core problem that "all law is universal but about some things it is not possible to make a universal statement which shall be correct"—prompting the emergence of equity as a corrective.[25] "When the law speaks universally, then, and a case arises which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission. . . . And this is the nature of the equitable."[26] Legal historians might immediately perceive resonances in old English decisions such as *The Earl of Oxford's Case*,[27] where Lord Chancellor Ellesmere declared in 1615 that "[t]he Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act"—the Chancellor's role, then, being "to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be."[28] Delaware corporate lawyers may in turn perceive resonances of the

23. DuPont v. DuPont, 85 A.2d 724, 727–29 (Del. 1951). For additional background on the history of the Court of Chancery and the scope of its equity jurisdiction, see Del. Const. art. IV, §§ 10, 17 (2017); BLACK, *supra* note 20, at 5; Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. 701, 703, 716–18 (2011); William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792–1992*, 18 DEL. J. CORP. L. 819, 825–30 (1993); Delaware Judiciary, *supra* note 22.

24. Johnson, *supra* note 23, at 711.

25. ARISTOTLE, THE NICOMACHEAN ETHICS 133 (David Ross trans., 1980).

26. *Id.*

27. 21 Eng. Rep. 485 (1615).

28. *Id*. at 486. For additional background on how the "Aristotelian tradition of equity" impacted courts of equity, see Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism* 5–6, 21–22 (Harvard Public Law Working Paper No. 15–13, 2015), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2617413.

foregoing in Delaware case law—for example, in *Schnell v. Chris-Craft*,[29] where the Delaware Supreme Court famously declared (much closer to the present) that "inequitable action does not become permissible simply because it is legally possible."[30]

Consistent with Delaware's rootedness in the long-standing legal, intellectual, and moral traditions of equity, corporate fiduciary duties themselves straightforwardly make their way from England to Delaware via the Court of Chancery's constitutional jurisdiction. Fiduciary duties were well recognized in England as an expression of equity by the eighteenth century,[31] including in the corporate context. As Lord Chancellor Hardwicke declared in a case involving board oversight failures and allegations of "a breach of trust, fraud, and mismanagement,"

> [n]or will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private, or public capacity. The tribunals of this kingdom are wisely formed both of courts of law and equity . . . and for this reason there can be no injury, but there must be a remedy in all or some of them.[32]

Accordingly, Delaware's own Court of Chancery—with jurisdiction keyed to this institutional framework and body of

---

29. 285 A.2d 437 (Del. 1971).

30. *Id.* at 439.

31. *See* Winchester (Bishop of) v. Knight, 24 Eng. Rep. 447, 448 (1717) (stating that "[i]t would be a reproach to equity, to say, where a man has taken my property . . . and disposed of it in his life-time, and dies, that in this case, I must be without a remedy," and that "it is stronger in this case by reason that the tenant is a sort of a fiduciary to the lord").

32. The Charitable Corp. v. Sutton, 26 Eng. Rep. 642, 642, 645 (1742). For additional background, see Henry E. Smith, *Why Fiduciary Law is Equitable, in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261, 264 (Andrew S. Gold & Paul B. Miller eds., 2014); Samuel L. Bray, *A Student's Guide to the Meanings of "Equity,"* OPEN SCIENCE FRAMEWORK (July 20, 2016), https://osf.io/sabev/ (last visited May 2, 2017) (on file with the Washington and Lee Law Review); Johnson, *supra* note 23, at 709–10; Lyman Johnson, *Enduring Equity in the Close Corporation* 23–24 (University of St. Thomas Minnesota School of Law Legal Studies Research Paper No. 10–26, Washington and Lee University School of Law Legal Studies Research Paper No. 2010–11), https://papers.ssrn.com/sol3/papers.cfm? abstract_id=1717034; Quillen & Hanrahan, *supra* note 23.

law—has straightforwardly possessed jurisdiction over corporate fiduciary duty cases. Indeed, Delaware's Chancellor Allen, writing in 1987, explained that the Court of Chancery's jurisdiction in such cases flows from the fact that such duties "are imposed by equity and are recognized and enforced exclusively by a court of equity."[33] And in the corporate context, those equitable powers and associated duties have generally trumped contractual freedom when they directly collide—notably in the courts' rejection of efforts to contractually "define or limit the directors' fiduciary duties," or to "prevent . . . directors from carrying out their fiduciary duties," whether at the board's or the shareholders' behest.[34]

III. Corporate Purpose: Loyalty to Whom?

Consistent with this broad view of the contours of the fiduciary enterprise as a superstructure for corporate law, encompassing a wide range of private and public actors contributing to the life of that enterprise in various ways, Johnson and Millon have taken a similarly expansive approach to the issue of corporate purpose—that is, the issue of whose interests ought to guide corporate decision-making. As noted above, phrased in fiduciary terminology, the question is essentially "loyalty to whom?"[35]—and Johnson and Millon together have long been recognized as prominent proponents of a conception of corporate purpose that reaches well beyond the shareholders alone, affording boards meaningful discretion to show regard for the interests of non-shareholders in a wide range

33. McMahon v. New Castle Assocs., 532 A.2d 601, 604 (Del. Ch. 1987).

34. Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 47 (Del. 1994); *see also* CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227, 238–40 (Del. 2008) (explaining that "[t]his Court has previously invalidated contracts that would require a board to act or not act" in a manner limiting its fiduciary duties, and similarly invalidating "a binding bylaw that the shareholders seek to impose involuntarily on the directors in the specific area of election expense reimbursement").

35. *See* ALLEN & KRAAKMAN, *supra* note 2, at 284 (styling the issue of corporate purpose as amounting to the question, "[t]o whom do directors owe loyalty?").

of circumstances. This approach has loomed largest in their scholarship on legal responses to hostile takeovers,[36] which pit premium-seeking shareholders diametrically against the stability interests of employees, creditors, local communities, and of course management.[37] In fact, by the mid-1990s one finds references in the corporate law literature to "the Washington and Lee School of corporate jurisprudence"—characterized by a "brilliant intellectual history of legal theorizing about the corporation

36. Johnson and Millon made numerous contributions in this area during the height of the takeover boom in the late 1980s and early 1990s. Co-authored pieces include Lyman Johnson & David Millon, *The Case Beyond Time*, 45 BUS. LAW. 2105 (1990); Lyman Johnson & David Millon, *Corporate Takeovers and Corporate Law: Who's in Control?,* 61 GEO. WASH. L. REV. 1177 (1993); Lyman Johnson & David Millon, *Does the Williams Act Preempt State Common Law in Hostile Takeovers?*, 16 SEC. REG. L.J. 339 (1989); Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862 (1989); Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846 (1989). Individually authored pieces include Lyman Johnson, *Corporate Takeovers and Corporations: Who Are They For?*, 43 WASH. & LEE L. REV. 781 (1986); Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865 (1990); Lyman Johnson, *The Eventual Clash Between Judicial and Legislative Notions of Target Management Conduct*, 14 J. CORP. L. 35 (1988); Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215 (1992) (reviewing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) and ROBERT N. BELLAH ET AL., THE GOOD SOCIETY (1991)); Lyman P.Q. Johnson, *Making (Corporate) Law in a Skeptical World*, 49 WASH. & LEE L. REV. 161 (1992); Lyman Johnson, *Sovereignty Over Corporate Stock*, 16 DEL. J. CORP. L. 485 (1991); Lyman Johnson, *State Takeover Statutes: Constitutionality, Community, and Heresy*, 45 WASH. & LEE L. REV. 1051 (1988); David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223 (1991); David Millon, *State Takeover Laws: A Rebirth of Corporation Law?*, 45 WASH. & LEE L. REV. 903 (1988); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990).

37. *See generally* CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 36–53 (2013). The core conflict that characterizes hostile takeovers can arise in any corporate governance system with widely dispersed shareholdings, and otherwise similar common-law legal systems have addressed this conflict in differing ways. *Id.* The U.S. approach shows greater regard for non-shareholders' interests, a response that I have argued elsewhere reflects the weakness of the U.S. social safety net and consequent political pressures brought to bear upon the corporate governance system in the period of perceived crisis following the advent of hostile takeovers in the 1980s. *See generally id.*

and . . . its powerful critique of conservative arguments against managerial responsiveness to nonshareholder interests."[38]

Johnson and Millon arrived in legal academia just as these developments were starting to re-shape corporate law and governance in fundamental ways, and they wrote extensively on these topics for many years, both individually and together.[39] To be sure, there is substantial disagreement across the academy—even among scholars who normatively favor such views—regarding whether shareholder-oriented approaches or so-called "communitarian" or "progressive" approaches better describe the law, particularly in Delaware.[40] For present purposes, however, I

38. William H. Simon, *What Difference Does It Make Whether Corporate Managers Have Public Responsibilities?*, 50 WASH. & LEE L. REV. 1697, 1697 (1993); *see also* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 857 (1997) (explaining that "the principal resistance" to law-and-economics conceptions of the corporation was "currently [being] offered by a group of relatively young academics loosely centered around the corporate law faculties of the Washington & Lee and George Washington law schools").

39. Johnson arrived in 1985 and Millon arrived in 1986. *Lyman P.Q. Johnson*, WASH. & LEE SCH. OF L., https://law2.wlu.edu/faculty/profiledetail.asp?id=23 (last visited May 2, 2017) (on file with the Washington and Lee Law Review); *David Millon*, WASH. & LEE SCH. OF L., http://law2.wlu.edu/faculty/profiledetail.asp?id=33 (last visited Apr. 4, 2017) (on file with the Washington and Lee Law Review).

40. *Compare, e.g.*, BRUNER, *supra* note 37, at 36–65 (arguing that "U.S. shareholders possess surprisingly limited capacity to intervene in corporate affairs, and their interests are not prioritized with anything approaching the clarity and consistency enjoyed by their U.K. counterparts"); LYNN STOUT, THE SHAREHOLDER VALUE MYTH 24–32 (2012) (arguing that "[t]here is no solid legal support for the claim that directors and executives . . . have an enforceable legal duty to maximize shareholder wealth"); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1408–27 (2008) (arguing that corporate law is "ambivalent regarding its power constituencies, its beneficiaries, and its relationship to the social good"); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 763–76 (2005) (arguing that "the law has never barred corporations from sacrificing corporate profits to further public interest goals that are not required by law"); Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, *supra* note 36, at 898–903, 909–17 (describing the tension between "management discretion and shareholder primacy"); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1014, 1022–25, 1043–44 (2013) (describing corporate law's traditional "assignment of broad discretion to management and its weak commitment to accountability to shareholders"), *with* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND

remain focused on the expansiveness of Johnson and Millon's investigation of the various factors that have fueled the increasingly widespread perception that corporate law and governance ought to focus narrowly on the shareholders' interests. This involves an account not solely of law and regulation, but also of academia, the market, and society. On this score I will focus particular on some of Millon's more recent work in that vein.

As Johnson and Millon both recognized early on in their takeover scholarship, there is a core ambiguity in the *Guth* formulation of the duty of loyalty, said to be owed to "the corporation and its stockholders" simultaneously—a formulation that, as Johnson suggested in a 1990 article, essentially "bracketed" the debate about whether the corporation is best conceptualized as an entity, or rather as an aggregation of individuals.[41] This debate did not require doctrinal resolution as a practical matter for most of the twentieth century due to widespread prosperity and correlatively limited conflict among corporate constituencies.[42] As Millon likewise observed the same year, "the interests of the corporation and of its shareholders

PROGRESSIVE POSSIBILITIES 22 (2006) (arguing that those describing corporate law as embracing "shareholder supremacy" are, in terms of "pure description, . . . more right than wrong"); Kent Greenfield, *Sticking the Landing: Making the Most of the 'Stakeholder Moment,'* 26 EUR. BUS. L. REV. 147, 147–48 (2015) (reporting "significant pushback against the shareholder primacy norm" while arguing that "accounts of [its] imminent death . . . are exaggerated"); Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law,* 50 WAKE FOREST L. REV. 761, 763 (2015) (expressing sympathy toward "center-left" views while arguing that "stockholder welfare [is] the sole end of corporate governance" under Delaware law); David G. Yosifon, *The Law of Corporate Purpose,* 10 BERKELEY BUS. L.J. 181, 228 (2013) (identifying with "progressive" scholars normatively while arguing that Delaware law embraces "shareholder primacy").

41. *See* Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, *supra* note 36, at 900 n.133 ("Asserting that directors owe duties to stockholders acknowledges the corporation as an *aggregation* of individual actors, and emphasizing duties to the corporation expresses that corporations are *entities* separate and distinct from individual participants.").

42. *See id.* ("Rather than seek to resolve a theoretical debate that could not be, and did not need to be, resolved at the doctrinal level . . . pretakeover legal doctrine in the fiduciary area simply equivocated.").

have been assumed to be at least congruent," but "[s]ince the advent of hostile takeovers, this assumed identity of interest has no longer been tenable."[43] In a substantial body of work—some written individually, and some together—Johnson and Millon argued forcefully that the legal response to hostile takeovers revealed a vision of corporate purpose far more expansive than shareholder interests alone.[44] This was most vividly reflected in anti-takeover statutes, but it was also detectable in Delaware case law, they argued, where review of takeovers broke strongly in favor of board discretion to focus on the corporation's long-term sustainability, with so-called "*Revlon* duties"—requiring focus on maximizing the price received by shareholders—applying only in a narrow range of final-period scenarios, which themselves would arise only if the board so decided.[45]

There is no gainsaying the extraordinary power of shareholder-centrism as a dominant norm in corporate governance,[46] however, and some of Millon's recent work has

43. Millon, *Theories of the Corporation*, *supra* note 36, at 255. Hostile takeovers and the stark divergence of interests revealed by these transactions vividly reflect corporate law's ambivalence regarding shareholders. *See generally* Bruner, *supra* note 40, at 1415–18; *see also* Miller & Gold, *supra* note 2, at 538–39, 582–83 (characterizing corporate law's apparent ambivalence as simultaneous pursuit of loyalty to shareholders and loyalty to abstract purposes).

44. *See supra* note 36 (cataloguing their scholarship in this area).

45. *Id.; see also* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (permitting target boards to assess effects on "the corporate enterprise," including "the impact on 'constituencies' other than shareholders"); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that once "the break-up of the company was inevitable," the board's duty "changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit"); Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 43–44 (Del. 1994) (applying *Revlon* duties in the context of "a sale of control"); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1149–54 (Del. 1990) ("The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals. . . . Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.").

46. *Cf.* ALLEN & KRAAKMAN, *supra* note 2, at 284–85 (characterizing "loyalty to equity investors" as "an important theme of U.S. corporate law," while adding that "shareholder priority more closely resembles a deep but implicit value in American corporate law than a legal rule in any normal

proven particularly illuminating as to its origins and the nature of its peculiar force. Specifically, Millon has dug deeply into the range of structures that condition what we expect of various market actors and impact how they choose to behave. In an important recent article Millon distinguishes a more "radical" variant of shareholder primacy that has taken hold over recent decades, which tends to characterize boards of directors as mere agents of the shareholders with little legitimate discretion to focus on the long-term.[47] The story of radical shareholder primacy's origins proves to be equal parts law, economics (of a sort), sociology, and cultural history. In addition to charting the ascendance of the "nexus of contracts" view of the corporation, rooted in Chicago-school "law and economics," he traces how those ideas made their way—again, via the academy, and figures well positioned to amplify those ideas in the business press—to those who ultimately counsel corporate managers and major investors.[48] Millon concludes, with considerable justification, that "[r]adical shareholder primacy in the law schools is probably part of a larger ideological, economic, and socio-political phenomenon that now shapes and legitimates business practice in powerful ways. That complex but hugely important story has yet to be told."[49]

In a similarly holistic manner, Millon has explored various market constraints driving major institutions—by far the most consequential actors in today's capital markets[50]—to focus

---

sense").

47. *See* Millon, *supra* note 40, at 1018–21.

48. *See generally id*. at 1025–42; *see also* Millon, *supra* note 18, at 191–92 (describing how shareholder primacy is commonly accepted by legal and business scholars, as well as "business leaders, investors, politicians, and government regulators").

49. Millon, *supra* note 40, at 1042; *see also* Millon, *supra* note 18, at 195 (arguing that students "need to understand that non-legal values and incentives—including political commitment, social norms, compensation arrangements, pressure from institutional shareholders, to name a few—can lead corporate management to prioritize current share price maximization over long-term strategic investment and cultivation of the well-being of key nonshareholder constituencies").

50. *See* David Millon, *Shareholder Social Responsibility,* 36 SEATTLE U. L. REV. 911, 913 (2013) (observing that institutions "own approximately three-fourths of the 1,000 largest U.S. corporations and around 70% of the shares of

intently on short-term stock price performance, and to pressure corporate management to do the same. In another recent piece he dissects the enormous pressures that institutions face to deliver short-term returns—for example, the fact that "[t]o meet their current obligations, public pension funds have historically assumed an annual rate of return of 8%, give or take a half point depending on the plan."[51] Obviously most public pensions have not been able to achieve that sort of return following the crisis, leading them to "focus on short-term stock price performance" and increasingly depend upon trading strategies involving "high turnover rates"—realities hardly compatible with the old-school ideal of patient capital supporting management in the pursuit of sustainable long-term growth.[52] Similar market pressures impact other types of institutions, and of course legal pressures emanating from unexpected sources can (ironically) reinforce these tendencies—including prudent investor standards applicable to pensions under federal labor law and state law,[53] which have been interpreted to require intense focus on generating returns for beneficiaries and even pro-active engagement in activism to force management to behave accordingly.[54]

IV. Contractualism and the Fiduciary Enterprise

The holistic approaches that Johnson and Millon have taken in their exploration of the fiduciary superstructure of corporate law and their related exploration of corporate purpose—including this wide-ranging discussion of the various pressures toward a

all U.S. corporations").

51. *Id.* at 931.

52. *Id.* at 930–32; *see also* Millon, *supra* note 18, at 192 ("Commitment to short-term shareholder value has significant negative implications for the long-term viability of large corporations . . . .").

53. *See* Millon, *supra* note 50, at 938–39.

54. For an in-depth examination of pressures toward short-term-oriented shareholder-centrism emerging from such bodies of law, see generally Christopher M. Bruner, *Center-Left Politics and Corporate Governance: What Is the "Progressive" Agenda?*, 2018 BYU L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2917253.

narrow focus on shareholders—highlight fundamental dimensions of the evolving landscape for business organizations law. This section explores some important lessons and challenges that this perspective reveals.

Doctrinally, the most significant innovations in this regard have arisen in the area of unincorporated entities—notably the advent of limited liability companies (LLCs)—and in this area Delaware, in particular, has chosen to permit total elimination of fiduciary duties that would otherwise be owed by those managing the business.[55] In such a case, we are quite literally left with a purely contractual business arrangement, for which the baseline standard of conduct is reduced to the implied covenant of good faith and fair dealing.[56] Indeed, the legislative intent to permit a fundamentally contractual relationship is underscored by an unequivocal "policy . . . to give maximum effect to the principle of freedom of contract and to the enforceability of partnership [or LLC] agreements."[57]

It is widely assumed in the literature that contract provides a clearer conceptual framework for business organizations, and accordingly ought to be preferred over messy, equitable gap-fillers.[58] However, the fuller picture of the fiduciary enterprise

---

55. *See* DEL. CODE ANN. tit. 6, § 18-1101(c) (2017) ("To the extent that . . . a member or manager or other person has duties (including fiduciary duties) to [an LLC] or to another member or manager . . . the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the [LLC] agreement . . . .").

56. *See id*. (providing that "the [LLC] agreement may not eliminate the implied contractual covenant of good faith and fair dealing").

57. DEL. CODE ANN. tit. 6, § 15-103(a), (b)(3), (d), (f) (2017); *see also* DEL. CODE ANN. tit. 6, § 17-1101(c)-(d), (f) (2017) (expressing the same policy); DEL. CODE ANN. tit. 6, § 18-1101(b)–(c), (e) (2017) (expressing the same policy). For a comparative discussion of permissible contractual limitation of fiduciary duties in the United States and the United Kingdom, see Christopher M. Bruner, *Opting Out of Fiduciary Duties and Liabilities in U.S. and U.K. Business Entities*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW (Gordon Smith & Andrew Gold eds., Edward Elgar, forthcoming 2017).

58. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 90 (1991) ("If contracts can be written in enough detail, there is no need for 'fiduciary' duties as well."); *see also* Larry E. Ribstein, *Fiduciary Duty Contracts in Unincorporated Firms*, 54 WASH. & LEE L. REV. 537, 541–50 (1997) (evaluating how the costs and benefits of fiduciary duties may vary depending on the circumstances).

that Johnson and Millon have sketched out for us suggests that the matter is not so simple as that. The shift from a more relational conception of governance to a more contractual conception of governance implicates not just legal rules, but the entire social and institutional framework that surrounds and applies fiduciary norms and rules.

Johnson, for example, has argued forcefully that the constitutional basis of the Delaware Court of Chancery's equity jurisdiction literally precludes the legislature from statutorily barring Chancery judges from scrutinizing fiduciary duty waivers.[59] As he pithily expresses the point, "[t]he judges of the Chancery Court may rue this discretion, or seek in various ways to shun it or corral it. What they cannot do is deny they continue to possess it."[60] Ultimately, Johnson challenges us to think harder about whether there is a broader wisdom to the constitutional embeddedness of the Court of Chancery's equity jurisdiction—for example, the "scant protection" offered by the implied covenant of good faith and fair dealing, and the consequent dangers facing unsophisticated parties not plausibly capable of anticipating all the ways in which they might be abused, let alone negotiating effective contractual protections.[61]

Relatedly, we might reasonably query what it means to alter the Court of Chancery itself, as arguably occurs in an incremental fashion as a consequence of these same developments. As discussed above, the Court of Chancery's jurisdiction over corporate governance relationships has long been considered a matter of course, flowing directly as it does from the equitable

59. *See generally* Johnson, *supra* note 23.

60. *Id.* at 720.

61. *See id.*at 723–24 ("Why try to clumsily retool an untried concept when one designed specifically for the task at hand—fiduciary duty—already exists? Moreover, recent decisional law demonstrates that there is little robustness to the doctrine and that it affords scant protection."). It has been argued more generally that equity emerged to provide "a safety valve to deal with the problem of opportunism that arises where the simple ex ante structures of the common law invite efforts at manipulation by the sophisticated and unscrupulous." *See* Henry E. Smith, *The Equitable Dimension of Contract,* 45 SUFFOLK U. L. REV. 897, 903–11 (2012); *see also generally* Smith, *supra* note 28 (similarly characterizing equity as "second-order law" aimed at responding to opportunistic behavior).

roots of fiduciary duties.[62] Chancellor Allen, in the opinion quoted above, explained that this is why "Chancery's traditional jurisdiction over corporate officers and directors" has applied "without regard to the remedy sought."[63] So how, then, do we conceptualize Chancery's role in governance-related disputes arising in the unincorporated entity context where—per the statutes and the express legislative policy in favor of maximum freedom of contract—such duties might not even apply? The general jurisdictional provision of the corporate statute does not bother to address such matters, presumably because (as Chancellor Allen's observation suggests) there is no need to do so.[64] Yet its counterpart in the LLC statute expressly clarifies that the Court of Chancery can hear actions involving "the duties, obligations or liabilities" among members and managers[65]—presumably reflecting the fact that, if fiduciary duties are removed from the equation, it is not entirely obvious that the Court of Chancery has any business here. This suggests, if subtly, that unincorporated entities heavily leaning on contract as their organizing principle impact not just the mores of governance among private actors, but also the larger social and institutional framework that their relations inhabit.

The larger public impacts of styling unincorporated entities as solely or primarily contractual in nature are readily apparent in recent Delaware case law tackling such matters directly. In his *In re Carlisle Etcetera LLC*[66] opinion in 2015, Vice Chancellor Laster found that an assignee of an LLC membership interest had equitable standing to seek dissolution, even though there was plainly no statutory or contractual right for an assignee to do

62. *See supra* notes 31–33 and accompanying text (describing how the Court of Chancery's jurisdiction over corporate fiduciary duty cases arises from the court's equitable jurisdiction).

63. McMahon v. New Castle Assocs., 532 A.2d 601, 604 (Del. Ch. 1987).

64. *Cf. id.* ("The duties they owe to shareholders . . . are imposed by equity and are recognized and enforced exclusively by a court of equity.").

65. *Compare* 8 DEL. C. § 111 (2017) (addressing corporations), *with* 6 DEL. C. § 18-111 (2017) (addressing LLCs); *see also* 6 DEL. C. § 15-122 (2017) (addressing general partnerships); 6 DEL. C. § 17-111 (2017) (addressing limited partnerships).

66. 114 A.3d 592 (Del. Ch. 2015).

so.[67] Both sides had apparently believed that a transfer of full membership had been accomplished, and Vice Chancellor Laster's response to the argument that Section 18-802 of Delaware's LLC act represents "the exclusive extra-contractual method of dissolving an LLC"[68] underscores the degree to which assessing the extent of the LLC's inherent contractualism remains bound up with what Vice Chancellor Laster calls "the 'complete system' of equity that [the Chancery] court inherited and administers,"[69] and the state's continuing political and social interest in business entities that deploy publicly created powers. Vice Chancellor Laster writes that if the statute had purported to displace the Court of Chancery's "traditional equitable jurisdiction" to order dissolution, that "would raise serious constitutional questions" (a proposition for which he cites Johnson's work),[70] and further states that parties' ability to contractually waive the right to statutory dissolution "does not extend to a party's standing to seek dissolution in equity."[71] He then ties the issue of contractualism directly to the Court of Chancery's own status and role:

> To my mind, when a sovereign makes available an entity with attributes that contracting parties cannot grant themselves by agreement, the entity is not purely contractual. Because the entity has taken advantage of benefits that the sovereign has provided, the sovereign retains an interest in that entity. That interest in turn calls for preserving the ability of the sovereign's courts to oversee and, if necessary, dissolve the entity. Put more directly, an LLC agreement is not an exclusively private contract among its members precisely because the LLC has powers that only the State of Delaware can confer. . . . Just as LLCs are not purely private entities, dissolution is not a purely private affair. . . . Because an LLC takes advantage of benefits that the State of Delaware provides, and because dissolution is not an exclusively private matter, the State of Delaware retains an interest in having the

67. *See id.* at 592, 594, 597, 601.
68. *Id.* at 595–97.
69. *Id.* at 602.
70. *Id.*
71. *Id.* at 605.

> Court of Chancery available, when equity demands, to hear a petition to dissolve an LLC. . . .[72]

Vice Chancellor Laster's analysis vividly emphasizes the "complete system" of equity to which he draws attention in the opinion, and reveals this issue of the LLC's degree of contractualism to be inherently bound up with a much larger set of political, social, and institutional dynamics, involving a high degree of identity-relevance for the Court of Chancery itself.[73] Simply put, the LLC's degree of contractualism cannot be assessed in isolation from broader political, social, and institutional dynamics; the subject is inherently public.

V. Conclusion

The stubborn persistence of equity and fiduciary duties, notwithstanding the apparent victory of contractualism reflected in the unincorporated entity statutes, suggests that the law of business organizations simply cannot be fully specified *ex ante*. As Lord Chancellor Ellesmere back in the seventeenth century might have put it, our "[a]ctions are so divers and infinite"[74] that a flexible, equitable framework becomes unavoidable; we could dismantle it, but would only end up reinventing it.[75] This is a critical aspect of the progressive response to contractualism—contractualists fundamentally believe that governance arrangements are amenable to a high degree of *ex ante* specification, and progressives fundamentally do not.[76]

---

72. *Id.* at 605–06.

73. *See id.* at 602 ("It is the 'complete system' of equity that this court inherited and administers, not the temporally specific subject matter of eighteenth century cases.").

74. The Earl of Oxford's Case, 21 Eng. Rep. 485, 486 (1615).

75. *Cf.* Smith, *supra* note 61, at 903–11 (characterizing equity as an essential "safety valve" to respond to opportunistic behavior).

76. *See, e.g.*, David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, *in* PROGRESSIVE CORPORATE LAW 1, 7–9 (Lawrence E. Mitchell ed., 1995) ("Skepticism toward contractarian assumptions about the technological feasibility of adequate self-protection through contract is an important aspect of the communitarian stance."). It has been argued more generally that, in overstating the degree to which risks can be assessed *ex ante*, law and economics scholarship effectively "sweeps the problem of the

There is arguably no more consequential issue in corporate law and governance than this, and Johnson and Millon's work challenges us to tackle it fully and forthrightly, recognizing that issues of time horizon, corporate purpose, and relational paradigm are not simply doctrinal questions. These matters reflect an extraordinarily complex netting of vectors that emanate not only from various forms of law and regulation, but also from a host of economic, institutional, professional, political, social, cultural, and moral inputs that shape norms and attitudes about how we ought to relate to one another in our economic lives. To paraphrase Millon's conclusion cited above, we have barely begun to tell this "hugely important story,"[77] let alone to grapple with it.

opportunist under the rug" and thereby "assume[s] away the problem equity is there to solve." Smith, *supra* note 28, at 58, 61–62.

77. *Cf.* Millon, *supra* note 40, at 1042.