FIDUCIARY JUDGMENT RULES

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ABSTRACT

Because of the strong moral rhetoric and robust equitable remedies available in fiduciary law, it is not surprising to find lawyers and legal scholars seeking to expand the reach of fiduciary law principles into new relationships and new areas of law. However, expansion often does not work very well because of the demanding and pervasive nature of fiduciary duties. Thus, jurists often turn to the business judgment rule and its policy of underenforcement of fiduciary duties as a way to fit fiduciary law principles into other areas of law. The problem with this approach is that it is based on a deficient understanding of the corporate law model. The business judgment rule is not an arbitrary abstention policy but rather a prudential policy decision that advances the beneficiaries' interests in the unique context of the business setting. Because its theoretical underpinnings tend to be absent from other relationships, the business judgment rule cannot serve as a model for indiscriminate expansion of fiduciary areas of law. For the same reasons, any policy of deferential review of fiduciary duties would have to be based on other considerations.

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INTRODUCTION

Fiduciary law is not so much a separate area of law, like contracts and torts, as it is a set of legal principles that is incorporated in other substantive areas of law, such as trusts, agency, and corporate law.[1] Fiduciary law principles are distinctive in many ways. First, fiduciary law employs strong moral rhetoric that is uncharacteristic outside of criminal law.[2] Thus, for example, it tends to demand the "utmost good faith" and "undivided and unselfish loyalty" of fiduciaries.[3] Second, fiduciary law principles impose demanding and pervasive duties upon fiduciaries,[4] often utilizing prophylactic rules to secure their objective.[5] Finally, fiduciary law opens up strong equitable remedies that are generally unavailable to plaintiffs in other areas of law.[6]

Characteristics such as these make fiduciary law attractive to jurists in other areas of law. It is not surprising to find lawyers and legal scholars seeking to expand the reach of fiduciary law principles into new relationships and new areas of law. Three particularly interesting examples will be considered in this Article[7]—friends,[8] parents,[9] and politicians[10]—but there are many others.[11]

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1. Julian Velasco, *Fiduciary Duties and Fiduciary Outs*, 21 GEO. MASON L. REV. 157, 159-60 (2013).

2. *See* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 434 (1993).

3. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

4. *See, e.g.*, Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998) ("[F]iduciary duty does not operate intermittently but is the constant compass by which all director actions for the corporation ... must be guided.").

5. TAMAR FRANKEL, FIDUCIARY LAW 108 (2011) ("[T]he duty of loyalty is manifested by important preventive rules. Such rules prohibit actions even though they are not necessarily injurious to entrustors." (footnote omitted)).

6. *See* Samuel L. Bray, *Fiduciary Remedies*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 449, 449-50 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

7. *See infra* Part III.B.

8. *See* Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009).

9. *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

10. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013).

11. *See, e.g.*, Andrew Kent, Ethan J. Leib & Jeb Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Principles and Public Offices*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 6, at 303; D. Theodore Rave, *Fiduciary Principles and the State*, *in* THE OXFORD

The problem with expanding the reach of fiduciary law into new areas of law is that it often does not quite work. Fiduciary law is very demanding. While it works well in traditional fiduciary relationships, it would be much more difficult to apply in other relationships. Nevertheless, many remain interested in extending fiduciary law principles into new areas of law and seek solutions to these difficulties.

One technique that is often employed is a resort to the corporate law model. One of the widest-known doctrines of corporate law is the business judgment rule, which applies a deferential standard of review to director actions that are undertaken in good faith.[12] It is, essentially, a policy of underenforcement of fiduciary duties.[13] Advocates of expanding the reach of fiduciary law tend to point to the business judgment rule as a solution. Although a strict trust law model of fiduciary law could not be adopted in other areas of law, they argue that the more flexible corporate law model could. Thus, they often call for a "fiduciary judgment rule"—a "friendship judgment rule,"[14] a "parental judgment rule,"[15] or a "political judgment rule"[16]—that would subject the new fiduciaries to deferential

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HANDBOOK OF FIDUCIARY LAW, *supra* note 6, at 323; Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016); Kiel Brennan-Marquez, *Fourth Amendment Fiduciaries*, 84 FORDHAM L. REV. 611 (2015); Margaux J. Hall, *A Fiduciary Theory of Health Entitlements*, 35 CARDOZO L. REV. 1729 (2014); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013); Edward B. Foley, *Voters as Fiduciaries*, 2015 U. CHI. LEGAL F. 153; Heather Harrell, *Direct-to-Consumer Advertising of Prescription Pharmaceuticals, the Learned Intermediary Doctrine, and Fiduciary Duties*, 8 IND. HEALTH L. REV. 69 (2011); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010); Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN'S L.J. 259 (2005); Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, 2005 BYU EDUC. & L.J. 159; Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45 (2001).

12. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("The business judgment rule is ... a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

13. *See* Julian Velasco, *A Defense of the Corporate Law Duty of Care*, 40 J. CORP. L. 647, 648, 651 & n.13 (2015).

14. Leib, *supra* note 8, at 709.

15. Scott & Scott, *supra* note 9, at 2438.

16. *See* Rave, *supra* note 10, at 677. It should be noted that Rave does not actually use the term "political judgment rule."

judicial review, thus overcoming the difficulties posed by demanding fiduciary duties.

Unfortunately, these arguments are based on a deficient understanding of the business judgment rule. The business judgment rule may be an abstention doctrine,[17] but it is not an arbitrary one. Rather, it represents a prudential policy decision that balances competing interests in a special context. It is a practical response to the idiosyncratic needs of the business setting.

In this Article, I argue that the business judgment rule cannot serve as a model for indiscriminate expansion of fiduciary law principles into new areas of law because its theoretical underpinnings tend to be absent from other relationships. Thus, if fiduciary law principles are to be expanded into new areas of law, other solutions must be found for the difficulties that will be encountered in doing so. My argument proceeds as follows. In Part I, I explain the difficulty of extending fiduciary law principles into new areas of law. I start with a short primer on fiduciary law. I then elaborate on the attraction of fiduciary law principles. Finally, I explain the difficulty of extending them to new relationships and new areas of law. In Part II, I provide a short primer on corporate law. I show how corporate law presents a typical fiduciary situation, as well as how it is idiosyncratic. I explain how the business judgment rule responds to its circumstances, as well as the limits of the business judgment rule—in particular, how it does not apply to conflict of interest situations and how the corporate law model deals with conflicts. In Part III, I argue that the corporate law model does not work in most other contexts. I do so first in general principle, and then with respect to the examples of friends, parents, and politicians. I conclude by addressing the limits of this Article. I am not arguing that fiduciary law cannot be expanded or that a rule of deference is always inappropriate. My argument is only that the business judgment rule, properly understood, cannot be the basis for overcoming the difficulties entailed in expanding fiduciary law indiscriminately into new areas.

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17. Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 128 (2004).

I. THE PROBLEM

This Part explores the concern that forms the basis for this Article: the difficulty of extending fiduciary law principles into new areas of law. Section A provides a short primer on fiduciary law. Section B explains why fiduciary law principles are so attractive to jurists. Section C explains why it is not so easy to extend fiduciary law principles to new relationships and new areas of law. Section D sets forth what advocates are looking for from fiduciary law: the benefits of moral rhetoric and strong remedies without the drawbacks of pervasive duties.

A. A Primer on Fiduciary Law

As previously mentioned, fiduciary law might better be understood as a set of legal principles than as a separate area of law.[18] These principles are implemented in other substantive areas of law. Examples of areas of law that are heavily governed by fiduciary law principles include trust law, agency law, corporate law, and professional practice.[19] Each implementation of fiduciary law is arguably unique, adapting the general principles to meet the needs of the specific context at hand.[20] As a result, it is difficult to make detailed claims about fiduciary law.[21] Thus, some scholars have expressed skepticism about whether fiduciary law can be adequately defined.[22]

Nevertheless, the general principles that animate fiduciary law are easily discernible. At the most general level,

> [a] fiduciary relationship is a legally recognized relationship in which one is [entrusted with] power over the interests of

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18. *See supra* note 1 and accompanying text.

19. Velasco, *supra* note 1, at 159-60.

20. *Id.* at 160.

21. *Id.*

22. *See, e.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 915 ("One could justifiably conclude that the law of fiduciary obligation is in significant respects atomistic."); Easterbrook & Fischel, *supra* note 2, at 438 ("Scholars ... have had trouble coming up with a unifying approach to fiduciary duties because ... [t]here is nothing special to find.").

> another, who thereby becomes vulnerable to abuse. Although such relationships are risky, they can also be very beneficial. In order to encourage and police such relationships, the law imposes a duty on the first party—the fiduciary—to act in the interests of the second party—the beneficiary.... Thus, the raison d'être of fiduciary duties ... is the protection of the beneficiary from abuse at the hands of the fiduciary.[23]

The biggest issue in fiduciary law is determining which relationships ought to be considered fiduciary in nature. Ideally, the law would adopt a definitional approach. There would be a legal definition, and relationships that fall within the definition would be deemed fiduciary, and those that do not would not. Unfortunately, there is no such definition in the law.[24] Legal scholars have proposed various possibilities. One leading definition comes from Professor Paul Miller's fiduciary powers theory: "A fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary)."[25] Another comes from Professor D. Gordon Smith's critical resource theory: "[F]iduciary relationships form when one party (the 'fiduciary') acts on behalf of another party (the 'beneficiary') while exercising discretion with respect to a critical resource belonging to the beneficiary."[26]

Although a definitional approach would be ideal, the law tends to take a status-based approach.[27] Under this approach, there is a finite set of relationship types that have been deemed fiduciary in nature.[28] Other relationships generally are not considered fiduciary.[29] However, while courts tend to be reluctant to expand the official canon, it is possible for new relationships to be added to the

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23. Velasco, *supra* note 1, at 159 (footnote omitted).

24. *See id.* at 160-61.

25. *See* Paul B. Miller, *The Fiduciary Relationship*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63, 69 (Andrew S. Gold & Paul B. Miller eds., 2014).

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

27. *See* Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 241 (2011) ("The status-based approach is the longest-standing and most widely used method of identifying fiduciary relationships.").

28. *Id.*

29. *Id.*

list if they are sufficiently analogous to the established categories.[30] In addition, courts sometimes find particular relationships that do not fall within any of the recognized categories to be fiduciary on an ad hoc basis.[31] They do so when the facts indicate that a relationship ought to be protected by fiduciary law principles.[32] However, this ad hoc approach is controversial.[33]

Once a relationship is deemed to be fiduciary, the law imposes a special obligation on the fiduciary: a duty to act in the interests of the beneficiary in all matters related to that relationship.[34] In other words, fiduciaries are obligated to behave in a self-denying manner.[35] This duty is often bifurcated into a duty of loyalty and a duty of care, although other duties could be enumerated.[36] Under the duty of loyalty, a fiduciary is prohibited from acting counter to the interests of the beneficiary.[37] The principle is so important that it is generally protected by prophylactic rules requiring the fiduciary to avoid conflicts of interest.[38] Under the duty of care, a fiduciary must act diligently, exercising an appropriate level of care and skill.[39] The

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30. *Id.*

31. Daniel B. Kelly, *Fiduciary Principles in Fact-Based Fiduciary Relationships*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 6, at 3, 6.

32. *See id.* at 10.

33. *See id.* at 10, 21-22.

34. *See* Velasco, *supra* note 13, at 648 ("Simply put, a fiduciary has the duty to act in the interests of the beneficiary in all relevant respects."); Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 1014 (2013) ("Power is vested in fiduciaries to enable them to act for, or on behalf of, beneficiaries, or to otherwise serve their interests. Fiduciary power is thus a means by which to achieve the ends of beneficiaries.").

35. Although it is often said that fiduciaries must act altruistically, such a claim probably goes too far. Miller, *supra* note 34, at 995 & n.83. Similarly, it is often said that fiduciaries must behave in an other-regarding manner, but such a claim probably does not go far enough. *Cf.* Julian Velasco, *Delimiting Fiduciary Status*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 76, 87-88 (D. Gordon Smith & Andrew S. Gold eds., 2018). Nearly all laws require actors to behave in an other-regarding manner. Fiduciary law goes further to require fiduciaries to deny their own interests with respect to the fiduciary relationship. *See, e.g.*, Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

36. *See* Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1232-33 (2010).

37. *Id.* at 1240 (citing *Guth*, 5 A.2d at 510).

38. More specifically, conflicts of interest and conflicts of duty. *See* Miller, *supra* note 34, at 972 & n.4 (citing Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1054 (1991)).

39. Velasco, *supra* note 13, at 690-91.

duty of care is not usually enforced with the same sort of prophylactic rules as the duty of loyalty.[40]

Remedies in fiduciary law are "comprehensive and tenacious."[41] This stems from the fact that fiduciary law is situated in equity rather than in law.[42] As a result, breaches of fiduciary duty are not limited to normal measures of damages.[43] In addition to equitable compensation, "a remedy that looks like damages,"[44] there is also available a panoply of more obviously equitable remedies. These include injunctions, restitutionary remedies such as accounting for profits, disgorgement, and constructive trusts, unwinding remedies such as equitable rescission, and supervisory remedies such as declaratory judgments.[45]

B. The Attraction

Fiduciary law principles are very attractive from an enforcement perspective. This is especially so for two reasons: first, its use of moral rhetoric, and second, its equitable remedies. Because these characteristics would be desirable in many legal contexts, it is not surprising that lawyers and legal scholars would be interested in extending fiduciary law principles into new and disparate areas of law.

Consider the prominence of moral rhetoric.[46] From its inception, fiduciary law is steeped in moral issues such as trust, vulnerability, and abuse of power.[47] Conceptually, it is difficult to justify violations of trust, failure to protect the vulnerable, or any abuse of power. By couching a relationship in these terms, fiduciary law grants the

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40. *See id.* at 648-50.

41. Bray, *supra* note 6, at 449.

42. *See id.* at 450.

43. *See id.* at 456.

44. *Id.*

45. *See generally id.* at 449-61.

46. *Cf.* Leib, *supra* note 8, at 669 ("[T]he law of fiduciary duties ... gives courts a useful set of rhetorical and analytical tools to employ when they are forced to entertain disputes that arise between close friends.").

47. *See* Miller, *supra* note 34, at 1010-11 ("The most commonly cited characteristics of fiduciary relationships are discretion, power, inequality, dependence, vulnerability, trust, and confidence.").

beneficiary plaintiff an enviable moral and rhetorical advantage over the fiduciary defendant.

Moreover, courts deciding fiduciary law cases tend to embrace morality and often play the role of preacher.[48] In describing fiduciary duties, they tend to use lofty language. Courts speak of "the duty of the finest loyalty[,] ... [n]ot honesty alone, but the punctilio of an honor the most sensitive,"[49] the "demand[] of ... the most scrupulous observance of his duty," and the "require[ment of] undivided and unselfish loyalty."[50] They insist that "thought of self [is] to be renounced,"[51] and that "precedence of self is compelled to give way."[52] In terms of enforcement, they often speak of "[u]ncompromising rigidity."[53]

What makes moral rhetoric so desirable? For one thing, it suggests that the courts will be intolerant of violations.[54] Perhaps more importantly, it increases the likelihood that fiduciaries will conform their behavior to the expectations of the law.[55] From the perspective of an advocate, whether a plaintiff's attorney or a sympathetic legal scholar, characteristics such as these would be very welcome in almost any area of law.

Next, consider equitable remedies. "Fiduciary remedies are ... attractive to plaintiffs, who often seek to characterize their claims

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48. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997) ("[W]e come much closer to understanding the role of courts in corporate law if we think of judges more as preachers than as policemen.").

49. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

50. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

51. *Meinhard*, 164 N.E. at 548.

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

53. *Meinhard*, 164 N.E. at 546; *see also Guth*, 5 A.2d at 510 (describing the duty of loyalty as "inveterate and uncompromising in its rigidity").

54. *See, e.g.*, *Meinhard*, 164 N.E. at 546 ("Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." (internal citation omitted)).

55. People often obey the law simply because it is law. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 170 (2006) ("People generally feel that existing legal authorities are legitimate, and this legitimacy promotes compliance with the law."); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1270 (1999) ("[T]he general norm of obedience to law ... is one of the most powerful norms of our society."); *cf.* LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 104-05 (2011) ("[S]ubjects cooperate when an experimenter instructs them to cooperate ... [and] people change their behavior in social dilemmas in response to mere hints about what the experimenter desires.").

as sounding in fiduciary law in order to take advantage of its remedies."[56] What makes fiduciary remedies special? In actions at law, monetary awards are generally limited to some sort of formula that would make the plaintiff whole, whether this be measured by losses incurred or by expectation interests.[57] Such awards are also available in equity, in the form of equitable compensation.[58] However, equity also offers a very different type of monetary award in the form of restitutionary remedies.[59]

Perhaps most importantly, fiduciaries are not permitted to retain any secret profit that they make in connection with fiduciary engagements. Rather, they must disgorge any such profits to their beneficiaries.[60] This is so even if the beneficiary was not harmed in any way,[61] and even if the beneficiary somehow benefited thereby.[62] This is significant because, even in cases in which it may be difficult or impossible to establish damages, the availability of disgorgement can allow for a monetary award.[63] Indeed, such an award can be substantial.[64]

In addition to monetary awards, fiduciary law allows for other types of remedies, such as injunctive and declaratory relief.[65] Thus, the court can fashion situation-specific remedies that are generally unavailable in actions at law. Moreover, prevailing in even a non-monetary way on a claim for breach of fiduciary duty may allow the plaintiff to recover consequential damages, including the costs of prosecuting the litigation.[66]

This combination of moral rhetoric and superior remedies makes fiduciary law very attractive to plaintiffs' attorneys and legal

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56. Bray, *supra* note 6, at 449.

57. *See, e.g.*, Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 119 (2003).

58. *See* Bray, *supra* note 6, at 456.

59. *See id.* at 451.

60. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 388 (AM. L. INST. 1933).

61. *See* Reading v. Att'y-Gen. [1951] AC 507 (HL) 514 (appeal taken from Eng.) ("It matters not that the master has not lost any profit, nor suffered any damage.").

62. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 8.05 cmt. b, illus. 1 (AM. L. INST. 2006).

63. Peter Jaffey, *Restitutionary Damages and Disgorgement*, 3 RESTITUTION L. REV. 30, 30 (1995).

64. *See id.*

65. *See supra* note 45 and accompanying text.

66. *See, e.g.*, Thorpe *ex rel.* Castleman v. CERBCO, Inc., 676 A.2d 436, 445 (Del. 1996); Tarnowski v. Resop, 51 N.W.2d 801, 804 (Minn. 1952).

scholars in other areas of law.[67] It can lead to enhanced enforcement of duty both by inducing greater compliance efforts as well as by raising the cost of noncompliance. However, there are a few problems that prevent the wholesale adoption of fiduciary law principles in other areas of law.

C. The Drawbacks

The moral rhetoric and equitable remedies of fiduciary law may be attractive characteristics, but they do not come without a cost. The central characteristic of fiduciary law is the existence of fiduciary duties that are rigorous and pervasive.[68] Simply put, a fiduciary must pursue the interests of the beneficiary in all matters related to the fiduciary relationship.[69] Moreover, fiduciary duties are often enforced strictly, with prophylactic rules intended to avoid even the appearance of impropriety.[70] Such a strict concept of duty works fairly well in relationships that are inherently fiduciary in nature, but they do not work so well in relationships that are not truly fiduciary.[71]

One reason this is so is that it is unrealistic to demand that people behave selflessly most of the time.[72] People can be expected to comply with laws and social mores, but they nevertheless should be permitted to pursue their own interests throughout. Self-denial can only be expected in limited circumstances. These circumstances correspond well to classic fiduciary relationships. To expand the domain of fiduciary law very liberally would be to impose a burden that may be unbearable.

Moreover, in most relationships that are categorically deemed fiduciary, the relationship is defined relatively narrowly. Trusts are fiduciaries only with respect to the trust.[73] Agents are fiduciaries

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67. *See* Velasco, *supra* note 35, at 76.
68. *See* Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998).
69. *See supra* note 34 and accompanying text.
70. *See supra* note 5 and accompanying text.
71. *See* Velasco, *supra* note 35, at 91-93.
72. *See id.* at 92-93.
73. *See* Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 663-64 (2002).

only with respect to the employment.[74] Lawyers are fiduciaries only with respect to the engagement.[75] Rigorous and pervasive fiduciary duties are manageable because of the limited scope of the relationship.

The same cannot be said for many other relationships, some of which are much more open-ended. Open-ended fiduciary duties are problematic in open-ended relationships.[76] At some point, they become entirely unrealistic. Consider, for example, friendship. Friendships have no obvious boundaries, and true friendships have none. A pervasive and rigorous duty to pursue the interests of one's friends in all matters related to the friendship—which is to say, all matters—would be overwhelming and unrealistic.[77]

Finally, at the heart of fiduciary law is the avoidance of conflicts.[78] When fiduciary relationships are limited and carefully cabined, it is reasonable to expect fiduciaries to avoid such conflicts.[79] If fiduciary relationships were to be expanded greatly, it might not even be possible to do so. Consider, for example, parents. Parents are conflicted at all times.[80] Every decision they make requires a balancing of the child's interests with those of their other children as well as their own interests.[81] This is true on every front, including not only money but also time, attention, and discipline.[82] There is almost no decision that a parent could make with respect to a child that does not involve some sort of conflict of interest.[83] Thus, a duty of loyalty simply cannot apply to such a relationship—at least, not without significant dilution.

74. *See id.*

75. *See id.*

76. *Cf. id.* at 666 ("The corporate relationship is ... open ended in time and scope.... The corporate director thus needs more flexibility to deal with evolving events.").

77. *See* Velasco, *supra* note 35, at 91-92.

78. *See supra* note 38 and accompanying text.

79. *See supra* note 38 and accompanying text.

80. *See* Velasco, *supra* note 35, at 93.

81. *See id.*

82. *See id.*

83. *See id.* ("Despite the rhetoric of 'the best interests of the child,' parenting is not as selfless as might easily be imagined. Parents make many sacrifices for their children, but they also refuse to make many others. The law could not be expected to require selflessness at all times.").

D. The Desired Solution

It is clear that expanding fiduciary law principles into new areas of law would be problematic. The moral rhetoric and the superior remedies of fiduciary law are desirable, but the enforcement of pervasive and rigorous fiduciary duties would not be. Many would find it desirable to find a way to get the benefits without the drawbacks. In fact, there may be various ways to do so.

One possibility would be to apply fiduciary law principles in a metaphorical matter. Although a relationship may not legally be considered a fiduciary relationship, it may be described in terms that sound essentially so. By making a connection between another area of law and fiduciary law, legal scholars may be able to borrow and incorporate its strong moral rhetoric without being encumbered by its strict technical duties. This sort of thing happens all of the time and is perfectly legitimate as long as it is acknowledged to be metaphorical or at least normative and not accurately descriptive of the law.[84]

However, such an approach would not give access to equitable remedies.[85] Moreover, metaphorical language is not in any way binding on others. Each individual can accept or reject the metaphor as they please. Thus, the moral rhetoric loses much of its force. As a result, scholars often want to go beyond mere metaphor into positive law. What would be preferable would be a way to adopt the moral rhetoric in a binding way, but without being overly encumbered by fiduciary duties. Various scholars have concluded that there is a way to do this. To do so, they look to one particular version of fiduciary law: corporate law.[86]

Corporate law is notorious for its underenforcement of fiduciary duties. This is especially evident in the doctrine known as the business judgment rule. This doctrine will be discussed in more detail in the next Part.[87] In short, it operates to protect director decisions from judicial review "in all but the most extreme cases."[88]

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84. *Cf. supra* Part I.B.
85. *See supra* notes 56-66 and accompanying text.
86. *See, e.g.*, Leib, *supra* note 8; Scott & Scott, *supra* note 9; Rave, *supra* note 10.
87. *See infra* Part II.B.
88. *See* Velasco, *supra* note 13, at 649.

As a practical matter, directors are almost never liable if the business judgment rule applies.[89]

If as venerable a field of fiduciary law as corporate law can avoid strict enforcement of fiduciary duties, then perhaps strict enforcement is not central to fiduciary law after all. Perhaps the business judgment rule can serve as a model for the expansion of fiduciary law principles into other areas of law. For example, friendship might be amenable to fiduciary law principles if there were also a "friendship judgment rule" that would allow for under-enforcement of fiduciary duties.[90] Similarly, fiduciary law principles could be applied to parenting if there were a "parental judgment rule" to the same effect,[91] and likewise to politicians if there were a "political judgment rule."[92] In general, we could apply fiduciary principles much more broadly if there were a general concept akin to the business judgment rule, which could generically be called a "fiduciary judgment rule," that would shield new fiduciaries from strict accountability for their discretionary decisions in open-ended relationships.

However, the move does not work. It is based on an overly simplistic and reductionist understanding of corporate law. In the next Part, I will explain why the business judgment rule cannot reasonably serve as the model for the expansion of fiduciary law into other areas of law.

II. PRIMER ON CORPORATE LAW

This Part considers corporate law within the constellation of fiduciary law. Corporate law is in some ways typical, and in some ways idiosyncratic. It is typical in that it meets the standard requirements for a classic fiduciary relationship and therefore requires the protection of fiduciary duties.[93] It is idiosyncratic in that beneficiaries benefit from and actually prefer underenforcement of

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89. *See* Julian Velasco, *Fiduciary Principles in Corporate Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 6, at 61, 69.

90. *See supra* note 14 and accompanying text.

91. *See supra* note 15 and accompanying text.

92. *See supra* note 16 and accompanying text.

93. *See* Velasco, *supra* note 89, at 61.

those fiduciary duties.[94] However, underenforcement in corporate law extends only to duty of care issues, as to which directors are considered trustworthy.[95] When conflicts of interest are at stake, the deference of the business judgment rule gives way to the more rigorous fairness test.[96] Nevertheless, when the conflict can be eliminated, the benefits of the business judgment rule can be restored.

A. Fiduciary Law Principles

Corporate law is one of the classic areas of law to which fiduciary law principles apply. Shareholders are the owners of the business, but often they are unable to manage it. This is especially true in large public corporations, in which there are many thousands of dispersed shareholders. Thus, shareholders hire expert managers to run the business on their behalf.[97] In doing so, shareholders entrust the managers with power over their assets and become vulnerable as a result.[98] The managers are supposed to run the business in the interests of the shareholders but may be tempted to pursue their own interests instead.[99] This makes "shareholders ... vulnerable to abuse at the hands of [directors]."[100] Thus, corporate law fits the normal fiduciary law mold.

Corporate law gives directors extensive power over the corporation, mandating that "[t]he business and affairs of every corporation ... shall be managed by or under the direction of a board of directors."[101] However, directors are not free to do whatever they want. The law imposes on them fiduciary duties towards "the corporation and its shareholders."[102] Although directors can and indeed must exercise their own independent business judgment, "[t]he board of

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94. *See id.* at 62.
95. *See id.*
96. *See id.* at 66-67.
97. *See id.* at 61.
98. *See id.*
99. *See id.*
100. *Id.*
101. DEL. CODE ANN. tit. 8, § 141(a) (2017).
102. *See* Velasco, *supra* note 89, at 64 (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)).

directors has the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners."[103]

Fiduciary duties are pervasive in corporate law. According to the Delaware Supreme Court, "fiduciary duty does not operate intermittently but is the constant compass by which all director actions for the corporation ... must be guided."[104] It is also all encompassing, "demand[ing] of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation."[105]

The two main fiduciary duties in corporate law are those of care and of loyalty.[106] The duty of care focuses on the decision-making process: "[D]irectors have a duty to inform themselves ... of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties."[107] The duty of loyalty focuses on conflicts of interest: "Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.... The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest."[108] However, it is fair to say that the duty of care and duty of loyalty are merely aspects of one overriding fiduciary duty—to pursue the interests of the shareholders.[109] "In other words, the duty of care represents the concern that the directors pursue the interests of the corporation and its shareholders *carefully*[, while] the duty of loyalty represents the concern that they do so *loyally* (without conflicts)."[110] Other duties could be specified, but discussion of the two main duties suffices for present purposes.

103. Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998).
104. *Id.* at 10.
105. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).
106. *See* Velasco, *supra* note 36, at 1231.
107. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).
108. *Guth*, 5 A.2d at 510.
109. *See* Velasco, *supra* note 13, at 648; *see also* Velasco, *supra* note 36, at 1281-84.
110. Velasco, *supra* note 36, at 1301.

In these respects, corporate law represents a very typical fiduciary situation. In other respects, however, corporate law is idiosyncratic. These are considered in the next Section.

B. Idiosyncrasy and the Business Judgment Rule

Perhaps the most obvious way in which corporate law differs from other applications of fiduciary law is in the business judgment rule. "The business judgment rule is ... a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[111] Under this doctrine, a business decision will be upheld if it "can be attributed to any rational business purpose."[112] Some have called the business judgment rule an abstention doctrine.[113] Others insist that Delaware courts are more interested in preaching the moral rhetoric than enforcing any legal duties.[114] Lay persons may be forgiven for concluding that corporate law simply does not enforce fiduciary duties, and that directors can get away with pretty much anything. Even corporate legal scholars sometimes interpret the business judgment rule in this way.[115] At first glance, it might seem to suggest that fiduciary duties simply are not very important in corporate law. However, this is incorrect.

It is well known that the business judgment rule is a core doctrine in corporate law,[116] but it is not well understood that the business

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111. *Aronson*, 473 A.2d at 812.

112. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

113. *See generally* Bainbridge, *supra* note 17.

114. *See, e.g.*, Rock, *supra* note 48, at 1016 ("[W]e come much closer to understanding the role of courts in corporate law if we think of judges more as preachers than as policemen.").

115. *See, e.g.*, Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 770-72 (2005) ("[C]ourts are extraordinarily willing to sustain decisions that apparently sacrifice profits (at least in the short run) ... as long as [they have] some conceivable relationship, however tenuous, to long run profitability ... [which] such a relationship can almost always be conceived." (footnote omitted)); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 16-17 (1979) ("As a practical matter, the business judgment defense is unlikely to fail in the absence of conflicts of interest, extraordinary amounts of profit foregone, or some other affirmative suggestion of bad faith. And all this is no less true because the defense is disingenuous." (footnote omitted)).

116. To be more precise, the managerial authority of the board of directors on which the business judgment rule is based is considered by the courts to be a core principle. *See, e.g.*, CA,

judgment rule actually serves the purposes of fiduciary law in corporate law's special circumstances. To suggest that the business judgment rule reflects a policy of non-enforcement is overly simplistic. In fact, it reflects a reasoned policy of prudential under-enforcement.[117]

Although Delaware defines the business judgment rule as a presumption, it might better be understood as a standard of review.[118] In fact, the business judgment rule comprises two standards of review. As to the actual substance of business decisions, the standard of review is waste or irrationality, which is almost insurmountable.[119] Thus, it is fair, if not quite perfectly accurate, to say that the business judgment rule operates as a policy of non-review as to such matters.[120] However, as to the decision-making process, the standard of review is gross negligence.[121] This is also a high hurdle for plaintiffs, but it is not insurmountable.[122]

However, deferential does not mean that directors are only required to refrain from waste and gross negligence. The courts are clear that directors must exercise "that amount of care which ordinarily careful and prudent men would use in similar circumstances."[123] What explains this discrepancy? Corporate law is

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Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 232 n.7 (Del. 2008) ("[T]he board's managerial authority under Section 141(a) is a cardinal precept of the [Delaware General Corporation Law]."); McMullin v. Beran, 765 A.2d 910, 916 (Del. 2000) ("One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors."); Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291 (Del. 1998) ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation.").

117. *See* Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519, 546-53, 571-80 (2012).

118. *See* Velasco, *supra* note 36, at 1238.

119. *See id.* at 1252-56 (discussing the waste standard).

120. *See, e.g.*, William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1297 (2001) ("[The business judgment rule] is an expression of a policy of non-review."); Lyman Johnson, *The Modest Business Judgment Rule*, 55 BUS. LAW. 625, 625 (2000) ("The business judgment rule ... is better understood as a ... policy of *non-review*."); *see also* Bainbridge, *supra* note 17, at 89-90 ("Alternatively, ... the business judgment rule can be seen as an abstention doctrine.").

121. *See* Velasco, *supra* note 36, at 1237-39 (discussing the gross negligence standard).

122. *See id.*

123. Graham *ex rel.* S'holders of Allis-Chalmers Mfg. Co. v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963).

characterized by a divergence between standards of conduct and standards of review.[124] The law requires directors to act with a relatively high standard of conduct—ordinary care[125]—but will only hold them liable for falling below a relatively low standard of review—for example, gross negligence.[126]

The legal basis for the business judgment rule is said to be a statutory command.[127] According to the Delaware General Corporation Law, "[t]he business and affairs of every corporation ... shall be managed by or under the direction of a board of directors."[128] Thus, it is the directors, rather than the shareholders or the courts, who should be making business decisions.[129] But why?

Many different justifications for the business judgment rule have been proposed. Because these justifications are well known to anyone familiar with corporate law, I will not go into them in much detail. Rather, I will briefly list the various justifications and argue that they have one important characteristic in common.

There are institutional choice arguments for the business judgment rule. It is often noted that courts are not business experts.[130] Therefore, they should not be second-guessing the decisions of

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124. *See generally* Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437 (1993).

125. *See Graham*, 188 A.2d at 130.

126. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("[U]nder the business judgment rule director liability is predicated upon concepts of gross negligence.").

127. *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) ("Under Delaware law, the business judgment rule is the offspring of the fundamental principle, codified in [Delaware General Corporation Law section] 141(a), that the business and affairs of a Delaware corporation are managed by or under its board of directors.").

128. DEL. CODE ANN. tit. 8, § 141(a) (2017).

129. *See Van Gorkom*, 488 A.2d at 872 ("The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors."); *see also* Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979) ("[B]y definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility.").

130. *See* Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000) ("Courts are ill-fitted to attempt to weigh the 'adequacy' of consideration under the waste standard or, *ex post*, to judge appropriate degrees of business risk." (quoting Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997))); Cuker v. Mikalauskas, 692 A.2d 1042, 1046 (Pa. 1997) ("[The business judgment] doctrine prevents courts from becoming enmeshed in complex corporate decision-making, a task they are ill-equipped to perform."); *Auerbach*, 393 N.E.2d at 1000 ("[T]he business judgment doctrine, at least in part, is grounded in the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments.").

directors.[131] This is especially true because of the phenomenon of hindsight bias.[132] Thus, judicial interventions are likely to be sub-optimal.

There are arguments based on risk. Business decisions are inherently risky: in order to generate wealth, corporations must be willing to take on appropriate entrepreneurial risks.[133] Shareholders willingly accept that risk.[134] They do so by choosing to buy stock in the corporation,[135] by deciding whether to diversify their investments,[136] and by electing the directors who will be making the risky decisions.[137] Shareholders should be permitted to take on risk, which includes both upside and downside potential.

Relatedly, there are liability concerns. Directors are inherently more risk averse than shareholders because they have more at stake—their jobs. If they were also exposed to the risk of being held personally liable for bad business decisions, they would be even less willing to take on business risks.[138] In fact, the potential for

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131. *See* Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982) ("[C]ourts recognize that after-the-fact litigation is a most imperfect device to evaluate corporate business decisions.").

132. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 619-23 (1998).

133. *See, e.g.*, *Joy*, 692 F.2d at 886.

134. *See id.* at 885 ("[S]hareholders to a very real degree voluntarily undertake the risk of bad business judgment. Investors need not buy stock, for investment markets offer an array of opportunities less vulnerable to mistakes in judgment by corporate officers."); Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996) ("Shareholders don't want (or shouldn't rationally want) directors to be risk averse. Shareholders' investment interests ... will be maximized if corporate directors and managers honestly assess risk and reward and accept for the corporation the highest risk adjusted returns available that are above the firm's cost of capital.").

135. *Joy*, 692 F.2d at 885 ("Since shareholders can and do select among investments partly on the basis of management, the business judgment rule merely recognizes a certain voluntariness in undertaking the risk of bad business decisions.").

136. *See id.* at 886 ("Shareholders can reduce the volatility of risk by diversifying their holdings.... Given mutual funds and similar forms of diversified investment, courts need not bend over backwards to give special protection to shareholders who refuse to reduce the volatility of risk by not diversifying." (footnote omitted)); *Gagliardi*, 683 A.2d at 1052 ("Shareholders can diversify the risks of their corporate investments.").

137. *Cf. In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968 (Del. Ch. 1996) ("If the shareholders thought themselves entitled to some other quality of judgment than such a director produces in the good faith exercise of the powers of office, then the shareholders should have elected other directors.").

138. *See id.* at 968 n.16 ("If those in charge of the corporation are to be adjudged personally liable for losses ... based upon what ... persons of ordinary or average judgment ... regard as 'prudent[,]' 'sensible[,]' or even 'rational[,]' such persons will have a strong incentive at the

crushing liability[139] could dissuade many competent people from being willing to serve as directors at all.[140] However, protecting directors from liability would increase their willingness to serve[141] and to take on appropriate business risks, as the shareholders desire.[142]

There are also arguments based on trust. As a general matter, director interests are aligned with shareholder interests.[143] Thus, courts need not police directors very closely. Deferential review allows courts to conserve judicial resources in most cases and focus attention on cases in which directors cannot be trusted because they have conflicts of interest.[144]

Finally, it has been argued that judicial review is not as necessary in the business context because various market forces provide accountability for directors' decisions.[145]

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margin to authorize less risky investment projects.").

139. *See* Kenneth B. Davis, Jr., *Once More, the Business Judgment Rule*, 2000 WIS. L. REV. 573, 575 ("In most cases, liability for negligence operates to shift the loss from a single human victim and spread it ... across a larger, more diversified group.... Imposing liability on the directors serves to re-concentrate [a] loss on a small handful of individuals.").

140. *See* Air Line Pilots Ass'n, Int'l v. UAL Corp., 717 F. Supp. 575, 582 (N.D. Ill. 1989) ("It would be considerably more difficult to recruit directors to serve on corporate boards if their business decisions were subject to substantive scrutiny."), *aff'd*, 897 F.2d 1394 (7th Cir. 1990).

141. *See id.* ("The business judgment rule encourages competent individuals to become directors who otherwise might decline for fear of personal liability.").

142. *See* Velasco, *supra* note 117, at 546-53 (discussing the room-for-error theory).

143. *See* Allen et al., *supra* note 120, at 1302 ("[A] board that is not conflicted is motivated to achieve the highest transaction price the market will permit. Because in those circumstances the board's interests and the interests of the shareholders are aligned, there is no reason for courts to engage in a substantive review of the board's decision."); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 117 (1965) ("Generally speaking, managers' incentives and interests coincide with those of their shareholders in every particular except one: they have no incentive, as managers, to buy management services for the company at the lowest possible price.").

144. *See* Velasco, *supra* note 13, at 654-55.

145. *See* Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-contractarians*, 65 WASH. L. REV. 1, 18-32 (1990) (discussing various market forces that constrain management conduct); Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 315 (1988) ("Competition in capital markets, product markets, and the market for corporate control all induce managers and directors of public corporations to act in ways consonant with shareholder welfare."); Robert B. Thompson, *The Law's Limits on Contracts in a Corporation*, 15 J. CORP. L. 377, 380-82 (1990) (describing various market forces that constrain management); Charles M. Elson & Robert B. Thompson, Van Gorkom*'s Legacy: The Limits of Judicially Enforced Constraints and the Promise of Proprietary Incentives*, 96 NW. U. L. REV. 579, 581 (2002) ("Product markets indirectly

Although these justifications seem fairly disparate, there is one thing that they have in common: they all redound to the benefit of the shareholders. In other words, properly understood, the business judgment rule does not exist for the benefit of the directors or the courts, but rather for the benefit of shareholders. Deferential review reflects a prudential judgment regarding the costs and benefits *to shareholders* of enforcement of breach of fiduciary duty. Given the limitations of the judiciary, shareholders do not want to rely too much on judicial interventions.[146] Moreover, given the risk aversion of directors, strict enforcement would be harmful to the shareholders' interests.[147] Thus, the law has settled on a policy of underenforcement for the benefit of shareholders.[148] That directors and courts may also benefit from underenforcement is entirely incidental.

It may seem fanciful to assert that shareholders actually prefer deferential review of directors' actions. However, there is strong evidence to support this view. In 1985, in the notorious case of *Smith v. Van Gorkom*, the Delaware Supreme Court held the directors liable for breach of the duty of care—notwithstanding the business judgment rule—finding that they were grossly negligent in approving a merger.[149] There was widespread agreement among commentators that the circumstances did not amount to gross negligence, and some thought they did not even amount to ordinary negligence.[150] This specter of newfound liability caused a panic, as

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constrain managers' decisions, as do the capital market, the market for managerial services, and the market for corporate control.").

146. *See* Velasco, *supra* note 89, at 70.

147. *See id.*

148. *See id.* ("After an implicit cost-benefit analysis, corporate law has come to the conclusion that shareholder interests are advanced best by underenforcement of the duty of care.").

149. Smith v. Van Gorkom, 488 A.2d 858, 874, 893 (Del. 1985); *see also* WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 234 (4th ed. 2012) ("*Van Gorkom* was the first Delaware case to actually hold directors liable for breach of the duty of care in a case in which the board had made a business decision.").

150. *See, e.g.*, William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 458 (2002) ("These failures of process may well have constituted ordinary negligence (though some observers dispute even that), but it is difficult to argue that those failures constituted true gross negligence."); William T. Quillen, Trans Union*, Business Judgment, and Neutral*

people questioned whether insurance companies would be willing to provide coverage to directors[151] and, as a result, whether directors would be willing to continue to serve.[152] Therefore, states passed laws known as "exculpation statutes" that allowed for the limitation or elimination of monetary liability for breach of the duty of care.[153] Delaware's statute has an opt-in provision, requiring shareholder approval.[154] Shareholders nearly universally adopted charter provisions eliminating liability for breach of the duty of care; moreover, there has been no significant push to repeal such provisions, even as shareholder activism has increased significantly since the adoption of such provisions.[155] Thus, the claim that shareholders prefer deferential review seems not only plausible but actually correct.

It is worth noting one theoretically possible justification that is not generally offered in defense of the business judgment rule. It is not maintained that the judicial deference is appropriate because of a lack of concern with breach of fiduciary duty.[156] Rather, deference reflects a deliberate decision to advance the interests of the shareholders.[157] Those interests are best advanced not by strict

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Principles, 10 DEL. J. CORP. L. 465, 498 (1985) ("[W]hatever anyone thinks of the directors' activity in [*Van Gorkom*], most commentators have not viewed the activity as grossly negligent.").

151. *See* Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1160 (1990) ("Delaware hoped to ease the insurance crisis by eliminating liability relating to duties typically covered by [directors and officers] insurance.").

152. *See* Roberta Romano, *What Went Wrong with Directors' and Officers' Liability Insurance?*, 14 DEL. J. CORP. L. 1, 1-2 (1989) ("There are reports of directors resigning because their firms had lost insurance coverage and of individuals declining invitations to serve on boards in increasing numbers.").

153. Different states have authorized exculpation provisions in different ways. *See generally* MODEL BUS. CORP. ACT ANN. § 2.02 cmts. 6-7, at 2-34 to -42 (AM. BAR ASS'N 2013) (comparing exculpation provisions across states); 2 WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 16.01-.08, at 16-1 to -24 (8th ed. 2019) (discussing history of exculpation provisions).

154. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2017).

155. Rock & Wachter, *supra* note 73, at 659-60.

156. *See* Velasco, *supra* note 13, at 654 ("[T]he business judgment rule does not exist because the duty of care is undervalued. At least, judges never express any such sentiment. To the contrary, they often opine on the importance of director diligence." (footnote omitted)); *see also* Velasco, *supra* note 117, at 539 ("Neither scholars nor courts argue that fiduciary duties are relatively unimportant and unworthy of additional enforcement.").

157. *See* Velasco, *supra* note 89, at 63 ("[I]t is not the case that fiduciary duty is unimportant in corporate law. Rather, the law is balancing general fiduciary law principles

enforcement of fiduciary duties but by a more deferential policy of underenforcement.

C. Conflicts of Interest in Corporate Law

The previous Section does not tell the whole story. It is fair to say that the business judgment rule applies primarily to claims of breach of the duty of care. In those cases, underenforcement is the appropriate policy because both the trust and risk rationales suggest that strict enforcement is unnecessary.[158] However, this is not true with respect to claims of breach of duty of loyalty. When directors face conflicts of interest, they are not as trustworthy.[159] In addition, the risk of self-dealing outweighs any concern about risk aversion.[160] Thus, "[t]he 'business judgment rule' ... yields to the rule of undivided loyalty."[161]

When confronting loyalty issues, corporate law takes a very different approach. By default, the courts subject director decisions to review under the fairness test: "[T]he burden is on the director ... not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein."[162] This is a far cry from the deference of the business judgment rule.

However, conflicts do not necessarily lead to the invocation of the fairness test. Rather, corporate law has come to accept an alternative solution to the problem of conflicting interests: approval by unconflicted decision makers.[163] Notwithstanding a director conflict, a transaction or decision will be subject to review under the business judgment rule instead of the fairness test if it is approved by a vote of fully informed, disinterested, and independent directors

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with practical considerations concerning the profit motive in order to achieve the best overall result for the shareholders.").

158. *See* Velasco, *supra* note 36, at 1239.

159. *See id.* at 1240.

160. *See id.* at 1242.

161. Bayer v. Beran, 49 N.Y.S.2d 2, 6 (Sup. Ct. 1944); *see also* Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) ("The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.").

162. Pepper v. Litton, 308 U.S. 295, 306 (1939). *See generally* Velasco, *supra* note 36, at 1239-44.

163. *See, e.g.*, DEL. CODE ANN. tit. 8, § 144(a) (2017).

or shareholders.[164] In theory, such approval eliminates the conflict altogether because it causes the decision to be made by unconflicted parties. Unconflicted directors themselves are an obvious alternative, because directors are the appropriate decision makers for the corporation and conflicted directors are simply excluded from the relevant vote. Unconflicted shareholders are not quite as obvious because shareholders are not the ordinary decision makers for the corporation. However, shareholders are the owners of the corporation, and they also elect the directors, so it is entirely fitting and proper that they should be able to essentially waive the conflict by approving the transaction or decision.

In short, the deference of the business judgment rule has little applicability when the duty of loyalty is at stake. Instead, the more rigorous fairness test applies. However, if the conflict of interests can be eliminated effectively, then corporate law is willing to provide the protection of the business judgment rule after all.

III. Fiduciary Wannabes

This Part will argue that the corporate law model does not work in the context of most other relationships and areas of law. Section A explains why this is so in general principle. Section B considers the corporate law model in the context of three specific examples: friends, parents, and politicians.

A. Corporate Law Model Does Not Work

The heart of fiduciary law is the beneficiary.[165] Fiduciary law exists to validate the trust that the beneficiary must have in the fiduciary.[166] Fiduciary duties are imposed to prevent abuse of the beneficiary at the hands of the fiduciary.[167] The fiduciary is required to pursue the interests of the beneficiary in all respects relevant to

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164. *See* Velasco, *supra* note 36, at 1241 & n.34. However, if the conflicted party is a controlling shareholder, then it would require the approval of the fully informed, disinterested, and independent directors *and* shareholders to invoke the business judgment rule. *See* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 645-46 (Del. 2014).

165. *See* Velasco, *supra* note 1, at 159.

166. *See id.*

167. *See id.*

the relationship.[168] Thus, fiduciary law requires the fiduciary to engage in self-denial: a fiduciary may not pursue his own interests, but must subordinate them to those of the beneficiary.[169]

It is safe to assume that beneficiaries generally want and appreciate the protections of fiduciary law. After all, they are in a structurally vulnerable position.[170] As a general matter, beneficiaries may well trust their fiduciaries, but the former nevertheless would want the option of legal redress should the latter prove to be unfaithful.

Moreover, in classic fiduciary contexts, strict enforcement is a real possibility. Because fiduciaries use powers that do not naturally belong to themselves but rather belong to the beneficiaries, the law can require self-denial as a matter of both legitimacy and practicality.[171] Although reasonable people can disagree on whether it is ideal to do so, there is no doubt that it is workable.

In most nonfiduciary relationships, fiduciary duties that require such self-denial would not work very well. First, such duties would lack legitimacy. In modern society, people expect to be able to pursue their own interests freely, provided only that they comply with restrictions imposed by law.[172] Second, it would be impractical to enforce fiduciary duties. Even a pervasive duty of care would be theoretically problematic, although it might be workable. However, a rigorous duty of loyalty would not be realistically possible. We understand, accept, and expect that people generally pursue their own interests. Although they may sometimes act in an other-regarding manner, they rarely engage in self-denial and cannot be expected to do so. Moreover, the duty of loyalty prohibits not only actual abuse but even any conflicts of interest.[173] It would be more or less impossible to enforce a prohibition against conflicts of interest in many if not most relationships.

For these reasons, fiduciary law should be carefully cabined. Fiduciary duties ought not to be imposed where they would not work.

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168. *See supra* note 34 and accompanying text.
169. *See supra* notes 34-35 and accompanying text.
170. *See* Velasco, *supra* note 1, at 161.
171. *See* Velasco, *supra* note 13, at 697 & n.302.
172. *See, e.g.*, TYLER, *supra* note 55, at 170.
173. *See* Miller, *supra* note 34, at 972 & n.4.

Some may argue that corporate law is a fiduciary relationship in which fiduciary duties are not strictly enforced. Thus, perhaps relationships can be considered fiduciary even when strict enforcement of fiduciary duties is inappropriate. It would seem that strict enforcement is not a necessary aspect of fiduciary law.

This argument falls short for various reasons. First, strict enforcement would be possible in corporate law. In fact, a strict prohibition of conflicts of interest was once in place.[174] My argument is that if fiduciary law could not work, then it does not fit and should not be imposed.

Second, although corporate law does underenforce fiduciary duties, it does so for reasons that are entirely consistent with the purposes of fiduciary law. As previously discussed, under-enforcement does not exist to protect the fiduciary, but rather to advance the interests of the shareholders.[175] On care issues, shareholders actually desire the underenforcement in order to incentivize risk-averse managers.[176] On loyalty issues, however, there is much less under-enforcement; because directors cannot be trusted, they are subject to much more rigorous judicial review.[177] Thus, although corporate law implements fiduciary law in a unique way, it does so not only consistently with the basic purposes of fiduciary law but actually in furtherance thereof.

As a result, corporate law is not the appropriate model for the expansion of fiduciary law principles into new areas of law. In most relationships that are not classically fiduciary in nature, fiduciary duties would not work and, indeed, would be somewhat illegitimate.[178] However, it is not the case that the beneficiaries would not

174. *See* Harold Marsh, Jr., *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 36 (1966) ("In 1880 it could have been stated with confidence that in the United States the general rule was that any contract between a director and his corporation was voidable at the instance of the corporation or its shareholders, without regard to the fairness or unfairness of the transaction.").

175. *See supra* Part II.B.

176. *See supra* notes 133-37 and accompanying text.

177. *See, e.g.*, Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993).

178. *Cf.* Velasco, *supra* note 35, at 77 ("Excessive expansion of fiduciary law presents myriad problems. Most obviously, the imposition of severe duties and extreme remedies upon unexpecting and undeserving parties is problematic and unfair. A less obvious, but nevertheless important, concern is the likelihood that aggressive expansion of the scope of fiduciary law may lead to its diminution.").

want the protections. Likely they would—at least *as beneficiaries*.[179] Rather, it is the fiduciary who would object to the imposition of fiduciary duties, and the rest of society—including, perhaps, the beneficiaries *as potential fiduciaries* in other relationships—who would agree.[180] Under such circumstances, the nonenforcement of fiduciary duties would not be in furtherance of the interests of the beneficiary. Rather, it would be based on a policy decision that runs counter to the interests of the beneficiary.[181] This makes it an inappropriate endeavor: an attempt to avoid fiduciary law principles for nonfiduciary law reasons.

In other words, a fiduciary judgment rule modeled on the business judgment rule would amount to little more than a legal gimmick: a way to take the desired advantages of fiduciary law without accepting the undesirable ramifications. Such a ploy should not be permitted to succeed. If a relationship cannot bear the weight of fiduciary law, then it should not be considered a candidate for its expansion.

Moreover, a fiduciary judgment rule based on the business judgment rule often would be radically insufficient to allow the application of fiduciary law principles into new relationships. This is because the judicial deference of the business judgment rule applies only to care issues.[182] However, the more serious problems with an expansive fiduciary law lie in the duty of loyalty and the prohibition of conflicts of interest. As to these matters, the business judgment rule provides little to no protection, and thus neither would a broader fiduciary judgment rule modeled after it.

To be fair, corporate law does provide ways for conflicted transactions to avoid the rigorous judicial review of the fairness test. If conflicted transactions are approved by fully informed and disinterested directors or shareholders, then the protections of the business judgment rule can be reclaimed.[183] However, it is important to note that such a move is, in a very real sense, the elimination of the conflict of interest: the relevant decision is made by unconflicted

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179. *See id.* at 76.
180. *See id.* at 77.
181. *Cf. supra* Part II.B.
182. *See supra* Part II.C.
183. *See supra* notes 163-64 and accompanying text.

parties.[184] Moreover, such decisions are not being made by unrelated unconflicted parties, but by legitimate decision makers: either other fiduciaries or the beneficiaries. In corporations, this means either unconflicted directors, who are the most appropriate decision makers, or shareholders, whose approval could be considered a waiver.[185]

In many other relationships, there would be no analogous decision makers through whom it could be said that the conflict of interest has been negated.[186] Of course, third-party decision makers are available, and the courts are the most obvious example. However, other third-party decision makers generally would not have the kind of inherent legitimacy that directors and shareholders do. Thus, corporate law does not provide a sufficient model for the expansion of fiduciary law principles into areas in which it does not naturally belong.

B. Examples

This Section will consider in more depth three types of relationships that legal scholars have suggested should be considered fiduciary relationships: friends, parents, and politicians. I do not consider the question of whether such relationships ought to be considered fiduciary as a moral matter or on policy grounds. Rather, I seek to show that they ought not to be considered fiduciary relationships because fiduciary law could not practically be applied to them generally. I also argue that the business judgment rule, properly understood, does not provide the kind of help that would be necessary to make it work.

1. Friends

Ethan Leib has argued that friendship should be considered a fiduciary relationship.[187] He demonstrates that some courts have

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184. *See supra* notes 163-64 and accompanying text.

185. *See supra* Part II.C.

186. *See supra* notes 163-64 and accompanying text; *infra* notes 216-17, 250-51 and accompanying text.

187. *See* Leib, *supra* note 8.

considered it so, and then argues that this is appropriate.[188] However, in order to make it work, he must resort to a "friendship judgment rule."[189]

The basic fiduciary duty is that a fiduciary must pursue the interests of the beneficiary in all matters related to the relationship.[190] Clearly, this rule taken seriously could not be applied to friendships. The friendship relationship is simply too broad.[191] There is little to nothing that lies outside of its scope.[192] Thus, fiduciary law principles potentially would require friends to pursue each other's interests in nearly all matters. It would be possible to cabin the duty to allow friends to pursue their mutual benefit, rather than exclusively the other's benefit, as in the case of partnerships. However, even so it would remain unworkable in friendships. People cannot be expected to put their individual or even selfish interests to the side very often.[193] Therefore, it would be necessary to find a way to limit the scope of fiduciary duty.

Consider the duty of care as applied to friendship. Friends would have a duty to monitor each other to be aware of each other's needs and a duty to use reasonable efforts to assist.[194] Whether such assistance would have to be material and financial or simply emotional, it would still be quite a burden. Consider next the duty of loyalty. A friend would not be able to do anything that would cause harm to the friend or the friendship.[195] Moreover, in order to comply with the duty of loyalty, friends would have to avoid conflicts of interest.[196] This would be unmanageable. Friends perpetually have conflicts in their lives, whether for oneself or for another friend; they simply manage to deal with them.[197] But fiduciary law

188. *See id.*
189. *See id.* at 709.
190. *See supra* note 34 and accompanying text.
191. *See* Velasco, *supra* note 35, at 92-93.
192. *See supra* note 77 and accompanying text.
193. *See* Velasco, *supra* note 35, at 92.
194. *Cf.* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("[D]irectors have a duty to inform themselves ... of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties.").
195. *See* Miller, *supra* note 34, at 972.
196. *See id.*
197. *See* Velasco, *supra* note 35, at 92.

prohibits conflicts, or at least regulates them.[198] Thus, fiduciary duties do not work well in the context of friendship.

There might be ways to limit the impact of fiduciary law principles. For example, it could be held that only close friends are fiduciaries.[199] Setting aside the difficulty of defining the closeness of friends,[200] this still seems inadequate. Presumably, most people have multiple close friends, and therefore the burdens and conflicts would remain high. Even if it were limited to best friends, we might mitigate the care issues but not the loyalty issues. It is virtually impossible, even for a mutually exclusive friendship, not to involve conflicts of interest.[201] Friendship involves generosity, and generosity necessarily involves conflicts of interest—in the decision of whether to be generous or selfish on any particular matter.

Another possible solution would be to limit the scope of friendship to financial matters. This would greatly alleviate the burdens and conflicts because issues involving only time and affection would no longer be litigable. However, it would also be an extremely arbitrary limit that undermines the very concept of friendship. Friendships are rarely, or at most only incidentally, about money.[202] To limit fiduciary duties in friendship to financial matters suggests that the true goal is not to make friendships fiduciary relationships but rather to make friendship a factor in considering whether to make another financial relationship a fiduciary one. This seems to be what Professor Leib was really trying to do.[203] However, to the extent that the friendship factor is heavily weighted, the problems remain; to the extent that it is weighted lightly, it becomes less meaningful.

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198. *See supra* notes 163-64, 173 and accompanying text.

199. *See* Leib, *supra* note 8, at 708; *cf.* Del. Cnty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017, 1023 (Del. 2015) (close friendship of fifty years).

200. *See* Velasco, *supra* note 35, at 91.

201. *See id.* at 92.

202. *Cf.* Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L.Q. 821, 859 (2004) ("Surely there are many things that one would not do for money that one might nevertheless do for a friend.").

203. *Cf.* Leib, *supra* note 8, at 704 ("Although most courts will concede that a friendship alone cannot trigger the responsibilities of a fiduciary relation, some will still acknowledge that friendship 'is often an important consideration and undoubtedly furnishes a vantage ground for one is not likely to expect a friend to deceive him into a bad bargain.'" (emphasis omitted) (quoting Meginnes v. McChesney, 160 N.W. 50, 52 (Iowa 1916))).

Either way, the boundaries would be difficult to establish with any degree of certainty. Leib's own example illustrates the point: he suggests that a shared dream of establishing "an environmentally friendly beverage company in China" should somehow limit the ability of one friend to pursue such a business without the other.[204] According to Leib's view, fiduciary duty should prevent this even though "neither [friend] had suggested to the other that their business idea was confidential," and even though no "theft claim or intellectual property claim could be sustained."[205] However, the law does not protect such ideas for good reason: it is generally the execution rather than the idea that adds value. To allow discussions among friends to unsettle legal expectations in this way could have very far-reaching consequences.[206] If this were settled law, it is likely that such friends would appear in very many circumstances, and the friendship exception could easily undermine many a general rule of law.[207]

Leib offers other ways to limit the severity of his proposal: the adoption of a "friendship judgment rule," which would "defer[ ] to the judgment of friends unless departures from good behavior are manifest."[208] Although he models his friendship judgment rule after the business judgment rule, there are at least two important ways in which the former diverges from the latter.

First, the purpose of the friendship judgment rule is not to benefit the beneficiary but rather to make the unworkable proposal manageable.[209] However, a vulnerable friend (in this case, the beneficiary of the friendship) who has been abused by another friend (the fiduciary) would surely desire protections ex post. In fact, he likely would desire them ex ante, as well, in order to prevent abuse. If he were not to desire such protections ex ante, the reason would have nothing to do with his role as a beneficiary; it would be because

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204. *Id.* at 666.

205. *Id.* at 666-67.

206. *See* Eric Goldman, *I'm Not Sure I Want to Be Ethan Leib's Friend Any More*, CONGLOMERATE (July 30, 2008), https://www.theconglomerate.org/2008/07/eric-goldman-on.html [https://perma.cc/9RYG-WSTU].

207. *See id.*

208. Leib, *supra* note 8, at 709-10.

209. In fact, Leib's proposals are discussed under the heading "How To Treat Friends as Legal Fiduciaries." *Id.* at 707.

he would not want fiduciary duties to be applied to himself when he is acting as a fiduciary. This is entirely different from the rationale of the business judgment rule, which is premised on the benefit of underprotection to shareholders as beneficiaries.[210] Thus, the business judgment rule preserves the most fundamental principle of fiduciary law—the protection of the beneficiary from abuse at the hands of the fiduciary—while a friendship judgment rule would not.

The second problem with this proposal is that it does not do much to solve the problem because such a rule would only apply to duty of care cases, whereas the real problems arise in duty of loyalty cases. Therefore, Leib further proposes that duty of loyalty cases not be strictly enforced.[211] He argues by analogy to the law of close corporations.[212] That analogy makes sense in principle, because just as partners are all equally fiduciaries and beneficiaries of each other, the same can be said of friends. However, Leib simplifies corporate law too much. He argues that, with respect to close corporations, "courts tend to employ 'remedial approaches which focus on the putative fiduciary's wrongful conduct' rather than on 'prophylactic fiduciary principles to prevent or resolve intra-corporate conflicts' or on 'the beneficiary's best interests.'"[213] In fact, however, corporate law is not quite as deferential as Leib suggests. In close corporations, prohibited conduct includes far more than merely engaging in "wrongful conduct" such as fraud or violation of clearly identifiable rights. Rather, the courts tend to prevent majority shareholders from frustrating the "reasonable expectations" of minority shareholders.[214] This is a demanding standard. To require a judicial resolution of friendship disputes in order to determine whether a given expectation is reasonable would be impractical and lead to great uncertainty.

Generally, when corporate law encounters a conflict of interest, it requires judicial review unless the decision is shifted to

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210. *See supra* Part II.B.

211. *See* Leib, *supra* note 8, at 710-12.

212. *See id.* at 711.

213. *Id.* (quoting Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1676 (1990)).

214. *See, e.g.*, *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984); Meiselman v. Meiselman, 307 S.E.2d 551, 559 (N.C. 1983).

appropriate unconflicted decision makers.[215] In the context of friendship, there is no such decision maker available. The only possibility would be third-party friends, but such an option would be unworkable[216] even in the unlikely situation that it could be considered legitimate.[217]

Thus, friendship would not be workable as a class of fiduciary relationships. Leib realizes this,[218] and tries to make it more workable by resorting to the business judgment rule.[219] However, his efforts are unsuccessful. Fiduciary law principles do not fit friendship relationships, and the business judgment rule does not help them to do so. Thus, friendship should not be considered a fiduciary relationship.[220]

2. Parents

Elizabeth Scott and Robert Scott have argued that parents should be considered fiduciaries.[221] For many it would seem obvious that parents should be considered fiduciaries, and some foreign jurisdictions consider them to be.[222] However, as Scott and Scott admit, the United States does not.[223] Nevertheless, the authors do not spend very much time arguing that the category of parenting meets the criteria of a fiduciary relationship. They merely point out that parenting "shares important features with other legal relationships that have been ... defined" as fiduciary in nature, such as

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215. *See supra* notes 163-64 and accompanying text.

216. Different friends would likely come to different conclusions without regard to legal principles. The person who got to choose the "unconflicted" friend to decide the question would likely get to decide the outcome indirectly.

217. Unlike directors and shareholders, third-party friends have no authority in the friendship relationship in question. *See* Velasco, *supra* note 35, at 91. Thus, their decisions would lack inherent legitimacy, which could only be created by mutual consent.

218. *See* Leib, *supra* note 8, at 711 ("[I]t would be very hard to require friends to be fully altruistic.").

219. *See id.* at 709-10.

220. In fact, it should not be considered an important factor in determining whether another relationship should be considered fiduciary, either.

221. Scott & Scott, *supra* note 9, at 2401; *see also* Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 6, at 227, 227.

222. *See, e.g.*, Lionel Smith, *Parenthood Is a Fiduciary Relationship*, 70 U. TORONTO L. J. 395, 396 (2020) (discussing a Canadian court case recognizing parents as fiduciaries).

223. Scott & Scott, *supra* note 9, at 2407-08.

"information asymmetries," "discretion," and "vulnerab[ility]."[224] These factors generally do appear in fiduciary relationships; however, without more, they are inadequate to sustain the categorization of a relationship as fiduciary under fiduciary law principles.

Scott and Scott's argument is not so much that parenting is a fiduciary relationship as that it could be and should be. They believe that fiduciary law principles would be helpful "to advance the interests of children,"[225] a normative goal that they assume.[226] Thus, they seek to develop a "relational model of parents as fiduciaries."[227] Rather than following a typical doctrinal approach, this model focuses on how legal and extralegal devices employ monitoring and bonding arrangements to reduce conflicts of interest at the least cost.[228] Although this model can generate interesting insights into fiduciary relationships, it can do so equally well for nonfiduciary relationships. Monitoring and bonding are not fiduciary-specific concepts.[229] Thus, demonstrating that these concepts can be helpful for considering the regulation of parenting does not establish that parenting should be considered a fiduciary relationship.

Applying their model, Scott and Scott argue that intact families are sufficiently regulated by extralegal forces as to not need the type of strict legal enforcement of fiduciary duties that usually accompany fiduciary status, while non-intact families require more enforcement.[230] For present purposes, it may be easily granted that

224. *Id.* at 2402, 2420.

225. *Id.* at 2403 n.5; *see also id.* at 2418 ("[F]amily law could usefully employ analogies drawn from the legal treatment of other relationships similarly subject to substantial conflicts of interest.... [F]iduciary relationships seem particularly relevant, and on inspection the relationship between parent and child shares many features in common with this category of relationships. Indeed, the fiduciary heuristic seems to capture the essence of the argument for a legal regime that is grounded in parental obligation to serve the child's interests.").

226. *Id.* at 2403 n.5 ("The utility of this perspective depends in part on whether the normative premise of the focus on children's welfare is attractive, a point which might be debated. We do not propose to enter this debate. Rather, our purpose is to examine the implications of thinking about family relationships from a fiduciary perspective, *assuming* that the normative goal is to advance the interests of children.").

227. *Id.* at 2404, 2430.

228. *Id.* at 2421-22.

229. *Cf.* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1165 (2014) ("Many of corporate law's monitoring and bonding mechanisms—disclosure and reporting requirements, incentive-based compensation, and the like—have little to do with [various] fiduciary duties.").

230. Scott & Scott, *supra* note 9, at 2452 ("The character of legal regulation will differ

intact families would require less legal regulation than non-intact families. But that in no way suggests that fiduciary law is the appropriate type of regulation. Extralegal and legal mechanisms are potential substitutes for one another in all areas of law. The fact that extralegal mechanisms are generally satisfactory in intact families actually suggests that fiduciary law principles are not necessary to protect parenting. The fact that extralegal mechanisms are generally insufficient in the context of non-intact families suggests that more legal regulation is necessary, but it does not indicate that the regulation should be by way of fiduciary law.

In any event, the purpose of this Section is to show that applying fiduciary law principles to parenting would be unworkable. Scott and Scott are aware of the difficulties involved.[231] Most importantly, the parenting relationship is simply too broad—and the authors admit as much.[232] Moreover, it would be impossible to eliminate conflicts of interest.[233] Parents give of themselves, of their time, and of their wealth to raise their children.[234] Thus, parenting necessarily involves conflicts of interest.[235] This strongly suggests that fiduciary law principles are inapposite.[236] Although conflicts are inevitable,

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depending on whether or not the family is intact. In the intact family, extralegal norms do much of the work to promote desired parental behavior.... The optimal regulatory patterns change when the subject of legal regulation is the non-custodial parent. Here, legal regulatory prescriptions are necessary substitutes for the informal norms that are relied upon in the intact family.").

231. *Id.* at 2402 ("Particular features of the parent-child relationship distinguish it from most traditional fiduciary relationships ... and thus present some unique challenges. This relationship is broader in scope than are many other fiduciary relationships. Beyond this, the parental relationship, once established, has intrinsic value for the child that extends beyond successful performance of caretaking tasks.").

232. *Id.*; *see also id.* at 2416 ("The scope of the relationship between parents and children and the range of parenting tasks are very broad.").

233. *Cf. id.* at 2430 ("Given the extensive scope of the relationship, a prescription that parents must systematically subordinate their personal interest to that of the child when the two are in conflict seems unduly burdensome.").

234. *Cf. id.* at 2416 ("Parenting places substantial demands on the time, energy and resources of those who undertake the job, and good parenting requires giving the role a high priority relative to others in parents' lives.").

235. *Cf. id.* at 2416-17 ("Inevitably, parents experience conflicts between the claims of parental obligation and other interests that may interfere with the fulfillment of parental duty.").

236. It is worth noting that the conflicts involved in parenting are entirely different than the kind involved in classic fiduciary relationships. In fiduciary relationships, the fiduciary is tempted to use the beneficiary's assets or powers for his own benefit. *See* Miller, *supra* note

parents can be encouraged and even required "to perform the services of parenthood with reasonable diligence."[237] However, fiduciary law is not necessary for this purpose. Moreover, because "undivided and unselfish loyalty" is not possible, fiduciary law is inappropriate.[238]

To overcome this burden, Scott and Scott develop a presumption that they call a "parental judgment rule."[239] Although this label is intentionally reminiscent of the business judgment rule and described as "analogous" to it,[240] it is not the same. The authors acknowledge that "even the relaxed standard for avoiding conflicts of interest between corporate directors and shareholders would be costly if applied to parents."[241] Yet they never define the scope of their desired presumption. The most obvious and crucial difference is that the business judgment rule provides no protection for conflicts of interest, while Scott and Scott's proposed parental judgment rule does.[242] Apparently, the parental judgment rule is a broad rule of deference to parental judgment when extralegal mechanisms are adequate to protect the interests of the child—for example, in intact families.[243] But this amounts to an admission that the protections of fiduciary law are unnecessary in intact families.

Scott and Scott argue that extralegal mechanisms break down with respect to non-intact families, and greater legal regulation becomes necessary.[244] This can easily be admitted, but that does not mean that fiduciary law is the appropriate means of regulation. Moreover, non-intact family parenting presents the same difficulties as intact family parenting: the relationship remains broad and

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34, at 972. In parenting, the parent is torn as to the use of the parent's assets and powers, not the beneficiary's. There is a conflict of interests, but it is not in the nature of a fiduciary conflict. *See* Velasco, *supra* note 35, at 93.

237. Scott & Scott, *supra* note 9, at 2419.

238. *See* Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

239. Scott & Scott, *supra* note 9, at 2438.

240. *Id.* at 2437-38.

241. *Id.* at 2437.

242. *See id.* at 2437-38.

243. *See id.*

244. *Id.* at 2446-51.

conflicts of interest remain unavoidable.[245] Thus, fiduciary law principles remain inappropriate. Some other solution is necessary.

At the very least, it is clear that corporate law does not provide the model for expanding fiduciary law into family law. The business judgment rule, which underenforces the duty of care but not the duty of loyalty,[246] would be inadequate. Scott and Scott's parental judgment rule extends to conflicts of interest situations and thus cannot be fairly said to be modeled after the business judgment rule.[247] Nor would corporate law's means of eliminating a conflict of interest be available in the context of parenting. In order to reclaim the protections of the business judgment rule, corporate law requires that conflicts of interest be decided by unconflicted parties.[248] The most obvious alternative would be the courts, but Scott and Scott clearly want to avoid excessive legal intrusion into the parent-child relationship.[249] The other options for unconflicted decision makers in corporate law are directors (fiduciaries) and shareholders (beneficiaries). However, parenting offers no workable analogs. The direct analog to unconflicted directors would be unconflicted parents, but there are none.[250] The direct analog to unconflicted shareholders would be unconflicted siblings, but presumably children are not adequate decision makers. Thus, the corporate law paradigm would require judicial involvement in all conflict situations—which is essentially to say that it would require constant judicial involvement.[251]

In conclusion, fiduciary law principles could not realistically be applied to the parenting relationship. Scott and Scott realize this and try to develop a rule of deferential enforcement patterned after corporate law's business judgment rule. However, the corporate law principles do not make the situation any more workable. Thus, what Scott and Scott seek is not really a "parental judgment rule," but

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245. In addition, the conflicts remain of a different nature than in fiduciary relationships. *See supra* note 236 and accompanying text.

246. *See generally* Velasco, *supra* note 89, at 66-70.

247. *See* Scott & Scott, *supra* note 9, at 2424, 2438.

248. *See supra* Part II.C.

249. *See* Scott & Scott, *supra* note 9, at 2417, 2441.

250. This is true in both intact and non-intact families. *See* Velasco, *supra* note 35, at 93.

251. Arguably, an analog to the courts would be some sort of state agency. In either case, legal enforcement would be necessary.

rather a rule of deferential enforcement. It seems that what they really want is the rhetoric of fiduciary law without the consequences that follow. In such a situation, metaphor is a better solution than law.

3. Politicians

Teddy Rave has argued that politicians should be considered fiduciaries.[252] He acknowledges the difficulties with doing so, but he argues that the "corporate law framework" can help to overcome these obstacles.[253] The corporate law framework that Rave relies on consists of the business judgment rule coupled with the fairness test.[254]

This example is significantly more delicate than the previous two. The shift from private law to public law makes a big difference for various reasons.[255] However, these are all beyond the scope of this Article. I set aside issues relating to the fundamental legitimacy of Rave's claims and focus exclusively on issues of fit: whether fiduciary law can be applied to politicians as a practical matter and whether the business judgment rule (or the corporate law framework) helps mitigate any problems. I maintain that the answer is no to both questions.

To begin with, as with friends and parents, there is a significant issue as to politicians regarding the scope of the fiduciary relationship. On the surface, this might not seem to be the case. After all, the political relationship could easily be cabined to the act of legislating, making it seem to be an extremely narrow relationship. However, legislation itself is entirely open-ended. This means that

252. *See* Rave, *supra* note 10, at 677.

253. *Id.* at 723 ("A similar framework can help to address the agency problem in the political process, without forcing courts to make the types of judgments for which we question their institutional competence.").

254. *See id.*

255. Fiduciary law is a private law concept and is not easily transferred to public law. *Id.* at 718 ("One must be careful in drawing analogies from private law."). In addition, imposing fiduciary law on politicians raises serious constitutional law issues. *Id.* at 720 ("Many would contend that judicial review is usually reserved for textually enumerated constitutional rights."). For a general critique of applying fiduciary law principles to governance, see generally Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479 (2020); Davis, *supra* note 229.

lawmakers are deciding *everything* for their beneficiaries, at least potentially. Moreover, almost any piece of legislation could be the basis for a conflict of interest for at least some legislators, and each legislator could be expected to face conflicts on many subjects that they will have to vote upon. This is problematic because the corporate law model breaks down if there are many unavoidable conflicts of interest.[256]

Rave attempts to avoid the problem of scope by advancing a very narrow position. He argues that "political representatives should also be treated as fiduciaries, subject to a duty of loyalty, which they breach when they manipulate election laws to their own advantage."[257] Moreover, he claims to limit his "focus to gerrymandering in state legislatures because that is the area where the conflict of interest is most stark."[258] As a result, he does not propose a fully developed theory of the applicability of fiduciary law to politicians. Although a detailed theory may not be necessary to address the specific issue on which he focuses, a robust understanding of the corporate law model and the theory behind the business judgment rule is necessary in order to determine whether they can be adopted in the political realm. As I will show, they cannot. First, the rationale of the business judgment rule does not apply to politics. Second, a more detailed understanding of how the corporate law model works reveals that it would not be very useful in the political realm.

First, there is theory. Rave does not seem to appreciate the pervasive nature of fiduciary principles in corporate law. He does not acknowledge the extensive demands of fiduciary duty on all business decisions.[259] Instead, he quickly jumps to the deference of the business judgment rule, noting that "[i]n most transactions, courts adopt a deferential approach to reviewing the business judgments of corporate directors."[260] His understanding of the rationale for this deference is not very robust, relying almost

256. *See generally* Velasco, *supra* note 1, at 165.

257. Rave, *supra* note 10, at 677.

258. *Id.* at 678. Despite the limited focus, Rave discusses various cases involving congressional redistricting throughout his paper. *See id.* at 688-91, 724 n.303.

259. *Cf. supra* note 4 and accompanying text.

260. Rave, *supra* note 10, at 700.

entirely on the "institutional incompetence" of the courts.[261] Although this is one justification for the business judgment rule, it is only a small part of the picture. Courts are institutionally incompetent as to many—arguably, most—matters that come before them, but this is not enough to create a generally applicable rule of judicial deference.[262] The business judgment rule is special. If the corporate law model is to be the basis for extending fiduciary law into the political sphere, there must be a stronger nexus between the business judgment rule and any political judgment rule.

The other justifications for the business judgment rule do not transfer very well to the political realm. Citizens cannot be said to voluntarily assume the risk of politics because they have no means of avoiding such risk. Unlike investors who can avoid risky stock, citizens cannot avoid legislation by not voting. In addition, there is no reason to suppose that they want to incentivize risky behavior by politicians. Thus, risk is not a reason to protect politicians' decisions from judicial review. Nor could it be said that citizens trust their politicians because their interests are aligned. The multivariable nature of politics makes alignment difficult to assert, and the current polarized state of political affairs makes the claim seem entirely implausible. One could more plausibly argue that other market forces—including elections themselves—are sufficient to obviate the need for strict enforcement of fiduciary duties.[263] However, this is debatable at best and almost certainly incorrect as to permanent minorities.[264] In short, the rationale of the business judgment rule is not applicable to the political realm, and thus it cannot reasonably be the basis for a political judgment rule.[265]

Without the business judgment rule, courts frequently would be required to enforce fiduciary duties. If so, this would be true not

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261. *Id.*

262. *See* Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287, 307 (1994) ("[S]uch lack of judicial expertise does not distinguish business decisions from medicine and innumerable other fields in which the negligence system holds sway." (footnotes omitted)).

263. *See, e.g.*, Rave, *supra* note 10, at 716.

264. *See, e.g.*, Oliver Hall, *Death by a Thousand Signatures: The Rise of Restrictive Ballot Access Laws and the Decline of Electoral Competition in the United States*, 29 SEATTLE U. L. REV. 407, 415-16 (2005).

265. *See supra* note 16 and accompanying text.

only for process but also for substance.[266] Rave acknowledges that this would be problematic.[267] Institutional incompetence is one strong argument against expansive judicial review. Constitutional concerns, such as separation of powers, provide another set of reasons why it would not be considered desirable.[268] On the level of fundamental principles of fiduciary law, it would be almost impossible to identify the interests of the beneficiary-citizens that the fiduciary-politicians would be charged with pursuing in a multicultural society.[269] There is no single goal, such as wealth maximization, to focus on.[270] To the contrary, the goal of social welfare is entirely open-ended and therefore difficult to review objectively. Thus, politics is not a good fit for fiduciary law.

Second, there is practice. Rave's account of the corporate law model is perfectly reasonable as an overview but a little too simplistic for purposes of implementation. A more detailed understanding of the corporate law model reveals that it would not work as he hopes. For example, the protections of the business judgment rule are not lost whenever there is a conflict of interest.[271] In order to invoke the fairness test, the conflict must rise to the level of self-dealing.[272] Self-dealing is a narrow concept. "Classic examples of [self-dealing] ... involve either a director appearing on both sides of

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266. *See* Velasco, *supra* note 202, at 829-30 ("[T]he business judgment rule consists of two separate components: one dealing with process and one dealing with substance.").

267. *See* Rave, *supra* note 10, at 723.

268. *Cf. id.* at 720 ("Many would contend that judicial review is usually reserved for textually enumerated constitutional rights." (citing Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121-22 (1998))).

269. *See id.* at 719 ("[O]n most issues the people's interests will diverge and will often be in direct conflict. Even identifying the relevant group of people to consider as the principal is not straightforward."); *see also* Davis, *supra* note 229, at 1206 ("Politicians ... are not like private fiduciaries. They do not serve discrete classes of beneficiaries, and they are subject to demands that cannot be distilled into a discrete maximand.").

270. *See* Rave, *supra* note 10, at 718-19 ("In a public corporation, ... the primary interest of the principals is generally presumed to be fairly uniform—to maximize shareholder value. In the political context, on the other hand, the interests of the principals are far from uniform." (footnote omitted)); *see also* Davis, *supra* note 229, at 1150 ("There is no single maximand that a public official must pursue, and no generally accepted means for her to pursue it.").

271. *See* Rave, *supra* note 10, at 678 ("[W]hen corporate agents engage in conflicted transactions, courts apply a strict standard of review.").

272. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) ("[T]he intrinsic fairness standard ... will be applied only when the fiduciary duty is accompanied by self-dealing.").

a transaction or a director receiving a personal benefit from a transaction not received by the shareholders generally."[273] Self-dealing is likely to have limited applicability in politics. For example, in gerrymandering, it would only apply when politicians are redrawing their own districts. This is why Rave focuses on redistricting at the state level—it is the easy case.[274] However, when state legislators are redrawing congressional districts, there is no self-dealing. The state politicians are disinterested because they have no direct benefit. Neither is there self-dealing when there is bipartisan gerrymandering.[275] Thus, the fairness test would not apply and the deference of the business judgment rule would shield most gerrymandering. In fact, because of the self-dealing requirement, the fairness test would apply to very few cases.[276]

273. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 362 (Del. 1993).

274. *See* Rave, *supra* note 10, at 724 n.303 (discussing the complexity of extending his analysis to gerrymandering of congressional districts).

275. Rave argues that bipartisan gerrymandering is "[p]erhaps even more insidious." *Id.* at 682. However, he does not demonstrate how it amounts to self-dealing in the corporate law sense. The negotiation and compromise involved are incompatible with a claim of classical self-dealing.

276. Perhaps it could be argued that self-dealing is not so limited. After all, the definition of self-dealing includes not only situations in which the fiduciary appears on both sides of the transaction but also situations in which the fiduciary receives a personal benefit not received by the beneficiaries generally. *See Cede & Co.*, 634 A.2d at 362. Legislation in which politicians get something to the exclusion of all others may be fairly rare, but legislation in which politicians get benefits that are not shared "equally" by all seems inevitable. If self-dealing were to cover such situations, and there is corporate case law to support the claim, *see, e.g.*, Pogostin v. Rice, 480 A.2d 619, 624 (Del. 1984) ("Directorial interest exists whenever ... a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders."), then the concept of self-dealing would become quite capacious. Its reach would extend far beyond voting matters and could apply to just about any type of legislation. Consider, for example, tax legislation. Given a tax code embodying progressive taxation along with numerous deductions and exemptions, any tax legislation would involve benefits that are not equally shared by all. Most other legislation would have similar, if less obvious, characteristics. However, if this is what is meant by self-dealing, then the benefits of the business judgment rule would be lost because the courts would have to be involved quite often.

Implicitly, Rave seems to want to make a different but similar move. He seems to want the concept of self-dealing to go beyond direct personal gain and include indirect partisan benefits. *See* Rave, *supra* note 10, at 686 ("In a world with national political parties, members of Congress have an interest in state elections and state legislators have an interest in congressional elections."). This would allow the courts to review congressional redistricting by state legislators. *See id.* at 724 n.303 ("It may also be possible to apply this framework to gerrymandering of congressional districts, but doing so requires a few more steps."). This would be a radical development. Most legislation could be said to have significant partisan

Moreover, the fairness test is not quite as strict as Rave imagines. Despite some dicta to the contrary, the fairness test is not truly outcome determinative.[277] Courts have indicated that perfection is not required; only fairness is.[278] Thus, even if a plaintiff could get the fairness test, it would not necessarily provide as much protection as Rave imagines. In addition, the typical remedy for self-dealing is to disallow the transaction in question[279]—not to substitute another transaction in its place.[280] While invalidating a questionable transaction is likely to solve the problem in corporate law, striking down a questionable law and returning to the status quo ante is unlikely to be a sufficient remedy in many political situations, including many voting rights cases.[281] Finally, politicians would not necessarily fear the fairness test as much as Rave imagines. Directors fear litigation primarily because of the risk of personal liability.[282] Because that is generally not a concern for politicians,[283]

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influence. As a result, there would be no easy way to limit judicial review. It seems that, in order to get the benefits of the business judgment rule in the political setting, the concept of self-dealing must be narrowly circumscribed.

277. *See* Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993) ("It is sometimes thought that the decision whether to apply the business judgment rule or the entire fairness test can be outcome-determinative.... Application of the entire fairness rule does not, however, always implicate liability of the conflicted corporate decisionmaker, nor does it necessarily render the decision void." (citation omitted)).

278. *See* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1179 (Del. 1995) ("A finding of perfection is not a *sine qua non* in an entire fairness analysis."); *see also* Weinberger v. UOP, Inc., 457 A.2d 701, 709 n.7 (Del. 1983) ("[P]erfection is not possible, or expected."); Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 23 (Del. 2017) ("To be sure, 'fair value' does not equal 'best value.'").

279. Rave acknowledges this. Rave, *supra* note 10, at 719-20 ("Just as the remedy for breach of the duty of loyalty in agency or corporate law is invalidation of the conflicted transaction, the remedy for a law passed in breach of representatives' duty of loyalty should be invalidation of the law.").

280. Admittedly, the courts have broad discretion as to remedies. *See Weinberger*, 457 A.2d at 714. However, the imposition of a substitute transaction would be virtually unheard of in corporate law.

281. An extreme example can be found in the facts underlying the watershed case of *Reynolds v. Sims*, 377 U.S. 533 (1964). States had been exceedingly negligent in redistricting their legislatures to account for population changes over the years, leading to widely disproportionate representation in the legislatures. *Id.* at 540. Under such circumstances, merely striking down new redistricting legislation would be the equivalent of permitting legislative inaction: in either case, the old, unfair system remains intact. *See id.* at 569-70. The solution to the problem would be to demand appropriate redistricting, but that is not the kind of remedy that the fairness test yields. *See supra* note 280 and accompanying text.

282. *See* Velasco, *supra* note 13, at 656 ("[T]he risk of personal liability would lead directors

they might be perfectly willing to risk litigation in order to achieve their desired goals.

Rave goes on to note that, in corporate law, fairness review can be avoided by having disinterested and independent parties decide matters involving conflicts of interest.[284] If this is done, the deference of the business judgment rule is restored.[285] Rave then explores various ways that independent committees could be established.[286] While his "truly *independent* districting commissions"[287] may well be ideal, it is unlikely that they would be required by the corporate law model. Best practices are not mandatory in corporate law, and fiduciaries can get by with significantly less.[288] Lack of independence in the corporate law sense requires that the decision maker be controlled or dominated, such that their discretion is sterilized and they are incapable of making impartial decisions.[289] Because the concept is so narrow, it would not be very difficult to staff committees with partisans that could be expected to deliver the desired results and still survive judicial scrutiny. Something similar happens in corporate law all the time: independent committees usually

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to excessive risk aversion. Exculpation provisions allow corporations to eliminate that risk, but not the other benefits of the duty of care."). A secondary concern with liability is that it could slow down and therefore undermine a merger or other transaction. This, however, is not a great concern in politics, where delay is often inevitable and expected.

283. *Cf.* Wuterich v. Murtha, 562 F.3d 375, 380 (D.C. Cir. 2009) ("The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, 'accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.' The Westfall Act's 'core purpose,' as the Supreme Court has explained, 'is to relieve covered employees from the cost and effort of defending the lawsuit, and to place those burdens on the Government's shoulders.'" (quoting Osborn v. Haley, 549 U.S. 225, 229, 252 (2007))).

284. Rave, *supra* note 10, at 695. It is worth noting that there must be a limit to the number and types of matters that could legitimately be delegated to independent committees. Ultimately, legislative power is granted to the legislatures, and legislatures must be able to legislate. *See, e.g.*, U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). While independent committees might work when limited to one or a few matters, they could not be employed for all conflicts of interest, as they can in corporate law.

285. *See* Rave, *supra* note 10, at 705.

286. *See id.* at 728-39 (discussing "[p]rocess [s]afe [h]arbors for [r]edistricting").

287. *See id.* at 730.

288. *Cf. In re* The Walt Disney Co. Derivative Litig., 907 A.2d 693, 697 (Del. Ch. 2005) ("Delaware law does not—indeed, the common law cannot—hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices.").

289. *See* Julian Velasco, *The Diminishing Duty of Loyalty*, 75 WASH. & LEE L. REV. 1035, 1071-72 (2018) (citing cases).

recommend dismissal of derivative litigation and their decisions are generally upheld.[290]

In truth, Rave's main concern—entrenchment—likely would not be evaluated under the fairness test at all. Rather, corporate law evaluates entrenchment issues under an intermediate standard of review.[291] Rave suggests that issues may be evaluated under the *Blasius* standard.[292] However, in corporate law this standard applies only if a plaintiff could establish that the rule in question was adopted for the primary purpose of thwarting an election.[293] This is a standard that is not easily met and is "applied rarely."[294] Moreover, *Blasius* cases do not tend to involve voting rules of general applicability, but rather intentional director interference with particular elections.[295] Thus, it is not clear that *Blasius* would be the appropriate standard. More likely, the action may be judged under a "reasonableness" standard.[296] This is the standard applied in hostile takeovers, in which directors must respond to the hostile bid—as politicians must create legislative districts—even though there is "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders."[297] Ultimately, the reasonableness standard

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290. *See* FRANKLIN A. GEVURTZ, CORPORATION LAW 434 & n.107 (2d ed. 2010); *cf. The Long Form*, CHANCERY DAILY (Chancery Daily, Wilmington, Del.), July 16, 2020, https://mailchi.mp/chancerydaily/the-long-form-july_16_2020_1055937-1057298 [https://perma.cc/SM2S-KT5L] (describing *In re Oracle Derivative Litigation* as "an exceedingly rare example of a stockholder derivative action in which a Special Litigation Committee of nominal defendant's board concluded, following an investigation of stockholder plaintiff's claims, that the company would be best served by permitting plaintiff to litigate its claims on the company's behalf" (citing 824 A.2d 917 (Del. Ch. 2003))).

291. *See* Allen et al., *supra* note 120, at 1290-93 (discussing "a third category" of fiduciary duty claims "where the directors have no direct pecuniary interest in the transaction but have an 'entrenchment' interest," and proposing a unified intermediate standard of review).

292. *See* Rave, *supra* note 10, at 714-15 (first quoting Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 660 (Del. Ch. 1988); and then citing MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1132 (Del. 2003)).

293. *Blasius Indus.*, 564 A.2d at 660-62; *MM Cos.*, 813 A.2d at 1130.

294. Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996).

295. *See, e.g.*, *Blasius Indus.*, 564 A.2d at 654-55; *MM Cos.*, 813 A.2d at 1124.

296. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); *see also* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995).

297. *Unocal*, 493 A.2d at 954. In typical duty of loyalty cases, the fiduciary has engaged in a transaction that he could have avoided entirely. *See* Velasco, *supra* note 202, at 874. Thus, to require the fiduciary to establish fairness or have the transaction voided is sensible. However, certain types of transactions absolutely demand a director response despite obvious

does not provide much more judicial scrutiny than the business judgment rule itself.[298] Thus, it is not clear that the corporate law model can deal with entrenchment as Rave would like it to.

In short, the corporate law model does not transfer well into the political realm. The rationale of the business judgment rule does not support the creation of a political judgment rule; the fairness test does not provide as much protection as Rave suspects; independence is a narrower concept than might be expected; and intermediate standards of review are not very helpful. Thus, the corporate law model is simply not an appropriate basis for expanding fiduciary law into politics.

CONCLUSION

The thesis of this Article is that the business judgment rule cannot be the basis for the indiscriminate expansion of fiduciary law principles into new areas of law. This is because the business judgment rule is not merely an arbitrary rule of deference but rather a principled policy of underenforcement that is intended to benefit primarily the beneficiaries of the fiduciary relationship in the idiosyncratic context of business. As such, it is entirely consistent with the purposes of fiduciary law. Attempting to apply the deference of the business judgment rule in settings in which it would not be primarily for the benefit of the beneficiaries would not be consistent with fiduciary law principles. Thus, these potential applications would be inconsistent with the business judgment rule.

I conclude with a clarification of the various positions that I have *not* taken in this Article. By clearly delineating the limits of my argument, it may be possible to determine the space that remains available for some type of fiduciary judgment rule. To begin with, I have not argued that the business judgment rule must be limited to corporate law and cannot be the basis for a fiduciary judgment rule in any other area of law. This is clearly not the case: the business judgment rule is applied not only in corporate law, but also in the

conflicts of interest. In such cases, the courts often apply a reasonableness test. *See id.* at 875.

298. *See generally* Velasco, *supra* note 289, at 1069 ("[I]ntermediate standards of review have not panned out as expected.... [C]ourts seem inevitably to find their way back to a deferential standard of review.").

law of other forms of business organization such as partnerships and limited liability companies.[299] Rather, my argument is that the business judgment rule should only be utilized in settings in which its rationale is applicable. This is most clearly the case in other forms of business organization. Although there may be some differences between corporations and partnerships or limited liability companies—and these differences may even relate to some of the justifications for the business judgment rule—the similarities among them are nevertheless significant, making the adoption of the business judgment rule an easy choice. Ultimately, it should not be surprising that all businesses could benefit from a business judgment rule.

However, my argument does not foreclose the possibility that other, nonbusiness relationships could also be similar enough that the business judgment rule could provide the foundation for a fiduciary judgment rule. As I have suggested, the core principles would be first, that pervasive fiduciary duties could be enforced, and second, that under-enforcement is a policy choice made for the benefit of the beneficiary qua beneficiary. It would not matter that others could also benefit from the deference, provided that the benefit to the beneficiary is sufficiently clear and substantial as to justify the underenforcement on its own. If other relationships and circumstances can meet these criteria, then adopting the corporate law rule might be appropriate in such cases.

In addition, my arguments have not ruled out the possibility of a rule of deference that is not based on the business judgment rule. The amount of enforcement that is given to any law or rule is itself a policy question. No law is ever enforced perfectly, and thus all laws are underenforced.[300] It is possible to conclude that fiduciary duties should be less rigorously enforced in some circumstances than in others.

For example, one possible reason for underenforcement would be scarcity of resources. It may be that fiduciary law principles are

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299. *See, e.g.*, Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015) (applying business judgment rule in the context of a limited liability company); Zoren v. Genesis Energy, L.P., 836 A.2d 521, 528 (Del. Ch. 2003) ("[T]he business judgment rule generally protects the actions of general partners." (alteration in original) (quoting *In re* Boston Celtics Ltd. P'ship S'holders Litig., No. C.A. 16511, 1999 WL 641902, at *5 (Del. Ch. Aug. 6, 1999))).

300. *See* Velasco, *supra* note 117, at 581.

appropriate, but there simply are not the resources available to enforce them strictly. This may seem unprincipled, but it is not entirely unreasonable. However, scarcity would not seem to be a good justification for the creation of a fiduciary judgment rule. The issue can come up when scholars consider the expansion of fiduciary law principles into new areas of law. In such situations, the appropriateness of fiduciary law principles is low because expansion necessarily means going beyond the core. This lack of fit, when coupled with a scarcity of resources, should suggest that expansion ought not to be considered in the first place. Maintaining the status quo is probably a more appropriate course of action.

A more promising rationale for a rule of deference would be judicial incompetence. The fact that courts are not experts is a perfectly plausible reason to limit their intrusion into decision-making processes. Experts should not too often be second-guessed by nonexperts. Thus, it might be sensible to limit judicial review to situations in which there are doubts about the experts' judgment. This, indeed, is one of the rationales of the business judgment rule.[301] Yet this rationale is by no means limited to the business context. Rave, for example, makes a strong argument based on judicial incompetence to police political judgments.[302] Limiting judicial review to cases in which one has doubts about the experts' judgment is a perfectly valid freestanding argument, and it thus theoretically could form the basis for specific fiduciary judgment rules without reference to the business judgment rule.

There is, however, one major concern with the argument. There would seem to be no legitimate way to cabin it. Judges are legal experts only. They are not business experts. They also are not medical experts. Nor are they experts in friendship, parenting, or politics. Indeed, they are not experts in any of the matters over which they preside.[303] If judicial incompetence is a sufficient basis for any fiduciary judgment rule, then it would seem to be a sufficient basis for every such rule. Rather than specific fiduciary judgment rules, judicial incompetence would seem to support a

301. *See supra* notes 130-32 and accompanying text.
302. *See generally* Rave, *supra* note 10; D. Theodore Rave, *Institutional Competence in Fiduciary Government*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW, *supra* note 35, at 418.
303. *See supra* note 262 and accompanying text.

general fiduciary judgment rule for all fiduciary relationships. Indeed, it would seem to support a general rule of deference applicable to all litigation, not just fiduciary relationships. Thus, the argument proves too much. However, this is not necessarily a fatal obstacle. One might be able to establish that judicial incompetence is a more pronounced issue in some types of cases than in others. Alternatively, one might prefer a general rule of deference. One might even conclude that consistency is not the most important value in the law and that it is worthwhile to implement a rule of deference whenever it can be done. In short, despite the challenges, judicial incompetence could be the basis for fiduciary judgment rules.

Relatedly, but conceptually different, a rule of deference may be grounded in the discretion that is afforded to fiduciaries. Many fiduciary law scholars maintain that discretion is an essential element of a fiduciary relationship.[304] The fiduciary undertakes to use his or her judgment for the benefit of the beneficiary. In many cases, the fiduciary will have expertise that the beneficiary and the courts lack. However, in some cases the fiduciary may be called to exercise judgment without any real expertise. Nevertheless, in all cases, it is the fiduciary's judgment that is called for. Such judgment arguably ought to be respected by the courts through deferential review.

To be fair, not everyone agrees that discretion is essential to fiduciary relationships.[305] Only certain fiduciary relationships depend upon discretion and expertise. This is a common characteristic of trust relationships, for example.[306] However, not all fiduciary relationships are like that. For example, an agency relationship is

304. *See, e.g.*, Miller, *supra* note 25, at 69 ("A fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary)."); D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 OHIO STATE L.J. 609, 610-11 (2014) ("We contend that the grant of discretion in fiduciary relationships is not merely an artifact of human weakness, but a crucial part of the fiduciary bargain. To borrow an expression from software design, contractual incompleteness is not a bug, it's a feature.").

305. *See, e.g.*, Arthur B. Laby, Book Review, 35 LAW & PHIL. 123, 130-34 (reviewing PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 25); Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 1036-37 (2017).

306. *See, e.g.*, GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, THE LAW OF TRUSTS AND TRUSTEES § 560 (rev. 2d ed. Supp. 2020).

characterized by the control of the principal rather than the discretion of the agent.[307] I have argued elsewhere that power, not discretion, is the essence of the fiduciary relationship.[308] And if that is the case, then judicial deference to the discretionary judgment of the fiduciary will not resonate quite so strongly. Even so, discretion may be considered sufficiently valuable—at least when it is a key feature of the relationship—as to deserve deference. Thus, discretion could be the basis for fiduciary judgment rules in certain cases.

Other justifications for fiduciary judgment rules could be imagined and defended. Although this Article does not provide support for such possibilities, it does not foreclose them either. This Article has defended a limited position: that the business judgment rule does not provide a solid basis for the indiscriminate expansion of fiduciary law principles into new areas of law. Properly understood, the business judgment rule is not an arbitrary rule of deference. It is an important principle, perfectly consistent with fiduciary law, that is intended to protect the interests of the beneficiary *qua* beneficiary. Any expansion that does not maintain this purpose cannot be modeled after the business judgment rule.

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307. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(1) (AM. L. INST. 2006).
308. *See* Velasco, *supra* note 35, at 83-87.