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FIDUCIARY GOVERNANCE

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ABSTRACT

The fiduciary relationship is one of the most fundamental legal relationships, and its importance for both public and private law is increasingly recognized. Fiduciary mandates typically involve one person—the fiduciary—administering the affairs or property of other persons—an individual beneficiary or group of beneficiaries. Yet, as we will demonstrate, this is not the only way fiduciary relationships are structured. Most accounts of fiduciary law oversimplify the law because they exclude a categorically different form of fiduciary relationship. A significant set of fiduciary relationships feature governance mandates in which the fiduciary is charged with pursuing abstract purposes rather than the interests of persons. Indeed, many public and private fiduciary institutions are best understood as being administered on the basis of governance mandates, rendering moot longstanding debates over specification of beneficiaries

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and requirements of loyalty. The resulting account provides important new insights for core issues in corporate law, administrative law, and constitutional law, among other fields.

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INTRODUCTION

Fiduciary theory is undergoing a renaissance. In recent years, public law scholars have offered fiduciary accounts of the state and its officials. Core features of corporate law have been explained in fiduciary terms. Several important legal relationships—the parent-child relationship, the lawyer-client relationship, and the doctor-patient relationship—have been elaborated from a fiduciary perspective. Yet, the nature of these fiduciary relationships is not well understood. This Article offers a new perspective on an important subset of fiduciary relationships.

Fiduciary mandates typically involve one person administering the affairs or property of another. Fiduciary mandates of this sort implicate a conventional fiduciary relationship to which the fiduciary and beneficiary are parties. In turn, the fiduciary's role is characterized by his or her possession of legal powers held relative to practical interests of the beneficiary.[1] Thus, for example, an agent is authorized to exercise certain powers to bind her principal in contract, and is understood as exercising her powers to advance the interests of the principal (for example, interests in a business venture). Similarly, a lawyer is authorized to represent her client and, in exercising particular powers of representation, acts to protect or pursue the interests of her client (for example, interests in a child custody matter or criminal prosecution). In these contexts, fiduciary mandates exist for the benefit of determinate persons. Given that fiduciary mandates of this sort involve fiduciaries serving the interests of persons, we shall refer to them as *fiduciary service* mandates.

Most accounts of fiduciary law assume that all fiduciary relationships are strictly interpersonal. For example, Tamar Frankel has argued that fiduciary relationships are a primary form of social relationship marked by interpersonal dependency: "[O]ne party to a fiduciary relation (the entrustor) is dependent on the other (the fiduciary).... [T]he entrustor becomes dependent because he must

1. Paul B. Miller, *The Fiduciary Relationship*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63, 69-72 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter Miller, *The Fiduciary Relationship*].

rely on the fiduciary for a particular service."[2] Gordon Smith has said that fiduciary relationships involve the fiduciary acting on behalf of a beneficiary in respect of a critical resource belonging to the beneficiary.[3] And Deborah DeMott has suggested that fiduciary duties be understood interpersonally in terms of an overarching obligation "to act to further the beneficiary's best interests."[4] Indeed, one of us has argued that fiduciary liability is premised upon the existence of a fiduciary relationship defined in interpersonal terms.[5] Moreover, these analyses are supported by sweeping judicial statements.[6]

These accounts are not unreasonable. The difficulty is that they oversimplify the law. A significant subset of fiduciary mandates involves governance rather than service. *Fiduciary governance* mandates arise in contexts in which the fiduciary is engaged to determine or advance certain *abstract purposes.* Whereas service mandates involve administration of the affairs or property of persons, governance mandates involve administration for particular purposes. The powers of the fiduciary, and the objects for which he acts, are specifiable entirely with reference to one or more abstract

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2. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 800 (1983) (emphasis omitted).

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

4. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, DUKE L.J. 879, 882 (1988).

5. *See* Miller, *The Fiduciary Relationship*, *supra* note 1, at 69; Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 1009-15 (2013) [hereinafter Miller, *Justifying Fiduciary Duties*].

6. *See, e.g.*, Dunn v. Dunn, 786 So. 2d 1045, 1053 (Miss. 2001) ("In determining whether a fiduciary relationship exists, we have to look to see if one person depends upon another." (citing *In re* Will & Estate of Varvaris, 477 So. 2d 273, 278 (Miss. 1985))); Chmieleski v. City Prods. Corp., 660 S.W.2d 275, 294 (Mo. Ct. App. 1983) ("[There are] certain basic elements necessary to the establishment of a fiduciary relationship .... [T]hese are: (1) as between the parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party."); Penato v. George, 383 N.Y.S.2d 900, 904 (App. Div. 1976) ("[A] fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another.").

purposes without it being necessary to identify a beneficiary, much less the particular interests or preferences of that beneficiary.

Fiduciary governance has striking implications for broad swaths of law, from corporate and charities law to administrative and constitutional law. Fiduciary theory has recently shed new light on these fields. Yet difficult and unresolved questions remain under the conventional view. For example, a longstanding debate exists in corporate law on the question of which groups are properly identified as the beneficiaries of the fiduciary administration of corporations by directors. Administrative law, for its part, raises difficult questions concerning the proper beneficiaries of agency discretion. And legal and political theorists who have advanced fiduciary theories of government have struggled with the problem of identifying beneficiaries of public offices and undertakings. To a considerable extent, these problems can be traced to assumptions implicit in conventional accounts of fiduciary law. Recasting the mandates in these settings in terms of fiduciary governance offers a fresh perspective on these debates.

In this Article, we explain the idea of fiduciary governance and distinguish it from fiduciary service. Our analysis unfolds as follows. In Part I, we examine the differences between fiduciary service and fiduciary governance mandates and discuss three exemplars of fiduciary governance: the administration of charitable purpose trusts; the administration of state-owned public purpose corporations; and the administration of conventional corporations.[7] In Part II, we explain the sense in which fiduciary governance mandates are situated within a distinctive kind of fiduciary relationship, and we explore the ramifications of fiduciary governance for our understanding of the structure of fiduciary liability. In Part III, we discuss fiduciary governance in the context of the hallmark fiduciary obligation of loyalty, contrasting the familiar ways in which fiduciaries exhibit loyalty to persons with the notion of *loyalty to purposes* that constrains execution of fiduciary governance mandates. In Part IV, we highlight some of the more important implications of our account of fiduciary governance.

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7. We refer to public purposes rather than benefits to distinguish these state-established and -controlled corporations from privately owned public benefit corporations.

The most significant implication of our discussion is that several key private and public institutions ordinarily theorized in terms of fiduciary service would be better understood as implicating fiduciary governance. For example, the state and its public offices and officials arguably have fiduciary governance mandates and, as such, a distinctive set of fiduciary responsibilities. Likewise, in corporate law settings, corporate directors may have fiduciary governance mandates. This view of the mandates of directors allows us to better understand what is at stake in cases like *Burwell v. Hobby Lobby Stores, Inc.*, in which corporate management sees its role in terms of given—and sometimes quite distinctive—corporate purposes.[8] In these and other settings, the idea of fiduciary governance suggests a fundamental rethinking of the nature of fiduciary mandates.

I. THE NATURE OF FIDUCIARY GOVERNANCE

Conventional fiduciary relationships are formed between fiduciaries and beneficiaries, and found an interpersonal form of accountability, realized through assignment of correlative rights and duties between the parties. We have suggested, however, that fiduciary law also admits of governance-type fiduciary mandates that are regulated by institutional accountability mechanisms. In what follows, we explain fiduciary governance and offer three illustrations to establish correspondence between our theory and actual practices of fiduciary administration. In order to establish the distinctiveness of fiduciary governance, we begin by offering a brief account of fiduciary service.

A. Fiduciary Service Mandates

Most fiduciaries are engaged in the provision of fiduciary services for or on behalf of a beneficiary or group of beneficiaries.[9] The services provided are varied but necessarily refer to a beneficiary in that they directly engage one or more of their specific practical

8. 134 S. Ct. 2751 (2014).

9. For the sake of convenience, we will henceforth refer by default to beneficiaries in the singular sense, though what we say holds equally true of mandates held for the benefit of multiple beneficiaries.

interests.[10] As we will explain in Part II, fiduciaries always occupy a position of authority under which they exercise one or more legal powers granted on a fiduciary basis. Under fiduciary service mandates, the beneficiary[11]—or a benefactor who wishes to make a mediated benefaction to the beneficiary—authorizes the fiduciary to act.[12] In either event, service mandates entail the fiduciary exercising powers relative to the person or property of the beneficiary, for the benefit of the beneficiary.

The fiduciary, if she performs well, will materially advance or protect those practical interests of the beneficiary that ground her mandate. For example, a fiduciary acting under a service mandate may ensure that the beneficiary's physical health is protected or that his money is wisely invested. Sometimes fiduciaries are retained because the beneficiary or benefactor is incapable of attending to the affairs subject to the mandate.[13] But more often, fiduciaries are retained so that individuals may invest their personal energies in pursuits that they feel better qualified to undertake or that they value more.[14]

In speaking of fiduciary service, we do not mean to imply that provision of services in the colloquial sense is always or even

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10. Practical interests are interests held by persons in respect of their own person, their property, or their relationships with others. *See* Miller, *The Fiduciary Relationship*, *supra* note 1, at 73.

11. For example, a lawyer is ordinarily authorized to act for his client by his client as beneficiary; similarly, an agent is customarily granted agency powers by her principal as beneficiary.

12. For example, a trustee acting under an ordinary private donative trust is authorized to act under a trust deed executed by a settlor as benefactor in the context of him settling property on trust for the benefit of named beneficiaries.

13. Avihay Dorfman suggests that many trusts can be understood in this way. Avihay Dorfman, *On Trust and Transubstantiation: Mitigating the Excesses of Ownership*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 339, 350-54.

14. Hanoch Dagan & Sharon Hannes, *Managing Our Money: The Law of Financial Fiduciaries as a Private Law Institution*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 91, 92 (arguing that, in the context of financial fiduciary management, "enabling the safe delegation of management of our money is autonomy enhancing because it allows people to enlist others for this increasingly complex task and focus their time and attention on their intrinsically valuable projects"); *see also* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426 (1993) (suggesting that people hire fiduciaries for the efficiencies generated by specialization and expertise); Frankel, *supra* note 2, at 803 (discussing the increasing prevalence and social importance of fiduciary relationships in the context of trends toward heightened labor specialization and professionalization of knowledge).

ordinarily fiduciary, much less that all fiduciaries in conventional fiduciary relationships are engaged in the provision of services so understood.[15] Some fiduciaries are, of course, professional service providers, such as lawyers and doctors. But we have in mind a more technical conception of service. By "fiduciary service," we mean to refer to the exercise of fiduciary powers in service of the interests of a determinate person or group of persons.[16] Fiduciary service mandates thus involve one person (the fiduciary) acting in service of another person (the beneficiary). Fiduciary service mandates are, on our account, so intimately connected with the service of persons that these mandates cannot be held absent the existence of an identifiable beneficiary. A lawyer-client relationship, for instance, is one in which the lawyer provides specialized fiduciary services for the benefit of the client. Provision of these services is contingent upon the lawyer having been authorized to act for a client. Absent an actual client, the lawyer has no mandate, and no relationship exists within which a mandate could be carried out.

Under our account, a fiduciary mandate has a beneficiary if, and only if, an identifiable person or group of persons exists for whose benefit the mandate is granted and executed.[17] A beneficiary in this sense is not simply a person with a contingent expectation of a possible but undefined and undesignated benefit from a mandate. It is instead a person whose personal, practical interests in the mandate are ascertainable ex ante and whose interests are protected through personal enjoyment of rights or powers relative to the mandate. Again, all fiduciary mandates have beneficiaries in the broad sense that persons do, or may, reasonably expect to benefit from their execution. Service mandates differ from governance mandates in that the mandate itself is necessarily defined and constituted in

15. This understanding is contrary to the suggestion of some that many service providers, including mechanics, electricians, plumbers, and other tradespeople, should be considered fiduciaries. *See* Robert Flannigan, *Fiduciary Mechanics*, 14 CAN. LAB. & EMP. L.J. 25, 25 (2008).

16. For example, a lawyer representing her client in a civil or criminal proceeding, or a partner acting on behalf of his fellow partners in partnership business, acts in service of determinate persons.

17. This coheres with a broader view which suggests that beneficiaries are ascertained persons enjoying *designated* benefits under law. *Beneficiary*, BLACK'S LAW DICTIONARY 149 (10th ed. 2014) (defining a beneficiary as: "A person who is designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, etc.); one designated to receive something as a result of a legal arrangement or instrument").

terms of *specific* beneficiaries and their ascertained or ascertainable interests.

The general characteristics of fiduciary service mandates might be best revealed by illustration. Consider two kinds of conventional fiduciary relationships: the first between the trustee and beneficiary of an ordinary donative trust, and the second between parents and their children.

The settlor's settlement of property on trust for the benefit of the beneficiary establishes the relationship between the trustee and beneficiary of an ordinary donative trust.[18] One indication of the fact that these trusts entail a service-type mandate is found in a basic principle of trust law—the beneficiary principle. Under this principle, a trust which was evidently settled for the benefit of persons will be deemed invalid if there are no ascertainable beneficiaries.[19] Similarly, an existing trust validly settled for the benefit of persons will be wound up if all such persons die or refuse to take the beneficial interest in the trust.[20] In the context of ordinary donative trusts, the trust necessarily implicates the existence of a beneficiary because a proper construction of the intention of the settlor is that she wished the trust property to be administered for the benefit of specific persons.[21]

Let us now consider parents and children. Parents are fiduciaries in many jurisdictions. Unlike most conventional fiduciary relationships, the nature of the parents' fiduciary mandate cannot be

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18. JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 385 (9th ed. 2013) ("A trust is ... a legal arrangement created by a settlor in which a trustee holds property as a fiduciary for one or more beneficiaries.") (emphasis omitted).

19. *See* UNIF. TRUST CODE § 402(a)(3) (UNIF. LAW COMM'N 2010); *see also* DUKEMINIER & SITKOFF, *supra* note 18, at 417 ("A private trust must have one or more *ascertainable beneficiaries* to whom the trustee owes fiduciary duties and who can call the trustee to account. This rule ... follows from the more fundamental principle that a private trust must be for the benefit of the beneficiaries."); GRAHAM VIRGO, THE PRINCIPLES OF EQUITY & TRUSTS 115 (2012) ("[A]n express trust for persons must have identifiable people in whose favour the court can decree performance.... A logical consequence of recognizing the beneficiary principle is that an express trust must be a trust for persons.") (footnote omitted).

20. RESTATEMENT (THIRD) OF TRUSTS § 44 (AM. LAW INST. 2003) ("A trust is not created, *or if created will not continue*, unless the terms of the trust provide a beneficiary who is ascertainable at the time or who may later become ascertainable within the period and terms of the rule against perpetuities.") (emphasis added).

21. *Id.* § 46 ("[W]here the owner of property transfers it upon intended trust for the members of an indefinite class of persons, no trust is created.").

readily implied from the circumstances surrounding the establishment of the relationship. Parental authority is a *sui generis* form of fiduciary authority recognized by law.[22] However, parental authority is evidently not held for the benefit of parents.[23] Instead, it is impliedly undertaken for the benefit of the *person* of the child. This is reflected in the foundational family law principle that the actions of parents and guardians are to be evaluated in light of the best interests of the child.[24] As is true of other conventional fiduciary relationships, it is impossible to conceive of parental fiduciary authority absent an actual, identifiable person for whose benefit fiduciary authority and powers exist. One is not a parent in any sense, and certainly not in a legal sense, absent a child to whom one stands as a parent.

B. The Nature of Fiduciary Governance

Many, perhaps most, fiduciary mandates are service mandates. However, others entail fiduciary administration for purposes rather than persons. These are governance mandates. All fiduciary mandates imply purposes inasmuch as the fiduciary's discretion is to be oriented to the achievement of certain objectives. However, purposes are distinctive in governance mandates insofar as they are not identified with determinate persons and their practical interests; they are, in this sense, abstract. The purposes that underlie

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22. *See* EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY 44 (2011) ("To establish the necessary connection between parent and child, Kant points to the act of procreation, an act that brings a helpless and vulnerable child into the world without the child's consent. Procreation is the interactional trigger that gives rise to the parents' obligation."); *see also* Paul B. Miller, *Principles of Public Fiduciary Administration*, *in* BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS: HUMAN RIGHTS, PRIVATE ACTORS, AND POSITIVE OBLIGATIONS (Anat Scolnicov & Tsvi Kahana eds., forthcoming 2016).

23. *See generally* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2401-02 (1995).

24. *See* JOSEPH GOLDSTEIN, ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 224 (1996); Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J.L. & FAM. 1, 3 (1994); Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 LAW & SOC'Y REV. 769, 774 (2004); Erwin Chemerinsky, *Defining the "Best Interests": Constitutional Protections in Involuntary Adoptions*, 18 J. FAM. L. 79, 80-81 (1979); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2216 (1991).

fiduciary governance mandates reflect goals or commitments defined in relation to groups, associations, or communities and are so tied to the interests of the group, community, or association that the interests of individuals cannot be disaggregated from those of the collectivity without undermining either the collectivity or the integrity of the purpose(s) posited for it.[25]

Recognizing that governance mandates are held relative to collectivities makes it important to know how stipulated purposes figure in the identity and functioning of collectivities. Though we cannot deal with this issue exhaustively here, we note that the purposes underlying a governance mandate are often constitutive of the collectivity in respect of its identity and functioning.[26] In some cases, the collectivity is so determinate that we can say with reasonable confidence that we know what demographic, community, association, or other site of collective interest is intended to benefit from a governance mandate, as in a trust established to provide medical or dental care for the benefit of a specific Native American community.[27] The collectivity in these cases subsists independently of the governance mandate established for it. In other cases, however, the purpose(s) might be framed in terms of the general public interest or in terms of general characteristics of persons that apply widely (for example, income level, educational background, etc.), such that little can be said of those intended to benefit other than that they actually or potentially fall within the scope of the mandate. In still other cases, a governance mandate is instrumental in bringing a well-defined collectivity into existence; the mandate, and a legal form of association with which it is connected, make organization of that kind possible, such as benefit corporations or workers' cooperatives.

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25. This is consistent with the recognition that in law, if not in morality, collectivities can have interests, rights, and powers, not to mention personality and legal capacity, independent of those of their members. On the nature of collective interests, and the notion that collective interests may be a basis for recognition of collective rights, see Leslie Green, *Two Views of Collective Rights*, 4 CAN. J.L. & JURIS. 315, 320-24 (1991), and Dwight G. Newman, *Collective Interests and Collective Rights*, 49 AM. J. JURIS. 127, 129 (2004).

26. Carol C. Gould, *Group Rights and Social Ontology*, *in* CHALLENGES TO LAW AT THE END OF THE 20TH CENTURY: RIGHTS 56, 57 (Rex Martin & Gerhard Sprenger eds., 1997) ("Groups are defined by ... joint activity or common purposes (whether explicitly recognized or not).").

27. *See, e.g.*, Caryn Trombino, Note, *Changing the Borders of the Federal Trust Obligation: The Urban Indian Health Care Crisis*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 129, 146-52 (2005).

Given the importance of fiduciary governance to social cooperation and coordination, and given the fundamental value of freedom of association, it should be unsurprising that the law takes a liberal approach to the specification of purposes for governance mandates. A governance mandate can be established for any of a number of private or public purposes, and the purposes in question can be posited by an individual acting in a private or official capacity, or by a group of individuals acting likewise as private persons or members of a public body. Purposes specified may be charitable, as when an individual establishes a charitable purpose trust or corporation for objects of public benefit.[28] They may also be private economic or commercial purposes, as is true of the fiduciary administration of unions, pension funds, commercial trusts, and business corporations. Purposes specified for a governance mandate may reflect interests in forms of common property (for example, homeowners' associations in cooperatives), or personal or community interests (for example, the incorporation of a leisure club). Individuals may also establish a governance mandate for purely public purposes relating to some aspect of general public welfare. While specification of purposes for governance mandates is largely subject to the discretion of the person or persons establishing them, the purposes in question must be legal, within the authority of those who have purported to establish the mandate, and tolerably clear.

One important indication of the dependence of governance mandates on clearly stipulated abstract purposes, and of their independence from persons with standing as beneficiaries, is found in their persistence over time despite changes in the membership of collectivities with which they are associated. The subsistence of a service mandate, by contrast, usually turns on the existence and continuing voluntary participation of specific persons as parties to the mandate. The fact that service mandates ordinarily depend on the ongoing involvement of specific persons suggests that conventional fiduciary relationships involve a form of privity, not unlike contractual relationships.[29]

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28. *See infra* Part I.C.1-2.

29. The fact that fiduciary relationships imply privity is also reflected in courts' refusal to countenance the idea that legal obligations owed by fiduciaries under service-type mandates extend to persons other than identified beneficiaries. For example, courts have held that

Fiduciary governance is different. The relationships through which governance mandates are carried out are not constrained by an expectation of privity. Instead, these relationships are maintained through legal offices.[30] A fiduciary office must be occupied by someone, but may be occupied by anyone with stipulated qualifications, pursuant to whatever process is established for the appointment or election of the officeholder. A particular governance mandate might, depending on available resources and the viability of its objects, persist for centuries and undergo regular change in the identities of occupants of attached offices.[31]

Given that governance mandates are institutional, it also merits notice that fiduciary governance has an important, if complex and contingent, relationship with concepts and practices of representation.[32] As we will explain in Part II, all fiduciaries represent others in the sense that their powers are derived from the legal personality

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the duty of care that a lawyer owes her client does not extend to third parties. *See* Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 903.

30. *See* SCOTT J. SHAPIRO, LEGALITY 75-76 (2011) (describing characteristics of offices by using the office of President of the United States as an illustration: "The presidency of the United States is an office. It endures from term to term and its normative character does not change merely because one president vacates and a new inhabitant assumes power. Presidents come and go but the presidency remains. Because the office of the president is continuous over time, each new inhabitant immediately assumes the power conferred on him or her by the office"). Offices are especially important to the administration of personified entities such as corporations. *See* Dick W.P. Ruiter, *Types of Institutions as Patterns of Regulated Behaviour*, 10 RES PUBLICA 207, 220 (2004) ("A legal person can be conceived of as having a will that must be expressed by a decision-maker. This means that ... decision-makers of legal persons are considered to express an objective will on the basis of individual decision-making capacities. The next step is to personify such individual decision-making capacities, thereby turning them into permanent organs of legal persons termed 'offices.'").

31. For example, consider a few of the more venerable American companies, such as Cigna (1792), Jim Beam (1795), JP Morgan Chase (1799), and DuPont (1802). *See* Diane Bullock, *America's 10 Oldest Public Companies*, MINYANVILLE (Sept. 23, 2011, 12:30 PM), http://www.minyanville.com/special-features/articles/oldest-public-companies-america2527s-oldest-companies/9/23/2011/id/37022 [http://perma.cc/84RM-FJNW]. Additionally, consider some only slightly less venerable charitable organizations, including Kamehameha Schools (1887), the Rockefeller Foundation (1913), the Kresge Foundation (1924), and the Ford Foundation (1936). *See List of Wealthiest Charitable Foundations*, PROJECT GUTENBERG, http://self.gutenberg.org/articles/list_of_wealthiest_charitable_foundations [http://perma.cc/6A7V-2EM4] (last visited Oct. 23, 2015).

32. On legal and political representation in general, see Ronald Rogowski, *Representation in Political Theory and in Law*, 91 ETHICS 395 (1981), and David Runciman, *The Paradox of Political Representation*, 15 J. POL. PHIL. 93 (2007).

of other persons. Fiduciaries undertaking a governance mandate serve as representatives in this sense, inasmuch as they act on derived powers devoted to the benefit of collectivities. But any claim they might have to being *representatives of* a collectivity depends on the nature of their authority.[33]

Some governance mandates are created by a person or personified entity for the benefit of a collectivity. In these cases, the fiduciary is authorized to act in ways that will benefit members of the collectivity, but the fiduciary has no authority to make decisions for members by virtue of their identification with the group.[34] Instead, the fiduciary acts on authority traceable to that enjoyed by the benefactor who established the mandate for the benefit of the collectivity. In these cases, if the fiduciary is a *representative of* anyone, he is a representative of the benefactor. However, other fiduciaries are representatives of collectivities either because the collectivity is a personified legal entity or because its members have associated themselves through a governance mandate. In either case, the fiduciary is a representative in the classical sense, and his mandate must be considered a constitutive element of the association of people for common purposes. The fiduciary is critical to the collectivity achieving its purpose(s) inasmuch as his mandate enables coordination of effort and investment in the association through centralized decision making.

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33. In the sense that they represent or personate those for whom they act as representatives. *See* Runciman, *supra* note 32, at 94 ("[P]ersons and things are granted a kind of artificial presence by the act of representation.").

34. The authority to make decisions for a collectivity entails the authority to represent but does not resolve the core normative dilemma respecting the manner in which representation ought to occur. The dilemma is framed chiefly in terms of whether political authorities in democratic government ought to govern on the basis of the manifest preferences of those for whom they govern or instead on the basis of their independent judgment about what would best serve their interests. *See generally* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967). This debate has played out in terms of divergent perspectives on the nature and content of norms governing political representatives. Tellingly, many of these norms have a decidedly fiduciary flavor. *See, e.g.*, Alexander A. Guerrero, *The Paradox of Voting and the Ethics of Political Representation*, 38 PHIL. & PUB. AFF. 272, 281 (2010) ("[T]he correct picture is one on which representatives face multiple competing norms regarding how they ought to behave: norms of *fidelity* (doing as they said they would), norms of *deference* (doing as their constituents would presently prefer), norms of *guardianship* (doing as would be best for their constituents), and moral norms of a more general sort.").

C. Fiduciary Governance in Practice

Given that fiduciary law scholars are most accustomed to thinking of conventional, service-type fiduciary mandates, we will briefly discuss three examples of governance-type mandates. We offer these illustrations simply to demonstrate that fiduciary governance is a real and distinctive form of fiduciary administration. We believe that fiduciary governance marks the primary point at which principles of private fiduciary administration mesh with those of public fiduciary administration. For that reason, we will discuss examples of both private and public fiduciary governance. Our clearest private law exemplar is the charitable purpose trust. Our public law model is the public purpose corporation. We will then show how similar structures are evident in a leading theory of conventional corporate laws.

1. Charitable Purpose Trusts

Private charitable purpose trusts are a widely recognized kind of express trust.[35] They are distinguished from both noncharitable purpose trusts that are permitted in some jurisdictions but subject to extensive limitations,[36] and ordinary donative trusts in which a settlor acts charitably but with an intention to benefit specified persons.[37]

Charitable purpose trusts clearly entail a governance mandate. The trustee is obliged to administer the trust to advance the charitable purposes specified for the trust; trusts of this sort are distinguished from ordinary donative trusts precisely on the basis that they lack beneficiaries.[38] As is true of other governance mandates, charitable purpose trusts are, of course, intended to benefit

35. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. a (AM. LAW INST. 2003).

36. *See* DUKEMINIER & SITKOFF, *supra* note 18, at 751.

37. *See* RESTATEMENT (THIRD) OF TRUSTS § 15 cmt. a (AM. LAW INST. 2003).

38. Maitland clearly recognized that a trust may be established for purposes as well as for persons in defining it, thus: "I should define a trust in some such way as the following—When a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose he is said to have those rights in trust for that other or for that purpose and he is called a trustee." F.W. MAITLAND, EQUITY 44 (A.H. Chaytor & W.J. Whittaker eds., 2d ed., rev. 1936).

people. But the promise of benefit is contingent in respect of the eventual recipients. Those who ultimately benefit from achievement of the purposes of the trust have no claim right (or any other legally enforceable expectation, for that matter) to benefit from the trust. Indeed, if such a trust is found to have been intended to benefit specific persons, the trust will fail.[39]

The law on the validity and administration of charitable purpose trusts reflects a preoccupation with specification of, and adherence to, purposes. In terms of specification, the first requirement is that the trust has been established to advance a purpose rather than to benefit specific persons.[40] The second is that the purpose be of the right sort; namely, that it be genuinely charitable.[41] Adherence to specified purposes is also a primary concern of the courts in reviewing the conduct of trustees. Accordingly, enforcement rights and powers are held not by persons asserting privileged standing in connection with personal claim rights, but instead by parties that have an interest in enforcing charitable purposes for the public benefit, such as attorneys general or state agencies with regulatory authority over charitable organizations.[42]

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39. *See* Shenandoah Valley Nat'l Bank v. Taylor, 63 S.E.2d 786, 789 (Va. 1951) ("In the law of trusts there is a real and fundamental distinction between a charitable trust and one that is devoted to mere benevolence. The former is public in nature and valid; the latter is private and if it offends the rule against perpetuities, it is void.").

40. *Id.* ("It is essential that a charity be for the benefit of an indefinite number of persons.").

41. The law zealously enforces the requirement of charity. It does so through a set of restrictions going to the definition of purposes in the trust; notably, purposes must be charitable in the sense of being of *public* benefit, and the purposes must be *exclusively* charitable. *See id.*; *see also* Statute of Charitable Uses 1601, 43 Eliz. c. 4 (Eng.); UNIF. TRUST CODE § 405(a) (UNIF. LAW COMM'N 2000); RESTATEMENT (THIRD) OF TRUSTS § 28 (AM. LAW INST. 2003).

42. DUKEMINIER & SITKOFF, *supra* note 18, at 743 ("[B]ecause a charitable trust does not require an ascertainable beneficiary, traditional law relies on the *state attorney general* to enforce the trust."); *see also* RESTATEMENT (SECOND) OF TRUSTS § 391 (AM. LAW INST. 1959) ("A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin."). Trust law in many states has since witnessed modification of rules on standing such that the settlor and those acting in his stead can now sue to enforce the trust. *See* Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 723 N.Y.S.2d 426, 434 (App. Div. 2001) ("The donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent."); UNIF. TRUST CODE § 405(c) (UNIF. LAW COMM'N 2000); RESTATEMENT (THIRD) OF

Unlike other varieties of governance mandate, the institutional character of the charitable purpose trust is not obvious, partly because these trusts often lack a formal default organizational structure. Trusts are often considered simply as a transactional device; more specifically, as a kind of benefaction serving the donative purposes of an individual person.[43] Allowing that most ordinary donative trusts are interpersonal in nature, the charitable purpose trust evidences its institutional character through the realization of its purposes over extended periods of time.[44] Charitable purpose trusts can persist for centuries. Indeed, according to Graham Virgo, the oldest charitable purpose trust in England established the King's School in Canterbury 1500 years ago.[45]

These trusts—and, by extension, fiduciary administration for the purposes for which they were established—persist despite fluctuation in their constituencies. This amply demonstrates the independence of fiduciary administration from the identity of persons that may be implicated in a governance mandate. However, the corollary of this is a dependence on viable purposes to be pursued by the fiduciary. The law relating to the termination of trusts for want of a viable purpose reflects the latter point,[46] as does the law relating to the substitution of nonviable for viable purposes under the *cy pres* doctrine.[47]

TRUSTS § 94(2) (AM. LAW INST. 2012).

43. But leading trust law scholars recognize that part of the enduring value of the trust lies in its adaptability to widely divergent purposes. *See* AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 1.1 (4th ed. 2006) ("The purposes for which we can create trusts are as unlimited as our imagination.").

44. Unlike trusts for persons, trusts for charitable purposes are exempt from the temporal limitation on the term of trusts imposed by the rule against perpetuities. *See* DUKEMINIER & SITKOFF, *supra* note 18, at 743.

45. VIRGO, *supra* note 19, at 166-67.

46. *See* DUKEMINIER & SITKOFF, *supra* note 18, at 752 ("A nineteenth-century trust to care for old horses retired from pulling fire wagons and streetcars could not be administered for those purposes in the twentieth century.").

47. *Id.* ("Under the *cy pres* doctrine, if a charitable trust's specific purpose becomes *illegal*, *impossible*, or *impracticable*, the court may direct the application of the trust property to another charitable purpose that approximates the settlor's general charitable intent."). Note that the *cy pres* doctrine now operates on the basis of a presumption of general charitable intent. *See* RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (AM. LAW INST. 2003).

2. Public Purpose Corporations

The charitable purpose trust provides a clear illustration of fiduciary governance in private law; the public purpose corporation is an equally vivid example of fiduciary governance drawn from public law.[48]

The "public purpose corporation" is not a legal term of art, and common synonyms—special act corporation, statutory corporation, special purpose corporation, government corporation, or state-owned enterprise—are only imperfectly synonymous and no less ambiguous.[49] Many different kinds of corporation may be referred to as public purpose corporations.[50] Conceived broadly, they include corporations established by private persons for mixed commercial and charitable or other social purposes, those established by private persons for charitable purposes, and those established by the state primarily for a public purpose.[51] In this Article we use "public purpose corporation" to refer only to the latter kind of entity. Given

48. We acknowledge, of course, that private investment in public purpose corporations and the involvement of public purpose corporations in private markets—not to mention privatization of public functions through conditional delegation of public functions to private corporations—problematizes efforts to distinguish "private" and "public." *See generally* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) [hereinafter Freeman, *The Private Role in Public Governance*]; Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013); Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014).

49. *See* Oliver Peter Field, *Government Corporations: A Proposal*, 48 HARV. L. REV. 775, 780 (1935) ("It seems clear that no analysis of the forms and controls and functions and essential elements of power will furnish any very satisfactory clue to just what is a government corporation or to the type of institution that should be called a government-owned corporation."); *see also* O'Connell, *supra* note 48, at 856 ("There is no established definition of a government corporation in federal law.").

50. *See, e.g.*, Field, *supra* note 49; O.R. McGuire, *Government by Corporations*, 14 VA. L. REV. 182 (1928); Robert H. Schnell, *Federally Owned Corporations and Their Legal Problems*, 14 N.C. L. REV. 238 (1936); John Thurston, *Government Proprietary Corporations—I*, 21 VA. L. REV. 351 (1935); John Thurston, *Government Proprietary Corporations—II*, 21 VA. L. REV. 465 (1935).

51. *See* O'Connell, *supra* note 48, at 856. Another category of potential interest is the otherwise private corporation in which the State acquires significant shareholdings. For a helpful discussion, see Mariana Pargendler, *State Ownership and Corporate Governance*, 80 FORDHAM L. REV. 2917 (2012).

that public purpose corporations will be unfamiliar to many, we offer the following additional explanatory remarks.[52]

Public purpose corporations include all entities incorporated primarily for a public purpose by a federal or state government. Thus, public purpose corporations are engaged in widely different kinds of activities.[53] Some undertake commercial activities in sectors of the economy that are state-controlled or regulated because they implicate essential public goods. Others administer state-supported benefit or development programs. Still others are effectively state agencies exercising regulatory powers on behalf of the state.

Public purpose corporations also vary widely in respect of their purposes. Some pursue mixed commercial and public policy objectives (for example, government-controlled corporations granted a monopoly over provision of certain goods or services—such as postal services, alcohol sales, or the supply of public utilities).[54] Others pursue specific economic or social policy objectives (for example, corporations engaged in provision of insurance and other financial services, such as the Federal Deposit Insurance Corporation, Fannie Mae and Freddie Mac, and various economic development corporations).[55] Still others pursue a mixture of policy and regulatory purposes. In addition, public purpose corporations differ in respect of their legal and operational autonomy.[56] Some are dominated by the state, such as those for which directors are appointed by the state as well as those for which decisions require regular consultation with, or approval from, government officials. Others enjoy significant autonomy.[57]

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52. For a detailed history of government corporations in the United States, see Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 386-91 (1995).

53. *See generally* A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 553-57.

54. *See, e.g.*, O'Connell, *supra* note 48, at 843-45.

55. *See, e.g.*, Pargendler, *supra* note 51, at 2926.

56. *See* Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 NOTRE DAME L. REV. 491, 510 (2011) (observing that public purpose corporations and other "quasi-government entities" are "characterized by varying degrees of executive branch control and accountability"); *see also* GEN. ACCOUNTING OFFICE, REFERENCE MANUAL OF GOVERNMENT CORPORATIONS, S. DOC. NO. 79-86, at x-xi (1945).

57. Froomkin, *supra* note 53, at 558 ("Like independent agencies, FGCs [Federal Government Corporations] allow Congress to insulate a program from the cabinet department that would normally have jurisdiction over it.").

Finally, public purpose corporations differ in terms of allowance made for private investment in the corporation and free market interaction with the corporation. Some public purpose corporations, for example, accept private investment (such as by selling bonds or engaging in joint private-public partnerships), while others do not.[58] Furthermore, while some public purpose corporations participate in private markets, others do not directly engage in markets. And, in certain circumstances, the state has excluded private investment in, and ownership of, formerly private corporations by nationalizing them.[59]

However constituted, all public purpose corporations are administered to advance purposes rather than to promote the interests of determinate persons. For many public purpose corporations, there is little sense in talking of beneficiaries even in a broad sense because the ends and activities of the corporation are not referable to a particular segment of the general population, much less to a determinate person or set of persons. Of course, all public purpose corporations are administered for the benefit of the public—and so in the public interest[60]—but that does not mean that there are ascertained or ascertainable beneficiaries of the corporation.

To say that a corporation carries on its affairs for the benefit of the public is simply to say that everyone in general, but no one in particular, has a reasonable expectation of benefitting from the advancement of its purposes.[61] In other words, the "beneficial interest" of the public is inextricable from the public purpose specified for the

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58. *Id.* at 554 ("Many, but by no means all, FGCs issue stock, some or all of which is owned by legal or natural private (nongovernmental) persons."); *see also, e.g.*, Susan H. Freeman & Elizabeth A. Inadomi, *Who's the Captain Kirk of this Enterprise?: Regulating Outer Space Industry Through Corporate Structures*, 18 U.C. DAVIS L. REV. 795, 812-16 (1985) (describing experience with the Communications Satellite Corporation, or Comsat, and illustrating the value of utilizing public purpose corporations as vehicles through which to encourage—yet control—private investment in common resources such as outer space).

59. Usually during periods of national emergency such as war time, or in respect of a pressing issue of national priority (for example, the development or improvement of railways, highways, and waterways). *See* Field, *supra* note 49, at 776-77.

60. *See* McGuire, *supra* note 50, at 182 ("[T]here is a tendency, having its roots in the World War, to organize Federal-owned corporations to discharge governmental functions which the legislative and executive branches deem necessary or desirable in the public interests.").

61. For the sake of clarity, we exclude from consideration public purpose corporations in which private persons are permitted to own, and do own, stock.

corporation, such that the interests of the public in the sound execution of the mandate are strictly tied to the achievement of the purpose(s) through which the mandate is defined. If members of the public feel that their interests are not reflected well in those purposes, their complaint lies with the state and its officials, rather than with corporate fiduciaries.[62]

The import of purposes in defining the mission and fiduciary mandates of public purpose corporations is reflected in legislative "purpose clauses" that specify the particular public purpose(s) to be advanced by a given corporation. Even though, in some cases, these purposes contemplate provision of some legal or material benefit to a segment of the general population, it is notable that purpose clauses are not framed so as to require that particular benefits be conferred upon particular persons.[63] Nor are particular beneficiaries granted enforceable personal rights or avenues of recourse.[64] Thus, unsurprisingly, cases dealing with questions of directorial propriety focus on conduct in light of the purposes of the corporation

62. Accountability is *public*, and responsibility for ensuring that directors of public purpose corporations are accountable as a matter of routine, and in response to concerns about possible wrongdoing, is the responsibility of government. *See* Government Corporation Control Act, 31 U.S.C. §§ 9101-9110 (2012). For criticism of the Act, see Froomkin, *supra* note 53, at 605-07.

63. Consider the purposes clause in the legislation establishing the National Fish and Wildlife Foundation, a charitable corporation created by Congress in 1984. The clause states:

> The purposes of the Foundation are—(1) to encourage, accept, and administer private gifts of property for the benefit of, or in connection with, the activities and services of the United States Fish and Wildlife Service and the National Oceanic and Atmospheric Administration, to further the conservation and management of fish, wildlife, plants, and other natural resources; (2) to undertake and conduct such other activities as will further the conservation and management of the fish, wildlife, and plant resources of the United States, and its territories and possessions, for present and future generations of Americans; and (3) to participate with, and otherwise assist, foreign governments, entities, and individuals in undertaking and conducting activities that will further the conservation and management of the fish, wildlife, and plant resources of other countries.

16 U.S.C. § 3701(b) (2012). Notice that the purposes of the Foundation are framed in terms of national interests and resources as well as functions and specific departments or agencies of government.

64. Save for the public purpose corporation that issues stock to private persons. *See* Froomkin, *supra* note 53, at 585 n.218 (explaining that accountability of government corporations differs from that of private for-profit corporations in that "'the people' must act through agents, the President and Congress, whereas stockholders can in theory act directly by voting their shares").

rather than the interests of persons who may have hoped to benefit from it.[65]

As was true of charitable purpose trusts, the institutional character of the governance mandate vested in directors is reflected in the independent and potentially perpetual existence of the entity. Public purpose corporations have persisted over centuries notwithstanding fluctuation in occupancy of offices within, and membership of, the entity.[66]

A public purpose corporation will cease to exist only if the state formally dissolves it, but it is telling of the centrality of purposes to the vitality of the corporation that it will cease to function as intended if the purposes it pursues become redundant, impossible to achieve, or are exhausted. The dependence of a public purpose corporation on the continuing relevance and importance of its purposes is reflected most vividly in the history of corporations established by the state in emergencies. For example, the U.S. government established several industrial corporations during World Wars I and II to ensure that the U.S. Armed Forces were adequately supplied and supported for war efforts.[67] Many of these corporations were dissolved soon after the wars ended because they no longer served live public purposes. Experience with other public purpose corporations suggests that any such corporation will not long outlive its purposes.[68]

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65. *Id.* at 587-89 (noting that the courts have not clearly explained directors' duties in government corporations, but arguing that even in mixed-ownership corporations the directors appointed by private stockholders would have a "duty to give effect to the public purpose specified in an FGC's charter").

66. *Id.* at 553 ("Although the exact mix of powers granted to FGCs varies, almost every FGC has permanent succession.").

67. For example, the Merchant Fleet Corporation was established with congressional authority on April 16, 1917, ten days after the United States entered World War I, and described by the United States Supreme Court as "an instrumentality of the Government.... [but one] organized under the general laws of the District of Columbia, as a private corporation, with power to purchase, construct and operate merchant vessels." United States *ex rel.* Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 5 (1927) (citation omitted); *see also* McGuire, *supra* note 50, at 182-84.

68. Consider the 2006 dissolution of the federally incorporated Rural Telephone Bank, established pursuant to the Rural Electrification Act and 7 U.S.C. § 941, and responsible for supporting (through provision of loans to telecom companies) broad access to conventional telephone services in the United States, and particularly in underserviced rural areas; a purpose made less pressing if not redundant by the increasing availability of low-cost cellular telephone service. U.S. DEP'T OF AGRIC., OFFICE OF INSPECTOR GEN., REP. NO. 15401-8-FM,

3. Conventional Business Corporations

One might think that charitable purpose trusts and public purpose corporations are outliers. Yet, fiduciary governance also plays a role in our theoretical understanding of traditional for-profit corporations. There are a number of leading theories of the firm and of directors' fiduciary duties, and we do not aim to adjudicate among them. Rather, this Section will illustrate how different theories of the firm imply that corporations are administered on the basis of fiduciary service and fiduciary governance mandates respectively. We will start with shareholder primacy: an account of the objects of corporate fiduciary duties historically associated with contractarian theories of the firm.[69]

Consider the classic case of *Dodge v. Ford Motor Co.*[70] The plaintiffs, Dodge brothers, were shareholders of Ford Motor Company, and had brought suit in light of its failure to issue a dividend. Henry Ford dominated the board of directors and was responsible for the policies at issue.[71] The Michigan Supreme Court concluded based on Ford's testimony that "he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken."[72] The Court then responded with a famous statement concerning the ends of directorial decision making:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[73]

AUDIT REPORT: RURAL TELEPHONE BANK CLOSEOUT AUDIT (2008).

69. On some accounts, this is the prevailing theory. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439-40 (2001).

70. 170 N.W. 668 (Mich. 1919).

71. *Id.* at 683.

72. *Id.* at 683-84.

73. *Id.* at 684. The *Dodge* case is also notable for its language respecting corporate purposes. The purpose the Court calls for directors to advance is not an abstract purpose but

Delaware courts have expressed similar views, and shareholder primacy has become one of the most influential approaches to corporate law.[74] Notice, however, that implicit in shareholder primacy is the adoption of a service-type conception of corporate fiduciary mandates: directors are to serve the interests of specific persons—shareholders (who are, at a given point in time, determinate in identity and extent of interest). Shareholders are admittedly not a uniform group.[75] Nevertheless, the members of the shareholder class can be specified consistent with the requirement of determinate beneficiaries for service mandates.

Yet there is another plausible account: in many cases, courts describe fiduciary duties as being owed to the corporation. There is, of course, debate over how best to interpret this language. Contractarians might insist that reference to corporate interests is shorthand for the interests of shareholders in the aggregate. But others argue that this language implies a license or authority to determine corporate interests by balancing the interests of multiple constituencies. For example, under the team production theory of the firm, developed by Margaret Blair and Lynn Stout:

> Corporate law does not treat directors as shareholders' agents but as something quite different: independent hierarchs who are charged not with serving shareholders' interests alone, but with serving the interests of the legal entity known as the "corporation." The interests of the corporation, in turn, can be understood as a joint welfare function of *all* the individuals who make firm-specific investments and agree to participate in the extracontractual, internal mediation process within the firm.[76]

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instead one defined in terms of the interests of determinate beneficiaries. *Id.*

74. *See, e.g.*, Katz v. Oak Indus., Inc., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others (even assuming that a transaction which one may refuse to enter into can meaningfully be said to be at his expense) does not for that reason constitute a breach of duty.") (footnote omitted).

75. *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 577-78 (2006). It may even be possible on some accounts to adopt a shareholder primacy perspective while not recognizing a determinate group of beneficiaries; this could result from a view that leaves open the question of time horizons, for example. Our point for present purposes is that shareholder primacy can implicate a service mandate.

76. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 288 (1999); *cf.* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 284 (1998) ("Some applications of the fiduciary principle in corporate law do not

The set of interests that may be considered in determining "corporate" interests is thus quite broad. As Blair and Stout note: "For most public corporations, these are primarily executives, rank-and-file employees, and equity investors, but in particular cases the corporate team may also include other stakeholders such as creditors, or even the local community if the firm has strong geographic ties."[77]

The team production theory of the firm implies that corporate fiduciary mandates are properly understood as governance-type mandates. Whereas shareholder primacy implies that directors hold service-type mandates to administer the affairs of the corporation for a specific beneficiary (shareholders in the aggregate), the team production theory suggests instead that directors are granted governance-type mandates to act for purposes that encompass but transcend the interests of various constituencies. It consequently becomes impossible to specify particular beneficiaries of the exercise of power by boards. As Blair and Stout point out: "[D]irectors are allowed free rein to consider and make trade-offs between the conflicting interests of different corporate constituencies."[78] These tradeoffs, in turn, are designed to maximize the joint welfare function of the constituents who comprise the firm. Directors look out for firm interests by serving as neutral, "mediating hierarchs," language that is highly evocative of the function of the state.[79]

There is, however, a further possibility: corporate law may be ambivalent as to corporate purpose. In recent case law, the Delaware Supreme Court has indicated that directors owe fiduciary duties to "the corporation and its shareholders."[80] It is possible to interpret this language as allowing for a stakeholder-oriented analysis. But another interpretation, consistent with the structural features of

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require the identification of any particular corporate constituency as beneficiary, but only that the interests of 'the corporation' in general must be served." (citing ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 197-202 (rev. ed. 1967))).

77. Blair & Stout, *supra* note 76, at 288.

78. *Id.* at 291.

79. *Cf.* Ethan J. Leib et al., *Mapping Public Fiduciary Relationships*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 401 (suggesting, with respect to legislators, that "[a]nalogies to corporate fiduciary law not only inform how to think through identification of relevant beneficiaries; they also usefully frame identification of relevant fiduciaries").

80. *See, e.g.*, N. Am. Catholic Educ. Programming Found. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007) ("It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders.").

Delaware law, suggests that the ambiguity is intentional.[81] At times, the Delaware courts appear sympathetic to shareholder primacy, at other times, less so. For a variety of reasons, ambivalence on corporate purpose may be a core feature of the law, one that underscores the broad functional flexibility of the corporate form of organization.[82] If this view is correct, Delaware corporate law is consistent both with accounts that presuppose service-type mandates and those that presuppose governance-type mandates.

II. GOVERNANCE-TYPE FIDUCIARY RELATIONSHIPS AND FIDUCIARY LIABILITY

Fiduciary relationships and liability are usually analyzed on the assumption that all fiduciary mandates are service mandates. In this Part, we will explain more precisely how fiduciary governance diverges from standard accounts of fiduciary law and will suggest how these accounts may be amended to accommodate it.

A. The Fiduciary Powers Theory of the Fiduciary Relationship

A key concern once we recognize fiduciary governance mandates is to figure out how they can be reconciled with theories of the fiduciary relationship. In previous work, one of us has articulated a general theory of the fiduciary relationship—the *fiduciary powers theory*.[83] As we will develop, this theory enables us to make sense of governance mandates. It will be necessary, however, to make appropriate modifications to the theory. We will thus start by introducing the fiduciary powers theory in its original form. The fiduciary

81. For accounts suggesting Delaware corporate law is ambivalent on the target of fiduciary duties, see Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1386 (2008), and Andrew S. Gold, *Theories of the Firm and Judicial Uncertainty*, 35 SEATTLE U. L. REV. 1087, 1093 (2012).

82. On the reasons for indeterminacy in Delaware corporate law, see Bruner, *supra* note 81, at 1431-32; Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1063-64 (2000); Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 522-26 (2012); and Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1913-19 (1998).

83. Miller, *The Fiduciary Relationship*, *supra* note 1, at 69-75; *see also* Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 277 (2011) [hereinafter Miller, *Theory*]; Miller, *Justifying Fiduciary Duties*, *supra* note 5, at 1016-21; Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570, 601-04 (2013).

powers theory recognizes the central conceptual role reserved for fiduciary relationships in fiduciary law. On this account, fiduciary duties arise relationally and are understood as securing the integrity of the fiduciary relationship. The core contribution of the fiduciary powers theory lies in its clarification of distinctive formal properties of fiduciary relationships.

The fiduciary powers theory offers the following definition of fiduciary relationships: "[A] fiduciary relationship is one in which one party (the fiduciary) enjoys discretionary power over the significant practical interests of another (the beneficiary)."[84] As this language suggests, like other accounts of fiduciary relationships, the fiduciary powers theory was developed with service-type relationships in mind.

Consistent with this understanding, the fiduciary powers theory conceives of fiduciary power as being held by fiduciaries relative to beneficiaries. Fiduciary powers are understood as a kind of legal power premised on the fiduciary's enjoyment of a form of legal authority derived from the *legal personality* of another person. A fiduciary receives her authority by grant from another person who, in acting on her personal legal authority in making the grant, confers powers on the fiduciary and so empowers (authorizes) the fiduciary person to act for her.

Fiduciary power implies the freedom to engage in conduct not otherwise open to its bearer. This follows from the fact that powers associated with legal personality are themselves personal in nature. An individual possessed of personality is the presumptive bearer of capacities and powers to act in her own name. The investiture of power in a fiduciary alters the normative basis upon which fiduciaries, beneficiaries, and benefactors interact amongst themselves and with third parties. The fiduciary, by virtue of her mandate, enjoys standing (authority) to make discretionary decisions for or on behalf of her beneficiary or benefactor that she would not otherwise have the standing to make.[85]

Consistent with the fact that it was developed with a mind to service-type mandates, the fiduciary powers theory assumes the

84. Miller, *Theory*, *supra* note 83, at 262 (emphasis omitted).

85. *See* Smith, *supra* note 3, at 1400-03; D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 OHIO ST. L.J. 609, 609-13 (2014); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 1-3 (1975).

existence of a beneficiary. It thus points out that fiduciary powers are held relative to the practical interests of beneficiaries and explains what makes an interest of a person "practical." The theory emphasizes the delimited nature of fiduciary authority and the correspondingly narrow scope of fiduciary powers by explaining that the latter are properly exercised only relative to the pertinent interests of beneficiaries in order to advance or promote those interests.

B. Conventional Fiduciary Relationships

The fiduciary powers theory and other theoretical accounts assume a conventional service-type relationship in which the fiduciary is engaged to administer the affairs of a person (or group of persons), or to administer property for the benefit of a specific person (or group of persons). Our brief summary of the fiduciary powers theory explained the basic nature of these relationships. To offer a more textured perspective, we will presently discuss the formation of conventional fiduciary relationships, their composition, and their core function.

Conventional fiduciary relationships are typically formed by mutual consent of the fiduciary and beneficiary.[86] The circumstances in which fiduciaries and beneficiaries come together vary. In many cases, the fiduciary offers fiduciary services to the general public; the beneficiary, attracted by that offer, enters into a contract for services with the fiduciary.[87] In other circumstances, a beneficiary may seek out the fiduciary, or vice versa, on the basis of trust rooted in some personal connection (as often happens in the context of family trusts).[88] In all events, the agreement between the parties

86. *See* Miller, *The Fiduciary Relationship*, *supra* note 1, at 74-75. *See generally* Matthew Conaglen, *Fiduciary Duties and Voluntary Undertakings*, 7 J. EQUITY 105 (2013); James Edelman, *When Do Fiduciary Duties Arise?*, 126 LAW Q. REV. 302 (2010); Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 39.

87. *See generally* Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595 (1997); Easterbrook & Fischel, *supra* note 14; Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899 (2011); D. Gordon Smith, *Contractually Adopted Fiduciary Duty*, 2014 U. ILL. L. REV. 1783.

88. *See generally* Frankel, *supra* note 2; Matthew Harding, *Trust and Fiduciary Law*, 33 OXFORD J. LEGAL STUD. 81 (2013); Richard Holton, *Fiduciary Relations and the Nature of Trust*, 91 B.U. L. REV. 991 (2011); David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011 (2011).

effectuates an authorization and transfer of power from beneficiary to fiduciary.

The mutual consent of fiduciary and beneficiary is not the only mode of relationship formation.[89] In some circumstances, the beneficiary is legally incapable of personally consenting to the formation of a fiduciary relationship to which he is a party. In other circumstances, the beneficiary may enjoy capacity but lack the authority to bring the relationship about through personal consent.

First consider beneficiaries who lack capacity. A personified entity, for example, will always lack legal capacity in its own right. It falls upon fiduciary representatives of the entity (such as directors of a corporation) to engage another fiduciary (a lawyer, for example) on behalf of the beneficiary.[90] Children and incapable adults also lack the legal capacity to establish a fiduciary relationship through personal consent. Thus, a child's parents or the state may consent to a fiduciary relationship on behalf of the child, such as when the state places a child in foster care or a parent delegates parental authority to a caregiver.[91]

Consider now circumstances in which the beneficiary lacks not capacity but authority. In some circumstances a fiduciary acts on powers derived from a third-party benefactor, such as the settlor of a trust.[92] In cases like this, the fiduciary relationship is formed by the benefactor and fiduciary to facilitate a mediated benefaction to beneficiaries.[93] The beneficiary does not, and cannot, establish the

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89. *See* Miller, *Theory*, *supra* note 83, at 252-53, 265-67, 278-79.

90. Of course, as the literature on lawyers as gatekeepers for shareholders indicates, the authority of a fiduciary to delegate to a subordinate fiduciary can create its own set of agency problems. *See* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53-55 (1986). *See generally* JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 1-10 (2006); John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301 (2004); Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L. REV. 491 (2001); Andrew F. Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 1583 (2010).

91. For an example of a statutory scheme governing delegation of parental authority, see CAL. FAM. CODE §§ 6550-6552 (West 2014).

92. *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 646-47 (1995).

93. The mediated nature of the benefaction necessarily contemplates interpolation of the trustee between settlor and beneficiary. *See* DUKEMINIER & SITKOFF, *supra* note 18, at 579 ("By making a transfer in trust rather than outright, a settlor ensures that the property will be managed and distributed in accordance with his wishes as expressed in the terms of the

relationship because he lacks legal authority in respect of the benefaction (disposition of the property that comprises the gift). The beneficiary's involvement is consensual in that it is for him to decide whether to accept the benefaction. But his consent is not instrumental; indeed, if he refuses the benefaction, the mandate may still be executed for the benefit of someone else.

The formation of conventional fiduciary relationships is telling of their constitution. All conventional fiduciary relationships feature, as parties, at least one fiduciary and one beneficiary. In some cases, several fiduciaries may serve one beneficiary under a given mandate as when a team of lawyers represents one client. In other cases, one fiduciary may serve a group of beneficiaries, such as a pension fund manager serving the interests of all subscribers. Similarly, several fiduciaries may serve a group of beneficiaries. There are other possible concatenations. When a mandate is created by a benefactor, the fiduciary relationship includes the benefactor insofar as he enjoys some legal standing (albeit often of a limited nature) during the currency of the mandate.[94] When a mandate has been established for a beneficiary by a fiduciary, that fiduciary will often stand in the stead of the beneficiary, with the first fiduciary standing to the second fiduciary as monitor and enforcer.[95]

Fiduciaries in conventional fiduciary relationships act on discretionary powers to pursue ends that engage the practical interests of determinate beneficiaries. In contrast to governance-type mandates, the objects of their authority are defined in terms of the interests of the beneficiaries. Indeed, ordinarily a service-type mandate would be hopelessly vague if these interests were not so defined. For example, a client facing divorce must specify for the benefit of his lawyer his interests in family property and child custody arrangements.

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trust rather than the whims of the beneficiaries.").

94. *Id.* at 779-80 (describing the gradual expansion of settlor standing to enforce charitable purpose trusts over the past ten to fifteen years); *see also* UNIF. TRUST CODE § 405(c) (UNIF. LAW COMM'N 2010).

95. The role of monitor and enforcer is seen to be so important in trust law that some jurisdictions, recognizing possible circumstances of beneficiary passivity, have permitted the appointment of dedicated trust protectors or enforcers. *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 670-71 (2004). *See generally* Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 CARDOZO L. REV. 2807 (2006); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761 (2006).

The same is true of any other service-type mandate that one might care to contemplate. We cannot understand what the fiduciary is called upon to do unless we place some construction on the interests of the beneficiary.

Appreciation of the relational positioning of the beneficiary is also essential to our understanding of the functions of conventional fiduciary relationships. These relationships enable individuals and groups to avail themselves of the skill, knowledge, and other personal resources of fiduciaries in pursuing ends relating to their interests or those of their designated beneficiaries.[96] As one of us has argued elsewhere, fiduciary authority may thus be understood as facilitating a kind of substitution, whereby one person may be granted standing to act as we are presumptively alone authorized to act in pursuit of our purposes.[97] Service-type relationships are distinguished from governance-type relationships not in terms of their function but instead in terms of their ends. Whereas in a conventional fiduciary relationship the fiduciary stands in substitution for another in acting in the interests of determinate persons, in institutional fiduciary relationships the fiduciary is to act for stipulated purposes that transcend the interests of determinate persons.

C. The Usual Structure of Fiduciary Liability

Fiduciary liability usually has an interpersonal structure. Principles of fiduciary liability govern the bilateral relationship between fiduciary and beneficiary. They are occasioned by that relationship and provide the terms under which fiduciary service mandates are to be carried out for the benefit of the beneficiary.

In fiduciary law, as in other areas of private law, interpersonal principles of liability make one person accountable to another in respect of interpersonal conduct. Generally speaking, interpersonal accountability is effectuated through correlative rights and duties.[98]

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96. Dagan & Hannes, *supra* note 14, at 92.

97. Miller, *The Fiduciary Relationship*, *supra* note 1, at 71-72; *see also* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 126 (2006).

98. Corrective justice theorists emphasize this point (though note that recognition of the fact that rights and duties are structured bilaterally is consistent with different views on the general structure of private liability and the ideas(s) of justice that animate private law). On the bilateral or correlative structure of private law rights and duties, see Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1885-87 (2011); *see also*

One party to a relationship will enjoy a bilaterally or omnilaterally held[99] legal right correlative to which the other party is subject to a legal duty. Correlative rights and duties are structural and substantive mirror images of each other.[100] Structurally, the right entails a correlative duty, for without the duty the right is incapable of securing the value or interest that justifies it. Substantively, the right and duty express one and the same norm of conduct, with the right being framed in terms of the right holder's enforceable claim and the duty being framed in terms of conditions of compliance.

It is characteristic of correlative rights and duties that their content is explained and justified in light of normatively salient interests of the right holder.[101] Thus, though reasonable people differ in how they define and attach salience to these interests, we ordinarily think that the possessory rights of property owners are to be understood in terms of owners' interests in the institution of ownership, that rights to the integrity of our person and reputation reflect our interests in same, and so on.[102] It is, by implication, also

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ERNEST J. WEINRIB, CORRECTIVE JUSTICE 9-12 (2012); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 115-20 (1995) [hereinafter WEINRIB, THE IDEA OF PRIVATE LAW]; Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 436-37 (1992) [hereinafter Coleman, *The Mixed Conception*]; Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 30-31 (1995); Stephen Darwall & Julian Darwall, *Civil Recourse as Mutual Accountability*, 39 FLA. ST. U. L. REV. 17, 18-20 (2011); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); John Gardner, *What Is Tort Law For? Part 1. The Place of Corrective Justice*, 30 LAW & PHIL. 1, 1 (2011).

99. On omnilaterally held rights in tort and property law, see Lisa M. Austin, *Possession and the Distractions of Philosophy*, *in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 182, 191-95 (James Penner & Henry E. Smith eds., 2013), and Gregory C. Keating, *The Priority of Respect over Repair*, 18 LEGAL THEORY 293, 321-23 (2012).

100. WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 98, at 123 ("Right and duty—and therefore plaintiff and defendant—are connected because the content of the right is the object of the duty.").

101. Of course, reasonable opinions widely vary in terms of the criteria of normative salience. For some, the law must be understood as protecting the interests of persons on the basis of the objective value of those interests for persons. Others argue that interests are protected insofar as they are to be understood as emanations of moral personality, the value of which is in turn analyzed in terms of human dignity, freedom, and equality. On the significance of interests to rights in general, see generally NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY (1977); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); Matthew H. Kramer, *Refining the Interest Theory of Rights*, 55 AM. J. JURIS. 31 (2010); and Joseph Raz, *Rights and Politics*, 71 IND. L.J. 27 (1995).

102. Some property theorists define owners' interests in terms of the use of owned property. *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 5 (1997); Henry E. Smith, *Emergent Property*,

characteristic of private law wrongs and remedies that they reflect the impact of wrongdoing on the interests of a right holder. Thus, for example, it is difficult to talk about what makes negligence wrongful without discussing persons' interests in being free of injury and, in turn, without considering the difficult question of what kinds of interests are or should be protected by the duty of care in tort law (for example, physical, psychological, economic).[103] The interests of right holders are also important in understanding the function and justification of remedies. Hence, compensatory damages in negligence are determined by the nature and extent of the injuries suffered by the victim of the tort (in other words, the measurable extent of setback to her interests).[104]

What we have just said of the interpersonal structure of private liability in general captures the usual structure of fiduciary liability. As noted earlier, fiduciary duties are occasioned by the establishment of a fiduciary relationship to which, conventionally, at least one fiduciary and one beneficiary are parties. Fiduciary duties ensure that fiduciaries are accountable to beneficiaries for the way in which they execute their mandate. The fiduciary owes certain legal duties *to* the beneficiary and the beneficiary in turn enjoys correlative claim rights as against the fiduciary.[105] Thus, by virtue of

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in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW, *supra* note 99, at 320, 330-31; Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1692-93 (2012). Others define owners' interests in terms of exclusion. *See* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 90-91 (2009); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

103. This is a point of considerable consensus even among scholars with widely divergent normative presuppositions. *See* Stephen R. Perry, *Risk, Harm, and Responsibility*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 321 (David G. Owen ed., 1997); Arthur Ripstein, *The Philosophy of Tort Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 656, 656-57 (Jules Coleman & Scott Shapiro eds., 2002); Coleman, *The Mixed Conception*, *supra* note 98, at 427; Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 151-53 (1973); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 (2010); Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 29-30 (1972).

104. Allowing that compensatory damages may imperfectly compensate for the setback to one's interests. *See* Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 98 n.86 (2010) ("[W]e also do not have a clear picture of how compensation remedies a wrong. The standard lines—that damages make the victim whole or return her to her preinjury state—are often false, and sometimes cruelly so."). *But cf.* Andrew S. Gold, *A Theory of Redressive Justice*, 64 U. TORONTO L.J. 159, 174-76 (2014) (indicating that imperfect compensation can still be consistent with corrective justice).

105. *See* DeMott, *supra* note 4, at 882 ("If a person in a particular relationship with another is subject to a fiduciary obligation, that person (the fiduciary) must be loyal *to the interests of*

the relationship established between them, the fiduciary is obligated to show due care for the beneficiaries' interests in executing a fiduciary mandate, and each beneficiary has an enforceable correlative claim right to the fiduciary's care. Likewise, conventional fiduciary relationships give rise to a duty of loyalty requiring the fiduciary to pay exclusive regard to the interests of the beneficiaries, and each beneficiary has a correlative claim right to the fiduciary's loyalty.

The interpersonal character of conventional fiduciary liability is also reflected in the content of fiduciary rights and duties. Thus, the duty of care contemplates the impact of the fiduciary's conduct on the interests of the beneficiary. Fiduciaries are required to take care to avoid causing injury to the interests of their beneficiaries.[106] Conventional standards of conduct associated with the duty of loyalty are likewise defined in terms of the beneficiary and her interests.[107] For example, the well-known proscriptive rules (no profit, no conflict) require the fiduciary to consider and act upon the interests of the beneficiary alone in executing her mandate.[108] Prescriptive rules (including fairness, demonstrable partiality, and

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the other person (the beneficiary).") (emphasis added); Smith, *supra* note 3, at 1408 ("The duty that is distinctive of fiduciaries arises out of a concern that *the fiduciary will take advantage of the beneficiary*.") (emphasis added).

106. Thus, for example, cases on the corporate law fiduciary duty of care analyze the conduct of fiduciaries in terms of the interests of corporations and their stakeholders. *See, e.g.*, Allaun v. Consol. Oil Co., 147 A. 257, 261 (Del. Ch. 1929) (suggesting that liability for carelessness will arise when there is "a reckless indifference to or a deliberate disregard of the interests of the whole body of stockholders"); *see also* Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) (holding that the fiduciary relationship between a corporation and its directors requires the latter to "scrupulous[ly] observ[e] [their] duty, not only affirmatively to protect the interests of the corporation ... but also to refrain from doing anything that [might injure] the corporation").

107. *See* Smith, *supra* note 3, at 1410 (arguing that fiduciaries "must refrain from self-interested behavior that wrongs the beneficiary"); Julian Velasco, *A Defense of the Fiduciary Duty of Care*, 40 J. CORP. L. 647, 648 (2015) (arguing that all fiduciary duties reflect an overarching "duty to act in the interests of the beneficiary in all relevant respects"). On the content of the duty of loyalty more broadly, see generally Andrew S. Gold, *The Loyalties of Fiduciary Law*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 176.

108. The classical formulation is found in *Aberdeen Railway Co. v. Blaikie Bros.*: "[N]o one, having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect." (1854) 1 Macq. 461 (H.L.) 471 (appeal taken from Scot.). See also, in the trust law context, *In re* Will of Gleeson, 124 N.E.2d 624, 626 (Ill. App. Ct. 1955), and *In re* Kilmer's Will, 61 N.Y.S.2d 51, 54 (Sur. Ct. 1946).

best-interests standards) are also formulated with reference to the interests of beneficiaries.[109]

D. Governance-Type Relationships: Revisiting the Fiduciary Powers Theory

The prevalence of fiduciary governance raises important questions about the nature of fiduciary relationships and the structure of fiduciary liability. The fact that governance mandates are established for the benefit of purposes rather than specific persons might suggest that fiduciary duties may arise independently of fiduciary relationships and thus that fiduciary liability is not inherently relational. Put simply, a fiduciary who undertakes a governance mandate would appear to be bound to respect its purposes but not to owe legal duties relating to the performance of his mandate to anyone in particular, simply because there is no one with a fixed beneficial interest in the mandate.

In this Section we will argue that these impressions are mistaken. Governance mandates *do* have relational features, but governance-type fiduciary relationships can and should be differentiated from service-type relationships. The fiduciary powers theory provides a way of explaining governance-type relationships in a manner that captures their distinctive qualities while showing that they are of the same genus as service-type relationships. In brief, we argue that governance-type fiduciary relationships share essential formal properties with service-type relationships, save that they are established with different objects. As we will demonstrate, this point of distinction is not simply analytical; it has broader consequences for our understanding of the nature of fiduciary relationships and the circumstances in which they arise.

The fiduciary powers theory suggests that fiduciary relationships are distinguished by the fiduciary's possession and exercise of other-

109. Consider John Langbein's analysis of the content of the trust law duty of loyalty in terms of whether the duty ought to prescribe—as it currently does—that trustees consider *only* the interests of beneficiaries or instead what is in their *best* interests. *See* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 981 (2005) ("In place of 'no further inquiry,' allow inquiry. Allow a trustee who is sued for a breach of the duty of loyalty to prove that the conflicted transaction was prudently undertaken in the best interest of the beneficiary.").

regarding discretionary powers. The theory contemplates service-type relationships. However, it can readily be broadened to encompass and explain governance-type relationships. To this end, we suggest the following extended definition of the fiduciary relationship:

> *A fiduciary relationship is one in which one person (the fiduciary) enjoys discretionary power to pursue an abstract other-regarding purpose or the significant practical interests of another person (an individual beneficiary or ascertained set of beneficiaries).*

This revised definition reflects our above-noted view that all fiduciary mandates are purposive, although the purposes specified for some mandates are defined in terms of the interests of determinate persons while others are abstract in that they are defined such that they transcend the interests of determinate persons. The definition retains the general claim that all fiduciary relationships are distinguished by the nature of the powers wielded by fiduciaries.[110] To summarize: fiduciary powers are legal powers enjoyed on the footing of authority derived from the personal legal authority of legal persons. Fiduciary authority consists in the standing to make decisions for or on behalf of another person in the exercise of legal powers. Fiduciary powers, like personal legal powers, are wide-ranging: fiduciaries regularly act on behalf of others on the footing of contract (for example, in contract negotiation, formation, performance, and exercise of contractual rights); in dealings with respect to property, investments, and commercial matters (for example, in selling, licensing, and granting permissions in respect of tangible and intellectual property); and in making sensitive decisions with respect to

110. We have made two additional modifications aimed at clarifying the conception of the fiduciary relationship that underlies the definition. First, we refer to *enjoyment* rather than *exercise* of fiduciary powers in recognition of the fact that fiduciaries may, in fact, exercise their powers for any number of reasons and that, in distinguishing fiduciary from non-fiduciary powers, our attention is properly directed to the basis on which the powers are held as such. Second, we say that fiduciaries enjoy discretionary powers to *advance* beneficiaries' practical interests rather than merely *over* their interests to underscore the fact that all fiduciary powers held under service mandates are impressed with a purpose that contemplates advancement of beneficiaries' interests in some sense and to differentiate fiduciary powers from other legal and factual powers that may be (and usually are) held "over" or exercised "relative to" other persons.

matters of personal care (for example, making medical treatment or custodial care decisions).

Fiduciaries who serve under governance mandates undertake and act on fiduciary powers so construed. The powers that they exercise are derived from benefactors. Consider the trustee of a charitable purpose trust. The trustee is authorized to act as a trustee, and is granted specific powers of trusteeship (including conventional powers to invest and maintain trust property, advance capital, and distribute income) by the declaration of trust made by the settlor.[111] Her position of authority and possession of fiduciary powers are essential to her ability to act in a legally effective way in advancing the purposes of the trust. And in assuming and acting on her mandate, the trustee stands in the stead of the settlor acting on authority derived from that of the settlor, through powers derived ultimately from the settlor's ownership powers in relation to the property settled on trust.

Whereas trustees of charitable purpose trusts receive authority and power by delegation from private persons, directors of public purpose corporations receive their mandate from the state. There are undoubtedly significant differences between the legal personality of the state and that of natural persons, some of which may be relevant to the authority of the state to delegate power on a fiduciary basis. We cannot, and need not, delve into these issues here. For present purposes, it suffices to recognize that the state can and does routinely delegate authority through the creation of public offices, agencies, and institutions mandated to pursue public purposes.[112] Directors and officers of public purpose corporations receive their mandate through legislative or executive acts whereby the state establishes (a) the corporation; (b) its purposes; (c) the offices through which the corporation will be administered; (d) the powers attached

111. *See generally* UNIF. TRS.' POWERS ACT § 3(c), 7C U.L.A. 689 (2006); UNIF. TRUST CODE § 816 (amended 2005), 7C U.L.A. 627 (2006).

112. Field, *supra* note 49, at 782 ("It seems pretty clear that the national government may use the corporate form as an administrative device for carrying out any power that it can exercise. The question is sometimes asked: for what purposes can Congress create a government corporation? The answer is, of course, that such a corporation can be created for any constitutional federal purpose."); Froomkin, *supra* note 53, at 551-53. For cases in which the federal government's power to establish specific public purpose corporations has been upheld in the face of constitutional challenge, see Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 211 (1921), and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421-22 (1819).

to the corporation and its offices; and (e) other details in respect of corporate governance, reporting, and accountability.[113]

Just as fiduciary service mandates and relationships serve to facilitate extension of the personality of persons through delegation of powers to promote the ends of particular *persons*, governance mandates enable extension of the personality of persons through delegation of powers to promote particular *abstract purposes*. Both kinds of fiduciary relationship permit those who establish them to avail themselves of the resources and capacities of others in advancing the cause of specified purposes or persons. Thus, fiduciary relationships: make it possible for individuals to make more productive and valuable use of their personal powers than would otherwise be possible;[114] advance private ordering by facilitating self-directed coordination and association of persons for common purposes; and permit the state to more efficiently and effectively accomplish its responsibility to govern in the public interest.[115]

Having established that governance-type fiduciary relationships, like service-type relationships, are distinguished by the fiduciary's possession and exercise of delegated power, we may now consider ancillary issues, including relationship formation and the relational character and objects of fiduciary authority.

As noted above, service-type fiduciary relationships are often formed by a beneficiary and fiduciary for the beneficiary's own benefit. Governance-type relationships, by contrast, are instead premised on a benefaction—an act whereby one person aims to confer benefits through stipulated abstract purposes. Fiduciary powers are often derived from the person of the benefactor acting in her own stead.

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113. And as is true of declarations of trust for charitable purpose trusts, the powers conferred on directors of public purpose corporations are almost always carefully delineated. See, for example, the statutory language in the legislation establishing the National Fish and Wildlife Foundation, discussed *supra* note 63. The powers of the Foundation are outlined at 16 U.S.C. § 3703 and incorporate eleven distinct grants of authority. *See* 16 U.S.C. § 3703(c) (2012).

114. Dagan & Hannes, *supra* note 14, at 92.

115. Froomkin, *supra* note 53, at 557 ("The classic reason given for creating an FGC instead of an agency ... is that an FGC will be more efficient at achieving a specific national goal."); Schnell, *supra* note 50, at 241 ("[T]he corporate form is a convenient method of operation providing elasticity of control and freedom from the usual governmental red tape.... [T]he ordinary machinery of government is too cumbersome to operate speedily and efficiently.") (footnote omitted); *see also* U.S. Shipping Bd. Emergency Fleet Corp. v. W. Union Tel. Co., 275 U.S. 415, 423 (1928).

However, they may also arise from further (second order) delegation by a fiduciary.[116] The precise manner in which a benefactor will establish a governance mandate will vary depending on whether she is a natural or legal person, on whether she is acting in a personal or fiduciary capacity, and on the nature of the powers she wishes to confer.

Take the relatively simple case of the charitable purpose trust. Here, the mandate conferred upon the trustee is a product of mutual consent reflected in the trustee undertaking trusteeship on terms set forth in the declaration of trust made by the settlor.[117] By contrast, public fiduciary governance mandates are often established through the exercise of *sui generis* powers of the state.[118] For example, an official with requisite authority in the executive branch may create an office and appoint an official by executive order, in which case the governance mandate undertaken by the appointee is the product of the order itself.

Whatever the nature of a governance mandate, and however it may be conferred, it should be evident that the powers enjoyed by the fiduciary are derivative of powers enjoyed by the benefactor and are granted and held in a relational context defined by purposes specified by the benefactor. The key to appreciating the differences in the constitution of governance-type and service-type relationships lies in recognizing that the former are institutional rather than interpersonal. There is no privity binding the fiduciary to another determinate person. Instead, the fiduciary relates to, and more specifically reports to, persons who occupy monitoring and enforcement roles relative to the fiduciary in respect of the mandate. In some cases, this role may be occupied by the benefactor, as when the government relies on the Government Accountability Office (GAO) to supervise public purpose corporations. In other cases, the role may be occupied by co-fiduciaries, as occurs within a fiduciary collective like a board or in hierarchical fiduciary structures. In yet

116. *See* McGuire, *supra* note 50, at 189 (characterizing the federal government as a corporation and public purpose corporations as subsidiary corporations).

117. The fact that these and other donative trusts are established by the mutual consent of the settlor (benefactor) and trustee has inspired contractarian analyses of trust law including, notably, that of Langbein, *supra* note 92, at 627-31. *But see* M.W. LAU, THE ECONOMIC STRUCTURE OF TRUSTS 22-25 (2011).

118. *See* Froomkin, *supra* note 53, at 551-52; McGuire, *supra* note 50, at 182-84.

other circumstances, monitoring and enforcement rights may be extended to representatives of constituencies committed to the purposes of a fiduciary institution, such as donors, volunteers, or other members of a charitable organization.

Governance-type fiduciary mandates diverge from service-type mandates primarily in respect of their objects. In a governance-type relationship, the fiduciary is empowered to advance certain purposes of a benefactor stipulated independently of the interests of particular persons who may stand to benefit from pursuit of same. The objects of governance-type mandates are often statements of *common purpose* that define the general nature and specific institutional mission of private associations or of *public purpose* for entities established for the benefit of the general public. Thus, for example, a person who incorporates a charity for the purpose of promoting family literacy must be understood as having conferred upon the trustees the authority and power to pursue that purpose.[119]

E. Accountability in Fiduciary Governance: Rethinking Fiduciary Liability

Governance-type fiduciary relationships arise and are carried on relationally, but they have an institutional nature. They do not embed an expectation of privity and are characterized by fluidity in composition while manifesting stability in institutional form and function over time. A given fiduciary governance mandate may result in relationships implicating several successive fiduciaries and monitors/enforcers; likewise, the characteristics and composition of the population intended to ultimately benefit from the mandate will often change over time. These qualities reflect, of course, the fact that governance mandates are concerned with advancement of purposes that, by definition, transcend determinate persons and are often atemporal.

The interpersonal nature of the service-type fiduciary relationship is reflected in the principles of liability rules it attracts. Fiduciary liability is, again, conventionally premised on correlatively structured rights and duties that make fiduciaries directly

119. *See, e.g.*, BARBARA BUSH FOUND. FOR FAMILY LITERACY, http://www.barbarabush.org [http://perma.cc/ELM5-VVCS] (last visited Oct. 23, 2015).

and personally accountable to beneficiaries for the way in which they perform their mandates. This is consistent with the typically interpersonal character of liability in private law and the fact that all service-type mandates have as their object advancement of interests of determinate persons.

Just as it is often assumed that all fiduciary relationships are service-type relationships, so too (and perhaps in consequence) it is usually assumed that fiduciary liability is strictly interpersonal.[120] Fiduciary law, it is said, makes fiduciaries accountable to beneficiaries and thus insulates the latter from vulnerabilities occasioned by the risk of abuse or misuse of fiduciary power.[121] This view is sound as far as it goes, but it is incomplete as a statement of the general nature of fiduciary liability. The characteristics of governance-type fiduciary mandates suggest that fiduciary law is equally concerned with ensuring that fiduciaries respect other-regarding purposes underlying their mandates. The institutional nature of governance-type relationships is also reflected in principles of liability applicable to them.

Fiduciary accountability under governance-type mandates is *structurally* institutional in that it is served by *standalone duties* that may be enforced by any of a number of persons or entities occupying a monitoring and enforcement role in respect of the mandate. Fiduciary duties are, in this context, standalone duties in just the sense articulated by Ronen Perry: the duties do not imply a correlative claim right that is enjoyed and may be asserted by a right holder in her personal capacity.[122] Like any legal duty, standalone

120. *See supra* notes 2-6 and accompanying text.

121. This view has been argued most exhaustively by Frankel, *supra* note 2, at 809-12. *See also* Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1048 (1991); DeMott, *supra* note 4, at 902 ("In many relationships in which one party is bound by a fiduciary obligation, the other party's vulnerability to the fiduciary's abuse of power or influence conventionally justifies the imposition of fiduciary obligation."); Smith, *supra* note 3, at 1404 (speaking of "the beneficiary's vulnerability [as] emanat[ing] from an inability to protect against opportunism by the fiduciary with respect to [a] critical resource").

122. Ronen Perry, *Correlativity*, 28 LAW & PHIL. 537, 537 (2009). Or, as rights theorists would have it, fiduciary duties are non-directed in that, in contrast to the directed duties generated by service-type relationships, they do not give rise to claim rights held by persons with the standing to enjoy and enforce such rights in a personal capacity. We recognize, of course, that recognition of standing to enforce fiduciary duties is not in itself telling of whether a fiduciary relationship is of a governance- or service-type. Standing to enforce personal claim

fiduciary duties *do* establish mandatory, enforceable norms of conduct. But unlike correlative duties, they are not owed to any particular person.[123]

That governance mandates attract standalone duties reflects the fact that they are established for purposes rather than determinate persons; the undefined and contingent nature of individuals' beneficial interests in governance mandates makes it impossible to recognize individuated claim rights in them.[124] This point is amply evidenced in practice. No individual is recognized as holding a personal claim right to the beneficial exercise of discretionary power by a trustee in a charitable purpose trust. Instead, the standalone duties of the trustee are enforced by parties who have been assigned monitoring and enforcement powers, such as state charities agencies, co-trustees, and courts. Likewise, no one may be said to enjoy a personal claim right rooted in a beneficial interest in fiduciary administration of public purpose corporations. Instead, the fiduciary duties of directors are enforced by the state through its officials (for example, the GAO).

The institutional nature of the accountability of fiduciaries under governance mandates is also reflected in the mechanics of enforcement. Whereas interpersonal fiduciary accountability is primarily achieved by beneficiaries acting personally on private rights of action, institutional fiduciary accountability is realized

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rights can be held by persons other than the holder of the right, and likewise an individual may be granted standing to enforce fiduciary duties attaching to a governance mandate without doing so on the basis of a personal claim right in respect of the mandate. *Cf.* Leib et al., *supra* note 79, at 394 (noting that "there is not necessarily a one-to-one correlation between standing to sue and to whom a duty is owed"). On the distinction between directed and non-directed duties in general, see generally DEREK PARFIT, REASONS AND PERSONS (1984); Michael Thompson, *What Is it to Wrong Someone? A Puzzle About Justice*, *in* REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 331, 350-51 (R. J. Wallace et al. eds., 2004); and Gopal Sreenivasan, *Duties and Their Direction*, 120 ETHICS 465, 467-68 (2010).

123. Likewise, there is no individual with the special standing to enforce such a claim right. On the special standing involved in accountability relationships structured in terms of correlative or bipolar rights and duties, see STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: RESPECT, MORALITY, AND ACCOUNTABILITY 11-15 (2006); Darwall & Darwall, *supra* note 98, at 20.

124. This is so at least under an interest theory of rights; on the nature of claim rights in general, see Leif Wenar, *The Nature of Claim-Rights*, 123 ETHICS 202, 207 (2013); Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFF. 223, 229 (2005); and Gopal Sreenivasan, *A Hybrid Theory of Claim-Rights*, 25 OXFORD J. LEGAL STUD. 257, 257-58 (2005).

differently.[125] As noted earlier, various legal actors may enjoy monitoring and enforcement powers relative to governance mandates. Those powers may be exercised in different ways depending on who has the power and how it arises. In some cases, enforcement powers may be wielded through a private right of action or a derivative action for a personified entity. Alternatively or additionally, when enforcement powers are held by public officials or government agencies, accountability may be achieved through direct administrative or regulatory action.

III. FIDUCIARY LOYALTY TO PURPOSES

To this point, in considering the implications of fiduciary governance for fiduciary liability, we have focused primarily on structural matters. We have implied, but not yet argued, that the institutional character of fiduciary liability as it relates to fiduciary governance is evident in the content of fiduciary duties. In this Part we aim to make good on this suggestion. In what follows, we canvass dominant interpretations of the fiduciary duty of loyalty in private law, noting that each supposes that loyalty is something shown to persons. We will then argue that it is possible to be loyal to abstract purposes and, indeed, that fiduciaries acting under governance mandates are obligated to be loyal in just this sense.

A. Conceptions of Loyalty to Persons

The fiduciary duty of loyalty has recently attracted significant academic attention. Most accounts of the duty assume that it is directed toward a person or persons who enjoy a corresponding claim right to the fiduciary's loyalty. There are two leading accounts of fiduciary loyalty in this sense: proscriptive accounts and prescriptive accounts. Proscriptive accounts focus on the types of conduct that fiduciaries are prohibited from participating in. Prescriptive

125. On the differences between private and public law remedies in general (and the promises and pitfalls of private enforcement actions in public law contexts), see Freeman, *The Private Role in Public Governance*, *supra* note 48, at 668-69; Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1206-07 (1982); and Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1444 (1988).

accounts, by contrast, suggest that the fiduciary must demonstrate her loyalty through some affirmative conduct.

As one of us has noted elsewhere, proscriptive accounts of loyalty tend to focus on two proscriptive rules in particular. These are the well-known conflict rules:

> First is the requirement that the fiduciary avoid conflicts between pursuit of his self-interest and fulfilment of his duty to act for the benefit of the beneficiary (the conflict of interest rule). Second is the requirement that the fiduciary avoid conflicts between this duty and the pursuit of others' interests (the conflict of duty rule).[126]

In combination, these rules do not require the fiduciary to act in any particular way but are instead thought to establish boundaries within which the fiduciary may reasonably be expected to act loyally, at least to the extent that the rules isolate biasing factors that might induce the fiduciary to subjugate the interests of beneficiaries to the interests of others.[127]

By contrast, prescriptive accounts suggest that compliance with the duty of loyalty calls for a distinctive kind of action on the part of the fiduciary. In their classic form, prescriptive accounts implicate a requirement of affirmative devotion toward the fiduciary's beneficiary.[128] Lionel Smith has provided a leading account of loyalty so understood.[129] On his view, the motives of the fiduciary are the crucial element in determining whether the fiduciary has acted loyally, and the requirement of motive is quite specific—the fiduciary "must act (or not act) in what *he perceives to be* the best interests of

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126. Miller, *Theory*, *supra* note 83, at 257. In some jurisdictions, notably in Australia, the duty of loyalty is considered to be purely proscriptive. *See* MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 62 (2010).

127. *See, e.g.*, Irit Samet, *Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-Stripping Rule*, 28 OXFORD J. LEGAL STUD. 763, 764-65 (2008) (discussing bias concerns in fiduciary law); Henry E. Smith, *Why Fiduciary Law Is Equitable*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 261, 265-68 (discussing opportunism concerns).

128. *See* Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 461 (2009); Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 37-38 (2003).

129. *See* Lionel Smith, *The Motive, Not the Deed*, *in* RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN 53, 67 (Joshua Getzler ed., 2003).

the beneficiary."[130] This conception of loyalty as pertaining to motive or subjective purpose is especially prominent in Delaware corporate law, where the duty of good faith has been incorporated into that of loyalty. According to the Delaware Supreme Court:

> A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation ... or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.[131]

As this language suggests, prescriptive accounts suggest that fiduciary loyalty to persons requires more than avoidance of conflicts or other sources of bias;[132] it requires that one take initiative to benefit one's beneficiary.[133]

While Lionel Smith's account is especially prominent, there are other possibilities for prescriptivism. One could, for example, adopt an agency model according to which loyalty is tied to obedience or compliance with the instructions of one's principal. On this view, loyalty may be understood as entailing adherence to a beneficiary's instructions or present preferences. Alternatively, loyalty may be a function of the fiduciary's adherence to a beneficiary's specified purposes.

Consider first the idea of being loyal to a person by acting in their best interests. This conception of loyalty may call for a fiduciary to act paternalistically. Indeed, Daniel Markovits has argued that "fiduciary loyalty and care build a measure of paternalism into

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130. *Id.* Whether such loyalty properly counts as a duty or as a requirement for valid fiduciary conduct is a separate question. *See* Lionel D. Smith, *Can We Be Obliged to Be Selfless?*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 141, 152; *see also* Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 99, 137-38 (2008).

131. Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006) (quoting *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006)).

132. While theorists often emphasize either proscriptive or prescriptive standards of loyalty, they may be linked. *See, e.g.*, Peter Birks, *The Content of Fiduciary Obligation*, 34 ISR. L. REV. 3, 28 (2000) ("The obligation of disinterestedness cannot be severed from the obligation to promote and preserve.").

133. *See* Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 209, 216 ("A fiduciary must take the *initiative* on her beneficiary's behalf.").

every fiduciary relation."[134] On this view, a fiduciary should act in what she believes are the beneficiary's best interests, even if the beneficiary might prefer a different course of action.[135] A paternalistic form of fiduciary loyalty is arguably prominent in trust law, in which trustees have independent discretion to make choices that beneficiaries may disagree with.[136] It is also arguably evident in corporate law, which provides that directors may act contrary to their shareholders' known desires when executing their mandate.[137]

Yet agents are also fiduciaries, and unlike trustees and directors, their powers are checked by a legal duty of obedience to their beneficiaries (that is, their principals). On one view, the duty of obedience is separate from that of loyalty.[138] But loyalty and obedience can be intertwined. For example, on a leading account, fiduciary loyalty serves as a benchmark for the interpretation of ambiguous instructions by an agent.[139] Furthermore, following a principal's unambiguous instructions may be described as an element of loyalty, such that an obedient agent is a loyal agent.[140]

This latter understanding is consistent with extra-legal usage, in which following instructions is frequently viewed as an element of loyalty. It is entirely coherent for the leader of a social group joined in a common cause to say to members of the group, worried about a matter delegated to one amongst them: "He is loyal; he will do what

134. *Id.* at 217.

135. *See id.* at 216-17.

136. *See* Tamar Frankel, *Watering Down Fiduciary Duties*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 242, 255 ("Agency and trusteeship are very similar except for the ability of the entrustor-principal to control the fiduciary.").

137. *See, e.g.*, *In re* Lear Corp. S'holders Litig., 967 A.2d 640, 655 (Del. Ch. 2008) ("Directors are not thermometers, existing to register the ever-changing sentiments of stockholders.").

138. *See* Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43, 47-48 (2008).

139. *See* Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 321 ("The agent's fiduciary duty to the principal furnishes a benchmark for interpretation and for assessing actions the agent takes in response.").

140. *See* Douglas R. Richmond, *Yours, Mine, and Ours: Law Firm Property Disputes*, 30 N. ILL. U. L. REV. 1, 26 (2009) ("Agents owe a duty of obedience as an aspect of their duty of loyalty, and they are accordingly bound to follow their principals' lawful instructions." (citing WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 144 (3d ed. 2001))); *see also* SIMON KELLER, THE LIMITS OF LOYALTY vii (2007) ("If you are loyal to something, then you probably favor it, in one way or another, in your actions. You might promote its interests, treat it with respect or veneration, *follow its orders*, or act as its advocate.") (emphasis added).

he is told."[141] This conception of loyalty is also prominent in political theory. A loyalty-based theory of political obligation suggests that individual citizens should comply with their state's directives out of loyalty to the state, with loyalty being understood as an expression of respect for the authority of the state.[142] This way of thinking about political obligation only makes sense if loyalty may involve compliance with a principal's instructions or commands.

Importantly for present purposes, a variant on this conception of loyalty emphasizes purposes. Rather than following a beneficiary's instructions as written, or even as intended, one may instead be loyal to a beneficiary by advancing the purposes underlying the beneficiary or benefactor's directives. This conception of loyalty is relevant to the well-known purposivist approach to statutory interpretation.[143] According to this approach, judges should aim to give effect to the purposes underlying a statute when they interpret it.[144] Doing so is said to be a way of proving oneself a faithful agent of the legislature.[145] On this view of agency, the faithful agent may be entirely unconcerned with present preferences, insofar as it is the purposes of a past legislature that are at stake.[146]

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141. There is also a related possibility: one might be loyal by doing what one is requested but not ordered to do. We may demonstrate loyalty to a friend, for example, by acting in compliance with that friend's requests. *Cf.* DAVID OWENS, SHAPING THE NORMATIVE LANDSCAPE 99-100 (2012) (indicating that a friend's request may create an obligation).

142. On such theories, see JOSEPH RAZ, *The Relevance of Coherence*, *in* ETHICS IN THE PUBLIC DOMAIN 308-10 (1994).

143. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 119-20 (describing the history of purposivist approaches to statutory interpretation). There is also a purposivist approach to constitutional interpretation. *See generally* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., 2007). A similar point about loyalty applies in this area as well.

144. *See* Manning, *supra* note 143, at 119-20.

145. *See id.* at 147-48 (describing the faithful agent theory as a core premise of purposivism in statutory interpretation); Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1582 (2014) ("The leading theories of statutory interpretation tend to accept the view that federal judges should ordinarily serve as faithful agents of Congress when interpreting federal legislation."). While there is a close relationship between complying with intentions and complying with purposes, they are not the same thing. For example, when it comes to statutory interpretation, purposivists often reject the existence of a subjective legislative intent. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006).

146. *But cf.* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 9-10 (2008) (suggesting the import of present legislative preferences in cases of statutory ambiguity).

Furthermore, it is possible to be loyal to an artificial person, such as a corporation, by respecting the purposes for which it was established. For example, corporate charters sometimes stipulate corporate purposes. Compliance with purpose clauses can be understood as a type of loyalty.[147] Indeed, a corporation's purposes may demand loyal adherence even if the director believes that the material best interests of the corporation would be better served by an alternative course of action.

This conception of loyalty has analogues beyond law. Unlike corporations, natural persons obviously do not have charters or other formal records of personal purposes; they usually develop a deeply meaningful set of purposes over time. Appreciation of these purposes and their significance can inform our understanding of what it means to be loyal to a person. Personal purposes are often formed through sustained commitments rooted in the development of personal, family, and cultural identities. During the course of their lives, individuals develop ground projects that give their lives meaning.[148] As Bernard Williams notes, a person may be "identified with his actions as flowing from projects and attitudes which in some cases he takes seriously at the deepest level, as what his life is about."[149] A loyal friend or family member may advance the purposes reflected in a person's ground projects as a means to be loyal to that person, even if they fear that pursuit of these purposes will not advance (or might impair) that person's objectively-construed best interests.

As these examples suggest, prescriptive accounts of loyalty to persons can involve much more than conduct in the best interests of another. Loyalty may involve obedience to the commands or instructions of others, fidelity to their preferences, or allegiance to their purposes.

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147. *See* Martin Gelter & Genevieve Helleringer, *Constituency Directors and Corporate Fiduciary Duties*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 302, 319 ("Directors to a large extent determine via their deliberations the corporate objective—and thus determine the content of the duty of loyalty—themselves.").

148. For seminal accounts of ground projects, see J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 116 (1973), and BERNARD WILLIAMS, *Persons, Character and Morality*, *in* MORAL LUCK 1, 8-10 (1981).

149. *See* SMART & WILLIAMS, *supra* note 148, at 116.

B. Conceptualizing Loyalty to Abstract Purposes

Although there are significant differences among prescriptive accounts of fiduciary loyalty, all characteristically suggest that a fiduciary's loyalty is directed toward persons—either their interests, preferences, or purposes in respect of their own person or that of others.[150] Loyalty, however, need not be directed toward persons. It may instead be directed toward abstract purposes that transcend the interests of determinate persons.[151]

There are suggestive statements to this effect in law and in scholarship.[152] For example, James Penner has pointed out that trustees' duty of loyalty to their beneficiaries in conventional donative trusts is often conditioned in significant ways by the settlor's specification of abstract purposes for the trust; indeed, in many trusts, beneficiaries' interests are conditioned on those purposes.[153] In circumstances like this, though the fiduciary owes loyalty to beneficiaries (and therefore to persons), she also owes allegiance to purposes specified by a benefactor.[154]

In our view, loyalty to purposes differs from loyalty to persons in the specification of the object of the duty of loyalty. Whereas the object(s) of fiduciary loyalty under service-type mandates are beneficiaries, the objects of loyalty for governance-type mandates are the abstract purposes for which a particular mandate has been established. Generally speaking, a fiduciary will demonstrate loyalty to the purpose(s) underlying her mandate by exercising her

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150. *See supra* notes 2-6 and accompanying text; *see also* J.E. Penner, *Is Loyalty a Virtue, and Even If it Is, Does it Really Help Explain Fiduciary Liability?*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 159, 161 ("I shall restrict my discussion to individuals, for they, as objects of loyalty, are most relevant to whether or not the concept of loyalty illuminates or obscures fiduciary liability.").

151. More broadly, loyalty may have abstract objects. A classic example from philosophical literature is 2 JOSIAH ROYCE, *The Philosophy of Loyalty*, *in* THE BASIC WRITINGS OF JOSIAH ROYCE: LOGIC, LOYALTY, AND COMMUNITY 855, 861 (John J. McDermott et al. eds., 2005) (providing a preliminary definition under which loyalty involves loyalty to a cause). *See also* KELLER, *supra* note 140, at 22 (describing the possibility of loyalty to a principle or an ideal).

152. Fiduciary law also recognizes beneficiaries that are non-abstract but lack legal personality, including animals. *See* Frankel, *supra* note 136, at 245 ("[U]nlike a contract, a trust relationship may, but need not, involve two parties. A trust can be established for the benefit of a cat or a dog or an unborn child.") (footnotes omitted).

153. *See* J.E. Penner, *Purposes and Rights in the Common Law of Trusts*, 48 REV. JUR. THÉMIS U. MONTRÉAL 579, 587-96 (2014).

154. *Id.* at 584-85.

discretionary powers exclusively with a mind to advancing those purposes. In our view, loyalty to purposes can be demonstrated more concretely in ways that parallel forms of loyalty to persons. Indeed, the parallel content of the duty may explain why commentators have failed to notice that fiduciaries are often obligated to act to advance purposes rather than the interests of persons.[155]

As is true of fiduciary loyalty to persons, fiduciary loyalty to purposes has proscriptive and prescriptive dimensions. Proscriptive rules limit the possibility of bias tainting the judgment of the fiduciary; prescriptive rules ensure that she is faithful to the objects of her mandate. The proscriptive rules attracted by governance mandates are identical to those familiar from service mandates save that they must be modified to reflect the fact that the objects of governance mandates are purposes. We suggest that the modified conflict of interest rule requires fiduciaries to avoid situations in which they have a personal interest that may undermine their uninhibited pursuit of the purpose(s) underlying their mandate. By contrast, the modified conflict of duty rule requires fiduciaries to avoid undertaking a new mandate if their pursuit of the purposes underlying it may undermine their uninhibited pursuit of the purposes stipulated for an existing mandate.

It may be noticed that, thus interpreted, the content of the proscriptive rules varies only slightly across service-type and governance-type relationships. In our view, the existence of a common core of proscriptive content should be unsurprising because the conflict rules respond to properties shared by service-type and governance-type fiduciary relationships; namely, the fact that fiduciaries enjoy discretion in the exercise of powers. The enjoyment of discretion entails a risk of biased or corrupted judgment.[156] That risk is controlled by the proscriptive rules.

We acknowledge that adaptation has its limits, however. Some prescriptive standards of loyalty known to apply to service-type

155. For related reasons, a shift from a service mandate to a governance mandate understanding need not have a significant impact on a fiduciary's liability risk, and remedial doctrines will often be unaffected. The business judgment rule in corporate law, for example, would be largely identical in its impact, outside of egregious cases in which deliberate violations are evident. In certain settings—such as when it is clear that a prescriptive duty is being violated—differences in content will produce divergent case outcomes, but in many settings both types of fiduciary mandate will operate in similar ways.

156. *See generally* Smith & Lee, *supra* note 85.

mandates could not easily be adapted for application to governance-type mandates. For example, best-interests standards of loyalty have no *direct* corollary in a governance context because they make essential reference to the interests of persons. Similarly, fairness standards as they are conventionally understood could not be applied to the administration of a governance-type mandate to the extent that interests in fair treatment are bound up in the moral personality of natural persons. Fairness standards, as they apply in service-type contexts, enjoin fiduciaries from discriminating between multiple beneficiaries with equal interests in a mandate. It is difficult to see how a standard like this, which references the legal interests of persons, could be transposed to a governance context. The parallel situation in fiduciary governance is one in which a fiduciary is called upon to pursue multiple, non-prioritized purposes. While fiduciaries in these contexts are evidently required to balance the purposes for which they act, it would be odd to suggest that in striking a balance between purposes they are enjoined to show fairness to the purposes by refraining from discriminating between them.

Nevertheless, the underlying idea that a fiduciary should judiciously balance competing claims is clearly one that could support parallel fiduciary governance norms. In lieu of a best interests standard, one could, for example, argue that fiduciaries are obliged to act in a manner that would be most likely to advance the purposes specified for their mandates.[157] Similarly, in place of an equal standing conception of fairness, fiduciaries could be held to standards of fair dealing, which require that they honestly and forthrightly serve the purposes attached to their mandates, and that they not knowingly prejudice achievement of those purposes by disregarding some purposes or favoring conflicting purposes.

157. As suggested by Lionel Smith in respect of the administration of charitable purpose trusts: "[T]rustees of charitable trusts do not have to take account of the best interests of any person or persons in order to act loyally; they must take account of the best way to achieve a purpose." Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf Another*, 130 L.Q. REV. 608, 611 (2014).

IV. THE IDEA OF FIDUCIARY GOVERNANCE: INTERPRETIVE IMPLICATIONS

Governance-type fiduciary mandates are distinguished from service-type mandates on the basis that their objects are defined purely in terms of abstract purposes, without reference to the interests of determinate persons. Fiduciaries who act under governance-type mandates are subject to standalone fiduciary duties that ensure a form of fidelity to purpose. In what follows, we will identify key interpretive implications of our account of fiduciary governance for public and private fiduciary law. As will soon become evident, our account offers new perspectives on a wide variety of important issues, ranging from our conception of the relationship between public officials and members of the public under fiduciary theories of government to our understanding of the role of religious and other non-commercial purposes in the governance of corporations.

A. Public Fiduciary Law

The idea that the state and its officials occupy a fiduciary role is longstanding,[158] and can be traced to the writings of the ancient Greeks and Romans.[159] Hugo Grotius's work suggests that the assertion of sovereignty by states is premised on fiduciary principles.[160] And the English philosopher John Locke argued that legislative power is "a fiduciary power to act for certain ends."[161] In the United

158. This brief historical account of origins of the idea of fiduciary government draws on the careful historical and exegetical work of Evan Criddle. *See* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 466-68 (2010).

159. *See* CICERO, DE OFFICIIS bk. I, ch. XXV, at 87 (T.E. Page & W.H.D. Rouse eds., Walter Miller trans., MacMillan & Co. 1913) (c. 44 B.C.E.); PLATO, THE REPUBLIC (Chris Emlyn-Jones & William Preddy trans., 2013); *see also* Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1097-1101 (interpreting Plato and Cicero in fiduciary terms).

160. *See* Evan J. Criddle, *A Sacred Trust of Civilization: Fiduciary Foundations of International Law*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 1, at 404, 413 (citing HUGO GROTIUS, MARE LIBERUM ch. V (Ralph Van Deman Magoffin trans., 1916) (1608); HUGO GROTIUS, DE JURE BELLI AC PACIS bk. II, ch. 2 (Francis W. Kelsey trans., 1925) (1625)).

161. JOHN LOCKE, *An Essay Concerning the True Original, Extent and End of Civil Government* (1690), *in* SOCIAL CONTRACT 3, 87 (Sir Ernest Barker ed., 1947).

States, a fiduciary conception of government was prominent in the nation's founding.[162] The idea of fiduciary government is not just of historical interest, however. Recently, public fiduciary theory has experienced a resurgence as seen in the development of important new accounts of the implications of fiduciary principles for our understanding of the state,[163] Congress,[164] the judicial branch,[165] and administrative agencies.[166]

Public fiduciary theorists commonly base their analyses on analogies between public institutions and private law counterparts, drawing most notably on exemplars of fiduciary relationships found in trust law,[167] corporate law,[168] partnership law,[169] and agency law.[170] In analogizing from private to public law, these scholars assume that all fiduciary relationships are similarly constituted and thus that the distinctive characteristics of service-type relationships must have corollaries in public law fiduciary relationships.

This Section will begin with a review of areas in which the idea of fiduciary governance can help us to better understand the application of fiduciary principles to public law. As we will see, certain features of public law institutions generate problems for public fiduciary theory because theorists work from the perspective of service-type fiduciary relationships. Appreciation of the distinctiveness of fiduciary governance and its role in government promises better reconciliation of theory and institutional reality.

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162. *See, e.g.*, THE FEDERALIST No. 46, at 294 (James Madison) (Henry Cabot Lodge ed., 1895); THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 28 (C. Bradley Thompson ed., 2000).

163. *See, e.g.*, FOX-DECENT, *supra* note 22, at 34.

164. *See, e.g.*, Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 852 (2013); Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105, 1111 (2011) [hereinafter Nagy, *Insider Trading*]; Donna M. Nagy, *Owning Stock While Making Law: An Agency Problem and a Fiduciary Solution*, 48 WAKE FOREST L. REV. 567, 568 (2013); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 676-77 (2013).

165. *See, e.g.*, Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 701 (2013).

166. *See, e.g.*, Criddle, *supra* note 97, at 120; Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271, 1272 (2010).

167. *See, e.g.*, Kim, *supra* note 164, at 872.

168. *See, e.g.*, *id.* at 888; Rave, *supra* note 164, at 723-24.

169. *See, e.g.*, Kim, *supra* note 164, at 885.

170. *See, e.g.*, Leib et al., *supra* note 165, at 727.

1. The Judicial Branch

The application of fiduciary principles to judges may seem counterintuitive given the importance of impartiality in judging. Courts sometimes recognize that judges are fiduciaries in limited circumstances. For example, Judge Richard Posner has noted: "We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries."[171] But the notion that judicial offices are inherently fiduciary may not be obvious.

Recently, Ethan Leib, David Ponet, and Michael Serota developed a sophisticated fiduciary theory of judging.[172] As they note, judicial offices have some of the standard indicia of fiduciary mandates.[173] Judges enjoy broad discretionary authority.[174] They can be understood to wield power through entrustment.[175] And citizens are obviously vulnerable to the judicial exercise of power in the ordinary course of adjudication.[176] Even so, fiduciary theories of judging face a significant challenge: on the conventional understanding of fiduciary law, one must identify beneficiaries of the particular mandate borne by the fiduciary.[177]

Suppose that, in recognition of citizens' heightened vulnerability to the exercise of judicial powers, we characterize litigants as the beneficiaries of judicial offices. This view, while supported to some extent by analysis of the characteristics of service-type fiduciary relationships, is difficult to square with the neutrality that society expects judges to show in adjudication. Impartiality is a virtue in adjudication, and it is a far cry from the decidedly partial pursuit of the interests of others that we normally expect of fiduciaries.

One might respond by substituting another beneficiary for litigants or others whose personal interests are directly affected by adjudication. One might argue that "the people" in aggregate are

171. Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279-80 (7th Cir. 2002).
172. Leib et al., *supra* note 165, at 703.
173. *Id.* at 727.
174. *See id.* at 718.
175. *See id.*
176. *See id.* at 719.
177. *See id.*

beneficiaries of judicial offices. Indeed, this is the view of Leib, Ponet, and Serota.[178] As they argue:

> Hard as it may seem to engage in the fiduciary representation of a class as large as "the people," democratic governance calls for nothing less. To say that judges hold the public's interest in trust is more than mere rhetoric or analogy; the people are their real beneficiaries and judges should conform their conduct to fiduciary standards.[179]

While the notion that judges are fiduciaries of the people is intuitively appealing, it is also overly vague. Who constitutes "the people" remains unclear. "The people" could include the people in the state, district, or circuit over which a judge has jurisdiction; it could include all American citizens; it might include non-citizens in cases that implicate their interests; it might even include future generations.[180] A further problem concerns the type of reasoning involved in decisions that aim at the best interests of the public. Such reasoning must inevitably be concerned with prospective outcomes, but it is questionable whether this type of reasoning is consistent with the internal point of view on adjudication.[181] Private law adjudication is famously retrospective, with courts seeking a just resolution of a dispute between litigants that is rooted in their past interactions.[182] Judges only occasionally focus on prospective issues and in doing so ordinarily focus on issues of interpersonal accountability (for example, in enjoining future harmful wrongdoing) rather than on incentives or socially just distributions.[183]

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178. *See id.* at 721.

179. *Id.*

180. This mapping problem is one that Leib, Ponet, and Serota have discussed at length in their work. *See infra* notes 209-13 and accompanying text.

181. The difficulty is in squaring this account with the way in which courts describe their reasoning in judicial opinions. In other words, it is difficult to accept the forward-looking account of judicial reasoning if we adopt a transparency criterion for the interpretation of private law doctrine. For a discussion of transparency criteria and their relevance, see STEPHEN A. SMITH, CONTRACT THEORY 24-32 (2004).

182. *See* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 16-18 (2001); Gold, *supra* note 98, at 1885-86 (2011); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 462 (2000).

183. This is a point on which there is some agreement amongst civil recourse and corrective justice accounts of private law. For leading corrective justice accounts, see JULES L. COLEMAN, RISKS AND WRONGS 303-24 (1992), and WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 98, at

In addition, engaging in conduct with the object of benefitting a person differs significantly from engaging in conduct that predictably benefits a person. When a trustee for a charitable trust acts to advance the trust's purposes, doubtless her success will redound to the benefit of the public. It does not follow that the public is a beneficiary of the trust. The trustee's mandate is defined by the purposes established for the trust, and she owes her fidelity to those purposes rather than to any person or group of persons who hope to benefit from their fulfillment. The same is true of judges. Judicial offices are established for the benefit of the public, and their proper exercise predictably yields public benefits, but it does not follow that the public is a beneficiary of judicial offices in a formal legal sense.[184]

An alternative would view judicial mandates as enjoyed by delegation, in which case judges may be considered fiduciaries of some other organ of the state, or of the state itself (which, in turn, is a fiduciary of the public). Thus one might argue that judges should be considered agents of the legislature. After all, a standard view of statutory interpretation requires judges to serve as "faithful agents" in enforcing statutes as written, as intended by the legislature, or in a manner consistent with legislative purposes.[185] This view of judicial power as enjoyed on the basis of delegation may be accurate in some settings. The difficulty is that this view is not generalizable; in many cases, adjudication does not involve, much less turn on, statutory interpretation or analogous functions.

Some describe judging as a fiduciary enterprise without referring to beneficiaries as such.[186] For example, according to Sarah Cravens: "It is the judge's duty, as a trustee, to maintain the integrity of the corpus of the common law, and the way to do that is to exercise judicial virtue."[187] Cravens appears to conceive of the judge as a

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62-63 (1995). For leading civil recourse accounts, see Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 714-18 (2003), and Goldberg & Zipursky, *supra* note 103, at 919.

184. This is also made clear in the public benefit corporation statute, discussed below. *See infra* notes 232-37, and accompanying text.

185. *See supra* note 145 (discussing this theory).

186. *See* Sarah M.R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH. & LEE L. REV. 1637, 1645 (2005).

187. *Id.*

fiduciary of law or legality.[188] Leib, Ponet, and Serota reject this view, arguing as follows:

> [I]n contrast to those commentators who consider judges "trustees" for the "corpus of the common law" ... our argument ties judges' fiduciary status to those actual citizens who have authorized and delegated power (expressly or not) to them. In other words, in searching out the relevant beneficiary, one should look to an actual relationship. The fiduciary principle is, as we have explained, a rubric for those in relationships of power and vulnerability; for that reason, the "corpus" is an insufficiently relational conception of the relevant beneficiary.[189]

This is a forceful argument, and it would be compelling if fiduciary relationships consisted only of the service-type. Yet, because fiduciaries need not have beneficiaries, one cannot dismiss Cravens's account so easily. Indeed, one of the benefits of the idea of fiduciary governance is that it redirects our attention to the inherently abstract public purpose(s) that underlie the creation and execution of public offices. One could argue that judges are fiduciaries with a mandate to serve purposes essential to our shared aspirations to conditions of legality and justice—purposes which, amongst other things, require judges to maintain the integrity of the common law. The problem of identifying beneficiaries of judicial offices then falls away and is replaced by the more tractable, and arguably more interesting, challenge of determining what abstract public purposes may be ascribed to judging.

2. The Executive Branch

The executive branch can also be analyzed through a fiduciary lens. For example, Evan Criddle has offered an influential account of the application of fiduciary principles to administrative law.[190] On this view, agencies are "stewards for the people," and "[t]he terms of an administrative agency's enabling statute reflect the type and degree of trust that the people, through their elected

188. *See id.*

189. Leib et al., *supra* note 165, at 720.

190. *See* Criddle, *supra* note 158, at 448; Criddle, *supra* note 97, at 120.

representatives, have chosen to repose in the agency."[191] A key feature in this account is the broad scope of an agency's discretion in carrying out its assigned responsibilities.

On Criddle's view, the ultimate beneficiary of an agency is the nation's populace, subject to the interpolation of a governmental intermediary—Congress—which, as delegator of power to agencies, stands between them and the people.[192] As is well known, agencies are supposed to respect congressional intent, and the nature of the agency's role depends on the terms of its delegation. In some cases, the delegation is sufficiently broad that it gives the agency significant discretion over how to carry out its mandate.

Consider one of Criddle's examples: the Federal Trade Commission. As he notes:

> The Federal Trade Commission Act, for instance, authorizes the Federal Trade Commission (FTC) to take steps to curb "unfair methods of competition" and "unfair or deceptive acts or practices," but provides strikingly little guidance regarding what competitive strategies would qualify as "unfair" or "deceptive." Such broadly phrased standards give agencies enormous flexibility to craft regulatory regimes responsive to legislative policies in complex or changing circumstances.[193]

The FTC does not simply follow legislative instructions; it interprets its mandate in light of legislative policy, as the circumstances require. According to Criddle, when a congressional statute is too vague to discern legislative intent as to the ends of agency discretion, an agency must look to "the broader public interest"[194] or to the interests of the segment of the population that Congress designed the agency to aid.[195] He explains that "[a]s fiduciaries for the people

191. *See* Criddle, *supra* note 97, at 136.

192. *See id.* at 177-78.

193. *Id.* at 137 (footnote omitted).

194. *See id.* at 138 ("Where legislative directives leave gaps for agencies to fill or speak in terms so broad as to 'give little hint of the congressional intent to which the agency must be faithful,' agencies look beyond Congress's specific intent to the broader public interest." (quoting Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 590 (1985))).

195. *See id.* at 137-38 ("Courts have come to recognize over time that agencies must not only satisfy the strict terms of their statutory mandates ... and investigate public preferences ... but also assume responsibility as fiduciaries for the broader interests of their statutory

as a whole, administrative agencies' fiduciary obligations do not run solely to the chief executive or the legislature per se, but rather to the agencies' statutory beneficiaries, who are often, but not always, the sovereign people as a whole."[196]

In analyzing the legal character of the mandates undertaken by administrative agencies, Criddle describes a fiduciary relationship that implicates beneficiaries.[197] Yet if we look closely at his account of agency responsibilities, it is more suggestive of fiduciary governance than fiduciary service. Criddle quotes Judge Merrick Garland:

> [T]he courts have turned ... to an expanded notion of fidelity, one that requires not only that the agencies not exceed their congressionally authorized powers, but also that they use those powers as Congress intended. In short, the courts have reached back to the oldest of administrative law values—maintaining agency constancy to congressional *purpose*—in order to extend protection to a new class of legislative beneficiaries.[198]

This model requires agencies to advance their legislated purpose(s) when acting on their mandates. It is, of course, possible that Congress will frame legislated purposes in a manner typical of the stipulation of purposes in service-type relationships, in which the fiduciary is granted powers to advance purposes defined in terms of the interests of determinate persons. But, in general, Criddle's account characterizes agencies as having mandates that call for a balancing of interests in pursuit of a general purpose or set of purposes.

Here, too, we find that features of public administration best lend themselves to explanation in terms of fiduciary governance. As was true of judges, in analyzing administrative agencies one may realize greater return in focusing on the fiduciary nature of the abstract purposes that animate agencies than one garners in focusing primarily on the interests of persons subject to agency decision making. This is not to say that agencies acting as faithful fiduciaries can

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beneficiaries.").

196. *See id.* at 139.

197. *See id.* at 126.

198. *Id.* at 138 (quoting Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 512 (1985)) (emphasis added and omitted).

safely ignore the interests of persons affected by their decisions;[199] it is, rather, to suggest that the fiduciary nature of the mandate occupied by an agency and its officials is often a function of legislated purposes rather than the delegation of power to advance interests of determinate persons.

3. The Legislative Branch

Congress has also recently been theorized in fiduciary terms. Fiduciary accounts of the legislative branch often center on the problem of conflicts of interest,[200] as fiduciary law provides sophisticated mechanisms to address agency problems that arise in legislative settings. Recent scholarship has, however, been bedeviled by difficulties in identifying the proper beneficiaries of legislative bodies.

One prominent strand of scholarship focuses on insider trading. Donna Nagy and Sung Hui Kim have independently developed arguments for insider trading liability for members of Congress or state legislators.[201] The relevant statutory provision—Section 10(b) of the Securities Exchange Act[202]—implicates disclosure of inside information by fiduciaries to their beneficiaries.[203] Nagy and Kim

199. For example, they cannot arbitrarily disregard the interests of persons affected by their decisions. On Criddle's view, the requirement of advertence to the interests of persons affected by administrative discretion is suggestive of a fiduciary relationship with, and duty toward, such persons. We view this requirement as an entailment of the broader mandate that agencies have to exercise discretion properly in pursuit of broad public purposes. However, we acknowledge that administrative law at times refers to persons affected by the decisions of administrative agencies as "beneficiaries" (for example, under the rubric of the zone of interests test for standing). It is possible that, in some circumstances, the mandates of administrative agencies are hybrid in nature with fiduciary service and fiduciary governance elements. The extent of hybridity is a question worthy of further exploration. We are grateful to Evan Criddle for bringing these points to our attention.

200. *See, e.g.*, Kim, *supra* note 164, at 908; Nagy, *Insider Trading*, *supra* note 164, at 1133; Rave, *supra* note 164, at 676.

201. *See* Kim, *supra* note 164, at 850; Nagy, *Insider Trading*, *supra* note 164, at 1111.

202. *See* Securities Exchange Act of 1934 § 10(b), Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78j(b) (2012)); *see also* SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2011).

203. For the classical theory, see *Chiarella v. United States*, 445 U.S. 222, 227-28 (1980). For the misappropriation theory, see *United States v. O'Hagan*, 521 U.S. 642, 652 (1997).

argue for legislator liability on fiduciary principles, on the basis that legislators are fiduciaries to the public or to the legislature.[204]

Another important application of fiduciary theory focuses on election law. Theodore Rave's recent work on gerrymandering offers an analysis of redistricting policy in terms of fiduciary proscriptions on conflicts of interest.[205] Legislators have a significant conflict of interest when they draw the districts in which they hope to be elected.[206] Building on analogies to agency cost problems in corporate law, Rave argues that a fiduciary duty of loyalty should apply to redistricting.[207]

In some cases it may be possible to set aside the question of whether there are identifiable beneficiaries of legislators and legislative bodies.[208] But if fiduciary theories of legislative offices and action are to apply more widely, it is necessary to confront the issue. Leib, Ponet, and Serota describe this as a "mapping" problem.[209] To illustrate its difficulty, they give the example of Jane, a state-level legislator who has sworn to uphold the Constitution of the State of New Jersey.[210] To whom is she a fiduciary? Jane may be a fiduciary for her constituents. After all, they elected her. However, Jane might instead be a fiduciary for the citizens of her entire state.[211] Leib, Ponet, and Serota add that "Jane may also have at least two other beneficiaries: the nation's citizenry and future generations."[212] Each of these latter possibilities is supported by the recognition that Jane's conduct in office implicates interests of a public that extend beyond her present constituents.

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204. For accounts identifying the beneficiary as the public or a subset of the public, see Kim, *supra* note 164, at 871-80, and Nagy, *Insider Trading*, *supra* note 164, at 1141. For the theory that legislators owe a fiduciary duty to the legislature, see Kim, *supra* note 164, at 880-87.

205. *See* Rave, *supra* note 164, at 676.

206. *See id.* at 677-79.

207. *See id.* at 708-13.

208. To the extent one focuses entirely on the avoidance of conflicts of interest, it may not always be necessary to determine the identity of a beneficiary. *Cf.* Ribstein, *supra* note 87, at 909 ("The fiduciary duty to avoid self-dealing is not defined with reference to the specific parties on whose behalf the fiduciary must act.").

209. *See* Lieb et al., *supra* note 79, at 398.

210. *See id.* at 398-99.

211. *See id.* at 399.

212. *Id.* at 400.

In analyzing these different ways of conceptualizing the fiduciary nature of legislative offices and activities, Leib, Ponet, and Serota argue that "it is only through identifying the relevant fiduciary and beneficiary that one is able to determine the precise contours of the fiduciary framework's ethical architecture."[213] On this point, we disagree. One need not identify a beneficiary to analyze a relationship or office in fiduciary terms; as we have shown, governance-type mandates have no determinate beneficiaries.[214] Adopting a governance perspective, one might argue that legislators are fiduciaries for particular abstract purposes.

The mapping problem does not disappear when we adopt a fiduciary governance perspective, but its significance changes. As noted, we must recognize the possibility of fiduciary duties that are not owed to particular beneficiaries but are instead framed in terms of the pursuit of specified abstract purposes.[215] If, for example, a legislator can legitimately consider environmental protection as an end of legislative action, she may advance a purpose defined in terms of broad considerations of public policy rather than in terms of the interests of a determinate beneficiary. Quite probably, her constituents and the citizenry at large will benefit indirectly from good environmental policy, but enjoyment of such benefits is a contingent matter—it is not a matter of right.

In our view, debate over the fiduciary character of legislative offices and institutions would benefit from reinterpretation in terms of fiduciary governance. The focus of debate ought not to be solely on identifying who should be considered first in line to benefit from the actions of legislators but also on the fiduciary character of purposes pursued by legislators and legislative bodies, the source(s) of those purposes and processes through which they are defined and varied, and the ways in which legislators can or should be held accountable on the basis of their fidelity to the public purposes with which they have been entrusted.

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213. *Id.* at 389.

214. *See supra* Part I.B.

215. *See supra* Part I.B.

4. The State

Others have argued that the state itself is a fiduciary. Evan Fox-Decent has provided the most detailed exposition of this view.[216] According to Fox-Decent, fiduciary relationships have the following basic features:

> (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding discretion or power.[217]

From this starting point, Fox-Decent explains that the state is a fiduciary in that it necessarily asserts the legal authority to govern over its subjects and, by extension, exercises a wide variety of legal powers.[218] Subjects are vulnerable in a twofold sense: First, subjects are inherently incapable of personally exercising most of the powers wielded by the state, and second, by virtue of their liability to state action and duty to obey the state's lawful commands, subjects are inherently "subject to" the state and its officials.[219]

Fox-Decent's account is powerful and evocative. Yet it faces challenges, doctrinal and otherwise. As Fox-Decent acknowledges, the entire project of theorizing state authority in fiduciary terms "may seem especially implausible to private lawyers accustomed to viewing the fiduciary duty as exclusively a duty of loyalty to a particular beneficiary."[220] The implausibility lies in the thought that fiduciary loyalty entails partiality to a person and her interests.[221] This conception of fiduciary loyalty is evidently inconsistent with the duty of the state to impartially balance the interests of different constituencies.[222] One response to this concern is to point to private fiduciary mandates for the benefit of multiple beneficiaries.[223] As

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216. *See* FOX-DECENT, *supra* note 22, at 29-30.
217. *See id.*
218. *See id.*
219. *See id.*
220. *Id.* at 34.
221. *See id.*
222. *See id.*
223. *See id.* at 35.

Fox-Decent rightly points out, private fiduciaries are regularly presented with this conundrum and the response in law is not to deny the applicability of fiduciary principles.[224] Instead, on his view, in these contexts "the discrete fiduciary duty of loyalty is necessarily transformed into duties of fairness and reasonableness in private law cases with multiple beneficiaries whose interests conflict."[225]

Fox-Decent is right to criticize private lawyers for "viewing the fiduciary duty as exclusively a duty of loyalty to a particular beneficiary."[226] However, his analysis assumes the necessity of establishing the existence of a service-type fiduciary relationship between the state and its people.[227] This, in turn, is problematic. The state is classically understood to have a responsibility to advance the public welfare. While there are circumstances in which the state undertakes fiduciary service mandates—for example, when it administers a conventional trust or estate for a deceased person[228]—the overarching governance functions of the state do not readily align with the features of service-type fiduciary relationships. In our view,

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224. *Id.* at 34-35.

225. *Id.* For further discussion, see generally Andrew S. Gold, *Reflections on the State as Fiduciary*, 63 U. TORONTO L.J. 655 (2013). On the significance of multiple beneficiaries with conflicting interests in private law contexts, see Steven L. Schwarcz, *Fiduciaries with Conflicting Obligations*, 94 MINN. L. REV. 1867 (2010).

226. FOX-DECENT, *supra* note 22, at 34.

227. *See id.* at 3 (adopting a view of the state as owing directed fiduciary duties to the people as beneficiaries: "[T]he state is a fiduciary of the people over whom it exercises power. As a fiduciary, the state owes its people a single but complex legal obligation, one which arises solely from the fiduciary character of its relationship to the people. The state must govern its people in accordance with the demands of legality"); *see also id.* at 20 (speaking of the state-subject relationship as one "mediated and based on trust"); *id.* at 28 (asserting that "an overarching fiduciary relationship exists between the state and each person subject to its authority"); *id.* at 40 (stating that "the fiduciary relationship, at its most abstract level, is between the state and each person subject to its power and authority" and noting that the "fiduciary and relational conception explains why anyone subject to legal authority, regardless of status, is an equal co-beneficiary of the rule of law"); *id.* at 41 (explaining fiduciary duties in public law as directed duties that give rise to correlative claim rights in the people as beneficiaries: "The approach I advocate pays equal attention to the beneficiary's right and the fiduciary's duty, and conceives of them as correlative to each other"; explaining fiduciary duties in terms of the protection they provide for beneficiaries' interests and the integrity of her personality: "the fiduciary principle authorizes the fiduciary to exercise power on the beneficiary's behalf, but subject to strict limitations arising from the beneficiary's worth as a person subject to fiduciary power").

228. *See* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323 (2011) (discussing contexts in which funds are held in trust by the U.S. government for Native American tribes).

fiduciary theories of the state should include analysis in terms of fiduciary governance.[229]

Analyzing the state in these terms would enable fiduciary theorists to better distinguish their own views from those of social contract theorists. It would also permit them to explain the significance of public policy development and the importance of process in identifying policy priorities, provide principled criteria for arbitrating contested claims about public purposes, and make a distinctive contribution to the debate over the privatization of public functions. Beyond opening up promising new avenues of inquiry, the idea of fiduciary governance provides theorists with a ready answer to private lawyers skeptical about public law applications of fiduciary principles. The state's obligation of impartiality is fully consistent with the fiduciary character of state authority precisely because the authority of the state is encumbered by public purposes that transcend the interests of determinate persons.

B. Private Fiduciary Law

As indicated above, a classic case of fiduciary governance is found in the administration of charitable purpose trusts. Fiduciary governance goes to the core of the charitable purpose trust as a kind of legal institution. A similar analysis could be made of other charitable entities, including non-profit corporations. Museums and educational institutions also raise a variety of important governance questions. Furthermore, these examples are not outliers in private law: entities with charitable or public-regarding purposes occupy a major place in developed economies.

This Section will consider other, less obvious examples of private fiduciary governance. While governance mandates exist in other areas, our focus will be on the law of corporations. We will begin by analyzing the public benefit corporation. The public benefit

229. Note also that public fiduciary theorists have made reference to the idea of loyalty to purposes. *See* FOX-DECENT, *supra* note 22, at 37 ("On this account, the most fundamental and general fiduciary duty is not loyalty to an individual or a discrete class of beneficiaries, but fidelity to the other-regarding purposes for which fiduciary power is held."). There is, however, an important difference between purposes that ground duties of loyalty owed to determinate beneficiaries, and abstract purposes that govern fiduciary conduct even in the absence of determinate beneficiaries.

corporation offers a particularly interesting variant on fiduciary governance inasmuch as it features mixed purposes, combining pursuit of business objects with charitable purposes. We will then consider the traditional for-profit corporation, suggesting ways in which our account sheds new light on important questions of corporate law theory.

1. Public Benefit Corporations

Public benefit corporations are a new kind of business entity that has recently gained significant attention.[230] Public benefit corporations also present significant puzzles for fiduciary theorists. On the one hand, shareholders in these for-profit corporations are considered beneficiaries of the board's fiduciary duties.[231] On the other hand, shareholders' interests in pursuit of profit are checked by corporate commitments to pursue public benefits.[232] How can the specification of mixed and potentially conflicting purposes be made consistent with traditional ideals of loyal fiduciary administration? Without distorting the character of the public benefit corporation, this cannot readily be done. These corporations occupy a middle ground between a non-profit entity and the classic for-profit corporation.

Consider the text of section 365 of the Delaware General Corporation Law,[233] which makes it clear that the administration of public benefit corporations entails fiduciary obligations to two parties. The directors, per section 365(b), are described as having "fiduciary duties to stockholders *and* the corporation."[234] Section 365(b) is quite explicit in specifying that those interested in receipt of the public benefits identified in the corporation's charter are not beneficiaries

230. For recent analyses of public benefit corporations, see generally J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012); Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247 (2014); and Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999 (2013).

231. *See* Westaway & Sampselle, *supra* note 230, at 1005.

232. *See id.* at 1034-35.

233. DEL. CODE ANN. tit. 8, § 365 (2013).

234. *See id.* (emphasis added).

in the strict sense of the board's duties.[235] The stockholders and the corporation are the only identified beneficiaries of the board's fiduciary duties.[236] On the other hand, the language of the provision also indicates that directors are permitted to balance the pecuniary interests of the stockholders and corporation against the achievement of specified public benefits.[237]

This suggests that the fiduciary administration of public benefit corporations entails a hybrid mandate involving service and governance elements. The board is not merely called on to advance abstract public purposes. It must also serve the private pecuniary interests of the corporation and its stockholders. Incorporating a public purpose into the objects of the corporation alters the character of the duty of loyalty owed by its directors. Consistent with the account we have provided above, the director owes an institutional form of loyalty to the abstract purposes of the corporation, but his duty is qualified by the need to consider specific interests of persons and is structured interpersonally.

2. Corporate Purpose Clauses and Agency Slack

While opting to incorporate a public benefit corporation is one way parties may establish a corporation in which directors will be invested with a governance-type mandate, it is not the only mechanism. Even in jurisdictions that adopt a service-type conception of the directors' mandate, there may be circumstances in which fiduciary governance plays a role. Governance-type mandates can be expressly adopted through corporate purpose clauses.[238] Alternatively, fiduciary governance may be a consequence of agency slack.[239]

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235. *See id.*

236. Section 365(c) also implicitly recognizes the existence of fiduciary duties of loyalty. *See id.* § 365(c) ("The certificate of incorporation of a public benefit corporation may include a provision that any disinterested failure to satisfy this section shall not, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty.").

237. For further analysis of the meaning of these provisions, see Plerhoples, *supra* note 230, at 257.

238. *See* Westaway & Sampselle, *supra* note 230, at 1004.

239. An additional possibility is a for-profit corporation in which directors are tasked with advancing the interests of shareholders but in doing so are expected to pursue various goals other than shareholder profit maximization. *See* Eric Rasmusen, The Goals of the Corporation Under Shareholder Primacy: Just Profit—Or Social Responsibility and Religious Exercise

It is well recognized that typical corporate purpose clauses provide very broad scope for directorial decision making.[240] Conventional corporate purpose clauses may allow for fiduciary governance without mandating it. Of course, directors may interpret broad corporate purpose clauses narrowly and act as though they have a service-type mandate. Nevertheless, the breadth of discretion they enjoy in determining corporate purposes facilitates fiduciary governance.

In some states, statutes grant boards discretion to consider a variety of constituencies when making decisions for the corporation.[241] In many cases, the variety of constituencies and impersonal factors that boards may consider is quite broad.[242] In other jurisdictions, including Delaware, the fiduciary administration of corporations may formally involve fiduciary service, yet directors may act on a de facto fiduciary governance model.[243] As is well known, directors have substantial freedom to make decisions in the public interest. The business judgment rule means that courts will refuse to second guess directors' substantive business decisions, barring conflicts of interest, corporate waste, or egregious procedural

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Too? (Jan. 12, 2014) (unpublished manuscript), http://ssrn.com/abstract=2365135 [http://perma.cc/N948-LE8E]. This is a service mandate in form, yet it might resemble a governance mandate in function. Another possibility is that corporations involve hybrid mandates in which director fiduciary duties involve the advancement of the interests of beneficiaries and the pursuit of abstract purposes. Furthermore, in some cases, a fiduciary's pursuit of an abstract purpose might be constrained by the interests of determinate beneficiaries. We thank Henry Smith for raising these possibilities.

240. *See* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Account of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1318 (2001) (giving prominent examples of very broad corporate purpose clauses). Characteristically, such clauses permit any activity for which such corporations may be organized under state law.

241. For a discussion of the history of these statutes, see Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 588-90 (1992), and Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 20-28 (1992).

242. *See* Orts, *supra* note 241, at 26-28.

243. *See supra* notes 233-37 and accompanying text.

impropriety.[244] As Einer Elhauge has noted, directors thus have significant agency slack.[245]

Whether or not the board's authority is framed in terms suggestive of fiduciary governance, corporations can commit themselves to purposes that transcend the interests of determinate persons. For example, a journalistic corporation may structure its affairs in pursuit of its purpose of providing neutral journalism. Consider *Paramount Communications, Inc. v. Time, Inc.*[246] The board of directors of Time was interested in a merger with Warner Brothers but faced a competing offer from Paramount.[247] The board placed great emphasis on the journalistic values of Time, and in particular, journalistic integrity.[248] Partly for this reason, the board rejected the Paramount offer and made a 51 percent tender offer for Warner.[249] The Delaware Supreme Court upheld Time's plan to merge with Warner under the business judgment rule and upheld its use of

244. The business judgment rule is often described as "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." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). For recent analyses of the rule and its significance, see generally William T. Allen et al., *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 (2002); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004); Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on* Disney, *Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398 (2007); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

245. *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738-39 (2005). To be clear, we are not claiming that agency slack is equivalent to a standard of conduct under which directors are required to pursue abstract purposes. The key point for present purposes is that, even if standards of conduct reflect a fiduciary service model of directors' mandates, directors may in practice pursue a governance mandate. On the significance of standards of conduct in corporate law, see generally Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437 (1993), and Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519 (2012).

246. 571 A.2d 1140 (Del. 1990).

247. *Id.* at 1144.

248. *See id.* "The board's prevailing belief was that Paramount's bid posed a threat to Time's control of its own destiny and retention of the 'Time Culture.'" *Id.* at 1148. "For its part, Time was assured [under Warner's terms] of its ability to extend its efforts into production areas and international markets, all the while maintaining the Time identity and culture." *Id.* at 1148-49; *see also id.* (indicating the Time board rejected the Paramount offer in part because, unlike the Paramount offer, the Warner transaction did not threaten Time's culture).

249. *See id.* at 1148.

defensive measures against Paramount under its decision in *Unocal Corp. v. Mesa Petroleum Co.*[250]

For present purposes, the interesting feature of the *Time* case is the board's alleged aim of preserving the journalistic identity of the corporation. Quite possibly, the board felt that this was the best way to maximize returns for shareholders. It is also possible that self-interest in entrenchment was a factor. But we need not assume these motivations. It is equally possible that the board really had internalized the importance of Time's journalistic identity and considered itself bound by abstract purposes that the corporation had adopted for itself, in which case we have an example of a for-profit corporation defining and acting on a governance-type or hybrid form of mandate.

There are other prominent examples of for-profit corporations adopting abstract purposes and therefore undertaking or introducing governance-type mandates. For example, for-profit corporations may commit themselves to religious objectives, a point recently underscored by the U.S. Supreme Court. In *Burwell v. Hobby Lobby Stores, Inc.*, three for-profit corporations, including Hobby Lobby, challenged the application of regulations under the Patient Protection and Affordable Care Act, which required certain employers' health group plans to provide health insurance coverage for contraceptives.[251] The owners of these corporations objected to being compelled to pay for coverage of the cost of contraceptives based on their sincerely held religious beliefs.[252] These beliefs were reflected in statements of corporate purpose for the corporations.[253] The Supreme Court concluded that the regulations violated the Religious Freedom Restoration Act (RFRA).[254]

Questions of corporate law arose in the case because the owners had decided to operate by means of a for-profit corporation rather than a sole proprietorship or partnership. The Department of

250. *See id.* at 1154.

251. 134 S. Ct. 2751, 2759 (2014).

252. *Id.*

253. For example, the website of Hobby Lobby Stores describes the mission of the company in terms that embrace conventional corporate purposes (return on investment) and religious and charitable purposes (honoring the Lord and investing in families and communities). *See Our Story*, HOBBY LOBBY, http://www.hobbylobby.com/about-us/our-story/ [http://perma.cc/GP4U-FPHS] (last visited Oct. 23, 2015).

254. *See Hobby Lobby*, 134 S. Ct. at 2785.

Health and Human Services (HHS) argued that for-profit corporate status barred the claims.[255] The government readily conceded that non-profit corporations are covered by RFRA, which suggests that the corporate form itself is not determinative. And precedent made clear that sole proprietorships are also covered, even if they are for-profit.[256] But the government argued that there is something about for-profit corporations that distinguishes them from these other types of entities.[257]

The majority of the Court found to the contrary. The Court held, in fact, that modern corporate law rejects the idea that corporations must exist for the sole purpose of making profits for shareholders[258] and emphasized the variability of corporate purposes:

> While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.[259]

The Court found that a corporation adopting religious purposes is entirely consistent with this picture.[260] In addition, as the Court's language implicitly suggests, the pursuit of corporate purposes need not involve the advancement of shareholder or stakeholder interests.[261] Corporate purposes will not be considered invalid merely on the basis that they are not defined in terms of the interests of determinate persons (beneficiaries).

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255. *See id.* at 2767.

256. *See id.* at 2770.

257. *See id.* at 2771.

258. *See id.* at 2770-72. "Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law." *Id.* at 2770 (footnote omitted). The Court emphasized that corporations may be created for any lawful purpose. *See id.* at 2770-72.

259. *See id.* at 2771.

260. *See id.* ("Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires.... If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.").

261. *See id.* at 2770-71.

There are a variety of possibilities. Fiduciary governance mandates in for-profit corporations may involve the balancing of constituency interests as contemplated by the team production and stakeholder theory literature. In some circumstances, corporations may deliberately undertake purposes that entail a hybrid form of fiduciary mandate with service and governance elements. Fiduciary governance may also be a consequence of agency slack. In each case, fiduciary governance plays a significant, and to this point unrecognized, role in corporate law and corporate behavior.

C. Summary

As the above examples suggest, fiduciary governance spans a broad range of legal practices. In the case of the state and its public offices and organs, the idea of fiduciary governance offers a fresh perspective on challenges faced by public fiduciary theorists. Our account promises reconciliation of fiduciary theories of government with aspects of public governance that are not easily squared with accounts of fiduciary law that assume all fiduciary relationships feature service-type mandates.

The idea of fiduciary governance, while clearly resonant with public law and its emphasis on public purposes and interests, is equally at home in foundational institutions of private fiduciary law. In trusts, corporations, and other critical legal forms of private association, fiduciaries may be tasked with the pursuit of abstract purposes instead of, or in addition to, mandates to advance the interests of determinate persons. Our account of fiduciary governance promises an improved understanding of the fiduciary administration of these institutions and of points of commonality between private and public forms of fiduciary administration.

CONCLUSION

Fiduciary duties are conventionally thought to be interpersonal legal obligations generated by relationships between fiduciaries and beneficiaries. More specifically, they are designed to ensure that fiduciaries are accountable to beneficiaries for the way in which they exercise power over beneficiaries' interests. Yet, much of fiduciary law simply cannot be squared with this view. Charitable

purpose trusts lack determinate beneficiaries, as do corporations established by the state for public purposes. Moreover, relationships like this are not outliers. Instead, they occupy a core, if unrecognized, part of the landscape of fiduciary law, encompassing most public offices and organs of the state and several categories of private institutions and associations.

Once the phenomenon of fiduciary governance is recognized, a variety of important implications arise. One set of implications concerns our understanding of fiduciary law proper, including, notably, the fiduciary duty of loyalty. In the context of governance-type fiduciary relationships, fiduciary liability and fiduciary duties take a different, institutional form. The fiduciary is obliged to be loyal, but the conventional standards by which his loyalty is judged are reframed in terms of fidelity to purpose. Similarly, the form of the underlying duty must be understood as a standalone rather than correlative duty, marking another point at which fiduciary law defies easy categorization.

But perhaps most importantly, the idea of fiduciary governance has implications for some of the most contentious and difficult debates in corporate law and political theory. If public corporations involve governance mandates, then it is no longer apt to query whether directors owe fiduciary duties to shareholders or even to a broader set of determinate beneficiaries. Instead, directors may be better understood as having been granted a governance mandate to advance abstract corporate purposes. Likewise, if the state itself has a fiduciary governance mandate, then we need not resolve the vexing question of whether the state must prove loyal to specific constituents, to the citizens as a whole, to non-citizens, and/or to future generations. The state may instead be governing on the basis of a complex and intricate set of abstract public purposes, and it must prove faithful to these purposes. Contentious questions, of course, still remain to be resolved; we might, for example, wonder how abstract purposes are to be validly decided upon or how their content may be settled when disputed. But to our minds, these are exciting new questions. Our understanding of fiduciary law and its social significance would be much improved if we pursued questions like these instead of those that are borne of the assumption that all fiduciary relationships are of a like kind.