Competing Visions of the Corporation and Fiduciary Obligation: Some Comparative Law Perspectives

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Abstract

Corporate law has periodically been declared moribund or intellectually exhausted, most notably in Bayless Manning's influential assessment of mid-twentieth-century scholarship. Contrary to such predictions, however, the field experienced a resurgence from the 1980s onward, driven by the emergence of new theoretical frameworks, including agency theory, communitarianism, team production theory, and convergence debates. Among these, agency theory, as advanced via the law and economics movement, achieved dominance. By recasting the corporation as a nexus of contracts, this contractarian movement narrowed the focus of corporate law to the mitigation of agency costs between managers and shareholders. Contractarianism, while analytically powerful, contributed to the marginalization of fiduciary law and attenuated the moral and social dimensions traditionally associated with corporate governance. This article revisits these developments through the lens of Professor Deborah DeMott's scholarship, which offers a sustained critique of law and economics orthodoxy. DeMott reconceptualizes fiduciary obligation as a historically grounded, equitable doctrine that operates not merely as a set of contractual duties but as a flexible, situation-specific mechanism for ensuring accountability and regulating power. Her work highlights the enduring normative and societal functions of fiduciary law and challenges the reductionist tendencies of contractarianism. Building on this insight, the article situates DeMott's analysis within a comparative framework, contrasting Delaware corporate law with contemporary developments in the United Kingdom and Australia. In doing so, the article highlights alternative trajectories in corporate theory and fiduciary obligation that preserve a broader conception of the corporation's social role.

Keywords: Fiduciary duties, corporation, agency theory, contract law, DeMott, Jensen and Meckling, private ordering, contractarianism, LLCs, LLPs, comparative law, Delaware, United Kingdom, Australia

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Jennifer G. Hill and Steve Kourabas*

1. INTRODUCTION

[T]here is an economic, and therefore a social, justification for the existence of corporate structures.

Richard M. Buxbaum[1]

Recognition that the law of fiduciary obligation is situation-specific should be the starting point for any further analysis.

Deborah A. DeMott[2]

Corporate law has sometimes been described as either dead or at its historical end point. In one of the most famous footnotes in corporate law scholarship, Bayless Manning delivered an "elegantly depressive"[3] assessment of 1960s corporate law scholarship, describing it as an intellectual construct that, since its heyday, had "slowly perforated and rotted away".[4] Similar pronouncements have followed periodically since that time.[5]

Contrary to Manning's prediction, however, corporate law scholarship did not die and, by the 1980s, had become "the hottest game in town".[6] It flourished over the following decades with

* We would like to thank Vice Chancellor Laster, Reza Motaghianpour, Susan Watson and participants at the 2025 conference held at Duke University in honour of Deborah DeMott, and a 2025 Workshop organized by University of Auckland, for helpful suggestions in relation to this paper.

[1] Richard M. Buxbaum, *Corporate Legitimacy, Economic Theory, and Legal Doctrine*, 45 OHIO ST. L.J. 515, 518 (1984).
[2] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, [1988] DUKE L.J. 879, 879.
[3] Ronald J. Gilson & Reinier Kraakman, *Clark's Treatise on Corporate Law: Filling Manning's Empty Towers*, 31 J. CORP. L. 599, 599 (2006).
[4] Bayless Manning, *The Shareholder's Appraisal Right: An Essay for Frank Coker*, 72 YALE L. J. 223, 245 n. 37.
[5] *See, e.g.*, Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263 (2019); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439 (2001).
[6] *See, e.g.*, Richard M. Buxbaum, *New Owners and Old Managers: Lessons from the Socialist Camp*, 18 DEL. J. CORP. L. 867, 868 (1993); William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992); Deborah A. DeMott, *Trust and Tension Within Corporations*, 81 CORNELL L. REV. 1308 (1996).

new conceptual frameworks,[7] such as the agency theory of the firm,[8] communitarianism,[9] team production theory,[10] the "law matters" hypothesis,[11] and convergence and path dependence theories,[12] which challenged existing legal doctrine. These theories sought to explain and, in some cases, shape profound transformations to the corporate landscape that included the rise of hostile takeovers;[13] growth of institutional investor power;[14] globalization;[15] and a spate of international corporate scandals and crises.

Amid the proliferation of new ideas, one approach emerged triumphant: agency theory, as advanced under the law and economics school. By focusing narrowly on the agency cost problem between managers and shareholders, this contractarian reframing reduced the corporation to a voluntary, private, and commercial nexus of contracts. The theory was also inextricably linked with certain legal doctrines.[16] It has been said that "[f]iduciary obligations pervade business law".[17] Yet agency theory had the effect of marginalizing fiduciary law and constraining the moral and social dimensions associated with the doctrine. Also, the corporation came to be interpreted purely as an instrument of shareholder wealth maximization, isolated from broader societal concerns.[18]

Deborah DeMott's scholarship, which traverses this volatile era, is notable for its careful historical analysis and its incisive critique of law and economics orthodoxy. DeMott's work highlights that fiduciary obligation is more than contractual duties. Instead, it represents a

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[7] *See generally* David Millon, *Theories of the Corporation*, [1990] DUKE L. J. 201.
[8] *See, e.g.*, William W. Bratton, *The 'Nexus of Contracts' Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989).
[9] *See, e.g.*, David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995).
[10] *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).
[11] *See, e.g.*, Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).
[12] *See, e.g.*, CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe, eds., 2004).
[13] *See* Edward B. Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. U.L.Q. 367, 374–75 (1996).
[14] *Id.*, 375–77.
[15] Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance*, 23 WISC. INT. L.J. 477 (2005).
[16] *See, e.g.* Zachary J. Gubler, *The Neoclassical View of Corporate Fiduciary Duty Law*, 91 U. CHI. L. REV. 165 (2024).
[17] Jacob Hale Russell & Arthur B. Laby, *The Decline and Rise of Fiduciary Obligations in Business*, 1, 2, in FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby and Jacob Hale Russell, eds., 2021).
[18] *See generally* Richard M. Buxbaum, *Corporate Legitimacy, Economic Theory, and Legal Doctrine*, 45 OHIO ST. L.J. 515 (1984).

moral and regulatory mechanism, cultivated through centuries of equity, that anchors corporate accountability to society at large. DeMott also emphasizes the situation-specific nature of fiduciary obligation, which provides a more dynamic and "prophylactic" role for corporate law than contractarianism.[19] Although DeMott's analysis is generally rooted in U.S. corporate law, she also uses a comparative lens to illuminate enduring questions about the corporation's social function.

This article proceeds as follows. Part 2 examines the reinterpretation of the corporation under agency theory and its implications for corporate law. Part 3 explores DeMott's critique of these developments, focusing on her analysis of fiduciary obligation and its broader social significance. Part 4 picks up DeMott's comparative law thread, by contrasting U.S.-style contractarianism with some contemporary developments in corporate theory and fiduciary obligation in the United Kingdom and Australia. Part 5 concludes.

2. THE RISE OF AGENCY THEORY AND THE SIDELINING OF CORPORATE LAW

> *As a continuing theory, the nexus of contracts serves as a powerful metaphor, focusing on the voluntary nature of the firm.*
>
> Edward B. Rock and Michael L. Wachter[20]

Michael Jensen and William Meckling revolutionized corporate finance[21] with their controversial yet ground-breaking article,[22] *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*.[23] The theory it advanced became the dominant paradigm in

[19] *See* Deborah A. DeMott, *Disloyal Agents* 58 ALA. L. REV. 1049, 1057 (2007): Zachary J. Gubler, *The Neoclassical View of Corporate Fiduciary Duty Law*, 91 U. CHI. L. REV. 165, 238 (2024).
[20] Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1628 (2001).
[21] *See generally* René M. Stulz, *The Lessons of Michael C. Jensen*, ECGI Finance Working Paper No 1045/2025 (April 2025); Patrick Bolton, *Jensen and Meckling at 50*, 172(C) J. FIN. ECON. 1 (2025).
[22] Brian R. Cheffins, *What Jensen and Meckling Really Said About the Public Corporation*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 2, 17 (Elizabeth Pollman & Robert B. Thompson, 2021).
[23] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

corporate law over the following decades.[24] The theory also came to be closely associated with shareholder primacy and profit maximization.[25]

Although Jensen and Meckling were economists, their reframing of the corporation relied heavily on legal doctrine, specifically contract law. Agency theory privatized the corporation by interpreting it as a "nexus of contracts",[26] limiting the role of law to enforcing private bargains.[27] By emphasizing managerial-shareholder (mis)alignment, other issues, such as intra-corporate power disparities and negative externalities, were largely rendered invisible.[28]

At a more fundamental level, by deconstructing the organization into a nexus of contracts, agency theorists devalued the corporation itself, describing it as "simply [a] legal fiction" on the basis that "*[t]he firm is not an individual*".[29] Much subsequent scholarship interpreted this to mean that firms were not merely like contracts, but were composed exclusively of them,[30] such that the corporation was "fictitious" or "non-existent".[31] This focus on free contractual choice sharply divided public and private domains, placing the corporation firmly in the latter. It also reinforced a view of corporate law as merely a system of default rules that prioritized private ordering.[32] Combined with optimistic assumptions about the effectiveness of market

[24] *See* Jennifer G. Hill, *Hidden Fallacies in the Agency Theory of the Corporation*, in HIDDEN FALLACIES IN CORPORATE LAW AND FINANCIAL REGULATION: REFRAMING THE MAINSTREAM NARRATIVES, 39, 40-46 (Alexandra Andhov, Claire A. Hill & Saule T. Omarova, eds., 2025).
[25] Donald C. Langevoort, *The Effects of Shareholder Primacy, Publicness, and "Privateness" on Corporate Cultures*, 43 SEATTLE U. L. REV. 377, 378 (2020). *Cf* Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 833 (1999).
[26] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976) (the original phrase used was "nexus of contracting relationships").
[27] *See* René M. Stulz, *The Lessons of Michael C. Jensen*, ECGI Finance Working Paper No 1045/2025, p.4 (April 2025).
[28] Jennifer G. Hill, *Hidden Fallacies in the Agency Theory of the Corporation*, in HIDDEN FALLACIES IN CORPORATE LAW AND FINANCIAL REGULATION: REFRAMING THE MAINSTREAM NARRATIVES, 39, 40 (Alexandra Andhov, Claire A. Hill & Saule T. Omarova eds., 2025).
[29] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310, 311 (1976) [italics in original].
[30] *See, e.g.,* Frank H. Easterbrook and Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989); *Eugene F. Fama, Agency Problems and the Theory of the Firm*, 88 J. POLIT. ECON. 288, 289 (1980).
[31] *See* Jennifer G. Hill, *Hidden Fallacies in the Agency Theory of the Corporation*, in HIDDEN FALLACIES IN CORPORATE LAW AND FINANCIAL REGULATION: REFRAMING THE MAINSTREAM NARRATIVES, 39, 42 (Alexandra Andhov, Claire A. Hill & Saule T. Omarova, eds., 2025); Jonathan Hardman, *Fixing the Misalignment of the Concession of Corporate Legal Personality*, 43 LEGAL STUD, 1, 6-7 (2023).
[32] Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV. 131, 133 (2018). For varied scholarly arguments against this approach, *see* Jacob Hale Russell & Arthur B. Laby, *The Decline and Rise of Fiduciary Obligations in Business*, 1, in FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby and Jacob Hale Russell, eds., 2021).

discipline,[33] this suggested a limited role for mandatory rules and diminished the accountability relevance of legal doctrines beyond contract law.

3. DEMOTT'S RESPONSE TO THE IMPLICATIONS OF AGENCY THEORY

> *Resorting unreflectively to contract rhetoric is insidiously misleading and provides no rationale for further development of the law of fiduciary obligation.*
>
> Deborah A. DeMott[34]

The great English jurist, F.W. Maitland, once described contract as the "greediest of legal categories."[35] Agency theory arguably demonstrates this point. Contract law proved voracious, offering the intellectual foundation for Jensen and Meckling's reimagining of the corporation. In adopting a contractarian approach, Jensen and Meckling censured any attempt to imbue the corporation with moral personality.[36] They stated that "the corporation cannot be socially (or otherwise) responsible!...the notion of 'being responsible' is a normative concept strictly relevant only to human beings. The corporation can be no more responsible than can a lump of coal."[37] This reconceptualization of the corporation inevitably led to the expansion of a contractarian approach into areas of law traditionally grounded in equity, such as fiduciary duty and trust law.

DeMott's scholarship offered a sustained and principled response to this development, by reaffirming fiduciary obligation as a distinct and indispensable mechanism of accountability in corporate law. In her 1988 article, *Beyond Metaphor: An Analysis of Fiduciary Obligation* ("*Beyond Metaphor*"), DeMott rejected the growing tendency to subsume fiduciary duties within the logic of contract. She argued that any meaningful account of fiduciary obligation must begin with recognition of its situation-specific and equitable character, [38] rather than with hypothetical bargains or presumed consent that are a key feature of contract law. DeMott traced

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[33] Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 823 (1999).
[34] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, [1988] DUKE L.J. 879, 879.
[35] Frederic William Maitland, *Trust and Corporations*, in THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND, Vol III, 321–404, 389 (H.A.L. Fisher, ed., 1911).
[36] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).
[37] Michael C. Jensen & William H. Meckling, *Reflections on the Corporation as a Social Invention*, 1 MIDL. CORP. FINANCE J. (1983).
[38] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, [1988] DUKE L.J. 879, 879.

the historical development of fiduciary obligation back to equity's regulation of relationships of "trust" and "confidence,"[39] emphasizing that the doctrine developed, not as a set of fixed contractual terms, but as a flexible response to the exercise of discretionary power over the interests of others.[40] This equitable foundation, DeMott insisted, preserves a core conception of company directors as occupying a "trustee-like" position, entrusted with discretionary authority to be exercised in the interests of the corporation and its shareholders.[41]

Against this background, DeMott was sharply critical of what she saw as the growing absorption of equitable doctrines into contract law. The immediate catalyst for *Beyond Metaphor* was the U.S. Seventh Circuit's decision in *Jordan v. Duff & Phelps, Inc.*,[42] where the court resolved a fiduciary obligation claim by asking what contractual terms the parties would have adopted had they "dickered about the subject explicitly."[43] A central claim of *Beyond Metaphor* was that such an approach was fundamentally misguided, given the "profound dissimilarity" between contract and fiduciary obligation in structure, function, and historical development.[44]

DeMott explored several of these dissimilarities in *Beyond Metaphor*. First, she noted that fiduciary obligation is inherently more fluid and context-dependent than contract.[45] The category of fiduciary relationships developed incrementally through analogy with those already judicially accepted as fiduciary in nature,[46] rather than through comprehensive doctrinal definition. Further, classification as a fiduciary did not trigger any uniform set of rules. Instead, fiduciary duties varied in intensity depending on the nature of the relationship and the degree of entrusted power.[47] This open-ended and graduated structure stood in sharp contrast to contract law's focus on defined obligations derived from voluntary agreement.

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[39] *Id.*, 880.
[40] *See id.*, 901.
[41] *Id.*, 880–81.
[42] 815 F.2d 429 (7th Cir. 1987), *cert*. dismissed, 108 S. Ct. 1067 (1988).
[43] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, [1988] DUKE L.J. 879, 884.
[44] *Id.*, 888.
[45] *Id.*, 879-80.
[46] L.S. Sealy, *Fiduciary Relationships*, [1962] CAMBRIDGE L.J. 69, 71-72.
[47] *Hospital Products Ltd v. United States Surgical Corp.* (1984) 156 C.L.R. 41, § 30 (Aust.). *See also* Deborah A. DeMott, *Fiduciary Duties on the Temporal Edges of Agency Relationships*, in FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby and Jacob Hale Russell, eds., 2021) (discussing the nature of duties at the temporal periphery of various fiduciary relationships).

Second, DeMott emphasized the distinct historical trajectories of the two doctrines. Contract law emerged within the common law courts, whereas fiduciary obligation originated in equity,[48] which was a separate legal system characterized by concern with conscience, discretion, and regulation of opportunistic conduct. She noted that "[f]ew areas of the law are as distinctively equitable in character as fiduciary obligation."[49] Historically, common law and equity operated in parallel and often engaged in rivalry for dominance; equity frequently intervened to temper the supposed rigidity of common law rules.[50]

These institutional differences were reflected in divergent policy goals and remedial frameworks.[51] Whereas common law relied on relatively standardized remedies aimed at enforcing agreed exchanges, equity developed a broader and more flexible remedial arsenal designed to deter disloyalty and prevent unjust enrichment.[52] Overlapping claims could arise between the two, potentially resulting in conflicting outcomes.[53] Contract law and fiduciary duty could also interact in complex ways.[54] Nonetheless, the two systems remained conceptually distinct, employing different methodologies, burdens of proof, and normative commitments.[55]

Finally, DeMott underscored the incompatibility of fiduciary obligation with contract law's foundational reliance on intention and self-interest. Contractual liability rests on the voluntary assumption of obligations and generally permits parties to pursue their own advantage.[56] She noted that fiduciary law, by contrast, routinely operates independently of, and sometimes in direct opposition to, the parties' expressed intentions.[57]

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[48] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, [1988] DUKE L.J. 879, 881-82.
[49] *Id.*, 881–82, fn 10.
[50] *See* The Hon. Justice Mark Leeming, *Overlapping Claims at Common Law and in Equity - An Embarrassment of Riches?*, Speech, J. of Equity, *Frontiers of Commercial Equity Conference*, University of New South Wales, May 18, 2017, 8-9, https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2017-Speeches/Leeming_20171201.pdf.
[51] Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, 39, 47 (Andrew S. Gold & Paul B. Miller, eds., 2014).
[52] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, [1988] DUKE L.J. 879, 888, 900.
[53] The Hon. Justice Mark Leeming, *Overlapping Claims at Common Law and in Equity - An Embarrassment of Riches?*, Speech, J. of Equity, *Frontiers of Commercial Equity Conference*, University of New South Wales, May 18, 2017, https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2017-Speeches/Leeming_20171201.pdf.
[54] Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 39 (Andrew S. Gold & Paul B. Miller, eds., 2014).
[55] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, [1988] DUKE L.J. 879, 900.
[56] Subject to the obligation of parties to act in good faith. *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, [1988] DUKE L.J. 879, 892*ff*.
[57] *Id.*, 887.

DeMott's resistance to contract law's colonization of equitable doctrines also extended to the normative implications of the nexus of contracts conception of the corporation itself. In *Organizational Incentives to Care About the Law*,[58] she advanced a critique of agency theory by challenging its portrayal of the firm as a morally inert aggregation of contractual relationships. Opening with the theoretical and legal difficulties posed by the corporation's "moral personality,"[59] DeMott critically analysed accounts that reduced organizational behavior to the self-interest of individual actors responding mechanically to financial incentives. Instead, she examined corporate culture and the ways in which organizational incentive structures shape not only conduct but also norms of compliance, loyalty, and ethical responsibility. DeMott's conception of the corporation is nothing like Jensen and Meckling's "lump of coal."

4. FIDUCIARY LAW DEVELOPMENTS IN COMPARATIVE CORPORATE GOVERNANCE

[I]nternational differences in corporate governance are attributable more to differences in markets than to differences in law.

Frank H. Easterbrook[60]

Fiduciary obligation is imposed by private law, but its function is public, and its purpose social.

Lord Wedderburn[61]

DeMott's analysis shows that fiduciary obligation fulfils a normative function by providing a sense of "moral direction" in the corporation, which is absent under agency theory. The extent to which corporate law preserves, or erodes, this equitable logic has profound implications for corporate accountability and the corporation's relationship with society.

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58 Deborah A. DeMott, *Organizational Incentives to Care About the Law*, 60 LAW & CONTEMP. PROBS. 39 (1997).
59 *Id*.
60 Frank H. Easterbrook, *International Corporate Differences: Markets or Law?*, 9 J. APPLIED CORP. FIN. 23, 29 (1997).
61 Lord Wedderburn, *Trust, Corporation and the Worker*, 23 OSGOODE HALL L.J. 203, 221 (1985).

Academic scholarship, such as La Porta et al's "law matters" hypothesis, assumes that there is a unified approach to corporate law within the common law "legal family".[62] However, a comparative analysis of fiduciary obligation in common law jurisdictions, such as the United States, the United Kingdom and Australia, reveals the kind of theoretical schism that DeMott identified in *Beyond Metaphor*.

A. The Implications of the Contractarian Turn in the United States

The Delaware Chancery Court, above all other courts, should appreciate that fiduciary obligations, and the right to enforce them, flow from equity and are not contractually based.

James D. Cox[63]

In *Beyond Metaphor*, DeMott identified early signs of the rise of contractarianism in a decision she described as "literally unprecedented in prior Anglo-American caselaw".[64] Although the case was initially treated as anomalous, it foreshadowed future judicial developments that would occur in Delaware.

Interestingly, the initial manifestation of these developments emerged not in Delaware's corporate law, but through its statutory reconfiguration of trust law. Trusts had long occupied a central place in Anglo-American legal history.[65] Traditionally grounded in equity, trusts were governed by stringent fiduciary obligations to constrain self-interest and ensure loyal administration.[66]

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[62] *See* Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1119 (1998). *Cf* Ruth V. Aguilera et al., *Corporate Governance and Social Responsibility: A Comparative Analysis of the U.K. and U.S.*, 14 CORP. GOVERNANCE: AN INT'L REV. 147, 147–48 (2006); Steven Toms & Mike Wright, *Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and U.K., 1950–2000*, 47 BUS. HIST. 267, 267–68 (2005).

[63] James D. Cox, *Whose Law Is It? Battling Over Turf in Shareholder Litigation*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 333, 338 (Jennifer G. Hill & Randall S. Thomas, eds., 2015).

[64] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, [1988] DUKE L.J. 879, 885.

[65] *See* e.g., Jennifer G. Hill, 'The Trajectory of American Corporate Governance' [2019] U. ILL. L. REV. 507, 544–45; John Morley, 'The Common Law Corporation: The Power of the Trust in Anglo-American Business History, 116 COLUM. L. REV. 2145, 2157–66 (2016).

[66] *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, [1988] DUKE L.J. 879, 908–09.

This paradigm was, however, fundamentally altered in the 1990s by reforms to the Delaware *Business Trust Act*.[67] A series of amendments, the most important of which were enacted in 1998, authorized a new statutory trust, which was designed to maximize contractual freedom and flexibility and which permitted modification or elimination of fiduciary duties by agreement.[68] In place of equity's traditional emphasis on loyalty and conscience, the statutory trust was repurposed as a commercial instrument governed mainly by private ordering, which transformed fiduciary obligation from a mandatory equitable constraint into a default rule subject to negotiation. The policy goal of the reforms was to prioritize transactional efficiency and business autonomy. Equity's normative function was not merely narrowed but displaced by contractarian logic in the trust arena.

The Delaware judiciary initially resisted full contractualization of corporate law and directors' duties. As courts of equity, the Delaware Court of Chancery and Supreme Court ("the Delaware courts") had long viewed their role as one of tempering an unduly legalistic approach in corporate law.[69] In the 1971 case, *Schnell v. Chris-Craft Industries*,[70] for instance, the Delaware Supreme Court stated that "inequitable action does not become permissible simply because it is legally possible".[71]

The Delaware courts traditionally regarded fiduciary obligation as a vital concomitant of directors' power to manage the corporation,[72] and for much of the late twentieth century, they continued to treat the duty of loyalty in particular as the immutable heart of Delaware corporate law.[73] The 1993 Delaware Supreme Court decision, *Cede & Co. v. Technicolor, Inc.*,[74] for example, affirmed that directors' loyalty obligations were articulated in "broad and unyielding terms".[75] This reflected a longstanding judicial insistence that certain fiduciary norms were

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[67] Delaware's *Business Trust Act* was enacted in 1988 and renamed the *Delaware Statutory Trust Act* (*DST Act*) in 2002. Regular amendments to the Act have been made since 1990. *See, e.g.*, The Delaware Counsel Group, LLP, *Delaware Statutory Trusts*, 2–3, June 2016, https://www.delawarecounselgroup.com/wp-content/uploads/2016/06/Delaware-Statutory-Trusts.pdf.
[68] *See* 12 Del. C. § 3806(c). *See also* Morris James LLP, *Overview of the Delaware Statutory Trust Act in Structured Finance Transactions*, 1 December 2022.
[69] Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PENN. J. BUS. L. 675, 678 (2009).
[70] Schnell v. Chris-Craft Indus., 285 A.2d 437 (Del. 1971).
[71] *Id*. at 439.
[72] Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PENN. J. BUS. L. 675, 678 (2009).
[73] *Id*.
[74] Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).
[75] *Id*.

immune from private ordering. This understanding was reinforced by statute through DGCL § 102(b)(7), which permitted exculpation for breaches of directors' duty of care, but explicitly excluded exoneration for breaches of loyalty and acts of bad faith.[76]

Yet, even as the Delaware courts continued to invoke fiduciary obligation in formal terms, contractarian reasoning steadily gained prominence. This trend was particularly striking in the context of alternative business entities, such as limited liability companies (LLCs) and limited liability partnerships (LLPs),[77] which the Delaware courts routinely treated as "purely creatures of contract".[78] Within these entities, fiduciary duties were regarded as modifiable defaults rather than mandatory standards[79] and the Delaware courts regularly upheld contractual waivers that eliminated fiduciary duties, provided that the relevant operating agreements were clear and entered into by sophisticated parties.[80]

Today, LLCs and LLPs outnumber corporations in Delaware by a significant margin.[81] During their rise to prominence as competitors to the corporate form, the contractual logic associated with these entities began to migrate to corporate jurisprudence itself, blurring the conceptual boundaries between different organizational forms[82] and arguably undermining the perceived advantages of corporations over their organizational competitors.[83]

Two high profile Delaware cases—the 2013 *Boilermakers* decision[84] and the 2014 *ATP Tour, Inc*. decision[85]—highlighted some troubling implications of contractarianism. The decisions

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[76] Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty,* 11 U. PENN. J. BUS. L. 675, 692 (2009).
[77] *See, e.g.,* Marc I. Steinberg, CORPORATE DIRECTOR AND OFFICER LIABILITY, 26–28 (2025); Megan Wischmeier Shaner, *Interpreting Organizational "Contracts" and the Private Ordering of Public Company Governance*, 60 WM. & MARY L. REV. 985, 999–1000 (2019).
[78] *See*, *e.g., R & R Cap., LLC v. Buck & Doe Run Valley Farms, LLC,* No. CIV.A. 3803-CC, 2008 WL 3846318, at *1 (Del. Ch. Aug. 19, 2008), which begins with the words "[f]or Shakespeare, it may have been the play, but for a Delaware limited liability company, the contract's the thing".
[79] *See* Mohsen Manesh, *Creatures of Contract: A Half-Truth About LLCs*, 42 DEL. J. CORP. L. 391, 458–66 (2018) (criticizing this approach).
[80] *See* Del. Code Ann. tit. 6, § 18-1101(c); Marc I. Steinberg, CORPORATE DIRECTOR AND OFFICER LIABILITY, 27, fn 56 (2025).
[81] *See* Delaware Division of Corporations 2024 *Annual Report,* https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2024-Annual-Report.pdf.
[82] *Cf* James D. Cox, *Whose Law Is It? Battling Over Turf in Shareholder Litigation,* in RESEARCH HANDBOOK ON SHAREHOLDER POWER 333, 337 (Jennifer G. Hill & Randall S. Thomas *eds.*, 2015)).
[83] *See* Patrick Bolton, *Jensen and Meckling at 50,* 172(C) J. FIN. ECON. 1, 16 (2025); Zachary J. Gubler, *The Neoclassical View of Corporate Fiduciary Duty Law,* 91 U. CHI. L. REV. 165, 224 (2024).
[84] Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013).
[85] ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554 (Del. 2014).

upheld the validity of "exclusive forum" and U.K.-style "fee shifting" bylaws respectively.[86] The bylaw amendments, introduced to address a massive increase in litigation, reduced shareholder rights to bring derivative and fiduciary duty suits. Central to the reasoning of both decisions was the assumption that the bylaws are a contract between the company and its shareholders and that shareholder rights and their enforcement are therefore fundamentally contractual and variable.[87] This analysis was accepted by the courts, in spite of the fact that the relevant bylaws had been adopted, not by the shareholders themselves, but unilaterally by the board of directors, leading one scholar to ask, "whose law is it?".[88] The Boilermakers and ATP Tour decisions were arguably direct descendants of Jensen and Meckling's description of the corporation as a nexus of contracts.[89]

By the 2020s, acceptance of contractarian logic in Delaware had reached its zenith.[90] The Delaware courts increasingly emphasized freedom of contract as a foundational principle of corporate law, describing the DGCL as an enabling statute designed to facilitate private ordering.[91] In *Salzberg v Sciabacucchi* ("*Salzberg*"), for example, the Delaware Supreme Court described the DGCL as an enabling Act that provides "immense freedom" for businesses to structure governance arrangements through private ordering, subject only to statutory parameters and residual fiduciary principles.[92] In spite of the nominal preservation of fiduciary duties,[93] the approach taken in *Salzberg* means that such duties now operate within a

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[86] *See* David A. Skeel, Jr., *The Bylaw Puzzle in Delaware Corporate Law*, 72 BUS. LAW 1 (2017); Deborah A. DeMott, *Forum Selection Bylaws Refracted Through an Agency Lens*, 57 ARIZ. L. REV. 269, 274 (2015); Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat* [2019] U. Ill. L. Rev. 507, 524*ff*.

[87] *See, e*.g., Jill E. *Fisch, Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913 (2021); Deborah A. DeMott, *Forum Selection Bylaws Refracted Through an Agency Lens*, 57 ARIZ. L. REV. 269, 274 (2015). N.B. the Delaware legislature subsequently introduced DGCL amendments that explicitly permitted the inclusion of forum-selection provisions in the charter or bylaws but explicitly prohibited the inclusion of fee-shifting provisions. *See* DEL. CODE. ANN. tit. 8, §§ 102(f), 109(b) (2018).

[88] James D. Cox, *Whose Law Is It? Battling Over Turf in Shareholder Litigation*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 333 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

[89] *Id*., 335.

[90] *See, e.g.*, Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. U. L. REV. 501, 526–34 (2021); Megan Wischmeier Shaner, *Interpreting Organizational "Contracts" and the Private Ordering of Public Company Governance*, 60 WM. & MARY L. REV. 985 (2019).

[91] *See* Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV.131, 133 (2018); Jill E. *Fisch, Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913 (2021).

[92] Salzberg v. Sciabacucchi, 227 A.3d 102, 116 (Del. 2020).

[93] *Id*.

framework that treats private agreement as the baseline. It has been said that the *Salzberg*, though silent on the topic of corporate theory, was "marbled with contractarianism".[94]

The implications of contractarianism also are apparent in cases, such as *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.* ("*Manti Holdings*"),[95] where the Delaware Supreme Court upheld a contractual waiver of statutory appraisal rights under a "Refrain Obligation" contained in a stockholders' agreement. The Majority Opinion repeatedly invoked Delaware's strong "public policy favoring private ordering",[96] thereby reframing what had historically functioned as a protective statutory mechanism as a waivable private entitlement.[97] It is hardly surprising that case law now openly declares that "Delaware is a contractarian state".[98]

Nonetheless, there is evidence of some judicial resistance to undiluted contractarianism in the corporate law context. In a series of cases in the Delaware Court of Chancery, Vice Chancellor Laster has pushed back against the view that LLCs and LLPs are "purely creatures of contract", characterizing them instead as "primarily creatures of contract".[99] In the 2023 decision, *New Enterprise Associates 14, L.P. v. Rich*,[100] he explicitly rejected an expansive contractual theory of the corporation, stating:

> "[j]ural entities are thus never wholly creatures of contract. Nor are they a nexus of contracts. However attractive that metaphor might be for economic modeling, entities are reified constructs".[101]

Vice Chancellor Laster acknowledged that fiduciary duties can be tailored by the parties and held that, on the specific facts of the case, a contractual covenant by shareholders not to sue for breach of fiduciary duty was enforceable. Nonetheless, his judgment adopts a more nuanced approach to

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[94] Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. U. L. REV. 501, 526 (2021).
[95] Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199 (Del. 2021).
[96] *Id.*,1216, 1217.
[97] Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199 (Del. 2021).
[98] Stream TV Networks, Inc. v. SeeCubic, Inc., 279 A. 3d 323, 355 (Del. 2022).
[99] *See, e.g.*, Gurney-Goldman v. Goldman, 321 A.3d 559, 588 (Del. Ch. 2024), *aff'd*, No. 166, 2025, 2026 WL 237221 (Del. Jan. 29, 2026); XRI Inv. Holdings LLC v. Holifield, 283 A.3d 581, 658 n.84 (Del. Ch.), *judgment entered* (Del. Ch. 2022), and *aff'd in part, rev'd in part and remanded*, 304 A.3d 896 (Del. 2023); Metro Storage Int'l LLC v. Harron, 275 A.3d 810, 878 n.41 (Del. Ch. 2022).
[100] New Enterprise Associates 14, L.P. v. Rich, 295 A.3d 520 (Del. Ch. 2023).
[101] *Id.*, fn 151.

the corporate law and fiduciary obligation that recognizes the state's role in creating business entities[102] and the role of public policy.[103]

Also, perhaps surprisingly, Justice Valihura (an otherwise firm judicial supporter of contractarianism)[104] offered a "strong dissent"[105] in the Delaware Supreme Court's *Manti Holdings* case, where she took issue with the majority's approach[106] and considered the better view to be that appraisal rights are mandatory.[107] She also expressed concern about the migration of private venture capital practices, which often lacked the transparency or formal safeguards associated with charter amendments, to public corporations.[108]

The Delaware legislature's recent intervention into the corporate law arena with the controversial enactment of SB-21 has arguably further entrenched a contractarian trajectory, as well as diminishing fiduciary duties and minority shareholder protection,[109] in response to the threat of DExit.[110] This illustrates the extent to which fiduciary obligation in Delaware, and more broadly in the United States, has become a variable, subject to market competition for incorporation, rather than a equitable framework grounded in normative constraints on power. In the light of Delaware's trajectory, it has been suggested that "ideas of contract are today so dominant across business law that it can be hard to resurrect what came before."[111]

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[102] *Id*. *See also* Obeid v Hogan, 2016 WL3356851 (Del Ch 2016), fn 2.

[103] *See, e.g.* New Enterprise Associates 14, L.P. v. Rich, 295 A.3d 520, fn. 159 (Del. Ch. 2023) (citing Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1554 (1989), who states that "despite contractarian strands, large chunks of corporate law continue to serve goals other than private wealth maximization".

[104] *See*, *e.g*., Salzberg v. Sciabacucchi, 227 A.3d 102 (Del. 2020); CompoSecure, L.L.C. v. CardUX, LLC, 206 A.3d 807 (Del. 2018); Holifield v. XRI Inv. Holdings, 304 A.3d 896 (Del. 2023); Thompson St. Cap. Partners IV, L.P. v. Sonova U.S. Hearing Instruments, LLC, 2025 WL 1213667 (Del. 2025).

[105] Arthur R. Bookout and Eric M. Holleran, *Waiver of Appraisal Rights Upheld by Split Delaware Supreme Court*, SKADDEN, ARPS, SLATE, MEAGHER& FLOM LLP AND AFFILIATES, Dec. 15, 2021, https://www.skadden.com/insights/publications/2021/12/insights-the-delaware-edition/waiver-of-appraisal-rights.

[106] Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 1231*ff* (Del. 2021).

[107] *Id*. at 1250. *See also* Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913 (2021).

[108] Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 1238 (Del. 2021). *See also* Jill E. *Fisch, Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913 (2021). *See* New Enterprise Associates 14, L.P. v. Rich, 295 A.3d 520, 587 (Del. Ch. 2023) (where Vice Chancellor Laster discussed in detail Justice Valihura's dissent in Manti Holdings, also noting that the dissent raised an important concern about "stealth" corporate governance).

[109] *See*, *e.g.*, Roy Shapira, *An Overlooked Cost of Delaware's Corporate Law Overhaul*, THE CLS BLUE SKY BLOG, Feb. 26, 2025.

[110] *See generally* Stephen M. Bainbridge, *Senate Bill 21: What It Does and What Questions Remain Open*, Working Paper, May 6, 2025.

[111] Jacob Hale Russell, *For Whom Are Nonprofit Managers Trustees? The Contractual Revolution in Charity Governance*, in FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby and Jacob Hale Russell, eds., 2021).

B. The Corporation as a Social Institution in the United Kingdom and Australia

> *[A]s a separate entity, from its shareholders, a company has responsibilities of a legal, societal, environmental and, in a loose sense, moral or ethical nature.*
>
> Lord Briggs[112]

Several developments in the United Kingdom and Australia provide a sharp contrast with U.S.-style contractarianism. This section discusses these developments, which are closely aligned with DeMott's discussion of legal history and her conception of the corporation and the role of fiduciary obligation.

The United Kingdom and the United States had very different corporate trajectories in the 19th century.[113] Whereas U.S. corporate law during this period was characterized by intense state control and regulation, U.K. company law reflected a "free contracting" model of corporate governance, tempered only by strong fiduciary duties.[114] During this period, shareholders had significant power because they alone controlled the contents of the company constitution, the articles of association.[115] It has been argued that this inalienable inherent power is cornerstone of shareholder rights in the United Kingdom.[116]

U.K. courts during 19th century struggled to conceptualize the corporation against this laissez-faire and shareholder-centered backdrop. Some cases adopted a theory of the corporation as an aggregation of its members, where directors were viewed mere agents of the shareholders.[117] The famous decision in *Salomon v. Salomon*, although in some ways reflecting this paradigm (by recognizing the doctrine of unanimous consent), also established that companies are separate legal persons.[118]

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[112] BTI 2014 LLC v. Sequana SA [2022] UKSC 25, § 140 (U.K.).
[113] Jennifer G. Hill, *The Trajectory of American Corporate Governance*, [2019] U. ILL. L. REV. 507, 547.
[114] *Id*; R.C. Nolan, *The Continuing Evolution of Shareholder Governance*, 65 CAMBRIDGE L.J. 92 (2006); Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 305 (D. Gordon Smith & Andrew S. Gold, eds., 2018).
[115] *See, e.g.*, 1862 Companies Act, 25 & 26 Vict., c. 89, § 50.
[116] R.C. Nolan, *Shareholder Rights in Britain*, 7 EUR. BUS, ORG. L. REV. 549, 554–56 (2006).
[117] *See* Isle of Wight Rly v. Tahourdin (1883) Ch. D. 320. *Cf* Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame [1906] 2 Ch 34 (which rejected this paradigm).
[118] Salomon v Salomon & Co Ltd (1897) AC 22.

Company law litigation is rare in the United Kingdom compared to the United States, due to procedural hurdles, such as the U.K.'s "loser pays" fee shifting rule.[119] However, the 2022 U.K. Supreme Court decision in *BTI 2014 LLC v Sequana SA* ("*Sequana*"),[120] was an exception to the norm. The case, described by one the judges as a "momentous" company law decision,[121] provided a broad-ranging discussion of the scope of directors' fiduciary duties and the nature of the corporation from a historical and modern perspective.

The *Sequana* decision traced the historical tendency of the courts to equate the interests of the company with those of its shareholders.[122] As Lord Briggs explained, 19th century judges frequently treated the company and its shareholders as "one and the same" for the purposes of fiduciary analysis, entrenching the assumption that directors' duties were discharged by exclusive regard to shareholder interests.[123] According to the court, this approach was shaped by the continuity between early joint stock companies and their precursor, the unincorporated deed of settlement company, in which directors were viewed as trustees managing the members' property.[124] Lord Reed also noted that even though a company's separate personality was recognized long before it was authoritatively established in *Salomon's* case, for the purposes of directors' duty to act "in the company's best interests", the "company" tended to be regarded as identical to its collective membership.[125]

Directors' duties under modern U.K. company law are codified in the Companies Act 2006.[126] They include s. 172(1), which requires directors "to act in the way they consider in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole."[127] A key issue in *Sequana* was whether, on the facts of the case, this provision was displaced by a requirement that the directors should act in the interests of the creditors.[128]

[119] *See, e.g.*, John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J. EMPIRICAL LEGAL STUD. 687, 699–700, 710 (2009); Jennifer G. Hill & Roy Shapira, *Accountability for Flawed Corporate Culture* (forthcoming, 2026, J. CORP. L.).
[120] BTI 2014 LLC v. Sequana SA [2022] UKSC 25 (U.K.).
[121] *Id.*, § 248 (U.K.).
[122] *Id.*, §§ 19–22.
[123] *Id.*, §§ 134–35 (per Lord Briggs).
[124] *Id.*, § 20.
[125] *Id.*, § 19 (per Lord Reed).
[126] *See* Pt 10, Ch. 2 of the Companies Act 2006, c. 46 (UK). *See generally* Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 305, 309–311 (D. Gordon Smith & Andrew S. Gold, eds., 2018).
[127] *See* Eilis Ferran & Pedro Schilling de Carvalho, *Reconciling Shareholder Primacy and the Interests of People and Planet*, Part 2, *Shareholder Primacy* (forthcoming, 141 LAW QUARTERLY REVIEW (2025)).
[128] *See* Pedro Schilling de Carvalho & Bobby V. Reddy, *Credit Where Credit's Due: The Supreme Court Take on Directors' Duties and Creditors' Interests*, 82 CAMBRIDGE L.J. 17.

The starting point for assessing whether the scope of directors' duties is broadened beyond shareholder interests was the Australian decision, *Walker v Wimborne*.[129] In that case, Mason J. acknowledged that "the directors of a company in discharging their duty to the company must take account of the interests of its shareholders and its creditors,"[130] although there was uncertainty regarding the conceptual boundaries of this dicta.[131] Other significant Antipodean cases stated that that in situations of near or doubtful insolvency, a director's duty to the company may require consideration of the interests of creditors.[132] Another Australian decision, *Kinsela v Russell Kinsela Pty Ltd*,[133] which Lord Reed approved in *Sequana*,[134] went further by denying shareholders the right to relieve directors from a breach of duty that involved failure to consider the interests of creditors.[135]

Evaluating such case law, the majority judges in *Sequana* held that creditor-regarding directors' duties will be activated when "the directors know, or ought to know, that the company is insolvent or bordering on insolvency or that an insolvent liquidation or administration is probable."[136] The approach of *Sequana* to the issue of creditor-regarding directors' duties differs markedly from the approach taken by the Delaware Supreme Court in the *Gheewalla* decision,[137] which held that, until the point of actual insolvency, directors' fiduciary duties run to solely to the shareholders.[138]

Despite enormous interest in the directors' duties aspect of *Sequana*, it has been argued that more profound significance of the case lies in its discussion of corporate theory.[139] *Sequana* depicts the company as a separate legal entity rather than as an abstract aggregate of its

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[129] Walker v Wimborne (1976) 137 CLR 1, 7.
[130] *Id*, § 29.
[131] Paul Davies, *Directors' Creditor-Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency*, 7 EUR. BUS. ORG. L. REV. 301, 327, 328–329 (2006). *See also* Sarah Worthington, *Creditors' Rights, Shareholder Intervention*, 18 MELB. U.L. REV. 121, 134–139 (1991).
[132] Nicholson v. Permakraft (NZ) Ltd [1985] 1 NZLR 242, 249.
[133] Kinsela v. Russell Kinsela Pty Ltd (1986) 4 NSWLR 722.
[134] BTI 2014 LLC v. Sequana SA [2022] UKSC 25, 51 (UK).
[135] *See* Kinsela v. Russell Kinsela Pty Ltd (1986) 4 N.S.W.L.R. 722, 732.
[136] Pedro Schilling de Carvalho & Bobby V. Reddy, *Credit Where Credit's Due: The Supreme Court Take on Directors' Duties and Creditors' Interests*, 82 CAMBRIDGE L.J. 17, 19.
[137] North American Catholic Educational Programming Foundation, Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007).
[138] *See* Brad Eric Scheler *et al*., *Director Fiduciary Duty in Insolvency*, HARV. LAW SCHOOL FORUM ON CORP. GOV., Apr. 15, 2020, https://corpgov.law.harvard.edu/contributor/ashley-katz/.
[139] Susan Watson, *Salomon and Sequana: The Central Significance of Separate Legal Entity*, in THE ORIGINS OF COMPANY LAW: METHODS AND APPROACHES 117 (Victoria Barnes & Jonathan Hardman, eds., 2024).

shareholders.[140] According to Lord Briggs, of the two competing strands of reasoning in *Salomon's* case—namely, the company as a separate entity versus the company as an aggregation of shareholders—it is the former that has ultimately prevailed in jurisdictions such as the United Kingdom.[141] In spite of historical ambiguity on this point, Lord Briggs stated that "the law has since moved on a long way from a view that the interests of others in relation to the company, and its relationships with others, are altogether irrelevant."[142]

The separate entity conception of the corporation in *Sequana* provided a strong foundation for a company's shape-shifting to encompass creditor interests for the purposes of directors' duties in the insolvency context. It was also used by Lord Briggs to anchor his claim that a company has moral or ethical responsibilities.[143] The adoption of an entity-based theory of the corporation in *Sequana* aligns closely with DeMott's vision of fiduciary duties and the nature of the company. The decision shows, for example, that fiduciary obligation is not frozen around the hypothetical bargains of shareholders but evolves in response to shifting power relations within the corporate form.

Sequana therefore represents a rejection of a contractarian approach to corporate law. Interestingly, Lord Reed indirectly touched on contractarian tenets, in stating that "[e]conomists and legal scholars remain divided between those who view the market, and some basic legal precautions, as providing all the protection creditors require, and those who consider the traditional forms of protection to be only partially effective."[144]

Although Australian law relating to directors' duties superficially appears to resemble Delaware and U.K. company law, there are some notable differences.[145] Australian directors and officers are subject, not only to common law and equitable duties, but also to statutory duties under the *Corporations Act*.[146] In contrast to the private model of enforcement of directors' duties in Delaware and the United Kingdom, Australia predominantly relies on a

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[140] *Id*.
[141] *BTI 2014 LLC v. Sequana SA* [2022] UKSC 25 (UK) § 139 (per Lord Briggs)
[142] *Id*.
[143] *Id*., § 140.
[144] BTI 2014 LLC v. Sequana SA [2022] UKSC 25 (UK) § 55 (per Lord Reed).
[145] Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 305 (D. Gordon Smith & Andrew S. Gold, eds., 2018).
[146] *See Corporations Act 2001* (Cth), ss 180–184 (Austl.).

public enforcement model for statutory directors' duties.[147] Under this regime, the business conduct regulator, the Australian Securities and Investments Commission (ASIC), is responsible for bringing enforcement actions against directors, who have supposedly breached the statutory version of their general law fiduciary duties, under a "civil penalty" regime.[148]

Whereas private enforcement in Australia tends to focus on actions for breach of the duty of loyalty, public enforcement by ASIC has focused predominantly on breaches of directors' duty of care in public corporations.[149] ASIC has generally enjoyed relatively high levels of success in these actions.[150]

Australia's public enforcement model has affected the content of directors' duties. The courts have increasingly viewed directors' statutory duties as public obligations, which have an important social function.[151] According to the 2011 decision, *ASIC v Healey,*[152] for example, "[t]he role of a director is significant as their actions may have a profound effect on the community, and not just shareholders, employees and creditors".[153]

The influential 2016 decision in *ASIC v Cassimatis (No 8)*[154] accepted that breach of the statutory duty of care is not only a private, but also a public, wrong and that there is a public interest in the enforcement of directors' duties in Australia.[155] In that case, Edelman J. held that Mr and Mrs Cassimatis, the directors of a company, Storm Financial, had breached their statutory duty of care by pursuing a high-risk leveraged investment strategy that was unsuitable for a substantial class of vulnerable clients, thereby failing to guard against foreseeable harm.

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[147] See Renee M. Jones & Michelle Welsh, *Toward a Public Enforcement Model for Directors' Duty of Oversight*, 45 VAND. J. TRANSNAT'L L. 343 (2012).
[148] Corporations Act 2001 (Cth.), Pt 9.4B; s 1317E(1) (Austl.).
[149] *See* Jennifer Varzaly, *The Enforcement of Directors' Duties in Australia: An Empirical Analysis*, 16 EUR. BUS. ORG. L. REV. 281, 285, 316 (2015); Geoffrey Nettle, *The Changing Positions and Duties of Company Directors*, 41 MELB. U.L. REV. 1402 (2018).
[150] Note, however, ASIC's mixed results in a recent high profile case, ASIC v. Bekier [2026] FCA 196 (Austl.). *See, generally* Ian Ramsay & Benjamin Saunders, An Analysis of the Enforcement of the Statutory Duty of Care by ASIC, 36 CO & SEC. L.J. 497, 510–11 (2019); Greg Golding, Tightening the Screws on Directors: Care, Delegation and Reliance, 35 UNSW L.J. 266, 273–74 (2012).
[151] *See* Michelle Welsh, *Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia*, 42 FED. L. REV. 217, 223–28 (2014).
[152] (2011) 196 FCR 291 (Austl.). *See generally*, Jennifer G. Hill, *Centro and the Monitoring Board – Legal Duties Versus Aspirational Ideals in Corporate Governance*, 35 UNSW L.J. 341 (2012); John Lowry, *The Irreducible Core of the Duty of Care, Skill and Diligence of Company Directors: Australian Securities and Investments Commission v Healey*, 75 MOD. L. REV. 249 (2012).
[153] ASIC v Healey (2011) 196 FCR 291, 297 (Austl.).
[154] ASIC v Cassimatis (No 8) [2016] FCA 1023 (Austl.).
[155] *Id.*, § 455, § 461, § 503.

Mr and Mrs Cassimatis appealed unsuccessful to the Federal Court of Australia.[156] Interestingly, one of the key arguments on which they based their appeal, but which was rejected, was that there could be no breach of duty because the company's interests were identical to their own interests as the sole shareholders. The Federal Court affirmed that the appellants' duties were owed to the corporation as a separate legal entity, whose included shareholder profitability but also the long-term viability of the enterprise and compliance with the legal and regulatory environment.

In recent years, many of ASIC's civil penalty applications have involved so-called "stepping stone" liability.[157] This form of liability comprises a two-step process, whereby directors and officers may be personally liable for failure to prevent contraventions of the law by their corporation.[158] Stepping stone liability is particularly well-suited to misconduct that involves stakeholder or social harm.

There is also growing recognition that environmental, social and governance (ESG) matters may be within the purview of the statutory duty of care. In 2016, for example, The Centre for Policy Development and the Future Business Council released a "landmark legal opinion,"[159] which argued that Australian directors who disregard the risks to their business associated with climate change could potentially face liability for breach of the statutory duty of care.[160] Australian regulators, including ASIC and the Australian Prudential Regulation Authority (APRA), subsequently endorsed this view.[161]

ASIC's public enforcement role, combined with the public nature of the statutory duties, has potential implications both for choice of remedy and for relief from liability. It has been argued, for example, that ASIC should not necessarily seek compensation for individual shareholder losses, but rather should protect the public interest at large by securing "maximum voluntary

[156] Cassimatis v. ASIC (2020) 376 ALR 261(Austl.).
[157] *See, e.g.*, Ian Ramsay & Miranda Webster, *An Analysis of the Use of Stepping Stone Liability Against Company Directors and Officers*, 50 AUST. BAR REV. 168 (2021).
[158] *See* Alice Zhou, *A Step Too Far? Rethinking the Stepping Stone Approach to Officers' Liability*, 47 FED. L. REV. 151 (2019).
[159] Reserve Bank of Australia, 'Financial Stability Risks from Climate Change' (Oct. 2019).
[160] The Centre for Policy Development and the Future Business Council, *Climate Change and Directors' Duties*, Memorandum of Opinion (Mr Noel Hutley SC & Mr Sebastian Hartford-Davis, Oct. 7, 2016. Updates of this Memorandum of Opinion were released in 2019 and 2021.
[161] *See e.g.* John Price (then-Commissioner, ASIC), *Climate Change* (Keynote address, Centre for Policy Development: Financing a Sustainable Economy, Sydney, Jun. 18, 2018).

compliance".[162] Furthermore, Australian courts have held that, although at general law, shareholders can waive directors' breaches of duty, this is not permissible in relation to the statutory duties.[163] In the *Cassimatis* appeal decision,[164] for example, Greenwood J. stressed that Australia's statutory duty of care "is *normative* and its burden is a matter of *public concern* not just *private rights*,"[165] reflecting Parliament's intention to create a mandatory objective standard of conduct for directors.[166] The Australian courts' emphasis on public policy provides a strong contrast with the strong private/contractual interpretation of shareholder rights under Delaware case law.[167]

5. CONCLUSION

[W]e experience the present through the lens of the past—and we shape our understanding of the past through the lens of the present.

Gerald McMaster[168]

Another strand of DeMott's expertise, not so far mentioned, is Art Law, and it seems only appropriate to end our article with a quotation from an artist and curator. In his discussion on the past and present of art history, McMaster states "[h]istory is not written on an unchanging scroll",[169] citing William James for the proposition that "the past, which by definition can only exist in the present, changes to "conform" to novel events".[170]

DeMott's scholarship shows that there are many parallels between law and this conception of art. Her scholarship shows that only by understanding its historical roots in equity can the operation of fiduciary obligation, its elusiveness and its complexity be understood today. She also highlights the ways in which fiduciary obligation can adapt to "changing scrolls" and novel events. She demonstrates that fiduciary obligation is situation-specific, fluid and continually

[162] Michelle Welsh, *Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia*, 42 FED. L. REV. 217, 230–31, 233, 239 (2014).
[163] *See* ASIC v Cassimatis (No 8) [2016] FCA 1023, § 457, § 459, § 508 (Austl.).; Forge v ASIC (2004) 213 ALR 574 (Austl.).
[164] Cassimatis v. ASIC (2020) 376 ALR 261 (Austl.).
[165] *Id*, § 27 [emphasis in original].
[166] *Id*.
[167] *See.* Singh v Attenborough 137 A.3d 151 (Del. 2016).
[168] Gerald McMaster, *Art History Through the Lens of the Present?*, 34 J. MUSEUM EDUCATION 215.
[169] *Id.*, 220.
[170] *Id.* (citing William James, *The Principles of Psychology*, Volume One, pp 237–283, 1890).

evolving. And she shows that law, like art, functions "as a recorder and catalyst for reflection and dialogue about the dynamics of power that affects human lives."[171]

[171] Gerald McMaster, *Art History Through the Lens of the Present?,* 34 J. MUSEUM EDUCATION 215.

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