1. Fiduciary law's mixed messages

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INTRODUCTION

A conventional starting point for discussing American fiduciary law is *Meinhard v. Salmon*, Judge Benjamin Cardozo's classic paean to fiduciary loyalty.[1] According to Cardozo, fiduciaries owe their beneficiaries a "duty of the finest loyalty" that is "stricter than the morals of the marketplace":

> Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.[2]

Some legal scholars have argued that *Meinhard*'s "uncompromising" formulation of the duty of loyalty should be consigned to the ashbin of history.[3] The problem with Cardozo's famous dictum, they contend, is that it does not accurately capture the restrained legal requirements that courts actually apply when they review a fiduciary's conduct under the duty of loyalty.[4] Although courts routinely affirm the "unbending and inveterate" character of fiduciary duties,[5] they rarely hold that fiduciary decisions violate the duty of loyalty in the absence of an unauthorized conflict of interest or other flagrant abuse of discretion. To skeptics, these features of American fiduciary law

* I am indebted to Andrew Gold for invaluable comments on an earlier draft and to Evan Fox-Decent for a decade-long conversation that has informed the ideas in this chapter.

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

2 *Id.*

3 *See*, *e.g.*, MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 107–08 (2010) (arguing that the "moralistic view of fiduciary doctrine rings somewhat hollow," in part, because "a breach of fiduciary duty may be committed without the fiduciary necessarily acting immorally"); John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 629, 658 (1995) (dismissing Cardozo's "rhetorical excesses" as superfluous "pulpit-pounding rhetoric").

4 *See*, *e.g.*, Kelli A. Alces, *The Fiduciary Gap*, 40 J. CORP. L. 351, 380 (2015) ("*Meinhard* v. *Salmon* is perhaps the most striking example of the disconnect between moralistic rhetoric and the duties courts will enforce."); Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1149 (2014) (arguing that fiduciary law presents "a kind of Goldilocks problem," because it "overlays moralistic standards of conduct upon legally enforced norms" without clarifying "what links the two").

5 *Meinhard*, 164 N.E. at 546.

suggest that Cardozo's moralistic rhetoric is a misleading distraction that should be abandoned in the interests of promoting precision and transparency.[6]

This chapter draws on republican legal theory to propose a fresh justification for fiduciary law's mixed messages. Republicans contend that individual liberty is compromised by "domination," understood as "exposure to the arbitrary will of another, or living at the mercy of another."[7] Elsewhere, I have argued that the fiduciary duty of loyalty is necessary under republican legal theory to protect a fiduciary's principal and beneficiaries from the domination that would otherwise arise when their fiduciary receives entrusted power over their legal or practical interests.[8] In this chapter, I develop this republican theory of fiduciary law further by explaining how republicanism can explain and justify the divergence between fiduciary law's strict rules for fiduciary conduct and its more deferential standards for judicial review.

The republican theory supports Cardozo's assertion that fiduciaries are subject to the most exacting legal standards of fidelity, loyalty, and diligence. But it also encourages courts to defer to fiduciaries' discretionary decisions in contexts where judicial intervention is more susceptible to arbitrariness—and, hence, more dominating—than fiduciary decision-making would be alone. In particular, I argue that the type of deference courts accord to fiduciary judgments should turn on two considerations: (1) whether or not the fiduciary has exercised entrusted discretionary power; and (2) whether the fiduciary or the court is in a better position to resolve the relevant issue in a manner that tracks the principal's intentions and the beneficiary's best interests. Consistent with these considerations, de novo judicial review is more easily justified under the republican theory for some issues that implicate fiduciary duties (*e.g.*, fraud, irrationality, self-dealing) than for others (*e.g.*, failure to make an informed decision). The republican account of fiduciary law thus offers a framework for specifying the standards of review that courts should apply when evaluating whether fiduciaries have violated their legal obligations to their beneficiaries.

I. PREVAILING THEORIES OF FIDUCIARY LAW'S MIXED MESSAGES

Mixed messages are an enduring feature of American fiduciary law. Although courts sometimes assert that fiduciaries must pursue their principals' objectives with "utmost good faith," observing "the highest standards of honor and honesty,"[9] they rarely find a

[6] *See*, *e.g.*, Gregory Scott Crespi, *Standards of Conduct and Standards of Review in Corporate Law: The Need for Closer Alignment*, 82 NEB. L. REV. 671, 673 (2004) ("[A] single, clearly articulated standard is preferable to the current conflation of legal standards with moral exhortations.").

[7] PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 31–2 (1997).

[8] *See* Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEXAS L. REV. 993 (2017).

[9] Grossberg v. Haffenberg, 11 N.E.2d 359, 360 (Ill. 1937); *see also* Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. Ch. 1939) (describing the duty of loyalty as a "rule that demands of a

breach of fiduciary duty absent evidence of egregious opportunism, recklessness, or neglect. The best-known example is corporate law's "business judgment rule," which calls on courts to defer to the decisions of disinterested directors as long as those decisions were undertaken deliberatively and in the good-faith pursuit of beneficiaries' best interests—even if the decisions ultimately harmed the interests of the corporation or its stockholders.[10] But the business judgment rule is hardly unique. Courts traditionally apply a healthy dose of deference to fiduciary decision-making in a variety of other settings, from trust law[11] to bankruptcy law.[12]

Although fiduciary law's deferential standards of review are deeply embedded in legal doctrine, they are also deeply controversial. Some scholars believe that deferential judicial review gives fiduciaries too much latitude for arbitrariness.[13] In their view, courts would be better off treating fiduciaries' uncompromising moral obligations as hard-edged legal duties to maintain fiduciary law's integrity. Others defend judicial deference, deriding the idea that fiduciary law can serve as a "mystical vehicle to a higher commercial morality."[14] They argue that courts should refrain from sermonizing and confine their definition of fiduciary duties to the "careful and constrained" formulations that are enshrined in their deferential standards of review.[15] Interestingly enough, despite their diametrically opposed positions, scholars on both sides of this debate agree that the divergence of fiduciary law's aspirational rhetoric from the actual practice of judicial review is a problem to be fixed.

Another group of scholars has embraced the disjuncture between fiduciary law's idealistic rhetoric and courts' less demanding standards of review. Gordon Smith has argued, for example, that fiduciary duties properly vary in intensity depending upon the risk of harmful opportunism that is present in a particular setting: the greater "the potential for opportunism" in a particular fiduciary relationship, the greater the

corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, … affirmatively to protect the interests of the corporation" with "undivided and unselfish loyalty").

10 *See* D. Gordon Smith, *The Modern Business Judgment Rule*, *in* Research Handbook on Mergers and Acquisitions (forthcoming).

11 *E.g.*, Crabb v. Young, 92 N.Y. 56, 66 (1883) ("[W]hile trustees are … held to great strictness in their dealings with the interests of their beneficiaries, the court will regard them leniently when it appears they have acted in good faith, and if no improper motive can be attributed to them, the court[s] have even excused an apparent breach of trust, unless the negligence is very gross.").

12 *See*, *e.g.*, In re Healthco Int'l, Inc., 136 F.3d 45, 50 n.5 (1st Cir. 1998) (when reviewing settlements between creditors and bankruptcy trustees to determine whether they are in the estate's best interests, "[t]he [bankruptcy] judge … is not to substitute her judgment for that of the trustee, and the trustee's judgment is to be accorded some deference") (internal citation and quotation marks omitted).

13 *See*, *e.g.*, Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 Colum. L. Rev. 1403, 1440 n.99 (1985) ("Together, statutory and case law relax the duty of care beyond anything imaginable for a fiduciary … .").

14 Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations*, *in* Mapping the Law 577, 584–5, 598 (Andrew Burrows & Alan Rodgers eds., 2006).

15 *Id.*; *see also* Conaglen, *supra* note 3, at 106–08 (rejecting *Meinhard* on the ground that the duty of loyalty is not concerned with moral rectitude).

demands of a fiduciary's duty of loyalty.[16] Accordingly, fiduciary law may employ less demanding decision rules in contexts where beneficiaries are able to exert significant control over their fiduciaries' decisions.[17]

Smith's account explains why courts do not strictly enforce Cardozo's exacting formulation of fiduciary loyalty in every case, but it does not fully explain why courts continue to invoke *Meinhard*'s uncompromising standards in cases where they apply deferential standards of review.[18] Some scholars have defended this practice on consequentialist grounds, arguing that fiduciary duties are most likely to prevent disloyal and sloppy fiduciary performance when courts nurture the duties' operation "both as legal rules and moral norms."[19] According to this view, the law "encourages fiduciaries to [engage in praise-worthy behavior] not only or even primarily by threatening punishment but by framing the relationship between the fiduciary and her beneficiary as one that calls for a psychological commitment to trustworthy, other-regarding behavior."[20] Courts may advance fiduciary law's purposes most effectively, the thinking goes, if they regularly emphasize the fiduciary duties of loyalty and care as moral and social norms that govern how faithful fiduciaries ought to behave. If courts were to eschew Cardozo's characterization of fiduciary law as entailing a "duty of the finest loyalty" in the interest of promoting juridical precision and transparency, as some scholars have advocated,[21] they would risk undermining the very social norms that make trust-based fiduciary relationships possible in the first place.[22]

Although legal scholars often describe fiduciary law's mixed messages as reflecting the divergence of law and morality, this is not how courts have understood the phenomenon. In *Meinhard*, for example, Cardozo characterized a fiduciary's "duty of finest loyalty" as a legally binding "standard of conduct" or "level of behavior" that courts must always preserve from erosion, even as they apply less demanding liability rules.[23] Thus understood, the disjuncture between fiduciary law's "unbending and inveterate" requirements for fiduciary conduct and its more restrained decision rules

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16 D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1483–4 (2002).

17 *Id.* at 1489.

18 A search of the Westlaw database suggests that federal and state courts cited *Meinhard* 141 times between 2005 and 2015 alone.

19 Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 70 (2005); *see also* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1783 (2001); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1265 (1999); Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847; Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1097 (1997).

20 Blair & Stout, *supra* note 19, at 1743.

21 *See*, *e.g.*, Crespi, *supra* note 6, at 673 (urging courts to clarify "that these exhortations represent aspirational norms rather than legally enforceable duties").

22 Gregory Alexander offers yet another explanation for fiduciary law's mixed messages: judges' cognitive biases lead them to "resolve questions of doubt against the fiduciary." Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 778 (2000).

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

can be understood to reflect a formal bifurcation *within* fiduciary law, rather than a tension between law and morality.[24]

Scholars who endorse this view have argued that fiduciary law exemplifies Jeremy Bentham's famous distinction between legal conduct rules and decision rules.[25] Whereas conduct rules direct the behavior of regulated parties, decision rules tell courts how to handle cases involving the alleged violation of conduct rules.[26] Because conduct rules and decision rules have different audiences and serve different purposes, they also tend to take different forms. As Meir Dan-Cohen has observed, conduct rules are often couched in ordinary language, rather than legal jargon, with the aim of providing fair warning to the general public regarding the law's requirements.[27] In contrast, decision rules typically utilize legal terms of art, reflecting the fact that they seek to constrain judges by laying clear boundary markers for the exercise of judicial power.[28] Some statutory or regulatory directives may serve simultaneously as both conduct rules and decision rules, encoding different messages to different audiences.[29] For example, the directive "*Let no man steal*" may speak to the general public's conventional understanding of "stealing," while simultaneously encoding a legal term of art comprised discrete elements and coupled with affirmative defenses. The difference between conduct rules and decision rules is particularly important, because the distinctive special substantive and procedural features of decision rules often inhibit courts from fully enforcing conduct rules.

Dan-Cohen argues that the bifurcation of legal regimes into conduct rules and decision rules can be an effective strategy for encouraging socially desirable behavior in the private sphere without sacrificing rule-of-law values in adjudication. For example, by framing a prohibition against stealing in ordinary language without explicitly discussing duress as an affirmative defense, a legislature may maximize the statute's ex ante deterrent effect as a conduct rule addressed to the general public, while also enabling courts to practice compassion ex post. Bifurcating conduct and decision rules in this manner is likely to be most successful, Dan-Cohen suggests, when the law achieves "acoustic separation" between the two sets of commands—informing regulated parties of the rules that govern their behavior, while simultaneously keeping them ignorant of the less demanding standards that courts will apply in enforcement

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[24] This is not to say, however, that legal norms and moral norms for fiduciary loyalty are the same. For a thoughtful discussion of possible divergences, see Andrew S. Gold, *Accommodating Loyalty*, *in* Contract, Status, and Fiduciary Law (Paul B. Miller & Andrew S. Gold eds., forthcoming).

[25] *See* Melvin Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 Fordham L. Rev. 437 (1993); Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 Wm. & Mary L. Rev. 519 (2012); *see generally* Jeremy Bentham, A Fragment on Government and an Introduction to the Principles and Morals of Legislation 430 (W. Harrison ed., 1948) (1789).

[26] Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625, 628 (1983); *Id.* at 630.

[27] *Id.* at 664.

[28] *Id.* at 664, 670–71.

[29] *Id.* at 631.

proceedings.[30] Even if perfect acoustic separation cannot be achieved, selective transmission of legal decision rules may stimulate more socially desirable behavior than the law could achieve through decision rules alone.

Julian Velasco has questioned whether acoustic separation can play a meaningful role in the regulation of corporate governance.[31] He argues that it is not realistic to expect sophisticated corporate officers and directors to conform their behavior to conduct rules that are "stricter than the morals of the marketplace," when they can easily anticipate the more deferential decision rules that determine their liability.[32] As long as courts apply modest decision rules, corporate fiduciaries with competent legal counsel are unlikely to miss the message that their decisions need not satisfy *Meinhard*'s uncompromising conduct rules to survive judicial review. Although corporate directors who wish to follow the law might embrace the guidance provided by *Meinhard*-style conduct rules,[33] their less scrupulous colleagues will know that they can do so in a variety of contexts without fear of liability. Whether acoustic separation can operate more effectively outside the corporate law context is an open question, but the notion that professional trustees and investment managers do not appreciate the divergence between fiduciary law's conduct and decision rules does seem rather naïve. Consequently, it is uncertain to what extent acoustic separation can operate effectively in many areas of fiduciary law.

In sum, legal scholarship offers a variety of perspectives on fiduciary law's mixed messages. Some scholars have criticized courts' comingling of "moralistic" standards with more restrained liability rules as "incoherent, both in application and theory,"[34] and have suggested strategies for bridging the gap. Others have defended fiduciary law's divergent conduct and decision rules, arguing that this feature is justified to prevent judicial overreach and nurture beneficial social norms of loyalty and care. The relationship between fiduciary law's conduct rules and decision rules therefore remains a topic of lively debate among experts in the field.

II. A REPUBLICAN THEORY OF FIDUCIARY LAW'S MIXED MESSAGES

In previous writings, Evan Fox-Decent and I have argued that fiduciary duties reflect the concerns of republican legal theory.[35] The central message of republicanism is that individual freedom is compromised by "domination," understood as subordination to

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[30] *Id.* at 632.

[31] *E.g.*, Velasco, *supra* note 25, at 541.

[32] *Id.*

[33] *See* Steve A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUDS. 215 (2011); Rebecca Stone, *Economic Analysis of Contract Law from the Internal Point of View*, 116 COLUM. L. REV. 2005 (2016).

[34] Davis, *supra* note 4, at 299.

[35] *See* EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 103–04 (2016); Criddle, *supra* note 8.

another's "alien control."[36] The purpose of legal institutions, under this account, is to neutralize domination by ensuring that those who hold power lack both the formal and practical capacity to exercise that power in a manner that is indifferent to others' legal and practical interests. Fiduciary law addresses the threat of domination in a particularly important category of relationships: those in which one party (the fiduciary) has been entrusted with power over another's legal or practical interests (the beneficiary). The concept of "entrusted" power denotes that power is committed to the fiduciary for an other-regarding purpose. Accordingly, a fiduciary must exercise entrusted power in a manner that is faithful to her principal's instructions and purposes. The duty of loyalty's requirements of solicitude to beneficiaries' best interests, fairness and evenhandedness among beneficiaries, and the avoidance of unauthorized conflicts likewise serve as default rules to protect beneficiaries from domination.

Republicanism's emphasis on freedom from domination underscores familiar themes in fiduciary jurisprudence, such as the idea that fiduciaries occupy offices,[37] the law's preoccupation with power and vulnerability,[38] the principle that a fiduciary's betrayal of trust is wrongful even in the absence of material harm to beneficiaries' interests,[39] and the restitutionary character of fiduciary law's traditional remedies.[40] The republican theory of fiduciary law also contributes to private law theorizing by explaining more clearly what it means to hold an office properly; i.e., consistent with norms of nondomination. Republicanism thus supplies an account of the legal requirements entailed in the exercise of entrusted power that applies both to fiduciaries who serve in public offices and those who occupy private offices such as guardian, trustee, or corporate director.

The republican theory of fiduciary law also helps to explain and justify fiduciary law's mixed messages. Unlike some previous theories, the republican rationale for divergent conduct and decision rules does not depend upon the empirically contingent and uncertain proposition that mixed messages induce fiduciaries to become more virtuous. Instead, fiduciary law's mixed messages are necessary to maximize principals' and beneficiaries' freedom from domination.

Under the republican theory, fiduciary law's "unbending and inveterate"[41] conduct rules establish the formal conditions necessary for republican freedom by affirming that fiduciaries lack authority to expose their principals and beneficiaries to domination.

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[36] Philip Pettit, *Republican Freedom: Three Axioms, Four Theorems*, *in* REPUBLICANISM AND POLITICAL THEORY 102, 102 (Cecile Laborde & John Maynor eds., 2008); *see also* PETTIT, *supra* note 7, at 1; Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, *in* REPUBLICANISM AND POLITICAL THEORY, *supra*, at 86.

[37] *See* Getzler, *supra* note 14, at 584–5, 594–6 (emphasizing the historically rooted conception of fiduciaries as office-holders).

[38] *See* Frame v. Smith, [1987] 2 SCR 99, 99 (emphasizing unilateral power and vulnerability); Smith, *supra* note 16, at 1483 (suggesting that "the strength of [fiduciary law's] protection varies inversely with the potential for self-help on the part of the vulnerable party").

[39] *See* United States v. Carter, 217 U.S. 286, 306 (1909) (emphasizing that a fiduciary's breach of trust and confidence is actionable irrespective of whether it causes harm).

[40] *See* Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 L.Q. REV. 608, 625–31 (2014).

[41] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

The fiduciary duty of loyalty denies fiduciaries the legal capacity to exercise alien control over entrusted power by requiring them to pursue their principals' instructions and purposes with fidelity. Within the scope of their discretionary power, fiduciaries must also seek to advance the best interests of their beneficiaries.[42] The duty of care likewise affirms that a fiduciary may not exercise its entrusted power arbitrarily by prohibiting it from handling this power recklessly or negligently. These conduct rules are "stricter than the morals of the marketplace"[43] because they require the fiduciary to subordinate her will to others' objectives and interests so as to ensure that the principal and beneficiaries are always in a position of self-mastery. Accordingly, when courts invoke *Meinhard*'s strict conduct rules, the rules are not merely inspirational sermons to spur fiduciaries toward higher planes of moral enlightenment; instead, they communicate the legally binding conduct rules that fiduciaries must satisfy—and public institutions cannot legitimately ignore or disavow—in order to secure freedom from domination within a republican legal order.

Consistent with Dan-Cohen's account, fiduciary law's conduct rules are typically couched in ordinary language such as "loyalty," "honesty," and "diligence," rather than esoteric legal terms of art. The fact that courts use this language to describe fiduciary duties to the public is not a sign that the strict requirements of fiduciary loyalty and care are merely moral exhortations. Instead, it is precisely *because* these requirements are legally binding conduct rules that courts employ ordinary language to ensure that fiduciaries, who may not be trained in law, receive fair warning of the uncompromising character of their legal duties of loyalty and care. Far from detracting from the cultivated precision of a well-ordered legal system, this approach tracks conduct rules' notice-giving function, affirming the universal right to freedom from domination.

Republicanism also explains why courts often apply deferential standards of review to fiduciary decision-making. The key point to bear in mind is that judges, like private-law fiduciaries, have the practical capacity to exercise arbitrary power.[44] Judicial review may be dominating in at least two ways. First, when a principal entrusts a fiduciary to exercise discretionary power on her behalf, judicial review would constitute a form of alien control over the fiduciary relationship if the court had the capacity unilaterally to supplant the fiduciary in this appointed office. Judicial review must therefore respect a principal's decision to repose trust in a fiduciary. Second, when a court reviews a fiduciary's performance, there is a risk that it might make mistakes reflecting the limits of judicial competence. For example, the court might misinterpret the fiduciary's mandate or misconstrue beneficiaries' interests. It might struggle to discern whether the fiduciary has acted with due diligence and prudence in gathering relevant information and exploring options. A legal regime that did not recognize courts' capacity for arbitrariness could very well exacerbate domination in fiduciary relationships. Hence, just as strict conduct rules are necessary to affirm that

[42] I flesh out the republican basis for these loyalty requirements in greater detail in Criddle, *supra* note 8.

[43] *Meinhard*, 164 N.E. at 546.

[44] For an argument that judges are also fiduciaries, see Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013).

fiduciaries are not entitled to dominate, deferential decision rules are necessary in many contexts to counteract courts' practical capacity for alien control.

The republican theory suggests, therefore, that courts should calibrate fiduciary law's decision rules to account for the relative threats that fiduciaries and judges, respectively, pose to individual liberty. As Yasmin Dawood has explained, republicanism approaches judicial review as a "domination-minimizing institutional tradeoff," which aims "to prevent the *most* dominating … action with judicial intervention that is the *least* dominating."[45] Courts should therefore interfere with fiduciary decision-making only in contexts where judicial review promises "an overall net minimization of domination."[46] As applied to fiduciary law, judicial intervention is appropriate in the fiduciary relationship only if it will render the principal and beneficiaries less vulnerable to alien control. In settings where robust judicial review would be more dominating than the alternative, republicanism supports applying a stronger dose of deference to fiduciary decision-making.

The republican theory's antidomination model of judicial review helps to explain the Delaware Supreme Court's landmark decision, *Smith v. Van Gorkom*.[47] At issue in the case was a shareholder request to rescind a corporate merger and grant damages against two directors based on their alleged failure to investigate adequately whether they might have negotiated a more favorable price for the corporation.[48] The court observed that because "a director is vested with the responsibility for the management of the affairs of the corporation, he must execute that duty with the recognition that he acts on behalf of others."[49] Accordingly, the court affirmed that directors bear an "unyielding fiduciary duty to [pursue the purposes and interests of] the corporation and its shareholders."[50] The court likewise framed the directors' duty of care as a stringent conduct rule:

> Representation of the financial interests of others imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye in assessing information … . In the specific context of a proposed merger of domestic corporations, a director has a duty … to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders.[51]

Interlaced with its discussion of the applicable conduct rule, the court also introduced the business judgment rule as a distinct decision rule for evaluating a corporate director's duty of care.[52] The court explained that the business judgment rule "exists to protect and promote the full and free exercise of the managerial power granted to

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45 *See* Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 Geo. L.J. 1411, 1418 (2008).
46 *Id.*
47 488 A.2d 858 (Del. 1985).
48 *Id.* at 870–71.
49 *Id.* at 872.
50 *Id.*
51 *Id.* at 872–3 (internal citations omitted).
52 *Id.* at 872.

Delaware directors."[53] The court did not have to spell out the reason why managerial power required protection, because the answer was obvious enough: deference was necessary to prevent minority shareholders from exploiting civil litigation as a mechanism for wresting control over corporate decision-making away from the directors.[54] If courts allowed this transfer of power to occur, they would subject the corporation to a form of alien control.

The risk of arbitrary judicial intervention is heightened in a case such as *Van Gorkom*, where the court is called upon to determine whether corporate directors have collected enough information to make a properly "informed decision" about a proposed merger. Courts are not ordinarily well-equipped to second-guess directors' business judgments about the amount of information necessary to make a merger decision, given directors' time constraints, the limits of a corporation's available resources, the likelihood of judicial hindsight bias, and the innumerable variables that may be relevant to the ultimate merger decision.[55] Moreover, courts should approach such questions with humility, recognizing that directors ordinarily have robust incentives to inform themselves regarding key business decisions because they are subject to removal if shareholders are dissatisfied with their performance. Consistent with this approach, *Van Gorkom* holds that the applicable decision rule for evaluating whether a director's business judgment was adequately informed is the highly deferential "gross negligence" standard.[56] It is only when directors have been grossly negligent in failing to inform themselves of relevant information that courts can be confident that their intervention will minimize domination in the director-corporation fiduciary relationship.[57]

The court in *Van Gorkom* also took pains, however, to emphasize that the gross negligence standard would not apply to all director business judgments. For example, the rule offered "no protection for directors who have made 'an unintelligent or

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53 *Id.*

54 *See* Orman v. Cullman, 794 A.2d 5 (Del. Ct. Chancery 2002) ("A cardinal precept of [Delaware law] is that directors, rather than shareholders, manage the business and affairs of the corporation."); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("The business judgment rule is an acknowledgement of the managerial prerogatives of Delaware directors under Section 141(a)").

55 *See*, *e.g.*, AC Acquisitions Corp v. Anderson, Clayton & Co, 519 A.2d 103, 111 (Del. Ch. 1986) (noting the "limited institutional competence of courts to assess business decisions"). Of course, corporate directors may also be subject to biases and incentives that raise domination concerns. *See* Claire A. Hill & Brett H. McDonnell, *Structural bias, RIP?*, Ch. 12 in this Volume.

56 *Van Gorkom*, 488 A.2d at 873 (reaffirming its holding in *Aronson*, 473 A.2d at 812); *see also* Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000).

57 The Delaware legislature responded to *Van Gorkom* by authorizing corporate boards to adopt charter provisions exempting board members from liability for violations of the duty of care. *See* 8 Del. C. § 102(b)(7). This change was motivated, in part, by concerns that robust judicial enforcement of the duty of care might arbitrarily discourage directors from engaging in desirable risk-taking and deter qualified individuals from accepting board positions. *See* Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 Bus. L. 1437, 1453–4 (1985). Significantly, although the Delaware legislature modified the liability rules applicable to a director's duty of care, it did not seek to modify the corresponding conduct rules.

unadvised judgment,'"[58] and it would "not tolerate faithlessness or [unauthorized] self-dealing."[59] The implication was that for decisions such as these, which involve patently dominating fiduciary action, there should be no divergence between fiduciary conduct and decision rules. Such decisions would qualify for de novo judicial review, as the court has confirmed in subsequent cases under its statutorily authorized "entire fairness" inquiry.[60] Accordingly, the business judgment rule would provide for divergence between fiduciary conduct and decision rules in contexts where searching judicial review would be more dominating than director decision-making alone.

The republican theory thus frames the business judgment rule as a meta-decision rule for corporate law that seeks to minimize domination by requiring heightened deference to various categories of business decisions.[61] As reflected in *Van Gorkom*, the business judgment rule requires courts to take a back seat in contexts where judicial review has the potential to introduce greater arbitrariness into the administration of a corporation's affairs.[62] But it provides no cover for business judgments that involve fraud, illegality, bad faith, irrationality, or unauthorized conflicts of interest.[63] In such cases, searching judicial review is appropriate because it can be expected to minimize domination. The business judgment rule thus carves out a space between corporate law's unyielding conduct rules for director loyalty and care, on the one hand, and decision rules that prevent judicial intervention from increasing overall net domination, on the other. The greater the risk that judicial review will compromise the interests and purposes of a corporation, the greater the gap between the conduct rules and decision rules that govern director fiduciary duties, and the greater the scope for unreviewable managerial power.

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[58] *Van Gorkom*, 488 A.2d at 872.

[59] *Id.*; *see also* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 2000) (holding that the business judgment rule's "protections can only be claimed by disinterested directors," which "means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing" without approval of a majority of the disinterested directors).

[60] *See* 8 DEL. C. § 144(a)(3) (2010) (authorizing a corporate director to enter a self-interested transaction, provided that the "transaction is fair as to the corporation at the time it is authorized, approved, or ratified, by the board of directors, a committee or the stockholders"); Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993) ("The entire fairness inquiry essentially requires 'judicial scrutiny,'" with the court serving as "the objective arbiter."). Significantly, a corporate director bears the burden to establish that a self-interested transaction satisfies the entire fairness test. *See Nixon*, 626 A.2d at 376.

[61] *See* Smith, *supra* note 10 ("The modern business judgment rule is not a one-size-fits-all doctrine, but rather a movable boundary, marking the shifting line between judicial scrutiny and judicial deference.").

[62] This approach is consistent with John Coffee's thesis that "the permissibility of deviations from [fiduciary law's conduct rules] should be judged primarily in terms of the competence of courts or other agencies to monitor these departures and prevent opportunism." John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1626 (1989); *cf.* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004) (arguing that the business judgment rule functions as an abstention doctrine); Lyman Johnson, *The Modest Business Judgment Rule*, 55 BUS. LAW. 625 (2000) (same).

[63] *See* Smith, *supra* note 10; Bainbridge, *supra* note 62, at 99.

Although the business judgment rule does not apply to fiduciary relationships outside the corporate law context, the domination-minimization principle that animates the business judgment rule operates in other domains of fiduciary law, as well. For example, although trustees are generally expected to apply their best efforts in the management of trust assets, courts apply a more restrained decision rule to determine whether a trustee has met their duty of care. As Robert Sitkoff has observed, the canonical decision rule for the duty of care is "measured by reference to a reasonable or prudent person in like circumstances."[64] This rule, which tracks the tort standard for negligence,[65] reflects courts' appreciation of the fact that trustees are primarily responsible for deciding how much time and effort to invest in trust management, as well as their recognition of the limits of their own institutional capacity to second-guess a trustee's expert judgments. Thus, decision rules in trust law, like those in corporate law, take into account the risk that judicial review may increase overall net domination in fiduciary relationships.

A fiduciary's legal duties are not reducible, however, to the decision rules that govern judicial enforcement.[66] Under the republican theory, a fiduciary's discretion is regulated pervasively by legal conduct rules, including the duty of loyalty's requirements to pursue a principal's instructions and purposes with affirmative devotion.[67] Every exercise of fiduciary discretion is subject to these exacting legal requirements. Accordingly, even when a fiduciary's discretionary decisions fall outside the scope of judicial supervision, fiduciary power is regulated at all times by uncompromising conduct rules of loyalty and care that constitute genuine legal obligations, not merely aspirational moral principles.[68]

III. CALIBRATING FIDUCIARY LAW'S DECISION RULES TO COMBAT DOMINATION

In his classic article on acoustic separation, Dan-Cohen observes that the "relationship between decision rules and their corresponding conduct rules is not a logical or analytical matter," but rather "a normative issue that must be decided in accordance

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[64] Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1043 (2011) (citations omitted); *see also* Kuykendell v. Proctor, 155 S.E.2d 293, 299 (N.C. 1967) (holding that the standard for guardianship is not "infallible judgment" but "ordinary diligence"). When a trustee is retained for their special skills, the applicable standard is a reasonable person in possession of those skills. *See* Sitkoff, *supra*, at 1043–4 (citations omitted).

[65] *See* Arthur Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U.L. REV. 75, 123 (2004) ("Courts typically have applied the doctrine of negligence to establish when an action (or inaction) of a fiduciary results in breach.").

[66] *See* D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 OHIO ST. L.J. 609, 613 (2014) (arguing that bounded judicial review preserves a space for unregulated fiduciary discretion); *cf.* Dan-Cohen, *supra* note 26, at 627–8 (rejecting the "reductionist" view that law is composed solely of decision rules).

[67] *See* Criddle, *supra* note 8.

[68] *See* Velasco, *supra* note 25 (defending the legal character of fiduciary conduct rules).

with the relevant policies and values."[69] The preceding discussion has shown that republicanism offers a rich normative framework that can explain and justify the divergence between fiduciary law's conduct rules and decision rules. In particular, republicanism supplies a test for evaluating the legitimacy of judicial intervention in fiduciary relationships: *courts may legitimately intervene to provide remedies for a breach of fiduciary duty when such intervention is less dominating than fiduciary decision-making alone*.

This Part develops the republican theory of judicial review further by outlining general guidelines to clarify when courts should apply strong deference, weak deference, or no deference to fiduciary judgments. The republican theory suggests that in the absence of express statutory or regulatory guidance, courts should determine what level of judicial deference to grant to fiduciary decisions based on two considerations: First, did the fiduciary exercise entrusted discretion? Second, is the fiduciary or the court in a better position to evaluate whether the fiduciary's conduct satisfied her legal obligations?[70] These two considerations suggest a general framework for determining what level of deference courts should accord to particular categories of fiduciary judgments, as reflected in Table 1.1.

Table 1.1 Judicial deference to fiduciary judgments

	Fiduciary exercises entrusted discretion	***Fiduciary does not exercise entrusted discretion***
Fiduciary has superior expertise	*Category 1* Strong deference: arbitrary and capricious review	*Category 3* Weak deference: respectful consideration
Court has superior expertise	*Category 2* Strong deference: arbitrary and capricious review	*Category 4* No deference: de novo review

Consider first cases where a fiduciary exercises entrusted discretion, but courts are comparatively poorly situated to second-guess the fiduciary's decision (Category 1). The paradigmatic example of a Category 1 question is a corporate director's business decisions. As discussed in Part II, courts routinely defer to directors' business judgments because they recognize that director decision-making is integral to a corporation's constitutive design, as reflected in its corporate charter and bylaws.[71] Corporations entrust such decisions to directors' discretionary judgment. Moreover, "courts have long been reluctant to second-guess" the business judgments of corporate

69 Dan-Cohen, *supra* note 26, at 629.

70 *See* AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. Ct. 1986) (explaining that the business judgment rule is based on two considerations: (1) "a recognition of the allocation of responsibility [to the corporate board]," and (2) "the limited institutional competence of courts to assess business decisions").

71 *See* Minstar Acquiring Corp. v. AMF Inc., 621 F. Supp. 1252, 1259 (S.D.N.Y. 1985) ("Courts have no place substituting their judgments for that of the directors.").

directors because "businessmen and women are correctly perceived as possessing skills, information and judgment not possessed by reviewing courts,"[72] and because corporate directors typically have more time, resources, and incentives to make the relevant decisions well.[73] Accordingly, courts have refused to simply substitute their own judgments concerning the wisdom or good faith of particular business decisions for the judgments of corporate directors. As long as corporate directors provide non-arbitrary justifications for their decisions and avoid "gross and palpable overreaching," judicial deference to these decisions is essentially automatic.[74] This arbitrary and capricious standard is consistent with the republican principle that courts should apply deferential decision rules in settings where robust judicial review would be more susceptible to domination—that is, more likely to subvert the principal's choices and undermine the beneficiaries' interests—than fiduciary decision-making alone.

The republican theory's antidomination model also suggests that heightened deference should be the rule when courts review fiduciaries' entrusted expert judgments in other contexts—for example, when an investment manager designs an investment portfolio for her client, a surgeon makes treatment decisions during surgery, or a guardian decides how to spend entrusted funds for the care and education of her ward.[75] In each of these contexts, the law entrusts the relevant decisions to the fiduciary's expert judgment. By virtue of their expertise and knowledge of the relevant facts—including the idiosyncratic preferences and interests of their beneficiaries—fiduciaries in these settings are also ordinarily better equipped than courts to make the relevant discretionary decisions in a non-arbitrary manner. Accordingly, the republican theory suggests that courts should apply a highly deferential arbitrary and capricious standard of review whenever fiduciaries exercise their expertise in deciding questions that have been entrusted to their discretionary judgment.

This highly deferential approach to fiduciary discretion is consistent with the common law's traditional approach to trusts. As the Tenth Circuit has explained,[76] the common law "traditionally did not sanction judicial interference with a trustee's discretion" precisely because courts recognized that "the original parties, by means of

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72 Solash v. Telex Corp., [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,608, at 97,727 (Del. Ch. Jan. 19, 1988); *see also* In re MFW Shareholders Litig., 67 A.3d 496, 526 (Del. Ct. Ch. 2013) ("Under Delaware law, it has long been thought beneficial to investors for courts, which are not experts in business, to defer to the disinterested decisions of directors, who are expert … .").

73 *See* Bainbridge, *supra* note 62, at 117–24.

74 Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971); *see also* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("Absent an abuse of discretion, [a corporate board's business] judgment will be respected by the courts.").

75 *See*, *e.g.*, In re Beidel's Estate, 13 Pa. D. & C.2d 29, 31 (Orphan's Court of Pa., Cumberland Cty. 1958) ("It is … the task of the guardian in the performance of its duties to determine whether a proposed expenditure is necessary for the care, maintenance or education of the minor. The Court should not be asked to perform the guardian's function."). Note that heightened deference has not been the rule for medical malpractice claims, although some commentators have argued in favor of something close to this approach. *See*, *e.g.*, Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. The Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587 (1994).

76 Gilbertson v. Allied Signal, Inc., 328 F.3d 625, 632 (10th Cir. 2003).

the trust instrument, [had] authorized the trustee to exercise discretionary powers" without judicial interference:

> The purpose of this principle is evident: trust settlors and trustees may, for a number of reasons, prefer that the trustee render individualized, discretionary-type decisions without a court second-guessing the trustee's judgments. The most obvious reason for such an arrangement is that the trustee's … expertise and familiarity with the overall scheme, as well as the details of each case, make him more likely to get the decision right than a court.[77]

Thus, common law courts have accorded strong deference to a fiduciary's discretionary decisions for the purpose of preventing more-dominating judicial review from supplanting less-dominating fiduciary judgments.

The U.S. Supreme Court has suggested that strong deference applies to a fiduciary's exercise of entrusted discretion even in some settings where the fiduciary's judgment is subject to conflicts of interest. In *Jones v. Harris Associates L.P.*,[78] the Court considered a civil action in which shareholders in mutual funds alleged that the investment-adviser who administered the funds had violated his duty of loyalty by charging exorbitant fees for his services.[79] Importantly, the shareholders did not dispute that they had authorized the investment adviser to set his own fees.[80] Nonetheless, they argued that the investment adviser had exercised this entrusted discretionary power in a manner that violated his duty of loyalty by charging fees that were "disproportionate to the services rendered" and "not within the range of what would have been negotiated at arm's length in light of all the surrounding circumstances."[81] On review, the Supreme Court declined to second-guess the investment-adviser's decision. The Court observed that Congress had not authorized "courts to engage in a precise calculation of fees representative of arm's-length bargaining" because "courts are not well suited to make such precise calculations."[82] Moreover, the investment adviser's discretion was subject to a procedural requirement that he receive approval from an expert board—a significant check against arbitrarily high fees. In the Court's estimation, these factors supported strong judicial deference to the investment adviser's assessment of fees "even if a court might weigh the factors differently."[83]

In reaching this decision, the Court acknowledged that "a fee may be excessive even if was negotiated by a board in possession of all relevant information."[84] Nonetheless, it held that a court should not set aside a board-approved fee as excessive unless the fee "is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining."[85] The

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77 *Id.* (citations omitted).
78 559 U.S. 335 (2010).
79 *Id.* at 338 (quoting 15 U.S.C. § 80a-35(b)).
80 For this reason, the duty of loyalty's default prohibition against unauthorized conflicts of interest did not apply.
81 *Id.* at 341 (quoting Brief for App. 52).
82 *Id.* at 352.
83 *Id.* at 351 (internal citations omitted).
84 *Id.*
85 *Id.* (quoting Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 928 (2d Cir. 1982)).

relevant inquiry, in other words, was not whether the fees were objectively fair to the shareholders (the strict conduct rule), but rather whether a reasonable person could conclude that the fees could be the result of arm's length negotiation (the deferential decision rule).[86] Only by applying this highly deferential arbitrary and capricious standard could the court be confident that judicial intervention would be less prone to arbitrariness, and hence less dominating, than the investment-adviser's exercise of entrusted discretionary judgment.

What if a fiduciary exercises entrusted discretion, but she is poorly equipped, relative to a court, to decide the relevant question (Category 2)? Consider the case of a newly minted trial attorney who employs an unwise litigation strategy to the detriment of her client.[87] A seasoned trial judge would almost certainly be more qualified to evaluate whether the novice attorney's chosen strategy would advance her client's best interests. Nonetheless, a trial judge should still grant strong deference to the novice attorney's discretionary judgments out of respect for the client's decision to entrust her case to the particular attorney. A court that applied anything less than strong deference would exercise a form of alien control over the attorney-client relationship by unilaterally displacing the client's choice of legal representation. This rationale for deferential arbitrary and capricious review applies under the republican theory regardless of whether the fiduciary or the court has superior expertise with regard to the particular decision under review.[88]

To be clear, strong deference does not mean that a grossly incompetent, corrupt, or negligent fiduciary should escape civil liability for breach of fiduciary duty. Under the arbitrary and capricious standard of review, a reviewing court may still find a breach of fiduciary obligation if a fiduciary's decisions are manifestly unreasoned, irrational, uninformed, unsupported by the basic skill and knowledge ordinarily expected in her profession,[89] or intentionally or recklessly indifferent to the client's preferences or best interests. Nonetheless, as long as the fiduciary has not exercised her entrusted discretionary power in a manner that is manifestly arbitrary and capricious, a court should refrain from undercutting the fiduciary's discretionary authority out of deference to the client's choice. To do otherwise would undermine freedom from domination by

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86 *Id.* at 353.

87 *See* Hartford Accident & Indemnity Co. v. Foster, 528 So.2d 255, 285 (Miss. 1988) (explaining that legal malpractice may also constitute a breach of an attorney's fiduciary duty to her client). *But see* Kimleco Petroleum Inc., v. Morrison & Shelton, 91 S.W.3d 921, 924 (Tex. Ct. App. 2002) (suggesting that duty of care cases should be regarded as malpractice claims, while duty of loyalty cases involve fiduciary law).

88 *See* Nichols v. Eaton, 91 U.S. 716, 724–25 (1875) ("[A] court of equity will not interfere to control [trustees] in the exercise of a discretion vested in them by the instrument under which they act."); Restatement (Second) of Trusts § 187 (1959) (June 2016 update) ("When discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.").

89 Note, however, that a fiduciary who "procure[s] his appointment by representing that he has greater knowledge and skill … is obligated to exercise such special skills." In re Kramer's Trust, 71 Pa. D. & C. 2d 51, 54 (Pa. Ct. Common Pleas 1975) (citing Estate of Killey, 326 A.2d 372 (Pa. 1974)).

subjecting the private relationship between the fiduciary and her beneficiaries to a court's alien control.

A third category of fiduciary decisions are those that have not been entrusted to a fiduciary's discretionary judgment, but still fall within the scope of a fiduciary's specialized expertise (Category 3). By way of example, consider the case of a bank that serves as a trustee and executor for trusts and estates. Courts have held when a bank performs these services, it can be held liable for breaching its duty of care "if it failed to exercise the skill and knowledge ordinarily possessed by such professional fiduciaries."[90] Although the bank-as-trustee may wield discretionary power in other respects, it is not entrusted with discretion to deviate from its baseline standard of care. Nonetheless, when a reviewing court seeks to ascertain whether a bank has employed "skill and knowledge ordinarily possessed by [other professional trustees]," it may reasonably accord some deference to the bank's representations concerning professional standards based on the bank's superior expertise. Given that professional standards are not entrusted to a fiduciary's discretionary judgment and are amenable to judicial fact-finding, judicial deference to the fiduciary's representations should be relatively weak. Rather than apply arbitrary and capricious review, courts should give "respectful attention to the reasons offered or which could be offered in support of a decision."[91] This standard emphasizes the need for courts to exercise humility in crediting fiduciaries' superior expertise, while also allowing beneficiary-plaintiffs to furnish expert testimony disproving the fiduciary's representations about the professional standards that govern her duty of care.[92]

Many other issues that arise in fiduciary law lie well within the heartland of judicial expertise and are not entrusted to a fiduciary's discretionary judgment (Category 4). These include a fiduciary's compliance with generally applicable legal norms, such as the duty of loyalty's categorical prohibitions against unauthorized conflicts of interest, unauthorized retention of profits, and fraudulent or other illegal activity;[93] as well as the requirements that a fiduciary keep accurate accounts,[94] maintain confidences,[95] and

[90] Estate of Beach, 542 P.2d 994, 998 (Ca. 1975) (citation omitted); *see also* In re Estate of Frye, 2014 WL 3511827, at *10 (Iowa Ct. App. 2014) ("[A] bank normally engaged in a fiduciary capacity must exercise the skill and knowledge ordinarily possessed by such professionals.").

[91] David Dyzenhaus, *The Politics of Deference: Judicial Review and Democracy*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 279, 286 (Michael Taggart ed., 1997) (distinguishing "deference as submission" from "deference as respect").

[92] Where the comparative competencies of fiduciaries and judges are uncertain, a strong argument can be made that courts should still also accord at least weak deference to fiduciary judgments. *See* Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on* Disney*, Good Faith, and Judicial Uncertainty*, 66 MARYLAND L. REV. 398, 447–72 (2007).

[93] *See*, *e.g.*, Scrushy v. Tucker, 70 So.3d 289, 312–13 (Ala. 2011) (holding that Delaware's business judgment rule does not apply to fraud or other illegal activity).

[94] 2A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 172, 452 (William Franklin Fratcher ed., 4th ed. 1987).

[95] *See*, *e.g.*, Ace v. State, 553 N.Y.S.2d 605, 607 (N.Y. Ct. Cl. 1990) (affirming physicians' fiduciary duty not to reveal the confidences of their patients).

avoid commingling personal assets with assets held in an official capacity.[96] None of these matters is entrusted to a fiduciary's discretionary judgment; instead, fiduciary law entrusts courts with primary responsibility to interpret these legal requirements and determine how they apply to particular cases. Courts are also better equipped than fiduciaries to carry out these quintessentially judicial functions, as they are designed and staffed specifically for these purposes. Thus, courts can best minimize domination in fiduciary relationships by according no deference whatsoever to fiduciary judgments when these questions arise.

De novo review is also the appropriate standard when a fiduciary holds discretionary power and relevant expertise but fails to apply their discretion and expertise to a particular decision. Consider, for example, an insurance plan administrator covered by the Employee Retirement Income Security Act of 1974 (ERISA),[97] who summarily denies a plan member's application for disability benefits.[98] In *Gilbertson v. Allied Signal, Inc.*, the Tenth Circuit emphasized that there is no principled basis for "judicial deference to automatically 'deemed denied' decisions," because neither of the two considerations that support deference to fiduciary judgments applies: "[s]uch decisions are not exercises of discretionary power vested in the [administrator]," and "the administrator has failed to apply his expertise to [the] particular decision."[99] In short, a fiduciary who acts, or fails to act, in a deliberate and reasoned manner "provide[s] no actual exercise of discretion or application of reasoned judgment to which a court can defer."[100] De novo review is therefore the applicable standard.[101]

Experts may disagree about how to categorize some fiduciary judgments under the typology set forth in Table 1.1 above. For example, what standard of review should courts apply when reviewing a fiduciary's interpretation of her own mandate? Do principals entrust gaps and ambiguities in a mandate to the fiduciary's discretionary judgment, or are such matters entrusted to courts? Are fiduciaries or courts more likely to interpret a fiduciary's mandate in a manner that is faithful to the principal's intentions and purposes?

Conventional wisdom suggests that courts should not defer to fiduciaries' interpretation of their own mandates. The venerable Scott & Fratcher treatise on trust law endorses this view, emphatically rejecting judicial deference to a trustee's interpretation

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[96] *See* Lewis M. Simes, Cases and Materials on the Law of Fiduciary Administration 215 (1941).

[97] 29 U.S.C. §§ 1001 *et seq*.

[98] Gilbertson v. Allied Signal, Inc., 328 F.3d 625, 632 (10th Cir. 2003).

[99] *Id.*

[100] *Id.*; *see also* Francis v. United Jersey Bank, 432 A.2d 814, 819–20 (N.J. 1981).

[101] *See Gilbertson*, 328 F.3d at 632; Nichols v. Prudential Insur. Co. of America, 406 F.3d 98, 109 (2d Cir. 2005) (applying de novo review to a "deemed denied" claim); Gritzer v. CBS, Inc., 275 F.3d 291, 296 (3d Cir. 2002) ("Where a trustee fails to act or to exercise his or her discretion, de novo review is appropriate because the trustee has forfeited the privilege to apply his or her discretion."); Jebian v. Hewlett Packard Co., 310 F.3d 1173, 1178 (9th Cir. 2002) (holding that de novo review, not arbitrary and capricious review, is the appropriate standard when a plan administrator summarily denies an application for disability benefits). *But see* Southern Farm Bureau Life Insur. Co. v. Moore, 993 F.2d 98, 101 (5th Cir. 1993) (holding that deferential arbitrary and capricious review applies even to an administrator's "deemed denied" determinations).

of a trust instrument: "The extent of the duties and powers of a trustee is determined by … the terms of the trust as the court may interpret them, and not as they may be interpreted by the trustee himself or his attorney."[102] The Supreme Court likewise has held that trustees presumptively lack discretionary authority over the interpretation of ambiguous terms in a trust instrument.[103] This opposition to deferential judicial review reflects the concern that a fiduciary's mandate is ordinarily a contract between the principal and fiduciary that should be interpreted in a manner consistent with ordinary principles of contract law.[104] De novo judicial review is arguably necessary, therefore, to prevent a fiduciary from dominating her principal and beneficiaries by occupying a position as both judge and party to controversies concerning the interpretation of her mandate.[105]

Although the case against judicial deference to a fiduciary's interpretations of her mandate is widely accepted, it is hardly incontrovertible. Unlike arm's length contracts, which are premised on the assumption that contracting parties will use contracts to advance their own respective interests, fiduciary relationships are premised on the idea that a fiduciary will "take the *initiative* on her beneficiary's behalf" and "make new sacrifices in the face of unforeseen developments."[106] To trigger the fiduciary duty of loyalty, contractual relationships must reflect this special "trust and confidence" (*fides*)—the expectation that a fiduciary will exercise affirmative devotion in pursuing her principal's purposes and her beneficiaries' best interests.[107] Accordingly, when a principal entrusts power to a fiduciary, it is not unreasonable for a court to presume that the principal would expect the fiduciary to take the leading role in filling gaps and resolving ambiguities in the mandate. This distinctive character of fiduciary relationships arguably supports heightened deference to a fiduciary's interpretations of her entrusted mandate. Moreover, even if strong deference does not apply, a court might still grant "deference as respect" to a fiduciary's interpretations of her mandate based on the fiduciary's professional expertise, her experience administering the particular mandate or other similar mandates, and other factors which suggest that she would be better equipped than the court and the beneficiaries to discern what interpretation will best advance the principal's intentions and the beneficiaries' interests.

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[102] 3 Austin W. Scott & William F. Fratcher, The Law of Trusts § 201, at 221 (4th ed. 1987); *see also* Restatement, *supra* note 88, § 201 cmt. b ("A trustee commits a breach of trust … where he interprets the trust instrument as authorizing him to do acts which the court determines he is not authorized by the instrument to do.").

[103] *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112–13 (1989) (citing Scott & Fratcher).

[104] *Id.*

[105] Viewed from this perspective, judicial deference to a fiduciary's interpretations of her mandate can be seen as analogous to allowing a baseball player to serve simultaneously as both pitcher and umpire, placing batters entirely at his mercy.

[106] Daniel Markovits, *Sharing* Ex Ante *and* Ex Post*: The Non-Contractual Basis of Fiduciary Relations*, *in* Philosophical Foundations of Fiduciary Law 208, 216, 222 (Andrew S. Gold & Paul B. Miller eds., 2014).

[107] *See* Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992) (Posner, J.) ("A fiduciary relation arises only if one person has reposed trust and confidence in another who thereby gains influence and superiority over the other.").

Viewed from this perspective, a fiduciary's interpretation of her mandate is closely analogous to statutory interpretation by a federal administrative agency.[108] Courts in the United States routinely defer to a federal agency's "construction of a statutory scheme it is entrusted to administer."[109] The kind of deference accorded to agency statutory interpretation depends upon whether Congress has committed a particular statute to the agency's administration. If a court determines that Congress has entrusted a statutory regime to a particular agency's administration, courts do not disturb the agency's reasonable interpretations of the statute's ambiguous provisions.[110] Instead, the agency's interpretations receive a strong form of deference equivalent to the arbitrary and capricious standard of review.[111] Significantly, the Supreme Court has held that this deferential standard of review applies even to an agency's interpretation of jurisdictional statutes, because:

> there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has … . [T]he question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not.[112]

Conversely, when courts determine that a statute has *not* been entrusted to a particular agency's administration, they accord only weak deference, or respectful consideration, to the agency's views based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[113] The type of deference due to an agency's statutory interpretation depends, therefore, upon whether the agency has been entrusted with authority to administer the relevant statute (strong deference) and, if not, whether other factors suggest that the interpretation merits a measure of deference in the particular case (weak deference).

On a few occasions, courts have applied a similar approach to fiduciary law. For example, in *Benadom v. Colby*, the Court of Special Appeals of Maryland held that a trial court had erred in failing to accord deference to certain trustees' interpretation of an ambiguous provision in a trust instrument.[114] Although "no language" in the trust

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[108] *Cf.* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 116, 143–7 (2006) (drawing connections between administrative law deference doctrines and fiduciary law); Getzler, *supra* note 14, at 596 ("The content of the modern rules for judicial review of administrative powers were lifted from Chancery doctrine concerning exercise of trust powers."); Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 Cardozo L. Rev. 491, 513 (2012) (observing that "the relation of courts to boards is similar to the relation of courts to agencies under the *Chevron* doctrine").

[109] Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837, 844 (1984).

[110] *Chevron*, 467 U.S. at 844–5.

[111] *Id.* at 844.

[112] City of Arlington v. FCC, 133 S. Ct. 1863, 1870 (2013).

[113] United States v. Mead Corp., 533 U.S. 218, 228 (2001) (quoting Skidmore v. Swift, 323 U.S. 134, 140 (1944)).

[114] 567 A.2d 463, 468–70 (1989).

document "explicitly set[] forth the parameters of the Trustees' discretion to interpret,"[115] the court concluded that the trustees' authority to interpret the trust document was implicit in a provision that authorized the trustees to "decide all matters, unless grave doubts of legality arise."[116] The court held, therefore, that the trial court below "should overturn the Trustees' determination only if it were unreasonable."[117] As the trial court had concluded that the relevant language in the trust document "was ambiguous and open to at least two interpretations," it was obligated to refrain from overturning the trustees' interpretation "unless absolutely necessary."[118] Although the appellate court recognized that the trustees were not the "sole repository of wisdom on interpretation," it stressed that they had:

> more experience with the … Trust than a court and consequently deserve deference. As the Trustees state, the court, when looking to see whether they have acted honestly and reasonably, is in much the same position as a court reviewing the action of an administrative agency or an appellate court using the substantial evidence with due deference to expertise standard.[119]

Finding no basis to conclude that the trustees' interpretation of the trust document was unreasonable, the appellate court reversed the trial court's ruling.[120]

Although I am persuaded that the case for deference to fiduciary interpretation is stronger than the case for de novo review in most contexts,[121] this brief chapter does not afford the space for a robust defense of the former approach. The key point, for present purposes, is simply that the terms of this debate can be fruitfully framed using the republican theory's antidomination model, as outlined in Table 1.1 above and developed throughout this Part. If proponents of the conventional approach are right that principals do not ordinarily intend to entrust interpretive authority to their fiduciaries, and if fiduciaries do not possess special expertise in interpreting their mandates, then courts should apply de novo review to prevent fiduciaries from dominating their beneficiaries. Conversely, if interpretation is indeed part of the discretionary authority entrusted to fiduciaries—or if fiduciaries are in the best position to interpret their own mandates—then a more deferential standard of review is warranted. As in other areas where courts review fiduciary judgments, the republican theory dictates that the decision rules courts apply to fiduciaries' interpretations of their

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115 *Id.* at 468.
116 *Id.* at 469.
117 *Id.* at 470.
118 *Id.*
119 *Id.*
120 In a footnote, the appellate court also noted that the trustees were members of the settlor's family and had "developed expertise in dealing with the … Trust." *Id.* at 470 n.12.
121 Courts should not apply strong deference, however, when interpretive disputes arise between partners, co-ventures, or other joint-fiduciaries, who have equal claims to interpretive authority unless one abdicates this role to the other. *See* Sriraman v. Patel, 761 F. Supp. 2d. 7, 20 (E.D.N.Y. 2011) (concluding that a partner lacked authority to explicate the terms of a partnership agreement because he had "completely defer[red] to [his partner's] intent" and "essentially failed to have any expectation or intent of his own until after he left the partnership").

mandates must take into account whether fiduciary decision-making or judicial decision-making is more dominating.

CONCLUSION

In *Meinhard*, Judge Cardozo confidently predicted that the "uncompromising" requirements of fiduciary law "will not consciously be lowered by any judgment of this court."[122] Some critics have derided Cardozo's prediction, observing that courts have, in fact, been all too happy to water-down the law's requirements by applying highly deferential liability rules. Although courts routinely cite *Meinhard* as the canonical text on fiduciary loyalty, the divergence between *Meinhard*'s strict standards and courts' more restrained approach to judicial review cries out for explanation and justification.

This chapter has endeavored to clarify the method in fiduciary law's mixed messages. Fiduciary law overlays strict conduct rules with deferential decision rules to secure freedom from domination in fiduciary relationships. Fiduciary law's conduct rules must remain "unbending and inveterate" to affirm that fiduciaries lack authority to dominate their principal and beneficiaries by wielding alien control over their entrusted power.[123] At the same time, courts wisely exercise restraint when they review fiduciary performance to ensure that judicial review does not inadvertently exacerbate overall net domination in the fiduciary relationship. Thus, far from undermining the law's coherency, mixed messages are a central and indispensable feature of fiduciary law's emancipating design.

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[122] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).
[123] *Id.*