2017

The Method in Fiduciary Law's Mixed Messages

Evan J. Criddle
William & Mary Law School, ejcriddle@wm.edu

The Method In Fiduciary Law's Mixed Messages

13 Apr 2017

OBLB categories
Corporate Governance

Evan Criddle

OBLB Types
Research

Share Share Share Share Share Subsc

More from this author

OBLB Keywords
Duty of loyalty Fiduciary Fiduciary decision-making Fiduciary duties Fiduciary law Judicial review Republican Legal Theory

American courts routinely pay homage to Benjamin Cardozo's classic statement in *Meinhard v. Salmon* (1928) that fiduciaries owe their beneficiaries a 'duty of the finest loyalty' that is 'stricter than the morals of the marketplace.' In practice, however, courts rarely set aside fiduciary decisions in the absence of an unauthorized conflict of interest or other flagrant abuse of power. Critics argue that this divergence between fiduciary law's uncompromising rhetoric and the more modest reality of judicial deference is an embarrassment.

My new paper, 'Fiduciary Law's Mixed Messages,' argues that this critique is misplaced. Drawing on ideas developed in a previous article, I argue that the divergence between fiduciary law's conduct rules and decision rules comes into clearer focus when viewed from the perspective of republican legal theory.

Republicans contend that individual liberty is compromised by 'domination,' understood as subjection to another party's arbitrary control. The fiduciary duty of loyalty is necessary, on this account, to prevent fiduciaries from exercising arbitrary power over the legal and practical interests of their principal and beneficiaries.

Republican theory supports Cardozo's assertion that fiduciaries are subject to the most exacting legal standards of fidelity, solicitude, and diligence. The uncompromising requirements of fiduciary loyalty are necessary to affirm that fiduciaries formally lack authority to dominate their principal and beneficiaries. Nonetheless, courts must defer to fiduciaries' discretionary decisions when judicial intervention is more susceptible to arbitrariness—and, hence, more dominating—than fiduciary decision-making would be alone. The republican theory thus suggests that the disjuncture between fiduciary law's conduct rules and decision rules is a principled feature of American fiduciary law, not a bug.

The republican theory also offers a significant practical payout by clarifying when courts should defer to fiduciary judgments. In particular, it suggests that the degree of deference courts accord to fiduciary judgments should turn on two considerations: (1) whether or not the fiduciary has been entrusted with discretionary power to decide the relevant issue; and (2) whether the fiduciary or the judiciary is in a better position to resolve the relevant issue in a manner that tracks the principal's purposes and the beneficiary's best interests.

The following table summarizes how these two criteria offer a framework for judicial review of fiduciary decision-making:

	Fiduciary Exercises Entrusted Discretion	***Fiduciary Does Not Exercise Entrusted Discretion***
Fiduciary Has Superior Expertise	Strong deference: arbitrary and capricious review	Weak deference: respectful consideration
Judiciary Has Superior Expertise	Strong deference: arbitrary and capricious review	No deference: de novo review

As the paper explains, this framework justifies prevailing standards of review in most respects, including American corporate law's 'business judgement rule.' But it also offers resources for refining judicial standards of review in other fields of fiduciary law where courts have struggled to explain how deferential standards of review can be reconciled with the strict requirements of fiduciary loyalty.

Evan Criddle is Cabell Research Professor of Law at the William & Mary Law School.