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What If Fiduciary Obligations Are Like Contractual Ones?

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Why does anyone care about the relationship between fiduciary obligations and contractual ones?

Fiduciary theorists pay more attention the question than do contract theorists. The latter are more likely to talk about the relationship between contract law and tort law than about how contract law relates to the law of fiduciary obligations. This might be because tort law is more familiar and better understood. Or perhaps there are other reasons. In any case, this chapter takes it as given that claims that fiduciary obligations are like contractual ones are more about the purpose and principles of fiduciary law than about the law of contracts.

Anyone who argues that there is a deep similarity between fiduciary and contractual obligations faces a hurdle: The two sorts of obligations are defined in very different ways. An obligation counts as contractual in virtue of how it comes into existence. Roughly speaking, a person acquires a contractual obligation by entering into an agreement for consideration. This simple formation rule applies across a wide range of transactions—anything from a corporate merger agreement to an agreement between family members. And it is neutral with respect to the content of the resulting obligations. Parties can, by and large, contract for whatever first-order obligations they wish, including fiduciary ones.¹

* Professor of Law, Georgetown University Law Center. This chapter benefited greatly from feedback from participants at the July 2015 UCL-Yale sponsored conference, *Contract and Fiduciary Duty: Two Things or Just One?*, and at the November 2015 McGill sponsored conference, *Contract, Status, and Fiduciary Law*. I am also grateful for helpful feedback from and conversations with Donald Langevoort, Paul Miller, Prince Saprai and Robert Thompson.

¹ Which is not to say that parties can contract for fiduciary remedies. Because this chapter focuses on possible similarities between contractual and fiduciary obligations, I largely ignore differences between the remedies that typically apply to each.

A duty qualifies as a fiduciary obligation partly in virtue of the relationship between the obligor and the obligee and partly in virtue of its content. As Peter Birks observes, the word “fiduciary” is Anglicized Latin, meaning trustee-like. Fiduciary obligations are obligations that are similar to those of a trustee.

The truth is that “fiduciary” is one of those words which means what it does, and what it does is to form a bridge from the express trust to other analogous situations. . . . A fiduciary relationship is a relationship analogous to that between express trustee and beneficiary, and a fiduciary obligation is a trustee-like obligation exported by analogy.²

The relationships that generate fiduciary obligations share family resemblance.³ Typically they involve an imbalance of power and degree of trust. But not every relationship of that sort generates fiduciary obligations. And an obligation is a fiduciary one only if it has the right sort of content; notably, only if it requires of the fiduciary some degree of care and loyalty. The category of fiduciary obligations is defined at least as much by the obligations’ content as by the relationships to which they attach.

Given the different ways the categories are defined, it is not surprising that there is overlap between them. Some fiduciary relationships, such as that between an agent and a principal, originate in contractual arrangements. And entirely arms-length contracting parties might write fiduciary-like obligations into their agreement. From a purely analytic standpoint, the relationship between contractual obligations and fiduciary ones appears to be like that between organic produce and leafy greens. Membership in the first category turns on origins, membership in the second on structural features. Leafy greens can be organic, but need not be. Organic produce can include leafy greens, but also much else. The only analytic connection between the two is that both are ways of describing produce.

But law is not merely a matter of definition. Claims that fiduciary relationships are types of contracts or that fiduciary obligations are contractual in nature are not meant to state analytic truths. Nor are they claims that the law of fiduciary obligations should be subsumed into the law of contract. No one is arguing that because fiduciary obligations are contractual they should be subject to the consideration requirement, the Mailbox Rule, or *Hadley v. Baxendale*. What is being claimed is that there is some deep similarity or continuity between fiduciary obligations and

² Peter Birks, *The Content of Fiduciary Obligation*, 34 ISRAEL L. REV. 3,8 (2000).

³ See John Glover, *The Identification of Fiduciaries*, in PRIVACY AND LOYALTY 269 (Peter Birks ed., 1997).

contractual ones. “Fiduciary obligations are contractual,” is best read as a metaphor. It is designed to prompt the listener to look for similarities or connections that she might not otherwise see.

This chapter examines three ways to unpack the metaphor. The first concerns the *content* of fiduciary obligations. The most plausible claim here is not that the content of fiduciary obligations is like that of contractual ones, but that the tools lawmakers apply to determine the content of fiduciary obligations should be the same ones they use to determine the content of contractual ones. The second possible claim concerns *causative events*. Fiduciary obligations and contractual obligations are both acquired obligations. They presuppose what Birks calls a “causative event.” In contract law, the causative event is typically an agreement for consideration. In fiduciary law, the causative event is entering into the right sort of relationship. The claim here is that there is a deep similarity between those causative events, one that illuminates the nature of fiduciary obligations. Third, much of contract law is made up of defaults, which parties have the ability to alter. Some fiduciary obligations are also defaults. Perhaps the *mutability* of fiduciary obligations reflects a deep similarity between the grounds of fiduciary and contractual obligations.

This chapter discusses each possible claim. My goal is not to provide a definitive resolution to any of them. By disaggregating them for separate consideration, I hope to cast some new light on each. The thrust of my argument, however, will be that any similarity between fiduciary obligations and contractual ones does not tell us much new about the former. The reason is that the grounds of contract law are more complex than is sometimes assumed. I conclude by identifying some reasons for caution when wielding the “fiduciary obligations are contractual” metaphor.

1 Content

Is there anything that the content of contractual obligations tells us about the content of fiduciary ones? The best known claim that there is can be found in the work of Frank Easterbrook and Daniel Fischel. Easterbrook and Fischel stake out a radical position: “Fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings.”⁴ This Part distinguishes several claims Easterbrook and Fischel make under this heading and discusses the grounds for each. I then describe and defend a minimalist contractualism about the content of fiduciary duties—one so minimal that it arguably does not deserve to be called “contractualist.”

⁴ Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. LAW & ECON. 425, 427 (1993).

Analytic considerations already discussed suggest reasons to doubt that the content of contractual obligations can tell us anything about the content of fiduciary ones. A legal obligation is contractual not by virtue of its content, but by virtue of being generated in the right way. Contractual obligations are created by acts that satisfy the conditions of contractual validity, such as entering into an exchange agreement. They are, as philosophers say, content independent: the reason for recognizing the obligation does not turn what the obligation requires.⁵ Given that contract law says so little about the content of contractual obligations, why should we expect it to tell us anything about the content of fiduciary ones?

Of course contract law is not entirely silent on the first-order obligations parties can contract for. Three generally applicable mandatory rules limit the performance obligations parties can put in their contracts. Courts will not enforce commitments that are against public policy, such as a promise to perform an illegal act; courts will not enforce terms that are unconscionable; and courts impose on all contracts a mandatory duty of good faith.⁶ But judicial interpretation and application of these rules suggest that they tell us little about fiduciary obligations. The public policy rule is a narrow one, emphasizing mostly third-party effects. Fiduciary obligations, on the contrary, look to be structured primarily for the benefit of the obligee. The unconscionability doctrine prohibits only the most extreme forms of advantage taking. It is a far cry from a fiduciary's positive duties of loyalty and care. Moreover, substantive unconscionability usually must be paired with some procedural defect to render a term unenforceable. Finally, as Daniel Markovits observes, the duty of good faith "permits contracting parties to remain as self-interested within the contract relation as they were without it," requiring only that they "limit their pursuit of their private interests according to the terms of their contractual settlement."⁷ Contract law demands from parties no more than the *minima moralia* of the marketplace, obligations that fall far short of the duties of loyalty and care that characterize fiduciary obligations.

If there is a connection between the contents of contractual and fiduciary obligations, it lies not in their substance but in the method of determining what those obligations are. This is one of Easterbrook and Fischel's claims. They call for "filling gaps in fiduciary relations the same way courts fill gaps in other contracts. The subject matter may differ, but

⁵ See, e.g., Joseph Raz, *Voluntary Obligations and Normative Powers* (pt. 2), in 46 *PROC. ARISTOTELIAN SOC'Y* 79, 95-96 (Supp. 1972).

⁶ The content of some contract types is governed by additional mandatory rules. Examples include usury laws, minimum wage laws and consumer protection laws.

⁷ Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-contractual Basis of Fiduciary Relations*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 209, 213 (Andrew S. Gold & Paul B. Miller, eds. 2014).

the objective and the process is identical.”⁸ Call this the “methodological continuity thesis.” No matter what the substantive differences between contractual and fiduciary obligations, lawmakers should use the same methods and procedures to determine their content.

Stated at this level of generality, the methodological continuity thesis is fairly weak. It is satisfied, for example, by the proposition that the content of both sorts of obligations should be that which a wise judge would decide—a claim that tells us almost nothing about what the content of either should be.

Easterbrook and Fischel fill in the methodological continuity thesis with a more substantive theory of how lawmakers should determine the content of both types of obligations: hypothetical agreement. When a court must fill a gap in a contract, they argue, it should seek out terms the parties would have chosen if they had had the time and resources to reach agreement on the matter. If, for example, the question in a contract case is whether a tenant had a duty to inform a lessor of an obscure term in a 20-year old lease when the tenant was laying the groundwork to invoke that term, the court might ask whether, if the parties had thought about the matter when negotiating the contract, they would have agreed to such a duty.⁹ When a court seeks to determine the legal duties of a fiduciary, it should ask the same question: Given the practical problem that the fiduciary relationship was aiming to solve—according to Easterbrook and Fischel, some form of agency problem—what duties would rational parties have agreed to assign to the fiduciary if they were given all the time and resources needed to think the problem through? I’ll call this the “hypothetical agreement method.”

There are two senses in which the hypothetical agreement method might be called “contractual.” The first is the sense I’ve been discussing. According to Easterbrook and Fischel, it is the method that courts should use to determine the content of contractual obligations as well as fiduciary ones. The term “contractual” seems especially appropriate in this respect, for the method feels especially natural when it comes to filling contractual gaps, where the parties have agreed on some terms but not others.

The hypothetical agreement method might also be called “contractual” because a hypothetical agreement is like a hypothetical contract. In fact, the more common term in the literature is “hypothetical contract.” But here care is required. Hypothetical agreements cannot do all the justificatory work that actual agreements or contracts do. Thinking about what parties would have agreed to is a way to identify what terms can be expected to maximize their welfare. Self-interested, knowledgeable and rational parties will agree to terms that they expect to maximize their

⁸ Easterbrook & Fischel, *supra* note 4 at 429.

⁹ The example comes from Judge Posner’s opinion in *Market Street Associates Ltd. Partnership v. Frey*, 941 F.2d 588 (7th Cir. 1991).

respective gains from a transaction. The justificatory force of hypothetical consent lies not in the idea of consent, but in the welfare effects that it identifies. As Anthony Kronman observes:

[O]nce we have concluded, for whatever reasons, that a rule is welfare-enhancing, the assertion that the parties to a hypothetical contract would voluntarily choose it adds nothing but rhetorical force to our conclusion; it is, so to speak, pure window-dressing. Hypothetical contract arguments are thus not really contractualist at all. They explain and justify their conclusion by an appeal to considerations of welfare alone.¹⁰

Easterbrook and Fischel's hypothetical agreement method is not so much a commitment to thinking of fiduciary obligations as contracts as it is a commitment to welfare economics.

Once we understand this, we can distinguish the hypothetical agreement method from a separate contractualist claim Easterbrook and Fischel make: that parties should have the power to modify their fiduciary obligations, or that "[a]ctual contracts always prevail over implied ones."¹¹ The hypothetical agreement method does not ask what terms the actual parties to a transaction actually would have agreed to had they actually thought about the matter. It asks what terms perfectly rational and perfectly knowledgeable parties would have agreed to if granted all the time they needed to reach an accord. These imagined actors are given perfect knowledge, perfect rationality and unlimited time in order to identify welfare-maximizing terms. It is not obvious that actual parties will arrive at the same result. On its own, the hypothetical agreement method does not entail that parties should have the ability to choose or alter their fiduciary obligations.

One can get from hypothetical agreement to "[a]ctual contracts always prevail over implied ones," with either of two additional premises. The first is that parties are better positioned, by virtue of knowledge and interests, to decide for themselves which terms best suit their needs than are courts, legislatures or regulators, which likely know less about the transaction at issue and do not have a stake in it. Alternatively or in addition, one might argue that party choice is a separate and perhaps sufficient ground for enforcement. The first is a common premise of pro-market neoclassical economic analysis. The second is the defining claim of autonomy theories. Easterbrook and Fischel invoke both when they write

¹⁰ Anthony T. Kronman, *A Comment on Dean Clark*, 89 COLUM. L. REV. 1748, 1750 (1989).

¹¹ Easterbrook & Fischel, *supra* note 4 at 427.

that “[t]o say that express contracting is allowed is to say that the law is designed to promote the parties’ own perception of their joint welfare.”¹²

I will say more about the value of party choice in fiduciary law in Parts Two and Three. For the moment, I simply observe that Easterbrook and Fischel need one of these two premises, or a third, to get from the hypothetical agreement method to their preference for party choice. But neither premise is uncontroversial. It might be that in some, if not all, fiduciary relationships we can expect lawmakers using the hypothetical agreement method to arrive at terms that create more value than those that the parties would choose. That might be so because parties are imperfectly rational, because parties have imperfect knowledge of the risks of the transaction, because parties have insufficient time and resources to weigh pertinent costs and benefits, or because one party is more sophisticated than the other or enjoys other bargaining advantages likely to produce an inefficient outcome. Alternatively or in addition, it might be that the social interest in imposing one or another fiduciary obligation outweighs the value we attach to party choice. Sometimes the law imposes duties on persons that they don’t want. We might worry about attaching too much weight to party choice especially where there is an imbalance of power or the opportunity for exploitation—common characteristics of fiduciary relationships. In short, one might accept Easterbrook and Fischel’s narrower methodological claim about the value of hypothetical agreement without committing oneself to their more thoroughgoing contractualism about fiduciary obligations.

This is important because the hypothetical agreement method has real benefits. To ask what obligations fully informed and rational parties would have agreed to is to ask what obligations best serve the parties’ interests. No matter what policies or purpose fiduciary obligations serve, they are clearly designed to protect beneficiaries’ interests. And as Easterbrook and Fischel emphasize, changing one term in a transaction can have unintended adverse effects on other terms. Just as adding a warranty might result in an increase in the price of goods, increasing or decreasing the scope of a fiduciary’s obligations might affect other aspects of her transaction with the beneficiary.

A beneficiary who does not value the new service or higher degree of loyalty at more than the cost of providing it is worse off, the opposite of a court’s objective; if the beneficiary does value the extra service at more than its cost, then the parties would have provided for this service by contract in a transaction-cost-free world.¹³

¹² *Id.* at 429.

¹³ *Id.* at 431.

Because the hypothetical fully informed, perfectly rational negotiating parties take a holistic view of costs and benefits—trading off a cost here for a benefit there—the hypothetical agreement method should capture such negative welfare effects. Hypothetical agreement is a tool for thinking through the full range of effects a fiduciary obligation might have.

That is not to say that hypothetical agreement is or should be the sole method for determining the content, default or mandatory, of fiduciary obligations. First, it is not obvious that welfare economics captures all of the law's reasons for recognizing and enforcing fiduciary obligations. Second, the hypothetical agreement method provides less certainty than lawmakers might want. The most all-things-considered efficient mix of obligations often depends on empirical facts about which we know very little. These include parties' risk preferences, how much they know about the law and how much it affects their behavior, and the power of reputational and other nonlegal incentives. The absence of information about the values of these and other variables makes it easy to tell just-so stories as to why a lawmaker's or theorist's preferred rule is the value-maximizing one.

Nonetheless, the hypothetical agreement method is helpful for identifying unintended costs that a proposed change in fiduciary obligations might bring. If one holds that fiduciary obligations are designed to protect or promote the welfare of beneficiaries, it is difficult to see why all of their welfare effects—intended and unintended—should not be considered when determining their content. The hypothetical agreement method does not commit a theorist to welfare economics or efficiency as the only goal when designing fiduciary obligations. But it provides an important check when doing so.

2 Causative events

A second way in which fiduciary obligations might be like contractual ones is in their causative events—how one acquires the obligation. Because a contractual obligation comes from the obligor's voluntary agreement to it, the law of contracts is often treated as the paradigm of a private power-conferring law, and contracts as a form of private legislation. To the extent that fiduciary obligations are voluntarily acquired, one might think they too are chosen obligations, and that fiduciary law is, like the law of contracts, grounded in principles of autonomy or choice. A more complete account of contract law, however, suggests a more complicated picture.

There is no doubt but that contract law gives private persons the ability to purposively undertake legal obligations when they wish.¹⁴

¹⁴ I discuss the themes in the following five paragraphs in greater detail in Gregory Klass, *Three Pictures of Contract: Duty, Power and Compound Rule*, 83 N.Y.U. L. REV. 1726 (2008).

Sophisticated parties are able to determine with precision when contractual obligations will attach, what the content of those obligations will be, how their agreement will be interpreted, who will enforce it, and the consequences of breach. And they can achieve those legal results by the simple mechanism of agreeing to them, which is to say, by expressing their shared intent to achieve those results. In such transactions, contract law operates as a private power-conferring law. It gives parties the ability to undertake new legal obligations when they wish.

That said, not all of contract law fits the model of private legislation. Contemporary contract law does not require that parties either intend or express an intention to undertake legal obligations.¹⁵ “Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract.”¹⁶ Parties acquire contractual obligations simply by entering into exchange agreements, which are not distinctively legal acts. It is therefore possible for persons to acquire contractual obligations unwittingly. Corbin suggests the following example:

There seems to be no serious doubt that a mutual agreement to trade a horse for a cow would be an enforceable contract, even though it is made by two ignorant persons who never heard of a legal relation and who do not know that society offers any kind of a remedy for the enforcement of such an agreement.¹⁷

The point is not that unexpected contractual obligations are common. It might be that the vast majority of contracting parties understand themselves to be entering into a legally binding agreement. But if so, that is an empirical fact, not a legal requirement. Contemporary contract law is designed to attach legal obligations not, or not only, because parties want them, but because they have entered into the right sort of relationship.

This feature of contract law suggests that it is designed to do more than confer on parties the power to undertake obligations when they wish. Contract law is also designed to impose legal duties on parties for reasons that have nothing to do with their intent *vel non* to acquire them. Contract theorists have suggested various reasons for such a duty-imposing function.

¹⁵ There are exceptions. Among the complexities is the nominal rule in civil law countries and in Great Britain that “[i]n order to be bound by a contract a party must have an intention to be legally bound.” THE COMMISSION OF EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW art. 2:101 cmt. B (Ole Lando & Hugh Beale eds., 2000). For a more detailed discussion, see Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437 (2009).

¹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981).

¹⁷ 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 34, at 135 (1st ed. 1950).

These include the social interests in protecting a promisee's reliance, in supporting the practices of promise-making and promise-keeping, and in enforcing obligations of corrective justice that arise after a breach. Other evidence for contract law's duty-imposing function includes courts' openness to finding implied-in-fact contracts, the fact that a bare representation can generate an express warranty and default interpretive rules that are highly contextualist.

The causative events that generate contractual obligations are therefore various. Often the events can be characterized as acts of private lawmaking, in which parties intentionally undertake new legal obligations to one another. But the conditions of contractual validity do not require the expression of such an intent. In other transactions, the causative event is simply agreement to an exchange transaction.

This variety says something about the broader purposes of contract law. It suggests that with respect to the single duty to perform, contract law serves both a power-conferring and a duty-imposing function. I have called this the "compound theory" of contract.¹⁸ The compound theory maintains that contemporary contract law recognizes and enforces the single duty to perform for two very different reasons at once. It does so in order to give parties the power to purposively undertake new legal obligations to one another when they wish. And it does so in order to impose legal obligations on parties for reasons that do not involve party choice.

What about the causative events associated with fiduciary obligations? James Edelman has emphasized that most fiduciary relationships are based on the fiduciary's consent or agreement.¹⁹ Edelman quotes with approval the Supreme Court of Canada's decision in *Norberg v Wynrib*:

Although fiduciary relationships may properly be recognized in the absence of consent by the beneficiary—the consent of a child to his or her parents acting in a fiduciary capacity for the child's benefit is not required—they are more typically the product of the voluntary agreement of the parties that the beneficiary will cede to the fiduciary some power, *and are always dependent on the fiduciary's undertaking to act in the beneficiary's interests.*²⁰

Fiduciary obligations are voluntary in the sense that one does not become a trustee, an executor, a guardian, a corporate director, a joint venturer, an agent, an attorney, a teacher or a priest by accident. One consents or agrees to the position. The resulting fiduciary obligations are therefore voluntary

¹⁸ Klass, *supra* note 14.

¹⁹ James Edelman, *When Do Fiduciary Duties Arise?*, 126 L.Q. REV. 302 (2010).

²⁰ *Id.* at 313 (*quoting Norberg v Wynrib* [1992] 2 S.C.R. 226 at 273).

obligations, in the sense that they are products of the fiduciary's voluntary acts. Does this suggest that fiduciary obligations are contractual in nature?

Edelman is probably wrong to claim that *all* fiduciary relationships originate in the fiduciary's consent or agreement. Courts have held, for example, that parents owe a fiduciary obligation to their children.²¹ Although Edelman works hard to construe the role of parent as premised on a voluntary undertaking,²² it is not obvious that this is the best reading of how a person acquires those obligations. More generally, because fiduciary obligations are identified as such by structural features of fiduciary relationships and by their content, there is no *a priori* reason why they might not sometimes attach to non-voluntary relationships.

That said, many fiduciary relationships are voluntary. Voluntary fiduciary relationships can be divided into two broad categories.

Some voluntary fiduciary relationships come into existence without the law's help. The relationships between teacher and student and between priest and parishioner, for example, are not in the first instance legal ones. They exist in and are defined by the social world in which we find ourselves, regardless of whether the law takes notice of them. The same can be said of some more discrete relationships that generate fiduciary obligations. A person who assumes management and control over trust property might become a trustee *son du tort*, whether she knows it or not.²³ Though these relationships are voluntary in the sense that the fiduciary voluntarily enters into them, there is no requirement or reason to expect that the fiduciary knows she is entering into a transaction that will alter her legal obligations in that way.

When the law attaches fiduciary obligations to such nonlegal voluntary relationships, it looks to be serving a duty-imposing function, rather than a power-conferring one. Because the relationship can come into being without the law's help, we cannot be sure that the fiduciary knows, much less intends, the legal obligations that attach to it. The law of fiduciary obligations in these instances is designed to impose legal duties on fiduciaries not because they want or have undertaken those duties, but for other reasons.

And of course it is easy to imagine what those reasons might be. Fiduciary relationships are generally characterized by asymmetries of power, trust and vulnerability. Fiduciaries typically enjoy discretionary powers or privileges, whose exercise can significantly affect the non-fiduciary's well being. These powers and privileges often create the risk of opportunism, leaving the non-fiduciary especially vulnerable to the fiduciary's breach of trust. In such circumstances, the case for legal

²¹ See, e.g., *M(K) v M(H)* [1992] 3 S.C.R. 6 (Australia). See also Elizabeth S. Scott & Robert E. Scott, *Parents As Fiduciaries*, 81 VA. L. REV. 2401 (1995).

²² Edelman, *supra* note 19 at 311-12.

²³ See, e.g., *King v. Johnston*, 178 Cal. App. 4th 1488 (Ct. App. 2009)

intervention to protect the non-fiduciary against neglect and opportunism is an easy one, and does not depend upon the fiduciary's intention to undertake the obligation.

If the fiduciary obligations that attach to such nonlegal voluntary relationships are similar to contractual obligations, they are similar to contract law's duty imposing aspect—the fact that one can acquire contractual obligations unaware. The causative event in both cases is the choice to enter into a nonlegal relationship of the right sort. The resulting obligations might be said to be voluntary in the sense that it could have been avoided. Yet the obligations have not been voluntarily undertaken in a more robust sense. There is no reason to expect that the obligor objectively intends, wants or even expects the legal obligation. The law's reason for imposing the obligation cannot therefore be the obligor's intention to undertake it.

This similarity does not tell us much new about fiduciary obligations. Contract law's duty-imposing function is not distinctive, except in its pairing with contract law's power-conferring aspect. The duty-imposing side of contract law suggests comparisons to tort law or family law—other fields in which legal obligations are imposed in order to protect vulnerable persons, to deter harmful behavior, to compensate for wrongful losses, and so forth. A claim that fiduciary obligations are like the duty-imposing aspect of contract law does no theoretical work.

Other fiduciary obligations attach to legally constituted relationships—relationships that they cannot exist without the law's help. Examples of legally constituted fiduciary relationships include those between executor and legatees, between guardian and ward, between corporate director and shareholders and between a licensed financial advisor and her clients. There are no executors outside the law of wills and probate, no guardians outside the law of guardianship, no corporate directors outside of the law of corporations, no licensed financial advisors outside of the regulatory framework they operate in. The relationships themselves are creatures of law. They are legally constituted. When a person knowingly becomes a fiduciary in such a relationship, she therefore understands herself to be assuming a new legal role²⁴ that involves new legal powers and obligations—though she may not understand what all those powers and obligations are. Unlike parents, priests, teachers or

²⁴ Rather than “new legal role,” one might say “new legal status.” I've chosen “role” because “status” is sometimes associated with legal situations that are not chosen, such as being a firstborn child. My use of “role” encompasses both Hanoch Dagan and Elizabeth Scott's “office” and their “contract type.” Hanoch Dagan & Elizabeth S. Scott, *Reinterpreting the Status-Contract Divide: The Case of Fiduciaries*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* ___, [MS at 9-10] (Paul B. Miller & Andrew S. Gold, eds., 2016).

borrowers, agreeing to enter into such a legal relationship is perforce agreeing to the legal role and everything that comes with it. If the fiduciary obligations that attach to extralegal voluntary relationships can be analogized to the duty-imposing side of contract law, perhaps the fiduciary obligations that attach to legally constituted voluntary relationships are more similar to the power-conferring aspect of contract law.

There is no question but that the laws that establish the roles of executor, guardian, corporate director and licensed financial advisor are private power-conferring rules of a certain type. They confer on private persons, who satisfy certain conditions, the power to enter into a new legal role. A person becomes an executor, a guardian, a corporate director or a licensed financial advisor by choice. In some instances the law requires that the choice be expressed in a formal legal act. To become an executor in the District of Columbia, a person named as such in a decedent's last will and testament must file a petition with the applicable court seeking an order naming her the executor for the estate.²⁵ To become the guardian of an adult, one must file a petition requesting assignment as such.²⁶ In other instances, no formal act is required, though the fiduciary must express her agreement to the new legal position or status. Thus to become a corporate director, one need express only an intent to undertake the position, usually in the form of an employment contract. In all these cases, however, the law grants the potential fiduciary the power to choose whether or not to accede to the new legal role, and it grants her the role based on the exercise of that choice.

I think the best available argument that the power to become a fiduciary of this sort is like the power-conferring aspect of contract law goes as follows: The legal role of fiduciary is just a bundle of Hohfeldian jural relations.²⁷ To be a fiduciary of one type or another is to have a certain collection of legal duties, powers, privileges, immunities and so forth. The new powers are often especially salient. But what makes the relationship a fiduciary one is that those powers come with certain obligations attached to their exercise. To say that someone is an executor is to say both that she has the legal powers to maintain and dispose of the estate's assets, and that she has the fiduciary obligations of care and loyalty in the exercise of those powers. To say that a person is a corporate director is to say both that she has the legal power to make certain executive decisions on behalf of the corporation, and that she has certain fiduciary obligations towards the shareholders. This way of understanding the role of a fiduciary suggests a deep similarity between legally constituted fiduciary relationships and many contracts. To purposively enter into a contract is also to knowingly

²⁵ D.C. Code § 20-304(f)(6) (2012).

²⁶ *Id.* § 21-2041 (2012).

²⁷ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

effect a change to one's jural relations. Although the new obligation to perform is the most salient change, contracts often also come with new powers, privileges, immunities and so forth. Both fiduciary law and contract law therefore give persons the power to purposively effect changes in their legal relations with others. Both enable private persons to alter their powers, privileges, immunities and obligations. At least some fiduciary obligations are therefore best understood as the result of private legislative acts, comparable to contract law's power-conferring aspect.

The above argument relies on picturing the role of fiduciary as a bundle of jural relations. The bundle theory of property illustrates the power of that analytic approach. Decomposing an apparently simple and natural legal concept into its constituent parts can reveal otherwise hidden complexity and contingency, and suggest alternatives that might otherwise remain out of view.²⁸ But like other reductive projects, this mode of analysis can also have a leveling effect. It risks leaving important variables out of the equation.²⁹ Reducing fiduciary statuses to mere bundles of jural relations tells us something important about them. But it does not tell us everything.

In order to see why, consider a different analogy: to become a fiduciary in a legally constituted relationship is like acceding to a public office. Take the ability of the candidate who has received the most votes to become a member of Congress. Like other legal roles, to be a member of Congress is, from a one perspective, just to enjoy a special collection of legal powers, privileges, immunities, duties and so forth. The most salient of these is the power to participate in the legislative process. But the office also comes with legal privileges and duties. The Speech and Debate Clause of the US Constitution, for example, gives members of Congress immunity from civil arrest while attending or travelling to and from a session of Congress.³⁰ The federal bribery statute makes it a crime for members of Congress and other public officials to receive anything of value in return for influence on their official acts.³¹ The power to become a member of Congress is the power to acquire a collection of new powers, duties, privileges and immunities.

Like the fiduciary obligations of an executor, guardian, trustee or corporate director, a Congressperson's duty to obey the bribery statute is in a sense voluntary. When taking the oath of office, she knows she is acceding to a new legal role. She might not be aware of every new power,

²⁸ See, e.g., Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS (PROPERTY) 69 (1980).

²⁹ For a similar point about bundle theories of property, see Thomas Merrill and Henry Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001).

³⁰ U.S. CONST., art. I, § 6(1); *Gravel v. United States*, 408 U.S. 606, 614 (1972).

³¹ 18 U.S.C. § 201(b)(2).

privilege, immunity or duty that comes with her new office. She might not know, for example, of her constitutional immunity from civil arrest under the Speech and Debate Clause. And she might not know that if she accepts a bribe, she will now be subject to criminal prosecution under the bribery statute. But her choice to assume the office, together with her generic awareness that it involves a new legal role, is enough to say that the new duties are voluntary ones. If she is later indicted under the bribery statute and complains that she is being held to too high a standard, one might reply, "You knew, or should have known, or could have known, what you were getting into when you chose to take the oath of office."

The example is relevant because there is an important difference between the power to become a member of Congress and the power to enter into a contract. The duties that the bribery statute imposes on members of Congress are voluntary in the sense that they are the knowable consequences of the decision to become a member of Congress. They are not, however, what we expect to motivate individuals to run for Congress. We do not expect people to seek to become members of Congress for the sake of the new legal duties they will thereby acquire.

Contractual obligations are different. Because contracts originate in exchange agreements, a person's reasons for entering into a contract are more closely tied to her resulting obligations. In a contractual exchange, one side undertakes an obligation as the price of the other side's return promise or performance. In the language of the Second Restatement, "[i]n the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration."³² A party who is engaged in exchanges of this sort does not merely expect the resulting duty to perform. She seeks it for instrumental reasons. Undertaking the duty to perform is essential to achieving her plans and projects, namely, receiving some promise or performance in return. Her new obligation allows her to accomplish what she could not otherwise. Contractual obligations are not merely expected, but specifically intended.

Both a member of Congress's legal duty not to accept a bribe and a contracting party's legal duty to perform result from the exercise of a legal power. The causative events are, in this respect, similar. But in other respects, the events are very different. We expect parties to enter into contracts for the sake of the new obligations they thereby acquire. We expect people to become members of Congress for the sake of the powers they thereby acquire, and not for the sake of the new duties. These different expectations correspond to a difference in the law's reasons for imposing the duty. When contract law functions as a power-conferring rule, the reason for recognizing the duty lies in the social interest in giving persons the ability to undertake new legal obligations when they wish. That reason

³² RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981).

presupposes that parties often enter into contracts seeking the resulting legal obligations. Because we do not expect people to enter public office for the sake of the new duties they thereby acquire, this cannot be the reason for imposing those duties. All this is a long way of explaining what was obvious from the start. The purpose of the federal bribery statute is not to give individuals the power, by becoming members of Congress, to acquire the duty not to accept bribes. It is to impose on members of Congress the duty not to accept bribes, whether they want that duty or not.

The question, then, is whether entering into a legally constituted voluntary fiduciary relationship is, with respect to the obligations that come with it, more like purposively entering into a contract or more like entering into a public office. There is considerable variety amongst fiduciary relationships, and there are probably at least as many reasons for becoming a fiduciary as there are types of fiduciaries. One person's reasons for serving as the legal guardian of her mentally incompetent sibling are likely to be very different from another's reasons for serving on a corporate board, both of which might be different from a person's decision to serve as a licensed financial advisor. I believe that with respect to many legally constituted fiduciary relationships, however, there is a strong intuition that those entering into them do not typically do so for the sake of the legal obligations they thereby incur. Much more salient to, say, the position of an executor or that of a guardian are the legal powers the fiduciary acquires. The fundamental fiduciary obligations of loyalty and care ride atop those powers. The fiduciary's duty of loyalty is a duty to exercise those powers in the interests of the beneficiary; her duty of care is a duty to use a reasonable level of knowledge and expertise in exercising them. Fiduciary obligations are, in this sense dependent on fiduciary powers.³³ This conceptual ordering—which a bundle theory of fiduciary obligations does not capture—is often reflected in the reasons individuals choose to become fiduciaries. Although the fiduciary might know that by acquiring the new role she acquires those obligations, we do not expect that her to undertake the role for the sake of the obligations.

This is not to say that fiduciary obligations are never salient. Especially when the fiduciary and beneficiary are engaged in an exchange of services for money, as are a financial advisor and her client, the scope of the fiduciary's duties of loyalty and care might be a key part of the deal. Here the fiduciary is being paid in part for performing her fiduciary obligations. Where this is so, the fiduciary's voluntary undertaking looks more like a contractual undertaking.

³³ For a more thoroughgoing and ambitious account along these lines, see See Paul B. Miller, *The Fiduciary Relationship*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63 (Andrew S. Gold & Paul B. Miller eds. 2014); Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235 (2011).

This suggests that the category of legally constituted voluntary fiduciary obligations is mixed. Entering into some relationships within the category is, with respect to the obligations one thereby acquires, more like becoming a member of Congress. Entering into others is, in that respect, more like entering into a contract.

The above analysis can be summarized using David Owens's fourfold classification of moral obligations based on whether and how the obligation is dependent on the obligor's exercise of a prior choice.³⁴

Obligations of the *null grade* in Owens's schema are choice independent. Owens suggests as an example the moral duty to help a child in distress. The obligation to assist simply exists, no matter what prior choices the obligor has made. Some fiduciary obligations—any that attach to being a parent—are of this null grade. Their causative events need not include a choice by the fiduciary. The reasons for imposing those obligations cannot depend upon choice.

A person incurs a *first grade* choice-dependent obligation as the result of her prior choice, but without regard to whether she knew she was incurring the obligation. By driving a car, for example, I incur a legal and moral obligation not to drive drunk, whether I know I am incurring it or not. Fiduciary obligations that attach to extralegal voluntary relationships, such as those between a priest and parishioner, teacher and student, borrower and lender, are first grade choice-dependent. The existence of the obligation depends upon an exercise of choice, but not upon the chooser's knowledge of the legal obligations that she thereby incurs. Although the fiduciary obligation is choice-dependent, the law's reasons for imposing it do not appear related to that choice. Fiduciary obligations of this sort are comparable to contract law's duty-imposing function.

Obligations are *second grade* choice-dependent "where someone's choice puts them under [the] obligation only when they make this choice in the knowledge that it might have the effect of putting them under this obligation."³⁵ Owens suggests friendship as an example.

Someone becomes my friend by spending time with me, by sharing various activities and experiences, by expressing interest and affection. And there are duties of friendship, things one is obligated to do for one's friends but not for other people. Still, one ignorant of the prevailing forms of friendship (perhaps newly arrived in this country and simply "being friendly") could not be held to these expectations.³⁶

³⁴ The classification is introduced in DAVID OWENS, SHAPING THE NORMATIVE LANDSCAPE 3-6 (2012).

³⁵ *Id.* at 4.

³⁶ *Id.*

The *third grade* of choice-dependence appears when a person not only must know that her choice will result in a new obligation, but must intend or appear to intend the obligation if she is to incur it. Obligations of this grade result from the exercises of normative powers. Promissory obligations are the example *par excellence*. A successful promisor undertakes a new obligation by virtue of her expression of an intent to do so.

My analysis of the fiduciary obligations that attach to legally constituted voluntary relationships can be restated as an argument that such obligations can be either second or third grade choice-dependent. Many such obligations are second degree choice-dependent. The fiduciary's *knowledge* that she will incur new legal obligations by assuming a new legal role might figure into the reasons for imposing them on her. They might, for example, remove an objection to imposing them.³⁷ But the law does not require that she intend to incur the obligations. Fiduciary obligations are third-degree choice dependent only when we expect fiduciaries to not merely expect, but also to intend, those duties, and when that intention is a reason for their legal recognition. Only fiduciary obligations of this type are comparable to the power-conferring aspect of contract law.

This Part has focused on the different ways a fiduciary's choice figure into her acquisition of fiduciary obligations. The question is interesting because it tells us something about the sorts of reasons why the law might recognize those obligations. The relatively limited role of choice in the generation of many fiduciary obligations suggests that the law has other reasons for recognizing them.

3 Mutability

A third way fiduciary obligations might be like contractual ones lies in their mutability—the fact that some fiduciary obligations are defaults, which the parties can agree to alter. Although there are connections between an obligation's voluntariness and its mutability, the two are distinct design features. Whether an obligation is voluntary, in the sense I am using the term, turns on the types of acts that generate the obligation. Whether it is mutable turns on whether parties have the ability to alter the obligation that would otherwise attach to their acts.

This chapter does not address the positive question, whether or to what extent private parties can modify, or even extinguish, the fiduciary

³⁷ Joseph Raz distinguishes two ways that an actor's awareness of moral or legal consequences can figure into the justification of those consequences: "positively as part of the reason for those consequences, or . . . negatively by removing an objection to them." Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 929 (1982) (reviewing P.S. ATIYAH, *PROMISES, MORALS, AND THE LAW* (1981)).

obligations that attach in virtue of their relationship. It is today clear that some fiduciary obligations are defaults. John Langbein has documented, for example, the default status of many obligations of gratuitous private trustees, which “yield to the more particularized intentions that parties may choose to express or imply in their trust deal.”³⁸ Langbein’s study, however, concerns only one type of fiduciary relationship.³⁹ More ambitious claims about the general mutability of fiduciary obligations need to be backed by similarly detailed studies of the law governing other members of the genus. Nor does Langbein fully explore the extent of parties’ ability to modify a gratuitous private trustee’s fiduciary obligations. Parties might have the power to alter some aspects of those obligations, yet there might remain an “irreducible core” of mandatory obligations they cannot avoid.⁴⁰ The extent to which the contemporary law of fiduciary obligations includes an irreducible core is another important question I do not address.

I am also not going to consider the normative question: whether any given fiduciary obligations should be mandatory or alterable. Easterbrook and Fischel advance an argument for mutability based on the principles of welfare economics and an empirical claim about who can better assess which terms maximize party welfare. But pure welfare economics is hardly uncontroversial, especially outside of the context of corporate law, which is where Easterbrook and Fischel focus their analysis. And Easterbrook and Fischel’s argument about the relative capacities of parties and lawmakers is an empirical claim, which might or might not be true and which might receive different answers in different contexts or for different sorts of fiduciary relationships. More generally, it is not obvious that the mutability question should get the same answer across the full range of fiduciary relationships. The reasons to empower the parties to alter the fiduciary obligations of a corporate director or financial advisor might not apply to the fiduciary obligations of a guardian, trustee de son tort or teacher. Whether a fiduciary’s obligations should be mandatory, mutable, or some mix of the two is a design question to be answered on the basis of policy, purpose and practical effects. Given the variety among fiduciary relationships, it would be odd if the answer were always the same.

This Part instead addresses two related questions. The first is an interpretive-theoretical one: What does it mean that some fiduciary

³⁸ John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 629 (1995).

³⁹ In fact, Langbein’s study addresses only one form of trust. He excludes from his study commercial trusts, charitable trusts, resulting trusts and constructive trusts. *Id.* at 630-31.

⁴⁰ See, e.g., Alexander Trukhtanow, *The Irreducible Core of Trust Obligations*, 123 L.Q. REV. 342 (2007); David Hayton, *The Irreducible Core Content of Trusteeship*, in TRENDS IN CONTEMPORARY TRUST LAW 47 (A.J. Oakley ed. 1996).

obligations are mutable? What can we infer about the law's reasons for recognizing a fiduciary obligation from the fact the obligation is only a default? The second, related question concerns legal design: What are the considerations that should go into setting default fiduciary obligations and determining what parties must do to contract around them?

The ability to purposively modify or opt-out of fiduciary obligations is itself a legal power. If parties to a trust arrangement have the ability to structure it so as to exempt the trustee from the no-conflict rule, that is because the law of trusts gives them the power to do so. More precisely, it is because the rule permitting the exemption gives parties the ability to modify or extinguish the obligation by expressing their intention to do just that. Where fiduciary obligations are mutable, the law governing them confers on private parties the power to change those obligations. Default fiduciary obligations, together with the rules that say what parties must do to alter those obligations, are power-conferring laws.⁴¹

It does not follow that the law imposing the fiduciary obligation in the first place is power conferring, or that it is designed solely to promote party choice. Consider the tort of negligence. By agreeing to an exculpatory clause, private parties can contract out of liability for negligently harming one another.⁴² To agree to such a clause is to exercise a legal power. But it does not follow from the existence of that power that the primary purpose of the law of negligence is to promote party choice. In Owens's classification, the tort duty of care is at most grade one choice-dependent. Although it might result from a person's prior choice, say to operate a ski resort, the duty of care does not depend upon her knowledge that she was

⁴¹ The above paragraph skips over some considerations that are more important to an understanding of contract law than they are to a theory of fiduciary law. A default need not be power conferring. It is power conferring when it can be changed by virtue of an act that expresses an intention to effect a nondefault legal state of affairs. It is not power conferring, or not only power conferring, if the default can be changed by acts that do not express a legal intent. Many contract defaults can be altered by such nonjuristic acts. In order to make an express warranty, for example, it "is not necessary . . . that the seller use formal words, such as 'warrant' or 'guarantee,' or that he have a specific intention to make a warranty." U.C.C. § 2-313(2). It is enough to simply make a representation about the quality of the goods. *Id.* § 2-313(1)(b). Similarly, "an implied warranty can . . . be excluded or modified by course of dealing or course of performance or usage of trade." *Id.* § 2-316(3)(c). My sense is that there is not the same variety among the acts that can alter parties' fiduciary obligations. I believe that parties who act to alter their fiduciary obligations generally do so by expressing an intent to effect a legal change. But this is only an intuition. Further work on the law in this area would be interesting.

⁴² See RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981).

thereby acquiring the obligation, much less upon the expression of an intent to do so. The ability to contract out of negligence liability does not entail that negligence law is designed to confer the power to undertake a duty of care.

The point of the example is not that all fiduciary obligations are comparable to the law of negligence. I have argued that fiduciary obligations might be grade one, two or three choice-dependent. The point is simply that the power to alter an obligation does not entail that the obligation itself is the result of a power-conferring rule. Private parties' ability to modify a legal duty does not tell us everything we might want to know about the reasons for assigning it to them in the first place.

The same point applies to contracts. Without denying contract law's power-conferring aspect, a clear understanding of how contract defaults work illustrates ways that contract law, even when it gives parties the ability to choose, is often structured to recognize values other than party choice. A more complete understanding of this aspect of contract law illuminates what sorts of conclusions theorists can draw from the mutability of fiduciary obligations.

First, some basic concepts. Any mutable term, whether it belongs to contract law, fiduciary law or some other area of law, is the product of two rules: a default rule and an altering rule. The default rule specifies the legal state of affairs absent the right legal actor's expression to the contrary. The associated altering rule specifies whose expression of what meaning in what form is sufficient, or necessary and sufficient, to change the default legal state of affairs. To take a simple example, section 2-314(1) of the Uniform Commercial Code establishes the implied warranty of merchantability: "Unless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." This legal state of affairs is a default, for it applies only "[u]nless excluded or modified." Section 2-316 contains associated altering rules, as it specifies several ways to exclude or modify the implied warranty. Section 2-316(3)(a), for example, provides that a seller's use of conventional phrases such as "as is" or "with all faults" suffices to exclude all implied warranties. And section 2-316(2) stipulates that when a seller does not use such phrases, "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous."

Contract defaults and altering rules are often designed to be choice promoting. So-called majoritarian defaults seek to capture the terms a majority, or at least plurality, of parties would choose. Majoritarian defaults promote party choice in several ways. First, they make it cheaper for parties to obtain the terms they want, as it costs less to remain silent than to speak. Second, when evidence is lacking, majoritarian defaults make it more likely that the court will impose the term that the parties actually wanted or

expected. Third, majoritarian defaults are often easier for parties to anticipate, Family Feud style. Non-majoritarian, information-forcing defaults, which are sometimes termed “penalty defaults,” can also be designed to promote party choice. When one party is more sophisticated than the other, setting the default against the sophisticated party’s interests can give her a new reason to educate the other about relevant legal consequences—by expressly addressing them in order to contract around the default. Alternatively or in addition, sharing that information can make it more likely that a court or third-party adjudicator will enforce the agreement that the parties intended. Information-forcing defaults can promote choice both by informing parties what they are choosing and by improving the accuracy of enforcement.

Contracts scholars have paid more attention to default rules than to the associated altering rules.⁴³ I have written a bit about altering rules, and Ian Ayres has recently devoted an article to their design.⁴⁴ Ayres identifies two variables in the design of altering rules relevant to promoting party choice: transaction costs and error costs.⁴⁵ Transaction costs are the costs to the parties of specifying a non-default term. Error costs occur when parties fail to understand the legal effects of their words and actions, or when courts fail to assign those words and actions their intended effect. Designing contract altering rules to maximize the parties’ ability to get the terms they want requires minimizing, to the extent possible, both sorts of costs. Sometimes this involves a tradeoff between the two. For example, formal requirements like the use of a writing or the inclusion of standard disclosures can reduce the chances of judicial or party error. But such requirements increase the costs of contracting around the default. Magic words like section 2-316’s rule for “as is” or “with all faults” can reduce transaction costs. But when nonsophisticates do not know the code, they can cause party error. Maximizing parties’ ability to get the terms they want involves striking the right balance between these costs.

In short, there is no doubt but that contract default and altering rules can be designed to maximize the parties’ ability to choose. Rules that

⁴³ See, e.g., Avery Weiner Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 503 (2004) (observing that on the question of “how to interpret [parties’] efforts when they try [to overcome a default] . . . the default rule literature has had little to say”).

⁴⁴ Gregory Klass, *Intent to Contract*, *supra* note 15 at 1461-75 (discussing the design of defaults and “opt-out rules”), 1475-99 (applying the discussion of defaults and opt-out rules to analyze the conditions of contractual validity for four types of agreements); Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012). See also Brett McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383 (2007).

⁴⁵ See Ayres, *supra* note 44 at 2054-63.

exhibit the above design elements—majoritarian or information-forcing defaults, altering rules designed to minimize both transaction and error costs—can be evidence that the law is designed to promote party choice, or that it functions as a power-conferring rule.

But default and altering rules can be designed to achieve other ends as well. They can do so in two ways: by changing the parties' incentives to pick one term or another and by using the law's expressive power.

A default establishes the legal state of affairs absent a relevant legal actor's contrary expression. Because parties have finite time, attention and resources, they sometimes fail to opt-out of defaults even when, other things being equal, they would prefer a non-default legal state of affairs. As a result, defaults are generally sticky. A default's stickiness is largely a function of the altering rule associated with it—what it takes to opt-out of the default. As Ayres explains, “[t]he stickiness of a default derives from the relative difficulty of contracting around—particularly if the altering rules impede fully-informed contractors from contracting for certain non-default effects because of the costs of complying with the impeding altering rules.”⁴⁶ Consequently, the stickiness of a default is partly within lawmakers' control. Just as altering rules can be designed to promote choice by reducing the transaction costs of achieving a non-default term, they can alternatively be designed to impede party choice by increasing those costs. Writing requirements, prolix mandatory disclosures, magic words and the like can all increase the cost of opting out of a default. Such altering rules impede departures from the default. Impeding altering rules can be used to impose something like a Pigouvian tax on attempts to achieve a non-default legal state of affairs.

Another way of putting this is that the choice between mandatory and default rules is not a binary one. There is a spectrum that runs from choice-promoting defaults and associated altering rules, which make it very easy to avoid a default, through to defaults with altering rules that make it more costly to avoid a default, and then on, at the far end of the spectrum, to mandatory rules that make it impossible to avoid a default.

This is important because sticky contract defaults can be used to advance social interests other than party choice. By setting the contract default at the socially preferred term, lawmakers can cause more contracts

⁴⁶ *Id.* at 2086. The stickiness of the default depends largely, but not entirely, on the altering rule. Defaults that do not correspond to the parties' expectations, for example, might stick because parties are less likely to know to contract around them, no matter what the altering rule. The same goes for a default against the interests of a non-sophisticated party, who is less likely to know that she should be contracting around it. Thus Ayres is not entirely correct when he writes that “what makes a default sticky . . . has nothing to do with the content or desirability of the default itself.” *Id.*

to include that term, while still giving sufficiently motivated parties the ability to opt out of it. As I have written elsewhere:

Stickier defaults, and by implication costlier opt-outs, . . . can mediate between the sometimes conflicting interests the law has in, on the one hand, granting parties the power to control the scope of their legal obligations and, on the other hand, imposing liability on parties because of extralegal wrongs they have committed, harms they have caused, or other considerations.⁴⁷

Ayres, an economist, identifies only two reasons why lawmakers might want to make a default stick: “to protect people inside (paternalism) or outside (externalities) the contract.”⁴⁸ A broader view of the non-choice-based reasons for imposing contractual obligations might include society’s interests in enforcing the moral obligation to perform, in doing justice between the parties after breach, or in supporting the moral culture of making and keeping agreements. Impeding altering rules are tools that lawmakers can use to achieve those ends, while still giving sophisticated and sufficiently motivated parties the power to get the nondefault terms they want.

A second way that a default can serve values other than party choice lies in law’s expressive capacity. Because we live in a culture that expects laws to reflect collective values, contracting parties often read the default to signal a collective judgment about what sorts of terms or behaviors are moral, just, right, efficient or otherwise socially preferred. This can be another cause of stickiness. Contract defaults stick not only when it is expensive to contract around them, but also when parties treat the legal default as a signal and use it to guide their choices and even to form their preferences. But the point here goes beyond incentives and stickiness. The default implied warranty of merchantability, for example, does more than give merchants a new reason to sell goods of passable quality. It says what we as a society believe the appropriate morals of the marketplace to be. The rule *caveat emptor* no longer expresses what we expect of sellers. The expressive dimension of defaults provides yet another avenue for advancing values beyond party choice.

In short, mutability does not entail that the default should either reflect the terms that the majority of parties want or be designed to elicit information to improve the quality of that choice. A default and the associated altering rule might be designed to serve goals that do not depend upon party choice, either because the default is likely to stick or because it expresses other social values.

⁴⁷ Klass, *supra* note 15 at 1472.

⁴⁸ Ayres, *supra* note 44 at 2084.

What does this mean for the theory of fiduciary obligations? I argued in Part Two that legally constituted fiduciary relationships are power-conferring laws in that they give parties the ability to choose whether to take on the role of a fiduciary. Default fiduciary obligations are power conferring in a different way: they give sophisticated and sufficiently motivated parties the ability to change their fiduciary obligations when they want. Insofar as fiduciary law builds in legal powers of this sort, it is similar to the power-conferring aspects of contract law.

But like the power to take on the role of the fiduciary, the fact that the parties have the power to alter their fiduciary obligations does not tell us everything we might want to know about the law's reasons for recognizing and enforcing those obligations in the first place, or even its reasons for permitting parties to modify them. To answer those questions, we need to know more about the scope of the parties' power to alter their fiduciary obligations, about the law's reasons for picking a default obligation, and about what it takes for parties to contract around that default. It will be important to ask, for example, how sticky a default fiduciary obligation is, and whether it is sticky by accident or by design. One would also want to ask whether the default expresses a collective decision about the appropriate duties of a fiduciary, whether it is majoritarian, or whether it is simply a coordinating rule. Again, there is no reason to expect the same answer for every sort of fiduciary relationship, or for every fiduciary obligation. Neither the voluntary aspect of fiduciary obligations nor their mutability can be understood from 30,000 feet. Understanding the meaning of either requires closer examination.

4 A concluding caution

There are several ways, then, in which fiduciary obligations are like contractual ones. Both are designed primarily to benefit parties to the relationship, making it important to ensure that their design takes into account both intended and unintended welfare effects. Asking which obligations fully informed rational parties would pick is, for both sorts of obligations, a way to check that. Both types of obligations are, by and large, voluntary obligations, in the sense that they come about only as the result of parties' voluntary acts—in the case of fiduciary obligations, entering into the right sort of relationship, in the case of contractual obligations, entering into an exchange agreement. Finally both sorts of obligations are sometimes mutable, giving private parties the power to alter the duties that attach to their relationship.

The question is whether these similarities tell us anything interesting about the law of fiduciary obligations. Contract law is often held up as the paradigm of a private power-conferring law. In fact, contract law serves a compound power-conferring and duty-imposing function. A more nuanced understanding of the design and functions of the law of contracts suggests

that the structural similarities between fiduciary obligations and contractual ones tell us less about fiduciary law than we might hope. (The differences between fiduciary obligations and contractual ones might be more revealing.)

I would like to conclude by suggesting that not only are the similarities between fiduciary and contractual obligations uninformative, but too much emphasis on them risks importing into fiduciary law problematic aspects of the law of contracts. I am thinking here of the almost talismanic quality that, at least in the United States, appeals to consent play in the judicial interpretation and enforcement of contracts. Important and valuable though party choice is, the language of consent is too often used to obscure what is really going on between contracting parties. This can be seen especially in the governance of mass consumer contracts, which might put us on guard against attempts to understand fiduciary obligations on the model of contract law's power-conferring aspect.

As almost any cell phone owner or software user knows, consumers do not read or understand the contracts they agree to. Systematically collected empirical evidence backs this up.⁴⁹ Yet courts often take the consumer's bare act of consent—signing a credit-card application, clicking an “I Agree” radio button—as sufficient reason to enforce just about any term that the associated document contains. As many commentators have observed, such a rule effectively gives sophisticated drafters a *carte blanche* to include terms that are most favorable to the drafter. These include terms such as class action waivers and arbitration clauses that operate in practice to preclude recovery for breach and other wrongs.⁵⁰

The results can be problematic for at least two reasons. First, emphasis on the formal act of consumer consent can distract from actual disparities between the parties' sophistication and power, and from the fairness and efficiency of the resulting terms. Our culture rightly valorizes freedom to contract and freedom of contract. It does not follow, however, that a consumer's bare act of consent to terms she has predictably neither read nor understood should license their enforcement, regardless of the terms' fairness or effect on consumer welfare. Yet much existing doctrine in the United States appears to do just that. When the only check on drafters is

⁴⁹ See, e.g., Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43(1) J. LEGAL STUD. 1 (2014); OMRI BEN-SHAHAR AND CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE*, Ch. 2 (2014).

⁵⁰ See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).

a consumer's bare act of assent, we should worry that consumers will suffer. Second, the widespread adoption in consumer contracts of drafters' preferred terms can result in the widespread deletion of rights that there is a social interest in maintaining. The contractual shifting of employment discrimination and other civil rights claims to private arbitration, for example, threatens to erode the development and effectiveness of those laws. The legal effect granted the bare act of consent also threatens broader social harms.

This too brief survey illustrates the potential costs of a certain type of contractualist thinking. A final lesson from contract law is to be on guard against placing too much weight on acts of consent when seeking to justify the content and enforcement of fiduciary obligations. Appeals to individual choice and consent are powerful forces in U.S. legal culture, at times riding roughshod over other legal, moral and policy arguments or principles. To characterize fiduciary obligations writ large as chosen obligations is to locate them within that rhetorical space. Doing so can lend credibility to private attempts to contract out of fiduciary obligations when our attitude should be more skeptical. And it can obscure other social interests that the law of fiduciary obligations serves.