

2016

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Recommended Citation

T. L. Anenson, *Public Pensions and Fiduciary Law: A View From Equity*, 50 U. MICH. J. L. REFORM 251 (2016).

Available at: <https://repository.law.umich.edu/mjlr/vol50/iss2/1>

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PUBLIC PENSIONS AND FIDUCIARY LAW: A VIEW FROM EQUITY

T. Leigh Anenson, J.D., LL.M.*

ABSTRACT

Controversies involving fund management may be the next frontier of public pension litigation. Recent scandals involving fraud, bribery, and corruption of public pension officials and other third parties have drawn the public eye toward the management of retirement assets. Individual and entity custodians, including pension boards of trustees, are charged with making investment and other decisions relating to pension funds. Unlike private pensions, there is no federal oversight of asset managers or others in control of retirement funds. Yet these funds hold more than three trillion dollars in assets. Until now, the guardians of these monies have operated almost invisibly in the background of the public pension crisis.

This Article advances the retirement reform debate by looking more closely at the fiduciary relationship that exists between trustees and beneficiaries involving public sector employee pension funds. It offers a singular view from historic equity. The Article aims to see how equity in the medieval world relates to the modern pension problem. From that viewpoint, it evaluates what the fiduciary relation means, or should mean, in the changing legal environment of public retirement systems.

The main objective is to raise issues involving fiduciary law and public pensions that have been undervalued or ignored. Based upon fiduciary law's ancestry in equity, the Article offers guidance in assigning and defining obligations and associated remedies in the government pension situation. It contemplates the equitable dimension of the public pension problem, analyzes circumstances where fiduciary violations may arise, and suggests possible outcomes. It also comments on deficiencies in current law. Overall, the Article provides a deeper perspective of the fiduciary principle and corresponding doctrine in the context of government retirement systems.

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INTRODUCTION

Recent scandals involving fraud, bribery, and corruption of public pension officials and other third parties have drawn the public eye toward the management of retirement assets.¹ Individual and entity custodians, including pension boards of trustees, are charged with making investment and other decisions relating to pension funds.² These funds hold more than three trillion dollars in assets.³ Until now, the guardians of these monies have operated almost invisibly in the background of the public pension crisis.⁴

In certain states like California, citizens entrusted the pension board with additional authority over fund management.⁵ Californians thought that increasing the responsibilities of these caretakers

1. See, e.g., Richard E. Mendales, *Federalism and Fiduciaries: A New Framework for Protecting State Benefit Funds*, 62 *DRAKE L. REV.* 503, 507 n.13 (2013) (citing 2012–13 cases filed by the SEC alleging investment advisors to public pension fund stole more than three million dollars and claiming that the public pension fund was defrauded by broker dealer and its former executive “by selling [the fund] unsuitably risky and complex financial instruments”); Bill Trott, *SEC Charges Atlanta Firm Over Public Pension Funds*, *REUTERS* (May 21, 2015), <http://www.reuters.com/Article/us-usa-sec-fraud-idUSKBN0O620D20150521> (explaining that the SEC charged an Atlanta firm with breaching its responsibility to act in the best interest of the pension funds by recommending investments in an alternative fund called GrayCo Alternative Partners II LP).

2. See *infra* Part III (outlining the governance structure of public retirement systems); Karen Eilers Lahey & T. Leigh Anenson, *Public Pension Liability: Why Reform is Necessary to Save the Retirement of State Employees*, 21 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 307, 310–11 (2007) (“In the public sector, the trust fund manager is generally a politically appointed or member-elected retirement board that makes investment decisions and determines funding levels and contribution obligations.”); see also *NASRA Issue Brief: State and Local Government Spending on Public Employee Retirement Systems*, *NAT’L ASS’N OF ST. RET. ADM’RS* 3 (May 2014), <http://www.nasra.org/files/Issue%20Briefs/NASRACostsBrief.pdf> (explaining that more than 200 billion dollars are paid annually from pension funds to public retirees and their beneficiaries across the United States).

3. See Phillip Vidal, *Annual Survey of Public Pensions: State- and Locally-Administered Defined Benefit Data Summary Report: 2014*, U.S. DEP’T. OF COM., ECON. AND STAT. ADMIN. 2 (July 2015), <http://www2.census.gov/govs/retire/g14-aspp-sl.pdf> (showing total investments in public pension funds); see also Robert Novy-Marx & Joshua Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 *J. FIN.* 1211, 1213 (2011) (noting that the 116 state plans studied had \$1.94 trillion in total assets in 2009); *id.* at 1215 (estimating that local plans hold \$560 billion in assets).

4. Scholarly interest in the public pension funding problem is a recent phenomenon and coincides with a series of financial setbacks suffered by economies worldwide. See Stephen P. D’Arcy et al., *Optimal Funding of State Employee Pension System*, 66 *J. RISK & INS.* 345, 346–47 (1999) (comparing the volume of research done on private pension funding with the lack of research on state pension funding). Ten years ago, I was among a group of scholars that raised awareness of a souring investment climate risking thousands of government workers’ pensions. See Lahey & Anenson, *supra* note 2, at 309 (describing the degree of financial distress in public pensions throughout the country and aiming to “begin the debate about public retirement plans”).

5. See *Bd. of Admin. of the Pub. Emps.’ Ret. Sys. v. Wilson*, 61 *Cal. Rptr.* 2d 207, 223 (Cal. Ct. App. 1997) (explaining series of pension reforms in the 1980s).

vis-à-vis the political branches was best to ensure the safety of their retirement assets.⁶ News headlines have confirmed, however, that the primary protectors of public pensions have been sleeping sentinels or worse.⁷

For example, the California Public Employees' Retirement System (CalPERS),⁸ the largest pension plan in the country,⁹ recently disclosed that it could not track the fees that it pays to private equity firms.¹⁰ Certain caretakers of the fund additionally may have conflicts of interest that jeopardize impartial decision-making.¹¹ These reports follow an investigation into the pension fund that uncovered fraud and bribery by its former chief executive officer and board member.¹²

6. *Id.* (explaining reform of the state pension board that gave it sole control of actuarial services to stop executive and legislative raiding of pension funds); *Singh v. Bd. of Ret.*, 49 Cal. Rptr. 2d 220, 228 (Cal. Ct. App. 1996) ("Proposition 162 was thus intended by its proponents to insulate the administration of retirement systems from oversight and control by legislative and executive authorities, and also return control of the actuarial function to the retirement boards themselves. This increased level of independence would make the [retirement] systems less of a target for local and state officials looking for a way to balance a budget.") (internal quotations omitted); see also T. Leigh Anenson, Alex Slabaugh & Karen Eilers Lahey, *Reforming Public Pensions*, 33 YALE L. & POL'Y REV. 1, 36, 39 (2014) (commenting on how state legislators dip into pension funds to pay unrelated bills and suggesting reforms to prevent the misuse and removal of assets by political branches).

7. See Emily Holbrook, *Pension Fraud Frenzy*, RISK MGMT. MAG. (Oct. 1, 2010, 4:40 PM), <http://www.rmmagazine.com/2010/10/01/pension-fraud-frenzy/> (providing a roundup of litigation regarding pension fraud); Editorial, *Pension Fund Shenanigans*, WALL ST. J., Aug. 20, 2004, at A12 (discussing trustee mismanagement costing state pension systems multiple millions of dollars).

8. See generally *Facts at a Glance*, CAL. PUB. EMP'S. RET. SYS., <https://www.calpers.ca.gov/docs/forms-publications/facts-at-a-glance.pdf> (last updated July 8, 2016).

9. See Lahey & Anenson, *supra* note 2, at 309, 320 (clarifying that CalPERS is the largest when measuring the plan in assets).

10. Alexandra Stevenson, *Calpers's Disclosure On Fees Brings Surprise, And Scrutiny*, N.Y. TIMES (June 25, 2015), <http://www.nytimes.com/2015/06/26/business/dealbook/calpers-disclosure-on-fees-brings-surprise-and-scrutiny.html?ref=topics>. A pension fraud investigator started a crowd fund to examine the fees that CalPERS pays as well as to search for potential conflicts of interest between its executives and placement agents (middlemen it hires to help it find money managers) and Wall Street. *Id.*

11. *Id.* Since 2011, CalPERS has had a policy that prevents its consultants from managing any of its private equity, real estate, or other nonpublic assets. Dan Fitzpatrick, *Lawmaker: Pension Advisers Need a Closer Look*, WALL ST. J. (June 8, 2014), <http://www.wsj.com/articles/lawmaker-pension-advisers-need-a-closer-look-1402267163>. But other public pension systems (even in California) allow outside consultants to serve in controversial dual roles as pension advisors and asset managers. *Id.* (reporting that the Washington State Investment Board and the California State Teachers' Retirement System do not absolutely bar the prospect of dual roles).

12. Stevenson, *supra* note 10. CalPERS spent \$11 million to investigate its use of placement agents as part of a wider pay-to-play scandal across the industry. *Id.* See also *Luzerne Cty. Ret. Bd. v. Makowski*, 627 F. Supp. 2d 506 (M.D. Penn. 2007) (covering a litigation against former board members, money managers, accountants, actuaries, and auditors that resulted from pay-to-play scheme). CalPERS's chief executive officer between 2002 and 2008 and a former-board-member-turned-placement-agent were subsequently charged with criminal

The internal operations of public retirement systems require further investigation. Unlike private pensions, there is no federal regulation of asset managers or others in control of such monies.¹³ A growing literature on public pension reform rarely attends to the powers and responsibilities of the keepers of retirement funds.¹⁴ All states recognize that pension assets are held in trust and that managers are fiduciaries.¹⁵ Yet there appears to be no comprehensive study and comparison of their duties.¹⁶ The laws are written in general terms and those terms, even when imposing common duties, can differ from state to state.¹⁷ Because of the broad language and other variances in the expression of fiduciary obligations, the specific substantive standards and available remedies are not readily apparent.¹⁸

What duties do, or should, the public pension protectors owe the plan members and beneficiaries? In what respect have they failed to

fraud. Stevenson, *supra* note 10. The CEO pleaded guilty in 2014 to conspiracy to commit bribery and fraud. *Id.* The former board member, who pleaded not guilty, committed suicide in 2015. *Id.* Earlier, California used a \$900 million pension obligation bond to help cover its debts because of increased benefits and fiscal mismanagement. Lahey & Anenson, *supra* note 2, at 321.

13. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2000). Public pension fiduciaries are not regulated by ERISA but are subject to applicable federal and state securities and other laws. For instance, California’s criminal law codifies the common law rule prohibiting conflicts of interest of public officials and “is concerned with ferreting out any financial conflicts of interest, other than remote or minimal ones, that might impair public officials from discharging their fiduciary duties with undivided loyalty and allegiance to the public entities they are obligated to serve.” *Lexin v. Superior Court*, 222 P.3d 214, 229 (Cal. 2010) (finding evidence supported allegations of conflict of interest against former members of city retirement board). With private pensions as well, the “trillions of dollars held in pension plans are an enticing target for intermediaries and service providers who are opportunistic, desperate, or just plain greedy.” Dana M. Muir, *Decentralized Enforcement To Combat Financial Wrongdoing in Pensions: What Types of Watchdogs Are Necessary to Keep the Foxes Out of the Henhouse?*, 53 AM. BUS. L.J. 33, 34 (2016) [hereinafter Muir, *Decentralized Enforcement To Combat Financial Wrongdoing in Pensions*].

14. For recent articles focusing on fiduciary relations in the public pension setting, see Mendales, *supra* note 1, at 512–13 (calling for minimum standards of conduct for plan fiduciaries and an Office of the Inspector General to police their behavior); David H. Webber, *The Use and Abuse of Labor’s Capital*, 98 N.Y.U. L. REV. 2106, 2168–69 (2014) (calling for an expanded duty of loyalty with respect to investments). Commentators have recognized that the imposition of fiduciary standards is an important part of any package of pension reform proposals. See, e.g., Anenson, Slabaugh & Lahey, *supra* note 6, at 39 (explaining that legal reform should ensure that administrators act solely in the interest of pension plan participants).

15. See *Governance*, NAT’L ASS’N OF STATE RET. ADM’RS, <http://www.nasra.org/governance> (last visited Oct. 12, 2016) [hereinafter *Governance*]; *infra* Part II (summarizing fiduciary law in the context of government retirement systems).

16. See Appendix (providing a state-wide comparison of the fiduciary duties of care and loyalty).

17. See *infra* Parts III & IV (analyzing duties owed by public pension plan fiduciaries).

18. It is beyond the scope of this Article to compile and compare the case law existing in each state.

live up to those obligations? What remedies are available for the breach? This Article begins to answer these questions. It is a preliminary inquiry and not an exhaustive analysis.

This Article attempts to understand the role and responsibilities of public pension managers in light of the fiduciary principle that developed in the private law of equity. It argues that looking to the past can help inform present and future issues involving fiduciaries' obligations in the public pension setting.¹⁹ The Article uses historical context to draw out a number of ideas and impressions in order to more generally discuss the fiduciary obligations of pension boards and other third-party trustees in managing public pension systems. Along these lines, it shows how private law principles relating to fiduciaries and the trust can be applied in a public law setting.

The inquiry should assist policy-makers and courts in creating, interpreting, and applying fiduciary standards, and pension managers and financial intermediaries in complying with them. While the focus is on framing (rather than resolving) the problems faced by public pension plans, the analysis should inform the form and content of the duties themselves and help identify when they are breached.

Part I provides a brief synopsis of the fiduciary framework and places public pension fund managers within it. Part II examines the antecedents of the fiduciary principle in equity jurisprudence and its evolution in the private law of trusts. Part III outlines the governance structure of public retirement systems. Drawing from laws on the books of several states, it also describes particular duties owed by public pension plan fiduciaries to participants. Based on this historical and functional understanding of the fiduciary relationship, Part IV contemplates what the responsibilities of public pension fund managers should be. It describes current controversies and criticism surrounding fiduciary behavior relating to government retirement systems, and evaluates actual and hypothetical fiduciary lapses.

This Article concludes that the protections of the fiduciary principle founded in private law should not be abandoned or diminished in the public pension context. As a result, governments seeking to reform fiduciary law should strengthen existing obligations that inure to the benefit of plan participants. Courts should

19. T. Leigh Anenson & Gideon Mark, *Inequitable Conduct in Retrospective: Understanding Unclean Hands in Patent Remedies*, 62 AM. U.L. REV. 1441, 1461 (2013) ("While equitable doctrines have never been cast in stone . . . their resolution requires a hard look at past practices and principles.").

also be aware of the similarities and critical differences between fiduciary relations prevailing in the public pension situation and its equitable antecedents in adjudicating these duties.

I. UNDERSTANDING FIDUCIARY LAW

The obligations owed by the overseers of retirement assets to plan members and their beneficiaries are fixed to, and function within, the boundaries of a fiduciary relationship. The existence of discretion is a critical component of fiduciary status.²⁰ There are many different kinds of fiduciary relations.²¹ Common to all of them is a reliance interest inherent in the nature of the relationship.²² Essentially, the fiduciary relation is one of special trust, confidence, and dependence where fiduciaries are held accountable should they abuse their position.²³ Justice Cardozo's now famous formulation captures the essence of fiduciary obligation: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."²⁴

When owners place their property under the exclusive direction and control of others to manage for the owner's benefit, the legal arrangement is typically called a "trust."²⁵ Thus, like all fiduciary relationships, the structure of the relation itself affords a special

20. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402, 1447 (2002); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 908 ("Common characteristics of such relationships include the fiduciary's commitment to exercise discretion in a fashion that affects the interests of the beneficiary and the fiduciary's obligation to exercise that discretion on the beneficiary's behalf.").

21. See, e.g., PETER W. YOUNG ET AL., ON EQUITY § 7.140, at 521 (2009) (describing different kinds of relations that qualify as fiduciary); see also Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 241–52 (2011) (discussing status-based and fact-based fiduciary relationships).

22. YOUNG ET AL., *supra* note 21, § 7.40, at 509 (explaining that a reliance interest is an implied element of all fiduciary relationships).

23. See Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 808–09, 816, 824–32 (1983).

24. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). Courts and commentators, both here and abroad, often quote Justice Cardozo's expression of the fiduciary concept. See Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. LAB. & EMP. L. 391, 391 (2000) [hereinafter Muir, *The Perversity of ERISA Fiduciary Law*] (providing a list of U.S. authorities that rely on Justice Cardozo's explanation).

25. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) (defining a trust); see RESTATEMENT (SECOND) OF TRUSTS § 3(3) (1959) (traditional trust law defines a trustee as "[t]he person holding property in trust."); see also DeMott, *supra* note 20, at 881 ("The term 'fiduciary' itself was adopted to apply to situations falling short of 'trusts,' but in which one person was nonetheless obliged to act like a trustee.").

opportunity for the property manager (trustee) to exercise power and control over the property to the detriment of the owner's funds (beneficiaries). To prevent such dangers, the law imposes duties of undivided loyalty and reasonable care along with severe penalties for breach, including the disgorgement of unjust gains.²⁶ More precisely, a trustee must act with reasonable prudence in administering trust property and comport with the standard of a prudent investor in investing assets.²⁷ A trustee must also act exclusively in the interest of the beneficiary.²⁸ Their responsibilities include appropriate disclosure, such as furnishing accurate information about the trust property.²⁹

Since its origins in equity, the law has drawn upon the principles of fiduciary obligation to govern its most pressing problems.³⁰ The modernization of fiduciary doctrine to fit contemporary concerns raises issues about the proper scope of the obligations owed by trustees and other fiduciaries to their beneficiaries.³¹ One area that

26. See generally RESTATEMENT (SECOND) OF TRUSTS, *supra* note 25, §§ 170–232.

27. In investing trust assets, a trustee must comport with the standard of a prudent investor. *Id.* § 227. To the extent the trust provides specific instructions regarding the propriety of investments, the trustee generally must obey those instructions. *Id.* While administering the trust, a trustee must act in accordance with a standard of ordinary prudence. *Id.* If, however, the trustee represents herself as having skills that meet a higher standard, the trustee will be held to that higher standard. *Id.* § 174.

28. A trustee must act “solely in the interest of the beneficiary.” *Id.* § 170. Other aspects of the duty of loyalty include the requirement that a trustee must be impartial in the treatment of multiple current beneficiaries and multiple successive beneficiaries. *Id.* §§ 183, 232.

29. Whenever a trustee is dealing with the beneficiary on the trustee's own account, the trustee must act fairly and communicate all known material information as well as that information that the trustee should know. *Id.* § 170. A trustee also must maintain accounts for the trust. *Id.* § 172. A trustee must additionally furnish “complete and accurate information as to the nature and amount of the trust property” to the beneficiaries of the trust. *Id.* § 173.

30. See Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 432–34 (1993) (discussing some of the many topics to which the label “fiduciary” is applied); Frankel, *supra* note 23, at 797 (“Courts, legislatures, and administrative agencies increasingly draw on fiduciary law to answer problems caused by . . . social changes.”); Jerry W. Markham, *Fiduciary Duties Under the Commodity Exchange Act*, 68 NOTRE DAME L. REV. 199, 214–18 (1992) (exploring the expansion of fiduciary duties to new categories of persons); L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69, 71–72 (1962) (discussing the evolution of fiduciary relationships in modern law).

31. See DeMott, *supra* note 20, at 879 (“Fiduciary obligation is one of the most elusive concepts in Anglo-American law.”). Depending on context, scholars have argued to raise or lower traditional fiduciary standards. See, e.g., Daniel B. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: “Don’t Look Back—Something May be Gaining on You,”* 68 AM. BANKR. L.J. 155, 159 (1994) (arguing that the fiduciary standards applied to directors of a debtor in possession are stricter than the usual standard of corporate governance); Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1678–79 (1990) (“The self-interest of officers and directors in the corporation and its assets, and the wide discretion granted them in the performance of their jobs, have led courts to abandon any attempt to hold corporate fiduciaries to the same high standard of conduct required of other fiduciaries.”) (citation omitted); Allan W. Vestal, *Fundamental Contractarian Error in the Revised*

has absorbed and adapted ancient fiduciary law is the management of public pensions.³² But there have been few attempts to track the transformation of fiduciary principles, a major branch of private law, into the public realm.³³

All fifty states authorize the assets of public retirement systems to be held in trust.³⁴ The states also clothe their pension boards, and others undertaking a managerial role with respect to pension assets, with fiduciary status.³⁵ The respective fiduciary duties of designated governing bodies and third parties may arise under state constitutions, statutes, and common law.³⁶ The obligations imposed on the board and third party managers include duties of undivided loyalty and reasonable care that are at the core of fiduciary law.³⁷

The language by which these duties are expressed, however, is diverse.³⁸ The judicial gloss afforded by state courts in interpreting

Uniform Partnership Act of 1992, 73 B.U. L. REV. 523, 524–30 (1993) (discussing the Revised Uniform Partnership Act's limitation on the fiduciary duties among partners).

32. See Muir, *The Perversity of ERISA Fiduciary Law*, *supra* note 24, at 406 (analyzing ERISA and arguing that “[b]ecause of its widely applicable, flexible, and adaptable nature, a fiduciary regime could be relied upon to adapt to changing benefit plan typology and practice”).

33. See *supra* notes 14–16 and accompanying text.

34. *Governance*, *supra* note 15. See, e.g., OR. REV. STAT. § 238.660(1) (2015) (declaring the Public Employees Retirement System a trust fund and the Board the trustee).

35. *Governance*, *supra* note 15; discussion *infra* Part III. See, e.g., *Kaho’ohanohano v. State*, 162 P.3d 696, 706 (Haw. 2007) (“Pursuant to HRS chapter 88, Trustees owe a fiduciary duty to the retirement system itself, as well as to members of the system.”) (citing HAW. REV. STAT. §§ 88-22, 88-23 (1993)); *Ayman v. Teachers’ Ret. Bd. of New York*, 193 N.Y.S.2d 2, 22 (N.Y. 1959) (holding that the relationship between members of the Teachers’ Retirement Association of the Teachers’ Retirement System and the retirement board is a fiduciary one); see also *Luzerne Cty. Ret. Bd. v. Makowski*, 627 F. Supp. 2d 506, 565 (M.D. Pa. 2007) (explaining that former retirement board members owed fiduciary duties to the fund pursuant to state statute and assuming that financial advisors and money managers also owed fiduciary duties to the fund).

36. The sources of fiduciary obligations in most states are statutes. Multiple sources, however, may apply to resolve a given dispute. See *State ex rel. Pub. Emps. Ret. Ass’n v. Longacre*, 33 P.3d 906, 908–09 (N.M. Ct. App. 2001) (discussing the retirement board as trustee and fiduciary under the Constitution, statute, and board regulation), *rev’d on other grounds*, 59 P.3d 500, 502 (N.M. 2002). For recent cases involving lapses in the management of public pensions, see *Milliman, Inc. v. Md. State Ret. & Pension Sys.*, 25 A.3d 988 (Md. 2011) (holding actuary liable for breach of contract due to miscalculation, over twenty-two years, of contributions needed for three state pension funds); *O’Brien v. S.C. Orbit*, 668 S.E.2d 396 (S.C. 2008) (holding that the City of Charleston violated the South Carolina Constitution by attempting to invest government funds in the ORBIT trust involving equity securities).

37. See, e.g., CAL. CONST. art. XVI, § 17(a)–(d) (expressing exclusive purpose and prudent man fiduciary rules and the duty of diversification); 71 PA. CONS. STAT. § 5931(a), (e) (2014) (requiring Pennsylvania public pension trustees to comply with the exclusive purpose and prudent person rules).

38. See Appendix (surveying similarities and differences in the statutory duty of care across states); see also Webber, *supra* note 14, at 2188 (Appendix) (noting general similarities and differences in the duty of loyalty across states).

the legal texts makes fiduciary standards more variable still.³⁹ As such, the substance of even core obligations may differ from state to state. Certain duties also diverge from their equitable tradition.⁴⁰ To date, the call for uniform standards of fiduciary responsibility in the management of public retirement systems across states has been unsuccessful.⁴¹

The fiduciary framework is critical to ensuring that pension plans sponsored by government employers contain sufficient monies to provide expected and needed benefits. The next Part describes the foundation of the fiduciary principle in equity as a way of analyzing the scope and content of fiduciary duties, as well as the import of fiduciary relations, in the public pension field.

II. ANALYZING FIDUCIARY OBLIGATIONS IN EQUITY

This Part studies the traditional equitable environment where fiduciary relations have arisen as a way of looking at the problem in public pension systems.⁴² The evaluation should help comprehend challenges involving the obligations of pension boards and other fiduciaries to their fund beneficiaries.

The fiduciary principle is a product of equity.⁴³ To be sure, fiduciary law is considered the “heart of equity.”⁴⁴ And the trust,

39. See discussion *infra* Part II (discussing judicial interpretations based on private pension law and the common law of trusts).

40. For example, Wyoming constricted the scope of the fiduciary obligation by requiring intentional conduct to trigger liability. See *infra* note 176. In California, an intermediate appellate court interpreted its constitutional provisions imposing fiduciary duties to require less than private trust law. See *Bandt v. Bd. of Ret., San Diego Cty. Emps. Ret. Ass'n*, 38 Cal. Rptr. 3d 544, 559 (Ct. App. 2006) (declaring that there is no constitutional fiduciary obligation for the retirement board to act in a manner consistent with the principle of intergenerational equity); *supra* note 28.

41. Only a few states have adopted the Uniform Management of Public Employee Retirement System Act (UMPERSA). Lahey & Anenson, *supra* note 2, at 329–31; see UNIF. MGMT. OF PUB. EMP. RET. SYS. ACT, 7A U.L.A. 336 (1997), http://www.uniformlaws.org/shared/docs/management_public_employee_retirement_systems/mpersa_amdraft_approved_jul97.pdf. Wyoming was the first state to adopt the substance of the uniform law, followed by Maryland after its pension fund management was subject to public scrutiny. Anenson, Slabaugh & Lahey, *supra* note 6, at 39. South Carolina also incorporated the fiduciary portions of UMPERSA into its Code. *Id.*

42. This Article makes no attempt to trace the trust from its origins in the historic law of uses. Rather, it relies on fundamental ideas underlying equity and the fiduciary relation.

43. Henry E. Smith, *Why Fiduciary Law Is Equitable*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261 (Andrew S. Gold & Paul B. Miller eds., 2014); see also T. Leigh Anenson & Donald O. Mayer, “Clean Hands” and the CEO: Equity as an Antidote to Excessive Compensation, 12 U. PA. J. BUS. L. 947, 971 (2010) (“Fiduciary duties are rooted in ancient equity and are often emphasized with respect to the importance of the preservation of equity in the modern commercial world.”).

44. Smith, *supra* note 43, at 283.

especially, is acknowledged as one of equity's most celebrated creations.⁴⁵ Given its antecedents in equity jurisprudence, state courts have found the judge-made law of equity germane to understanding the role and responsibilities of public pension trustees.⁴⁶ Equitable ideas affect how judges interpret positive law as well as how they understand legislative silence.⁴⁷

There are, of course, other contexts for comparison.⁴⁸ Additional perspectives would provide a multidimensional view of the fiduciary issue for public pensions. For example, the regulation of private pensions and the duties of fiduciaries under the Employee Retirement Income Security Act (ERISA) would be an obvious choice for analysis.⁴⁹ Yet even ERISA is supposed to be based on the equitable

45. *Id.* at 263. See generally Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 69 (1993) (explaining that “the equitable law of trusts has displaced the cumbersome common law of future interests” and that “the concept of fiduciary duty has spread from express trusts to the whole range of principal-agent relationships, and is influencing relationships traditionally thought to be arm’s-length, such as buyer-seller and debtor-creditor”).

46. See *Petition of Eskeland*, 101 A.3d 11, 18 (N.H. 2014) (“Under the common law of trusts, the board of trustees owes the [System’s] members and beneficiaries a fiduciary obligation to manage the [System] for the benefit of its members and beneficiaries.”) (citation omitted) (internal quotation marks omitted); see also *Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1244 (D.N.M. 2011) (“New Mexico is not alone in applying the law of trusts to public pension funds; courts in numerous jurisdictions have made the same determination.”).

47. See *Arken v. City of Portland*, 263 P.3d 975, 980 (Or. 2011) (explaining that public pension trust funds are administered by applicable statute and default rules of general trust law); see also T. Leigh Anenson, *Equitable Defenses in the Age of Statutes*, at 23–24, 38–39 (working paper, on file with author) [hereinafter Anenson, *Age of Statutes*] (explaining how the content of equitable principles in statutes are derived from state law); Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, U. PITT. L. REV. 513, 513 (1984) (analyzing assumption of equitable discretion in interpreting statutory remedies); see generally T. Leigh Anenson, *Statutory Interpretation, Judicial Discretion, and Equitable Defenses*, at 7–15 (working paper, on file with author) [hereinafter Anenson, *Statutory Interpretation*] (identifying the background assumption of equitable defenses in interpreting federal statutes); David Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 936–37 (1992) (commenting on the common law canon as one of many background assumptions that reflect continuity and change in statutory interpretation).

48. Associations that would add dimensions to the problem include the regulation of private pensions under the Employee Retirement Income Security Act (ERISA) and corporate law. As to the latter, it would be beneficial to compare the duties of the pension board and other third-parties in administering public retirement systems with the duties owed by directors and officers in managing the corporation. See Anenson & Mayer, *supra* note 43, at 1008 (“Early equity tradition reflects the prevailing belief that corporate management has ethical responsibilities that the common law—and equity—can help discharge.”).

49. If there is shared language, state courts often refer to ERISA in adjudicating fiduciary duties pursuant to state legislation. See Webber, *supra* note 14, at 2119–21 (“An odd feature of the legal landscape for public pension fiduciary duties is that any analysis usually begins by reference to an inapplicable federal statute, ERISA.”); *id.* at 2121 (explaining that ERISA operates as a type of “shadow law” for public pension fund fiduciary duties, governing the funds’ conduct even though it is both inapplicable and unenforceable against them); *id.* at 2120 (“[T]here are many sharp distinctions between ERISA and state pension codes.”).

law of trusts.⁵⁰ Thus, while this Article looks through only one lens, it is an important one. The idea is to advance a theoretical framework for thinking about the role of equity in the fiduciary law of government retirement funds. An equitable model of decision making, along with its development of ethically-based substantive standards, should inform the way that fiduciary principles and doctrines are created and interpreted in safeguarding public retirement systems.⁵¹

The English Court of Chancery had jurisdiction over matters of equity.⁵² Sir Thomas More, the first Lord Chancellor drawn from

Public pension reform proposals have urged to extend ERISA to public pension law. See Paul M. Secunda, *Litigating for the Future of Public Pensions*, 2014 MICH. ST. L. REV. 1353, 1402–04 (2014). ERISA's fiduciary rules, however, may need strengthening. See Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 HOUS. L. REV. 153, 215–16 (2013) (proposing reforms to ERISA fiduciary law).

50. See *Vanity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (recognizing that ERISA fiduciary duties draw from the common law of trusts that governed pensions before the legislation); Bd. of Trs. of N.H. Judicial Ret. Plan v. Sec'y of State, 7 A.3d 1166, 1173 (N.H. 2010) (citing ERISA cases when analyzing public pension fiduciary duties due to their common source in the common law of trusts); Muir, *The Perversity of ERISA Fiduciary Law*, *supra* note 24, at 396–97 (explaining that ERISA adopted the substantive standards of traditional trust law). The Supreme Court, however, has been criticized for failing to adhere to ERISA. John Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1343 (2003) [hereinafter Langbein, *What ERISA Means by "Equitable"*].

51. Equity originated in the Middle Ages when the "might makes right" mentality predominated among kings and commoners. T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 384–85 (2008) [hereinafter Anenson, *The Triumph of Equity*]. Catholic bishops, who were well-versed in canon law and became the first chancellors, influenced these equity principles. See, e.g., 2 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 402–07 (1927) (discussing the long line of bishops and archbishops serving as chancellors). Over time, the common law became more moral. See Anenson & Mayer, *supra* note 43, at 979–83 (describing integration of equitable doctrines into the common law and statutes). Notwithstanding, equitable maxims and principles, and the doctrines that derive from them, are still known for their more direct appeal to ethics and justice. See Anenson, *Age of Statutes*, *supra* note 47, at 19 ("Equitable doctrines provide 'individualized justice . . . illuminated by moral principles.'") (citing Philip A. Ryan, *Equity: System or Process?*, 45 GEO. L.J. 213, 217 (1957)).

52. The High Court of Chancery emerged as a separate forum for the administration of equity in the fourteenth century. RALPH A. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 22–23 (1961); see also 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW 3 (2d ed. 1898) (explaining that Chancery was known at that time as the *Curia Cancellariae*). The regimes of law and equity began with the royal prerogative of English kings to do justice in any case between their subjects. Roger L. Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 90–91 (1934). Over time, it became customary for the King to delegate his authority to administer justice to his secretary, the chancellor. William F. Walsh, *Equity Prior to the Chancellor's Court*, 17 GEO. L.J. 97, 100–06 (1929). The chancellor was the head of Chancery and a great officer in the nature of a secretary of state or prime minister. Garrard Glenn & Kenneth R. Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 761 (1945).

the ranks of the common lawyer,⁵³ is said to have grounded the authority of the Chancery in fraud, accident, and things of confidence.⁵⁴ These are the three general circumstances that moved the conscience of the Chancellor.⁵⁵ Confidence is often connected directly to the fiduciary relationship, and particularly to the trust.⁵⁶ The idea of accident includes relief from forfeiture, which motivates the fiduciary relation.⁵⁷ Equitable fraud, furthermore, is more expansive than common law fraud.⁵⁸ The objective was to deter the commission of the wrong and safeguard the public interest.⁵⁹ Therefore, equity extended the ancient maxim that one should not profit from their own wrong to include situations where it is hard to tell if one was profiting from their own wrong.⁶⁰ Activities regarded as fraudulent in equity were done without any intention to deceive

53. See Anenson, *The Triumph of Equity*, *supra* note 51, at 379 n.4 (explaining that Sir Thomas More was the first lawyer to be Lord Chancellor in 1529). Every chancellor from 1380 to 1488 was a church official. Thomas Edward Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant*, in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 208, 214–15 (Ass'n of Am. Law Schs. ed., 1907); see also Henry Arthur Hollond, *Some Early Chancellors*, 9 CAMBRIDGE L.J. 17, 23 (1945) (indicating that the position was held by laymen for only about twelve years during the fourteenth century).

54. R.P. MEAGHER, W.M.C. GUMMOW & J.F.R. LEHANE, EQUITY: DOCTRINES AND REMEDIES § 1207, at 339 (3d ed. 1992).

55. See 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 42, at 47 (14th ed. 1918) (The chancellor was the “dispenser of the king’s conscience.”). The process of referring petitions to the chancellor was common at the time of Edward I, but it was Edward III in 1349 that confirmed the procedure and ordered the chancellor to base his decision on “Honesty, Equity, and Conscience.” 1 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE §§ 33–35, 38–40 (5th ed. 1941).

56. MEAGHER, GUMMOW & LEHANE, *supra* note 54, § 1207, at 339.

57. *Id.*

58. Anenson & Mark, *supra* note 19, at 1466–67; see also Anenson & Mayer, *supra* note 43, at 968 n.79 (relating flexibility of fraud to confront novel economic stratagems as well as scholarly criticism of the Supreme Court’s stinging definition of securities fraud as providing a roadmap for crooks).

59. Anenson & Mark, *supra* note 19, at 1467; 27A AM. JUR. 2d *Equity* § 5, at 552 (2013) (“[F]raud in equity has a much broader connotation than at law and includes acts inconsistent with fair dealing and good conscience . . .”).

60. Smith, *supra* note 43, at 273. The prevention of an abuse of right is the motto of many equitable defenses. See Anenson & Mark, *supra* note 19, at 1449–50 (explaining rationale of unclean hands); T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 662 (2007) [hereinafter Anenson, *Pluralistic Model*] (describing one of the purposes of estoppel as withholding aid to a wrongdoer).

or cheat.⁶¹ The state of mind was simply irrelevant.⁶² In certain situations, equity acted on simple negligence.⁶³ In this manner, equitable doctrines operated as a means of preventative justice and corrective justice.⁶⁴ Justice Joseph Story explains the equitable version of fraud:

[It] was founded on the anxious desire of the law to apply the principle of preventative justice, so as to shut out the inducement to perpetrate the wrong, rather than to rely on mere remedial justice after a wrong has been committed. By disarming the parties of all legal sanction and protection for their acts, they suppress the temptations and encouragement which might otherwise be found too strong for their virtue.⁶⁵

These underlying notions of ancient equity align with the development of fiduciary doctrine and the trust. Such situations included a fiduciary pursuing their own interest.⁶⁶ Recall that similar to other fiduciary relations, it is the structure of the relationship, and especially the discretion afforded to the trustee, that gives the trustee a unique ability to harm the beneficiary. Hence, the primary duties of care and undivided loyalty that arise out of this discretionary relationship of great dependence are quite broad.⁶⁷

Professor Henry Smith reminds us that equitable principles are aimed at preventing opportunism and that fiduciary law partakes of

61. MEAGHER, GUMMOW & LEHANE, *supra* note 54, § 1201, at 335 (equitable fraud is not just actual, intentional, premeditated fraud); POMEROY, *supra* note 55, at § 399, at 99 n.17 (“Fraud, in equity, often consists in the unconscientious use of a legal advantage originally gained with innocent intent . . .”).

62. JOHN GLOVER, EQUITY, RESTITUTION & FRAUD, § 1.6, at 8 (2004) (“Moral culpability . . . need not be proven to justify equitable fraud—it has a different role.”); Anenson & Mark, *supra* note 19, at 1487 (discussing equity as a sliding scale where “courts employ stricter rules of relatedness for inadvertence, and allow a more liberal connection for increasing levels of cognition”); *see also* Anenson, *Pluralistic Model*, *supra* note 60, at 650 (examining the removal of reliance and relaxation of intent for equitable estoppel in light of certain core concerns of equity); Anenson, *The Triumph of Equity*, *supra* note 51, at 390–91, 398–400 (same).

63. Anenson & Mark, *supra* note 19, at 1467 n.161.

64. *See* T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L.J. 509, 518 (2010) (describing the equitable defense of unclean hands, in the larger context of equity jurisprudence, as equally concerned with preventative justice as well as remedial justice after the wrong is committed).

65. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 258, at 265 (13th ed. 1886).

66. MEAGHER, GUMMOW & LEHANE, *supra* note 54, at § 1210, at 341.

67. *See* Smith, *supra* note 43, at 273, 280–81.

this attitude.⁶⁸ Scholars in the private pension field agree.⁶⁹ Professor Dana Muir, a leading authority on the regulation of private pension funds, finds the idea of opportunism central to the correct interpretation and application of fiduciary law.⁷⁰ Combatting strategic behavior calls for ex post discretion by courts to prevent and remedy the problem.⁷¹ Smith argues that the treatment of equity as a safety valve is the reason it should remain flexible and fuzzy around the edges.⁷² After all, “equity was aiming at a moving target.”⁷³ A certain degree of judicial discretion is effective to prevent misbehavior without undermining legitimate expectations and chilling desirable behavior.⁷⁴ Of course, the need for some level of open-endedness does not tell us much about particulars. But it does explain something about the form of the laws themselves. It tells us

68. *Id.* at 273 (“Equity is an all-purpose anti-avoidance standard, and fiduciary law not unexpectedly partakes of this approach.”); see also T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 62–63 (2005) [hereinafter Anenson, *Role of Equity*] (discussing how equitable defenses prevent gamesmanship and hypocrisy at the expense of the court, the law, and other litigants).

69. See John H. Langbein, *The Supreme Court Flunks Trusts*, 6 SUP. CT. REV. 207, 216 (1990) (arguing that benefit determinations made over the long-term by repeat players raise reputational costs that limit opportunistic behavior); Daniel Fischel & John H. Langbein, *ERISA’s Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1132–33 (1988) (acknowledging situations where the long-term, repeat player constraints fail to operate effectively).

70. Muir, *The Perversity of ERISA Fiduciary Law*, *supra* note 24, at 393 (“Trust law traditionally has used the concepts embodied in the fiduciary obligation to protect trust beneficiaries from opportunistic behavior by trustees.”).

71. Smith, *supra* note 43, at 264–65 (explaining that equity cannot be too predictable because opportunists will anticipate it and evade it as well as invent new ways of engaging in such behavior); see also Anenson, *Age of Statutes*, *supra* note 47, at 18–23 (discussing judicial discretion as a component of equitable defenses); Anenson, *Statutory Interpretation*, *supra* note 47, at 21–22 (explaining historical basis for equitable discretion).

72. Smith, *supra* note 43, at 264–65; see also Anenson, *The Triumph of Equity*, *supra* note 51, at 403–06 (describing the flexibility of equity and how estoppel has no exhaustive formula); Anenson, *Pluralistic Model*, *supra* note 60, at 651 (explaining the embryonic character of equitable doctrines).

73. Smith, *supra* note 43, at 269; see also Anenson & Mayer, *supra* note 43, at 995 (discussing the contours of the equitable clean hands doctrine and claiming that “[w]hat is ‘unclean,’ like what is fraud, necessitates some ambiguity to promote deterrence”).

74. Smith, *supra* note 43, at 278 (explaining the idea is to keep the law “unpredictable enough to keep opportunists guessing but without destabilizing the law” for which it is a safety valve); Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 235 (2012) (relating the same idea for equitable remedies). See generally T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455, 461 (2008) [hereinafter Anenson, *Treating Equity Like Law*] (discussing the value of discretion in the application and extension of equitable defenses).

why standards, rather than rules, generally accompanied an equitable approach.⁷⁵ Equity employed *ex ante* rules in the service of combatting opportunism as well.⁷⁶

Equity was over-inclusive,⁷⁷ and one of equity's most pronounced prophylactic precepts is the fiduciary duty of loyalty.⁷⁸ Traditional trust law discourages self-interested fiduciaries.⁷⁹ An undisclosed conflict of interest—regardless of harm—often led to a presumption against the fiduciary and *per se* liability and disgorgement.⁸⁰ As Smith explains, equity strikes down all disloyal acts, rather than trying to distinguish the harmful from the harmless by permitting a trustee to justify the representation of the two competing interests.⁸¹

Indeed, a recognized authority on traditional equity, former Australian High Court Justice William Gummow, advises that those who believe it unfair or too stringent to hold a fiduciary liability for unauthorized profits without an intent to deceive or sharp practice “misunderstand the particular approach of the Chancellor in these matters.”⁸² In this vein, fiduciaries are also liable without bad faith or fraud.⁸³ Even good faith is not a defense.⁸⁴ Equity thus took an extreme attitude towards the probable behavior.⁸⁵

On a separate note, analyzing the common criteria found in fiduciary relationships helps us appreciate those relationships in the

75. See Anenson & Mark, *supra* note 19, at 1514–17 (discussing how rule-based precepts can be underinclusive for equitable doctrines aimed at preventing the unconscientious abuse of rights); Anenson, *Pluralistic Model*, *supra* note 60, at 642–43 (discussing rules and standards in the context of equitable doctrines).

76. Smith, *supra* note 43, at 271 (“[W]hat is an *ex post* safety valve in equity becomes the general *ex ante* and untailed case in fiduciary law.”).

77. *Id.* at 280.

78. *Id.* at 271.

79. See RESTATEMENT (SECOND) OF TRUSTS, *supra* note 25, § 170 (1) cmts. a–h (listing prohibited actions to trustees due to self-interest).

80. Smith, *supra* note 43, at 273; Charles Bryan Baron, *Self-Dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit from Transactions Involving Trust Property?*, 72 ST. JOHN'S L. REV. 43, 45–54 (1998) (discussing prohibitions against certain self-dealing transactions). If a trustee does engage in a self-interested transaction, the application of the “no further inquiry” rule essentially establishes an irrebuttable presumption that the trustee's action was wrongful and the transaction will be voided. See *id.* at 53–54.

81. Smith, *supra* note 43, at 274 (citing GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 543, at 228 (rev. 2d ed. 1993)). The rationale for disallowing conflict is to avoid self-serving rationalization that representing two conflicting interests may cause a trustee's judgment of the interests of the beneficiary to be less accurate. *Id.* at 277–78 (citing Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 498–99 (2009) and Ira Samet, *Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-stripping Rule*, 28 OXFORD J. LEGAL STUD. 763 (2008)).

82. MEAGHER, GUMMOW & LEHANE, *supra* note 54, § 1201, at 335.

83. Smith, *supra* note 43, at 271.

84. *Id.*

85. See *id.*

public pension context. It will correspondingly inform the setting of substantive standards for trustee fiduciaries. Professor Smith describes three criteria comprising the fiduciary relation in private law: disproportionate hardship, hidden action, and vulnerability.⁸⁶ These conditions separately concerned the early Court of Chancery.⁸⁷ The considerations collate in the fiduciary relationship.⁸⁸ These collective concerns explain why the relationship is an enhanced form of equity.⁸⁹ If fiduciary law is a “beefed up” version of equity,⁹⁰ then the public pension trust is the Big Mac. As described below, the circumstances are more pronounced in the public pension scenario.

First, the demise of public pension systems will cause severe hardship. Failing to provide the promised retirement benefits when due results in financial devastation—or the very real possibility of such destitution—to pension plan participants and their families.⁹¹ Government workers depend on pension assets to secure their retirement. Many workers and retirees do not have access to Social Security should their retirement plans fail.⁹² In fact, certain groups of employees in the worst-funded pensions lack this federal safety net.⁹³ Moreover, unlike pensions offered by private companies, the federal government does not oversee government pension plans, nor are there any insurance programs that will bestow benefits if

86. *Id.* at 278.

87. *See id.* at 268–69; *see also* Anenson, *Pluralistic Model*, *supra* note 60, at 663 n.203 (analyzing equitable estoppel in light of equity’s interest in promoting fair play, protecting weaker parties, and preserving the integrity of the justice system); *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 493 (Miss. 2005) (“Equity comes to the aid of those who may not or can not protect themselves.”).

88. Smith, *supra* note 43, at 270–71.

89. *Id.* at 272 (“Trusts and trust like relationships present great dangers of opportunism that call for a broader and more stringent version of equity.”).

90. *Id.* at 270 (“Fiduciary law presents a more systematic problem of potential opportunism that calls for more than a mere safety valve.”).

91. *See* Patricia E. Dille, *Hope We Die Before We Get Old: The Attack on Retirement*, 12 ELDER L.J. 245, 250–64 (2000) (discussing pensions, personal savings, and Social Security as the “three legged stool” of retirement).

92. *See* Jack M. Beermann, *Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 20 (2013) (noting that about one in four public employees do not contribute to the Social Security System); *see also* *Social Security Coverage*, NAT’L ASS’N OF STATE RET. ADM’RS, <http://www.nasra.org/socialsecurity> (discussing that more than one-third are public school teachers, and the remaining two-thirds are firefighters, police officers, and first responders) (last visited Oct. 14, 2016).

93. Anenson, Slabaugh & Lahey, *supra* note 6, at 6–7 (comparing fifty state defined benefit pension plans for teachers and finding that the non-Social Security plans are at an even greater risk of not being able to meet promised benefit payments).

the government plan fails.⁹⁴ Plan participants, presumably like most Americans, also lack other savings to survive through old age.⁹⁵

Second, in terms of hidden action, public pension plans are shrouded in secrecy. For more than a decade now, academics and activists have been calling for increased transparency to plan participants and the public.⁹⁶ Part of the problem is the absence of uniform standards to compare the financial status of pension plans between various public systems.⁹⁷ Another issue involves overly optimistic actuarial assumptions that minimize the pension funding deficit.⁹⁸ Without an effective way to evaluate their plans, participants do not know the security of their employer's retirement promises.⁹⁹

Third, public pension plan participants are extremely vulnerable. In comparison to other fiduciary relationships, such as those

94. Lahey & Anenson, *supra* note 2, at 314.

95. See EVERETT T. ALLEN ET AL., PENSION PLANNING: PENSION, PROFIT-SHARING, AND OTHER DEFERRED COMPENSATION PLANS 7 (9th ed. 2003) (noting that personal savings rates are "running at historically low levels"); see also Muir, *Decentralized Enforcement To Combat Financial Wrongdoing in Pensions*, *supra* note 13, at 67 n.212 ("Lack of retirement plan coverage strongly correlates with poverty of individuals in their fifties.").

96. See Lahey & Anenson, *supra* note 2, at 329–31 (highlighting lack of uniformity as an obstacle to public pension reform and advocating the adoption of the Uniform Management of Public Employees Retirement Systems Act (UMPERSA) or minimum universal disclosure rules akin to it); see also Daniel J. Kaspar, *Defined Benefits, Undefined Costs: Moving Toward a More Transparent Accounting of State Public Employee Pension Plans*, 3 WM. & MARY POL'Y REV. 129 (2011) (proposing federal legislation that requires states to adopt a uniform standard for the reporting and valuation of pension funding). For a summary of UMPERSA, see generally Steven L. Willborn, *Public Pensions and the Uniform Management of Public Employee Retirement Systems Act*, 51 RUTGERS L. REV. 141 (1998); *Management of Public Employee Retirement Systems Act Summary*, NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS (2014), <http://www.uniformlaws.org/ActSummary.aspx?title=management%20of%20Public%20Employee%20Retirement%20Systems%20Act> (last visited Oct. 14, 2016).

97. Anenson, Slabaugh & Lahey, *supra* note 6, at 42–48 (discussing public pension reporting problems with transparency, uniformity and accuracy). There are different vesting requirements, fiduciary standards, and reporting rules. See generally CYNTHIA L. MOORE, PUBLIC PENSION PLANS: THE STATE REGULATORY FRAMEWORK (2d ed. 1993) (discussing various disclosure and reporting requirements in states). In a survey of state and local government pension funds by the Government Finance Officers Association and the Public Pension Coordinating Council, ninety percent had an annual report, but half of those systems distributed it only on demand. David Hess, *Protecting and Politicizing Public Pension Fund Assets: Empirical Evidence on the Effects of Governance Structures and Practices*, 39 U.C. DAVIS L. REV. 187, 191, 210 (2005).

98. Current reporting methods understate taxpayer liability. See Anenson, Slabaugh & Lahey, *supra* note 6, at 46–88 (citing Moody's Investors Service Report revealing that while states had forty-eight cents of each dollar promised to current and future retirees in 2011, they reported having seventy-four cents of each dollar owed to retirees) (citation omitted); see *infra* Part IV (discussing potential liability for the failure to accurately evaluate liability leading to inadequate funding and disclosure).

99. Anenson, Slabaugh & Lahey, *supra* note 6, at 46 ("Misrepresentations of the magnitude of fiscal stress are frequently credited as contributing to the imminent demise of many public pension plans.").

found in corporate law, beneficiaries are often not financially literate.¹⁰⁰

Even if they were, participants are unable to estimate the risk to their expected retirement savings given the absence of transparency already discussed. Besides, few will be able to do much about it. Assuming it is even possible for employees to uproot and transplant themselves in another state with equivalent job prospects and a retirement system that is not in jeopardy, it is not practical. Many pension plans have built-in deterrents to prevent employees from leaving their employment.¹⁰¹ Employees may lose employer contributions if they have not satisfied the terms of service.¹⁰² As a result, the mobility risk makes public pension participants more exposed than workers in the private sector.¹⁰³

Also, in addition to the three criteria identified by Smith above regarding private fiduciary status, there is another concern at the historic core of equity that is relevant to the fiduciary principle in the public pension setting. This matter is not necessarily present in private trusts or other fiduciary relations like those found in corporate law.¹⁰⁴ Yet this consideration is paramount to understanding the way that fiduciary law can be reimagined and transformed in a public law location. More specifically, the tradition of equity is sensitive to the public interest. Justice Story expounded on equity's association with public policy. He explained how equity intervened

100. See Tucker, *supra* note 49, at 222–24; see also Anenson & Mayer, *supra* note 43, at 967–74 (outlining scholarly criticism that fiduciary law is not protective enough in the corporate setting).

101. ALLEN ET AL., *supra* note 95, at 441–53.

102. Lahey & Anenson, *supra* note 2, at 312–13 (comparing mobility risk between types of pension plans); *id.* at 324 (describing how defined contribution plans become fully vested immediately so that employees may keep the full amount of an employer's contribution in comparison to defined benefit plans where employer contributions are tied to years of service).

103. Anenson, Slabaugh & Lahey, *supra* note 6, at 53 (explaining the mobility penalty of defined benefit plans as opposed to defined contribution plans such as the 401k). The defined contribution plan is the predominant pension plan offered by private employers. Lahey & Anenson, *supra* note 2, at 311. The percentage of employees participating in defined contribution plans is roughly double that of defined benefit plans. Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 470 (2004).

104. See Muir, *supra* note 13, at 66–68 (examining public values and their relationship to the enforcement and redress of financial wrongdoing in the private pension context); cf. Jonathan D. Glater, *Private Offerings and Public Ends: Reconsidering The Regime For Classification of Investors Under The Securities Act of 1933*, 48 CONN. L. REV. 355, 363–68 (2015) (discussing the idea of publicness in corporate law). Certain states, however, equate pension and corporate fiduciaries. *Honda ex rel. Kamakana v. Bd. of Trs. of the Emps.' Ret. Sys.*, 120 P.3d 237, 243 (Haw. 2005) (explaining that since the retirement system was statutorily granted the powers of a corporation, the board has fiduciary responsibilities including a duty of good faith). State statutes impose a duty of good faith in the interpretation of the law. See, e.g., N. C. GEN. STAT. § 147-69.7(a)(6) (2013).

when there was “tendency to . . . violate public confidence, or injure the public interests.”¹⁰⁵ The purpose of equity’s interference in the public interest was to shut off the inducement to perpetrate a wrong in the first place.¹⁰⁶ It was not simply to remedy the wrong after it had been done.¹⁰⁷

State courts rely on public policy in the application and modification of equitable principles.¹⁰⁸ The Supreme Court has also imbued modern equity law with the public interest.¹⁰⁹ The public interest doctrine allows judges to expand or contract equitable doctrines in interpreting statutes, including those aimed at preventing the unconscientious abuse of rights at the foundation of fiduciary law.¹¹⁰

Public policy should be equally important in defining the fiduciary relation between those managing public pension plans and their beneficiaries. Government retirement systems operate in a political environment where pressure is exerted on and by plan fiduciaries.¹¹¹ By the same token, what becomes of the pension plans has micro- and macroeconomic effects.¹¹² The demise of public retirement systems will extend beyond the financial deprivation

105. See MEAGHER, GUMMOW & LEHANE, *supra* note 54, at 335.

106. Anenson & Mark, *supra* note 19, at 1467 n.162. “By disarming the parties of all legal sanction and protection for their acts, they suppress the temptations and encouragements which might otherwise be found too strong for their virtue.” 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §258, at 265 (Melville M. Bigelow ed., 13th ed. 1886).

107. STORY, *supra* note 106, at 265.

108. See Anenson & Mark, *supra* note 19, at 1503–04 (discussing extension of the equitable doctrine of unclean hands in the public interest); Anenson & Mayer, *supra* note 43, at 969 (discussing equitable defenses in light of the state courts’ time-honored role as guardians of public policy).

109. Anenson & Mark, *supra* note 19, at 1481 (discussing the public interest as an integral part of the equitable doctrines of inequitable conduct and unclean hands). The public interest is one of the factors trial courts consider in exercising their discretion to grant or deny equitable relief. See Gergen, Golden & Smith, *supra* note 74, at 204 (explaining the Supreme Court’s four-factor test to determine an injunction to include irreparable injury, inadequacy, balancing of hardships, and the public interest).

110. See Anenson & Mark, *supra* note 19, at 1467; see also Anenson, *Age of Statutes*, *supra* note 47, at 12–18 (explaining how the public interest doctrine influences the application of equitable defenses); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 382 (1983) (“The point [that equity courts may go further to give and withhold relief in the public interest] has been restated so often by federal courts that it has become an aphorism.”).

111. See, e.g., *Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1255–57 (D.N.M. 2011) (claiming breach of fiduciary duty claims based in part on public pension board members conflicts of interest in selecting investments to repay political favors and to further their own political aspirations); *Nasrawi v. Buck Consultants LLC*, 179 Cal. Rptr. 3d 813, 817 (Cal. Ct. App. 2014) (listing multiple claims that the retirement association deliberately kept the pension fund underfunded to avoid employer contributions).

112. Anenson, Slabaugh & Lahey, *supra* note 6, at 56; Jacob S. Hacker, *Restoring Retirement Security: The Market Crisis, the “Great Risk Shift,” and the Challenge for Our Nation*, 19 ELDER L.J. 1, 2–3 (2011) (concluding that security in employer-sponsored public plans has even broader implications for states individually and for the U.S. as a whole).

of individual pension plan participants and their families.¹¹³ Failed (and failing) pensions will adversely impact all state citizens.¹¹⁴ Taxpayers will share the burden of plan insolvency when states raise taxes to cover pensions.¹¹⁵ Given the pervasiveness of the public pension problem across the country, individuals seeking to move to another state to avoid additional tax liabilities will likely encounter similar issues when they arrive.¹¹⁶

For state governments, the unsustainability of government pensions will cause “higher funding costs for public employers sponsoring the plans, higher general borrowing costs for states and municipalities with insufficiently funded plans, and ultimately higher borrowing costs for states regardless of how adequately their benefit plans are funded.”¹¹⁷ State services, such as education funding, will also suffer repercussions where paying down the pension debt will curtail them.¹¹⁸ The dire financial situation in several states, especially California, led one analyst to conclude that “bankruptcy or the complete cessation of all state functions save paying benefits to retirees is not unthinkable.”¹¹⁹

The pension deficit is detrimental to the shared concerns of state citizens in another manner as well. Government workers counting on their pensions play an important social and economic role in the welfare of their respective states. They have careers in education and public safety, and include teachers, police, firefighters, and first-responders. Thus, pension cuts “will almost certainly result

113. See Terrance O’Reilly, *A Public Pensions Bailout: Economics & Law*, 48 U. MICH. J.L. REF. 183, 222 (2014) (relating limited remedies against the government in the event of pension plan default).

114. Anenson, Slabaugh & Lahey, *supra* note 6, at 6.

115. *Id.*

116. See *infra* notes 205–06 (summarizing estimates of government pension plan default across states).

117. Mendales, *supra* note 1, at 508 (citations omitted).

118. Anenson, Slabaugh & Lahey, *supra* note 6, at 34 (“Growing obligations raise the specter of more taxes and less public services, including state funding of education.”); Gina M. Raimondo, *Truth in Numbers: The Security and Sustainability of Rhode Island’s Retirement System*, at 8 (May 2011), <http://www.ricouncil94.org/Portals/0/Uploads/Documents/General%20Treasurer%20Raimondo%20report.pdf> (“In recent years, state aid to cities and towns, which is used mostly for K–12 education, has decreased annually by eight percent”); see also Stuart Buck, *Legal Obstacles to State Pension Reform*, at 5 (Aug. 26, 2011), <http://ssrn.com/abstract=1917563> (commenting on litigation in nine states and noting policy tradeoff between benefits and public services).

119. Maria O’Brien Hylton, *Combating Moral Hazard: The Case for Rationalizing Public Employee Benefits*, 45 IND. L. REV. 413, 434 (2012); see also Beermann, *supra* note 92, at 84 (“[California] which once boasted of the most comprehensive and inexpensive higher education systems in the nation, is now finding it impossible, for example, to continue to offer sufficient community college slots for all students.”).

in a lower quality of applicants for [some] of the nation's most important jobs."¹²⁰

The federal government will not be immune to the looming financial disaster. It certainly recognizes that retirement savings plans are a driver of the national economy.¹²¹ Even without a federal bailout,¹²² the nation as a whole will be adversely impacted as government workers with little personal savings are forced into the welfare system.¹²³ Consequently, alarming actuarial deficits adversely impact the economic welfare of the entire country and its residents.

In summary, equity's attention to the public interest dramatizes fiduciary responsibilities in the public pension field. The underlying indicia of fiduciary status, understood against the background law of equity, helps to explain the content of fiduciary duties and their seemingly stringent remedies. In fact, a fuller appreciation of the fiduciary relation and its application in government retirement

120. Alicia H. Munnell & Rebecca Cannon Fraenkel, *Compensation Matters: The Case of Teachers*, CTR. FOR RET. RESEARCH AT BOS. COLL. (Jan. 2013), <http://ctr.bc.edu/wp-content/uploads/2013/01/slp28-1.pdf>; Robert M. Costrell & Michael Podgursky, *Teacher Pension Costs: High, Rising, and Out of Control*, EDUC. NEXT (June 25, 2013), <http://educationnext.org/teacher-pension-costs-high-rising-and-out-of-control/> (concluding that the high costs of teacher defined benefit plans are real and are "crowding out other school spending and are leading to layoffs of young teachers"); see also Anenson, Slabaugh & Lahey, *supra* note 6, at 4 (citing studies linking teacher quality to student achievement and the future of education).

121. Members of Congress attempted to facilitate a solution to the state pension debt crisis because of its negative impact on the American economy. See Julia Lawless & Antonia Ferrier, *Hatch Releases Report Detailing Threat of \$4.4 Trillion Public Pension Debt*, U.S. SENATE COMM. ON FIN., (Jan. 10, 2012), <http://www.finance.senate.gov/newsroom/ranking/release/?id=F9a92142-d190-4bca-a310-b43cb462eb45> (discussing report released by Senator Orrin Hatch upon the introduction of a pension reform bill analyzing "how the unfunded pension liabilities of state and local governments jeopardize the fiscal solvency of states and municipalities as well as the nation's long-term fiscal health, including the U.S. credit rating").

122. See, e.g., R. Eden Martin, *Unfunded Public Pensions—The Next Quagmire*, WALL STREET J. (Aug. 19, 2010), <http://online.wsj.com/articles/SB10001424052748704017904575409813223662860> (advising that "[t]he next big issue on the national political horizon" may be whether the federal government should bail out the many states across the country with "overly generous and badly underfunded pension plans"); see also Mark J. Warshawsky, Rose A. Marchand & the Mercatus Center at George Mason Univ., *The Extent and Nature of State and Local Government Pension Problems and A Solution* (January 2016), <http://mercatus.org/sites/default/files/Warshawsky-Govt-Pension-Problems.pdf> (arguing that reform proposals that assume the federal government will bail out state and local pensions are politically and economically unworkable and unfair).

123. See Anenson, Slabaugh & Lahey, *supra* note 6, at 2 (relating that members of Congress have even attempted to facilitate a solution to the state pension debt crisis due to its negative impact on the American economy); see also Muir, *supra* note 24, at 402–04 (tracing the historical events leading to the enactment of ERISA and Congress' concern that private pension plan failures will harm Social Security).

systems can be realized by tracing it to the origins of equity jurisdiction.¹²⁴

The merger of law and equity, however, has obscured the evolution of equity.¹²⁵ The removal of equity as a standard course in the law school curriculum has aggravated the problem.¹²⁶ Scholarship on equity waned in the wake of these phenomena.¹²⁷ As a result, courts and commentators have lost sight of certain equitable doctrines along with the reasons for their existence.¹²⁸ In this regard, Roscoe Pound's prediction at the turn of the twentieth century has come true.¹²⁹ He feared we would lose (and confuse) equitable rules and principles after the fusion of law and equity.¹³⁰ Courts

124. Smith, *supra* note 43, at 265; *see also* MEAGHER, GUMMOW & LEHANE, *supra* note 54, at § 1209, at 340 (“The solidification of various principles and doctrines has meant that in modern equity there has been a propensity to lose sight of Chancery’s inherent flexibility and capacity to adjust to new situations by reference to mainsprings of the equity jurisdiction.”).

125. *See generally* T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 Ky. L.J. 63 (2010) [hereinafter Anenson, *Limiting Legal Remedies*] (discussing fusion and confusion over equitable defenses in state and federal law after the unification of law and equity).

126. *See* Anenson, *Pluralistic Model*, *supra* note 60, at 647 (“Many practicing lawyers have graduated without the benefit of a comprehensive course in equity.”); Jerome Frank, *Civil Law Influences on the Common Law: Some Reflections on Comparative and Contrastive Law*, 104 U. PA. L. REV. 887, 895 (1956) (“In several of our leading university law schools there is now no course on ‘equity.’”); *see generally* Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 249–60 (2008) (recounting the law school movement away from an equity course to a remedies course in the 1970s).

127. The last treatises to provide a comprehensive treatment of equity were published in the early twentieth century; these books were geared to practitioners and concentrated on the technical aspects of equitable doctrines. *See* JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA (Spencer W. Symons ed., 5th ed. 1941); JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (W.H. Lyon ed., 14th ed. 1918); *see also* Anenson, *The Triumph of Equity*, *supra* note 51, at 438–39 (2008) (discussing lack of contemporary American treatises on equity). The latest literature to examine equity holistically and philosophically was published in the middle of the twentieth century. *See, e.g.*, ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY (1950); WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY (2d ed. 1956); HENRY MCCLINTOCK, PRINCIPLES OF EQUITY (2d ed. 1948). My research has sought to fill a critical gap in equity scholarship.

128. *See generally* Anenson & Mark, *supra* note 19 (critiquing the Federal Circuit for failing to follow the equitable tradition in remaking the inequitable conduct doctrine). *See* Anenson, *Pluralistic Model*, *supra* note 60, at 642 n.57 (commenting that there is a risk that courts may pick up the broad phraseology of equitable ethical standards but not the broad sentiments underlying them).

129. *See* Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 35 (1905) (predicting the decline of equity after the fusion of courts and procedures); Anenson, *Age of Statutes*, *supra* note 47, at 7 (“Dean Roscoe Pound was prescient in cautioning against equity’s compartmentalization into discrete subject areas at the turn of the twentieth century.”).

130. Pound, *supra* note 129, at 29; *see also* Anenson & Mark, *supra* note 19, at 1450–52, 1504–05, 1511–12 (endorsing a trans-substantive approach to understanding equitable remedies and defenses); Anenson, *Age of Statutes*, *supra* note 47, at 8 (explaining the benefits of a wider and deeper theoretical frame of analysis).

have carried equitable principles forward in their cases.¹³¹ Yet many have ceased to understand them.¹³² Even trust law has been a victim of historical incomprehension, and has been molded by mistakes concerning the classification of equitable precepts.¹³³

With respect to the fiduciary principle more generally, Henry Smith argues that it too has been adversely affected since the union of law and equity.¹³⁴ He explains that fiduciary law is undergoing a brand-identity crisis.¹³⁵ He maintains that the theory of the fiduciary relation should be reoriented back to its roots in equity.¹³⁶ Examining equity in its historical setting tells us what it is and why it existed. Smith calls this a “functional” approach, but it is based on the equitable tradition.¹³⁷ Consistent with my own research on equity,¹³⁸ he describes how courts behaved in equity in order to comprehend the historical reasons for their actions.¹³⁹ In this way, the heritage of equity becomes the touchstone for solving contemporary problems.¹⁴⁰

Accordingly, the derivation of the fiduciary principle and its connection to the grounds for equitable intervention serves as a warning to those who would restrict the application of fiduciary

131. Anenson & Mark, *supra* note 19, at 1525 (“Equity is not lost, for it continues in a steady stream of precedents, but it has ceased being understood.”).

132. *Id.* See Anenson, *Limiting Legal Remedies*, *supra* note 125, at 110, 63 (detailing court confusion and describing the unclean hands doctrine as “the most powerful,” but also as the “least containable defense that came from ancient courts of equity”).

133. Langbein, *What ERISA Means by “Equitable,”* *supra* note 50, at 1351–54; see also Anenson & Mark, *supra* note 19, at 1525 n.554 (“In attempting to answer questions of equity, members of the Supreme Court have disagreed over the existence or relevancy of a particular custom, been mistaken as to what it is or means, and divided when traditional principles purportedly deviate from practice.”).

134. Smith, *supra* note 43, at 261, 277; see *id.* at 282 (“Like equity after the fusion of law and equity, it is hard to justify the mix of formalism and contextualism in a hybrid system if the purpose of the architecture has been obscured.”).

135. *Id.* at 261.

136. *Id.* at 262 (“Cut off from the special rationales of equity, fiduciary law itself threatens to become too expansive or too narrow and hidebound—like equity generally.”).

137. *Id.* at 262–63; *id.* at 261 (“This chapter will argue that a functional theory of equity—of equity as a safety valve aimed at countering opportunism—captures the character of fiduciary law.”); Anenson, *Age of Statutes*, *supra* note 47, at 8 (endorsing historical and functional approach to equitable defenses and equity jurisprudence); Anenson, *Statutory Interpretation*, *supra* note 47, at 3–4 (same).

138. There is no comprehensive treatment of modern equity in American law. My scholarship has concentrated on equitable principles with a special focus on equitable defenses. See, e.g., T. LEIGH ANENSON, *JUDGING EQUITY: THE FUSION OF UNCLEAN HANDS IN U.S. LAW* (forthcoming 2017).

139. See generally Smith, *supra* note 43.

140. See generally Anenson & Mayer, *supra* note 43 (using scholarship in business ethics to inform the application of the equitable defense of unclean hands in solving the contractual problem of excessive executive pay).

law.¹⁴¹ Fiduciary law should be understood in its present form by the concerns that provoked it.¹⁴² Moreover, equity's association with the public interest, along with its assistance of the vulnerable and its regard for relieving against forfeiture found in the fiduciary relation, should caution against diluting the traditional duties of trustees and other fiduciaries in managing critical retirement assets, or in circumscribing the remedies available to beneficiaries in the event of a breach. It bears repeating that possible political interference is another reason to keep the fiduciary duties of the pension trustees strong. Again, the potential damage from public pension mismanagement or self-dealing is exceptionally egregious due to extreme hardship, vulnerability, and hidden action.

Renewing and renovating equity, though, is not easy.¹⁴³ Its absorption into public law is particularly complex.¹⁴⁴ Government pension law is but one of many examples of the integration of equity over time.¹⁴⁵ Of course, what equity demands will depend on the legal context, which for public pensions is state law.¹⁴⁶ When in doubt, however, it seems best to hew to the tradition of equity and eschew changes that run counter to the temper of its history. The reasons behind the rules should serve as guide.¹⁴⁷ What is more, based on the foregoing analysis, is that if states are going to regulate the fiduciary framework in a way that alters its equitable

141. Smith, *supra* note 43, at 275–77 (critiquing potential reforms in private fiduciary law).

142. My research has been building a philosophical foundation in the present century for the lost defenses of equity by resort to their past. *See supra* note 127.

143. Anenson, *Treating Equity Like Law*, *supra* note 74, at 469–71 (showing how unclean hands doctrine has been extended to cases seeking legal relief). Anenson, *Limiting Legal Remedies*, *supra* note 125, at 66, 109–15 (discussing the debate over the fusion of law and equity).

144. Anenson, *Age Of Statutes*, *supra* note 47, at 8–37 (analyzing the assumption of equitable defenses in federal statutes and explaining that modernizing equity is difficult); *see also* Anenson & Mark, *supra* note 19, at 1502–05 (demonstrating how the inequitable conduct doctrine in patent law can be legitimately transformed); *see generally* Muir, *The Perversity of ERISA Fiduciary Law*, *supra* note 24, at 396–97 (explaining how ERISA is narrower than traditional trust law because the statute limits liability to the scope of fiduciary responsibilities and broader than traditional trust law by extending liability to those managing assets not held in trust).

145. HAROLD GREVILLE HANBURY, *ARTICLES IN EQUITY* 34 (1934) (“The stream of equity is, in reality, continuous throughout ages.”); *see* NEWMAN, *supra* note 52, at 255 (“The evolution of law is to a large extent the history of its absorption of equity.”); *see also* Laycock, *The Triumph of Equity*, *supra* note 45, at 67–71 (commenting on various areas where equity integrated the law).

146. *See supra* Parts I & III (providing an overview of public pension governances).

147. Smith, *supra* note 43, at 277 (“We should not lose sight of the danger of opportunism in the historical core of fiduciary law.”); *see also* Anenson & Mayer, *supra* note 43, at 980 (advocating the use of unclean hands to prevent company executives’ unfair advantage-taking in their employment contracts).

tradition, they should consider adding more, rather than less, protection from malfeasance in the management of government retirement funds.¹⁴⁸

To better evaluate the actual and potential fiduciary duties and distinctions against their equitable past, it is essential to understand the present context in which they arise. The content of the fiduciary obligations allocated to the board and additional fiduciaries depends on the specific roles they play in each state retirement system. The next Part summarizes how fiduciaries function within the governance mechanisms of public pensions.

III. GOVERNING PUBLIC PENSIONS

There are thousands of public retirement systems for state and local employees in the United States.¹⁴⁹ The defined benefit plan remains the primary pension plan offered in these systems.¹⁵⁰ In comparison to other pensions, in which employees make the investment decisions and otherwise manage their own retirement accounts, defined benefit plans are managed by the government in an employer-owned trust fund.¹⁵¹ The governance of public retirement systems is overseen by the governor, legislature, and the board of trustees, including any staff to whom the board has delegated administrative responsibility.¹⁵²

Not surprisingly, the size and structure of the board, along with member credentials, differs between public retirement systems. Board members have different levels of knowledge and experience, along with any necessary qualifications.¹⁵³ Boards also vary in number and composition.¹⁵⁴ How members are selected is likewise

148. It would be incorrect to say that the fiduciary relations in public pensions can never circumscribe traditional duties. There may be situations where there is little risk of opportunism or where other policy reasons trump equitable considerations.

149. Lahey & Anenson, *supra* note 2, at 307; Annual Survey of Public Pensions: State- and Locally-Administered Defined Benefit Data (2014), U.S. CENSUS BUREAU, <http://www.census.gov/govs/retire/> (last visited Oct. 14, 2016) (tallying 6,299 public retirement systems).

150. Lahey & Anenson, *supra* note 2, at 307, 313; Olivia S. Mitchell et al., *Developments in State and Local Pension Plans*, in *PENSIONS IN THE PUBLIC SECTOR* 11, 15 (Olivia S. Mitchell & Edwin C. Hustead eds., 2001). State governments may also separate pension systems within the state for different kinds of employees. Lahey & Anenson, *supra* note 2, at 310.

151. *Id.* at 310–12. Unlike defined contribution plans where employees bear the risk of their own retirement savings, defined benefit plans obligate employers to provide employees retirement income regardless of market performance or other financial distress. *Id.* at 312.

152. *Governance*, *supra* note 15.

153. *Id.*

154. *See id.* (showing that retirement system board size ranges from five to nineteen trustees across states with a median size of nine trustees).

different;¹⁵⁵ governors and legislatures appoint most trustees.¹⁵⁶ Nevertheless, a majority of boards do have some active and retired participants of the retirement system who are elected by their fellow participants.¹⁵⁷ Pension boards may also be comprised of ex-officio members who tend to be state treasurers, budget officers, and superintendents of public education.¹⁵⁸

The types and degrees of responsibility and authority of pension boards fluctuate among the fifty states.¹⁵⁹ Any brief account of the board's role necessarily involves some simplification. Basically, though, pension boards must comply with federal and state laws as well as their own system's policies and procedures.¹⁶⁰ Their oversight responsibilities usually include accounting, financial reporting, and actuarial evaluation.¹⁶¹ In particular, the board of trustees may set actuarial assumptions, approve contribution rates, and propose statutory revisions.¹⁶²

155. Board of trustee composition at state and local pension systems falls into three categories depending on how they were selected: plan member-elected, politically appointed by the governor or legislative committee, or *ex officio* trustees who serve because they hold a particular public office. Hess, *supra* note 97, at 195; *Governance*, *supra* note 15 (specifying selection methods as election, appointment, ex-officio).

156. *Governance*, *supra* note 15.

157. *Id.*; Hess, *supra* note 97, at 195. Board composition that includes plan participants presumably independent of political influence result in better plan performance. *Id.* at 195–98, 216–17; Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 820 (1993). The stakeholder model, however, is not foolproof. See Ed Mendel, *CalPERS Considering Term Limits for Board Leaders* (Dec. 21, 2015), <https://calpensions.com/2015/12/21/calpers-considering-term-limits-for-board-leaders/> (noting that pension reform was introduced in California after state workers and the Highway Patrol gave themselves large retroactive pension increases); cf. Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. 199, 205 (2004) [hereinafter Muir, *ERISA and Investment Issues*] (“Most DB plans have a formal committee of fiduciaries, who are employees of the plan sponsors, who oversee investment policy and practices.”).

158. Hess, *supra* note 97, at 195; *Governance*, *supra* note 15.

159. See Edwin C. Husted & Olivia S. Mitchell, *Public Sector Pension Plans: Lessons and Challenges for the Twenty-First Century*, in PENSIONS IN THE PUBLIC SECTOR 5, 8 (Olivia S. Mitchell & Edwin C. Husted eds., 2001) (explaining the typical duties of a retirement board); Michael Useem & David Hess, *Governance and Investments of Public Pensions*, in PENSIONS IN THE PUBLIC SECTOR, *supra* note 150, at 132 (state retirement systems differ in external or in-house money managers, board oversight of investment strategy, and investment performance of public plan assets).

160. *Governance*, *supra* note 15.

161. *Id.* Government employers play a more limited role with defined contribution pension plans. They may offer a selection of investment options to their employees and monitor those options. See Dana M. Muir, *Choice Architecture and the Locus of Fiduciary Obligation in Defined Contribution Plans*, 99 IOWA L. REV. 1, 15, 30–32 (2013) (discussing fiduciary law for private pensions where employers retain fiduciary duties for selecting and monitoring of investment options from which participants choose).

162. *Governance*, *supra* note 15.

A board's obligations also typically include the appointment or approval of top executive positions and consultants and the payment of benefits.¹⁶³ Additionally, the overwhelming majority of pension boards also oversee fund investments.¹⁶⁴ Those systems that do not make boards responsible for investing pension fund assets designate a sole trustee or a separate entity for that purpose.¹⁶⁵ Furthermore, a board is tasked with ensuring that systems are in place to report and monitor retirement system activities and processes.¹⁶⁶

Accordingly, pension boards perform a grab bag of functions related to pension assets. In most cases, members of the board of trustees, along with others to whom they have delegated authority, are the primary guardians of these funds. The behavior of pension boards and financial intermediaries are key to assuring asset integrity. Their actions are out of the control of public sector employees who rely on these plans for their retirement benefits.

Based on an understanding of traditional fiduciary principles, the next Part turns to how the fiduciary relationship should be structured in the setting of government retirement systems.

IV. REFORMING FIDUCIARY DUTIES AND ADJUDICATING FIDUCIARY VIOLATIONS

An equitable outlook is admittedly incomplete. Because the fiduciary relationship is an outgrowth of equitable tradition, however, the cleansing power of equity should make that tradition a subject of comparison.

There are a myriad ways for pension plan actors to violate their obligations by acting wrongfully with respect to the corpus of the trust. This Part does not attempt to obtain total completeness in evaluating individual responsibility and its limits in the public pension system. The subject is so large that only a few representative

163. *Id.*

164. *See id.* (showing that seventy percent of states have pension boards that oversee fund investments).

165. *Id.* (noting that in approximately thirty percent of states, pension boards do not oversee fund investments). A sole trustee of pension funds can be found in Connecticut, Michigan, New York, and North Carolina. *Id.* States that have separate entities managing pension assets include Massachusetts (Pension Reserves Investment Management Board), Minnesota (State Board of Investment), and Oregon (Investment Council). *Id.*

166. *Governance, supra* note 15. *E.g.*, LA. STAT. ANN. § 11:832 (1991) (requiring the board of trustees to keep a record of its proceedings which shall be open to public inspection and to publish annually a report of its fiscal transactions, amount of accumulated cash and securities, and a balance sheet showing the financial condition of the system by means of an actuarial valuation of assets and liabilities).

instances of fiduciary responsibility in the public pension scenario are examined below.

This Part does extend its analysis beyond the usual issues involving the theft of funds and inappropriate investments or asset diversification to translate private trust law into the public regime of pension plan administration.¹⁶⁷ As an overview, the types of behaviors that may give rise to liability involve inadequate funding and disclosures as well as incurring unreasonable investment costs.¹⁶⁸ Governments should also reform existing law by removing any scienter requirement for fiduciary liability and, when feasible, prohibiting dual roles of fiduciaries that may influence opportunism.

As explained above, standards as opposed to rules are the best fit for an equitable approach. As such, the need for equitable discretion should caution state governments and courts from making fiduciary law overly rigid, especially by creating catalogues of permissive actions. Lists of prohibitions may be appropriate,¹⁶⁹ but even those can be problematic if they curtail fiduciary discretion in the legitimate performance of their functions.¹⁷⁰

Considering equity's approach to the duty of loyalty, state governments should nonetheless consider banning dual roles of fiduciaries that may affect their judgment and promote opportunism.¹⁷¹ Barring perks to board members by money managers, including travel, should also be considered. Prohibiting fiduciaries

167. See generally Webber, *supra* note 14 (arguing for an expanded discretion to consider the impact on member jobs in making investment decisions). For public pension funds, Professor Webber argues that considering the impact on jobs should not be a fiduciary violation. It is unclear if his position is also that the failure to account for such job prospects would result in a violation.

168. Muir, *The Perversity of ERISA Fiduciary Law*, *supra* note 24, at 409 (listing fiduciary behaviors that result in violations); Muir, *Decentralized Enforcement to Combat Financial Wrongdoing in Pensions*, *supra* note 13, at 52–59 (ascribing wrongdoing to three categories: (1) asset transfers from pension plans, (2) acts prior to transfer of funds to a pension plan, and (3) financial wrongdoing with collateral effects on pension plans).

169. See KY. REV. STAT. ANN. § 61.650(5) (“Based upon market value at the time of purchase, the board shall limit the amount of assets managed by any one (1) active or passive investment manager to fifteen percent (15%) of the assets in the pension and insurance funds.”).

170. Experience with ERISA demonstrates that prohibitions can be problematic when they are overbroad and lack the individualized decision-making ability of equity judges. See Muir, *The Perversity of ERISA Fiduciary Law*, *supra* note 24, at 397 (advising of certain prohibited transactions that are so broad that the Department of Labor has established exemptions from them).

171. See Fitzpatrick, *supra* note 11 (“Some of the nation’s largest public pension funds already bar consultants from acting as investment managers because of concerns about the dual roles, but many don’t.”).

from working in certain businesses for a period of time after terminating their role on the pension board may be appropriate as well. At a minimum, there should be a process in place in which prospective and existing fiduciaries are vetted to ensure that no conflicts of interest exist (or are acceptable).¹⁷² History teaches that whenever a fiduciary can benefit at the expense of plan participants and beneficiaries, there will be an incentive for opportunistic behavior.¹⁷³ Recall that the purpose of the “no profit” and “no conflict” rules of fiduciary law is to preclude the fiduciary from being influenced by considerations of personal interest and misusing the position for personal advantage. State governments should additionally disallow fiduciaries from waiving or otherwise limiting their obligations as is often found in corporate law.¹⁷⁴

A related issue involving the duty to act in the sole interest of plan beneficiaries is what to do when the retirement board, by various means, wrongfully reduces the employer’s contribution.¹⁷⁵ In California, at least one state court has granted retirement boards

172. There may be unavoidable conflicts under certain circumstances in the public pension domain or those that are deemed acceptable for other reasons. For example, if the state treasurer sits on the pension board, there may be a conflict of interest in setting pension funding policy with her obligation to fund schools or with investments in state infrastructure. A union member on the board may have a conflict with member interests in health care, wages, and limiting layoffs. ERISA allows agents of plan sponsors and of other fiduciaries to act as ERISA fiduciaries for fear that the increased cost of impartial decisionmaking would discourage sponsorship of pension plans. Muir, *The Perversity of ERISA Fiduciary Law*, *supra* note 24, at 414–15 (noting tension between ERISA’s recognition of a conflicted beneficiary with its duty of loyalty).

173. Muir, *The Perversity of ERISA Fiduciary Law*, *supra* note 24, at 409.

174. See Smith, *supra* note 43, at 282 (citing Andrew S. Gold, *On the Elimination of Fiduciary Duties: A Theory of Good Faith for Unincorporated Firms*, 41 WAKE FOREST L. REV. 123 (2006) and citing Scott Johnston, *Opting Out: Bargaining for Fiduciary Duties in Cooperative Ventures*, 70 WASH. U.L.Q. 291 (1992)); see *id.* at 271 (explaining that contracting out should be difficult when exploitation is unforeseeable and where equity seeks to keep its signals straight); cf. Willborn, *supra* note 96, at 160 (prohibiting agreements to exonerate fiduciary responsibilities); ERISA § 410, 29 U.S.C. § 1110(a) (“[A]ny provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.”). Waiving liability may be more likely in those states that equate corporate and pension fiduciary duties. See *Kaho’ohanohano v. State*, 162 P.3d 696, 705 (Haw. 2007) (explaining that pension trustees are “functionally equivalent to those of a board of directors of a private corporation”).

175. See *O’Neal v. Stanislaus Cty Emps. Ret. Ass’n*, No. F061439, 2012 WL 1114677 *7 (Cal. Ct. App. Apr. 4, 2012) (finding complaint stated a cause of action when it alleged that the retirement association, through its governing retirement board, “took funds that had been set aside to provide discretionary supplemental retirement benefits, including health insurance benefits, and used those funds for a different and impermissible purpose, namely, to lower the county’s employer contribution for the years in question”) (citing 79 Ops. Cal. Atty. Gen. 95, 99–101 (1996) (use of excess earnings to reduce current county employer contribution violates County Employment Retirement Law)).

and associations statutory immunity from such claims seeking damages to the fund.¹⁷⁶ The interplay between the law of pension governance and government immunity should be reconsidered, or the waiver of immunity for fiduciary claims should be made clear.

Another reform that government retirement systems should consider is to remove the requirement of intent to trigger fiduciary liability. In Wyoming, for example, the legislature amended the statute to “make clear” that board members are not personally liable for acting within the scope of their responsibilities unless their conduct rises to the level of “willful misconduct, intentional torts or illegal acts.”¹⁷⁷ While fiduciary law may seem far-reaching, it is necessary in light of the structure of the relationship and the interests at stake. Again, equitable doctrines were derived in the service of safeguarding against strategic behavior.¹⁷⁸ Fiduciary law is even broader than general equity because of the sustained problem of opportunism.¹⁷⁹ But the law is also limited due to the fact that personal liability only attaches to those who choose to become a fiduciary.¹⁸⁰ Third party claims are also restricted to those with knowledge.¹⁸¹ As such, states should not elevate the criteria against actuaries, accountants, pension advisors, or anyone else who aids and abets fiduciary breaches by pension boards to require specific intent.¹⁸² In fact, states should consider expanding by legislation or

176. See *Nasrawi v. Buck Consultants L.L.C.*, 179 Cal. Rptr. 3d 813, 822–23 (Cal. Ct. App. 2014) (finding retirement association immune under government immunity statute for breaches of fiduciary duties involving discretionary acts of the pension board); see also *Hill v. Vanderbilt Capital Advisors, L.L.C.*, 834 F. Supp. 2d 1228, 1272–77 (D.N.M. 2011) (discussing but not deciding whether statutory sovereign immunity in tort bars claims against retirement board for breach of fiduciary duty).

177. WYO. STAT. ANN. § 9-3-443(e) (West 2015).

178. See discussion *supra* Part II (examining the equitable dimension of fiduciary law).

179. *Id.*

180. Smith, *supra* note 43, at 278–79 (arguing that fiduciary law is not overbroad because it is difficult to become a fiduciary and liability is limited to third parties with knowledge). See *Hittle v. Santa Barbara County Emps. Ret. Ass’n.*, 703 P.2d 73, 84 (Cal. 1985) (noting that retirement association officers, by acceptance of their position, become voluntary trustees subject to fiduciary obligations).

181. The beneficiaries of a trust may also sue responsible third parties; a beneficiary may bring an action against a third-party where “the trustee improperly refuses or neglects to bring an action.” RESTATEMENT (SECOND) OF TRUSTS, *supra* note 25, § 282(2).

182. See *Nasrawi v. Buck Consultants L.L.C.*, 179 Cal. Rptr. 3d 813, 826 (Ct. App. 2014) (commenting that “some cases suggest that a plaintiff also must plead specific intent to facilitate the underlying [breach]” for aiding and abetting liability). But see *In re First Alliance Mortg. Co.*, 471 F.3d 977, 993 (9th Cir. 2006) (explaining that “aiding and abetting liability under California law, as applied by the California state courts, requires a finding of actual knowledge, not specific intent”).

adjudication who may become a fiduciary of public pensions beyond retirement boards or other designated entities.¹⁸³

Fiduciary breaches often occur in the absence of fraud and corruption. Examples abound of neglect, inadvertence, or incompetence. As an initial matter, the standard of review of a board's discretionary decisions are an open question in some states. Courts (or legislatures) should refrain from adopting the deferential business judgment rule found in the law of corporate governance.¹⁸⁴

With respect to specific fiduciary violations, state pension funds nationwide are beginning to more closely examine how much they are paying Wall Street to manage their investments.¹⁸⁵ These management fees can exceed more than a billion dollars and result in a substantial weight on returns.¹⁸⁶ CalPERS' failure to account for some of its investment fees is an especially clear violation of fiduciary obligations.¹⁸⁷ By analogy, a private fiduciary's failure to

183. See discussion *supra* Part II. There appears to be no case where parties have raised the question in interpreting government pension law. See *Luzerne County Ret. Bd. v. Makowski*, 627 F. Supp. 2d 506, 565 (M.D. Penn. 2007) (explaining that former board members owed fiduciary duties to the fund pursuant to state statute and assuming that financial advisors and money managers also owed fiduciary duties to the fund for purposes of determining federal law); see also Muir, *The Perversity of ERISA Fiduciary Law*, *supra* note 24, at 395 (explaining that an individual becomes an ERISA fiduciary when they exercise discretion over the assets, management, or administration of the plan or they provide investment advice for compensation while limiting liability to only those functions performed).

184. For decisions raising, but not deciding the issue, see *Bandt v. Board of Retirement, San Diego County Employees Retirement Ass'n*, 38 Cal. Rptr. 3d 544, 555–56 (Ct. App. 2006) (advising that neither party has offered a constitutional standard to determine whether a retirement board has violated its fiduciary duties and suggesting that the law of corporate governance and its business judgment rule may be appropriate as opposed to other standards that are less deferential to the retirement board's judgement); *O'Neal v. Stanislaus County Employees' Retirement Ass'n*, No. F061439, 2012 WL 1114677 at *6 n.8 (Cal. Ct. App. Apr. 4, 2012) (noting that "potential defenses of [the retirement association] under the so-called 'business judgment' rule . . . are not before the court"). Cf. Muir, *The Perversity of ERISA Fiduciary Law*, *supra* note 24, at 410 (advising that discretion, a factor crucial in determining fiduciary status, is also a key factor in determining deference, and therefore a significant limitation to finding liability for violated fiduciary standards).

185. Stevenson, *supra* note 10; see also Gretchen Morgenson, *When Private Equity Firms Give Retirees the Short End*, N.Y. TIMES (June 13, 2015) (disclosing that Wall Street is charging higher fees to pensions funds versus other investors). There may be other lawsuits involving costs paid by the fund. See *Board of Trustees of City of Omaha Police and Fire Ret. Sys. v. City of Omaha*, 858 N.W.2d 186, 194 (Neb. 2015) (holding that pension board had authority to retain an actuarial consultant for advice and to study underfunding which was an administrative cost to be paid by the city and not an investment cost to be paid by fund).

186. Stevenson, *supra* note 10 (citing study by CEM Benchmarking); see also Muir, *Decentralized Enforcement To Combat Financial Wrongdoing in Pensions*, *supra* note 13, at 57 ("Providers of services to pension plans, for example, investment managers, record-keepers and auditors, have an incentive to maximize their fees.").

187. See CAL. CONST. art. XVI § 17(a)–(c) (imposing prudent investor rule and for fiduciaries to "defray[] reasonable expenses of administering the system"); see generally Stevenson,

monitor and evaluate investment costs has recently been held to be a breach under ERISA.¹⁸⁸ Moreover, it makes sense that a reasonably prudent fiduciary would not only ascertain the quoted fees by Wall Street, but also to check them against actual fees incurred.¹⁸⁹ Further, to keep investment expenses reasonable, the fiduciary obligation should require trustees to consolidate fund management to create economies of scale.¹⁹⁰

Perhaps a more contentious issue on the horizon, but one that should also result in fiduciary liability, is the failure to accurately evaluate liabilities that lead to inadequate funding and disclosure.¹⁹¹ The undervaluation of the pension deficit is due in part to an unsuitable discount rate.¹⁹² There is a growing consensus among economists and other scholars that private sector actuarial standards should be used to give an adequate representation of the

supra note 10. According to CalPERS annual report, it paid \$1.6 billion in fees to Wall Street in 2014, but the figure does not include how much it paid in carried interest which could be as much as an additional \$1 billion a year. *Id.* Private equity firms typically charge investors a management fee of one to two percent of assets and about twenty percent of any gains each year. *Id.* But fees for transactions, costs for monitoring investments and legal fees are not readily disclosed. *Id.*

188. *See* *Tussey v. ABB, Inc.*, 746 F.3d 327, 336–37 (8th Cir. 2014) (upholding a failure to monitor claim because the defendants made no effort to benchmark the fees being paid and there was no evidence that they attempted to use purchasing power (\$1.4B) to reduce fees).

189. *See, e.g.*, KY. REV. STAT. ANN. § 61.650(1)(c)(2) (LexisNexis 2015) (requiring fiduciaries to incur only reasonable investment expenses); N.H. REV. STAT. ANN. § 100-A:15.1-a.(a)(5) (2012) (requiring fiduciaries to incur only “costs that are appropriate and reasonable”); *Meeting Your Fiduciary Responsibilities*, UNITED STATES DEPT. OF LABOR 5–6 (Feb. 2012), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/meetingyourfiduciaryresponsibilities.pdf> (explaining that fiduciaries of private pension plans must monitor fees for service providers and investments paid from plan assets by checking promised fees against actual fees incurred); UMPERSA, *supra* note 41, at § 7 (fiduciary responsibilities include incurring only reasonable costs of investment). A fiduciary breach regarding investment fees may also arise due to the failure to disclose such fees. *See* *Luzerne Cty. Ret. Bd. v. Makowski*, 627 F. Supp. 2d 506 (M.D. Pa. 2007) (holding that pension fiduciaries owed duty to disclose material information under Pennsylvania law and discussing claim of concealment of investment fees). *But see* *Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp.2d 1228, 1255–57 (D.N.M. 2011) (finding the beneficiaries lacked Article III standing for breach of fiduciary duty claims based in part on board members lack of due diligence in monitoring fees because beneficiaries failed to allege that the defined benefit plan is currently underfunded or that the investment losses caused the underfunding).

190. *See* *Mendales*, *supra* note 1, at 543 (urging states to reform their retirement systems by consolidating pension plans, if legally and politically possible, to defray costs).

191. *See* *Lahey & Anenson*, *supra* note 2, at 315. (“[T]he predominant calculation used to evaluate defined benefit plans is the funding ratio. This ratio measures a plan’s financial health by dividing the market or actuarial value of assets by the liabilities. If liabilities exceed assets, the plan is underfunded.”).

192. *Anenson, Slabaugh & Lahey*, *supra* note 6, at 46–48. *See also* J. Fred Giertz & Leslie E. Papke, *Public Pension Plans: Myths and Realities for State Budgets*, 60 NAT’L TAX J. 305 (2007) (finding evidence that assumptions are manipulated in order to lower necessary contributions to the pension plans).

default risk.¹⁹³ This would mean “valuing pension liabilities according to the likelihood of payment, rather than to the return expected on pension assets.”¹⁹⁴ Overstating pension health lowers necessary contributions to the plan.¹⁹⁵ In a defined benefit plan paradigm, government employers promise to contribute to the plan at whatever levels are necessary to fund the plan.¹⁹⁶ Funding levels affect both benefit security and the ability to receive enhanced benefits.¹⁹⁷ In most states, there are no legally mandated minimum funding levels like that for private sector pensions so the criteria for determining funding are even more important for public sector pensions.¹⁹⁸ No doubt pension actuaries, in response, will rely on the fact that the discount rate is an industry standard.¹⁹⁹ Yet Cardozo captured the elevated ethical standards of equity and fiduciary law when he stated that fiduciaries are “kept at a level higher than

193. Eileen Norcross & Andrew Biggs, *The Crisis in Public Sector Pension Plans: A Blueprint for Reform in New Jersey 2* (Mercatus Ctr., George Mason Univ., Working Paper No. 10-31, June 2010), <https://www.mercatus.org/system/files/WP1031—NJ-Pensions.pdf> (noting that “economists almost universally agree” that private sector accounting methods are more appropriate than current public sector assumptions in calculating pension liabilities). See Novy-Marx & Rauh, *supra* note 3, at 1211 (asserting that the appropriate discount rate to calculate liabilities should reflect risk from a taxpayer perspective rather than the expected rate of return on pension assets as stipulated by government accounting rules); O’Reilly, *supra* note 113, at 222 (arguing for private actuarial standards for public pensions). See also Beerman, *supra* note 92, at 13–14 (comparing contrary studies on the public pension debt and concluding that the pension crisis is real).

194. Anenson, Slabaugh & Lahey, *supra* note 6, at 46–47. The effect would cut the interest rate by half (eight percent to four percent) and more than triple unfunded liabilities for public sector pensions. *Id.* at 48. Cf. Mendales, *supra* note 1, at 533–37 (concluding that the usual discount rate of eight percent is too high for government pensions, but that four percent may be too low for large plans).

195. See Lahey & Anenson, *supra* note 2, at 310 (“A defined benefit plan provides for employer, and sometimes employee, contributions to a trust fund administered by a trustee.”); Anenson, Slabaugh & Lahey, *supra* note 6, at 13 (“Increasing the contribution rate for employees, employers, or both, should increase the funds available to invest in the existing portfolio of assets.”). Additional funds add to the dollar amount of assets and, ideally, to the investment income which may decrease the unfunded pension liability. See Muir, *ERISA and Investment Issues*, *supra* note 157, at 202–04 (explaining that contributions and investment returns are the two primary inputs that affect funding levels in defined benefit plans). See generally ALLEN ET AL., *supra* note 95, at 441–53.

196. Muir, *ERISA and Investment Issues*, *supra* note 157, at 202–04.

197. *Id.* (explaining how funding levels ease workforce reductions, cost of living allowances, and other collateral benefits).

198. See T. Leigh Anenson & Karen Eilers Lahey, *The Crisis in Corporate America: Private Pension Liability and Proposals for Reform*, 9 U. PA. LAB. & EMP. L. 495, 495–96 (2007) (explaining that Congress took corrective action in the private sector by mandating adequate funding and plan termination insurance after a series of business failures). A few states do mandate minimum funding levels. See KAN. STAT. ANN. § 74–4921(5) (2014); UTAH CODE ANN. § 49–11–301(5) (West 2013); VT. STAT. ANN. tit. 3, § 472a(b) (2013).

199. Depending on the circumstances, lawsuits may arise against the retirement board and/or association for breach of fiduciary duty due to the failure to sue the actuaries for

that trodden by the crowd.”²⁰⁰ Fiduciary integrity in assigning the correct rate of return on plan assets will lead to the financial integrity of government pensions.

The discount rate question may also result in liability when fiduciaries provide advice to plan participants with a choice of plans.²⁰¹ A common reform in many state retirement systems is to allow government employees to choose between plan types.²⁰²

Finally, equitable defenses may limit the liability of fiduciaries. This could occur if an alleged breach of duty results from a decision of the board that has pension plan participants serving on it. The agreement by participant board members may be attributed to all pension plan participants and raise issues of acquiescence and estoppel.²⁰³ In the application of equitable defenses, however, judges have residual discretion to refuse such defenses under the circumstances of the case and the corresponding policies.²⁰⁴

negligence or directly against actuaries for aiding and abetting fiduciary violations by pension managers. *See, e.g.,* Nasrawi v. Buck Consultants L.L.C., 179 Cal. Rptr. 3d 813, 822–23 (Ct. App. 2014).

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

201. *See Hittle v. Santa Barbara Cty. Emps. Ret. Assn.*, 703 P.2d 73, 85 (Cal. 1985) (ruling that county retirement association failed to comply with fiduciary obligation to accurately inform beneficiary of retirement options). *See also* Muir, *Decentralized Enforcement To Combat Financial Wrongdoing in Pensions*, *supra* note 13, at 58–59 (discussing misleading disclosures by fiduciaries to private pension participants). *Cf.* Muir, *The Perversity of ERISA Fiduciary Law*, *supra* note 24, at 404–10 (explaining why there are many opportunities for strategic behavior in the pension benefit administration context).

202. Anenson, Slabaugh & Lahey, *supra* note 6, at 53; Alicia H. Munnell et al., *Why Have Some States Introduced Defined Contribution Plans?*, 3 CTR. FOR RET. RESEARCH AT BOS. C. (Jan. 2008). *See also* Lahey & Anenson, *supra* note 2, at 326–28 (supporting the movement to optional or exclusive defined contribution plans, coupled with an employee education program describing the distinction). Because employees manage their own funds, defined contribution plans are always fully funded. *Id.* at 312. Therefore, the defined contribution plan has an economic advantage for government employers of removing responsibility for underfunded or underperforming fund assets. Anenson, Slabaugh & Lahey, *supra* note 6, at 51–52.

203. *See* Anenson, *Role of Equity*, *supra* note 68, at 51–52 (outlining similarities and differences among equitable defenses); Anenson & Mayer, *supra* note 43, at 980 (explaining acquiescence). *See also* YOUNG ET AL., *supra* note 21, § 7.450, at 550 (examining defensive equities in trust law such as acquiescence). Other equitable defenses may also apply. *See* O’Neal v. Stanislaus Cty. Emps.’ Ret. Ass’n, No. F061439, 2012 WL 1114677 *6 (Cal. Ct. App. Apr. 4, 2012) (“[I]f a beneficiary with knowledge of the trustee’s breach of fiduciary duty does not seek judicial relief, the beneficiary may be guilty of laches, precluding such equitable relief.”).

204. *See* Anenson & Mark, *supra* note 19, at 1500–02; Anenson, *Treating Equity Like Law*, *supra* note 74, at 461. *See also* *Oakland v. Oakland Police and Fire Ret. Sys.*, 169 Cal. Rptr. 3d 51, 83 (Ct. App. 2014) (“[A]s with estoppel laches is not available where it would nullify an important policy adopted for the benefit of the public.” (citing *Feduniak v. Cal. Coastal Comm’n.*, 56 Cal. Rptr. 3d 591 (2007))); *Medina v. Board of Ret., Los Angeles Cty. Emps. Ret. Ass’n*, Cal. Rptr. 3d 634, 637 (Ct. App. 2003) (discussing public policy consideration in the application of estoppel in retirement benefits dispute).

In conclusion, legions of Americans working in the public sector are at risk of losing their pensions.²⁰⁵ Government plans have failed to build and maintain sufficient asset reserves to meet their benefit commitments.²⁰⁶ In California and other states, some blame will attach to those who manage and maintain these funds. Holding fiduciaries charged with protecting plan assets to high standards and individual accountability is an important means of maintaining these important streams of retirement income.²⁰⁷ An equitable perspective suggests that, if anything, the law should aspire to a stronger legal bond between public pension trustees and beneficiaries than exists under extant law. To the extent that high obligations affect fiduciary behavior, such as turning over the in-house management of assets to outside investment managers or deterring board membership by those less financially astute, such changes can only benefit public pension systems.²⁰⁸

205. Anenson, Slabaugh & Lahey, *supra* note 6, at 12 (“[P]rojections estimate that plans in seven states will be insolvent by 2020 and plans in half the states will be broke by 2027.”) (citations omitted).

206. Anenson, Slabaugh & Lahey, *supra* note 6, at 5 (“[S]tate pensions are collectively somewhere between \$700 billion and \$4.6 trillion short of the funding needed to meet their actuarial liabilities.”); *id.* at 48 n.281 (“[D]ata from the Bureau of Labor of Statistics show that public pension obligations account for almost seventeen percent of all public debt in the United States.”); *see generally* Issue Brief: State and Local Government Spending on Public Employee Retirement Systems, NAT’L ASS’N OF STATE RET. ADM’RS 3 (May, 2014) <http://www.teacherpensions.org/sites/default/files/NASRACostsBrief.pdf>.

207. Almost fifty years ago, the Supreme Court of California echoed this sentiment:

In the vast development of pensions in today’s complex society, the numbers of pension funds and pensioners have multiplied, and most employees, upon retirement, now become entitled to pensions earned by years of service. We believe that courts must be vigilant in protecting the rights of the pensioner against powerful and distant administrators; the relationship should be one in which the administrator exercises toward the pensioner a fiduciary duty of good faith and fair dealing.

Symington v. Albany, 485 P.2d 270, 276 (Cal. 1971).

208. *See* discussion *supra* Part III (summarizing governance mechanisms in public pension systems). Regarding a financially astute board, Governor Brown in California issued a pension reform plan in 2011 that included changes to the pension board. Mendel, *supra* note 157. To achieve greater independence and sophistication, he proposed adding two independent, public members with financial expertise to the CalPERS board and to replace the Personnel Board designee with the governor’s Finance director. *Id.* However, the law enacted only requires CalPERS board members to receive twenty-four hours of education every two years. *Id.* The pension consulting industry may need more effective regulation to prevent conflicts of interest or better policing by pension funds themselves. *See* Fitzpatrick, *supra* note 11 (reporting on the call for increased surveillance of the pension consulting industry and noting that seventy-five percent of pension consulting firms registered with the Securities and Exchange Commission act in dual roles as consultants and investment managers).

CONCLUSION

Controversies involving fund management may be the next frontier of public pension litigation.²⁰⁹ With the specter of massive defaults on the horizon, this Article advances the retirement reform debate by looking more closely at the fiduciary relationship that exists between trustees and beneficiaries involving government pension funds. It offers a singular view from historic equity.

The Article aims to see how equity in the medieval world relates to the modern pension problem. From that viewpoint, it evaluates what the fiduciary relation means, or should mean, in the changing legal environment of public retirement systems.²¹⁰ The main objective is to raise issues involving the fiduciary principle that have been undervalued or ignored. The purpose of the discussion is not to offer a simple solution to this complicated problem. Any such resolution would be impossible in light of the distinctive governance mechanisms of public pensions and their divergent legal architecture.

Nevertheless, based upon fiduciary law's ancestry in equity, the Article offers guidance in assigning and defining obligations and associated remedies in the public pension situation. Contemplating the equitable dimension of the public pension problem, it analyzes certain circumstances where fiduciary violations may arise and suggests possible outcomes. It also comments on deficiencies in current law. Overall, the appraisal provides a deeper perspective of the fiduciary principle and corresponding doctrine in the context of government retirement systems.

209. Anenson, Slabaugh & Lahey, *supra* note 6, at 15–34 (surveying constitutional challenges to state pension reform).

210. *Id.* at 11 (“Pension reform has taken center stage in the public policy debate as states struggle to deal with the fallout from the Great Recession.”); *see id.* at 11–14 (analyzing reforms in thirteen states from 2007–2015).

APPENDIX
COMPARISON OF STATE PENSION CODES AND
ERISA FIDUCIARY DUTIES²¹¹

State	Citation	Duty of Loyalty ²¹²	Duty of Care: General Same	Duty of Care: General Close	Duty of Care: General Similar Purpose	Duty of Care: Prudent Investor Rule Same	Duty of Care: Prudent Investor Rule Close	Duty of Care: Prudent Investor Rule Similar Purpose
Alabama	ALA. CODE § 36-26-14(g) (2013) (duty of loyalty) ALA. CODE § 36-36-8 (duty of care)	X		X			X	
Alaska	ALASKA STAT. § 39.35.011 (2012)	X	X				X	
Arizona	ARIZ. REV. STAT. ANN. § 38-712(D) (2014)	X	X				X	
Arkansas	ARK. CODE ANN. § 24-2-207 (2013)	X			X			X
California	CAL. CONST. art. XVI, § 17(a)	X	X			X		
Colorado	COLO. STAT. § 31-31-901(3) (2014) ²¹³	X		X				X
Connecticut	CONN. GEN. STAT. § 5-155a(c) (2013)	X	X			X		
Delaware	DEL. CODE ANN. tit. 29, § 5541 (2014)	X						
Florida	FLA. STAT. § 122.355(2) (2013)	X		X				X
Georgia	GA. CODE ANN. § 47-1-85(a) (2014)	X		X			X	
Hawaii	HAW. REV. STAT. § 88-22.5(a) (1) (2013)	X		X			X	

211. This chart is intended to show the similarities and differences between the statutory fiduciary law of public pensions and private pensions regulated by federal law. It is not a comprehensive account of all fiduciary law in each state. Given Professor Webber's state-wide survey comparing the language and purpose of ERISA's duty of loyalty, see Webber, *supra* note 14, at 2188 (Appendix), this chart adds a detailed account of the duty of care.

212. For a detailed comparison of the duty of loyalty, see Webber, *supra* note 14, at 2188 (Appendix).

213. This provision applies solely to Colorado's fire and police pension fund.

Idaho	IDAHO CODE ANN. § 59-1301(2)(a) (2014)	X	X			X		
Illinois	40 ILL. COMP. STAT. ANN. 5 / 1-109(a) (2014)	X	X			X		
Indiana	IND. CODE ANN. § 5-10-5.5-2.5(b)(2) (2013)	X		X			X	
Iowa	IOWA CODE § 410. 3 (2014)	X		X			X	
Kansas	KAN. STAT. ANN. § 74-4921(1)(2) (2014)	X	X			X		
Kentucky	KY. REV. STAT. ANN. § 61.650(1)(c)(2) (West 2014)	X						
Louisiana	LA. REV. STAT. Ann. § 11:834(B) (2014) (duty of loyalty) La. Rev. Stat. Ann. §§ 11:263, 263 (2014) (duty of care)	X	X			X		
Maine								
Maryland	MD. CODE ANN., STATE PERS. & PENS. § 21-203 (West 2014)	X	X			X		
Massachusetts	MASS. GEN. LAWS ANN. ch. 32 § 23(3) (2014)	X	X			X		
Michigan	MICH. COMP. LAWS ANN. § 38.1133(3) (2014)	X	X			X		
Minnesota	MINN. STAT. ANN. § 356.001 (b) (2014)	X		X			X	
Mississippi								
Missouri	MO. REV. STAT. § 105.688(3)(4) (2014)	X		X		X		
Montana	MONT. CONST. art. 8, § 15(1)	X		X			X	
Nebraska	NEB. REV. STAT. § 72-1239.01(b) (2014)	X	X			X		
Nevada	NEV. REV. STAT. § 287.430(2) (2014) (duty of loyalty) NEV. REV. STAT. ANN. § 287.330 (West 2014) (duty of care)	X	X			X		

New Hampshire	N. H. REV. STAT. ANN. § 100-A:15 (I-a) (a) (2) (3) (5) (6) (2012)	X	X			X		
New Jersey	N. J. STAT. ANN. § 43:15A-5(i)-(l) (West 2014)	X						
New Mexico	N. M. CONST. art. 20, § 22(a)	X	X					X
New York	N. Y. COMP. CODES R. & REGS. tit. 11, § 136-2.3(a) (2014); N.Y. EDUC. LAW § 502(3) (McKinney 2014)	X	X			X		
North Carolina	N. C. GEN. STAT. § 147-69.7(a) (2) (3) (5) (6) (2013)	X	X			X		
North Dakota	N. D. CENT. CODE § 54-52.3-03 (2013)	X			X			X
Ohio	OHIO REV. CODE ANN. § 145.11 (A) (West 2014)	X	X			X		
Oklahoma	OKLA. STAT. ANN. tit. 74, § 909.1(A) (1) (West 2014)	X	X			X		
Oregon	OR. REV. STAT. § 243.435(2) (2013)	X		X			X	
Pennsylvania	71 PA. CONS. STAT. ANN. § 5931(e) (West 2012)	X	X			X		
Rhode Island	R. I. GEN. LAWS § 35-10-6(b) (2011)	X	X			X		
South Carolina	S. C. CODE ANN. § 9-16-40 (Supp. 2013)	X	X			X		
South Dakota	S. D. CODIFIED LAWS § 3-13-51.1 (2013)	X	X					X
Tennessee	TENN. CODE ANN. § 8-36-920(f) (Supp. 2013)	X	X					X
Texas	TEX. GOV'T CODE ANN. § 825.101 (West 2012)	X		X				X
Utah	UTAH CODE ANN. § 49-11-301(3) (West 2013)	X		X			X	
Vermont	VT. STAT. ANN. tit. 3, § 472a(b) (2013)	X	X			X		

Virginia	VA. CODE ANN. § 51.1- 124.30(C) (2013)	X	X			X		
Washington	WASH. REV. CODE ANN. § 41.50.780(4) (West 2014)	X	X				X	
West Virginia	W. VA. CODE § 5- 10B-10(a) (2014)	X	X				X	
Wisconsin	WIS. STAT. § 40.01(2) (2013)	X	X				X	
Wyoming	WYO. STAT. ANN. § 9-3- 439(a)(ii) (2013)	X	X			X		