Tulsa Law Review

Volume 41
Number 3 *Disputed Concepts in Contemporary Business Association Law: Discussion on Fiduciary Duty and Capital Lock-in*

Volume 41 | Number 3

Spring 2006

On Models, Metaphors, Rhetoric, and the Law

Margaret M. Blair

ON MODELS, METAPHORS, RHETORIC, AND THE LAW

Margaret M. Blair*

I. INTRODUCTION

Models, by their nature, are not intended to be complete descriptions of the underlying phenomenon being modeled. A model is an analogy, or a reduced form description of the thing being modeled. The value of a well-specified model for social scientists and other scholars is that it isolates and highlights certain issues, features or relationships that are part of a complex reality so that the scholar can draw inferences, or speculate, about the role being played by those features or about what might happen if those features, or relationships are altered. Used in this way, a model can be highly informative, facilitating decision-making or policy discussions by clearing away or controlling for factors that are believed to be irrelevant to the decision or policy matter under discussion and focusing attention on the most essential factors.

But there are risks in relying on models rather than actual descriptions. One important risk is the possibility that the model will be applied too broadly to aspects of the underlying reality, which the model does not fit, rendering the model inappropriate. A related risk is that a scholar or policy advocate may become seduced by the elegance or charm of a particular model so that he or she begins to believe in it too much, treating it as a literal, fully accurate, and complete description. Models can also be risky if they begin to "carry too much baggage" by symbolizing or standing for more than is warranted.

Three of the articles in this symposium, Larry E. Ribstein's *Should History Lock in Lock-in?*,[1] Larry Catá Backer's *The Autonomous Global Corporation: On the Role of Organizational Law beyond Asset Partitioning and Legal Personality*,[2] and Robert W. Hillman's *Closely-Held Firms and the Common Law of Fiduciary Duty: What Explains the Enduring Qualities of a Punctilio?*[3] build on, criticize, or advocate several different models that are each supposed to illuminate something important about business corporations. In this article, I discuss the ways in which these three authors use several popular models in their articles and I comment on the pedagogical, analytical, and hortatory effectiveness of the models when so used.

* Professor of Law, Vanderbilt University Law School.

1. 41 Tulsa L. Rev. 525 (2006).
2. 41 Tulsa L. Rev. 543 (2006).
3. 41 Tulsa L. Rev. 441 (2006).

II. MODEL AS SYLLOGISM

Backer and Ribstein both appeal to various models in their respective articles in ways that sometimes illuminate, but sometimes introduce confusion. One way that a model can confuse is when it is used as a syllogism: "If A is like B, and B does X, then A should also do X." This logical reasoning may be fine if the way in which A is like B is closely related to the reason that B does X. Otherwise, policy recommendations drawn from such syllogisms can be misleading if the fact that B does X is irrelevant or unconnected to the way in which A is like B.

Consider, for example, the problem of whether a corporation should be thought of as a form of "property" or as an independent entity or juridical "person." Backer notes that this question is an old debate in the legal literature about corporations.[4] On one side, he notes, is a model treating a corporation as just a mechanism for holding property collectively. This model suggests one should think of the corporation itself as a form of property. Its interests are nothing more than the aggregate interests of its "owners."[5] The contemporary form of this model holds that a corporation is a "nexus of contracts" through which the owners hire managers and directors to be their "agents" in carrying out their desires that the property be managed to maximize value for the owners.

On the other side is the idea that a corporation is a juridical "person" separate from those who invest in the corporation, manage it, or control it at any point in time. Under this view, the metaphors Backer uses are that the corporation is a "pallid reflection of the political state"[6] and "an autonomous institutional actor"[7] that might have goals and interests separate from individual investors, employees, or other participants. Backer considers two recent articles that he believes provide fresh insight into the old debate and then attempts a synthesis that, he argues, has some surprising implications for understanding the role of transnational corporations.

The first of these articles is Henry Hansmann and Reinier Kraakman's, *The Essential Role of Organizational Law*.[8] Hansmann and Kraakman come to the question of how to model firms from the "law and economics" perspective popular among legal academics during the last three decades. This school of jurisprudence has generally accepted the nexus of contracts model, viewing corporations as a type of standard-form contract that enables a group of people to hold property collectively. But Hansmann and Kraakman observe that the law that governs economic organizations serves at least one function that would be difficult or impossible to achieve solely through contract law. They call this function "asset partitioning," by which they mean that organizational law helps create a legal separation of assets into those that are available to pay creditors of the business (but not available to pay creditors of investors

4. Backer, *supra* n. 2, at 541–42.

5. *Id.* Note that the term "owners" is also a model or a metaphor when used to describe the role of shareholders in publicly traded corporations. This metaphor assumes the "property" or "juridical person" debate has been resolved in favor of the property model.

6. *Id.* at 542.

7. *Id.*

8. 110 Yale L.J. 387 (2000).

in the business), and those that are only available to pay creditors of investors in the business (but not available to pay creditors of the business).[9]

If one starts from a nexus of contracts model of firms, the asset partitioning function is not at all intuitive. So the contribution of Hansmann and Kraakman is significant because it helps explain certain well-known features of organizational law that are otherwise hard to explain within a nexus of contracts model. Indeed, Hansmann and Kraakman conclude that organizational law provides something more than contracts can provide and should perhaps be regarded as part of property law, rather than part of contract law.[10]

One might ask why Hansmann and Kraakman feel it is necessary to stay within the nexus of contracts framework when explaining what the law of corporations and other business firms accomplishes. The central idea of asset partitioning is more naturally understood if one begins with a view of firms as separate legal entities or juridical persons.[11] From this point of view, the firm is a separate entity from any of its investors, and the firm's assets are, therefore, separate from the assets of those investors. If one accepts the separate entity model as valid, then it goes almost without saying that the firm is responsible for its own debts—that is, the assets of the firm should be available to pay creditors of the firm, and creditors should not be able to seize assets of the individual investors to satisfy firm debts. Conversely, individual investors should be responsible for paying their own debts with their assets—but not the assets of the firm available by law to pay their creditors.

The debate over whether a corporation should be understood as an aggregate of the interests of its investors or as a separate entity is long, somewhat arcane, and will not be resolved by anything that I say here. Nonetheless, it seems to me that law and economics scholars impart a false sense of rigor into their work by making a fetish of the notion that corporations are nothing more than contracts. Nexus of contracts is a useful metaphor when one wants to highlight the terms of the relationships among some or all of the participants in a business enterprise. It emphasizes that the relationships are voluntary in nature, for example, and suggests an argument for why organizational law should be completely enabling, permitting participants to structure their relationships any way they desire without restriction by the state. The metaphor is also useful for making the point that at least some of the relationships involve some actors acting on behalf of other actors, which can lead to discussion of the well-known agency problems that have so dominated corporate law discourse in recent years.

But the nexus of contracts model stops adding value to the discussion when this metaphor is applied too broadly. I see no reason why one cannot simply say that the law treats a corporation as if it were a separate juridical person for purposes of holding property, entering into contracts, suing, or being sued. We can then discuss why the law

---

9. *Id.* at 390.

10. *Id.* at 440 ("At its essential core, organizational law is property law, not contract law.").

11. This is actually close to what Hansmann and Kraakman do in their article. Although they use the language of contract throughout the article, they also refer to various legal entities created by organizational law, asking what organizational law accomplishes that could not be accomplished by contract. In fact, they state early in the article that "organizational law is much more important as property law than as contract law." *Id.* at 390.

works this way, or whether it ought to work a different way. But the legal entity or juridical person metaphor illuminates much more clearly how the law works with respect to these tasks than the nexus of contracts metaphor does.

Ribstein's article suggests one of the reasons why some legal scholars have been so obsessively committed to employing the nexus of contracts model of corporations rather than the entity or juridical person model. This is the idea that private individuals can create contracts, but only the state can create a juridical person. He says:

> [I]n this country, creation of a corporation historically required state intervention and, therefore, could be considered a sort of concession of state power. Thus, any argument that the corporate form was necessary to enable the modern firm implicitly supports the significant role of the state that necessarily accompanies the corporate form. Conversely, relying more on the contractual partnership form might diminish the state's role in regulating business associations.[12]

In other words, Ribstein is concerned less about the descriptive accuracy or analytical fit of the choice of models used to describe or understand property-holding aspects of corporate law than he is about what each metaphor might evoke when applied to a *different* question, the question of whether corporations should be subjected to substantial regulation by the state or be allowed to evolve or be used by private parties in structuring their relationships as they please. The latter are questions worth debating, but imposing an otherwise inapt model on a problem because it suggests a preferred answer to a different problem is a rhetorical device that can confuse rather than enlighten.

III. MODEL AS METAPHOR TAKEN TOO LITERALLY

Another risk that arises when social scientists use models for analysis is that of taking the model too literally, as if it were an accurate description of the underlying reality. For example, both Backer and Ribstein use the terms "owner" or "owners" to refer to the shareholders of publicly traded corporations. Throughout his discussion of the Hansmann and Kraakman article, Backer refers repeatedly to "creditors and owners"[13] as the two classes of capital providers to firms. Hansmann and Kraakman, in turn, note,

> we generally use the simple term "owners," rather loosely, to refer to all of these persons [i.e., the firm's beneficial owners or beneficiaries]: the partners in a general partnership, the shareholders of a business corporation, and the members of a cooperative, as well as the limited partners in a limited partnership, the beneficial owners of a private trust, the beneficiaries of a nonprofit corporation, and the residents of a municipal corporation.[14]

Similarly, Ribstein notes, "[t]he corporation does not allow owners, at least by default, to cash out their interests"[15] and later that "[e]mpowering owners to cash out of or dissolve

12. Ribstein, *supra* n. 1, at 524–25 (footnote omitted).
13. *See e.g.* Backer, *supra* n. 2, at 547.
14. Hansmann & Kraakman, *supra* n. 8, at 392.
15. Ribstein, *supra* n. 1, at 523.

the firm can effectively complement or replace [standard mechanisms of controlling agents]."[16]

In these examples we find, as in a great deal of corporate law scholarship, that the authors use the term "owners" as if it were a descriptive, factual characterization of the role played by shareholders rather than a model that captures (poorly at best, I believe) some features of the relationship between shareholders and firms. Hansmann and Kraakman are at least self-conscious about their use of the term; however, in their list of parties to which they are applying the term, the "beneficiaries of a nonprofit corporation" and "residents of a municipal corporation" stretches the concept of what it means to own something far enough to begin to suggest why using this metaphor can be misleading if taken too literally.[17]

Ownership is defined as "the collection of rights allowing one to use and enjoy property, including the right to convey it to others."[18] The definition continues: "Ownership implies the right to possess a thing, regardless of any actual or constructive control."[19] Shareholders do not have legal possession of property held by the corporation, nor the right to use or convey property held by a corporation, nor the right to pledge the corporation's assets as collateral for a loan to a shareholder. This is a central point of Hansmann and Kraakman's article and of my article on capital "lock-in"[20] discussed at length in Ribstein's article. Shareholders in widely traded firms own their shares, but they do not, in any ordinary sense of the term, own the corporation itself. Ribstein concedes that separating the investors from direct ownership of the firm's assets is an important corporate feature. Yet corporate law scholars—especially those of the law and economics school—repeatedly appeal to the metaphor of shareholders as owners without qualifying the word, being careful about how it is used, or even acknowledging the discrepancies introduced by the use of this model.

For many purposes, the misfit of the owner metaphor is not a problem. But it becomes problematic when scholars and other commentators draw conclusions about how control rights should be allocated in a corporation based on the claim that one group of participants in the enterprise are owners, while the others are mere contract claimants.[21] To see how the ownership metaphor misleads in this case, ask the reverse question: What is it about the role played by shareholders in a publicly traded corporation that makes ownership a useful model? The circular-logic answer is that it is

16. *Id.* at 530.

17. Hansmann & Kraakman, *supra* n. 8, at 392.

18. *A Handbook of Business Law Terms* 436 (Bryan A. Garner ed., West 1999).

19. *Id.*

20. Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. Rev. 387 (2003).

21. One of the classic articles in the agency cost literature on corporate governance, for example, simply assumes that shareholders are the "owners" of corporations. It then asserts that "the relationship between the stockholders and managers of a corporation fit the definition of a pure agency relationship" in which the central problem is how shareholders get managers to do what is in the shareholders' best interests, and then proceeds to explore how contractual relationships between owners and top management are designed to that end. Michael C. Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 387 (1976).

reasonable to regard shareholders as owners because they have control rights through their right to vote for directors.[22]

IV. MODEL WITH TOO MUCH BAGGAGE

Another risk in using models to analyze complex realities is the possibility that over time a model may come to carry too much baggage by symbolizing whole schools of thought rather than just the small clusters of insights it was originally meant to provide. For example, a great many of the scholars and analysts who have adopted the nexus of contracts model of corporations have also adopted the view that the job of corporate officers and directors is to maximize share value even though there is nothing about the nexus of contracts idea per se that would necessarily lead to that conclusion. Nonetheless, the phrase "nexus of contracts" has come to carry all the "baggage" associated with shareholder primacy.

In this collection of articles, Ribstein concedes that the characteristic of corporations that I refer to as capital lock-in (which is very similar to the concept that Hansmann and Kraakman call "affirmative asset partitioning"[23]) is a crucial feature of organizational law that made it easier for business organizers to form "reliable and sustainable business entit[ies]."[24] His objection to the analysis of the concept and interpretation of the historical events in the evolution of corporate law in my prior work is, instead, the claim I have made that lock-in could not be effectively achieved with partnership law in the nineteenth century, hence requiring corporate law.[25]

This strikes me as an interesting and fair historical question, and I readily concede that I had less in the way of historical evidence about whether lock-in could be achieved with partnership law than I would have liked to have had to seal the case. Ribstein's challenge raises a question that Paul Mahoney has previously asked[26] and that Hansmann and Kraakman have addressed in their work with Richard Squire:[27] Is there any compelling reason why some form of state intervention, such as the granting of a

22. Frank Easterbrook and Daniel Fischel provide a slightly more sophisticated answer, which is that shareholders have the residual claim rights in corporations. Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 114 (Harv. U. Press 1991). But this is only true in an accounting sense—a snapshot at a point in time—and possibly in the case of a bankruptcy or liquidation. As long as the firm is a going concern, directors may allocate surpluses (or losses) generated by the firm to any corporate constituent. Managers may get bonuses and fancier offices; employees may get better health care benefits (or benefit cuts when the firm is under financial pressure); the local opera company may get a donation; or the firm may retain the surpluses and reinvest them, which may or may not result in equivalent additional value for the shareholders. *See* Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, 31 J. Corp. L. 719, 739 (2006).

23. Hansmann & Kraakman, *supra* n. 8, at 393.

24. Ribstein, *supra* n. 1, at 523, 524 ("Blair is wrong, not in concluding that corporate *features* were important, but in suggesting that the creation of the modern *corporate form* was necessary for the development of modern business." (emphasis in original)).

25. *Id.* at 524 ("[E]ven if the corporation offered stronger default entity features than partnership, this still does not demonstrate the need for the corporate form. Partnership law was already developing continuity and other entity features by the early nineteenth century.").

26. *See* Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 Ga. L. Rev. 873 (2000).

27. Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1333 (2006).

corporate charter, is required for business organizers to create and utilize a separate legal entity to hold property?

Mahoney argues that there is not,[28] and Ribstein similarly argues that partnership law was evolving in the direction of making it possible for partners to form an entity that provided for effective capital lock-in without a corporate charter.[29] When I wrote the articles that developed the capital lock-in concept,[30] it appeared to me that the main legal barrier to that was the problem of succession and claims of heirs because by law a partnership is dissolved upon the death or withdrawal of any partner. Moreover, it appeared to me from the thin case evidence I found that courts probably applied this principle to so-called "joint stock companies" as well as to standard general partnerships in the nineteenth century. The only case law I found on point came from British cases, but, based on other circumstantial evidence I came to a conclusion—a speculation would perhaps be a better term—that courts in the nineteenth century just did not seem to understand what business people were trying to achieve by way of a property-holding entity when they formed joint stock companies and that courts, therefore, tended to treat these creatures as variants on partnership. At least they did so for purposes of applying the general rules that a partner could withdraw from the partnership at any time, thereby forcing dissolution of the firm, and that the partnership was automatically dissolved if a partner died.

By contrast, courts did understand what it meant when the state granted a corporate charter to a group of business people, perhaps because state-issued charters had been used for centuries to create property-holding entities such as churches, charitable institutions, and municipalities. Hence, if the business people wanted the benefits of a separate entity, they were more certain of getting what they wanted if they sought and obtained a corporate charter from the state than if they tried to accomplish the same thing by using a variant of partnership law or of trust law.

Ribstein's sense of urgency about proving me wrong, however, is largely unrelated to the property-holding question at issue here. Instead, as discussed above, his primary concern is to show that the property question—the issue I call capital lock-in—can be achieved contractually and without concession from the state. Ribstein may be surprised to find that I have no dog in that race. In fact, I regard the capital lock-in explanation for certain features of corporate law as very "contractarian" in spirit, because it suggests a reason why the organizers of the business might, on their own initiative and for their own long-term best interests, prefer an arrangement that gives ownership rights over the assets used in the business to the separate entity and gives control rights over the entity to a trusted group of outsiders—the board of directors. The same applies to the work I have done jointly on a "mediating hierarchy" and "team production" model of corporate law.[31]

---

28. Mahoney, *supra* n. 26.

29. Ribstein, *supra* n. 1.

30. Margaret M. Blair, *The Neglected Benefits of the Corporate Form: Entity Status and the Separation of Asset Ownership from Control*, in *Corporate Governance and Firm Organization: Microfoundations and Structural Forms* 45–66 (Anna Grandori ed., Oxford U. Press 2004); Margaret M. Blair, *Reforming Corporate Governance: What History Can Teach Us*, 1 Berkeley Bus. L.J. 1 (2004); Blair, *supra* n. 20.

31. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 Va. L.

Whether the characteristic we now associate with the corporate form could have been achieved through partnership is an interesting, but in my view minor, point. The more salient point is that business organizers apparently wanted the advantages of entity status, capital lock-in, and of decision making by boards of directors. Sure these advantages came with costs. But we have substantial evidence that business people in the nineteenth century perceived the advantages to more than outweigh the costs. What is this evidence? It is the revealed preferences of thousands upon thousands of business organizers who, over the course of the nineteenth century, battered down the doors of state legislatures seeking to be granted corporate charters even though those charters were obviously more costly to get initially than the cost of forming some form of partnership.[32]

V. MODEL AS SYNTHESIS OF OTHER MODELS

The other contemporary article that Backer discusses is by Katsuhito Iwai.[33] According to Backer, Iwai believes that it is useful to understand corporations as both a form of property and as juridical persons that can own property.[34] Because he subscribes to the juridical person view, Iwai considers it obvious that a corporation's assets are separate from the assets of investors. But because he also considers corporations to be a form of property, he is open to the paradoxical idea that a corporation could, in theory, buy up its own shares, and, in effect, own itself. Backer believes that this possibility, even if only hypothetical, is more consistent with an entity model of the firm and, when combined with an asset partitioning analysis, suggests that corporations can in fact be quite autonomous, both from their creditors and from their shareholders.

This synthesis, I would add, further illustrates the problem with casually referring to shareholders as "owners." Why is it necessary to identify one set of claimants as owners instead of simply categorizing claimants by the type and priority of their claims? What value does it add to any analysis about who does or should have what claims and what control rights? If some entities can "own" themselves, the term "owner" is not a very useful construct when talking about corporations. Similarly, other entities—such as non-profit institutions including universities—clearly have no claimant that remotely resembles an "owner." Who, for example, do Hansmann and Kraakman think are the beneficiaries of non-profit institutions such as their home institutions, Yale and Harvard University, respectively?

Rev. 247, 254 n. 17 (1999) ("We locate the mediating hierarchy model of the public corporation within the nexus of contracts tradition because in the model, team members voluntarily choose to submit themselves to the hierarchy as an efficient arrangement that furthers their own interests.").

32. Partnerships could be formed by simple agreement among the partners. Throughout most of the nineteenth century, to form a corporation business people had to lobby their delegation to the state legislature to convince the lawmakers to pass special acts granting charters to the organizers. Blair, *supra* n. 20, at 65, 138–41.

33. Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 Am. J. Comp. L. 583 (1999).

34. Backer, *supra* n. 2, at 554 (citing Iwai, *supra* n. 33).

Backer is, however, interested in a different problem. He points out that, whether one regards corporations as juridical persons—holding property separately from the individuals who invest in the corporation—or as special contractual solutions to holding property, the segregation of property can only be effective if the corporation is embedded within a political state that can enforce both the property rights of the corporation and those of investors.[35] This requirement implies two characteristics of the legal environment within which a corporation operates. The first is the principle of "territoriality," by which jurisdiction over the regulation of rights, including property rights, is divided among nation-states according to geographical boundaries.[36] The second is the principle of "hierarchy of regulatory authorities," by which the corporation's ability to control the property it holds is subject to higher level regulation through laws of the nation-state within which the corporation is embedded.[37]

This raises the question of how we should understand corporations that are not embedded within a single legal jurisdiction. When corporations have operations and property and employees in many countries—as a growing number of transnational corporations do—and when they can form subsidiary entities in each nation-state and move property from one place to another to keep it out of the reach of any one state, then, Backer observes, corporations may have substantial if not total autonomy from the state. Backer refers to this as "enterprise autonomy."[38] Thus, Backer employs the firm-as-entity model in a way that illuminates a particular issue of concern, which is the question of whether and how such an entity can be held accountable for actions taken by its agents, whether on its behalf or against its interests.

VI. MODEL AS DESCRIPTIVE FRAMEWORK

Finally, we find a very benign and uncontroversial use of models in Hillman's article,[39] which makes a simple empirical claim about the evolution of law with respect to the fiduciary duties of partners and controlling shareholders in closely-held firms. His use of models is largely implicit and designed simply to provide a framework within which to interpret certain empirical facts.

A substantial part of Hillman's extensive prior writings on partnership law suggests that he generally thinks of partnerships as a special type of contractual relationship and that he is sympathetic to the idea that a firm (especially a firm organized as a partnership) is appropriately modeled as a nexus of contracts. In his article in this symposium, Hillman questions whether the moral and ethical duties that partners in a partnership owe each other should be specified externally by the law as fiduciary duties or whether they should be a matter determined by the terms of the explicit contract between the partners. For this question, the nexus of contracts model of firms is relevant and useful—it "describes" the relationships in question in terms that are relevant to the particular question being studied. In particular, the model focuses attention on the nature

35. *See* Backer, *supra* n. 2.
36. *Id.*
37. *Id.*
38. *Id.*
39. Hillman, *supra* n. 3.

and terms of the contractual relationships that partners enter into when they form a partnership. The only problem that could come from employing this model is assuming that labeling the relationship among business partners as "contractual" automatically implies that fiduciary duties are contractible.

Hillman does not do this. Instead, he brings empirical data to the question and uses the contracting model as simply a framework within which to interpret his data. If the relationship is purely contractual, then one might naturally assume that partners should be able to contract over the content of the duties partners owe each other. Alternatively, if a firm is something more than, or different from, a simple contractual switchboard through which various participants are connected to each other, then one might be more inclined to think that it is appropriate for externally provided law to impose some duties and conditions on the participants.

Hillman's article also employs a different implicit model to delineate how "law" gets made. Law is made through legislation or through litigation.[40] Hillman observes that legislatively-provided partnership law was largely unchanged for most of the twentieth century—for example, the Uniform Partnership Act[41] was approved in 1914 and unchanged until 1992—during which time the law of fiduciary duties of business partners to each other evolved through judicial opinions. Since the Revised Uniform Partnership Act was approved in 1992, however, legislative law has been revised already at least four times.[42] Despite this legislative activism with respect to defining some of the terms on which partners or associates in a closely-held firm relate to each other, Hillman notes the judicially developed standards of conduct for partners or co-participants in a business do not appear to have declined in importance as one might expect. As evidence, he presents data showing that the number of citations in legal opinions to *Meinhard v. Salmon*,[43] one of the classic cases defining fiduciary duties, has grown over time and continues to grow into the twenty-first century.[44]

VII. CONCLUSION

It is almost inevitable that legal scholars and social scientists will use models in their analyses. Models can provide a familiar framework through which to look at unfamiliar facts. They can help to isolate what questions are being asked and what the relevant factors are for those questions. Using models generally requires the scholar to make assumptions in order to control for factors that are not relevant or less relevant to the question under consideration. This can be an aid to understanding, but it can also lead to confusion and misunderstanding if the scholar is not careful to articulate what assumptions were made and the underlying reasons.

---

40. *Id.* at 441 ("Increasingly, the law of business associations is developed through legislation rather than litigation.").

41. 6 U.L.A. 275 (2001).

42. Hillman, *supra* n. 3, at 441–42.

43. 164 N.E. 545 (N.Y. 1928).

44. Hillman does not provide data on how many of these citations were to cases involving partnerships or to cases involving corporations. *See* Hillman, *supra* n. 3.