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SYMPOSIUM: Fiduciary Duties in the Closely Held Business 35 Years After Wilkes v. Springside Nursing Home: Foreword

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**SYMPOSIUM:
FIDUCIARY DUTIES IN THE
CLOSELY HELD FIRM 35 YEARS
AFTER *WILKES V. SPRINGSIDE
NURSING HOME***

FOREWORD

RENÉ REICH-GRAEFE*

On October 15, 2010—exactly fifty-nine years to the day after the opening of the original nursing home operation in 1951¹ which formed the core business asset of the closely held *Springside Nursing Home, Inc.* corporation—the Western New England College School of Law and School of Business² jointly hosted their 2010

* Associate Professor of Law, Western New England University School of Law. LL.B., Free University of Berlin School of Law, 1996. LL.M., University of Connecticut School of Law, 1997. I am indebted to Eric Gouvin—Professor of Law and Director of the Law and Business Center for Advancing Entrepreneurship at the Western New England College School of Law and, as always, the organizational force behind the Symposium—for giving me the opportunity to write this Foreword. I have also received helpful comments and support from Barbara Noah for which I am grateful. All errors are mine.

1. See Eric J. Gouvin, *Wilkes v. Springside Nursing Home, Inc.: The Backstory*, 33 W. NEW ENG. L. REV. 269, (2011).

2. Western New England University School of Law is the only Massachusetts law school located outside the Greater Boston area which is fully accredited by the American Bar Association and the Association of American Law Schools. The School of Business at Western New England College is one of three business schools in Massachusetts outside the Greater Boston area to be accredited by the Association to Advance Collegiate Schools of Business.

Academic Conference on “Fiduciary Duties in the Closely Held Business 35 Years after *Wilkes v. Springside Nursing Home*.” As with installments from prior years, the Conference was sponsored by the Western New England College Law and Business Center for Advancing Entrepreneurship.³ This Issue of the *Western New England Law Review* documents the papers which were presented at the Symposium.

I. WILKES’S ANNIVERSARY CELEBRATED

Wilkes v. Springside Nursing Home, Inc. was handed down by the Massachusetts Supreme Judicial Court on August 20, 1976.⁴ Its enduring legacy and continuing appeal (as well as that of its pioneering precursor, *Donahue v. Rodd Electrottype Co. of New England, Inc.*, decided by the same court on May 2, 1975)⁵ comes as no surprise—at least, to us who are blessed with the benefit of hindsight. The decision simply had all of the right ingredients for purposes of jurisprudential longevity.⁶

For one thing, *Donahue* and *Wilkes* both straddled (and valiantly zeroed in on) the most evasive fault line which our American law of business organizations has attempted to draw for the better part of the last one hundred years.⁷ Looked at *in tandem*, the deci-

3. The Western New England College Law and Business Center for Advancing Entrepreneurship offers students real-world, hands-on opportunities to apply, expand, and refine their knowledge and skills in entrepreneurship and business development. The Law and Business Center’s overall goal is to educate legal and business professionals, and its two main operational objectives are (i) to provide legal and business counseling for entrepreneurs; and (ii) to sponsor local educational events focused on entrepreneurship and economic development. The flagship program of the Law and Business Center is the Small Business Clinic which has been in operation for more than seven years and has provided legal and business advice to over 150 businesses during such time. In addition to its annual academic conference, the Law and Business Center also hosts a series of workshops on entrepreneurship topics as well as a speaker series where nationally recognized guest lecturers with expertise in entrepreneurship, small business, and economic development present on current issues.

4. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976).

5. *Donahue v. Rodd Electrottype Co. of New England, Inc.*, 328 N.E.2d 505 (Mass. 1975). In this Issue, *Donahue v. Rodd Electrottype Co. of New England, Inc.* will hereinafter be cited as *Donahue v. Rodd Electrottype Co.*

6. Cf. Robert B. Thompson, *Allocating the Roles for Contracts and Judges in the Closely Held Firm*, 33 W. NEW ENG. L. REV. 369 n.1 (2011) and accompanying text.

7. See *Meinhard v. Salmon*, 164 N.E. 545, 546, 548 (N.Y. 1928) (Cardozo, C.J.) (“Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the *finest loyalty*. . . . Not honesty alone, but the *punctilio of an honor the most sensitive*, is then the standard of behavior. . . . Salmon had put himself in a position in which *thought of self was to be renounced*, however hard the abnegation. . . . For him and for those like him the rule of *undivided loyalty* is relentless and *supreme*.”

sions gave immediate and sustained momentum to our intellectual inquiry and debate about the context, reach, alignment, and proper application of fiduciary duties within the law of closely held firms⁸—and, thus, arguably helped to fill Bayless Manning’s “towering skyscrapers of rusted girders, internally welded together and containing nothing but wind”⁹ in an instant.

In addition, *Wilkes* also continued *and* succeeded where *Donahue* left off in danger of becoming conceptually stuck.¹⁰ It confined the abstract normative and, perhaps, even poetic beauty of a broad, overarching fiduciary duty among co-shareholders of a closely held corporation, grounded in concepts of loyalty and equality as pre-

(emphasis added) (internal quotation omitted)); cf. Robert B. Thompson, *The Story of Meinhard v. Salmon: Fiduciary Duty’s Punctilio*, in CORPORATE LAW STORIES 105, 105 (J. Mark Ramseyer ed., 2009) (stating that *Meinhard v. Salmon* “after eight decades still defines our thinking about fiduciary duty, the most important issue in the law of business associations”). But see UNIF. P’SHIP ACT § 404(b) (1997), 6 U.L.A. 143 (2001) (“A partner’s duty of loyalty to the partnership and the other partners is limited to the following” (emphasis added)); UNIF. P’SHIP ACT § 404(e), 6 U.L.A. 143 (“A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner’s conduct furthers the partner’s own interest.” (alteration in original)).

8. Cf. Douglas K. Moll, *Of Donahue and Fiduciary Duty: Much Ado About . . . ?*, 33 W. NEW ENG. L. REV. 471 (2011) (“[I]t is beyond debate that *Donahue* helped to spark an evolution in the law of fiduciary duty in closely held corporations”); Larry E. Ribstein, *Close Corporation Remedies and the Evolution of the Closely Held Firm*, 33 W. NEW ENG. L. REV. 536 (2011) (“The most significant changes in the law of business associations over the last thirty years relate to small firms.”).

9. Bayless Manning, *The Shareholder’s Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962) (famously conveying his sentiment of listlessness by stating that “corporat[e] law, as a field of intellectual effort, is dead in the United States” and equating “our great empty corporation statutes” to the metaphor above); see Ronald J. Gilson & Reinier Kraakman, *Clark’s Treatise on Corporate Law: Filling Manning’s Empty Towers*, 31 J. CORP. L. 599, 599 (2006); see also Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 1 (2006) (stating that corporate law scholarship was “[v]irtually nontheoretical until the mid-1970s”); Charles R.T. O’Kelley, *The Entrepreneur and the Theory of the Modern Corporation*, 31 J. CORP. L. 753, 763 (2006) (stating that after the Berle-Means era, “corporation law scholarship, if not ‘dead,’ was certainly viewed as an intellectual backwater”); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 923 (1984) (finding that “[u]ntil recently, corporate law has been an uninspiring field for research even to some of its most astute students”).

10. Cf. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976) (“[W]e are concerned that untempered application of the strict good faith standard enunciated in *Donahue* to cases such as the one before us will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned.”).

scribed by *Donahue*,¹¹ and distilled such abstract beauty into a concrete, yet flexible, tripartite balancing test¹² which—with its relative ease of application for entrepreneurs, attorneys and judges alike—provided much needed pre-investment predictability for the resolution of post-investment majority-minority agency conflicts among the closely held firm’s owners.¹³ In doing so, *Wilkes v. Springside Nursing Home, Inc.* developed—for the first time—an immensely practicable analytical framework and solution to the long neglected problem of intershareholder opportunism in the law of the closely held corporation. In other words, *Wilkes* succeeded in imparting much needed fresh air¹⁴ into the stale, circular, abstract, and often

11. *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 515, 518 (Mass. 1975) (“Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same *fiduciary duty* in the operation of the enterprise that partners owe to one another. . . . When the corporation reacquiring its own stock is a close corporation, the purchase is subject to the additional requirement, in the light of our holding in this opinion, that the stockholders, who, as directors or controlling stockholders, caused the corporation to enter into the stock purchase agreement, must have acted with the *utmost good faith and loyalty* to the other stockholders. To meet this test, if the stockholder whose shares were purchased was a member of the controlling group, the controlling stockholders must cause the corporation to offer each stockholder an *equal opportunity* to sell a ratable number of his shares to the corporation at an identical price.” (emphasis added) (internal footnotes omitted)); cf. *Meinhard*, 164 N.E. at 547 (“The very fact that Salmon was in control with exclusive powers of direction charged him the more obviously with the duty of disclosure, since only through disclosure could opportunity be *equalized*. . . . *Loyalty* and comradeship are not so easily abjured.” (emphasis added)).

12. *Wilkes*, 353 N.E.2d at 663-64 (“It is an inescapable conclusion from all the evidence that the action of the majority stockholders here was a designed ‘freeze out’ . . . It must be asked whether the controlling group can demonstrate a legitimate business purpose for its action. . . . When an asserted business purpose for their action is advanced by the majority, however, we think it is open to minority stockholders to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority’s interest.”). One can add a fourth part to the balancing test where the “court[] must weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative.” *Id.* at 663; see, e.g., Lyman Johnson, *Enduring Equity in the Close Corporation*, 33 W. NEW ENG. L. REV. 313 (2011) (“*Wilkes* sought to cabin the broad duty laid out in *Donahue* . . . through a structured four-step framework.”).

13. Cf. Deborah A. DeMott, *Investing in Work: Wilkes as an Employment Law Case*, 33 W. NEW ENG. L. REV. 497 (2011) (describing how the doctrine of employment at-will as a default may be particularly prevalent as a standard fallback for employment of the founder-shareholders in the closely held corporation and, thus, may be an “especially sticky” default, “because putting an alternative on the agenda for discussion requires imagining how one’s co-founders may discover and indulge their dark sides at some indeterminate time in the future”).

14. Cf. Hein Kötz, *The Role of the Judge in the Court-Room: The Common Law and Civil Law Compared*, 1987 J. S. AFR. L. 35, 42 (describing how lawyers from Euro-

cryptic jurisprudential principle that managing business co-owners—in their individual relationships vis-à-vis each other as well as vis-à-vis the business as a whole—were to be held to nothing less than “the punctilio of an honor the most sensitive.”¹⁵

As each of the following nine articles in this Issue addresses in greater and more elegant detail, *Wilkes v. Springside Nursing Home, Inc.* is all about defining the fundamental, yet, evasive fault line of corporate law—namely, the line (however gray and diffuse it may be) that distinguishes between legitimate and non-legitimate forms of personal greed and self-interest (or, more euphemistically, of wealth maximization) as well as between legitimate and non-legitimate (ab)uses of intra-firm power (or, again, more euphemistically, of corporate control and governance). For Justice Cardozo, there never was a fault line to begin with. Joint entrepreneurial activity was typified by a sanctity of the common interest (or of joint greed) underlying the business venture.¹⁶ No singular personal interest could be permitted by the law to control unless it was congruent with (or, at least, complementary to) the overriding common interest and objective.¹⁷ From Cardozo’s perspective, the actuation of personal interests equated with selfish and, thus, disloyal behavior *per se*. Only behavior in the furtherance of the common interest satisfied loyalty. Figure 1 describes such perspective schematically.

The problem with this bright-line, black-and-white-only approach of a fiduciary duty of *absolute* loyalty¹⁸ is, of course, that it is inherently circular in a multi-principal business. There is no *a priori* common interest—a *summum bonum* which the law could

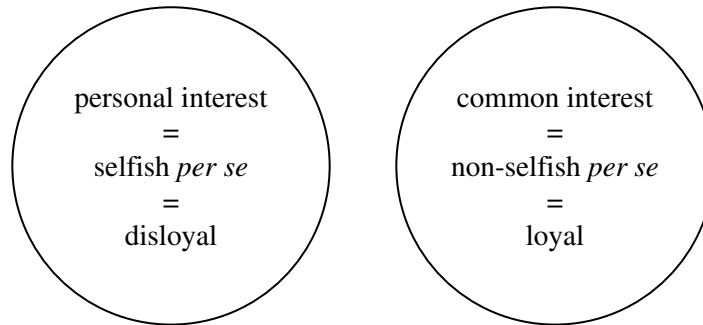
pean Continental legal systems often “feel[] like being submerged in an oxygen bath” when reading certain judicial opinions by common law judges).

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

16. A sanctity which to Justice Cardozo even appears tantamount to the vows of marriage. *See id.* at 546 (“For each [of *Meinhard* and *Salmon*] the venture had its phases of fair weather and of foul. The two were in it jointly, *for better or for worse.*” (emphasis added)).

17. *Id.* at 548 (“Equity refuses to confine within the bounds of classified transactions its precept of a loyalty that is undivided and unselfish. . . . [T]he rule of undivided loyalty is relentless and supreme.”).

18. Similar superlatives are regularly used when courts hold that closely held firm participants owe each other *finest* loyalty and *utmost* good faith. Note that “utmost” could even be called a “super-superlative.” *See id.* at 546 (“finest loyalty”); *id.* at 551 (utmost good faith); *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 518 (Mass. 1975) (“utmost good faith and loyalty”); *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976) (same). Apparently, regular “run-of-the-mill” loyalty and good faith (whatever they may be) are not good enough.

FIGURE 1: LOYALTY *A LA MEINHARD*

easily recognize under any and all circumstances. Any “common good”—however defined—is always subject to, and *solely* the result of, a majoritarian preference at any given particular point in time. And such majoritarian preference may turn out to be exactly the opportunistic position or action taken by the majority¹⁹ in a closely held firm—as long as it is sufficiently clothed in legitimacy (or is, in other words, deemed “loyal”). Even the very same people may have different opinions at different times under different circumstances as to whether their identical behavior will either constitute “loyal” or “disloyal” conduct.²⁰ Thus, loyalty—the lodestar of proper investor behavior in closely held firms—turns out to be ineluctably *relative*. Its guidance starts to vary. And when a lodestar

19. The term “majority” as used herein is not only limited to (static, i.e., numerical) majority ownership of the business entity in question (and the majoritarian control rights usually, but not always, flowing from such majority ownership) but also includes all other exercises of majoritarian control which stem from (dynamic) de facto control mechanisms. Thus, for example, a shareholder owning only a minority of a closely held corporation’s outstanding stock can still be a de facto, ad-hoc “majority” under certain scenarios through the exercise of contractually secured veto rights, through a strong familial relationship over other shareholders, etc. *See, e.g.,* *Smith v. Atlantic Properties, Inc.*, 422 N.E.2d 798, 801-02 (Mass. App. Ct. 1981) (“[C]ases may arise in which, in a close corporation, majority stockholders may ask protection from a minority stockholder . . . [, where the control given to the minority shareholder through a de facto control mechanism] may have substantially the effect of reversing the usual roles of the majority and the minority shareholders . . . [, and where the] minority . . . becomes an ad hoc controlling interest.”).

20. Such broad statement can be supported anecdotally by reminding ourselves that Walter J. Salmon, the very losing party before the New York Court of Appeals in *Meinhard v. Salmon*, felt so grateful in the economically challenging years following the decision (which forced him to continue his venture with Meinhard but also gave him continued access to Meinhard’s capital) that he sent Justice Cardozo a bouquet of flowers on each anniversary of the opinion. *See, e.g.,* Nicholas L. Georgakopoulos, *Meinhard v. Salmon and the Economics of Honor*, 1 COLUM. BUS. L. REV. 137, 144 n.11 (1999). In other words, greed “opportunizes” man.

rises in different positions of the sky night after night,²¹ it eventually becomes just another star (with any of its former guidance now fully dissipated). Likewise, loyalty's overall behavior-guiding value for resolving agency conflicts in the closely held firm—as a mere abstract, normative concept not solidly linked to a descriptive “operating manual”—is severely diminished and often non-existent. However, in 1976, *Wilkes* finally managed to link loyalty to such a solid operating manual.

It may be argued, today, that the law of business organizations recognizes that greed is a universal human condition and that certain exercises of selfishness are not only rightful, they are beneficial to both the individuals exercising selfishness as well as to society as a whole. Or to state it differently: certain instances of selfishness transcend into the common good. The interest of the part and the interest of the whole cannot be entirely divorced from each other. Cardozo's opinion for the majority in *Meinhard v. Salmon* simply could not (or did not want to) embrace such an *a priori* unsettled state of relativity between the interest spheres of the common venture and its constituent parts. Rather, Justice Cardozo was looking for a universal and absolute principle in order to prescribe intra-firm standards of conduct. *Donahue v. Rodd Electrotype Co.* very much followed such tradition (and, in prescribing a similar universal and absolute principle—equal opportunity—equally ended up overshooting the mark).²² *Donahue* attempted to recognize both economic *equality* as well as entrepreneurial *liberty*. Obviously, both of these positions (or objectives of a corporate law system) are ultimately mutually exclusive—we cannot have more of the former without less of the latter, and vice versa. Accordingly, corporate law must be charged with developing an efficient framework that (i) assists firm participants in finding an optimal equilibrium between those two positions (thereby, inherently, recognizing both equality and liberty of such firm participants), and (ii) in the absence of such an equilibrium being sufficiently (pre-)arranged among firm participants through contracting, provides a balancing of interests—for example, through the mechanism of the delictual²³ fiduciary obligations of loyalty and good faith.

21. For example, when the star in our Northern Hemisphere toward which the axis of the earth points (the so-called North Star or polestar) would no longer rise in the North.

22. *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 518 (Mass. 1975).

23. Fiduciary duties are traditionally seen as *delictual* obligations, i.e., their breach resonates in tort, not in contract. *Compare, e.g., ENEA v. Superior Court*, 34

Wilkes v. Springside Nursing Home, Inc.—for the first time—boldly acknowledged both the logical conundrum of a “peaceful co-existence” of self-interest and loyalty as well as the inevitably resultant balancing required among the same:

[W]e are concerned that untempered application of the strict good faith standard enunciated in *Donahue* to cases such as the one before us will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned. The majority, concededly, have certain rights to what has been termed “selfish ownership” in the corporation which should be balanced against the concept of their fiduciary obligation to the minority.²⁴

Wilkes recognized that the two interest spheres which Justice Cardozo had so fervently attempted to keep separate from each other (as described in Figure 1 *supra*) indeed collapsed into one another: the realms of loyal behavior and selfish behavior actually blend into each other in a fluid, seamless fashion so that it is impossible for the law to define—*a priori* and with generality—where one ends and the other begins.²⁵ Indeed, under certain circumstances, they must be identical and one of the same.²⁶ In other

Cal. Rptr. 3d 513, 519 (2005) (describing fiduciary duties as “delictual” duties “imposed by law” and that “their breach sounds in tort” (emphasis omitted)); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887, with Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 244 (2009) (“All fiduciary relationships are, at some level, contractual.”); *id.* at 270-71 (“Even though all fiduciary relationships are contractual, not all contractual relationships are fiduciary.”).

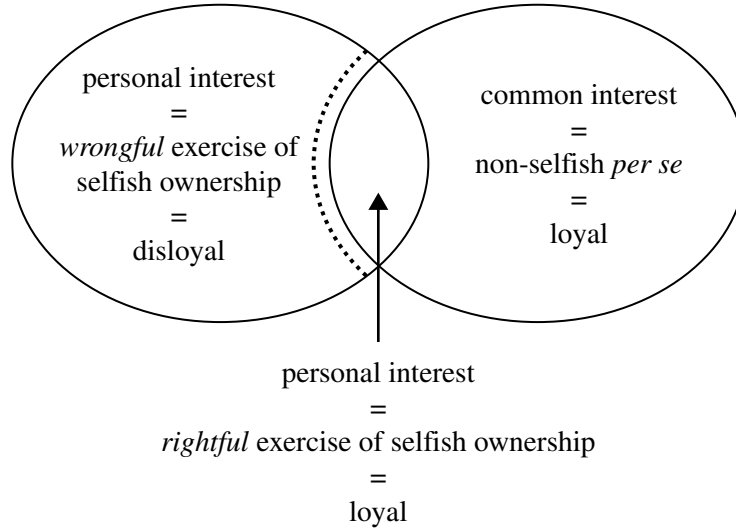
24. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976) (“[T]he controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation.”); see also Symposium, *The Close Corporation*, 52 NW. U. L. REV. 345, 396 (1957) (“The concept of a ‘selfish fiduciary’ is a contradiction in terms. . . . The application of the term ‘fiduciary’ to the majority’s duty towards the minority is of little value because of the difficulty of reconciling the majority’s trust obligation with his right of selfish ownership.”). This symposium issue of the *Northwestern University Law Review* is quoted four times for authoritative support in *Wilkes*. *Wilkes*, 353 N.E.2d at 662-63.

25. Cf. Benjamin Means, *The Vacuity of Wilkes*, 33 W. NEW ENG. L. REV. 433 (2011) (“The values of efficient governance and shareholder loyalty conflict . . .”).

26. Otherwise, shareholder voting in a closely held corporation or partner voting in a general partnership would *always* have to be unanimous. Any form of dissenting from the majority would always be, *ipso facto*, disloyal by the minority. At the same time, any consensus reached through mere majorities would be equally disloyal by the majority. Consensus would always be required in its narrowest literal meaning, i.e., unanimity. Thus, it must be safe to assume that if shareholders vote in a closely held corporation (and, similarly, if partners vote in a general partnership), they are entitled and unrestricted to vote in their respective personal self-interests in the vast majority of

words, loyalty and selfishness, as the result of a dialectic process, not only overlap; they create a synthesis—a hybrid sphere—in which selfish behavior must also be loyal behavior, and vice versa. Figure 2 schematically describes this “genius”²⁷ of *Wilkes* in the form of a *Venn Diagram*.

FIGURE 2: LOYALTY A LA WILKES



The dotted line in Figure 2 further signifies the most evasive fault line in our American law of business organizations that initially was described above.²⁸ To its right, business owners in the closely held firm have unrestricted access to the levers of majoritarian power for the best interest of the whole even if their exercise of such power also results in a (possible) detriment to the interests of the minority.²⁹ Or to put it differently: here, the majority simply self-legitimizes its interests *qua* constituting, and acting as, a majority. To its left, however, the exercise of majoritarian power is illegitimate because it destroys the very incentives for individuals to collectivize entrepreneurial activity. Or, again, to put it differently: here, we simply do not want to permit the majority’s

cases. Their (possible) disagreement over what is—for each of them individually—the best way to proceed within the common business venture cannot, *per se*, mean that they are all disloyal to each other.

27. Cf. Daniel S. Kleinberger, Donahue’s *Fils Aîné*: Reflections on Wilkes and the Legitimate Rights of Selfish Ownership, 33 W. NEW ENG. L. REV. 405 (2011).

28. See *supra* text accompanying notes 7 and 16.

29. See *supra* text accompanying note 24.

greed to undermine and, ultimately, destroy its very objective of economic wealth maximization (and the resultant societal benefits thereof).³⁰

II. THE CONTRIBUTIONS CELEBRATING *WILKES*

The number and quality of the articles in this Symposium Issue of the *Western New England Law Review* demonstrate the enduring contribution and appeal of the judicial masterpiece which is *Wilkes v. Springside Nursing Home, Inc.* For purposes of introduction, it appears helpful to consider the articles in two separate categories: *ambience* and *legacy*.³¹

The first group of articles (Eric Gouvin, Lyman Johnson, Mark Loewenstein, and Robert Thompson)³² meticulously situates *Wilkes* and its underlying dispute within the larger *ambience* of its environment and time—namely, the specific circumstances of the formation and operation of, and the developing conflict within, the Springside Nursing Home, Inc. corporation; the diverse and (maybe, too) disparate backgrounds and personal affairs of the corporation's founders and eventually litigating principals; the larger economic backdrop of a rapidly changing, ever professionalizing, high-growth “industry” in the nursing home and elder care services sector; the intricacies of litigating a rather novel legal theory in a judicial system that still functionally segregated into courts of law and courts of equity; the fortune of an activist high court “headed by judges with strong progressive philosophies generated by their

30. I should caution that the schematic view presented in Figure 2 can be misleading in one crucial respect: in the reality of closely held firms, the overlap area in my *Venn Diagram* can extend significantly into the circle of common interest and non-selfish behavior on the right. It may even be argued that, under normal circumstances, the overlap area will fill most of the remaining, non-overlap area within the right circle. Furthermore, by way of comparison, it also seems necessary to point out that, for purposes of proportion, the overlap area will be significantly larger in size in real life than each of the two non-overlap areas individually. One could even argue that the non-overlap areas in both circles only include “fringe” behavior and that, therefore, the overlap area is the empirical norm as far as the (opportunistic) behavior of equity participants in closely held firms is concerned.

31. In fairness, the line between *ambience* and *legacy* is, of course, artificial and, at best, blurry (probably even another *Venn Diagram* situation). Each of the articles in this Issue—either by necessity or choice—discusses elements of both. It is only their respective main focuses by which I mean to distinguish them for purposes of introduction.

32. This first set of articles correlates with the first two panels at the Conference. Hon. William Simons, David Martel, & Eric Gouvin, Panel 1: *Wilkes v. Springside Nursing Home: The Backstory* (Oct. 15, 2010); Lyman Johnson, Mark Loewenstein, & Robert B. Thompson, Panel 2: Putting *Wilkes* into Context (Oct. 15, 2010).

life experiences;³³ and the robust academic interest, investigation, and discussion of the minority shareholder's plight in the closely held corporation, together with elaborately developed calls for judicially-crafted remedies in order to alleviate such plight, for more than two decades preceding the decision.

Eric Gouvin's immaculately researched account of *Wilkes v. Springside Nursing Home, Inc.: The Backstory*³⁴ starts us out with a "truism" in the law of business organizations. We spend a lot of judicial, legislative, and academic effort in order to explain, understand, and properly regulate these aggregations of investors which economists simply and conveniently refer to as "firms" (thus, avoiding the difficult task left to the law to translate such "firm-ishness"³⁵ into legally recognized constructs). However, ultimately, the law of business organizations is always about the people, the real flesh-and-bone human actors from whom everything else is derived. In vividly bringing to life the human characters and their relationships which lie beneath the legal dispute, Gouvin reminds us that (thankfully) "[h]omo sapiens is not merely homo economicus."³⁶ By furnishing us with a unique insight into how differently (if not, asymmetrically) the principals of Springside Nursing Home, Inc. were situated—including, for example, their disparate educational backgrounds and respective statures within the community, their divergent (active-passive/insider-outsider) roles within the business venture, and (perhaps, most importantly) their dissimilar expectations and need for personal income derived from their company—Professor Gouvin emphasizes the intricate equilibrium which exists between scrupulous opportunism of firm investors on the one hand and a necessary, ameliorative moral/ethical/normative "code of conduct" of entrepreneurs on the other hand, all of which is imperative for purposes of overall firm cohesion and survival. In other words, Gouvin opens the stage by re-

33. Mark J. Loewenstein, *Wilkes v. Springside Nursing Home, Inc.: An Historical Perspective*, 33 W. NEW ENG. L. REV. 339 (2011).

34. Gouvin, *supra* note 1.

35. Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 621 (2006).

36. *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 932 (Del. Ch. 2003) ("Delaware law should not be based on a reductionist view of human nature that simplifies human motivations on the lines of the least sophisticated notions of the law and economics movement. *Homo sapiens* is not merely *homo economicus*. We may be thankful that an array of other motivations exist that influence human behavior; not all are any better than greed or avarice, think of envy, to name just one. But also think of motives like love, friendship, and collegiality, think of those among us who direct their behavior as best they can on a guiding creed or set of moral values.").

minding us that the law always takes second place.³⁷ If we want to make the closely held firm work, we need to make the human relationships that constitute the firm work (out) in the first place.

Lyman Johnson's article, *Enduring Equity in the Close Corporation*,³⁸ can be described as a celebration of, and an elaboration on, the famous fusion of law and equity as well as the prevalence given to one (and only one) of such two strands of jurisprudence—namely, that in matters of conflict or variance between the rules of law and the rules of equity, “equity shall prevail.”³⁹ For Johnson, *Wilkes* replicates—*en miniature*—the same “epic struggle between the regimes of law and equity” which has been said to characterize the “grand history of Anglo-American law.”⁴⁰ In a world of constant, pervasive change with near infinite stochastic variation, rigid rules of law are of limited value and reach. In contrast, rules of equity (including rules of fiduciary duty) endure by taking into account the inevitable flux and variety in firm relationships and by formulating *dynamic* and elastic standards of fairness which require courts to measure and balance rival interests and to, thus, temper the *static* application of universal rules of law. Professor Johnson points out that this statism-dynamism dichotomy is particularly pronounced in the governance of closely held corporations where differences in opinion can be—and, over time, often will be—both pervasive and recurrent. Such differences not only affect the clashes between the minority's reasonable investment expectations and the majority's prerogatives of how to run the business best. They transcend, by necessity, into the legal realm and replicate into

37. Cf. Ronald J. Gilson, *Separation and the Function of Corporation Law*, 2 BERKELEY BUS. L.J. 141, 147 (2005) (“The point is that markets encourage a management and governance structure that fits the corporation's business. Corporate law has nothing to add to the process.”); Lawrence E. Mitchell, *Vulnerability and Efficiency (of What?)*, 2 BERKELEY BUS. L.J. 153, 159 (2005) (“Law has its limits.”); Robert B. Thompson, *Corporate Law Criteria: Law's Relation to Private Ordering*, 2 BERKELEY BUS. L.J. 95, 99 (2005) (“[L]aw defers to other regulators of human behavior when . . . alternative regulators have a relative advantage. . . . Law is humble.”).

38. Johnson, *supra* note 12.

39. See Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, § 25(11) (“[I]n all matters . . . in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail.”); see also Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 475-76 (2003) (describing the deconstruction of the historic separation between common law courts and equity courts in England, the procedural merger of law and equity jurisprudence in the English High Court of Justice, and the equity-favoring conflict rule stated above between the substantive principles of both law and equity, all as effected by the Judicature Acts of 1873 and 1875).

40. Main, *supra* note 39, at 429.

differences of opinion on how to best address and reconcile such clashes in interests. Here, *Wilkes* achieves the best-possible equilibrium: it affirmed the centrality of *Donahue*'s strict fiduciary duty of loyalty and good faith among shareholders of a closely held corporation while establishing a principled, standard-based balancing test, which prevents majorities from unjustly using lawfully-exercised corporate power to create unfairness and harm to minority investors.

The contribution of Mark Loewenstein, *Wilkes v. Springside Nursing Home, Inc.: An Historical Perspective*,⁴¹ focuses on yet another realm which is part of the ambience of the *Wilkes* decision: the court which wrote the decision. First, Loewenstein carefully puts the precedential support for *Wilkes*'s predecessor, *Donahue*, under his legal microscope and concludes that "the supporting authority for the holding in *Donahue* was weak, at best."⁴² Indeed, Massachusetts precedent at the time clearly suggested that shareholders in a closely held corporation were not standing in a fiduciary relationship to one other. Likewise, as Professor Loewenstein explores in detail, *Wilkes* "rested on a thin reed" of precedential support.⁴³ The decision can thus be described as both radical and a clean break from the Massachusetts corporate law that preceded it. But such break does not come as a surprise to Loewenstein—he simply points us to the very court which decided *Wilkes*. Directing our ambience-oriented attention to the jurists who wrote the opinions in *Donahue* and *Wilkes*, Chief Justice G. Joseph Tauro for the former and his successor, Chief Justice Edward J. Hennessy for the latter opinion, Loewenstein discusses the structural changes brought to the Massachusetts appellate court system, including the installation of a completely new interim appellate court structure, which significantly freed up the workload of its highest court. Thus, he situates the radicalism of the decisions (when compared to what came before them) in the larger context of a progressive, activist and also properly-resourced Supreme Judicial Court charged, by default, with overseeing a necessary and fundamental modernization of many aspects of Massachusetts state law during an era of unprecedented societal metamorphosis.

Finally, after discussing the respective contextual fabrics of *people*, *equity*, and *court* involved in *Wilkes*, Robert Thompson in

41. Loewenstein, *supra* note 33.

42. *See id.*

43. *Id.*

*Allocating the Roles for Contracts and Judges in the Closely Held Firm*⁴⁴ looks at *Wilkes*'s ambience from an equally important, additional angle: *Donahue* and *Wilkes* are at the very center of a fundamental reorientation within the American corporate law with regard to the role of private-party *contracting* on the one hand and judicial intervention based on an investor's *status* as minority participant in a closely held corporation on the other hand.⁴⁵ The driving force behind such reorientation were not courts but legal *academics*. In the decades after World War II, academic scholars like F. Hodge O'Neal and George Hornstein zeroed in on the predicament of minority investors in the closely held corporation and pointed out that the available *instrumentarium* of American corporate law for the governance of the corporate entity applied indiscriminately to both publicly held and closely held entities—and, in doing so, applied with discriminating effect to oppressed minority shareholders in the closely held business. Thompson describes the complex structural predicament of the minority shareholder to be solved as well as the menu of possible solutions available in order to remedy such predicament. He reminds us that the understanding of the predicament and its solutions was already meticulously developed pre-*Donahue/Wilkes*—namely, by corporate scholars, in particular, by O'Neal in his landmark treatises.⁴⁶ Thus, Professor Thompson provides us with yet another facet of *Wilkes*'s ambience: once the Massachusetts Supreme Judicial Court started digging (by freeing itself from business-judgment-rule inflicted, judicial deference for corporate business decisions in the closely held corporation context), the mine for extracting a practicable and fair legal solution had already been laid and made operational by the comprehensive study of the majority-minority agency problem in the

44. Thompson, *supra* note 6, at 369 n.1.

45. The utilization of status-based solutions (i.e., fiduciary duties) over contract-based solutions (i.e., shareholder agreements—whether actually used or not) in *Donahue* and *Wilkes* can, thus, be recognized as a reversal of Sir Henry Sumner Maine's famous finding in 1861 that the history and evolution of English law—in terms of legal anthropology—are best understood as a movement from *status* (as the controlling feature of interrelations in primitive communities) to *contract* (as a characteristic and key determinant of relationships in progressive, developed societies). See SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 168 (London J. Murray 1861).

46. F. HODGE O'NEAL, *CLOSE CORPORATIONS* (1958); F. HODGE O'NEAL, *CLOSE CORPORATIONS: LAW AND PRACTICE* (2d ed. 1971); F. HODGE O'NEAL & JORDAN DERWIN, *EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES: SQUEEZE-OUTS IN A SMALL ENTERPRISE* (1961); F. HODGE O'NEAL, "SQUEEZE OUTS" OF MINORITY SHAREHOLDERS (1975).

closely held firm in legal *academia*. Unsurprisingly then,⁴⁷ by my count *Donahue* quotes no less than thirteen different academic sources (including works by O’Neal and Hornstein) for authority in support of its special treatment given to closely held corporations—to which count *Wilkes* quotes fifteen *additional* academic works as secondary authority. Finally, Thompson also bridges our focus to the legacy of *Donahue* and *Wilkes* and to the application of their combined doctrinal value to limited liability companies in the twenty-first century.

Which brings us to the second group of contributions presented at the Symposium. These articles concentrate, in one way or another, on what can be termed the *internal* and *external legacy* of *Wilkes*.⁴⁸ The latter form of legacy (represented in the contributions by Deborah DeMott and Larry Ribstein) positions *Wilkes v. Springside Nursing Home, Inc.* in relief with, and investigates its doctrinal reach for the continuing development of minority protection mechanisms in, related areas of business law—namely, the employment-at-will doctrine as well as the emergence of the consensual, unincorporated limited liability company. The remaining contributions—revolving around internal legacy claims of *Wilkes* (Daniel Kleinberger, Benjamin Means, and Douglas Moll)—each examine aspects of the doctrinal and practical soundness, persuasiveness as well as overall fairness and justice of the judicial tools developed in *Wilkes* and made available to oppressed shareholder minorities in the closely held corporation.⁴⁹

Daniel Kleinberger’s position on the legacy of *Wilkes* in *Donahue’s Fils Aîné: Reflections on Wilkes and the Legitimate Rights of*

47. However, what is remarkable (if not surprising) about this and, thus, noteworthy is that common law judges usually seem to have a significantly lesser “appetite” for expressly quoting prior academic work as secondary authority relevant to solving the legal issue in question when compared with their colleagues in civil law jurisdictions. See, e.g., Basis S. Markesinis, *A Matter of Style*, 110 L. Q. REV. 607, 608-09 (1994).

48. This second set of articles spans the presentations made during the two remaining panels at the Conference. Daniel Kleinberger, Benjamin Means, & Douglas Moll, Panel 3: *Wilkes* and the State of Fiduciary Duties (Oct. 15, 2010); Deborah DeMott & Larry Ribstein, Panel 4: Beyond “Corporate” Law (Oct. 15, 2010). In addition to the panels, the Conference included a keynote speech delivered by the Honorable Francis X. Spina, Associate Justice of the Massachusetts Supreme Judicial Court, on “The *Amicus*: Friend in Need.”

49. Obviously, this examination—focused on the internal cohesion of *Wilkes*’s legacy and precedent—continues to this day within the judicial system itself. See, e.g., *Brodie v. Jordan*, 857 N.E.2d 1076 (Mass. 2006) (defining freeze-outs as majority-inflicted frustrations of the minority’s reasonable expectations of benefit from firm ownership and limiting frozen-out minority’s remedies for a breach of fiduciary duty to those that are—and only are—proportional to the breach).

*Selfish Ownership*⁵⁰ is that the decision evidences ingenuity, if not, geniality in its practicable and equitable, multi-tiered balancing approach which, in conjunction with its burden-shifting mechanism, allows us to distinguish even the difficult cases of legitimate majority shareholder control from those of (borderline) minority shareholder oppression. For Kleinberger, fiduciary duties among co-owners of closely held businesses are essentially “schizoid”—a term by which he means that such owners cannot be in a classic fiduciary relationship owing *absolute*, i.e., *undivided* loyalty to the party protected by the fiduciary obligation.⁵¹ Rather, co-owners of the closely held firm are simultaneously fiduciary *obligee* and fiduciary *obligor*. Thus, each co-owner must have some right to pursue self-interest. It follows that, in many close disputes among the co-owners, each side must be, in part, “right” and, in part, “wrong” so that both sides can justifiably put some blame at each other’s doorstep for frustrating (at least, to some extent) their respective investment expectations. As Professor Kleinberger further explains, in such a situation, a universal all-or-nothing rule would consistently produce sub-optimal outcomes. Hence, the “genius”⁵² of the inevitable balancing approach prescribed in *Wilkes* and the superiority of its tripartite balancing test in which each successive step or layer constitutes a fallback safety valve to further control for, and finesse the weighing and balancing of firm participant interests on the immediately preceding step. Consequently, *Wilkes* is not only alive and well in Massachusetts, it is a sound doctrinal and practical contribution to the law of closely held businesses which fares significantly better when compared to the single-layer oppression tests based on a determination of reasonable investor expectations as are utilized in many jurisdictions outside of Massachusetts.

Benjamin Means’s contribution, *The Vacuity of Wilkes*,⁵³ presents an interesting juxtaposition to Kleinberger’s analysis and assessment of the *Wilkes* legacy. Means argues that the pragmatism of *Wilkes* in offering reliable solutions to majority-minority shareholder oppression/freeze-out scenarios has significant shortcomings—both, descriptively and normatively. He starts out by agreeing that *Wilkes* must have done something right if it managed to establish an “outsized influence on the development of a robust,

50. Kleinberger, *supra* note 27.

51. *Id.*

52. *See id.*

53. Means, *supra* note 25.

fiduciary-based response to shareholder oppression nationwide.”⁵⁴ But, with closer and more skeptical scrutiny, Professor Means finds that the Massachusetts Supreme Judicial Court “skimped” a little in telling us all there is to tell. What constitutes “legitimate” in a business purpose for the majority’s actions? What constitutes “less harmful” in a “reasonably available” alternative course of action in order for the minority to avail itself the protective reach of the fiduciary duty notwithstanding the legitimate business purpose demonstrated by the majority? Obviously, all of these remaining inquiries are matters of degree⁵⁵ and, for Means, the process of their determination is left unsatisfactorily open in *Wilkes*. Or, as he points out more forcefully and elegantly: “the *Wilkes* test is vacuous.”⁵⁶ One way to fill the gaps and, thus, to improve upon *Wilkes*, would be to develop more fully a theory of reasonable shareholder expectations as (at least) a threshold inquiry for judicial intervention. Here, courts would ask first whether the majority action is violative of a shared understanding among the shareholders, i.e., of their actual bargain. And, from Means’s perspective, Massachusetts’s signature approach to cases of shareholder oppression under *Wilkes* already includes the necessary DNA for such a more bargained-focused approach—namely, to graft a well-developed (general and specific, i.e., bargained-for) reasonable-expectations analysis onto *Wilkes*’s solid roots⁵⁷ in order to differentiate mere opportunistic majority behavior from oppressive majority conduct.

54. *See id.*

55. *Cf. Martin v. Peyton*, 158 N.E. 77, 80 (N.Y. 1927) (“As in other branches of the law, a question of degree is often the determining factor.”).

56. *See Means, supra* note 25.

57. As is already underway as a refining judicial development in Massachusetts. *See, e.g., O’Brien v. Pearson*, 868 N.E.2d 118, 129 (Mass. 2007) (finding that the minority shareholder-plaintiff of a closely held corporation had not “shown with reasonable certainty that he suffered compensable damages as a result of the defendants’ breach” under the *Brodie* reasonable-expectation test for breach-remedy proportionality; *supra* note 49); *Brodie v. Jordan*, 857 N.E.2d 1076, 1082 (Mass. 2006) (“[T]he remedy for the defendants’ breach of fiduciary duty is one that protects the plaintiff’s reasonable expectations of benefit from the corporation and that compensates her for their denial in the past. An evidentiary hearing is appropriate to determine her reasonable expectations of ownership; whether such expectations have been frustrated; and, if so, the means by which to vindicate the plaintiff’s interests.”); *Merola v. Exergen Corporation*, 668 N.E.2d 351, 354 (Mass. 1996) (“[A]lthough the plaintiff invested in the stock of Exergen with the reasonable expectation of continued employment, there was no general policy regarding stock ownership and employment, and there was no evidence that any other stockholders had expectations of continuing employment because they purchased stock.”); *see also Pointer v. Castellani*, 918 N.E.2d 805, 816 (Mass. 2009) (stating, in the LLC context, that “[a] breach of fiduciary duty through a freeze-out also occurs when the reasonable expectations of a shareholder are frustrated” (emphasis added)).

In *Of Donahue and Fiduciary Duty: Much Ado About . . . ?*,⁵⁸ Douglas Moll guides us all the way back to the main source. If we are, indeed, talking legacy here, then we should remind ourselves where the tectonic paradigm shift for shareholder oppression cases in Massachusetts actually occurred—*viz.*, in *Donahue v. Rodd Electrotype Co.* It is in *Donahue* where we find the fiduciary duty first recognized which has henceforth served as the conceptual cleavage tool for purposes of differentiating between legitimate control and unlawful oppression. It is *Donahue*'s inter-jurisdictional appeal and reach that is responsible for the now (almost) universal recognition that closely held corporations, because of their distinct internal governance structure and because of their investors' more intimate investment relations and expectations, warrant a different legal treatment from the one-size-fits-all rules of corporation statutes targeted mostly at the publicly held entity as a default of regulatory prescription. Moll thoroughly reexamines all of the puzzle pieces that make up *Donahue* and finds that some of the pieces—or changes of the law with which *Donahue* and its progeny is routinely credited—may not be changes from the pre-*Donahue* corporate law at all. As he describes in detail, traditional corporate law already recognized shareholder-to-shareholder fiduciary duties and, for example, reigned in on disproportionate awards of de facto dividends. However, he also finds that other legal strategies employed by *Donahue* clearly speak to its changing of the law by instituting a novel playing-field for majority-minority interaction within the closely held corporate firm. Those legal strategies include the protection of employment and management rights of investors, even in the absence of any de facto-dividend improprieties, and the conscious judicial sidestepping and dilution of the courts' traditional application of the business judgment rule, i.e., of the well-honed tool of conventional corporate law used to exercise judicial deference (and, thus, to avoid judicial second-guessing) with regard to the substantive propriety of corporate business decisions (including, of course, majoritarian employment and management decisions). Accordingly, Professor Moll concludes that *Donahue* and its progeny not only recognized the specific and systemic vulnerabilities of minority shareholders in closely held corporations, the Massachusetts decisions also fundamentally changed the law in that they far exceeded any built-in pliability of traditional corporate law rules for

58. Moll, *supra* note 8.

purposes of addressing the minority shareholders' plight in the closely held firm.

Turning our spotlight now to what has been described earlier as the *external legacy* of *Wilkes*, Deborah DeMott in her contribution *Investing in Work: Wilkes as an Employment Law Case*⁵⁹ immediately elaborates on one of the key findings by Moll and on such finding's doctrinal impact on a related field of business law. A fiduciary duty of utmost loyalty and good faith owed to a minority shareholder and a simultaneously existing relationship of employment at-will between the closely held corporation and such minority shareholder inevitably must be at odds, and regularly come into conflict, with each other. Indeed, as DeMott argues, both rules can be seen as "sticky" default rules because either normatively (whether deviations are permitted by law) or empirically (whether deviations are negotiated by the parties when permitted by law) we mostly seem to stick with those rules. The obvious question, then, is: which rule shall prevail this time?⁶⁰ One way of reading *Wilkes*'s legacy and effect on the employment-at-will doctrine is that such doctrine yields to the irreducible core of mandatory law which *Donahue* and *Wilkes* created in the form of a fiduciary duty. In other words, the operation of employment at-will is only permitted as long as such operation aligns with a majority-legitimizing balancing-test outcome under *Wilkes*. Thus, an at-will termination is neither *wrongful per se* nor *rightful per se*. The determination depends entirely on the application of the *Wilkes* test. As a doctrinal result, however, *Wilkes* is a just-cause amelioration of employment at-will and, though never a complete bar to a minority's successful termination at-will, ousts the default rule of at-will employment. Professor DeMott further explains how subsequent Massachusetts decisions have allowed shareholders in the closely held corporation to narrow, by explicit agreement, the scope of conduct to which their fiduciary duties apply. Accordingly, *Wilkes* itself must be seen as a (partial) default rule, i.e., it replaces one default rule (employment at-will) with another default rule (a partially yielding fiduciary duty as it concerns corporate employment—for example, under an employment agreement that specifically permits both parties to terminate without cause). Thus, it is the actual bargain of the shareholders—translated into reasonable expectations for purposes of determining oppression/freeze-out—which interlocks employment

59. DeMott, *supra* note 13.

60. See *supra* note 39 and accompanying text.

at-will and fiduciary duty and allows both rules to align (if not, to collapse into each other). Yet, in the absence of an actual bargain which would work around *Wilkes* and would situate corporate employment outside of the realm of general and specific investment expectations of a particular shareholder, *Wilkes* carries the day and prevails.

In the final contribution to this Symposium Issue, *Close Corporation Remedies and the Evolution of the Closely Held Firm*,⁶¹ Larry Ribstein brings us back to the contract-status divide, already discussed by Thompson in particular,⁶² which bipartitions the formulation of remedial legal approaches to minority oppression scenarios in the closely held firm. Ribstein positions *Wilkes*'s legacy in the larger context of the closely held "firm"—irrespective of how its "firm-ishness" translates into a separate, legally recognized aggregation/entity⁶³—and then traces the evolutionary progression and coming of age of the law's translative efforts from "firm" to "legal construct"—as well as *Wilkes*'s due place in such efforts' history—on a three-stage continuum from the small firm's infancy (the general partnership), via its adolescent identity crisis (the closely held corporation), to its final reach of adulthood and, perhaps, even maturity within the law of business organizations (the limited liability company). Thus, when we refocus on *Wilkes* and its legacy, Professor Ribstein finds the decision to fall firmly into the interim stage of evolution, i.e., the closely held firm in crisis. *Wilkes* constitutes a temporary, though important, but, ultimately, unhappy structural compromise for the efficient bundling of investor objectives and expectations in the closely held firm. What the judicial intervention in *Wilkes* accomplished (other than to allow for a judicial re-writing of the small-firm investors' actual bargain in order to rescue them from their imperfect advance planning) was to create a momentum for further evolution and change in the law of closely held firms which has accumulated in the triumph of contract, thus, bargaining, thus, law paradigms over those rooted in status, thus, fiduciary duty, thus equity paradigms. Today, it is the limited liability company that has evolved as "a robust contracting platform"⁶⁴ which helps closely held firm investors—taking their limits of foresight, i.e., their "bounded rationality" into account—to avoid the uncertainties of judicially-structured interventions created by closely held

61. Ribstein, *supra* note 8.

62. See *supra* note 45 and accompanying text.

63. See *supra* note 35 and accompanying text.

64. See Ribstein, *supra* note 8.

corporation cases like *Donahue* and *Wilkes*. Ribstein further describes how future improvements, in particular, in the form of well-tailored statutory judicial dissolution remedies as well as better contracting technology (aimed at optimizing (i) statutory defaults; (ii) the counseling and documentation of investors' bargaining in the face of complexity and stochastic uncertainty; and (iii) the private adjudication of intra-firm disputes), can effectively complement and supplement the contract paradigm in its central investment-structuring role in the limited liability company.

* * *

The following nine articles, both individually and collectively, are a fantastic kaleidoscope and tribute to the intricate and elaborate balancing act that is *Wilkes v. Springside Nursing Home, Inc.* Each of the articles, in its respective ways, describes some part of the multi-faceted, multi-layered, and multi-dimensional dichotomies—including statism vs. dynamism; law vs. equity; judicial deference vs. judicial activism and second-guessing; contract vs. status; and selfish ownership vs. loyalty—which *Wilkes* carefully and in “one fell swoop” had to bridge, synthesize, and reconcile in order to give appropriate relative weight and credence to each of the underlying dialectic interests involved. Not getting the balance right would most likely have guaranteed the decision's quick descent into jurisprudential oblivion. That this Issue of the *Western New England Law Review* instead celebrates the decision (roughly) thirty-five years after it was released into a world of constant judicial and academic reconsideration, affirmation, and improvement (or, perhaps, eventual empirical falsification and legal abolition), boldly illustrates that *Wilkes* must have gotten much of the balancing right. Each of the following articles demonstrates that *Wilkes* is truly a judicial gem and masterpiece. Granted, it does not achieve perfect balance. But perfect balance—perfect harmony among competing, dynamic interests—is a logical impossibility. *Wilkes*, therefore, deserves all of its praise and has endured over three-and-a-half decades because it is a masterpiece of a second-best solution (or a second-best optimum)⁶⁵ with regard to the problem of the oppressed minority's plight in the closely held corporation.

65. A so-called “second-best solution” or “second-best optimum” in the theory of welfare economics describes the remaining, next-best optimal outcome that can be achieved under existing conditions after a constraint has been introduced that prevents the attainment of one of the optimality conditions of the economic model (which, in

itself, is necessary for the attainment of a Paretian optimum within the same model). Peter Böhm, *Second Best*, in 4 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 280, 280 (2008). In order to still achieve a “second-best solution,” i.e., an optimum subject to such constraint, some, if not, all of the other Paretian optimum conditions also need to be departed from. See Richard G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11-12 (1956), reprinted in READINGS IN SOCIAL WELFARE: THEORY AND POLICY 47, 47-48 (Robert E. Kuenne ed. 2000); see also Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250 n.6 (1999); Böhm, *supra*, at 280-84. In a similar vein to this characterization of *Wilkes* as a second-best solution, Professor Means argues that the apparent normative contradiction in *Wilkes*’s recognition of a majority shareholders’ right of “selfish ownership” on the one hand and a duty of “utmost loyalty” owed to minority shareholders on the other hand can be explained by a theory of value pluralism in which economic efficiency is not the sole value objective, but is also commensurable with other value objectives—for example, the fairness and legitimacy of intra-corporate decision-making processes among majority and minority owners. See Means, *supra* note 25.