Trusts law and structural power: A study in conceptual fossilization

TT Arvind[*] and Ruth Stirton[†]

1 Introduction

Modern equity presents a paradox. On the one hand, much of its doctrinal apparatus is grounded in a past of dealing with the human and relational dimensions of transactions. The modern practice of equity, however, has drifted towards the domain of commerce and the market. This new, altered, context has subjected equity to a range of new demands—for certainty, for a recognition of the importance of contract, for the facilitation of commercial risk-management—which differ fundamentally from the social expectations, arising out of relations of trust and vulnerability, with which it historically dealt.[1]

These changes pose serious questions in relation to the role equity plays, and the role it should play, in the legal system. Should equity concede the demands of the marketplace, as private law in general has done, and embrace its role as a framework for infusing commercial structures with a certain degree of flexibility?[2] Or should it expressly seek to strike a different balance from the common law, grounded in the distinctive conceptual language of 'trust', 'loyalty', and 'conscience' in which its doctrines are expressed?[3]

Our purpose in this chapter is to show that answering these questions requires a deeper consideration of the relationship between equity and structural power, and the role equity could play in dealing with structural power. The idea that equity is in some way connected with power is, of course, not new to socio-legal scholarship. It has underlain a significant body of work, including the seminal paper by Roger Cotterrell which inspired this collection.[4] Much of that work, however, has focused on what one might broadly call 'instrumental power'—the power of one individual to determine or alter the legal status or entitlements of another—and, in particular, on agent power arising out of property relations. Structural power represents a rather different phenomenon. As we discuss in greater detail in Section 2, structural power is not simply the ability to exercise dominion over another, but a broader ability to embed particular dispositions within the functioning of institutions,[5] and to legitimise a given social structure

[*]York Law School

[†]Sussex Law School

[1]Peter Millett, 'Equity's Place in the Law of Commerce' (1994) 110 Law Quarterly Review 238.

[2]See eg John H Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107 Yale Law Journal 165; John H Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 Yale Law Journal 625.

[3]Margaret Halliwell, *Equity and Good Conscience in a Contemporary Context* (Old Bailey Press 1997).

[4]Roger Cotterrell, 'Power, property and the law of trusts: A partial agenda for critical legal scholarship' (1987) 14 Journal of Law and Society 77.

[5]Clarissa Rile Hayward, 'On Structural Power' (2018) 11(1) Journal of Political Power 56, 62–63.

by embedding a justificatory narrative for it into the ordinary functioning of social, cultural, and political institutions.[6] The role of argument in making law, and the role of doctrine in restricting the domain of permissible argument, make law particularly prone to becoming a vehicle for the exercise of structural power and, correspondingly, make it necessary for the legal system to incorporate mechanisms to identify and limit the influence of structural power. Although equity has the potential to provide such a mechanism, in practice it rarely engages with the task. Instead, it simply reinforces the power relations present in society without articulating, or seeking to articulate, any normative basis for doing so.

In Section 3, we use a detailed case study of the pension trust to suggest that this reflects a deep conceptual fossilization within equity. Pension trusts embody a form of structural power which is fundamentally inimical to the interests of beneficiaries. Whilst equity could, in theory, provide redress, its deference to contract and regulation mean that it does not in fact do so. Section 4 builds on this analysis to argue for a new research agenda for socio-legal scholarship, focused on reviving equity's potential to ameliorate, rather than reinforce, the social impact of structural power.

2 Structural power and the legal system

2.1 What is structural power?

In legal theory as well as in the social sciences more generally, 'power' is typically discussed in terms of the dominion a legal actor has over another; their ability, to put it differently, to get someone to do something which they otherwise would not do, and which they might not wish to do.[7] As a result, this approach sees power as in terms of the ability of a person or group of persons to alter the position of another.[8] A trustee in a discretionary trust has power over the beneficiary because the trustee can determine the beneficiary's entitlements to proceeds generated by the investment of the trust property. Simultaneously, as Cotterrell pointed out, beneficiaries also have considerable power over trustees because they too can determine the trustees' legal entitlements[9]—for example through their ability under the rule in *Saunders v Vautier*[10] to set aside the trust device.

Structural power, in contrast, is a more subtle phenomenon. Unlike relational or instrumental power, structural power does not require the ability to exercise control over another's actions through direct dominion, nor does it require a conscious attempt to exercise dominion in the way instrumental power does. It refers, instead, to power that is conferred by the normative dimensions of social life. Rather than being a consequence of relations of *domination*, structural power is a consequence of relations of *justification*.[11] Structural power restricts the ability of an actor to freely determine their course of action by creating normative structures of justification that make it politically or culturally impossible for actors to pursue a particular

[6] Rainer Forst, *Normativity and Power: Analyzing Social Orders of Justification* (Ciaran Cronin tr, Oxford University Press 2017) 42.

[7] Robert Dahl, 'The concept of power' (1957) 2 Behavioral Science 201, 202–3.

[8] See Wesley Newcomb Hohfeld, 'The relations between law and equity' (1912-1913) 11 Michigan Law Review 537.

[9] Cotterrell, 'Power, property and the law of trusts: A partial agenda for critical legal scholarship' (n 4) 86.

[10] *Saunders v Vautier* [1841] EWHC J82, [1841] 4 Beav 115.

[11] Forst (n 6) 49.

practice or outcome to which they might otherwise have been inclined.[12] This impossibility comes, in part from, the normative dimension of structural power, which defines certain actions as normatively unacceptable while promoting, and creating arguments justifying, other types of actions.[13] But, equally and arguably more fundamentally, structural power functions by creating conditions that make it difficult or impossible for actors to create or institionalise practices that are grounded in other structures of justification.[14]

Structural power, in other words, functions as a form of closure that is *both* institutional *and* epistemic. Three of its manifestations are of particular importance to socio-legal analyses of law. The first, which has received particular attention in the study of organisations, is the ability to set agendas and determine the terms of debate. The classic example, which has particular salience in the post-crisis agenda, is the phenomenon where regulatory bodies define the challenges they face, and their task in relation to those challenges, in terms that are largely determined by the dominant thought style in the industry they regulate, and whose conceptual development and translation into actual policy agendas is frequently led by dominant firms in those industries.[15]

A second dimension of structural power, which has received particular attention from sociologists of power, is the ability to shape ideas, values, and beliefs in relation to the types of outcomes and conduct that are considered desirable, shift perceptions of whether and to what extent particular real or potential happenings constitute threats in relation to those outcomes, and establish accepted understandings of the types of actions and interventions—whether political or social—that will obviate those threats and increase the propensity of a society to achieve the outcomes in question. These typically operate in a self-reinforcing cycle between structural power and relational power where each element further supports the others,[16] and where the cumulative effect is to create social processes that are very difficult to displace or deflect.[17]

Underpinning both of these, and central to the success of both, is a third dimension of structural power, namely its entrenchment in and through the everyday practices of institutions. Structural power operates cognitively,[18] by creating and socially embedding schemas—dispositions to see the world in a particular way and to respond to events in particular ways.[19] In institutions, these schemas create institutional propensities towards particular modes of operation and, in particular, propensities towards adopting particular ways of formulating questions, evaluating the likely consequences of particular courses of action, and considering the desirability of outcomes. As the work of Mary Douglas has demonstrated, these schemas, or 'thought styles' as she terms them, shape not just evaluative processes but also world views: the responses which they see particular stimuli as producing, the way in which they perceive or ascribe causal responsibility for events, and their perceptions of the desirability or undesirability of various

[12]Forst (n 6) 17.

[13]ibid, 17.

[14]ibid, 40–47.

[15]See e.g. Young's study of policymaking by financial regulators in the US: Kevin Young, 'Not by Structure Alone: Power, Prominence, and Agency in American Finance' (2015) 17(3) Business and Politics 443.

[16]See e.g. Fairfield's analysis of economic reforms in Chile: Tashi Fairfield, 'Structural Power in Comparative Political Economy: Perspectives from Policy Formulation in Latin America' (2015) 17(3) Business and Politics 411.

[17]See e.g. Hayward's analysis of the social entrenchment of discriminatory policies in the US: Clarissa Rile Hayward, *De-Facing Power* (Cambridge University Press 2000).

[18]Forst (n 6) 63.

[19]Sally Haslanger, *Resisting Reality: Social Construction and Social Critique* (Oxford University Press 2012) 406–427.

risks.[20]

The institutionalisation of these schemas, and the shaping of institutional dispositions to accord with them, has a significant effect on social interaction. It means that social interaction is *habitually* characterised by particular patterns of incentives and disincentives which not only become a necessary basis of social interaction but also, because of the roots of structural power in relations of justification, are coupled with a powerful *legitimatory* basis for the resulting social order and for a 'frame of mind' in which the justificatory basis of that order is seen as being *objectively* legitimate and desirable.[21] For those *exercising* the power, the consequence is to create a "second nature of functioning", where the rules of the structures and the justifications for the patterns of outcomes they produce become part of what is seen as 'natural' rather than a choice which is potentially contestable, grounded in a particular ideology, or requires critical scrutiny.[22] For those *subject* to the exercise of the power, the consequence is to render certain types of social actions impossible or difficult, due to the social force of the schemas and the institutional structures they generate.[23]

This means that

2.2 The power of doctrine

As the previous subsection has shown, structural power, unlike instrumental power, can operate even where its beneficiaries did not themselves institute the constraints on social action, or even intend them to come about.[24] This distinguishes it from standard, agent-based accounts of social power, such as the influential account advanced by Keith Dowding, which treats social power as consisting of the ability to achieve desired outcomes by deliberately altering other actors' incentive structures and, consequently, ties this to the possession of resources which enable the first actor to alter the second actor's incentives.[25] From this perspective, social power is never a useful tool for critically analysing judge-made law as an individual litigator rarely possess the ability to alter the judge's or the other party's incentive structures in a way that might influence the direction of the law. Structural power, in contrast, collapses the artificially sharp structure / agency dichotomy on which such accounts depends, by highlighting the extent to which agents may, whether consciously or routinely, exploit the power conferred by institutional predispositions.

This has obvious implications for how we study law. Equity, like other branches of private law, is dependent on rules and principles articulated in terms of concepts which are normative in form and open-textured in character. The law of trusts, for example, is expressed in legal rules such as 'the duty to take reasonable care', 'the duty to avoid conflicts of interest', or 'the duty of loyalty', which use normative and evaluative language, but are open-textured in that nothing about the concepts carries any necessary implication in relation to when the duties come into existence, what they require legal actors to do, or what constitutes their breach. The answer to these questions is, instead, determined through accumulated institutional practice—the combined mass of judicial rulings, accepted interpretations, and other practices, that are collectively termed 'doctrine'.

[20] See generally Mary Douglas, *How Institutions Think* (Syracuse University Press 1986).
[21] Hayward, 'On Structural Power' (n 5) 23–24.
[22] Forst (n 6) 44–45.
[23] Hayward, 'On Structural Power' (n 5) 25.
[24] IM Young, *Responsibility for Justice* (Oxford University Press 2011) 52.
[25] Keith Douglas, *Rational Choice and Political Power* (Edward Elgar 1991).

The result is that doctrine embeds dispositions towards particular ways of formulating questions and evaluating competing options, as well as to particular types of outcomes, in the ordinary functioning of the legal system, precisely like the schemas dicussed above. The purpose of doctrine, as analytical legal theorists have long recognised, is to screen a sensitive decision-maker off from factors to which he or she would otherwise have had regard, by assigning a high evaluative weight to some factors, a low weight to others, and declaring still others to be legally irrelevant.[26] This is the exact role schemas play, and it suggests that doctrine is best understood as comprising of structured sets of schemas. Much like schemas, doctrine does not *determine* an outcome. Instead, its primary effect is to rule out certain types of outcomes while also creating a predilection towards other types of outcomes. Doctrine may do sometimes do so directly by declaring certain outcomes impermissible. More commonly, however, it does so indirectly by requiring courts or equivalent actors to take into account factors or ignore factors, the practical effect of which is to rule out or impose high bars to certain types of outcomes. Whilst doctrine is never conclusive, even a partial effect—for which there is considerable evidence—makes law particularly prone to becoming a vehicle for structural power.

That structural power is problematic is obvious. A fundamental tenet of socio-legal scholarship is that systems of law must be judged at least in part on whether they show some degree of socially responsiveness. To be socially responsive, a system of law must at a minimum show a conscious awareness that law has a socially relevant institutional function, as a 'facilitator of response to social needs and aspirations',[27] and it must also show the ability and willingness to engage with that role in developing and applying the rules of law. Structural power, in contrast, not only precludes the law from doing so in relation to the social needs and aspirations that are most salient in the areas with which it deals, but also results in the law failing to recognise that it is not doing so. It is this that gives equity its importance as a way of dealing with structural power. Confining or ameliorating the effects of structural power requires an *alternate* set of schema and supporting narratives of justification, which have power not only at the discursive level but also at the institutional level, by being embedded in the everyday functioning of governing institutions in much the same way as the schema that are the source of structural power. The historical conceptualisation of equity's role as being concerned with 'correcting' the common law is particularly suggestive against this background, as is the concern of 19th century equity for groups within society who were particularly prone to being subject to structural power, such as widows and orphans.

Modern equity is, of course, a thing radically different from 19th century equity, and has other preoccupations.[28] The rise of commerce, in particular, has resulted in a very different range of demands being made of equity, resulting—as Cotterrell has shown—in an increased focus on technical competence rather than moral trust, on the proprietary rather than the relational character of the underlying relationship, and on the systemic, transactional link between the parties (in a manner akin to contract) rather than on the social and personal link between the parties.[29] This is closely tied to the broader shift in private law that one of us has elsewhere called the 'managerial turn'. As we demonstrate in the next section through the example of the

[26]Frederick Schauer, 'Formalism' (1988) 97(4) Yale Law Journal 509.

[27]Philippe Nonet and Philip Selznick, *Law and Society in Transition: Towards Responsive Law* (Harper and Row 1978) 14–15.

[28]For a particularly clear account of the shift, see GS Alexander, 'The Transformation of Trusts as a Legal Category, 1800–1914' (1987) 5 Law and History Review 303.

[29]Roger Cotterrell, 'Trusting in Law: Legal and Moral Concepts of Trust' (1993) 46 Current Legal Problems 75.

pension trust, its consequence is that modern equity no longer seeks to identify or redress the effects of structural power, even though the need for the role has not gone away.

3 Structural power in context: The case of the pension trust

The pension fund, which is typically constituted as a trust, is a complex and risky beast, and the experience of the past three decades has shown that the ordinary law of trusts cannot by itself deal with the issues it creates. This was evidenced very clearly in 2001-2002 when a significant number of pensions were decimated in the Enron collapse. The Pensions Act 2004 created The Pensions Regulator (a replacement for the Occupational Pensions Regulatory Authority that had been created by the Pensions Act 1995) as a response to criticism of OPRA, and to increase public confidence in the regulatory oversight of all pension funds.[30]

The fact that the law of trusts is not a *sufficient* mechanism for dealing with the issues created by pensions funds does not mean, however, that it is no longer *necessary*. The challenge for the law is to find a regulatory framework that protects both the stability of pension funds and the interests of beneficiaries. Our argument in this section is that the current legal framework, largely as a consequence of structural power, favours the interests of fund managers and the fund itself over the expectations and needs of beneficiaries by failing to provide any legal mechanisms by which beneficiaries can seek to hold fund managers to account. The Universities Superannuation Scheme and particularly the crisis in 2017 and 2018 are a good vehicle to explore the limits of the current approach to the pensions trust and its connection with structural power. USS is a unique pension fund with a significant defined benefit component complemented by a minor defined contribution scheme once the contributor earns over the current threshold of £57,216.50 (increasing annually in line with inflation). It is one of largest pension schemes in the UK, with 418,964 members. USS is a multi-employer scheme which binds all the member institutions together with its 'last man standing' principle. The 'last man standing' principle means that as members go bankrupt, the remaining member institutions take on their liability, and in the event of total collapse of the sector, the last solvent institution carries the liability for the whole of the scheme's commitments. The effect of this is that the burden of risk associated with failure of the scheme falls disproportionately on some institutions.

In theory, the interests of the different persons involved in USS—the fund managers, the institutions contributing to the fund, and the members of the scheme—are balanced in a range of ways. The first is a mixture of 'soft' and 'hard' regulation. The 'soft' regulation arises from the structure of the scheme, which includes an express role for negotiations between representatives of employers and employees. The 'hard' regulation comes from the role of the Pensions Regulator (tPR). In addition, the law of trusts continues to exist as a backstop to hold trustees to their legal duties. Despite this, contributing members in 2017 began growing increasingly concerned about protecting their rights. This caused the USS pensions crisis of 2017-2018, which included the biggest industrial action in the UK higher education sector to date. The resort to industrial action raises the question of why the legal mechanisms to balance the interests of different groups failed to provide effective relief to the contributing members of the USS. As we demonstrate in the remainder of this section, the answer lies in the deference of equity to contract and regulation, whose cumulative effect is to insulate fund managers from virtually every one of the mechanisms that trust law in theory provides beneficiaries. This is a product of the third

[30] Department of Work and Pensions, *Simplicity, security and choice: Working and saving for retirement* (Cm 5677, 2002) para 3-7.

dimension of structural power discussed above—namely, a thought-style that prioritises the commercial motivations of modern pension fund trustees and their key personnel (leading to a deference to contract), and the systemic interests of the financial and retirement systems (leading to a deference to regulation) over addressing the consequences of the peculiarly vulnerable and powerless situation in which beneficiaries find themselves.

3.1 The failure of regulation

The Pensions Act 1995[31] requires defined benefit pension funds to be maintained at a level at which the fund can meet all its obligations. This is calculated on the basis of an actuarial valuation of the exposure of the fund against its assets and investment performance.[32]. This is also to be weighed against the 'employer covenant', which is the employers' capacity to make additional contributions to the fund in order to ensure its ability to meet its liabilities. The USS valuation is carried out on a triennial basis. The delay in the 2017 valuation raises some significant concerns about the integrity of the regulatory framework in this area. The Pensions Regulator[33] states that trustees should "start their valuation process in good time and follow a project plan that leaves sufficient time for advice and analysis, as well as negotiation with the employer".[34] Trustees that have not completed their valuation within the 15-month period may be subject to enforcement proceedings by the Pensions Regulator with a view to ensuring that an appropriate recovery plan is in place going forward.

The success of this relatively short time period seems predicated on employers and employees speaking with one voice, and negotiation being a straightforward and quick process. USS, however, is the exclusive pension scheme for 68 institutions. Although negotiation is to be carried out by the umbrella organisations Universities UK, for the employers, and the Universities and Colleges Union, for the employees, each individual employer has its own position on the risk it is willing to carry, and its relations with its employees are affected by distinct local and national issues. As a result, when it became clear in late 2017 that there was no real chance of agreement between UUK and UCU on how best to take forward the valuation, this assumption broke down. Fighting industrial action at a local level and within the context of other local employment relationship disputes led to public challenges from individual vice-chancellors to the hardline approach taken by UUK. Newcastle University's vice-chancellor broke ranks with UUK on the first strike day.[35] Much the same phenomenon also occurred on the side of the employees. There were calls for the UCU general secretary to step down to change the union's approach, which escalated into a full-blown fracture between the national UCU executive and the ordinary members when branches rejected the offer from Universities UK in defiance of guidance from the national UCU team.

The question this raises is the ability of the Pensions Regulator to enforce its standards. If the USS trustees can demonstrate that they are actively trying to facilitate the necessary negotiations, and are taking account of the complex industrial relations issues that are relevant, then the Pensions Regulator is likely to simply allow them to get on with it.[36] Even if they

[31] S56-59

[32] Alastair Hudson, *Equity and Trusts* (Routledge 2016).

[33] The Pensions Regulator, *Annual funding statement* (April 2018).

[34] ibid 14.

[35] UCU, *Newcastle vice-chancellor backs striking lecturers and calls for talks in pension row* ⟨https://www.ucu.org.uk/article/9350/Newcastle-vice-chancellor-backs-striking-lecturers-and-calls-for-talks-in-pension-row⟩.

[36] Regulator (n 33).

were to seek to take enforcement action against USS, it is far from clear that any result would be forthcoming. Equally, action imposing additional contributions on the basis of the disputed 2017 valuation would simply exacerbate the dispute, especially in the wake of the Joint Expert Panel[37] report, which was intended to break the gridlock between the negotiating parties, but concluded that there were significant problems with the way that the 2017 valuation had been conducted. If law's function is to provide an arena in which conflict can be limited through a process in which different interests can compete on an equal footing, then the regulatory framework is clearly unable to discharge this function; and systemic power plays a central role in that inability.

3.2 The failure of trusts law

What, then, of the ability of beneficiaries to control their trustees through the remedies in the ordinary law of trusts highlighted by Cotterrell? Collective action in the way envisaged and approved of in *Saunders v Vautier*[38] is impossible because the practical issues involved in getting the circa 400,000 members to agree to the collective legal action are a complete barrier to any possibility of using *Saunders*. It is also practically impossible for the beneficiaries (including contributing members, deferred members, existing pensioners) to join together to bring the fund to an end, and resettle it on different terms. A further practical barrier arises from the complexity of pensions law, which must be navigated to initiate and continue legal action against the trustees. The legal advisors to USS are part of a magic circle law firm—CMS Cameron McKenna Nabarro Olswang—with a pensions law team charging a hourly rate of around £1000+VAT. Initiating and bringing legal proceedings against the trustees in relation to any of the duties the law puts them under is likely to be so prohibitively expensive as to be wholly outwith the capacity of any beneficiaries, whether acting individually or collectively.

This state of affairs is the antithesis of what we mean when we talk about equity. The point of equity is conventionally taken to be that beneficiaries of trusts have power to claim what they are entitled to, to hold the trustees to account, and to direct the trustees who work for them to act in their interests. The failure to rework the principles underlying the law of trusts, so as to make this power a practical possibility for the significantly altered entity represented by the modern pensions trust, is therefore particularly striking. The significance of the failure becomes clear when we consider the differences between these trusts and family trusts—the paradigm example of a trust in the ordinary law. Beneficiaries are entitled to their pensions, their benefits, because they are contributors to the pension fund.[39] In the ordinary law of trusts, this means that they hold a dual role as both settlor and beneficiary. We need only make fleeting reference to the *Vandervell*[40] litigation to illustrate the challenges that this dual role presents. Further, employers, who are also settlors, are unlike settlors of family trusts paying in money in fulfilment of a contractual obligation for which the beneficiaries have given good consideration.

The position of trustees is similar. The paradigm of the trustee envisaged by much of equity is the trustee acting voluntarily in the interests of the beneficiaries—for example, the family friend who manages a testamentary trust for the children of his longstanding friend–who has no interest or ability to make a profit from this enterprise and does it as voluntary service. The

[37]The Joint Expert Panel on the Universities Superannuation Scheme, *Report of the Joint Expert Panel* (techspace rep, 2018) .
[38]*Saunders* (n 10).
[39]Hudson (n 32).
[40]*Vandervell v IRC* [1967] 2 AC 291, [1967] 2 Appeal Cases 291.

reality of pension fund management is the antithesis of this. The management of a pension scheme is a professional–and typically very well remunerated—service that is established under the trust deeds. In the case of USS, the entity that carries out the management is a private limited company.[41] A corporate trustee is not acting out of beneficence. Rather, it acts because its commercial interests are served by providing a professional service for the beneficiaries.

On its face, these factors would militate in favour of a *higher*, rather than lower, level of practical power in the hands of beneficiaries. Yet, in actual fact, the law does the opposite. A fundamental structural difference between the paradigm private family trustee and the corporate trustee service is the presence of an exclusion clause, which the modern law of trusts not only recognises but also facilitates. In the theory of trusts law, the exclusion clause is a way of recognising the high burden on the trustees of the fiduciary duties, by permitting them to control their potential liability. In practice, they go well beyond this. The exclusion clause that applies to USS, found in clause 72 of the USS trust deed, excludes all liability for breach of trust except for "fraud or deliberate or culpable disregard of the interests of those actually, prospectively or contingently entitled to any relevant benefit under the scheme."[42] If the only scope for finding the pension trustees liable is for breaches which amount to fraud, or culpable disregard for the interests of the beneficiaries, the effect is that access to justice for beneficiaries, and access to the mechanism for controlling the actions of trustees is eroded to the point of virtual non-existence.

Why, then, does the law take this stance, creating such a significant gap between the reality of the legal framework of pensions trusts and the underpinning equitable concepts? The discussion of structural power in section 2 provides us with an important part of the answer to this question. The heart of the modern legal approach to the pensions trust lies in the systemic function it plays, as a key component of social welfare provision in the UK—every person who is adequately provided for by their occupational pension fund is a person who is not dependent on the state pension or any other aspect of the welfare state for their livelihood—and as a key source of investment in the financial and capital markets. The result is that when faced with a choice of schema favouring either the beneficiaries' interests of control and accountability, or the broader systemic interests fostered by making the resilience of the fund the primary source of restraints upon the trustees' discretion, it is to the latter that governing institutions are likely to be predisposed. The law, in such a situation, will take a position that gives significant structural power to the trustees and the fund managers at the expense of the beneficiaries.

The current shape of the law of pensions trusts is consistent with this picture. The law does in fact prioritise the resilience of the trust fund, permitting the trust to resile very significantly from promises made to beneficiaries if that is necessary to secure resilience. It permits trustees and fund managers to protect themselves against actions by framing broad exclusion clauses. And, as discussed above, this *epistemic* closure is reinforced by *institutional* closure, under which the law sets hurdles to ordinary actions in the law of trusts whose practical effect is to make those actions impossible. Beneficiaries, in consequence, have to rely on the Pensions Regulator to protect their interests, even though the standards of protection in the Pensions Act are considerably inferior to those under the ordinary law of trusts, and even though tPR acts primarily to protect the resilience of the trust fund, rather than to vindicate the beneficiaries'

[41] Company number 01167127

[42] Universities Superannuation Scheme, *Consolidated Rules of Universities Superannuation Scheme incorporating all Deeds of Amendment up to and including the Fifteenth Deed of Amendment dated 9 December 2014* (April 2009). Liability is also preserved for certain duties of care and skill under s. 33, Pensions Act 1995.

putative claim to hold trustees to account. As with all forms of structural power, the accompanying justification narrative, and the schema it generates, provides a powerful and attractive normative validation for this state of things being the natural, and desirable, order of things. The result is to close the doors of law to beneficiaries, leaving them with little choice but to rely on extra-legal means such as industrial action. Academia is relatively unique in involving beneficiaries with high amounts of social capital (and, hence, access to structural power in non-legal circles). Outside this specific context, it is hard to avoid the conclusion that the law of trusts has failed to discharge what ought to be a core social function.

4 Equity and structural power: Towards a new research agenda

Structural power is not an easy phenomenon for legal systems to deal with. Unlike instrumental power, which arises out of features of a specific jural or social relationship, structural power has more multifarious roots making it resistant to the ordinary forms of legal control. The law can set limits to relational or instrumental power in relatively straightforward way, because the ability of an agent to exercise dominion can be restrained through a range of techniques. It can be restrained by setting bounds to the power directly as, for example, the exceptions to *Saunders v Vautier*[43] do. Alternately, it can be restrained by setting pre-conditions that seek to channel the ends to which the power can be exercised and, hence, the impact it can have on those subject to it as, for example, rules around the public benefit test for charitable trusts do. Finally, it can be restrained by setting procedural safeguards that seek to reduce the likelihood that the power will be exercised to induce someone to act against their interests as, for example, the law of undue influence does.[44] But it is hard to see how these techniques can assist in controlling structural power. As the previous section has shown, structural power arises out of "multiple, interacting, large-scale social processes"[45] which are deeply embedded in the institutional structure of the legal system, including not just fundamental aspects of its doctrines and processes, but also the assumptions it makes about the way the world functions. It is self-evidently unlikely that legal schemas which have a high likelihood of reflecting the same underlying predispositions can play a strong role in restraining these processes.

Our aim in this paper has been to show that equity is no exception. Notwithstanding equity's roots in very different ways of thinking about society, the deference to regulation and to common law concepts that characterises the modern law of trusts makes it prone to the very same problems of structural power that trouble other areas of law. Many of the problems that are conventionally analysed as being connected with property, or with commerciality, are on our analysis a result of the role structural power plays within the doctrines of equity. Two cases decided within the past two decades, *Re Farepak*[46] and *Scott v Southern Pacific*,[47] provide particularly clear illustrations. Both *Re Farepak* and *Scott* related to situations where the interests of disempowered groups came head-to-head with the interests of the financial sector, a group that enjoys an unusually high degree of structural power in modern Britain. Both cases involved situations where public regulatory frameworks failed to protect the interests of the group in question—in *Re Farepak*, because the Financial Services Compensation Scheme

[43] *Saunders* (n 10).

[44] *Royal Bank of Scotland plc v Etridge* [2001] UKHL 44, [2002] 2 AC 773.

[45] Hayward, 'On Structural Power' (n 5) 56.

[46] *Re Farepak* [2008] EWHC 3272 (Ch), [2008] BCC 22.

[47] *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52, [2015] 1 AC 385.

did not apply to the specific type of saving at issue, and in *Scott* because 'sale and lease back' schemes were not at the time a regulated activity under s. 19 of the Financial Services and Markets Act 2000 (a situation that has since changed).

Given the discussion of structural power in Section 2 of this chapter, it is hard to avoid the conclusion that the regulatory gaps in both cases were a result of the groups in question lacking structural power and, hence, the ability to have their interests, and their vulnerability, brought onto the regulatory agenda. Structural power—or, rather, the failure to consider the relevance of structural power for the workings of equitable doctrine—also lay at the heart of the final outcomes in both sets of cases, with equity too failing to protect the groups in question. The reasoning in both cases demonstrates that the courts were overtly influenced by the now-established trend of according higher priority to contractual rights over equitable rights save where precedent clearly establishes otherwise and, less overtly but no less clearly, by the systemic importance to the economy of providing an environment in which lenders feel able to lend with security.[48] In both cases, the result was, paradoxically, that the law protected precisely those persons who were in a position to take steps to protect themselves but failed to do so, while refusing to protect precisely those persons who had little practical ability to protect themselves and, hence, were in actual need of legal protection.

The discussion of the pensions trust in Section 3 of this chapter shows a similar pattern. The law's task in relation to pensions trusts can be conceptualised in a number of ways. As we have shown in section 3, the expectations of beneficiaries are of no more than peripheral importance to the present framing which focuses, instead, on protecting the fund and on creating an environment within which fund managers can make investment decisions in a manner that insulates them from any broader responsibility or accountability to the beneficiaries. This stands in stark contrast to the position in the types of trusts studied by Cotterrell, and reflects the dominant influence of structural power. The systemic importance of pensions trusts as sources of funds in the financial system, and the consequent imperative of freeing fund managers to make investment decisions, means that it is their interests that will dominate policy-making agendas, and that it is towards their protection that the regulatory policy will be predisposed. Here, too, the tendency of modern equity to defer to contract and to regulation means that it has little additional relief to offer affected beneficiaries.

Our purpose in this paper, however, is not just critique. An implicit point in our argument is that equity can in principle play a constructive role in dealing with the problem of structural power. Notwithstanding the actual outcome in the cases discussed above, the fact remains that only equitable concepts and doctrines, and not the common law or regulation, provided the claimants in those cases a language—and, more fundamentally for our purposes, a conceptual framework—in which they could seek to protect their interests. Equally, it remains the case that as things stand equitable concepts and ideas come far closer to giving legal form to the needs and expectations of the beneficiaries of pensions trusts than do either the regulatory approach taken by tPR, or the contractual language that characterises the actual constitutive documents of the typical pensions trust. Equity, in other words, has far more potential than any other part of the legal system to form a counterweight to the structural power whose effects so profoundly influence the practical everyday working of the law, and statutory regulation, too, would be more effective if it drew on the resources provided by equitable concepts. Working to develop equity so that it does in fact realise this potential, and begin play a role in ameliorating the effects of structural power, should for that reason be an important part of the agenda of

[48] Lina Mattsson, 'Harsh but fair?' (2015) 165 New Law Journal 14.

socio-legal scholarship.