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Loyalty Loses Ground to Market Freedom in the U.S. Supreme Court

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LOYALTY LOSES GROUND TO MARKET FREEDOM IN THE U.S. SUPREME COURT

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ABSTRACT

In the last decade, the U.S. Supreme Court has taken a much less moralistic and much more market-oriented approach to questions of fiduciary loyalty. In cases involving fiduciaries with conflicts of interest, the Court has shifted the burden of proof to the party claiming unfair treatment, thereby protecting deals and making loyalty harder to enforce. The Court has also struck down or narrowly construed laws designed to prevent disloyalty by fiduciaries on the theory that broad prohibitions on business conduct encroach on constitutionally protected freedoms.

This Article discusses how the Supreme Court's new approach represents a departure from the Court's own precedents and from the fiduciary principles still followed by the State courts. The Article also considers how the changes in Supreme Court jurisprudence reflect changing attitudes toward loyalty in this country, particularly among the financial elites.

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INTRODUCTION

Over the last decade, there has been a "renaissance" of scholarly interest in fiduciary theory,[1] including a spate of articles pushing for stricter scrutiny of fiduciaries.[2] During this same time, the U.S. Supreme Court has taken federal law in precisely the opposite direction, by rejecting or refusing to follow old rules designed to safeguard fiduciary loyalty.[3]

The Supreme Court's trend is most evident in cases involving fiduciaries accused of profiting at the expense of those they were supposed to protect.[4] The traditional standard requires such fiduciaries to prove they have not taken unfair advantage of the powers entrusted to them.[5] But in recent cases, the Supreme Court shifted the burden of proof to the party claiming unfair treatment, protecting deals and making loyalty harder to enforce.[6]

The trend may also be seen in decisions striking down or narrowly construing laws banning corporate campaign expenditures or prohibiting dishonesty by fiduciaries.[7] The Court held that these laws could only be used to stop fiduciaries from taking personal bribes in exchange for official action.[8] Broader use against

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[1] *See, e.g.*, Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1822 (2016) ("'Fiduciary political theory' is a burgeoning intellectual project that uses fiduciary principles to analyze aspects of public law."); Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 516 (2015) ("Fiduciary theory is undergoing a renaissance.").

[2] Articles urging expansion of the fiduciary principle include Isaac D. Buck, *Furthering the Fiduciary Metaphor*, 104 CAL. L. REV. 1043 (2016); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010); Dayna Bowen Matthew, *Implementing American Health Care Reform: The Fiduciary Imperative*, 59 BUFF. L. REV. 715 (2011); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 672 (2013).

[3] *See* Jones v. Harris Assocs., L.P., 559 U.S. 335, 351 (2010); Skilling v. United States, 561 U.S. 358, 408–09 (2010); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 384–85 (2009); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 116 (2008); Pegram v. Herdrich, 530 U.S. 211, 233–34 (2000).

[4] *See, e.g.*, Wardell v. R.R. Co., 103 U.S. 651, 656–57 (1880); Michoud v. Girod, 45 U.S. 503, 553–55 (1846).

[5] RESTATEMENT (SECOND) OF AGENCY § 387, cmt. b (AM. LAW INST. 1957).

[6] *See, e.g.*, *Jones*, 559 U.S. at 347; *Metro. Life Ins. Co.*, 554 U.S. at 116–17.

[7] *See, e.g.*, *Citizens United*, 558 U.S. at 365–66.

[8] *See Skilling*, 561 U.S. at 408–09.

other forms of disloyalty, the Supreme Court held, improperly encroached on constitutionally protected freedoms.[9]

Taken together, these decisions show a general trend that has been overlooked in the academic literature.[10] In a wide variety of settings, the Supreme Court has prioritized contract norms over fiduciary principles and market freedom over precedent.[11]

Put in terms of fiduciary theory, the Supreme Court is seeing fiduciary relationships as increasingly closer to contractual ones.[12] For the Court, the special obligations of fiduciaries seem to be getting smaller.[13] Good or bad, the trend is big news.

Part I of this Article shows that the recent cases represent a major change in how the Supreme Court regulates fiduciaries. Part II puts the trend into a larger context: the Court's new approach is at odds with traditional loyalty norms still enforced by state courts and supported by most scholars, but it is consistent with a more transactional approach to relationships, contractarian legal scholarship, and the evolving views of financial elites.

I. FIDUCIARY LOYALTY IN THE U.S. SUPREME COURT

A. The Traditional Standard for Regulating Fiduciary Conflicts

To appreciate how much the Supreme Court's recent decisions depart from past practice, it is first necessary to understand the traditional standard for regulating fiduciary conflicts of interest that the Supreme Court has recently chosen not to follow. Let us begin with some basics. A fiduciary is a person (such as

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[9] *See, e.g.*, *Skilling*, 561 U.S. at 408–09, 412; *Citizens United*, 558 U.S. at 328–29.

[10] Some commentators, however, have seen the connection between a small subset of the recent loyalty decisions: the criminal corruption cases like *Skilling* and the campaign finance cases like *Citizens United*. *See, e.g.*, Deborah Hellman, *A Theory of Bribery*, 38 CARDOZO L. REV. 1947 (2017); Jacob Eisler, *The Unspoken Institutional Battle Over Anti-Corruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363 (2010).

[11] *See, e.g.*, *Skilling*, 561 U.S. at 410; *Jones*, 559 U.S. at 351; *Metro. Life Ins. Co.*, 554 U.S. at 116; Pegram v. Herdrich, 530 U.S. 211, 231–35 (2000).

[12] *See* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 431, 443–44 (1993).

[13] *See, e.g.*, *Skilling*, 561 U.S. at 410; *Jones*, 559 U.S. at 351; *Metro. Life Ins. Co.*, 554 U.S. at 116; *Pegram*, 530 U.S. at 231–32.

an agent or trustee) who has been entrusted with authority or resources to use for the benefit of another person (whom we can call a "principal").[14] The duty of loyalty is the fiduciary's obligation to remain faithful to that charge and use the entrusted resources and authority solely for the benefit of the principal.[15]

In the words of Section 170(1) of the Restatement (Second) of Trusts: "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."[16] Or as Section 387 of the Restatement (Second) of Agency puts it when describing the duty of loyalty for agents: "Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."[17]

Fiduciaries who simply take money from the till and put it into their own pockets are clearly violating their duty of loyalty. But what if the fiduciary uses entrusted authority to effectuate a transaction that confers a personal benefit on the fiduciary? According to the traditional rule, such a conflict of interest transaction is illegal unless the fiduciary proves that he or she made a complete disclosure of all material facts and that the transaction was substantively fair to the principal.[18]

In the nineteenth century, the U.S. Supreme Court adopted this rule as a matter of common law and equity.[19] For example, in *Michoud v. Girod,*[20] decided in 1846, executors of an estate sold property of the estate to a dummy purchaser who then sold the property to the executors five days later. The Court held the concealed self-dealing transaction was illegal because under "the morality and policy of the law" and the rule of equity "in every code of jurisprudence with which we are acquainted, that a purchase

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[14] RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. e (AM. LAW INST. 2006).

[15] *Id.*

[16] RESTATEMENT (SECOND) OF TRUSTS § 170(1) (AM. LAW INST. 1957).

[17] RESTATEMENT (SECOND) OF AGENCY § 387 (AM. LAW INST. 1957); *see also* Rave, *supra* note 2, at 695 ("This exclusive-benefit principle is the heart of the fiduciary relationship.").

[18] *See* RESTATEMENT (SECOND) OF AGENCY § 390, cmt. a (AM. LAW INST. 1957); RESTATEMENT (SECOND) OF TRUSTS § 170(2) (AM. LAW INST. 1957); *see also* Austin W. Scott, *The Fiduciary Principle,* 37 CAL. L. REV. 539 (1949).

[19] *See* Wardell v. R.R. Co., 103 U.S. 651, 657–58 (1880); Michoud v. Girod, 45 U.S. 503, 553 (1846).

[20] *Michoud,* 45 U.S. at 508, 565.

by a trustee or agent of the particular property of which he has the sale, or in which he represents another ... carries fraud on the face of it."[21] The Supreme Court explained: "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity."[22] The Court went on to explain that if an executor wants to purchase property from the estate, the executor should do so after full disclosure and court approval based on proof that the transaction is in the best interest of the beneficiaries.[23]

The Court reaffirmed these principles in 1880 in another self-dealing case.[24] The executive directors of the Union Pacific Railroad set up a coal company that they personally (and secretly) owned.[25] The directors then authorized a contract between the railroad and that coal company that gave the coal company the right to mine coal on land owned by the railroad and then sell the coal back to the railroad at a profit.[26] In a unanimous opinion authored by Justice Field, the Court said that the transaction was "utterly indefensible and illegal" because the directors' "character as agents forbade the exercise of their powers for their own personal ends against the interest of the company."[27]

In the twentieth century, the Supreme Court repeatedly read these principles into the silences and ambiguities of federal statutory law.[28] A prime example is the 1939 decision in *Pepper v. Litton*.[29] The dominant shareholder of a coal company secured a judgment against the company for unpaid wages and a supporting lien that, according to a state court, gave him priority over other creditors of the company.[30] A federal bankruptcy court, however, disallowed the dominant shareholder's claim because of his fiduciary relationship to the company.[31] The Supreme Court affirmed,

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[21] *Id.* at 553.
[22] *Id.* at 555.
[23] *Id.* at 557–58.
[24] *Wardell*, 103 U.S. at 651, 657–58.
[25] *Id.* at 654–55, 657.
[26] *Id.* at 653–54, 656–57.
[27] *Id.* at 657–58.
[28] *See, e.g.*, Nat'l Labor Rel. Bd. v. Amax Coal Co., 453 U.S. 322, 330 (1981); Pepper v. Litton, 308 U.S. 295, 306–07 (1939).
[29] *See generally Pepper*, 308 U.S. 295.
[30] *Id.* at 297–301.
[31] *Id.* at 301.

holding that because of the conflict of interest, the transaction was subject to rigorous scrutiny with the controlling shareholder having the burden of proving substantive fairness.[32]

The unanimous opinion by Justice Douglas explained that, under equitable principles incorporated into the federal bankruptcy law, the dominant shareholder had the burden

> not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain.[33]

The Court went on to explain that the fiduciary cannot "violate the ancient precept against serving two masters .... He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements."[34] The "ancient precept" referenced in the Court's opinion justifying the overriding duty of loyalty came from the Gospel of Matthew in the New Testament: "No man can serve two masters."[35]

In the waning years of the twentieth century, the Supreme Court continued to follow the traditional standard, although with less moralistic verve.[36] For example, in 1981, the Court remanded a criminal case for further review because of concern that there might be a conflict of interest between criminal defendants and their lawyer, who was being paid by the defendants' former employer.[37] None of the parties had raised the conflict issue, but the Court thought that it deserved a hearing.[38] The opinion by Justice Powell in *Wood v. Georgia* explained: "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of

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[32] *Id.* at 306.

[33] *Id.* at 306–07 (citations and footnotes omitted).

[34] *Id.* at 311.

[35] *Id.* at 295; *Matthew* 6:24 (King James).

[36] *See* Varity Corp. v. Howe, 516 U.S. 489, 504 (1996); Nat'l Labor Rel. Bd. v. Amax Coal Co., 453 U.S. 322, 329–30 (1981); Wood v. Georgia, 450 U.S. 261, 271–72 (1981).

[37] *Wood*, 450 U.S. at 267–68, 270–71.

[38] *Id.* at 267–68.

interest. ... Here, [the defendants' lawyer] may not have pursued their interests single-mindedly."[39]

In another 1981 case, *National Labor Relations Board v. Amax Coal Company,* involving the interpretation of the Employee Retirement Income Security Act (ERISA), the Court said: "To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.'"[40] Those general principles had to be read into ERISA, the Court said, because "we must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary."[41]

The Court also took a broad view of fiduciary responsibility in a 1996 case, *Varity Corporation v. Howe.*[42] Varity decided to spin off its money-losing divisions into a new company and to urge employees to work for that spin-off.[43] After the spin-off failed, the employees sued claiming that the employer had been acting in its capacity of an ERISA fiduciary when it assured them that their benefits would be safe with the new company.[44] Varity argued that it was acting in its capacity as an employer and was therefore not subject to a fiduciary duty.[45]

The Supreme Court sided with the employees.[46] The statute made a person an ERISA fiduciary "'to the extent' that he or she 'exercises any discretionary authority or discretionary control respecting management' of the plan, or 'has any discretionary authority or discretionary responsibility in the administration' of the plan."[47] Conveying information about likely future benefits was sufficiently related to the management of the plan to impose a fiduciary duty, the Court held, since reasonable employees could have thought that Varity was communicating to them both in its capacity as employer and its capacity as an ERISA fiduciary.[48]

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[39] *Id.* at 271–72.
[40] *Nat'l Labor Rel. Bd.*, 453 U.S. at 329–30.
[41] *Id.* at 330.
[42] Varity Corp. v. Howe, 516 U.S. 489, 498, 503 (1996).
[43] *Id.* at 493.
[44] *Id.* at 494.
[45] *Id.* at 495.
[46] *Id.* at 503.
[47] *Id.* at 498.
[48] *Id.* at 503.

The Court held that it was irrelevant that the challenged statements were not required by the ERISA statute or plan.[49] The duty of loyalty, the Court explained, imposed obligations on fiduciaries that go beyond the letter of the contract or the positive law.[50] "If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose."[51]

Campaign finance might seem far afield from our theme of fiduciary loyalty. But consider that elected officials are fiduciaries of their constituents. They exercise power that has been entrusted to them to serve others. They are public servants. Like other servants, they are supposed to be loyal to their masters, which for them is the public. Large campaign contributions are dangerous because the money might corrupt that loyalty to the public by inducing officials to favor those who pay them over those the officials are supposed to represent.

That, at least, was the theory the Supreme Court used in 1976 to uphold restrictions on campaign contributions against a First Amendment challenge.[52] In *Buckley v. Valeo*, the Supreme Court said the restrictions were justified "to limit the actuality and appearance of corruption resulting from large individual financial contributions" reasoning that "[t]o the extent that large contributions are given to secure political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."[53]

In 2003, the Court followed a similar approach in *McConnell v. Federal Election Commission*,[54] holding that the McCain Feingold statute's restrictions on campaign contributions were justified in order to ensure that elected officials were loyal to their constituents and not swayed from that loyalty by the corrupting influence of large campaign contributions.[55] The Court explained: "Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political

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[49] *Id.* at 504.
[50] *Id.*
[51] *Id.*
[52] Buckley v. Valeo, 424 U.S. 1, 26–27 (1976).
[53] *Id.*
[54] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 93–95 (2003).
[55] *Id.* at 143–45.

contribution limits."[56] The Court went on: "Take away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.'"[57]

A key assumption in the Court's analysis was that elected officials should be loyal to their constituents, not to their large donors.[58] It followed that banning large campaign contributions was a legitimate way to avoid the creation of a conflict between the duty of loyalty and financial self-interest.[59] The Court said: "Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'"[60]

B. The Supreme Court Changes Course

And then the Supreme Court became much more deferential to (and protective of) the decisions of conflicted fiduciaries.[61] With surprising unanimity (except in the politically charged campaign finance decisions), the Court's tone and approach in loyalty related cases underwent a sea change.[62]

The new era began around 2008. But there was a harbinger of what was to come in 2000 with *Pegram v. Herdrich*.[63] Cynthia Herdrich experienced pain in her groin and went to see her doctor, Lori Pegram, who worked for Carle Clinic, a for-profit HMO providing services to Herdrich pursuant to an ERISA plan.[64]

> Six days later, Dr. Pegram discovered a six by eight centimeter inflamed mass in Herdrich's abdomen. Despite the noticeable inflammation, Dr. Pegram did not order an ultrasound diagnostic procedure at a local hospital, but decided that Herdrich would have to wait eight more days for an ultrasound, to be performed at a facility staffed by Carle more than 50 miles away. Before

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[56] *Id.* at 143.
[57] *Id.* at 144.
[58] *Id.* at 143–44.
[59] *Id.*
[60] *Id.* at 150.
[61] *See* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 105 (2008).
[62] *Id.*
[63] Pegram v. Herdrich, 530 U.S. 211, 211 (2000).
[64] *Id.* at 215.

> the eight days were over, Herdrich's appendix ruptured, causing peritonitis.[65]

Herdrich sued for malpractice and won.[66] Herdrich also claimed a breach of fiduciary duty under ERISA, alleging Pegram and Carle had an undisclosed financial interest in advising Herdrich to delay treatment until she could go to the Carle facility and that this undisclosed conflict led Dr. Pegram to give Herdrich bad medical advice.[67] The United States Court of Appeals held that the ERISA allegation stated a claim upon which relief could be granted,[68] but the Supreme Court unanimously reversed in an opinion written by Justice Souter.[69]

Even though the HMO was within the statutory definition of an ERISA fiduciary, the Court worried about the practical implications of treating its treatment decisions as fiduciary ones.[70] After all, the Court noted, conflicts of interest are ubiquitous.[71]

> In this case, for instance, one could argue that Pegram's decision to wait before getting an ultrasound for Herdrich, and her insistence that the ultrasound be done at a distant facility owned by Carle, reflected an interest in limiting the HMO's expenses, which blinded her to the need for immediate diagnosis and treatment.[72]

If traditional fiduciary standards were applied, the Court noted, almost every unsuccessful treatment decision by a for-profit HMO could be challenged as a breach of fiduciary duty under ERISA.[73] That was not acceptable. There was no reason to add a federal remedy to state law malpractice claims.[74] So treatment decisions could not be subjected to fiduciary standards.[75] "It is enough to recognize that the Judiciary has no warrant to precipitate the

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[65] *Id.*
[66] *Id.* at 215, 218.
[67] *Id.* at 211.
[68] *Id.*
[69] *Id.* at 213.
[70] *Id.* at 217–18.
[71] *Id.* at 212.
[72] *Id.* at 220.
[73] *Id.* at 211, 213.
[74] *Id.* at 235.
[75] *Id.* at 232–34.

upheaval that would follow a refusal to dismiss Herdrich's ERISA claim."[76]

The Court took a similarly pragmatic approach in a 2008 ERISA decision, *Metropolitan Life Insurance Company v. Glenn*.[77] ERISA benefit plans often provide that the same insurance company will act both as the decision-maker and the payor with respect to ERISA benefit claims.[78] The question before the Court was the proper standard of review for such conflicting decisions.[79] The governing statute left this issue open for the courts to decide.[80] The liberals, who prevailed, said that the conflict was a factor a reviewing court should consider, among many other things, in deciding whether to overturn a denial decision.[81] The conservatives believed that the conflict should only be considered if there was evidence that the conflict affected the decision.[82] However, both sides agreed that the conflicted decision should be treated as presumptively correct and reviewed deferentially.[83]

The majority opinion by Justice Breyer explained that Congress had not expressly required *de novo* review and adopting such a standard would pose practical problems for the courts that Congress could not have intended: "1.9 million beneficiaries of ERISA plans have health care claims denied each year ... [there were] 257,507 total civil filings in federal court in 2007 ... Congress does not 'hide elephants in mouseholes.'"[84] Chief Justice Roberts agreed: "the majority is surely correct in concluding that it is important to retain deferential review for decisions made by conflicted administrators, in order to avoid 'near universal review by judges *de novo*.'"[85]

The 2009 *Citizens United* decision,[86] striking down restrictions on independent corporate campaign expenditures, involved a host of issues. But the question of fiduciary loyalty was

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[76] *Id.* at 233.
[77] Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008).
[78] *Id.* at 112.
[79] *Id.*
[80] *Id.* at 111–12.
[81] *Id.* at 115–17.
[82] *Id.* at 127.
[83] *Id.* at 121.
[84] *Id.* at 116.
[85] *Id.* at 121 (Roberts, J., concurring).
[86] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 310 (2009).

one of them.[87] As we have seen, the main rationale for regulating corporate campaign contributions is that the contributions are similar to bribes in that they may induce the recipients to favor the interests of the payors over the interests of the constituents, which would violate the officials' fiduciary duty of undivided loyalty to the constituents.[88]

The Supreme Court rejected this loyalty argument.[89] The Court held that to avoid encroaching on the First Amendment, the government could only prohibit *quid pro quo* corruption, money for official action, or its appearance.[90] Even if campaign contributors get greater access to elected officials, the Court held, the mere selling of access to elected officials was not a form of disloyalty, or corruption, that the government could prohibit.[91] The dissent by Justice Stevens, by contrast, took the view that "the difference between selling a vote and selling access is a matter of degree, not kind."[92] Justice Stevens, the only World War II veteran still on the Court, also argued that a corporation might be analogized to a foreign power, because its legal duties do not include patriotism, so the majority's logic giving them a constitutional right to participate in our political process "would have accorded the propaganda broadcasts to our troops by 'Tokyo Rose' during World War II the same protection as speech by Allied commanders."[93]

The same theme of non-interference with conflicted fiduciaries may be seen in *Jones v. Harris Associates, L.P.*,[94] a 2010 case involving mutual funds. A mutual fund is a pool of assets owned by the investors in the fund.[95] Typically, a mutual fund is set up by a separate entity, an investment adviser, which selects the directors of the fund and then negotiates its compensation arrangement with the (supposedly) independent directors whom it has just selected.[96] The question before the Supreme Court was how courts should review these compensation decisions under

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[87] *Id.* at 382, 386.
[88] *Id.* at 453.
[89] *Id.* at 379, 383.
[90] *Id.* at 384.
[91] *Id.* at 360.
[92] *Id.* at 447 (Stevens, J., dissenting).
[93] *Id.* at 424 (Stevens, J., dissenting).
[94] Jones v. Harris Assocs., L.P., 559 U.S. 335, 335 (2010).
[95] *Id.* at 338.
[96] *Id.*

a New Deal era statute, the Investment Company Act, which required the application of fiduciary standards.[97]

The Court's opinion made it clear that judicial review of these compensation decisions should be very deferential (essentially ignoring the old rule that put the burden of proof on the conflicted fiduciary to prove substantive fairness).[98] The Court said that if the mutual fund directors followed normal procedures, a judicial determination of impropriety "must be based on evidence that the fee 'is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining.'"[99] In a concurring opinion, Justice Thomas noted that the Court properly held investor plaintiffs challenging compensation decisions to a "heavy burden of proof ...."[100]

That same year, 2010, the Supreme Court dealt with another kind of fiduciary conflict in *Skilling v. United States*.[101] Jeffrey Skilling, the former CEO of Enron, was convicted of engaging in a fraudulent scheme that deprived his company and its shareholders of their right to his honest services in violation of a federal statute specifically intended to protect a principal's right to honest services from a fiduciary.[102] The Supreme Court held unanimously that the honest services fraud conviction had to be reversed because of vagueness concerns.[103]

The majority opinion by Justice Ginsburg said that the honest services law had to be limited to bribes and kickbacks, which was not the specific accusation against Skilling.[104] "Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine."[105] The Court rejected the Government's argument that the honest services law could be applied to undisclosed self-dealing (a practice the Court had condemned

[97] *Id.* at 341–45.
[98] *Id.* at 352.
[99] *Id.* at 351.
[100] *Id.* at 354 (Thomas, J., concurring).
[101] Skilling v. United States, 561 U.S. 358, 358 (2010).
[102] *Id.*
[103] *Id.* at 368.
[104] *Id.*
[105] *Id.* at 408.

as obviously immoral and illegal back in 1846),[106] such as the pursuit of a fiduciary's own financial interests while purporting to act in the interests of those to whom a duty is owed.[107] The Court explained that the government's theory

> leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made, and what information should it convey?[108]

A concurring opinion by Justice Scalia, joined by Justice Kennedy and Justice Thomas, would have gone further and simply struck down the honest services law as void for vagueness rather than save it, for bribery cases, with a limiting construction.[109] Justice Scalia explained that the statute was intended to incorporate lofty, grandiloquent, "astoundingly broad" moralistic language from prior lower court case law and the fiduciary duty standard articulated in those decisions was "hopelessly undefined" and therefore void for vagueness.[110]

The Court came to a similar conclusion in *McCutcheon v. Federal Election Commission*,[111] a 2013 case striking down a restriction on campaign contributions. As in *Skilling*, the Court drew a sharp distinction between *quid pro quo* bribery and kickbacks, which the law could prohibit, and other forms of disloyalty, which the Court held to be constitutionally protected.[112] The plurality opinion by Chief Justice Roberts set the stage for its analysis by noting how the expansion of First Amendment freedoms undercut the broader loyalty justifications for restricting campaign contributions.[113] "If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition."[114]

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[106] *Id.* at 409, 410.
[107] *Id.*
[108] *Id.* at 411 n.44.
[109] *Id.*
[110] *Id.* at 418–19 (Scalia, J., concurring).
[111] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 239 (2013).
[112] *Id.* at 237–40.
[113] *Id.* at 196–97.
[114] *Id.* at 191.

The issue of loyalty and conflict of interest came before the Supreme Court in another 2013 case, *Burt v. Titlow*.[115] Titlow was charged with helping her aunt kill the aunt's husband.[116] Titlow's lawyer negotiated a plea bargain to manslaughter that would have gotten her a 7- to 15-year sentence.[117] But a jailer heard Titlow protest her innocence after she entered her guilty plea and advised her to get a new lawyer.[118] The new counsel, Fredrick Toca, agreed to represent Titlow and to take, as part of his payment, the publication rights to the story of the case.[119] He then advised her to withdraw her guilty plea without reviewing the evidence against her or even talking to her prior counsel about why he had advised the plea bargain.[120] The plea was withdrawn.[121] Titlow went to trial on the murder charge, was convicted and received a sentence of 20 to 40 years.[122] Titlow sought a writ of habeas corpus based on ineffective assistance of counsel by Toca.[123] The state courts rejected her argument, but the United States Court of Appeals for the Sixth Circuit sided with Titlow.[124]

The U.S. Supreme Court reversed unanimously, reinstating the conviction and holding that the federal court should have deferred to the state court factual findings on the duty of care issue.[125] The fee arrangement between Titlow and Toca created an obvious conflict of interest.[126] Because his payment included the publication rights to the story of the case, the lawyer Toca had a financial interest in an exciting trial that conflicted with his client's interest in a quiet but favorable plea bargain.[127] And under Supreme Court precedent the Sixth Amendment right to counsel includes the right to conflict-free counsel.[128] But the

[115] Burt v. Titlow, 571 U.S. 12, 12 (2013).
[116] *Id.* at 13.
[117] *Id.* at 11–13.
[118] *Id.* at 16.
[119] *Id.* at 18.
[120] *Id.* at 14.
[121] *Id.* at 19.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 10.
[127] *Id.* at 14.
[128] Wood v. Georgia, 450 U.S. 261, 262, 272 (1981).

Court managed to avoid the conflict of interest problem by focusing on the duty of care, not using the words "conflict of interest" to describe the issue and treating the state court decision as a finding of fact to which deference was due.[129]

The fee arrangement, however, did not go unnoticed. The Court said the defense counsel might have violated professional rules by accepting publication rights.[130] Nevertheless, the Court said, that did not amount to a constitutional violation.[131] While the defense lawyer's conduct was "far from exemplary ... the Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance, and we have held that a lawyer's violation of ethical norms does not make the lawyer *per se* ineffective."[132]

C. Something Significant Has Changed

When considered in isolation, each of these recent decisions might be explainable based on factors peculiar to the particular statute or constitutional provision at issue in that case. But when the decisions and their rhetoric are taken as a whole they reveal a profound change in the Supreme Court's attitude toward fiduciary conflicts. Consider the before and after.

In 1981, in *Wood v. Georgia*,[133] the Supreme Court went out of its way to recognize a potential conflict of interest between criminal defendants and their counsel and to remand the case for a hearing, even though the defendants had not complained about the lawyer's conduct.[134] In 2013, in *Burt v. Titlow*, the Court went out of its way to ignore a serious and actual conflict of interest between a criminal defendant and her lawyer and to reinstate a conviction, even though the defendant was complaining bitterly about the lawyer's conduct.[135]

In 1981, in *NLRB v. Amax Coal Company*, the Court said that traditional fiduciary principles had to be read into ERISA

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[129] *Id.* at 263–66.
[130] *Burt*, 571 U.S. at 18.
[131] *Id.* at 17.
[132] *Id.* at 18.
[133] *Wood*, 450 U.S. at 261.
[134] *Id.*
[135] *See generally id.*

unless Congress clearly said otherwise.[136] In 2000, in *Pegram v. Herdrich*, the Supreme Court said that traditional fiduciary principles should not be read into ERISA, absent a specific Congressional command to do so, because the traditional principles were so impractical.[137]

In 1939, in *Pepper v. Litton*, the Supreme Court said that conflict of interest transactions involving fiduciaries are presumptively unlawful and require a heavy burden of justification as to their substantive fairness, even if there has been perfect compliance by the fiduciary with the technical requirements of the law.[138] In 2008 in *Metropolitan Life Insurance Company v. Glenn*, and in 2010, in *Jones v. Harris Associates, L.P.*, the Supreme Court said that conflict of interest transactions involving fiduciaries are presumptively lawful and judicial review should normally be very deferential.[139]

In 1846, in *Michoud v. Girod*, the Supreme Court said that undisclosed self-dealing by a fiduciary was obviously illegal and immoral and violative of every known code of jurisprudence.[140] In 2013, in *Skilling v. United States*, the Supreme Court said that a federal statute specifically intended to require honesty by fiduciaries could not be applied to undisclosed self-dealing by fiduciaries because doing so would raise due process, void for vagueness concerns.[141]

In 2003, in *McConnell v. Federal Election Commission,* the Supreme Court upheld restrictions on corporate campaign contributions and expenditures based on the government's legitimate interest in preventing corruption, including the sale of access to elected officials.[142] In 2009, in *Citizens United*, the Supreme Court held that the First Amendment protected corporate campaign expenditures, even if the expenditures allowed corporations to buy access to elected officials.[143]

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[136] *Id.* at 330.

[137] *Id.* at 211–12.

[138] *See generally id.*

[139] Jones v. Harris Assocs., L.P., 559 U.S. 335, 352 (2010); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 133–34 (2008).

[140] *See generally* Michoud v. Girod, 45 U.S. 503 (1846).

[141] *See generally* Skilling v. United States, 561 U.S. 358 (2010).

[142] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 150 (2003).

[143] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 329, 340–41 (2009).

It is also remarkable that (except for the politically charged campaign finance cases where other considerations were in play) the new decisions have either been unanimous or the Court has adopted the position of its liberals, with the conservatives on the Court wanting to go even further in reducing fiduciary oversight. When it comes to the fiduciary loyalty, the Court seems to have changed its mind as a group.

II. DIFFERENT WAYS OF VIEWING LOYALTY

The U.S. Supreme Court has not overturned its nineteenth-century conflict of interest decisions, which established basic rules of common law and equity. Those rules are still generally followed by State courts and by federal courts following State law, except when the old rules have been specifically modified by statute. For example, a 2018 decision of the United States Court of Appeals for the Fifth Circuit noted that: "Under Texas law, where a fiduciary engages in a transaction with a party to whom the fiduciary owes duties, a presumption of unfairness arises, and the burden is placed on the fiduciary to establish that the transaction was fair."[144]

But the Supreme Court is backing away from its twentieth-century practice of reading the traditional conflict rules into the silences and ambiguities of federal statutory and constitutional law.[145] This shift is consistent with a larger story. The old fiduciary rules were fashioned in a very different society. Ideas have changed. Contract norms have gained ground, while loyalty (even fiduciary loyalty) has become controversial.[146]

A. The Old Ideas

The modern idea of fiduciary loyalty was formed through the merger of two traditions. One was the fiduciary responsibility of trustees as articulated and enforced by courts of equity.[147]

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[144] UTSA Apts. LLC vs. UTSA Apts. 8, LLC (*In re* UTSA Apts. 8, LLC), 886 F.3d 473, 492 (5th Cir. 2018).

[145] *See generally UTSA Apts.*, 886 F.3d at 473.

[146] To be sure, the old fiduciary loyalty rules are preferred by most scholars. *See, e.g.*, Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 623 (1997); Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1210 (1995).

[147] *See* Brudney, *supra* note 146, at 601–02; Frankel, *supra* note 146, at 1227 n.47, 1272 n.165.

The other, evoked by the word "loyalty," was the type of fidelity that masters have traditionally demanded of their servants, kings of their subjects, armies of their soldiers, and religions of their faithful.[148]

Both traditions treated duty in moralistic terms and not simply as a matter of contract. The English equity chancellors and ecclesiastical judges who created the rules for fiduciaries described the obligations of trustees with words like fidelity, integrity, faith and honor.[149] "The chancellor was the keeper of the king's conscience" and a goal of equity was to prevent those acting in a fiduciary capacity from gaining unfair advantages through opportunistic conduct.[150]

The loyalty obligations of servants and subjects were likewise considered an important restraint on opportunism, as well as essential for social cohesion, trust, order, and stability.[151] The alternatives were seen as frightening. Consider the Shakespeare plays *Othello*[152] and *Macbeth*[153] and how disloyalty by Iago to Othello and by Macbeth to King Duncan leads to tragedy. Or consider the emotions aroused by words like "corruption," "treason" or "betrayal" or by the mention of Judas Iscariot taking thirty pieces of silver.[154] There was a visceral fear that without loyalty, society would dissolve into a war of all against all, or fall prey to its more unified enemies.

Loyalty was designed to force moral behavior, not to facilitate deals. The analogy would be to our contemporary view of criminal law and its moral channeling role, as described in a 1997 article by Judge Gerard Lynch: "What society wants from its members ... is not an intelligent calculation of the costs and benefits of abiding by its basic norms, but more or less unthinking obedience to them."[155]

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[148] John Kleinig, *Loyalty*, STAN. ENCYCLOPEDIA OF PHIL. (last updated Oct. 16, 2017), https://plato.stanford.edu/entries/loyalty/ [https://perma.cc/2SBF-YMTS].

[149] *See* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829–31 (1983).

[150] Henry E. Smith, *Why Fiduciary Law is Equitable*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 263 (Andrew S. Gold & Paul B. Miller, eds., 2014).

[151] *See id.*

[152] *See generally* WILLIAM SHAKESPEARE, OTHELLO.

[153] *See generally* WILLIAM SHAKESPEARE, MACBETH.

[154] *Matthew* 26:15 (King James).

[155] Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 46 (1997).

The idea of loyalty also carried with it the notion that the agent or servant was part of a team; an agent is an instrument of the principal, rather than an autonomous individual.[156] Because the agent was acting as the principal's other self, the agent owed the principal a duty of self-abnegating, selfless devotion.[157]

Actual behavior, of course, often fell short of this ideal. But the judicial response was to condemn the disloyalty, rather than the stringency.[158] In 1910, for example, the Supreme Court described the practice of government procurement officials taking kickbacks from contractors as "utterly vicious, unspeakably pernicious, and an unmixed evil.'"[159]

The two traditions (fiduciary and loyalty) were brought together in the twentieth century. The first time that the New York Court of Appeals used the word "loyalty" to describe the duties of a fiduciary was in a 1926 opinion by Justice Cardozo.[160] The U.S. Supreme Court followed suit in 1941 in an opinion by Justice William Douglas.[161]

The merger provided rhetorical support for the idea that corporate fiduciaries should be subject to the same type of loyalty obligations traditionally demanded of servants. For example, in his 1914 book, *Other People's Money and How the Bankers Use It*, Louis Brandeis used language associated with the loyalty duties of servants (specifically the precept in Matthew 6:24 that "No man can serve two masters") to describe the obligations of corporate directors, stating: "The practice of interlocking directorates is the root of many evils. It offends laws human and divine. ... [I]t tends to disloyalty and to violation of the fundamental law that no man can serve two masters."[162] A 1934 article in the Harvard

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[156] *See* United States v. Gooding, 25 U.S. 460, 470 (1827); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 232 (1881); Floyd Mechem, *The Nature and Extent of an Agent's Authority*, 4 MICH. L. REV. 433, 436–67 (1906).

[157] Meinhard v. Salmon, 164 N.E. 545, 548 (N.Y. 1928); Frankel, *supra* note 149, at 795, 808, 830; Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 440 (2012).

[158] United States v. Carter, 217 U.S. 286, 308–09 (1910).

[159] *Id.* at 308.

[160] *See* Wendt v. Fischer, 154 N.E. 303, 304 (N.Y. 1926).

[161] *See* Woods v. Cty. Nat'l Bank & Tr. Co. of Chi., 312 U.S. 262, 269 (1941).

[162] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 71 (Bedford Books of St. Martin's Press, 3rd ed. 1995).

Law Review by Supreme Court Justice Harlan Fiske Stone made a similar reference, stating that most of the "mistakes" and "major faults" of finance in the 1920s could be "ascribed to the failure to observe the fiduciary principle, the precept as old as holy writ, that 'a man cannot serve two masters.'"[163]

Another example of the moralistic tone of fiduciary law may be found in Professor Austin Scott's classic 1949 California Law Review article, *The Fiduciary Principle*.[164] Professor Scott began with a parable from the Gospel of Luke and toward the end quoted an article referring to the Gospel of Matthew.[165] In between, Professor Scott defined the duty of loyalty in moralistic terms: "In loyalty, when loyalty is properly defined, is the [fulfillment] of the whole moral law."[166]

Professor Scott also made it clear that because of its moral underpinnings a fiduciary relationship was quite different from a merely contractual one.[167] For example: "Where the fiduciary does an act which would be a breach ... if he did not have the consent of his principal, such consent will protect him only if he has in no way taken advantage of his position as fiduciary in procuring the consent."[168] Professor Scott explained there were also substantive limitations on the fiduciary; "where the trustee has an adverse interest in the transaction, the consent of the beneficiary will not preclude him from holding the trustee liable for a breach of trust if the transaction was not fair and reasonable."[169] Because of the fiduciary nature of the relationship, the "consent of the beneficiary is indeed a slender reed upon which a trustee may lean."[170]

In the middle years of the twentieth century, the Supreme Court treated the idea of fiduciary loyalty as an important public policy that guided the construction of federal statutes and justified strict regulation of financial fiduciaries.[171] That attitude

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[163] Harlan Fiske Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 8 (1934).

[164] Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 540 (1949).

[165] *Id.* at 539, 555.

[166] *Id.* at 540.

[167] *See id.* at 540–41.

[168] *Id.* at 541.

[169] *Id.* at 542.

[170] *Id.*

[171] *See* United States v. Miss. Valley Generating Co., 364 U.S. 520, 566 (1961).

is best illustrated by a 1961 Supreme Court case, *United States v. Mississippi Valley Generating Company*.[172]

The U.S. government wanted to negotiate a contract with a private company, the Mississippi Valley Generating Company, for the construction of a power plant.[173] The government hired a vice president with the First Boston investment banking firm to provide the government with advice in connection with the negotiations.[174] At the time the adviser was hired, the government knew that First Boston might help arrange financing for the construction project if the deal was signed.[175] The advice was proper, the negotiations were successful, and the resulting deal was fair.[176] But the government lost interest in the project and wanted to get out of the contract.[177] So the government sued its counterparty, Mississippi Valley, to void the contract on the ground that the First Boston vice president who had advised the government had a conflict of interest under a criminal statute, the federal conflict of interest law, because of the prospect that First Boston might help arrange financing.[178]

The Supreme Court ruled in favor of the government, with the Court's liberals prevailing over its conservatives.[179] The opinion for the Court by Chief Justice Warren explained: "The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest."[180]

It did not matter that the adviser had acted in good faith and that the contract was fair because the statute was "directed not only at dishonor, but also at conduct that tempts dishonor."[181] Nor did it matter that the government had known First Boston might provide financing for the deal and insisted that the adviser

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[172] *Id.*
[173] *Id.* at 523.
[174] *Id.*
[175] *Id.* at 535–37, 555.
[176] *Id.* at 540.
[177] *See id.* at 565–66.
[178] *See id.* at 554, 556–57, 559.
[179] *Id.* at 566.
[180] *Id.* at 549.
[181] *Id.*

serve anyway; "we have consistently held that no government agent can properly claim exemption from a conflict-of-interest statute simply because his superiors did not discern the conflict."[182]

Strict enforcement was necessary, the Supreme Court explained, because "a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."[183]

Finally, the Supreme Court brushed aside the problem that the relevant law was a criminal statute that provided no civil remedy, let alone a civil remedy against an innocent third party that had not created, exploited or profited from the alleged conflict of interest of the government adviser.[184] The Court explained that a remedy had to be implied because "the primary purpose of the statute is to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government."[185]

The Supreme Court came to a similar conclusion in 1963 in *Securities and Exchange Commission v. Capital Gains Research Bureau*,[186] once again using the concept of loyalty as a justification for strict regulation of financial fiduciaries.[187] The case involved an investment adviser's practice of buying shares of a security for his own account, recommending that security to his clients for long-term investment and then selling the shares at a profit when its price rose following the recommendation.[188] The Court held that the practice, without full disclosure to clients, constituted a fraud or deceit within the meaning of the Investment Advisers Act of 1940.[189] The Court reasoned that the Investment Advisers Act was designed to "achieve a high standard of business ethics in the securities industry"[190] and "to eliminate, or at

[182] *Id.* at 561.
[183] *Id.* at 562.
[184] *Id.* at 563.
[185] *Id.*
[186] SEC v. Capital Gains Res. Bureau, 375 U.S. 180, 196 (1963).
[187] *Id.*
[188] *Id.* at 181.
[189] *Id.* at 181–82.
[190] *Id.* at 186.

least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."[191]

The Court regarded the investment adviser's practice as a conflict of interest transaction similar to self-dealing and explained the rule against conflicts of interest was not justified not only by sound public policy but also by "the authoritative declaration that no man can serve two masters; and considering that human nature must be dealt with, the rule does not stop with actual violations of such trust relations, but includes within its purpose the removal of any temptation to violate them ...."[192] The Court went on: "The Investment Advisers Act of 1940 was 'directed not only at dishonor, but also at conduct that tempts dishonor.'"[193] The Court explained: "Experience has shown that disclosure in such situations, while not onerous to the adviser, is needed to preserve the climate of fair dealing which is so essential to maintain public confidence in the securities industry and to preserve the economic health of the country."[194]

B. From Conformity to Choice

The Supreme Court's rhetoric about fiduciary loyalty in *Mississippi Valley* and *Capital Gains Research Bureau*—the negative attitude toward self-interest and human nature; the talk about moral duty, evil, dishonor and the need to avoid temptation; the references to the Gospel of Matthew as authoritative; the broad construction of regulatory statutes; and the idea that high ethical standards are needed to preserve public trust in the government and in the securities industry—stands in sharp contrast to the much more pragmatic approach toward loyalty of today's Supreme Court.[195]

The differences are consistent with more general changes. The United States in 1961 and 1963, back when the Supreme Court decided *Mississippi Valley* and *Capital Gains Research Bureau*,

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[191] *Id.* at 191–92.
[192] *Id.* at 196–97 n.50.
[193] *Id.* at 200.
[194] *Id.* at 201.
[195] *See id.* at 186; United States v. Miss. Valley Generating Co., 364 U.S. 520, 548–51 (1961).

was a very different country than it is now. There was less freedom, diversity, and wealth than there is now. On the other hand, there was more economic equality, faster growth, less debt and a much smaller fraction of the population in prison.

Workers, minorities, and intellectuals were then allies in the political party that controlled the federal government. And under the leadership of that party, there was a spirit of optimism, idealism, and national unity that is hard to imagine today. In response to a poll question in 1964, 76 percent of respondents said that the federal government could be trusted most of the time to do what was right.[196] Armed with that confidence, the federal government was dismantling Jim Crow, enacting major civil rights legislation and getting the country more and more deeply involved in a land war in Asia.[197]

Society back then was more tightly knit. The marriage rate was higher.[198] People were more apt to participate in groups, such as labor unions, churches, political parties, and social clubs.[199] Society was also much more regimented. It was a time of loyalty oaths, restrictive divorce laws, patriarchy, hierarchy, conscription into the military, and a general ethic of deference to authority.[200] People not only belonged to groups. They generally followed the dictates of group leaders. Loyalty was the norm and something of an obligation.

In a 1963 article on the First Amendment in the Yale Law Journal, Thomas Emerson described America of that time as an

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[196] Allan Murray, *Foreword* to LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS at ix (1996).

[197] *See generally* Kenneth T. Walsh, *The 1960s: A Decade of Promise and Heartbreak*, U.S. NEWS & WORLD REP. (Mar. 9, 2010), https://www.usnews.com/news/articles/2010/03/09/the-1960s-a-decade-of-promise-and-heartbreak.

[198] Ana Swanson, *144 years of marriage and divorce in the United States, in one chart*, WASH. POST (June 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/23/144-years-of-marriage-and-divorce-in-the-united-states-in-one-chart/?utm_term=.c4a3fcaeb919 [https://perma.cc/G5W8-UH8B].

[199] *See generally* ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

[200] *See generally* Jeff Nilsson, *The Price of an Organized Society: Conformity in the 1960s*, SATURDAY EVENING POST (Aug. 27, 2010), https://www.saturdayeveningpost.com/2010/08/high-price-organization-conformity-1960s/ [https://perma.cc/Z567-TXTM].

increasingly organized, "highly conformist society" in which dissenters faced "overwhelming hazards."[201] According to Professor Emerson, "prosecutors, police and other officials charged with maintaining internal order are left largely unrestrained" and the "natural balance of forces in society today tends to be weighted against individual expression."[202]

And then America changed. Among other things, the norms supporting the old loyalty culture (such as group conformity and deference to authority) gave way to a new ethos celebrating individual autonomy, personal freedom, and self-realization.[203] For example, protests about the civil rights movement and opposition to the Vietnam War led to legal disputes between protestors and local authorities.[204] In a series of cases, the U.S. Supreme Court sided with the protestors.[205] Eventually, in a 1969 decision involving student protestors, the Supreme Court held that peaceful protests were protected by the First Amendment and explained: "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[206]

The ruling prompted an angry dissent by Justice Hugo Black,[207] who had been one of the leading liberals on the Court from New Deal days until about 1965. Justice Black stated, "[i]t is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases."[208] Justice Black thought that the rights of the community should be paramount: "[T]axpayers send children to school on the premise that at their age they need to learn, not teach."[209] He warned: "Change

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[201] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 901 (1963).

[202] *Id.* at 932, 955.

[203] Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 4, 20 (1964); Emerson, *supra* note 201, at 878–79.

[204] John D. McCarthy & Clark McPhail, *The Institutionalization of Protest in the United States, in* THE SOCIAL MOVEMENT SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY 83, 85 (David S. Meyer & Sidney Tarrow eds., 1998).

[205] The Court, however, was not willing to abolish the Fourteenth Amendment state action doctrine. *See* Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 770–71 (2010).

[206] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 514 (1969).

[207] *Id.* at 515–26 (Black, J., dissenting).

[208] *Id.* at 522.

[209] *Id.*

has been said to be truly the law of life but sometimes the old and the tried and true are worth holding."[210]

Justice Black's dissent is not well remembered. By contrast, the Court's free speech decisions from that era have become the bedrock of our constitutional faith. For many, the First Amendment right to protest is now the cherished symbol of our nation.[211] Indeed, the protestors of that day soon came to be seen as heroic and more faithful to a higher morality than those who stood by the government.[212] For that reason (and for many other reasons, including the general disillusionment brought on by the Vietnam War and the Watergate scandal), attitudes toward authority changed. A new ethic of questioning, challenging, and debunking authority replaced the old notion of deference.[213] Blind obedience and blind loyalty came to be considered as something bad.[214]

An insightful article by Steven Smith reasoned through the new philosophy and found that people (including Americans) do not have an obligation to regard the laws of their own country as authoritative.[215] Of course, one might choose to comply with a law for prudential reasons or because the particular law happened to coincide with one's own moral code. But there was nothing about the law having been enacted by one's own government that creates even a presumptive duty of obedience. Professor Smith concluded that under "modern assumptions, centrally including a commitment to individual autonomy ... 'legitimate' or normatively attractive authority ... seems impossible, almost inconceivable."[216]

A key part of a culture is the attitude of individuals toward society's leaders. Willing deference to authority was a cornerstone of the old loyalty ideal, as well as a hallmark of the New Deal, World War II generation.[217] Americans accepted a regulated, regimented society, in which loyalty was expected and required, in large part

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[210] *Id.* at 524.

[211] McCarthy & McPhail, *supra* note 204, at 85.

[212] Schmidt, *supra* note 205, at 768–69.

[213] *See* Steven D. Smith, *Hart's Onion: The Peeling Away of Legal Authority*, 16 S. CAL. INTERDISC. L.J. 97, 133 (2006).

[214] *Id.* at 132.

[215] *Id.* at 117–18, 121.

[216] *Id.* at 133.

[217] *Id.* at 132.

because of this ethic.[218] The new thinking about the proper respect for authority changed a great deal.

For one thing, the new attitude fostered skepticism about federal government efforts to legislate morality, mandate social reforms,[219] or regulate business. Influential thinkers concluded that the deficiencies of legislators were far worse than those of corporate agents,[220] and that it would be a mistake to assume that government regulation would be preferable to the free market.[221]

Distrust of the federal government became the norm. In 1964, 76 percent of survey respondents said Americans could trust the government in Washington to do what is right most of the time; however, in 1996, only 19 percent of the respondents to the same question said the government could be trusted.[222]

There was also new thinking as to the primacy of individual self-realization and self-fulfillment—first in law review articles,[223] then in Supreme Court opinions,[224] and then as a matter of course. A 1992 article by Jana Singer, for example, noted that the words "'[c]hoice' and 'autonomy' are becoming synonyms for 'right' and 'good.'"[225] In 2002, Evelyn Brody could simply take as a given that "our broader political structure ... enshrines individual autonomy as its core norm."[226] A 2015 book by Edward Rubin described self-fulfillment as a moral obligation.[227]

To be sure, the individualist philosophy was sharply contested both in the general culture and in the legal culture. Many

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[218] *See* Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1471, 1485, 1535 (2005).

[219] John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 490 (2002).

[220] Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 57 (1990).

[221] *Id.* at 19 n.77.

[222] Murray, *supra* note 196, at ix.

[223] Emerson, *supra* note 203, at 4, 20; Emerson, *supra* note 201, at 878–79.

[224] Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972).

[225] Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1538 (1992).

[226] Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 824 (2002).

[227] *See generally* EDWARD L. RUBIN, SOUL, SELF, AND SOCIETY: THE NEW MORALITY AND THE MODERN STATE (2015).

people believed in a more community-oriented view in which the individual was treated as a member of a group and the interests of the group and its moral code took precedence.[228] But there was no longer a single dominant moral code for the country to rally behind.[229] An incomplete cultural revolution had left the nation divided.

On the issue of religion, for example, many believed that morality should be consistent with the Bible, while many others regarded the Bible as divisive and unnecessary.[230] Conservatives wanted to restore the values of America's past. Progressives saw that past as shameful.[231] In their view as expressed in a 2000 article, "we cannot and should not go home again to those homogeneous and exclusionary ... 'communities of place'—which devalued difference and included elements of subordination."[232]

For their part, conservatives had a similarly dim view of the progressive social agenda, believing that progressives were seeking to destroy conservative communities, religion, values, and culture.[233] Progressive efforts to suppress "hate speech" and corporate campaign contributions were seen by conservatives as attempts to suppress conservative speech.[234] Conservatives also felt threatened by the progressive idea that the government had "an affirmative duty to dismantle unequal conditions between racial groups created by historical systems of domination or inequities."[235]

As a result of these disagreements, many who were sympathetic to communitarian ideals came to see the individualist position as the only workable compromise.[236] The communitarian goal of a shared community based on shared values seemed

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[228] *See* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 23 (1989).

[229] *Id.* at 2.

[230] Linda C. McClain & James E. Fleming, *Some Questions for Civil Society–Revivalists*, 75 CHI.-KENT L. REV. 301, 305, 325 n.119 (2000).

[231] *Id.* at 338.

[232] *Id.* at 342.

[233] Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 317 (2014).

[234] *Id.* at 343.

[235] Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 134 (2017).

[236] McClain & Fleming, *supra* note 230, at 325–26.

impractical, at least at the national level.[237] As one article put it, "Can there be social solidarity ... in a heterogeneous, diverse society?"[238]

C. Morals of the Marketplace

Meanwhile, there were big changes in how law and society viewed the market. Years earlier, Justice Cardozo had described fiduciary loyalty, "the punctilio of an honor the most sensitive," as something higher than the mere "morals of the market place," the standard of behavior "for those acting at arm's length" that was "trodden by the crowd."[239] But in the new thinking, that hierarchy flipped. For many, the morals of the marketplace seemed the better model.

Loyalty, after all, requires subordination and self-abnegation.[240] That is hard to square with what one article described as "our broader political structure that enshrines individual autonomy as its core norm."[241] Furthermore, as Professor Donald Langevoort noted, "a legal ethic of service to others" faces difficulties "in a culture that celebrates personal wealth, achievement and consumption."[242]

And there was more. By its very nature, loyalty requires partiality toward those to whom one is loyal.[243] We are not loyal to the world. We are loyal to particular people, groups or entities. The whole idea of allegiance means taking a side. As Columbia Law Professor George Fletcher explained in a 1993 book on loyalty, "[o]utsiders cannot claim equal treatment with those who are the objects of loyal attachment."[244] Furthermore, he stated that these "[l]oyalties circumscribe communitarian circles."[245]

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[237] *Id.*

[238] *Id.* at 342.

[239] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

[240] *See* GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 14–15 (1993).

[241] Brody, *supra* note 226, at 824.

[242] Donald C. Langevoort, *Psychological Perspective on the Fiduciary Business*, 91 B.U. L. REV. 995, 995 (2011).

[243] FLETCHER, *supra* note 240, at 7–8.

[244] *Id.* at 7.

[245] *Id.* at 20.

These aspects of loyalty became suspect after the Civil Rights Act of 1964 outlawed various forms of discrimination.[246] Traditional loyalty, with its attendant ideas of communitarian trust and in-group bonding, came to be seen by many as a form of bias, a source of division, and potential tool of oppression.[247] Professor Frank Cross expressed this view well in a 2005 article when he said that trust based on shared values is often a "form of cronyism" or "a cover for racism, sexism, and nationalism."[248] According to Professor Cross, the "idealized past" was an age of prejudice,[249] the in-group bonding produced by its loyalties was "divisive by its nature,"[250] and the social trust created by loyalty was often an enabler of corrupt and authoritarian governments.[251]

Proponents of loyalty, particularly in the legal academy, found it hard to respond. In his book, Professor Fletcher tried to justify loyalty on emotional grounds as an alternative that "beckons to those of us who suffer from the rootlessness and anomie of a society in which families disintegrate, friendships are hard to maintain, and working relationships are 'cashed out' in the capitalist marketplace."[252] But Professor Fletcher had to acknowledge that loyalty conflicted with the now dominant idea of universal, impartial moral values and that it was difficult to make a rational, philosophical case for loyalty.[253]

Loyalty went from being a generally accepted norm to something controversial. And while many institutions stood by the old loyalty idea (such as the Marine Corps, whose motto remained *semper fidelis*), many other institutions backed away. For example, "[i]n 1972, the Girl Scouts deleted from their handbook the requirement that a scout be 'loyal.'"[254]

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[246] Schmidt, *supra* note 205, at 769.
[247] Cross, *supra* note 218, at 1539.
[248] *Id.* at 1531.
[249] *Id.* at 1536.
[250] *Id.* at 1540.
[251] *Id.* at 1530, 1537.
[252] FLETCHER, *supra* note 240, at 163.
[253] *Id.* at 163.
[254] Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law,* 28 DEL. J. CORP. L. 27, 28 n.2 (2003).

Just as loyalty was falling in status, the free market was gaining.[255] Memories of the Depression were fading. Wall Street seemed a place of vitality and success.[256] And the morals of the marketplace were more in keeping with the new ideals. After all, the market does not require subordination, self-abnegation, or discrimination. On the contrary, the market is designed to promote freedom, individual autonomy, self-realization, informed choice, and impartial detachment. The free market is also better adapted to dealing with diversity, complexity, change, and choice.

Professor Fletcher captured the new thinking in his 1993 book when he said: "The exemplar of the marketplace has conquered neighboring arenas. Today we think about relatives, employers, religious groups, and nations the way we think about companies that supply us with other products and services."[257] The market became the measure of all things.[258]

To be sure, the idea of loyalty did not vanish. But fewer people saw loyalty as a moral obligation imposed by society that the law could enforce. Instead, loyalty was seen more as a potential contract term or as a way of choosing one's identity through an act of self-expression.[259]

One example of the changed thinking involves the expected relationship between the citizen and the nation. In the past, loyalty to your country had been a required norm. Think conscription into the military and the Pledge of Allegiance. But that changed. Loyalty to country became, at best, an option, like brand loyalty, and not something that the law could require or protect.[260]

Consider the metaphors that Justice Stevens and Chief Justice Roberts used in the campaign finance cases. Justice Stevens, a World War II veteran, compared corporate campaign expenditures to the propaganda broadcasts of Tokyo Rose, an example from his generation of disloyal speech intended to produce disloyalty

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[255] *See* Park McGinty, *The Twilight of Fiduciary Duties: On the Need for Shareholder Self-Help in an Age of Formalistic Proceduralism*, 46 EMORY L.J. 163, 178 (1997).

[256] *See* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1151, n.160 (1988).

[257] FLETCHER, *supra* note 240, at 3.

[258] *Id.* at 4.

[259] James, *supra* note 235, at 128.

[260] *See* FLETCHER, *supra* note 240, at 6.

that was punishable as treason.[261] Chief Justice Roberts, by contrast, compared campaign contributions to protestors burning an American Flag, an example from his generation of disloyal conduct intended to produce disloyalty that is protected by the First Amendment.[262]

The same rethinking may be seen in debate over the Oath of Allegiance required for naturalized citizens. The Oath mandates renunciation of all former allegiances, based on the theory (as stated in an 1859 opinion of the United States Attorney General) that "no government would allow one of its subjects to divide his allegiance between it and another sovereign, for they all know that no man can serve two masters."[263] Today's legal culture rejects the idea of the nation as a master and regards the citizen more like a customer.[264] For example, a 1997 article by Peter Spiro argued: "In a world of liberal states ... the necessity of exclusive allegiances has largely dissipated" so that "acceptance of dual nationality" is demanded by "liberal conceptions of citizenship."[265]

There was a similar change in the rules governing marriage. Traditionally, law treated marriage as a status from which it was difficult to opt out.[266] That paradigm was challenged in the 1960s.[267] Growing support for "consumer sovereignty and the pursuit of self-interest in all spheres of life" led legal economists "to celebrate private markets as the ideal form of social interaction in both the family and nonfamily realms."[268] This new thinking led to the adoption of no-fault divorce laws, beginning with California in 1969 and covering forty-six other States by 1976.[269]

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[261] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 424–25 (2010) (Stevens, J., dissenting).

[262] *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 191–92 (2014).

[263] 9 Op. Att'y Gen. 356, 361 (1859).

[264] *See generally* Tom Fox, *Treating Citizens Like Customers*, WASH. POST (Sept. 17, 2014), https://www.washingtonpost.com/news/on-leadership/wp/2014/09/17/treating-citizens-like-customers/?utm_term=.dcb78a18c3e4 [https://perma.cc/DH7G-HSUL].

[265] Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1416 (1997).

[266] Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 89 VA. L. REV. 1225, 1333 (1998).

[267] Singer, *supra* note 225, at 1523.

[268] *Id.* at 1524–25.

[269] *Id.* at 1472.

Because of these and other changes, marriage evolved into a relationship "regulated by contractual norms"[270] and family members were "increasingly treated as autonomous individuals."[271] The law no longer concerned itself with ensuring loyalty or group cohesion. The new emphasis on "individual freedom" and "self-realization" together with the option of unilateral exit at will reduced "the potency of societal norms promoting fidelity, loyalty, and cooperation in marriage."[272]

Around the same time, something roughly similar took place in the workplace. Corporations abandoned their Eisenhower era paternalism toward employees in favor of an ethic of maximizing shareholder value, a shift chronicled in a recent book aptly titled *The End of Loyalty*.[273] As June Carbone and Nancy Levit noted in a 2017 article entitled *The Death of the Firm*, the idea of a company as an organic unit was rejected[274] and workers became "fungible commodities" rather than loyal and valued members of a team.[275]

Corporate scholars echoed this thought, treating corporations as simply a nexus of contracts and rejecting the idea of any organic unity.[276] In the new environment, as James Nelson noted in 2015, businesses were "no longer willing to make implicit promises of job security," so employees could not "make deep and ongoing commitments to those organizations."[277] Identification with one's employer (the psychological aspect of loyalty) became dysfunctional.[278]

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[270] Scott & Scott, *supra* note 266, at 1226.

[271] *Id.* at 1233.

[272] *Id.* at 1242, 1330.

[273] RICK WARTZMAN, THE END OF LOYALTY 6 (2017).

[274] June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 992 (2017).

[275] *Id.* at 1009.

[276] *See, e.g.*, Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320, 323 (1996).

[277] James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 503 (2015).

[278] *Id.* at 504. For a discussion of the relationship of identification and loyalty, see Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1312, 1316, 1319–23, 1346 (2003).

D. The Challenge for Fiduciary Loyalty

These developments shook the foundations of fiduciary loyalty. The word "loyalty" was no longer an asset for the concept. Choice was the new norm. The model of contract had become the dominant paradigm.[279] Legal rules governing relationships of all types were increasingly seen "as resting mainly on imputed bargains that are susceptible to alteration by actual bargains."[280] And so, if marriage and citizenship were just contracts and corporations nothing more than a nexus of contracts, it was hard to see why fiduciary relationships should be treated as anything other than contractual.

Supporters of this contractarian approach argued that it was enough to require fiduciaries to keep their word.[281] The competitive market for fiduciary services would force them to make the necessary promises.[282] Fencing in amorphous duties through contract would also reduce socially wasteful litigation costs.[283] In addition, treating fiduciary relationships as contractual, and allowing parties to set their own terms, would be consistent with the general trend in favor of greater freedom. The old rules, the argument went, reflected outmoded pessimism or starry-eyed idealism about how fiduciaries actually conducted themselves.[284] Replacing the moralistic loyalty rhetoric with ordinary contract norms would bring the law more in line with business reality.[285]

But there were many who opposed this approach, believing that it would allow the powerful to escape their moral obligations through their control of contract forms.[286] As the anti-contractarians saw it, the promotion of individual autonomy and choice was

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

[280] *Id.* at 630.

[281] *See* Larry E. Ribstein, *Symposium: The Role of Fiduciary Law and Trust in the Twenty-First Century*, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 906–07 (2011).

[282] *Id.* at 907.

[283] *Id.* at 905.

[284] *Id.* at 900, 903.

[285] For a good criticism of the overbroad use of fiduciary principles, see generally Daniel Yeager, *Fiduciary-Isms: A Study of Academic Influence on the Expansion of the Law*, 65 DRAKE L. REV. 179 (2017).

[286] *See* Johnson, *supra* note 254, at 47, 51.

intended to liberate the oppressed, so it would be perverse for these ideas to be used to enhance the power of the strong.[287] The freedom agenda should not mean greater freedom for fiduciaries.[288]

Elite opinion was divided on this subject. This disagreement might have remained the subject of academic debate alone. But developments on Wall Street made it relevant for the country and created a powerful lobby for applying market logic to fiduciary relationships.[289]

On May 1, 1975, the Securities and Exchange Commission (SEC) ended the New York Stock Exchange's practice of fixed, noncompetitive brokerage commissions.[290] Wall Street profits fell from "$915 million in 1971 to $188 million in 1977."[291] The industry had to think outside the fiduciary box in order to survive. No longer able to rely on large brokerage commissions as a stable source of revenue, Wall Street needed to find new ways to make money.[292]

The quest was successful, and then some. The junk bond fueled takeover boom of the 1980s was just one of many examples of how the securities industry learned to become more creative.[293] The innovations made the business much more profitable and, as a consequence, much more politically powerful.

The political resurgence came at an opportune time. The New Deal coalition against economic royalists had broken up over cultural issues.[294] Neither party had any particular antipathy toward Wall Street. Both were eager for its campaign contributions. Flush with cash, and willing to finance both sides, the financial services industry found political allies among Democrats and Republicans.[295] The industry used its influence and well-crafted

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[287] *Id.* at 50.

[288] *See generally* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 37 DUKE L.J. 879 (1988).

[289] *See id.* at 902.

[290] *See* Jessica C. Wiley, Note, *Will the "Bang" Mean "Big" Changes in Japanese Financial Laws*, 22 HASTINGS INT'L & COMP. L. REV. 379, 388 (1999).

[291] *Id.* at 388.

[292] *See id.* at 388–89.

[293] *See generally* William W. Bratton & Adam J. Levitin, *A Transactional Genealogy of Scandal: From Michael Milken To Enron To Goldman Sachs*, 86 S. CAL. L. REV. 783 (2013).

[294] *See* Arthur E. Wilmarth, Jr., *The Road to Repeal of the Glass-Steagall Act,* 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 441, 504–05 (2017).

[295] *See id.* at 512.

arguments[296] to eliminate barriers to market freedom.[297] Stock prices increased,[298] lending credence to the industry position and leading to still more deregulation.[299]

Among the rules swept away were New Deal era restrictions designed to eliminate conflicts of interest in the financial services industry, such as the separation of the securities business, insurance and commercial banking.[300] Firms were able to step outside their traditional roles and act instead as market participants and dealmakers.[301] To add capital, many firms transformed themselves from cautious partnerships into profit-maximizing corporations.[302] The new business model led to a new ethic. Staid, safe and sound gave way to aggressive, nimble and opportunistic.[303] Wall Street developed a culture based on constant change, liquidation of relationships, and a single-minded focus on short-term profits.[304]

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[296] *See, e.g.*, Daniel R. Fischel et al., *The Regulation of Banks and Bank Holding Companies*, 73 VA. L. REV. 301, 303 (1987).

[297] *See generally* Wilmarth, *supra* note 294; *see also* J. Robert Brown, Jr., Symposium: *The "Great Fall": The Consequences of Repealing the Glass-Steagall Act*, 2 STAN. J.L. BUS. & FIN. 129, 129 (1995) (arguing against repeal of Glass-Steagall but conceding: "We live in a deregulatory era. Calls for reduced government regulation have been particularly pronounced in the area of corporate finance.").

[298] To get a sense of how much, consider that on August 12, 1982, the Dow Jones average hit a low of 776.92. *See* Fischel & Langbein, *supra* note 256, at 1151 n.160.

[299] For a general discussion of the financial deregulation movement, see Charles W. Murdock, *The Big Banks: Background, Deregulation, Financial Innovation, and "Too Big to Fail"*, 90 DENV. U. L. REV. 505, 516–25 (2012). For a broad discussion of changes in the financial services industry, see generally Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975–2000: Competition, Consolidation, And Increased Risks*, 2002 U. ILL. L. REV. 215.

[300] For a discussion of the tension between the new practices and the old regulations, see generally Note, *A Banker's Adventures in Brokerland: Looking Through Glass-Steagall at Discount Brokerage Services*, 81 MICH. L. REV. 1498 (1983).

[301] For a discussion of how commercial banks were able to expand their roles, see generally Keith R. Fisher, *Orphan of Invention: Why the Gramm-Leach-Bliley Act Was Unnecessary*, 80 OR. L. REV. 1301 (2001).

[302] *See* Steven M. Davidoff et al., *The SEC v. Goldman Sachs: Reputation, Trust, and Fiduciary Duties in Investment Banking*, 37 IOWA J. CORP. L. 529, 543 (2012).

[303] *See id.* at 543–46.

[304] KAREN HO, LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET 295 (2009).

Of course, Wall Street could not do all this on its own. The industry needed corporations as clients and counterparties. To generate this business, Wall Street encouraged corporate managers to stop thinking of themselves as stewards of a corporate community and, instead, to think more like owner-entrepreneurs.[305] Frequently, managers were incentivized to change their thinking with deals that gave them greater personal interests in the restructured company. So, Wall Street culture spread.[306] "The stable bureaucratic structures of the corporation" were replaced "by a new institutional structure that value[d] disloyalty, irresponsibility, and immediacy."[307] The market stopped expecting fiduciary behavior from corporate managers, assuming instead that they would "hold their own personal interests paramount."[308]

Large law firms adopted the ethos of their most powerful clients. Their attitudes toward relationships became more transactional and businesslike. The Chair of the ABA Law Practice Management Section announced that "[t]he 'commoditization of law'" was something to be "welcomed and not feared,"[309] a sign that leading lawyers were moving away from the professionalism ideal toward "treating the practice of law just like any other business."[310]

Meanwhile, the cultural change on Wall Street intensified. A 2013 book by Yale Law Professor Jonathan Macey, *The Death of Corporate Reputation*, subtitled *How Integrity Has Been Destroyed on Wall Street*,[311] described how investment banks and other firms in the securities business found they did not need a reputation for selfless, fiduciary behavior in order to attract business. Customer trust expectations were lower, yet the industry was more profitable than ever.[312]

But there was friction. Legal rules did not keep pace with changing industry norms, which sometimes resulted in liability.[313]

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[305] *See* Davidoff et al., *supra* note 302, at 544–45.

[306] HO, *supra* note 304, at 247.

[307] *Id.* at 246.

[308] Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 IOWA J. CORP. L. 239, 240 (2009).

[309] Dana A. Remus, *Reconstructing Professionalism*, 51 GA. L. REV. 807, 809 (2017).

[310] *Id.* at 810 (footnotes omitted).

[311] JONATHAN R. MACEY, THE DEATH OF CORPORATE REPUTATION 1, 258 (2013).

[312] *Id.*

[313] *See* Davidoff et al., *supra* note 302, at 529–32.

For example, in the wake of the 2008 financial crisis, various financial institutions settled claims by government regulators regarding their practices contributing to the crisis.[314] "By the end of 2016, the costs associated with those settlements for the sixteen largest banks collectively totaled more than $320 billion."[315] A separate, postcrisis matter involving alleged manipulation of interest rate benchmarks resulted in settlements totaling about $9 billion,[316] while another set of postcrisis charges, relating to foreign exchange transactions, resulted in regulatory fines of almost $15 billion.[317]

There were other practices, before the crisis, that did not sit well with the old fiduciary rules. For example, firms paid brokers for steering client business[318] and contributed money to government officials to influence "the selection and retention of pension plan investment advisers."[319] Firms also engaged in practices adverse to the interests of their customers, such as front running customer orders, betting against customer trades, acting for multiple parties in the same set of transactions, and advising customers to become counterparties in complex deals.[320]

The industry saw these activities as legitimately entrepreneurial. Many firms tried to mitigate their exposure to challenge under the old fiduciary rules through contracts, disclosures, and disclaimers.[321] But the safeguards did not always work. Here are

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[314] *See* Jerry W. Markham, *Regulating the "Too Big to Jail" Financial Institutions*, 83 BROOK. L. REV. 517, 517 (2018).

[315] *Id.* at 518.

[316] *Id.* at 549.

[317] *Id.* at 552.

[318] *See In re* Ins. Brokerage Antitrust Litig., 579 F.3d 241, 273–85 (3d Cir. 2009) (approving class action settlement over practice of insurance companies paying contingent commissions to brokers representing insureds); *In re* Am. Funds Sec. Litig., 556 F. Supp. 2d 1100, 1101–02 (C.D. Cal. 2008) (dismissing suit on statute of limitations grounds because the practice of mutual funds paying Morgan Stanley for putting the funds on the list of preferred funds had been reported years earlier). As a plaintiffs' lawyer, I was involved in litigation challenging the practice of stock-brokers receiving payments for directing customer order flow.

[319] N.Y. Republican St. Comm'n. v. SEC, 70 F. Supp. 3d 362, 364 (D.D.C. 2014).

[320] *See, e.g.*, *In re* Van Der Moolen Holding N.V. Sec. Litig., 405 F. Supp. 2d 388, 391–92, 394 (S.D.N.Y. 2005) (securities fraud suit arising out of front running charges against New York Stock Exchange specialist firm).

[321] *See, e.g.*, Khan v. BDO Seidman, LLP, 948 N.E.2d 132, 153 (Ill. App. Ct. 2011).

some examples (the facts recited are generally allegations by the plaintiffs and not necessarily true).

According to allegations in an Illinois case, Shahid Khan came to Deutsche Bank seeking help with a business deal that required the use of foreign currency.[322] The bank advised Khan to enter into a series of complex foreign currency transactions with the bank, telling him the deals would either result in his making money on the deals or incurring tax-deductible losses.[323] In fact, the deals were designed to result in profits for the bank and losses for Khan that would not be tax deductible.[324] After suffering non-tax-deductible losses on the deals, Khan sued for breach of fiduciary duty.[325]

Deutsche Bank argued that Khan had contracted away any right to fiduciary loyalty by signing a contract early in the relationship that said the bank was not acting as his fiduciary.[326] But the Illinois Appellate Court said the allegations supported an inference that the bank had a relationship of trust with Khan.[327] "After all, Deutsche Bank was a prestigious investment bank, highly sophisticated in its field and capable, by its very name, of inspiring confidence."[328] The Court went on: "All in all, one could get the impression that Khan was considerably out of his element and that he more or less was told where to sign."[329]

The Appellate Court said the contractual disclaimer of fiduciary duty was void because the bank was already acting as Khan's fiduciary when he signed the agreement and to obtain his informed consent the bank would have had to disclose all relevant material facts, including the falsity of its prior representations.[330]

In another case, a technology company needed money.[331] The company sought help from a group of lenders and received a loan, investments, and directors who were affiliated with the

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[322] *Id.* at 137–38.
[323] *Id.*
[324] *Id.* at 138–39.
[325] *Id.* at 132, 136.
[326] *Id.* at 140.
[327] *Id.* at 152.
[328] *Id.*
[329] *Id.*
[330] *Id.* at 154.
[331] CDX Liquidating Tr. v. Venrock Assocs., 640 F.3d 209, 212 (7th Cir. 2011).

lenders.[332] The directors from the lenders (the only ones on the company's board with financial acumen) arranged a subsequent loan for the company from the lenders.[333] The new loan provided that in the event the company was liquidated "the lenders would be entitled to be paid twice the outstanding principal of the loan plus any accrued but unpaid interest on it; as a result, little if anything would be left for the shareholders."[334]

After the company went bankrupt, it sued the directors and the lenders alleging that the deal was unfair.[335] The Court of Appeals for the Seventh Circuit, applying Delaware law, held that the defendants had the burden of showing that the loan terms were at least as fair to the company as they would have been if the directors had been loyal to the company.[336] The fact that the directors had disclosed their conflict of interest did not relieve them of the burden of showing fairness, the Court held, because the directors still had a duty to be loyal to the company.[337] The Court explained: "A director may tell his fellow directors that he has a conflict of interest but that he will not allow it to influence his actions as director; he will not tell them he plans to screw them."[338]

Another illustrative case arose out of the initial public offering of eToys for which Goldman Sachs acted as the managing lead underwriter. According to the company, Goldman also agreed to provide the company with financial advice as to how to price the offering.[339] After receiving Goldman's input, the company signed a contract whereby the company would sell its shares to Goldman and the other underwriters at $18.65 per share and they would offer the shares to the public at $20 per share, which would give the underwriters a potential profit of 6.75 percent.[340] As it happened, the stock closed at $76.56 on its first day of trading.[341]

The company later went bankrupt and sued Goldman, alleging that the investment bank had breached its fiduciary duty

[332] *Id.* at 212–13.
[333] *Id.* at 213.
[334] *Id.*
[335] *Id.*
[336] *Id.* at 217.
[337] *Id.* at 219.
[338] *Id.*
[339] EBC I, Inc. v. Goldman, Sachs & Co., 832 N.E.2d 26, 30 (N.Y. 2005).
[340] *Id.* at 29.
[341] *Id.* at 29–30.

to the company by not disclosing a conflict of interest.[342] More specifically, the company alleged that Goldman had a secret incentive to advise the company to price its initial public offering below a fair market price because Goldman had secret arrangements whereby the firms that purchased stock from Goldman at $20 per share would later pay Goldman 20 percent to 40 percent of any profits that they made reselling the stock.[343]

Goldman argued that its relationship with eToys was strictly contractual and that the contract did not create any fiduciary duties.[344] But the New York Court of Appeals said that under New York law "fiduciary 'liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation'" so that even if the underwriting contract did not itself establish a fiduciary duty the company could allege that a relationship of trust apart from the contract had, in fact, been created.[345] The court concluded that the allegations supported a claim that Goldman had a fiduciary obligation to disclose its conflict of interest with respect to "the pricing of the IPO."[346]

Another case from New York involved short sales by Morgan Stanley based on non-public information.[347] Veleron Holding borrowed money from BNP Paribas and provided as collateral its stock in Magna International.[348] Veleron was required to post additional collateral if the value of the Magna stock fell below a certain level.[349] The loan agreement had a confidentiality provision.[350] BNP engaged Morgan Stanley to act as its Disposal Agent for the Magna stock in the event a loan default gave BNP the right to sell the collateral.[351] Later, BNP told Morgan Stanley that the value of the collateral was going down and that Veleron was unlikely

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[342] *Id.* at 30.
[343] *Id.*
[344] *Id.* at 31.
[345] *Id.*
[346] *Id.*
[347] Veleron Holding, B.V. v. Morgan Stanley, 117 F. Supp. 3d 404, 420 (S.D.N.Y. 2015).
[348] *Id.* at 413–14.
[349] *Id.* at 414.
[350] *Id.* at 415.
[351] *Id.*

to meet a margin call on the loan.[352] Morgan Stanley then, acting in its own capacity, shorted Magna stock (essentially a bet that the price would go down, done by selling borrowed shares), which allegedly caused the market price to collapse.[353]

When Veleron sued Morgan Stanley, the investment bank argued that it did not have a fiduciary duty of confidentiality because the contract it signed with BNP, even though it designated Morgan Stanley "BNP's Disposal *Agent*" specifically provided that Morgan Stanley was "'acting as an independent contractor and not as a fiduciary ... or in any other position of higher trust.'"[354] The district court rejected this argument, holding that, under New York law, agency relationships carry with them fiduciary duties as a matter of law.[355] The court held that whether the parties had entered into such a relation was for a jury to decide based on their actual relationship.[356] The language of the contract was relevant, but not dispositive, because one cannot "avoid a duty's being deemed fiduciary in nature by the simple expedient of refusing to call it by its proper name."[357]

From Wall Street's perspective, these decisions and others like them represented unwarranted judicial interference with freedom and the modern market. As the industry saw it, deals should be governed by the terms of the written agreement and normal rules of contract construction.[358] Except when cabined by something in writing, economic actors should be free to pursue their self-interest.[359] Courts should not be inserting amorphous moral duties into private deals.[360] That sort of paternalism was outmoded and reduced overall wealth.[361] In the industry's view, the definition of fiduciary loyalty needed to be updated to make it compatible with the new business reality.[362]

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[352] *Id.* at 419.
[353] *Id.* at 420.
[354] *Id.* at 451.
[355] *Id.* at 452.
[356] *Id.* at 453.
[357] *Id.* at 451.
[358] *See, e.g.*, Davidoff et al., *supra* note 302, at 550.
[359] *Id.*
[360] *Id.* at 551.
[361] *See, e.g.*, *id.*
[362] *See, e.g.*, *id.*

The "contractarian" academic philosophy discussed earlier was perfectly suited to the task. Scholars following this approach argued that the same market logic that had discredited other forms of loyalty should be applied to fiduciary loyalty as well.[363] Fiduciary relationships, in their view, were simply contractual and should be governed entirely by contract norms.[364] There was nothing special about the duty of loyalty. It was simply (at best) a set of possible implied contract terms and did not carry any moral freight.[365]

So, the prejudice against conflicts of interest was a mistake, John Langbein argued: "Conflicts of interest are endemic in human affairs, and they are not inevitably harmful. Accordingly, indiscriminate efforts to prohibit conflicts can work more harm than good."[366] "The very term 'conflict' is an epithet that prejudices our understanding that some overlaps of interest are either harmless or positively value enhancing for all affected interests."[367]

Also outmoded, according to the contractarians, was the idea that fiduciaries were somehow different from other market participants.[368] For example, a recent article by Dana Remus noted how "scholars, commentators, and bar leaders alike" have been pushing the legal profession to adopt the logic of the market.[369] Professor Remus observed that their arguments followed a larger trend.[370] "Neoliberal thought, which seeks to extend market rationalities to all areas of social life, has become the 'commonsense way' of our era."[371]

The most influential expression of the contractarian view came in a 1993 article by Judge Frank Easterbrook and Professor Daniel Fischel, *Contract and Fiduciary Duty*, which said that the fiduciary duty of loyalty was not a moral obligation but simply a set of terms that may or may not be implied into particular contracts.[372] According to Easterbrook and Fischel: "The usual

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[363] *See generally* Easterbrook & Fischel, *supra* note 12.
[364] *Id.*
[365] *Id.*
[366] John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 935 (2005).
[367] *Id.* at 938.
[368] *See generally* Easterbrook & Fischel, *supra* note 12.
[369] Remus, *supra* note 309, at 809.
[370] *Id.* at 810.
[371] *Id.*
[372] *See generally* Easterbrook & Fischel, *supra* note 12.

economic assessments of contractual terms and remedies apply. Fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings. Actual contracts always prevail over implied ones."[373]

The Easterbrook & Fischel article was well timed. During the Cold War, an argument for loyalty had been the need to maintain the social order and avoid class conflict. But with the fall of the Soviet Union in 1991, free market capitalism no longer had a rival. The cautionary argument for loyalty lost force. It seemed a safe time to replace patriarchal relations with the cash nexus.

The case for loyalty was further undermined by the secularization of the legal culture. In the middle years of the twentieth century, jurists cited the precept from Gospel of Matthew "No man can serve two masters" to justify the prohibition against fiduciary conflicts.[374] But in the new age, the quasi-religious tone of the old cases became a talking point for the contractarians. In 1995, for example, John Langbein denounced the "pulpit-thumping rhetoric about the sanctity" of fiduciary duties.[375] In 2017, Gabriel Rauterberg & Eric Talley disparaged the duty of loyalty as a "long-hallowed 'sacred cow' of fiduciary principles."[376]

To be sure, the contractarians did not dominate the academy. On the contrary, most fiduciary scholars found secular reasons for preserving or expanding the fiduciary principle, seeing it as an important restraint on the powerful and source of protection for the vulnerable.[377]

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[373] *Id.* at 427.

[374] *Matthew* 6:24 (King James).

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

[376] Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1119 (2017). For a more positive view of the relevance of religion, see Lyman Johnson, *Reflecting on Three Decades of Corporate Law Scholarship*, 74 WASH. & LEE L. REV. 677, 677–78 (2017); *see also* Lyman Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 1 (2006). *See generally* Frankel, *supra* note 146.

[377] *See, e.g.*, Brudney, *supra* note 146, at 623; Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 35 TEX. L. REV. 993, 993 (2017); Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 925 (2006);

State courts have generally followed tradition, rejecting attempts to turn fiduciary duties into contractual ones, except when the change is mandated by statute. Their prevailing view, expressed in a 2007 California Appellate opinion, is that: "an agent's duty of loyalty arises not from any contract but from the parties' relationship."[378]

Thus, the remedies for breach of fiduciary duty under State law go beyond those for breach of contract. Disloyal fiduciaries may be required to disgorge their ill-gotten gains or forfeit their fees, even if the plaintiff has not suffered any damage.[379] One justification, as the Indiana Supreme Court explained in 2008, is that "by promoting the agent's integrity, the disgorgement rule facilitates the principal's trust on which the fiduciary relationship is grounded."[380]

State courts have also rejected the contractarian idea that conflict of interest transactions should be reviewed under normal contract standards.[381] Instead, they have followed the traditional, moralistic approach. The examples are legion.

In 2017, the California Supreme Court held that a criminal conflict of interest statute "should be construed broadly, to ensure that the public has the official's 'absolute loyalty and undivided allegiance.'"[382] In 2014, the Maryland Court of Appeals disbarred an attorney for borrowing money from a client trust to pay his personal debts, holding that "it is a breach of trust for a trustee to lend trust funds to himself ... [e]ven where the trustee is authorized to make such investments as in his absolute and uncontrolled discretion he may see fit"[383] because "it is generally not possible for the same person to act fairly in two capacities and on behalf of two interests in the same transaction."[384]

Frankel, *supra* note 146, at 1276; Arthur Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 99, 99 (2008).

[378] Huong Que, Inc. v. Luu, 58 Cal. Rptr. 3d 527, 537 (App. 2007).

[379] *See, e.g.*, Helms & Greene, LLC v. Willis, 773 S.E.2d 491, 494 (Ga. App. 2015); Miller v. Bank of America, N.A., 352 P.3d 1162, 1171 (N.M. 2015); First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 220 (Tex. 2016).

[380] Nichols v. Minnick, 885 N.E.2d 1, 5 (Ind. 2008).

[381] *See infra* notes 382–94 and accompanying text.

[382] People v. Superior Court of Riverside Cty., 219 Cal. Rptr. 3d 436, 444 (2017).

[383] Att'y Grievance Comm'n of Maryland v. Hodes, 105 A.3d 533, 558 (Md. 2014) (internal quotation marks omitted).

[384] *Id.* at 569.

In 2014, a New York Appellate Court said that the fiduciary's "duty of undivided and undiluted loyalty" requires the fiduciary to avoid "situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty."[385] To like effect from the Wyoming Supreme Court in 2015: "The duty of loyalty prohibits self-dealing by trustees, because '[i]t is not possible for any person to act fairly in the same transaction on behalf of himself and in the interest of the trust beneficiary.'"[386] And from the South Dakota Supreme Court in 2016: "'A fiduciary must act with utmost good faith and avoid any act of self-dealing that places [his] personal interest in conflict with [his] obligations to the beneficiaries.'"[387]

At a minimum, State courts have required conflicted fiduciaries to show that the transaction was fair. As a Texas Appellate Court explained in 2014: "The presumption of unfairness applies to transactions between a fiduciary and a principal in which the fiduciary profits or obtains a benefit. ... In such cases, the profiting fiduciary bears the burden to rebut the presumption by proving the fairness of the questioned transaction."[388]

Or as the Alaska Supreme Court explained in 2015, most State courts model their standard of review for interested director transactions "after Delaware's, which requires 'the [self-interested] directors to prove that the bargain [was] at least as favorable to the corporation as they would have required if the deal had been made with strangers.'"[389] The Court went on: "This exacting standard has come to be known as the 'entire fairness' test, and it 'requires judicial scrutiny regarding both fair dealing and fair price.'"[390]

In 2015, for example, the North Carolina Supreme Court voided an arbitration agreement between a doctor and a patient because the doctor did not make "full disclosure of the nature and import of the arbitration agreement" to the patient "at or

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[385] Pokoik v. Pokoik, 982 N.Y.S.2d 67, 70 (App. 2014).

[386] Forbes v. Forbes, 341 P.3d 1041, 1058 (Wyo. 2015).

[387] Hein v. Zoss, 887 N.W.2d 62, 66 (S.D. 2016).

[388] *In re* Estate of Boyle, No.11-13-00151-CV, 2014 Tex. App. LEXIS 13553, at *18 (Ct. App. Dec. 18, 2014).

[389] Brooks v. Horner, 344 P.3d 294, 301 (Alaska 2015).

[390] *Id.*

before the time it was presented for his signature."[391] The normal contract rules did not apply, the Court explained, because a fiduciary is held to a stricter standard.[392] Similarly, the Maine Supreme Judicial Court in 2017 voided an arbitration agreement in a client engagement letter because the lawyer had not explained the "scope and effect of that provision" in terms understandable to the client before obtaining the client's signature.[393] The Court explained that contract norms did not govern because "attorneys owe a fiduciary duty of 'undivided loyalty' to their clients, a duty that is derived from the common law" and persists independent of "codified ethical standards."[394]

The contractarians have had better success with State legislatures. While the basic rules remain in place, some State statutes have been amended to allow parties to contract out of traditional duties of loyalty in specific areas. The Revised Uniform Partnership Act, for example, reduces mandatory fiduciary standards.[395] Similarly, the Delaware Revised Uniform Limited Partnership Act permits the drafter of a limited partnership agreement "to disclaim fiduciary duties, and replace them with contractual duties."[396]

There have been similar changes in corporation law and practice. For example, a 2017 article by Gabriel Rauterberg & Eric Talley, found that hundreds of companies have taken advantage of permissive changes in State corporation laws to adopt charter provisions opting out of the corporate opportunity doctrine, an aspect of the duty of loyalty that prohibits corporate fiduciaries from competing with the company, evincing "a significant appetite for contracting out of the fiduciary duty of loyalty."[397]

Trust law and practice has also become more contractarian. A 2017 article by Adam Hofri-Winogradow, for example, found that due to changes in trust statutes and new ways of drafting trust instruments, trusts administered by corporate fiduciaries have

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[391] King v. Bryant, 795 S.E.2d 340, 350 (N.C. 2016).

[392] *Id.* at 349.

[393] Snow v. Bernstein, 176 A.3d 729, 736 (Me. 2017).

[394] *Id.*

[395] *See* Eric Talley, *Taking the "I" out of "Team": Intra-Firm Monitoring and the Content of Fiduciary Duties*, 24 IOWA J. CORP. L. 1001, 1034 (1999).

[396] Brinckerhoff v. Enbridge Energy Co., Inc., 159 A.3d 242, 252 (Del. 2017).

[397] Rauterberg & Talley, *supra* note 376, at 1079.

become more like ordinary contracts.[398] The article noted: "The fiduciary situation has morphed from a relationship to a transaction, with fiduciaries only prepared to bear well-defined and clearly priced risks, rather than the open-ended protective commitment characteristic of the classical fiduciary."[399] Professor Hofri concluded: "The transformation of fiduciary practice resembles that of other social institutions, such as marriage, which were classically characterized by a long-term open-ended commitment of each party to the other, as well as by exit difficulties. It expresses the social alienation and relationship commodification characteristic of current society."[400]

And, as we have seen, the contractarians have done well in the U.S. Supreme Court. Less bound by precedent than the State courts, more willing to make policy and more in tune with the attitudes of large law firms and financial elites, the United States Supreme Court has repeatedly departed from its past practice and construed federal fiduciary standards in a more contractarian way.[401] While the Court has not completely dropped the old loyalty rules, the Court seems less and less inclined to read the old standards into the silences and ambiguities of federal law.[402]

Conclusion

State and federal fiduciary law used to be the same. Now there is a split. State courts still generally adhere to the traditional standard for regulating fiduciary conflicts (the same standard that the U.S. Supreme Court followed in the twentieth century), except when the old loyalty rules have been specifically modified by statute.[403] The U.S. Supreme Court has been loosening fiduciary restrictions on its own.[404] State courts treat loyalty as a moral obligation arising out of a fiduciary relationship.[405]

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[398] Adam S. Hofri-Winogradow, *Contract, Trust and Corporation: From Contrast to Convergence*, 102 IOWA L. REV. 1691, 1715 (2017).

[399] *Id.*

[400] *Id.* at 1716.

[401] Pepper v. Litton, 308 U.S. 295, 306–07 (1939).

[402] *Id.*

[403] *See supra* Part II.

[404] *Pepper*, 308 U.S. at 306–07.

[405] *See supra* notes 382–97 and accompanying text.

The U.S. Supreme Court has been dealing with the subject much more pragmatically and more in keeping with the preferences of financial elites.[406]

For supporters of market freedom, the Supreme Court's new approach is good news. And for those who prefer a broad construction of fiduciary loyalty, there are more and more reasons to appreciate the role of State courts in enforcing basic principles of justice.

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[406] *See* EDWARD LUCE, THE RETREAT OF WESTERN LIBERALISM 68 (Atlantic Monthly Press 2017) ("It is the elites who are loosening their allegiances and workers who are reaching for national flags"); ROBERT C. POST, CITIZENS DIVIDED 90 (2014) ("The public cannot help but worry that he who pays the piper will call the tune."); Robert C. Post, *The Supreme Court, 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 80 (2003) ("Judge-made law is constantly interpreting ambient culture.").