LIBERTY IN LOYALTY:
A REPUBLICAN THEORY OF FIDUCIARY LAW

Evan J. Criddle∗

Conventional wisdom holds that fiduciary duties are prophylactic requirements that deter and compensate for harmful opportunism. This idea can be traced back to the dawn of modern fiduciary law in England and the United States. It is a common theme in contemporary case law, and it has inspired generations of legal scholars to attempt to explain and justify fiduciary duties from an economic perspective. Nonetheless, this Article argues that the conventional account of fiduciary duties as a prophylaxis against material harm is based upon a libertarian misreading of fiduciary law and should be abandoned.

Historically speaking, fiduciary law developed out of an entirely different tradition in legal theory: Roman republicanism. Rather than focus on harmful interference per se, republicans have argued for centuries that the great threat to individual liberty is “domination,” understood as subjection to another’s arbitrary control. Consistent with this tradition, Roman law developed the fiduciary concept to empower private parties, while also ensuring that fiduciary power did not compromise liberty by exposing them to domination.

Although the republican theory of fiduciary law has been overlooked in contemporary debates, it is superior to the dominant libertarian theory because it better explains and justifies the central features of contemporary fiduciary law. The republican theory offers clear criteria for distinguishing which relationships trigger fiduciary duties. And unlike the libertarian theory, the republican theory explains and justifies core features of fiduciary law such as the requirements of fiduciary loyalty and the classic remedies of constructive trust and disgorgement.

The republican theory arrives at a time when libertarians have been working to dismantle fiduciary law’s traditional requirements. Recent years have witnessed state legislatures and courts eliminate or substantially modify a centerpiece of fiduciary law: the categorical prohibition against conflicted transactions without informed consent. The republican theory developed in this Article shows why these

∗ Professor of Law, William and Mary Law School. J.D., Yale Law School. For helpful comments and conversations at various stages of this project, the author expresses appreciation to workshop participants at William and Mary Law School and the Law and Society Association Annual Meeting, including Deborah DeMott, Jim Dwyer, Evan Fox-Decent, Stephen Galoob, Andrew Gold, Michael Green, Tara Grove, Laura Heymann, Eric Kades, Tom McSweeney, Alan Meese, Paul Miller, Gordon Smith, Lionel Smith, and James Stern. This Article was made possible by generous funding from the Social Science and Humanities Research Council and the College of William and Mary.
INTRODUCTION

Fiduciary relationships are ubiquitous in American law,¹ but judges and legal theorists have struggled to explain precisely when, why, and how developments must be resisted in the interest of safeguarding liberty.

INTRODUCTION .................................................................................................................. 2
I. REPUBLICAN LEGAL AND POLITICAL THEORY: A BRIEF
   INTRODUCTION .................................................................................................................. 9
II. THE REPUBLICAN TRADITION IN ROMAN FIDUCIARY LAW .... 13
   A. Slaves and Other Dependents ................................................................. 13
   B. Mandate ................................................................................................. 15
   C. Fideicommissium .................................................................................. 16
   D. Tutorship .............................................................................................. 17
   E. The Republicanism of Roman Fiduciary Law ....................................... 18
III. THE LIBERTARIAN TRADITION IN ANGLO-AMERICAN
    FIDUCIARY LAW ........................................................................................................ 19
   A. The Emergence of the Libertarian Theory ........................................... 20
   B. Libertarianism in Contemporary Fiduciary Theory ............................ 25
   C. Challenges to the Libertarian Theory ................................................... 28
   D. Beyond the Libertarian Theory .............................................................. 30
IV. REVIVING THE REPUBLICAN THEORY OF FIDUCIARY LAW .... 31
   A. The Normative Foundations of Fiduciary Law .................................... 31
      1. Empowerment ...................................................................................... 32
      2. Emancipation ....................................................................................... 33
   B. Identifying Fiduciary Relationships ..................................................... 37
      1. Entrustment .......................................................................................... 40
      2. Power ................................................................................................... 40
      3. Over Another Party's Legal or Practical Interests ............................ 41
      4. Some Applications ............................................................................. 41
   C. The Requirements of Fiduciary Loyalty ................................................ 45
      1. Fidelity to Instructions and Purposes ................................................. 46
      2. Affirmative Devotion to Beneficiaries' Interests .............................. 47
      3. Fairness and Evenhandedness ......................................................... 49
      4. Conflict Avoidance ........................................................................... 49
      5. The Mandatory Core ....................................................................... 51
   D. Understanding Fiduciary Remedies ..................................................... 53
   E. The Divergence of Fiduciary Conduct and Decision
      Rules ......................................................................................................... 57
CONCLUSION ................................................................................................................... 59

¹ Fiduciary duties arise, for example, in the law of agency, trusts, corporations, partnerships and other unincorporated entities, charities and non-profits, pensions, banking, bankruptcy, family relationships, guardianship, employment, legal representation, and medical care. See TAMAR FRANKEL, FIDUCIARY LAW (2011) (discussing these and other fiduciary relationships).
fiduciary duties apply. Conventional wisdom suggests that a relationship qualifies as “fiduciary”—triggering the classic fiduciary duty of loyalty—if one party (the principal) has reposed special “trust and confidence” in another (the fiduciary), thereby exposing herself or others (the beneficiaries) to a heightened risk of injury. But aside from a handful of well-established fiduciary relationships such as trustee-beneficiary, guardian-ward, and attorney-client, there is little agreement about just how broadly the fiduciary concept extends. Equally troubling, recent years have witnessed intensifying disagreement over the legal requirements of fiduciary loyalty. Some experts have argued that the duty of loyalty obligates fiduciaries to avoid conflicts of interest should the duty of loyalty’s requirement to avoid conflicts of interest should extend.

2 See Paul B. Miller, Justifying Fiduciary Duties, 58 MCGILL L.J. 969, 969 (2013) (observing that “the justification for fiduciary duties is an enigma in private law theory”).

3 See Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992) (Posner, J.) (“A fiduciary relation arises only if one person has reposed trust and confidence in another who thereby gains influence and superiority over the other.”) (internal quotation marks and citation omitted).


promotes or undermines the rule of law. These theoretical debates are beginning to spill over from academic discourse into judicial decisions, and uniform laws, sowing uncertainty and inconsistency in federal and state jurisprudence.

This Article draws on republican legal theory to develop a new interpretive theory that clarifies when, why, and how fiduciary duties apply. The republican theory developed in this Article is “new” in the limited sense that it has been almost entirely overlooked in contemporary legal scholarship. But it is also undeniably ancient—indeed, the idea that fiduciary law serves to safeguard republican liberty can be traced back to the very origins of the fiduciary concept during the Roman Republic. Drawing inspiration from Roman fiduciary theory, this Article argues that the republican tradition continues to capture the core normative commitments of contemporary fiduciary law: individual empowerment and emancipation.

The fact that private-law scholars have overlooked the connection between fiduciary law and republican legal theory is puzzling, because this connection has been hiding in plain sight for centuries. Generations of legal and political theorists have invoked private fiduciary relationships such as guardianship, agency, and trusteeship to explain by analogy how state authority can be reconciled with individual liberty. According to the

---

9 Compare Blair & Stout, supra note _, (defending fiduciary law’s affirmation of moral and social norms); with CONAGLEN, supra note _, at 108-24 (rejecting moralistic rhetoric in fiduciary jurisprudence as an irrelevant distraction).

10 See, e.g., United Airlines, Inc. v. Mesa Airlines, Inc., 219 F.3d 605, 610 (7th Cir. 2000) (Easterbrook, J.) (asserting that “fiduciary rules are a part of contract law”).

11 See, e.g., 28 ARK. C. ANN. 28-68-114 (2012) (“An agent . . . is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.”); 15 IDAHO C. ANN. 15-12-114(4) (same); 18-A MAINE REV. STAT. ANN. §50-914(d) (2010) (same); VA. C. ANN. § 64.2-1612 (2012) (same).

12 See, e.g., UNIF. BUS. C. § 8-507 (providing that a conflicted transaction is not voidable if “the covered party shows that the transaction is fair to the trust”); UNIF. STAT. TRUST ENTITY ACT § 507 (2013) (same); UNIF. PROB. C. § 5B-114(d) (2010) (“An agent . . . is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.”).

13 By way of illustration, a recent collection of essays on the “philosophical foundations of fiduciary law” does not contain a single reference to republicanism as a normative theory of fiduciary obligation. See PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter PHILOSOPHICAL FOUNDATIONS].

14 See infra Part II.

15 See, e.g., MARCUS TULLIUS CICERO, DE OFFICIIS bk. I, ch. 25, § 85 (characterizing the “guardianship of the state” as “a kind of trusteeship which should always be managed to the advantage of the person entrusted rather than of those to whom it is entrusted”); JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §§ 141-42 (C.B. MacPherson ed., 1980) (1690) (describing legislative power as a “trust” committed to the legislature for the benefit of the commonwealth); THE FEDERALIST 46, at 294 (James Madison) (New American Library 1961) (1788) (affirming that all public institutions serve as “agents and trustees of the people”); THE FEDERALIST 65, at 397 (Alexander Hamilton) (“The delicacy and magnitude of trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs, speak for themselves.”). Although Locke would not have embraced the term “republican,” his conception of freedom fits within this aspect of the tradition. See Quentin Skinner, Freedom as the Absence of Arbitrary Power, in REPUBLICANISM AND POLITICAL THEORY 83, 84 (Cecile Laborde & John Maynor eds., 2008).
republican tradition, the “great evil” that legal and political institutions must combat is “domination,” defined as “exposure to the arbitrary will of another, or living at the mercy of another.” The purpose of the state is to root out domination in the private sphere by preventing the powerful from tyrannizing their vulnerable neighbors with impunity. Republicans recognize that state power may also dominate, but they argue that a powerful state is not necessarily antithetical to individual liberty. Here private fiduciary law points the way for legal and political theory, showing how legal norms and institutions may secure individual liberty in relationships characterized by asymmetrical power: by requiring a fiduciary to exercise her entrusted powers in a manner that tracks her beneficiary’s avowed or avowal-ready interests, fiduciary duties safeguard a beneficiary’s freedom from domination. Likewise, republicans contend that state power does not undermine individual liberty if legal norms and institutions compel public officials to exercise their entrusted powers in a manner that is faithful to the public’s avowed or avowal-ready interests. This vision of the state as a “trustee” for its “people as trustor” has profoundly shaped how American judges, political theorists, and legal theorists have conceptualized the legal basis, character, and limits of public authority. For present purposes, however, the key point is this: the republican fiduciary conception of state authority is predicated upon the idea that the primary function of private fiduciary law, like public law, is to safeguard individual freedom from domination.

The conventional wisdom among judges and legal scholars today, 

---

17 Id. at 9.
18 See, e.g., Taylor v. Beckham, 178 U.S. 548, 577 (1900) (describing public offices as “mere agencies or trusts”); Stone v. Mississippi, 101 U.S. 814, 820 (1879) (“‘The power of governing is a trust committed by the people to the government. . . . The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights.’”); Trist (Burke) v. Child, 88 U.S. (21 Wall.) 441, 450 (1875) (“‘[T]he theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice and the public good.’”).
however, is that fiduciary law rests on an entirely different normative foundation. Most fiduciary law experts accept as an article of faith that fiduciary law is devoted to deterring harmful interference, an idea that resonates with classical liberal theory—or what we would describe today as libertarianism—rather than republicanism. The libertarian theory of fiduciary law holds that there is nothing inherently wrongful about fiduciary self-dealing, provided that conflicted transactions do not harm beneficiaries’ material interests. Libertarians argue that fiduciary law prohibits conflicted transactions without beneficiaries’ consent either as a prophylactic rule to deter fiduciary opportunism or to atone for courts’ inability to discern whether particular conflicted transactions actual harmed beneficiaries’ interests.

The libertarian theory of fiduciary law, like the republican theory, boasts a venerable pedigree. It features prominently in Keech v. Sanford, the English Chancery Court’s celebrated 1726 decision that ushered in the modern era of Anglo-American fiduciary law. It also supplied theoretical ballast for the first major American fiduciary law case, Davoue v. Fanning. And it has inspired a generation of legal academics to try to explain and critique fiduciary law from an economic perspective. Nonetheless, as an interpretive theory of fiduciary law—one that purports to explain how the law actually works, while also furnishing normative principles to explain how the law should work—the libertarian theory has glaring, and probably fatal, deficiencies.

As this Article will show, the libertarian theory is poorly equipped to explain some central features of fiduciary law. For example, fiduciary law’s categorical prohibition against conflicted transactions is probably overly broad, if its purpose is exclusively to deter harmful self-dealing; the prohibition could likely be reframed as a rebuttable presumption to better tailor its impact to its purported deterrence goal. At the same time, information asymmetries are likely to render the classic remedies for breach

21 See infra Part III. For purposes of this Article, I refer to this tradition as the “libertarian” theory rather than the “liberal” theory in view of the fact that modern liberalism encompasses many diverse streams, some of which arguably share the republican theory’s normative commitments. See Philip Pettit, Just Freedom: A Moral Compass for a Complex World 22-24 (2014) (arguing that libertarianism is the modern successor to classical liberalism and republicanism’s principal foil); Alan Ryan, Liberalism, in A Companion to Contemporary Political Philosophy 360 (Robert E. Goodwin, Philip Pettit & Thomas Pogge eds., 2012) (emphasizing liberalism’s diversity).

22 See CONAGLEN, supra note _, at [ch 4.I.2] (asserting that “the fiduciary doctrine is prophylactic in its very nature”); Langbein, supra note _, at 655-56 (“The harshest application of the duty of loyalty is prophylactic.”); Henry E. Smith, Why Fiduciary Law Is Equitable, in PHILOSOPHICAL FOUNDATIONS, supra note _, at 261 (characterizing fiduciary law’s purportedly prophylactic rules as an outgrowth of equity).


24 2 Johns. Ch. 252, 261 (N.Y. Ch. 1816).


26 See infra text accompanying nn._-_. 
of fiduciary duty—constructive trust and disgorgement—insufficient to deter fiduciary malfeasance, because beneficiaries will not always know when self-dealing has occurred. More fundamentally, the optimal-deterrence account does not fit contemporary fiduciary law because the traditional fiduciary remedies—constructive trust and disgorgement—are plainly not punitive remedies. If we take the libertarianism’s normative commitments seriously, therefore, it would seem to follow that legislatures and courts would be better off stripping fiduciary law down to its foundations and reconstructing fiduciary duties and remedies from the ground up. Perhaps it should come as no great surprise, therefore, that the most ardent critics of traditional fiduciary rules are precisely those scholars who are most devoted to libertarianism’s normative vision.

The republican theory suggests that recent efforts to overhaul fiduciary law are misguided, because they reflect fundamental misconceptions about the normative foundations of fiduciary duties and remedies. As this Article demonstrates, republican legal theory explains and justifies the fiduciary duty of loyalty and traditional fiduciary remedies by showing how fiduciary law neutralizes the domination that would otherwise arise in relationships premised upon trust and confidence. A fiduciary’s power to make decisions for and on behalf of her principal (or pursuant to authority entrusted to her by law) would constitute domination but for the fact that courts interpose fiduciary obligations, such as the duties of loyalty and care, to force the fiduciary to honor the beneficiary’s avowed or avowal-ready interests. The republican account of fiduciary law thus frames fiduciary duties as liberty-enhancing safeguards that deny fiduciaries the capacity to exercise arbitrary power.

The republican theory illuminates fiduciary law’s proper scope, explaining why some interpersonal relationships that pose a risk of harmful opportunism qualify as fiduciary relationships (e.g., trustee-beneficiary), while others do not (e.g., manufacturer-consumer). As this Article will explain, republicanism offers a simple test for identifying fiduciary relationships: fiduciary duties apply whenever one party is entrusted with power over another’s legal or practical interests. Fiduciary duties are necessary in relationships that meet this test, because without these constraints a party who holds entrusted power over another’s legal or practical interests would have the capacity to work a double-wrong: she could both (1) harm her beneficiary’s legal or practical interests, and (2) violate the trust reposed in her by treating fiduciary power as an instrument.

---

27 See infra text accompanying nn._-_.
28 See infra text accompanying nn._-_.
29 See Kenneth B. Davis, Jr., Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives, 80 NW. U.L. Rev. 1, 5 (1985) (arguing that fiduciary law is concerned with “opportunism,” which “reflects the fiduciary’s departure from the pattern of conduct she would engage in were she alone to bear the full costs and enjoy the full benefits of her actions”).
30 See, e.g., Burton v. R.J. Reynolds Tobacco Co., 397 F.3d 906, 911-13 (10th Cir. 2005) (holding that cigarette manufacturers are not fiduciaries for consumers).
31 The Article fleshes out the various elements of this test in Section IV.B.
that she may use to advance her own unilateral purposes. A fiduciary’s capacity to commit the second type of wrong—breach of trust—poses a unique form of domination and therefore justifies fiduciary law’s special loyalty duty and its associated remedies. While other species of private law such as contract, tort, property, and unjust enrichment are capable of neutralizing the domination entailed in a private party’s capacity for harmful interference, only fiduciary duties and remedies are calibrated to neutralize a fiduciary’s capacity to betray trust.

An important virtue of the republican theory is its ability to provide principled guidance for current controversies over the requirements of fiduciary loyalty. Under the republican theory, the duty of loyalty comes into focus as entailing at least four requirements: fidelity to instructions and purposes, affirmative devotion to beneficiaries’ best interests, fairness and evenhandedness among beneficiaries, and the avoidance of conflicts. With respect to the last requirement, the republican theory provides a powerful new argument against libertarians’ proposals to water-down the duty of loyalty: avoidance of unauthorized conflicts is strictly necessary, the theory suggests, to safeguard principals and beneficiaries from domination.

Finally, the republican theory furnishes a fresh justification for courts’ much-criticized practice of describing fiduciary duties in uncompromising, moralistic terms, while simultaneously applying deferential standards of review that significantly constraint courts’ power to intercede in fiduciary relationships. Although republicanism affirms that fiduciaries are subject to the most exacting legal standards of fidelity, loyalty, and diligence, it also encourages courts to defer to fiduciaries’ discretionary decisions in contexts where judicial intervention is more susceptible to arbitrariness—and, hence, more dominating—than fiduciary decision-making alone. Consistent with this approach, judicial review is more easily justified under the republican account for some alleged violations of fiduciary duties (e.g., fraud, irrationality) than for others (e.g., failure to make an informed decision). The republican account of fiduciary law thus offers a valuable framework for specifying the standards of review that courts should apply when evaluating fiduciaries’ exercises of discretionary power.

The remainder of this Article develops the republican theory of fiduciary law in several stages. Part I furnishes a brief primer on legal republicanism, summarizing the tradition’s distinctive conception of liberty as freedom from domination. Using illustrations from Roman law, Part II explains why fiduciary power raises a distinctive threat to liberty, and shows how fiduciary duties developed to counteract this threat. Part III describes the libertarian tradition’s emergence in early English and American fiduciary law. It also explains how legal scholars have used economic tools to craft increasingly sophisticated formulations of the libertarian theory, and it

32 See infra Section IV.C.
explains why these formulations nonetheless do not offer a satisfying interpretivist account of fiduciary duties and remedies. Lastly, Part IV reviews some of the republican theory’s major contributions to contemporary fiduciary theory, including its fresh account of the normative foundations of fiduciary law, its simple test for identifying fiduciary relationships, its clarification of the fiduciary duty of loyalty, and its principled justification for judicial deference to fiduciaries’ discretionary judgments. In each of these respects, the republican theory offers a descriptively and normatively persuasive account of fiduciary law’s core features and ambitions.

To be clear, although this Article advances the thesis that republican principles can best explain fiduciary law’s structure, it does not set out to prove that judges in England, the United States, or other former British colonies have deliberately drawn upon republican principles as they have developed contemporary fiduciary law. Nor does it attempt to show that republicanism can explain or justify every statute, regulation, or judicial decision involving fiduciary duties. The Article does make the case, however, that the classic fiduciary duty of loyalty is best be understood as a response to republican concerns about unilateral power, and it aims to persuade the reader that fiduciary jurisprudence could achieve greater coherence through deeper engagement with the republican ideal of liberty as freedom from domination.

I

REPUBLICAN LEGAL AND POLITICAL THEORY: A BRIEF INTRODUCTION

To understand the role that republican theory has played, and might yet play, in fiduciary law, we must first appreciate what makes the republican tradition distinctive. Over the centuries, the term “republicanism” has been used to capture a diverse collection of ideas, including popular sovereignty; representative government; the constitutional separation of legislative, executive, and judicial powers; civic virtue; inclusive public deliberation; and universal citizenship. Indeed, the republican tradition has come to embrace so many diverse trends and voices that debates between the tradition’s adherents threaten at times to eclipse the tradition’s core contribution to legal and political theory. At its heart, however, republicanism offers a distinctive account of the source and purpose of state


authority. Specifically, it asserts that all public officials and institutions derive their authority from their people for the purpose of securing individual liberty. The state fulfills its mission to secure liberty when it enacts and enforces laws that protect its people from “domination.”

To fully appreciate the republican ideal of liberty as freedom from “domination,” it may be helpful to unpack what this term means for republicans. The leading contemporary exponents of republicanism, Philip Pettit and Quentin Skinner, have explained that “domination” for republicans is subjection to another’s “arbitrary power” or “alien control”—the evil of subjection to another’s will—particularly in important areas of personal choice. Domination arises whenever an individual’s legally privileged choices are at the mercy of another’s unilateral will or judgment (arbitrium). If I can interfere in your choices as I like,” Pettit explains, “you are dependent on my will and not ‘your own person’ (sui juris), in the expression of Roman Law. You are no longer capable of freely exercising of “your own right.” The fact that another has the capacity to interfere arbitrarily in your choices with impunity means that you are “under the power of a master” (in potestae domini)—effectively a slave rather than a fully emancipated, self-determining agent.

Importantly, republicans contend that domination is wrongful even if the empowered party never affirmatively interferes with the dependent party’s choices. The mere fact that the empowered party has the capacity for arbitrary interference underscores the dependent party’s vulnerability, impressing upon the dependent party’s mind the need to remain within the power-holder’s good graces. The dependent party therefore faces “a continual state of uncertainty and wretchedness,” characterized by the need

36 See PETTIT, supra note _, at 8.
38 Philip Pettit, Republican Freedom: Three Axioms, Four Theorems, in REPUBLICANISM AND POLITICAL THEORY 102, 102 (Cecile Laborde & John Maynor eds., 2008).
40 See id. at 49; Quentin Skinner, Freedom as the Absence of Arbitrary Power, in REPUBLICANISM AND POLITICAL THEORY, supra note _, at 83, 85-86.
41 PETTIT, ON THE PEOPLE’S TERMS, supra note _, at 7.
42 PETTIT, REPUBLICANISM, supra note _, at 60 (observing that domination generally “involve[s] the awareness of control on the part of the powerful, the awareness of vulnerability on the part of the powerless, and the mutual awareness . . . of the consciousness on both sides.”); SKINNER, LIBERTY BEFORE LIBERALISM, supra note _, at 57 (noting Francis Osborne’s exhortation to his fellow citizens “to assume the natural shape of free-men” rather than “remain asses still under the heavy pressures of a king”).
for constant invigilation, self-abasement, and self-censorship. This condition of subservience persists even if the empowered party chooses not to exercise their power in an arbitrary manner. The mere presence of alien control is sufficient to render individuals unfree. Accordingly, subjection to a virtuous king or benevolent slave-master is incompatible with liberty, notwithstanding the fact that the king or slave-master may always choose to exercise their power altruistically for the benefit of their subordinates.

The republican conception of liberty as freedom from domination might appear at first glance to be incompatible with government. Republicans argue, however, that public authority does not constitute “alien control” if the state is properly “checked” to ensure that it does not serve as an instrument of arbitrary control. The key question for republicans is whether public institutions are hedged about by sufficient legal and political safeguards to ensure that they lack the capacity to exercise power in an arbitrary manner. If state action is “forced to track the avowed or avowal-ready interests of the interferer,” it is not arbitrary in the relevant sense and therefore does not constitute a form of alien control. Thus, republicans assert that the state can make, adjudicate, and enforce laws that constrain individual autonomy without undermining liberty, provided that robust safeguards are in place to guarantee that the state cannot violate the public interest with impunity.

An important lesson of the republican tradition is that individual liberty in the private sphere is also a product of effective institutional design. 

---

45 TRENCHARD & GORDON, supra note __, at 249; see also Pettit, Three Axioms, supra note __, at 103 (observing that alien control “invigilates the choices of the controlled agent, being ready to interfere should the controlled agent not conform to the desired pattern or should the controller have a change of mind”).

46 See SELLERS, supra note __, at 71 (observing that James Madison’s contributions to the Federalist Papers “attributed tyranny to an excess of power, even in the service of the common good”).

47 Pettit, Three Axioms, supra note __, at 117. The eighteenth-century republican John Trenchard puts the matter thus:

Only the Checks upon Magistrates make Nations free; and only the Want of such Checks make them Slaves. They are Free, where their Magistrates are confined within certain Bounds set them by the People, and act by Rules prescribed them by the People: And they are Slaves, where their magistrates choose their own Rules, and follow their Lust and Humours.

PETTIT, REPUBLICANISM, supra note __, at 212 (quoting Trenchard) (internal citations omitted).

48 Id.

49 Some contemporary republicans believe that individuals, to be fully free, must participate in developing the laws that govern them so that these laws can be understood as the product of their own authorship. See, e.g., MICHAEL SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A POLITICAL PHILOSOPHY (1996); Charles Taylor, Cross-Purposes: The Liberal-Communitarian Debate, in LIBERALISM AND THE MORAL LIFE (Nancy Rosenblum ed., 1989). However, most republicans consider it “more important not to have a master than to be a master.” ISUELT HONOHN, CIVIC REPUBLICANISM 184 (2002). As long as legal norms and institutions require public officials to exercise their powers in a non-arbitrary manner that tracks the public’s avowed or avowal-ready interests, these officials relate to the public not as masters, but as public servants. Accordingly, it is the fiduciary character of public authority—the legal obligation that all public officials and institutions bear to wield power in furtherance of the public interest—that constitutes the state as a liberty-safeguarding republic rather than an instrument of tyranny.
Republican freedom is “an explicitly political notion of freedom,” Martin Loughlin has observed; “rather than being a natural or intrinsically human characteristic, liberty is . . . created through governmental action” as the state makes and enforces laws to protect individuals from being subject to others’ arbitrary power.50 Thus, legal norms and institutions are necessary to protect individuals from domination in the private sphere, just as they are necessary to protect individuals from the state itself.

Although republican legal and political theorists have lavished attention on public law, private law’s equally vital role in securing freedom from domination has received comparatively scant attention.51 The clear implication of republican theory, however, is that private law also may promote liberty by ensuring that individuals are not consigned to live at the mercy of others. Tort law duties of care neutralize the domination that would arise if private parties could harm their neighbors negligently, recklessly, or intentionally with impunity. Similarly, under the law of unjust enrichment, courts quash alien control by compelling individuals to restore property in their possession to the rightful owner. Contract law and property law likewise enshrine rights and duties and supply remedies to prevent private parties from wielding unilateral control over others’ legally protected interests. By preventing individuals from asserting arbitrary power over others in the private sphere, the law offers an indispensable bulwark against domination.52

In sum, republicanism offers a distinctive theory of the purpose of legal institutions that is based on the ideal of liberty as freedom from domination. According to the republican tradition, individuals are wronged whenever their legal interests are subject to another’s arbitrary control, irrespective of whether that control results in harmful interference. The condition of being subject to another’s dominating will renders the dependent party effectively a slave rather than a person sui juris. Legal institutions are necessary, therefore, to ensure that the powerful are unable to interfere in others’ legally privileged choices with impunity. In the discussion that follows, this Article lays the foundation for a republican theory of fiduciary law by considering how the republican conception of liberty as freedom from domination shaped the development of Roman fiduciary law.

50 MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 174 (2010); see also WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 126 (1765) ("[L]aws, when prudently framed, are by no means subversive but rather introducive of liberty.").

51 See, e.g., LEGAL REPUBLICANISM, supra note __ (providing excellent essays on republican approaches to constitutional law, criminal law, and international law, but ignoring private law).

52 Of course, the formal rights and duties of private law do not eliminate private parties’ practical capacity for arbitrary interference. Tort duties of care cannot negate the size and strength advantages that enable Biff, the brawny bully, to dominate featherweight George McFly. To the extent that republicanism demands a counterweight to private parties’ practical capacity for arbitrary interference, this role is served (however inadequately) by law enforcement.
II
THE REPUBLICAN TRADITION IN ROMAN FIDUCIARY LAW

Although the genealogy of common law fiduciary duties is murky and contested, contemporary scholars typically trace the fiduciary concept to Roman legal institutions that resemble contemporary agency, trust, and guardianship. The mature Roman law of fiduciary relationships had two primary functions. First, by facilitating the entrustment from principals to fiduciaries, Roman law empowered principals to conscript others to serve as extensions of their own legal agency, enabling them to accomplish objectives that they could not readily accomplish without a fiduciary’s assistance. Second, Roman fiduciary law served to neutralize the domination that would otherwise result from the fiduciary’s alien control over the principal’s legal and practical interests. Thus, the core concerns of Roman fiduciary law were to empower emancipated citizens and safeguard their liberty as free, self-determining agents (sui juris).

The republican foundations of Roman fiduciary law are not merely of historical interest. As this Article will show in Part IV, Roman law offers a vitally important precedent, because its republican account of the normative basis of fiduciary law helps to explain which relationships trigger fiduciaries, the legal requirements of fiduciary loyalty, and the circumstances under which courts should defer to fiduciaries’ discretionary judgments. Although this Part does not attempt to canvass all fiduciary relationships recognized under Roman law or to explore in detail how Roman fiduciary law evolved over time, the examples that follow show how republican legal theory illuminates the design and purpose of fiduciary law’s rules for constituting, distributing, and regulating fiduciary power.

A. Slaves and Other Dependents

The proper starting point for understanding Roman fiduciary law is the relationship between emancipated citizens and their dependents. Under early Roman law, only a head of household—the pater familias—qualified as a

53 See, e.g., DAVID JOHNSTON, THE ROMAN LAW OF TRUSTS 1 (1988) (observing that it is unclear to what extent common law judges deliberately modeled the trust on the Roman fideicommissium); David Ibbetson, Book Review, Itinera Fiduciae: Trust and Truehand in Historical Perspective, 4 EDINBURGH L. REV. 244, 244 (2000) (observing that the trust has been characterized variously as an idiosyncratically English institution, an ancestor of the German treuhand, and a continuation of the Roman fideicommissium); Avisheh Avini, The Origins of the Modern English Trust Revisited, 70 TUL. L. REV. 1139, 1142 (1996) (suggesting that the common law trust may have originated in the Islamic waqf).


55 For discussion of the distinction between persons sui juris and alieni juris (within the potestas of another) under Roman law, see W.H. HASTINGS KELIKE, AN EPITOME OF ROMAN LAW 23 (1901); cf. II BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 34 [more citation needed?], available at http://bracton.law.harvard.edu/index.html (discussing the concept’s application in England).
person *sui juris* possessing full legal capacity to conclude commercial transactions outside the household. Accordingly, a *pater familias* who wished to use his slave to purchase goods on credit in the marketplace encountered an insurmountable legal obstacle: slaves, as legal property (*res mancipi*) under the dominion of another (*alieni juris*), lacked legal capacity to enter contracts.\[^{56}\] For slaves and other dependents to be useful in the marketplace, therefore, the *pater familias* needed a legal mechanism that would enable his dependents to exercise his legal capacity to enter transactions on his behalf.

The Roman Praetor eventually engineered a solution to this dilemma, introducing a rule that allowed a *pater familias* to authorize his slaves and other dependents to conclude transactions on his behalf.\[^{57}\] As Tamar Frankel has observed, this innovation “render[ed] the slave transparent by allowing the slave to bind the master to legal obligation[s], even though the slave himself was incapable of entering into a binding contract.”\[^{58}\] When acting on the master’s behalf, a slave was deemed by law to function as the master’s “animated tool”—a living extension of the master’s own agency without independent legal personality.\[^{59}\]

By authorizing the *pater familias* to conduct business transactions through slaves and other dependents, Roman law empowered the *pater familias* to organize his household much like a corporation. The *pater familias* could use his dependents as agents to buy and sell goods or contract for services on his behalf. If the *pater familias* desired less involvement in the household’s day-to-day administration, he could entrust a particularly capable slave or other dependent to serve as his *de facto* chief executive officer, exercising broad managerial authority over the household’s financial interests.\[^{60}\]

Once this new system of vicarious representation was in place, however, a *pater familias* who commissioned slaves to act on his behalf also rendered himself vulnerable to vicarious liability based on the slave’s *de facto* control over his legal interests. Although the law considered slaves to be mere tools of their masters without the capacity for independent agency, the fact remained that slaves were human beings with the practical capacity to abuse their entrusted responsibility. Slaves might bind their masters to commercial agreements that were inconsistent with their masters’ instructions or financial interests. They might be tempted to retain profits or otherwise abuse their entrusted authority for their own benefit. Thus, to the


\[^{57}\] See Kaser, *supra* note _, at 68-70, 87, 248.

\[^{58}\] Frankel, *supra* note _, at 90.


\[^{60}\] See Nicholas, *supra* note _, at 70 (observing that some slaves in Rome were highly educated and entrusted with vast discretionary authority as managers of large estates and business ventures).
extent that the law empowered slaves to exercise unilateral power over their masters’ legal or practical interests, *pater familia* could no longer be considered “their own masters.”

Roman law addressed these concerns by empowering the *pater familias* vis-à-vis his slaves. If a slave accepted kickbacks from a third-party or failed to take due care in negotiating a favorable deal for his master, the *pater familias* was legally entitled to compel the slave to turn over any money or property withheld, and he could exact punishment, including imprisonment, physical abuse, or even death, as befitting the severity of the slave’s disloyalty or lack of care. This legal authority (*potestas*) to control, correct, and punish slaves offered a potent check against slaves abusing their entrusted power by acting contrary to the master’s instructions and interests. By empowering the *pater familias* in this manner, Roman law safeguarded his liberty as a person *sui juris.*

B. Mandate

Given a *pater familias’s* dominant position vis-à-vis his dependents, there was little need for Roman law to develop other enforcement mechanisms to protect the *pater familias* from the alien control of slaves or other dependents. The specter of alien control could not be so easily banished, however, when a *pater familias* recruited a free person outside his household to transact business on his behalf as an independent “commissioning agent” (*mandatarius*) under the law of mandate. Roman law did not authorize a *pater familias* to punish a commissioning agent or unilaterally compel the commissioning agent to disgorge profits, as he might punish or coerce an unmarried child or slave within his own household. Consequently, the *pater familias* required assistance to prevent the commissioning agent from exercising alien control over his legal interests.

The Roman fiduciary law of mandate “grew out of” the law governing household relationships, seeking to give the *pater potestas* the same freedom from domination irrespective of whether he transacted business through a dependent or commissioning agent. Under Roman law, the commissioning agent, like a slave, was deemed to exercise entrusted powers as a “man of straw,” with the *pater familias* recognized always as “the man of substance.” In recognition of the *pater familias’s* limited authority over

---

61 DIGEST OF JUSTINIAN, TITLE 6 [further citation needed?] [hereinafter Justinian] (quoting ULPIANUS, INSTITUTES, bk. 1); cf. PETIT, REPUBLICANISM, supra note _, at 52 (asserting that a relationship of domination is characterized by a person’s “(1) capacity to interfere, (2) on an arbitrary basis, (3) in certain choices that [an]other [person] is in a position to make”).

62 Indeed, because all property in a slave’s possession belonged to his master by operation of law, a master could compel his slave to turn over any resources in the slave’s possession at any time. See JUSTINIAN, TITLE 6 (quoting GAUSS, INSTITUTES bk. 1).

63 See id. (observing that “among nearly all nations masters have the power of life and death over their slaves,” but cautioning that under Roman law masters were not permitted to engage in “cruelty to their slaves which is atrocious, or without a cause recognized by the law”).

64 KELKE, supra note _, at 178.

65 Id. at 183.

66 Id. at 183.
commissioning agents, Roman law saddled commissioning agents with legal obligations comparable to the contemporary fiduciary duties of loyalty and care. A commissioning agent’s primary legal duty was to act within the scope of his mandate for the benefit of his principal.\(^\text{67}\) Failure to satisfy this standard would “entail infamy if without legal excuse [the commissioning agent] neglected to perform and perform well what he had undertaken.”\(^\text{68}\) The law of mandate also obligated commissioning agents to undertake their commission personally, without subdelegation of responsibilities; to restore all entrusted property to the principal, if possible, along with any profits; to render an accounting of all entrusted resources; and to cede to the principal any rights of action against third-parties arising out of the principal’s business.\(^\text{69}\) Ultimately, these obligations were enforceable through actions brought before the Praetor.\(^\text{70}\) Public enforcement of a commissioning agent’s fiduciary duties thus severed as a functional substitute for the pater familias’s control over his own household, ensuring that the commissioning agent could not abuse his entrusted powers with impunity.

C. Fideicommissium

Roman law antecedents to the common law trust reflect a similar concern for empowering and liberating persons sui juris. Under the law of fideicommissum, a pater familias as testator could entrust property to the faith (fides) of an intermediary (fiduciarius) for the subsequent conveyance to a third-party beneficiary (fideicommissarius).\(^\text{71}\) This mechanism enabled the pater familias to bequest property to unmarried children and female non-Roman citizens who were legally incapable of holding property independently.\(^\text{72}\)

Similar to mandate, Roman law conceptualized the fideicommissium “as an institution aimed at serving the testator’s intentions (voluntas), a way free of fuss and formality where legal technicality would take second place to satisfying the wishes of the testator.”\(^\text{73}\) The fiduciarius was expected to serve as an extension of the testator’s volition, ensuring that the testator’s

\(^{67}\) Id. at 179, 181.

\(^{68}\) Id. at 179.

\(^{69}\) Id. at 181.

\(^{70}\) Id. at 180. Similar duties applied to managers of others’ affairs who did not stand in a formal agency relationship such as mandate or guardianship. See Kaser, supra note _, at 231-32 (discussing the negotiorum gestio cause of action).

\(^{71}\) David Johnston, Trusts and Trust-like Devices in Roman Law, in ITINERAE FIDUCIAE: TRUST AND TRUEHAND IN HISTORICAL PERSPECTIVE 45, 45-47 (Richard Helmholtz & Reinhard Zimmermann eds., 1998). Unlike the common law trust, the fideicommissium did not entail a formal separation of legal and equitable title; the fiduciarius held full legal title, subject to a collateral duty to transfer the property to the fideicommissarius. Id. at 51.

\(^{72}\) James Muirhead, Historical Introduction to the Private Law of Rome 217, 319-20 (3d ed. 1916); Johnston, supra note _, at 45. Initially, the fideicommissium was not enforceable under Roman law; instead, testators were forced to rely upon social pressure and the fiduciarius’s internal sense of moral obligation to ensure fidelity to the testator’s purposes. Johnston, supra note _, at 21. Eventually, however, the fideicommissium became an enforceable legal institution under praetorian jurisdiction. Nicholas, supra note _, at 267.

\(^{73}\) Johnston, supra note _, at 7.
choices regarding the use and disposition of his property would be honored after his death. The juridical structures of mandate and fideicommissarium were also similar: just as a 
\textit{pater familias} could authorize a dependent or commissioning agent to exercise his contractual rights in entering transactions on his behalf, a 
\textit{pater familias} could authorize a \textit{fiduciarius} to exercise property rights in his behalf after his death for the purpose of preserving his estate for a designated heir.\textsuperscript{74} In both contexts, the law empowered the 
\textit{pater familias} to exercise his legal rights more effectively by permitting him to commission others to exercise these rights in furtherance of his own purposes.

Like a commissioning agent under the law of mandate, Roman law required a \textit{fiduciarius} to be legally capable of holding property in his own name.\textsuperscript{75} As such, a \textit{fiduciarius} had to be a person \textit{sui juris}—one who could not be pressed into service by the testator involuntarily in the same way that a master could compel his slave to act on his behalf. Moreover, once property passed to a \textit{fiduciarius} upon the testator’s death, the \textit{fiduciarius}, like an agent under mandate, was not vulnerable to the same powerful self-help remedies as a disloyal slave. These features of the \textit{fideicommissum} threatened to expose both the testator and his appointed heir to domination in the form of the \textit{fiduciarius}’s alien control over the estate.

Roman law addressed this concern by placing the \textit{fiduciarius} under legally enforceable duties akin to those of a commissioning agent. The \textit{fiduciarius} was obligated to honor his testators’ instructions and purposes, maintaining entrusted property intact for the designated beneficiaries.\textsuperscript{76} Should a \textit{fiduciarius} fail to discharge this responsibility, Roman consuls were authorized to order a recalcitrant \textit{fiduciarius} to convey trust property to the rightful beneficiary.\textsuperscript{77} Roman law thus regulated \textit{fideicommissium} to ensure that testamentary dispositions did not result in the \textit{fiduciarius} wielding alien control over the testator’s legally protected choices.

D. Tutorship

The Roman law of tutorship (\textit{tutela impuberum}) also illustrates how the republican conception of liberty informed the scope and content of fiduciary duties.\textsuperscript{78} Roman law imposed the office of tutor “on certain classes of persons, or on certain individual persons,” for the protection and nurturing

\textsuperscript{74}That legal title formally transferred to the \textit{fiduciarius} upon the testator’s death did not negate the fact that the \textit{fiduciarius} continued to exercise the testator’s legal rights on his behalf. As James Muirhead has noted, the term “\textit{lex fiduciae}” was employed in Roman law only “when it was the intention of [the] parties that the mancipatory transference, although in form absolute, should in reality be only provisional; the transferee was therefore bound by its terms to reconvey either to the transferrer or to a third party, or to manumit a slave he had received, or to denude himself of the thing in any other way that might be embodied in the engagement.” Muirhead, \textit{supra} note \_\_ at 127.

\textsuperscript{75}Kaser, \textit{supra} note \_\_ at 71.

\textsuperscript{76}Johnston, \textit{supra} note \_\_ at 51.

\textsuperscript{77}Id. at 226.

\textsuperscript{78}Nicholas, \textit{supra} note \_\_ at 90. This Article will not address curatorship, a second form of legal guardianship recognized under Roman law.
of minors “as a public burden or duty to be rendered to the State.” T tutorship could be established by testamentary disposition, propinquity of familial relationship, or special appointment by a magistrate exercising the state’s parens patriae authority. The tutor’s primary function was to administer the ward’s property for the ward’s benefit until the ward reached the age of majority when he would acquire the legal capacity to govern his own affairs. Unlike a commissioning agent or fiduciarius, a tutor was entrusted with broad discretionary powers for the management of entrusted property.

To ensure that tutors would not exercise their powers arbitrarily in a manner that would place them in a dominating position relative to their wards, tutors bore affirmative duties that closely mirrored contemporary fiduciary duties at common law. In particular, tutors were obligated to ensure the security of their ward’s property; maintain an inventory of entrusted property; invest entrusted money; sell perishable goods; and, more generally, “demonstrate the same care for the pupil’s as for their own affairs.” A tutor was not permitted to “authorize any act in which he had a personal concern, and where suit between the ward and the [tutor] sprang up a temporary trustee (curator) was appointed” to handle the transaction. Moreover, tutors were subject at every point and turn to magisterial control and, if necessary, intervention; they were bound, on surrendering their post, to present strict accounts, and to make good all deficiencies. Effective judicial remedies and special processes were in vogue for attaining these ends. Cumulatively, these legal safeguards operated to prevent the tutor from exercising alien control over the ward’s practical interests.

Significantly, Roman law considered wards to be persons sui juris, not alieni juris. Although wards were not legally capable of bearing rights until they reached the age of majority, as emancipated citizens they were entitled to freedom from domination. Roman law therefore intervened to secure their liberty by protecting their practical interests in property administered by tutors on their behalf.

D. The Republicanism of Roman Fiduciary Law

Legal scholars and judges today often characterize the common law trust as fiduciary law’s paradigm case and assert that other private law relationships may qualify for fiduciary duties if they are sufficiently similar to the trust. In contrast, the republican tradition provocatively asserts that

---

79 SHELDON AMOS, THE HISTORY AND PRINCIPLES OF THE CIVIL LAW OF ROME 291 (1883); see also KASER, supra note ___, at 317 (observing that a tutor’s power was “conceived, more and more, as a compulsory burden (munus) imposed in the public interest”).
80 Id. at 292.
81 Johnston, supra note ___, at 55.
82 AMOS, supra note ___, at 303.
83 Id. at 292; see also KASER, supra note ___, at 316-17 (observing that the strict’ constraints on a guardian’s powers were essentially those of trusteeship).
84 See KASER, supra note ___, at 76 (___).
85 See, e.g., LEONARD ROTMAN, FIDUCIARY LAW 57 (2005); SHEPHERD, supra note ___, at 5, 22-23; Eric Talley, Turning Servile Opportunities into Gold: A Strategic Analysis of Corporate Opportunities Doctrine, 108 YALE L.J. 277, 299-302 (1998); DeMott, supra note ___, at 1880-81; cf.
fiduciary law’s paradigm case is the master-slave relationship. Roman law enabled a person sui juris to enlist slaves and other fiduciaries as “animated tools” to exercise his legal rights and capacities on his behalf. At the same time, the law furnished safeguards to ensure that the principal (and beneficiaries, if applicable) would suffer no greater domination from the fiduciary than from his own slaves.\textsuperscript{86}

Although a commissioning agent, fiduciarius, tutor, or other fiduciary had to be a person sui juris, within the scope of their vicarious representation they were legally required to function as if they were a slave or dependent to their principal by aligning their actions with their principals’ instructions and avowal-ready interests. Fiduciaries who performed purely ministerial functions without significant scope for the exercise of independent discretionary judgment (e.g., fiduciarius) assumed a straightforward obligation to faithfully discharge their entrusted responsibilities. Those entrusted with broader discretionary powers (e.g., tutors) were also required to manifest uncompromised fidelity to their principal’s purposes. These requirements not only protected principals from suffering financial or other material injury from a fiduciary’s indiscretions; they also operated to safeguard principals and beneficiaries from domination by ensuring that power entrusted by the principal (or by operation of law, in the case of an appointed tutor) would be exercised exclusively in the interests of the beneficiaries. The fact that Roman law permitted fiduciaries to exercise power over the legal and practical interests of persons sui juris was not thought to undermine liberty, but only because fiduciary duties intermediated these relationships to align fiduciaries’ performance with their principals’ purposes and their beneficiaries’ avowal-ready interests. Thus, Roman fiduciary law empowered principals (or beneficiaries, in the case of appointed tutors) to use fiduciaries as extensions of their own agency, while simultaneously protecting principals and beneficiaries from domination.

III

THE LIBERTARIAN TRADITION IN ANGLO-AMERICAN FIDUCIARY LAW

Over time, the republican underpinnings of Roman fiduciary law have receded into the obscuring mists of history.\textsuperscript{87} Legal scholars today almost never mention republicanism as a possible theoretical framework for

\textsuperscript{86} Cf. Deborah DeMott, Defining Agency and Its Scope, in COMPARATIVE CONTRACT LAW: A TALE OF TWO LEGAL SYSTEMS (Martin Hogg & Larry A. DiMatteo eds., forthcoming 2015) (“[T]he agent’s role does not so much substitute for the principal as it elongates the principal externally . . . .”).

\textsuperscript{87} See VINTER, supra note _, AT 1-2 (noting scholarly opposition to the idea “that the English trust has a Roman origin,” but asserting that “it does not seem particularly suggestive to say that ‘fiduciary’ is derived from the Latin ‘fiduciarius’”).

L.S. Sealy, Fiduciary Relationships, 1962 CAMBRIDGE L.J. 69, 70-71 (observing that English courts extended fiduciary principles to guardianship and other relationships by drawing analogies to the trust).
explaining, justifying, or critiquing fiduciary law. Instead, the assumption implicit in most contemporary fiduciary law scholarship is that courts in England and the United States founded modern fiduciary law on the normative foundations of classical liberalism. According to this view, what led Anglo-American courts to develop the common law of fiduciary duties was not necessarily their aversion to domination per se, but rather a concern that opportunistic fiduciaries might exploit the special trust and confidence reposed in them in a manner that would cause concrete harm to beneficiaries’ material interests. Put another way, legal scholars today tend to agree that courts imposed fiduciary duties based on the concern that the risk of unchecked opportunism in these relationships was sufficiently dire to justify extraordinary measures: a prophylactic prohibition against conflicted transactions, backed by the supra-compensatory equitable remedy of disgorgement.

This Part reviews the libertarian tradition in Anglo-American fiduciary law in several steps. It begins by summarizing briefly the libertarian vision of freedom as noninterference and considers how this tradition shaped the Rumsford Market Case, the landmark eighteenth-century decision that is widely credited with ushering in the modern law of fiduciary duties. The discussion then turns to the libertarian tradition’s contemporary legacy, explaining how private-law and corporate-law scholars have employed economic theory to develop sophisticated libertarian justifications for fiduciary duties. Lastly, this Part considers several obstacles the libertarian tradition has encountered in its effort to explain and justify core features of fiduciary law.

A. The Emergence of the Libertarian Theory

Republicans typically present their vision of liberty as “freedom as nondomination” as an alternative to libertarianism, which conceptualizes liberty as “freedom as noninterference.” Whereas republicans consider a power-holder’s mere capacity for arbitrary interference to undermine liberty (whether or not it results in actual interference), libertarians contend that individual freedom is compromised if (and only if) a person’s choices are actually constrained by another. Libertarians contend that it is the

---

88 In previous writings, Evan Fox-Decent and I have drawn explicit connections between republicanism and fiduciary law. See EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES SOVEREIGNTY _ (Oxford University Press, forthcoming 2016); EVAN FOX-DECENT, SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY _ (2011); Criddle, supra note _, at __. To my knowledge, however, this Article is the first to develop this connection systematically and defend republicanism as an alternative to libertarian and legal-formalist accounts of fiduciary duty.

89 See, e.g., [Henry] Smith, supra note _, at 262-71.
91 See ROTMAN, supra note _, at 58.
92 PETTIT, supra note _, at 40.
93 See, e.g., MATTHEW KRAMER, THE QUALITY OF FREEDOM (2003); Quentin Skinner, Freedom as the Absence of Arbitrary Power, in REPUBLICANISM AND POLITICAL THEORY, supra note _, at 96 (observing that removing a choice is a form of interference).
possibility of choice-constraining interference—not the experience of subordination per se—that renders a person unfree. As such, a person may be unfree without actual interference only to the extent that another is likely to actually interfere in their affairs.94

The distinction between the republican and libertarian conceptions of liberty leads the two theories to support different approaches to protecting liberty in the private sphere. In some respects, republicans’ conception of unfreedom is broader than the libertarian conception. For example, republicans would consider an individual’s formal subjection to a benevolent sovereign to be a form of unfreedom even if the sovereign was disposed to treat the subject well and refrain from interference in the subject’s choices.95 In other respects, the libertarian conception of threats to freedom is broader than its republican alternative. For example, any state interference in matters of personal choice—not just arbitrary interference—constitutes a threat to freedom under the libertarian tradition. Accordingly, libertarians tend to view laws that constrain citizens’ choices as limitations on personal freedom even if the laws are necessary to protect all members of society from domination.96 Libertarians recognize, of course, that legal institutions are often necessary to protect individual autonomy from private interference. They consider state intervention in the private sphere to be appropriate, however, only if there is an actual risk of harmful interference in matters of personal choice, not merely the abstract capacity for such interference.97

Viewed from a libertarian perspective, fiduciary duties guard against the possibility that individuals in positions of trust and confidence may interfere with the legally privileged choices of their principals and beneficiaries. Most fiduciaries are uniquely positioned to interfere with others’ choices because they are enlisted precisely to carry others’ choices into execution. Arguably the first principle of agency law, for example, is that an agent is required to follow her principal’s instructions.98 Trustees likewise are obligated to honor the terms of their trust agreement,99 and corporate officers and directors are bound to respect the requirements of their corporate charter and bylaws.100 When principals do not give their fiduciaries

94 See, e.g., Ian Carter, How Are Power and Unfreedom Related?, in REPUBLICANISM AND POLITICAL THEORY 58, 70 (Cecile Laborde & John Maynor eds., 2008); Matthew H. Kramer, Liberty and Domination, in REPUBLICANISM AND POLITICAL THEORY, supra, at 31, 42-44.

95 See Cecile Laborde & John Maynor, The Republican Contribution to Contemporary Political Theory, in REPUBLICANISM AND POLITICAL THEORY, supra note _, at 1, 4-5.


97 See Matthew H. Kramer, Liberty and Domination, in REPUBLICANISM AND POLITICAL THEORY 31, 42 (Cecile Laborde & John Maynor eds., 2008) (“In the eyes of the negative-liberty theorists, . . . the soft-hearted dominator’s superiority is not itself a source of unfreedom; everything hinges on what the dominator does with his superiority.”).


100 See, e.g., Henrichs v. Chugach Alaska Corp., 250 P.3d 531, 533 (Ala. 2011) (affirming that a corporate director breached his duty of loyalty by, inter alia, “refusing to comply with corporate bylaws requiring that a special meeting of the shareholders be held in response to a shareholder petition”).
precise instructions, fiduciaries are required to honor principals’ general choices by faithfully exercising the discretionary judgment to advance their principals’ objectives. Furthermore, a fiduciary’s duty of care arguably protects beneficiaries from harm by ensuring that entrusted property and opportunities are not squandered to their detriment. These features of fiduciary law plausibly promote freedom as noninterference by requiring fiduciaries to respect their principals’ freedom of choice.

Libertarians argue that there is nothing inherently wrongful about a fiduciary engaging in conflicted transactions, provided that the transactions are consistent with her principal’s objectives and advance the best interest of her beneficiaries. In some settings, a fiduciary may be able to advance her principal’s interests most effectively by engaging in transactions that entail conflicts of interest or conflicts of duty. The trouble, however, is that it is often difficult in practice for courts to discern whether conflicted transactions actually promote beneficiaries’ best interests. Fiduciary law’s rules against conflicts of interest and conflicts of duty may be justified under libertarianism, therefore, as a pragmatic response to the thorny epistemic challenge of discerning whether conflicted transactions actually serve beneficiaries’ interests.

This libertarian account of fiduciary law’s no-conflict rules can be traced back to English Court of Chancery’s seminal 1726 decision, *Keech v. Sanford* (the *Rumford Market* case). At issue in the case was a lease to Rumford Market which had been devised to a trustee to hold in trust for an infant. When the lease was set to expire, the trustee allegedly sought to renew the lease on the infant’s behalf, but the lessor refused to renew the lease, objecting that he would not be able to defend his interests in court against an infant lessee in the event of the lease’s breach. Finding the path to renewing the lease in the infant’s favor blocked, the trustee opted to renew the lease on his own behalf. This action had the effect of disrupting the infant beneficiary’s customary, non-legal, but none the less firm entitlement [under the principle of ‘tenant’s right’] to roll over finite leases and thus

---

102 Republicans agree, of course, that fiduciaries must follow their principals’ instructions and faithfully pursue their principals’ objectives, refraining from opportunism and waste, to ensure that principals are respected always as persons sui juris. See infra Section IV.C.1.
103 See, e.g., CONAGLEN, supra note __, at 108-09, 113, 124; Langbein, supra note __, at 934.
105 According to Joshua Getzler, an action for “[d]istress could not be levied for recovery of such a profit, being an incorporeal hereditament, and covenant could not be used since the lessee was to be an infant lacking the requisite contractual capacity.” Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations*, in MAPPING THE LAW 577, 581 (Andrew Burrows & Alan Rodgers eds., 2006) [hereinafter Getzler, *Rumford Market*]. Pleadings in the case suggest, moreover, that the trustee may have bribed the lessor to deny renewal to the infant beneficiary in favor of the trustee. See Joshua Getzler, “As If,” *Accountability and Counterfactual Trust*, 91 B.U. L. REV. 973, 984 (2011).
maintain possession over long stretches of time across lives and generations. A trustee who used his legal title and fiduciary position to renew a lease was taking this benefit to himself and exploiting his office to do so.106

By renewing the lease in his own name and thereby breaking the inter-generational chain of possession, the trustee had allowed himself to become an instrument for frustrating the purposes of the trust.

Responding to these concerns, Chancellor King ordered the trustee to hold all profits from the lease in a constructive trust for the infant. The Chancellor acknowledged the extraordinary nature of his determination that “the trustee is the only person of all mankind who might not have the lease.”107 Nonetheless, he stressed that “if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to cestui que use.”108 A general prohibition against conflicted transactions was necessary, in other words, to guard against the likelihood that trustees would abuse their positions of trust and confidence for their own gain at the beneficiaries’ expense.

Despite its antiquated facts and terse reasoning, Rumford Market continues to be cited widely for the proposition that a fiduciary may not enter transactions in which she has a personal interest or allow her position to be compromised by conflicting duties without her principal’s informed consent (the “no-conflict rule”).109 If a fiduciary derives profit from an unauthorized conflicted transaction without her beneficiary’s consent (or, in some contexts, with approval of a court or legislature), the profits are subject to constructive trust and disgorgement in favor of the beneficiary (the “no-profit rule”). Consistent with Chancellor King’s reasoning, judges and legal scholars today generally characterize these rules as preventative measures that serve to deter fiduciaries from engaging in opportunism: by prohibiting all self-interested transactions and profit-taking without a principal’s consent—regardless of a fiduciary’s intent or whether the beneficiary has been harmed—fiduciary law eliminates the incentives for a fiduciary to abuse her position for her own gain and correspondingly lowers bonding and monitoring costs for the principal.110 The no-conflict and no-profit rules also

106 Getzler, Rumford Market, supra note _, at 582 (discussing arguments developed in S. Cretney, The Rationale of Keech v. Sandford, 33 CONVEYANCER (NS) 161 (1969); and W.G. Hart, The Development of the Rule in Keech v Sandford, 21 L.Q. REV. 258 (1905)).
108 Id.
110 See In re Primedia Inc. Deriv. Litig., 910 A.2d 248, 262 (Del. Ch. 2006) (“As the Delaware Supreme Court long ago noted, the duty of loyalty ‘does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for purposes of removing all temptation, extinguishes all possibility of profit flowing from the breach of confidence imposed by the fiduciary relation.’”) (quoting Guth v. Loft, Inc., 5 A.2d 503, 510 (Del.1939)). CONAGLEN, supra note _, at 108-09, 120; Smith, supra note _, at 262.
serve a prophylactic function, preventing a fiduciary from exploiting the fact that she “controls all evidence of the relationship and can easily conceal wrongdoing from the vulnerable party or the court.” Thus, “the Rumford Market case has been received as embodying a policy of prophylaxis, or preventative sanction through profit-stripping that takes away all incentive for a fiduciary to consider how he might gain from his position.”

Nearly two centuries after the Rumford Market case was decided, Chancellor King’s libertarian theory of fiduciary law received perhaps its most iconic expression in Bray v. Ford, an 1896 case from the English House of Lords. The defendant in the case was a governor of Yorkshire College who was found to have violated his fiduciary duty by simultaneously receiving payment for services rendered as the College’s solicitor. In his opinion, Lord Herschell declared:

“It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondents, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration of human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing.”

This account of fiduciary loyalty also influenced the early development of American fiduciary law. In Davoue v. Fanning, the foundational American case recognizing and enforcing the then-recently-settled English rule, Chancellor Kent explained the rule as follows:

The cestui que trust is not bound to prove, nor is the Court bound to judge, that the trustee has made a bargain advantageous to himself, . . . and yet the [beneficiary] not have it in his power, distinctly and clearly, to show it. There may be fraud, . . . and the party not able to prove it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will

---

111 Id. (citing, inter alia, Ex parte James (1803) 8 Vesey Junior 337, 345; 32 ER 385, 388; Ex parte Hughes (1802) 6 Vesey Junior 617, 31 ER 1223; and Ex parte Lacey (1801) 6 Vesey Junior 625, 31 ER 1228).
112 Getzler, supra note , at 586.
113 Bray v. Ford [1896] AC 44.
114 Id. at 44.
115 Id. at 51-52.
116 2 Johns. Ch. 252, 261 (N.Y. Ch. 1816).
permit the *cestui que trust* to come, at his own option, and without showing actual injury . . . . This is a remedy which goes deep, and touches the very root of the evil.\textsuperscript{118}

The critical point to take away from these three cases—*Rumford Market* case, *Bray v. Ford*, and *Davoue v. Fanning*—is that courts in the United Kingdom and the United States appear to have applied the no-conflict and no-profit rules from the beginning as measures for addressing risks of harm to beneficiaries’ proprietary interests rather than as responses to the per se wrongfulness of conflicted transactions.\textsuperscript{119} Conflicted transactions did not necessarily constitute an abuse of a trustee’s office warranting judicial interference in the fiduciary’s choices, the thinking went, as long as the fiduciary had respected the principal’s choices and objectives and had not harmed the beneficiaries. Prophylactic no-profit and no-conflict rules were necessary only because it was expected that most conflicted transactions would harm beneficiaries, and it would generally be difficult, if not impossible, for a court to discern whether any particular conflicted transaction produced harm. Implicit in this pragmatic justification for the duty of loyalty was a libertarian conception of fiduciary law; namely, that personal freedom is limited, and judicial intervention warranted, only if a principal’s choices have not been respected or beneficiaries have suffered material harm.

\section*{B. The Libertarian Theory in Contemporary Fiduciary Theory}

Many contemporary legal scholars continue to endorse the *Rumford Market*’s libertarian theory of fiduciary law, arguing that fiduciary duties serve to protect principals’ choices and beneficiaries’ material interests. For example, an influential recent monograph by Mathew Conaglen characterizes fiduciary duties as promoting principals’ contractual agreements.\textsuperscript{120} Fiduciary duties encourage fiduciaries to follow their mandate, he argues, by removing distractions that could interfere with their performance.\textsuperscript{121} Other scholars such as Robert Cooter and Bradley Freedman have focused on beneficiaries’ interests, arguing that fiduciary duties protect beneficiaries from “two distinct types of wrongdoing: first, the fiduciary may misappropriate the principal’s asset or some of its value (an act of malfeasance); and second, the fiduciary may neglect the asset’s management (an act of nonfeasance).”\textsuperscript{122}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{118} Id. at 260-61; see also Langbein, supra note _, at 944 (noting that Kent’s *Commentaries on American Law* also assert that the no-conflict rule “is founded on the danger of imposition and the presumption of the existence of fraud, inaccessible to the eye of the court”).
\item \textsuperscript{119} For this reason, some commentators have suggested that the decision is based on “public policy.” See, e.g., Walter G. Hart, *The Development of the Rule in Keech v. Sanford*, 21 L.Q. REV. 258 (1905).
\item \textsuperscript{120} See CONAGLEN, supra note _, at 4, 32-40.
\item \textsuperscript{121} Id.; see also Stephen A. Smith, *The Deed, Not the Motive: Fiduciary Law Without Loyalty*, in *Contract, Status, and Fiduciary Law* (Andrew Gold & Paul B. Miller eds., forthcoming) (“The rationale for [fiduciary duties] is to prevent fiduciaries from breaching their mandates.”).
\item \textsuperscript{122} Cooter & Freedman, supra note _, at 1047.
\end{itemize}
\end{footnotesize}
Despite their different starting points, these accounts both accept that the no-conflict rule is over-inclusive because it prohibits some transactions that may promote beneficiaries’ best interests. Both accounts endorse Chancellor Kent’s thesis that the no-profit rule is necessary to secure optimal deterrence, given the fact that information asymmetries between fiduciaries and beneficiaries often make monitoring ineffective. Accordingly, dispensing with the no-conflict rule and burdening beneficiaries with proving an injury to their material interests would lead to systematic under-enforcement. The same information asymmetries support the no-profit rule, scholars argue, because compensatory damages alone would likely be insufficient to deter fiduciary malfeasance. Thus, fiduciary law’s no-conflict and no-profit rules arguably furnish a prudent and efficient response to the incentive structures that would otherwise enable opportunism in fiduciary relationships.

Another prominent theme in libertarian scholarship is the idea that fiduciary relationships are generated by contract or voluntary undertaking. In an early formulation of this thesis, Judge Posner explained:

The common law imposes [fiduciary] duty when the disparity between the parties in knowledge or power relevant to the performance of an undertaking is so vast that it is a reasonable inference that had the parties in advance negotiated expressly over the issue they would have agreed that the agent owed the principal the high duty that we have described, because otherwise the principal would be placing himself at the agent's mercy.

The following year, Frank Easterbrook and Daniel Fischell published an article titled “Contract and Fiduciary Duty,” in which they argued that courts use fiduciary duties as gap-fillers for incomplete contracts, recognizing “the

---


124 See Talley, supra note __, at 301 (observing that “fiduciaries tend to occupy an informationally privileged position, in which their knowledge and actions are either costly or impossible for shareholders to monitor”).

125 See James J. Edelman, Unjust Enrichment, Restitution, and Wrongs, 79 TEX. L. REV. 1869, 1876 (2001) (asserting that courts apply “disgorgement damages” to fiduciary relationships because “there is a profound need for deterrence not fulfilled by compensatory damages”).

126 See, e.g., BOGERT ON TRUSTS § 543 (2010) (“The principal object of the [no-profit] rule is preventative, to make the disobedience of the trustee to the rule so prejudicial to him that he . . . will be induced to avoid disloyal transactions in the future.”); Cooter & Freedman, supra note __, at 1074 (“The duty of loyalty must be understood as the law's attempt to create an incentive structure in which the fiduciary's self-interest directs her to act in the best interest of the beneficiary.”); Talley, supra note __, at 281 (arguing that fiduciary law’s prophylactic rules may be justified on the basis that “an optimal legal rule in a private-information environment may consciously permit some inefficiencies in order to obviate even greater efficiency losses”); T.G. Youdan, The Fiduciary Principle: The Applicability of Proprietary Remedies, in EQUITY, FIDUCIARIES AND TRUSTS 93, 105 (T.G. Youdan ed., 1989) (arguing that “[t]he twin policies of prophylaxis and of surmounting the evidence problem may justify the finding of personal liability”).

127 See, e.g., James Edelman, When Do Fiduciary Duties Arise?, 126 L.Q. REV. 302 (2010); Easterbrook & Fischel, supra note __.

128 Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992).
impossibility of writing contracts completely specifying the parties’ obligations.  

Over the past two decades, scholars have refined the contract theory of fiduciary duties by characterizing no-conflict and no-profit rules as “off-the-rack” default rules that enhance the efficiency of contract negotiation and protect unsophisticated parties. Consistent with Judge Posner’s explanation, these scholars argue that fiduciary duties are reasonable inferences about principals’ presumed intentions, because they are the kind of rules that sophisticated parties would demand when entering contractual relationships that involve the reposing of special trust and confidence. Grounding fiduciary law in contract has encouraged a generation of fiduciary scholars to conceptualize fiduciary duties in economic terms as a calibrated response to agency cost problems.

Some libertarian theorists have argued that the putatively contractual character of fiduciary duties means that all fiduciary duties should be waivable by informed consent. To date, however, courts have not gone quite so far. Although a few judges have embraced the contractarian account of fiduciary duties as a general matter, courts regularly affirm that some requirements of fiduciary loyalty—most prominently, the requirements to act in good faith and apprise the principal of facts material to informed consent—are not subject to contractual waiver.

To summarize briefly, libertarian theorists in the United States continue to endorse Lord Herschell’s dictum that fiduciary law’s no-conflict and no-profit rules are over-inclusive because they “might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing.” They argue, however, that fiduciary duties are warranted to promote optimal deterrence, removing fiduciaries’ incentives to misappropriate or waste entrusted assets and opportunities. The fiduciary duty of loyalty is thought, therefore, to

---

129 Easterbrook & Fischel, supra note _, at 426.
130 Brett H. McDonnell, Sticky Defaults and Altering Rules in Corporate Law, 60 SMU L. REV. 383, 387 (2007); see also Henry N. Butler & Larry E. Ribstein, Opting Out of Fiduciary Duties: A Response to Anti-Contractarians, 65 WASH. L. REV. 1, 29 (1990) (characterizing fiduciary duties as “implied terms” and “legally enforceable standard-form provisions” that “are not distinct from the contract but are simply one of many drafting alternatives”).
132 See, e.g., Davis, supra note _, at 21 (“The legal process must be alert to the existence of private bargaining and avoid upsetting the apple cart when an informed modification of the standard set of duties has been agreed to by the parties. This may seem self-evident, but at times it is overlooked by the courts.”); Talley, supra note _, at 284 (suggesting alternatives to categorical fiduciary rules for incentivizing corporate directors to promote a corporation’s best interests).
133 E.g., United Airlines, Inc. v. Mesa Airlines, Inc., 219 F.3d 605, 610 (7th Cir. 2000) (Easterbrook, J.).
134 See BOGERT, supra note _, § 152 (collecting cases).
135 Bray v. Ford [1896] AC 44, at 51-52; see, e.g., CONAGLEN, supra note _, at 106-09, 113.
136 See, e.g., Cooter & Freedman, supra note _, at 1052; Edelman, supra note _, at 1876; Daniel Fischel & John H. Langbein, ERISA’s Fundamental Contradiction: The Exclusive-Benefit Rule, 55 U. CHI. L. REV. 1105, 1115 (1988); Hon. Mr. Justice Gummow, Compensation for Breach
promote freedom as noninterference by deterring harmful interference in relationships premised upon trust or confidence.

C. Challenges to the Libertarian Theory

Despite the libertarian tradition’s many virtues as an interpretive theory of fiduciary law, it is far from a perfect fit with current legal doctrine. Some key features of fiduciary relationships run at cross-purposes with the libertarian ideal of freedom as noninterference, including the discretionary authority fiduciaries often exercise over their principals’ interests (sometimes without either party’s consent). Moreover, as legal theorists have begun to recognize in recent years, the inflexible no-conflict and no-profit rules do not reliably advance the libertarian ideal of optimal deterrence. For these and other reasons, the libertarian tradition does not offer a persuasive interpretive theory of the normative basis for the contemporary duty of loyalty.

Consider first the fact that many fiduciaries are entrusted with discretionary power to make decisions for and on behalf of their principals. Libertarians tend to view any form of interference in matters of personal choice as a threat to freedom. Such interference is pervasive, however, in relationships such as guardianship and investment management, where fiduciaries exercise discretionary power over their beneficiaries’ legal and practical interests. Guardians and investment managers are not charged solely with carrying their principals’ choices into execution; instead, they make choices for their principals. Indeed, it is no great exaggeration to say that a fiduciary’s interference in her principal’s privileged choices is the entire raison d’être for these categories of fiduciary relationships.

To the extent that a fiduciary’s exercise of discretionary power limits a principal’s autonomy, it is unclear how a libertarian should respond. Some might argue that the law should prohibit principals from entrusting discretionary authority to fiduciaries as a matter of public policy, limiting fiduciary representation to purely ministerial functions. But even supposing libertarianism could support a principal’s choice to entrust discretionary power to a fiduciary, this would not support the full spectrum of fiduciary relationships that courts recognize today. Some fiduciary relationships are established by legislation, judicial decree, or unilateral undertaking, for example, rather than through contract. It is hard to see how these features of fiduciary law can be reconciled with libertarianism’s emphasis on freedom from interference.

Just as libertarianism cannot fully account for fiduciary authority, there are good reasons to reject its thesis that optimal deterrence can fully explain or justify the duty of loyalty. Interestingly enough, many of the most potent critiques of libertarianism as an interpretive theory of fiduciary law have come from within the libertarian tradition itself. For example, scholars such


See Miller, supra note __, at 982 (citing as examples the relationships between parents and children and between a trustee and beneficiary of a declaratory trust).
as Robert Cooter, Bradley Freedman, and John Langbein have questioned whether the no-conflict and no-profit rules—with their associated remedies of constructive trust and disgorgement—actually promote optimal deterrence.\(^{138}\) Economic theory suggests that successful deterrence depends upon the expected sanction equaling or exceeding the expected gain from indiscretions. However, the expected value of fiduciary self-dealing will almost always exceed the expected value of disgorged assets. Some beneficiaries will not realize that their fiduciaries have engaged in conflicted transactions. Others may lack a sufficient stake to justify incurring litigation costs. As long as the probability of effective judicial enforcement is generally less than 100\% for these or other reasons, the classic fiduciary remedies of constructive trust and disgorgement will come up short as mechanisms for deterring harmful opportunism.\(^{139}\)

More commonly, however, libertarian scholars have criticized fiduciary law rules and remedies based on concerns that these rules may deter loyal fiduciaries from concluding desirable transactions. John Langbein has pursued this critique with particular vigor in a series of important articles on fiduciary principles in trust law. Langbein characterizes the no-conflict rule as “Bleak House law, born of the [English Chancery Court’s] despair” over its inability to distinguish faithful trust administration from fraud.\(^{140}\) “Today, by contrast, in the wake of fusion and the reform of civil procedure, courts dealing with equity cases command effective fact-finding procedures,” he argues.\(^{141}\) “Accordingly, much of the concern voiced by [Chancellor Kent and others]—that without the [no-profit] rule the beneficiary would be ‘not able to prove’ trustee misbehavior—is archaic.”\(^{142}\) In Langbein’s view, therefore, the prophylactic no-conflict rule is no longer necessary today.

Recognizing, however, that U.S. courts have shown little interest in abandoning the no-conflict rule, Langbein also advocates reframing the rule as a rebuttable presumption: courts should set aside the no-conflict and no-profit rules if a fiduciary can demonstrate that conflicted transactions advanced the beneficiaries’ best interests.\(^{143}\) His argument rests on a simple (libertarian) premise: there is nothing inherently immoral about a fiduciary profiting from a conflicted transaction, provided that the transaction also maximizes the beneficiaries’ profits (or minimizes losses). After all, why should courts require fiduciaries to act in the sole interest of their beneficiaries if a conflicted transaction would promote the beneficiaries’ best interests? Indeed, as Steven Smith has observed, the no-conflict rule

\(^{138}\) See, e.g., Cooter & Freedman, supra note _, at 1051-52, 1061; Langbein, [Questioning] supra note _, at _._ Langbein, Mandatory Rules, supra note _,; [Stephen] Smith, supra note _._

\(^{139}\) See Lionel Smith, Deterrence, Prophylaxis, and Punishment in Fiduciary Obligations, 7 J. EQUITY 87 (2013) (further developing this critique).

\(^{140}\) Langbein, Questioning, supra note _, at 947.

\(^{141}\) Id.

\(^{142}\) Id. But see Getzler, supra note _, at 597-98 (“There is a great weight of English legal history—and some recent frauds in corporate America—to suggest that [Langbein’s] call for abolition is premature.”).

\(^{143}\) Langbein, supra note _, at 931; see also CONAGLEN, supra note _, at 124.
plausibly “reduces . . . the number of instances in which fiduciaries who are inclined to act loyally can act on their inclinations.” 144 If we take the normative premises of libertarianism seriously, it is hard to defend courts’ traditional commitment to applying the no-conflict and no-profit rules with “[u]ncompromising rigidity.” 145

One last critique of the libertarian tradition merits consideration before we turn our attention elsewhere. As Paul Miller and Lionel Smith have noted, there is a fundamental mismatch between the libertarian tradition’s focus on optimal deterrence and the conventional understanding of disgorgement—the classic remedy for fiduciary disloyalty. 146 Traditionally speaking, courts have conceptualized disgorgement as a restitutionary remedy rather than a punitive remedy. 147 The purpose of disgorgement, in other words, is simply to effectuate the return of assets that have been withheld from the rightful owner. 148 Constructive trust also applies only when a party has been “unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant’s rights.” 149 Under the libertarian tradition, however, it is unclear why profits from conflicted transactions or misappropriated business opportunities would belong, strictly speaking, to the principal. That a principal may suffer harm from the opportunism that generates fiduciary profits is self-evident. Yet compensatory damages, punitive damages, and criminal sanctions—not constructive trust and disgorgement—would seem to be the appropriate remedies to make a principal whole and deter future indiscretions. 150 Taking the libertarian tradition’s optimal-deterrence theory seriously would therefore call for a wholesale revamping of fiduciary duties and remedies.

D. Beyond the Libertarian Theory

In sum, the historical record indicates that libertarianism has shaped how courts in England and the United States have conceptualized fiduciary duties for centuries. Nonetheless, the libertarian tradition has struggled to

---

144 [Stephen] Smith, supra note __, at __.
146 See Smith, supra note __, at __; Paul B. Miller, Justifying Fiduciary Remedies __; Steven Smith, supra note __, at __.
147 See, e.g., SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1231 (D.C. Cir. 1981) (explaining that disgorgement “may not be used punitively”).
148 See id. (“[D]isgorgement primarily serves to prevent unjust enrichment.”).

Mathews Conaglen has argued that disgorgement can be rehabilitated as a fiduciary remedy if it is reconceptualized as a purely prophylactic measure that focuses on expunging the risk of harm caused by opportunism rather than deterring self-dealing. See Conaglen, supra note __, at 74. As Lionel Smith has explained, however, this account still raises the over-inclusivity concerns associated with deterrence accounts. See Smith, supra note __, at __.
explain central features of fiduciary law such as fiduciaries’ authority to exercise power in some contexts without their principal’s consent, the duty of loyalty’s inflexible no-conflict and no-profit rules, and the classic disgorgement remedy for fiduciary disloyalty. Despite scholars’ creative efforts to explain and justify fiduciary duties based solely on principles of efficiency and party autonomy, it appears that core features of contemporary fiduciary law cannot be shoehorned easily into conventional theories of fiduciary law that are premised on a commitment to freedom as noninterference.

The republican tradition offers a promising path forward. To make headway along this path, however, courts will have to set aside some cherished myths about the normative basis for fiduciary duties, including Chancellor King’s oft-repeated dictum that the duty of loyalty operates as an over-inclusive prophylactic rule. In the discussion that follows, this Article shows how republican theory opens up new vistas for fiduciary theory, clarifying the normative basis for controversial and misunderstood features such as the juridical character of fiduciary authority, the requirements of fiduciary loyalty, and the choice of fiduciary remedies.

IV
REVIVING THE REPUBLICAN THEORY OF FIDUCIARY LAW

In this Part, I explore how fiduciary law’s republican past might offer guidance and inspiration for the future. Despite centuries of neglect, the republican theory of fiduciary law is not “dead. It’s not even past.”\textsuperscript{151} Instead, the republican conception of fiduciary relationships remains deeply embedded in the juridical structure of fiduciary law today, from the law’s emphasis on breach of trust as a distinctive legal wrong, to its utilization of equitable remedies that are calibrated precisely to neutralize domination. Although centuries of libertarian rhetoric from courts and commentators have undoubtedly caused some erosion, fiduciary law’s republican foundations remain remarkably intact, all things considered.

This Part shares some of the republican theory’s insights for contemporary fiduciary theory. It argues that republicanism explains core features of contemporary fiduciary law, while also supplying a persuasive normative justification for these features. In particular, the Sections that follow demonstrate that the republican theory provides compelling answers to some of the most important and controversial questions in fiduciary theory today, including: (A) the normative foundations of fiduciary law; (B) the distinguishing features of fiduciary relationships; (C) the requirements of fiduciary loyalty; and (D) the reasons for fiduciary law’s divergent conduct and decision rules.

A. The Normative Foundations of Fiduciary Law

The republican theory posits that fiduciary law serves to \textit{empower}
principals, while also emancipating principals and beneficiaries alike from domination. Fiduciary law is concerned not merely with promoting efficiency or preventing material harm, as libertarian theorists have long assumed. Rather, it secures freedom from domination by affirming that all people are *sui juris*—free and equal agents whose legal and practical interests are entitled to respect.

1. *Empowerment*

Fiduciary law empowers principals in several different ways. First, it empowers principals by making it possible for them to extend their agency through fiduciaries who agree to exercise legal powers and assert legal rights on their behalf.152 For example, a principal may decide to entrust a fiduciary with authority to conclude transactions on her behalf with third-parties (agency), manage and distribute her assets upon her death (testamentary trusts), distribute her assets to unspecified third-parties for charitable purposes (charitable trusts), use her assets to develop a for-profit commercial enterprise (corporations), or tend to the physical, emotional, educational, and religious upbringing of her children (guardianship). In each of these settings, fiduciary law makes vicarious representation possible by enabling a principal to authorize a fiduciary to exercise legal rights and assume obligations on her behalf.

Fiduciary law also empowers principals in settings where a principal lacks the legal or practical capacity to designate a fiduciary to act on her behalf. For example, children lack legal capacity not only to assert their own legal rights, but also to designate an adult to exercise these rights as fiduciary on their behalf. Fiduciary law addresses this problem by providing legal mechanisms whereby adults (e.g., parents, guardians) are assigned to serve as fiduciaries until children reach adulthood.153 Consider also the scenario where a ship runs aground, imperiling cargo that does not belong to the shipmaster. Although shipmasters do not ordinarily have contractual relationships with cargo owners, courts have held that shipmasters who are unable to communicate with cargo owners may sometimes sell the cargo to a third-party, acting as agent of necessity for the cargo owners, in order to protect the goods’ value.154 In these and other settings, fiduciary law empowers principals by ensuring that their legal rights can be exercised on their behalf even though they lack the legal or practical capacity to select

---

152 Cf. Robin Bradley Kar, *Contract as Empowerment*, 83 U. Chi. L. Rev. (forthcoming 2016) (arguing that contract law operates as ‘a mechanism of empowerment: it empowers people to use legally enforceable promises as tools to influence other people’s actions and thereby meet a broad range of human needs and interests’).

153 It may seem counter-intuitive to characterize fiduciary law as “empowering” children, insofar as the law does not ordinarily require parents and guardians to follow children’s choices. Children would be disempowered indeed, however, if parents and guardians lacked the capacity to serve as fiduciary representatives to vindicate children’s rights on their behalf.

154 See, e.g., The Gratitudine (1801) 3 CH Rob 240; Australasian SN Co. v. Morse (1872) LR 4 PC 222; China-Pacific SA v. Food Corporation of India: The Winston [1981] 3 All ER 688, 693. I am grateful to Evan Fox-Decent for bringing this example to my attention. See FOX-DECENT, *supra* note _, at 132-34.
their own fiduciary.

In some settings, fiduciary law also empowers private parties by enabling them to benefit from the exercise of legal powers that they do not independently possess. For example, when multiple investors commit assets to a pooled investment fund, each retains an equitable interest in the profits generated by the fund, but no particular investor has the right to decide unilaterally how the fund will be distributed. Accordingly, when an investment manager winds up a pooled fund and distributes assets, she exercises a power that none of the contributing investors can claim independently. Although the investment manager’s authority to resolve investors competing claims to pooled funds is called into existence by investors’ mutual consent, it is not derivative of investors’ independent legal powers; rather, it is constituted and regulated by fiduciary law itself. Similarly, when parties appoint an arbitrator to resolve their dispute, the arbitrator exercises a legal power that neither party would have the right to exercise independently under the general principle that no private party is authorized to serve as judge and party to the same cause (\textit{nemo iudex in sua causa}).\footnote{See Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 428 (1995) (characterizing this principle as “a mainstay of our system of government”); Calder v. Bull, 3 U.S. (Dall.) 386, 388 (1798) (identifying “certain vital principles in our free Republican governments,” such as prohibition against “a law that makes a man a Judge in his own cause”).} Like the investment manager for a pooled fund, the arbitrator’s authority to adjudicate disputes is called into existence by the parties’ common consent, but it involves the exercise of a power that private parties do not possess. This power to arbitrate between the rivalrous claims of multiple beneficiaries is quintessentially fiduciary in nature.\footnote{See DOL Advisory Op. 79-66A (Sept. 14, 1979), 1979 Pens. Rep. (BNA) R-9 (Oct. 8, 1979) (concluding that an arbitrator who decides the question of a participant’s entitlement to ERISA plan benefits acts as a fiduciary); Atkins v. Bert Bell/Pete Rozelle NFL Player Retirement Plan, 694 F.3d 557, 569 (5th Cir. 2012) (concluding that “a trustee deadlock over [ERISA] eligibility matters, like any other deadlock, must be submitted to the compulsory resolution procedure” by an “arbitrator as fiduciary”); Int’l Union v. Greyhound Lines, Inc., 701 F.2d 1181, 1187 (6th Cir. 1983) (suggesting in dicta that an arbitrator’s role “would seem to come within the purview of a fiduciary, as defined by ERISA”); cf. Ethan Leib et al., \textit{A Fiduciary Theory of Judging}, 101 CALIF. L. REV. 699, _ (2013) (_).}

Fiduciary law thus reflects an implicit normative commitment to individual empowerment. By allowing principals to designate fiduciaries to act in their behalf, fiduciary law empowers beneficiaries to accomplish purposes that they could not achieve as easily—or could not achieve at all, legally or practically speaking—without a fiduciary’s assistance. This commitment to individual empowerment is consistent with republicanism’s respect for individual agency.\footnote{I do not argue here that a commitment to individual empowerment is unique to republicanism, as this feature of fiduciary law is plausibly compatible with libertarianism and a variety of other normative theories.}

2. \textit{Emancipation}

Fiduciary law also empowers fiduciaries, but in a very different way than it empowers principals. The law empowers fiduciaries in the limited
sense that they receive authorization to exercise legal rights that they would not otherwise be entitled to exercise in their personal capacity. Fiduciary law authorizes a fiduciary to exercise fiduciary power solely in an institutional or official capacity—as an office that is constituted and regulated by law—for a prescribed, other-regarding purpose. Fiduciary power is categorically different from principals’ power because fiduciaries are not free to pursue their own ends: a constitutive feature of fiduciary power is that the law permits its exercise only in a manner that is faithful to the fiduciary’s mandate and solicitous of beneficiaries’ legal and practical interests. Fiduciary law thus confers power on fiduciaries to act in a manner that affects others’ legal and practical interests, while constituting that power juridically in a manner that formally rules out alien control.

As a practical matter, of course, fiduciaries are creatures of flesh and blood, and therefore susceptible like all humankind to the deadly sins of greed and sloth. Under republican theory, therefore, it is not enough for fiduciary law to prescribe legal rights and duties that affirm a universal right to freedom from domination in the abstract. To secure liberty in a practical sense, the law must also furnish appropriate causes of action and effective remedies to protect beneficiaries against a fiduciary’s self-dealing and waste. Legal sanctions that deter fiduciaries from abusing trust may be particularly valuable as checks against domination. But perfect deterrence is not a prerequisite for republican liberty. A legal system can secure freedom from domination even if it does prevent all abuses from occurring ex ante, as long as it supplies robust mechanisms for accountability ex post to defuse domination by guaranteeing that fiduciaries are unable to exercise arbitrary control with impunity.

Fiduciary duties emancipate principals by ensuring that their liberty is not compromised by fiduciary power. Whenever the law authorizes a fiduciary to exercise a principal’s legal powers or assert the principal’s legal rights on his behalf, the duty of loyalty requires that exercises of fiduciary power must be interpretable as empowering the principal to accomplish his own purposes. The fiduciary must follow the principal’s instructions, and he

---

158 See CRIDDLE & FOX-DECENT, supra note __, at __ (discussing the institutional, purposive, and other-regarding characteristics of fiduciary power).

159 This approach is consistent with the republican insight that the true threat to individual liberty is not interference in matters of personal choice per se, but rather a party’s capacity to interfere in a manner that is indifferent to the interferer’s avowed or avowal-ready interests. See Philip Pettit, Keeping Republican Freedom Simple: On a Difference with Quentin Skinner, 30 POLITICAL THEORY 329, 342-43 (2002) (distinguishing non-arbitrary interference, which “condition[s]” freedom by “reduc[ing] the range or ease with which people enjoy undominated choice,” from alien control, which “compromise[s]” liberty).

Some negative-liberty theorists might view a fiduciary’s discretionary power as a form of ‘friendly coercion’ that does not compromise freedom, although this is not entirely clear. See, e.g., Ian Carter, How Are Power and Unfreedom Related?, in REPUBLICANISM AND POLITICAL THEORY, supra note __, at 58, 65 (arguing that binding Ulysses to the mast constitutes “friendly coercion” consistent with freedom as non-interference, but questioning whether the same can be said of “a justly convicted thief” who is imprisoned against his will).

160 See CRIDDLE & FOX-DECENT, supra note __, at 271 (characterizing impunity as “domination institutionalized”).
must act with reasonable diligence and prudence to achieve the principal’s objectives. The fiduciary thereby becomes a “man of straw,” enabling the principal to act through him as “the man of substance.”

The duties of loyalty and care thus safeguard a principal’s liberty by ensuring that he remains in a position of formal self-mastery with respect to the exercise of his own legal rights.

Fiduciary duties also protect beneficiaries from domination. For example, absent fiduciary duties, trust beneficiaries would interact with their trustees from a position of insufferable vulnerability and subservience. Recognizing the trustee’s unilateral (arbitrary) control over their equitable interests in trust property, beneficiaries would be forced to remain vigilant at all times against the threat of fiduciary misconduct. They might feel the need to engage in self-abasement or self-censorship so as to remain within the trustee’s good graces. Indeed, as security against the risk of trustee self-dealing or neglect, beneficiaries might feel compelled to offer kickbacks or other material inducements.

The fiduciary duties of loyalty and care rescue beneficiaries from this position of abject vulnerability by arming them with legal claims to enforce the institutional, purposive, and other-regarding character of fiduciary authority.

Skeptics might ask whether the republican theory’s focus on freedom from domination adequately captures how fiduciary law actually works in court. After all, a fiduciary is not subject to civil liability merely because she has the practical capacity to abuse the trust of her principal and beneficiaries. Isn’t material injury a necessary element of any legal claim for breach of fiduciary duty? And doesn’t this mean that domination plays no direct part in fiduciary jurisprudence?

This critique of the republican theory misses the mark for two reasons. First, it fails to consider how judicial enforcement of concrete injuries also serves to neutralizes domination. A fiduciary who can be held liable for abuse of power does not, under the republican theory, possess the formal or practical capacity for alien control. And beneficiaries who have access to courts for relief from fiduciary misbehavior are not subject to the “wretched” condition of coerced subservience and invigilation that republicans associate with “tyranny.”

Although a fiduciary may cause harm to her beneficiaries’ interests in the short term, judicial review operates on a longer time horizon to vindicate beneficiaries’ right to enjoy the full fruits of fiduciary power, thereby expunging the wrong of domination. Thus, courts are able to protect freedom from domination without making a fiduciary’s practical capacity for arbitrary interference an independently actionable claim.

161 KELKE, supra note _, 183.
162 See Nat’l Westminster Bank v. Morgan, [1985] UKHL 2 (characterizing a fiduciary relationship as a “dominant,” “confidential,” or “influential relationship” in which “one party has come to occupy or assume a position of ascendency, power or domination over the other”).
163 See, e.g., Hylton v. Hylton, 28 Eng. Rep. 349, 350 (1754) (observing that if courts did not apply the no-conflict rule, beneficiaries could feel compelled to offer kickbacks to secure a smooth transfer of the estate).
164 See TRENCHARD & GORDON, supra note _, at _.
Second, republicanism does not emphasize freedom of domination to the exclusion of material harm. A corporate officer who steals business opportunities from a corporation or a parent who diverts child support payments for her own personal use engages in a particularly egregious form of alien control, one that undermines republican liberty. The republican theory is not indifferent to such injuries; by characterizing liberty as freedom from domination, republicanism simply underscores that material harm does not fully comprehend the injury a beneficiary suffers from fiduciary disloyalty or profligacy. To borrow Pettit’s words, “the evil of reduced choice” that results from harmful interference is distinguishable from “the evil involved in the assumption and exercise of domination . . . ; it is this [latter] evil that explains why, intuitively, it is worse to have one’s choices reduced by [fiduciary disloyalty] than by an unintended, perhaps purely natural, accident.”

Under republican theory, individual freedom is compromised by domination even in the absence of harm. When harmful interference and domination are combined, however, the injury to freedom is correspondingly compounded.

Some scholars argue that the primary purpose of fiduciary law is to inculcate social norms, encouraging fiduciaries to practice loyalty and care out of a sense of moral obligation. The implicit corollary of this view seems to be that legal duties would be unnecessary in a world where fiduciaries could be trusted to refrain from opportunism. The republican tradition challenges this perspective, insisting that a fiduciary’s unilateral commitment to social norms of loyal and careful behavior is neither necessary nor sufficient to safeguard liberty. Although voluntary adherence to social norms might be highly desirable, virtuous motivations are not necessary to preserve freedom from domination as long as legal norms and institutions are in place to ensure that a fiduciary cannot engage in opportunism or waste with impunity. Nor is a fiduciary’s commitment to social norms sufficient to secure liberty. As the classic examples of the virtuous king and benevolent slave-master illustrate, domination can be present even if a power-holder’s intentions and actions are above reproach. If all fiduciaries were angels, fiduciary law would still be necessary to affirm

---

166 See, e.g., ROTMAN, supra note __, at 2, 18 (___); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1266 (1999) (emphasizing that “the social norm of loyalty that the legal rules support and define is critical to the efficient operation of the duty of loyalty”); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997) (“My intuition is that we come much closer to understanding the role of courts in corporate law if we think of judges more as preachers than as policemen.”).
167 Eisenberg, supra note __, 1275 (“To put the extreme case, if all corporate actors fully internalized the social norm of loyalty and gave full effect to that norm, the costs of both legal sanctions and monitoring and bonding systems would be unnecessary . . . .”).
168 See SELLERS, supra note __, at 67 (noting John Adams’s observation that in a republican legal and political system liberty may flourish “even among highwaymen”).
169 See Pettit [law and liberty], supra note __, at 44 (“From the earliest Roman days, the republican tradition insisted that being under the power of a master—in potestae domini—meant being unfree, even if that master was quite benevolent and allowed you a great deal of leeway”).
that loyalty and care are legal obligations—vindicating the formal equality of all private parties—and not merely social conventions that depend for their fulfillment on a fiduciary’s unilateral discretion, personal morality, or good will.

Republicanism thus offers a fresh and interpretively compelling account of the normative basis for fiduciary obligations. Under the republican theory, fiduciary law is not merely a subfield of contract law or property law, as some scholars have suggested.170 Its primary purpose is not to lower transaction costs in private bargaining,171 nor is it designed to provide a framework for optimal deterrence172 or to promote voluntary adherence to social norms.173 Instead, fiduciary law empowers private parties by enabling them to enlist others as “animated tools” in furtherance of their own lawful objectives, while also emancipating private parties by defining and regulating fiduciary power in a manner that ensures that fiduciary relationships will not engender domination. Viewed from a republican perspective, therefore, fiduciary law normative core is “a principle of humanity” that reflects the “debt of humanity that one man owes to another” in a free society.174

B. Identifying Fiduciary Relationships

Private-law theorists have struggled in the past to provide principled criteria for distinguishing fiduciary relationships from non-fiduciary relationships.175 Courts have held that certain categories of relationships always trigger fiduciary duties, including agent-principal, trustee-beneficiary, guardian-ward, director/officer-corporation, attorney-client, and doctor-patient.176 Other categories of private relationships such as employer-employee are sometimes held to trigger fiduciary duties, but sometimes not, depending upon case-specific features of the relationship between specific parties.177 Legislatures and courts have not always been consistent, however,

170 See, e.g., Easterbrook & Fischel, supra note _ (contract); Langbein, supra note _ (contract); Avihay Dorfman, On Trust and Transsubstantiation: Mitigating the Excesses of Ownership, in PHILOSOPHICAL FOUNDATIONS, supra note _, at 339 (property); cf. Smith, supra note _, at _ (advancing a property-like “critical resource” theory of fiduciary duty).
171 See, e.g., Butler & Ribstein, supra note _, at 29.
172 See, e.g., Cooter & Freedman, supra note _, at 1052.
173 See, e.g., Rotman, supra note _, at 2, 18.
175 See, e.g., Miller, supra note _ (reviewing theories based on contract, property, and vulnerability, and offering a legal-formalist alternative); DeMott, supra note _ (surveying these debates and concluding that fiduciary relationships lack a common theoretical basis).
176 See Deborah A. DeMott, Relationships of Trust and Confidence in the Workplace, 100 CORNELL L. REV. 1255, 1258 (2015) (observing that “fiduciary-duty analysis usually proceeds categorically”).
177 See id. (explaining that assessments of ad hoc fiduciary status in the employment context depend “on fact-specific inquiries that are structured against a backdrop of settled fiduciary categories with characteristics that serve as analogies and benchmarks for these inquiries along their peripheries”); Matthew T. Bodie, Employment as a Fiduciary Relationship, _ GEO. L.J. (forthcoming) (evaluating whether employers owe their employees fiduciary duties based on ad hoc criteria).
in their efforts to clarify which relationships qualify as "fiduciary." As a result, fiduciary law’s borders remain theoretically and doctrinally amorphous.

Contemporary fiduciary theorists have proposed a variety of tests for distinguishing fiduciary relationships from non-fiduciary relationships. As discussed previously, some scholars have argued that fiduciary duties are based on contract or voluntary undertaking based on the fact that parties typically (but not always) enter fiduciary relationships through one of these mechanisms. Normatively, this theory trades on the libertarian intuition that private parties should not be required to assume other-regarding obligations without their express or implied consent. The problem with the contractarian account, as discussed previously, is that it cannot account for fiduciary relationships that arise without parties’ express or implied consent. To be sure, many fiduciary relationships involve private parties voluntarily opting into a category of relationship that is universally recognized as “fiduciary” (e.g., agency, trust), thus making it reasonable to infer the party’s implied consent to fiduciary duties. In other contexts, however, courts ascribe fiduciary duties to specific relationships on an ad hoc basis only after taking into account whether specific features of the relationship suggest that it is one based on “trust and confidence.” When undertaking this inquiry, a party’s actual or hypothetical consent to fiduciary duties of loyalty and care does not ordinarily enter a court’s calculus. Thus, while some libertarian theorists might welcome making a party’s express or implied consent a prerequisite for the assumption of fiduciary duties, this approach has not gained much traction in the courts.

Another theory of the fiduciary relationship, advanced most forcefully by Paul Miller, posits that fiduciary relationships share a distinctive juridical structure. What makes fiduciary relationships special, Miller asserts, is that the fiduciary holds discretionary power over the exercise of another party’s legally protected rights. Because the legal rights that a fiduciary exercises belong to the beneficiary rather than fiduciary, “[t]he fiduciary may not treat fiduciary power as an unclaimed means or as a personal means.” Instead, the fiduciary must treat her beneficiary always as entitled to all benefits generated by her exercise of the entrusted power.

Miller’s juridical theory offers a powerful framework for identifying some fiduciary relationships, but it also struggles to make sense of other relationships that are universally accepted as fiduciary. As Miller’s theory predicts, many fiduciaries do hold discretionary power to exercise another’s...

---

178 E.g., Edelman, supra note _; Easterbrook & Fischel, supra note _; Langbein, supra note _; Hansmann & Mattei, supra note _ at 447-49.
179 See SHEPHERD, supra note _, at 106 (observing that a fiduciary’s voluntary assumption of fiduciary duties may be inferred from their express acceptance or use of fiduciary powers).
181 Miller, supra note _, at 69-75.
182 Miller uses the term “personal legal capacity” rather than rights, but the message is essentially the same. See id. at 71.
183 Miller, supra note _ at 1021.
legal rights, including trustees, corporate officers, guardians, and investment managers. In these relationships, it is certainly plausible to think that the fiduciary duty of loyalty reflects the principle that beneficiaries are legally entitled to the full fruits of any exercise of their rights.\textsuperscript{184} Returning to examples discussed previously, however, it would be hard to make the case that an arbitrator actually exercises parties’ legal rights when she renders a judgment or that an investment manager exercises investors’ legal rights when she winds up a pooled fund, though in both contexts the fiduciary’s actions may limit her beneficiaries’ subsequent choices in ways that impact their legal interests. Moreover, courts have also held that advisors may qualify as fiduciaries in a variety of contexts even if they lack formal authority to exercise their advisee’s legal rights.\textsuperscript{185} Thus, Miller may be right that a person is a fiduciary if she has discretionary power to exercise another’s legal rights, but it does not follow that a person must hold such authority to qualify as a fiduciary.

Other scholars have argued that what distinguishes fiduciary relationships from other relationships is a fiduciary’s discretionary power over beneficiaries’ interests, a power which renders beneficiaries uniquely vulnerable to opportunism.\textsuperscript{186} This focus on power, vulnerability, and opportunism resonates with fiduciary law’s historical roots in equity.\textsuperscript{187} The trouble with basing fiduciary duties on such vague concepts as power, vulnerability, and opportunism, however, is that it becomes necessary to identify some further limiting principle to prevent the fiduciary concept from swallowing all of private law.\textsuperscript{188} What is needed, in short, is a theory of the fiduciary relationship that is capable of justifying fiduciary duties without imposing these duties indiscriminately as a one-size-fits-all solution to every threat of opportunism that arises in the private sphere.

Republicanism furnishes a novel definition of the fiduciary relationship that is distinct from the contractarian, legal-formalist, and generic-opportunism accounts. Under the republican theory, \textit{a party is a fiduciary if she has been entrusted with power over another party’s legal or practical

\textsuperscript{184} Note, however, that Miller’s juridical theory does not attempt to answer the question \textit{why} fiduciary law is structured in such a way as to maintain this connection between legal rights and benefits. As this Article will explain shortly, the republican theory fills in this gap.


\textsuperscript{186} See Tamar Frankel; J.C. Shepherd; Gordon Smith, Critical Resource Theory.

\textsuperscript{187} See, e.g., Henry Smith, \textit{Why Fiduciary Law Is Equitable, in PHILOSOPHICAL FOUNDATIONS, supra note \_, at 261, 261 (“Equity as anti-opportunism explains not only the general tenor, but the overall structure and particular features of fiduciary law.”); Robert Flannigan, \textit{The Economics of Fiduciary Accountability, 32 DEL. J. CORP. L. 393, 393 (2007) (“The conventional function of fiduciary regulation is to control opportunism in limited access arrangements. That function has never been disputed.”).}

\textsuperscript{188} Scholars who characterize fiduciary duties as penalty default rules designed to deter opportunism and incentive disclosure have yet to explain adequately why such duties are appropriate in fiduciary relationships, but not in other asymmetrical relationships that raise similarly grave opportunism concerns.
interests.189 For the sake of clarity, it may be helpful to break this definition down into its various component parts to allow for closer inspection.

1. Entrustment

A defining feature of any fiduciary relationship is entrusted power. Power is entrusted if it does not belong to a person by right but is nonetheless committed to their administration. Power may be entrusted to a fiduciary by a voluntary assignment from a principal (e.g., attorney), by judicial appointment (e.g., receivership), or by the independent operation of law (e.g., agent of necessity). The power may belong by right to the principal (e.g., agency) or to a beneficiary (e.g., guardianship), or it may be called into existence by the independent operation of law (e.g., arbitration). Regardless of the mechanism that triggers the entrustment of fiduciary power, the critical point to keep in mind is that entrusted power is not committed to the unilateral discretion of the one who holds it. The very concept of entrustment denotes that the recipient holds the power in “trust” (fides), subject to the expectation that she will exercise that power in a manner that is consistent with the principles of loyalty and care, while refraining from any conduct that would constitute an abuse of the trust reposed.190 Put another way, the concept of entrustment itself implies that a recipient receives power subject to a constitutive requirement that she will respect the terms under which the power has been conferred, including fidelity to instructions and purposes and solicitude to the interests of beneficiaries.191 Contemporary fiduciary law doctrine supports this common-sense understanding by affirming that entrustment gives rise to a distinctive legal relationship that is premised upon “trust and confidence,”192 rather than an arms-length relationship.

2. Power

Fiduciary power is authority to act on another’s behalf. It may be de jure or de facto. A fiduciary holds de jure power if she holds a legal mandate to exercise another’s legal rights (e.g., agency) or powers conferred by law (e.g., arbitration). A fiduciary holds de facto power if she is able, in practice, to dictate how another’s legal rights will be exercised (e.g., investment

189 This test essentially tracks Paul Miller’s definition of the fiduciary relationship, except that it eliminates the requirement that a fiduciary hold “discretionary” power. See Paul B. Miller, The Fiduciary Relationship, in PHILOSOPHICAL FOUNDATIONS, supra note _, at 69, 72.

190 “Trust,” in this sense, denotes a structural feature of fiduciary relationships, not a subjective state of mind. Parties to relational contracts may exercise subjective trust in one another, but they do not form a fiduciary relationship unless their contract or other features of their relationship entails the entrustment of power, taking the relationship out of the realm of arms-length transactions. See Gerdes v. Estate of Cusih, 953 F.2d 201, 205 (5th Cir.1992) (characterizing “the position of trust” as the fiduciary relationship’s distinguishing feature).

191 See Flannigan, supra note _, at 291 (“The settlor is the one who reposes trust in the fiduciary, but it is still reasonable to say that the fiduciary relationship is with beneficiaries, because the trust is accepted on behalf of beneficiaries.”).

192 Courts often cite this formulation—“trust and confidence”—as a distinguishing feature of ad hoc fiduciary relationships. See, e.g., Advocare Int’l LP v. Horizon Labs. Inc., 524 F.3d 679, 695 (5th Cir. 2008); Amendola v. Bayer, 907 F.2d 760, 763 (7th Cir.1990).
Although discretion is often characterized as a necessary characteristic of fiduciary power, the republican theory suggests otherwise. A fiduciary’s power may be limited to performing purely nondiscretionary ministerial tasks, or it may entail broader power to make discretionary judgments. Courts and legal scholars often assert that discretion is a necessary element of fiduciary relationships, but the republican theory suggests otherwise. As this Article will explain further below, bringing nondiscretionary power within the ambit of fiduciary loyalty is important under the republican theory, because fiduciary remedies are necessary to remedy the domination entailed in a fiduciary’s infidelity to a non-discretionary mandate.

3. Over Another Party’s Legal or Practical Interests

A relationship is fiduciary only if a person holds power relative to another person’s legal or practical interests. Under the republican theory, it is a fiduciary’s empowered position relative to their principal and beneficiaries that raises the threat of alien control. A fiduciary’s power to constrain another’s choices constitutes domination, absent fiduciary law’s emancipating intervention.

4. Some Applications

These defining features have important implications for the identification of fiduciary relationships.

The republican theory confirms that some categories of private relationships always satisfy the republican theory’s criteria. For example, all trustees are entrusted with power over others’ legal or practical interests. The scope of a trustee’s power may vary depending upon the degree to which a settlor has vested the trustee with discretion in the management of entrusted assets. Some testamentary trusts provide little scope for a trustee to exercise independent judgment, while others may give a trustee considerable discretion to determine how trust assets will be distributed. Notwithstanding the diversity of these instruments, however, all trustees are fiduciaries because the office of trustee is defined in such a way that every trustee holds entrusted power over another’s legal or practical interests. Other fiduciary relationships that always satisfy these criteria, such as agent-principal, officer/director-corporation, partner-partner, guardian-ward, and attorney-client, also qualify as categorically fiduciary under the republican theory.

---

193 See, e.g., Hodgkinson v. Simms, [1994] 3 SCR 377, ___ (“A party becomes a fiduciary where it . . . has an obligation [that] carries with it a discretionary power.”); DeMott, supra note __, at 901 (“If the relationship . . . does not confer discretion on the ‘fiduciary,’ then his actions are not subject to the fiduciary constraint.”); Ernest J. Weinrib, The Fiduciary Obligation, 25 U. TORONTO L.J. 1, 4 (1975) (asserting that “the fiduciary must have scope for the exercise of discretion”); Miller, supra note __, at 72 (“[P]owers are ordinarily considered fiduciary only if they are discretionary.”).

194 See infra Subsection IV.C.2.

195 See Nat’l Westminster Bank PLC v. Morgan [1985] AC 686, 709 (Lord Scarman) (asserting that fiduciary relations arise where one party is subject to another’s dominating influence).
Significantly, the republican theory also lends support for the idea that parent-child and marital relationships are categorically fiduciary. Like other fiduciaries, parents and spouses are entrusted with power over the legal and practical interests of their family members. Family law entrusts parents with power to make decisions relative to the legal and practical interests of their minor children. A constitutive feature of this entrusted power is that parents may exercise it only to advance the “best interests” of her child.\(^\text{196}\) Similarly, spouses are entrusted by law with \textit{de jure} power over their legal partners’ interests, including the power to sell community property and incur debts on behalf of both spouses. They also exercise \textit{de facto} power by virtue of the trust-based character of the marital relationship. Spouses therefore bear fiduciary obligations under the republican theory to refrain from abusing the trust reposed.\(^\text{197}\) The republican theory thus supports the (still contested\(^\text{198}\)) view that parent-child and marital relationships are categorical fiduciary relationships that trigger fiduciary duties and remedies.\(^\text{199}\)

The republican theory’s test for identifying fiduciary relationships helps to explain why republicans have confidently characterized public officials and institutions—including the state itself—as public fiduciaries.\(^\text{200}\) Like other fiduciaries, public officials and institutions are entrusted by law with power over the legal and practical interests of their people.\(^\text{201}\) Accordingly, public officials and institutions bear fiduciary obligations to exercise their entrusted power in a manner that is faithful to their mandates, fair and reasonable, uncompromised by conflicts of interest, and calculated in good faith to advance the public interest.\(^\text{202}\)

\(^{196}\) See Com v. F.W., 986 N.E.2d 868 (Mass. 2013) (affirming “a parent’s duty to act in the best interest of his or her child”).

\(^{197}\) See CAL. FAM. CODE § 721(b) (1994) (“[I]n transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other.”); In re Marriage of Hokanson, 68 Cal App 4th 987, 992 (1998) (holding that spouses have fiduciary duties in the management and control of community property). Indeed, Daniel Markovits has recently suggested that the marital relationship should be viewed as among the most important examples of a fiduciary relationship. See Daniel Markovits, \textit{Sharing Ex Ante and Ex Post: The Non-Contractual Basis of Fiduciary Relations}, in \_\_\_\_ 208, 220-23.

\(^{198}\) See United States v. Chestman, 947 F.2d 551, 568 (2d Cir.1991) (asserting that “marriage does not, without more, create a fiduciary relationship”); Davis, supra note \_, at 1158-60 (citing cases that decline to find fiduciary relationships between parents and their adult children, and extrapolating from these cases that parents are not categorically fiduciaries for their minor children).

\(^{199}\) The Supreme Court of Canada has held that parents are fiduciaries for their children. See M(K) v. M(H) [1992] 3 SCR 6. American jurisprudence on this point is less clear, but courts have accepted the idea that parents are fiduciaries for their minor children in at least some settings. See, \textit{e.g.}, Holmes v. Wooley, 792 A.2d 1018, 1021 (Del. 2001) (holding that parents who receive child support payments must manage the funds as a fiduciary for the benefit of their children rather than to pay off their own debts); Perkins v. Perkins, 989 N.E.2d 758, 762 (Ind. 2013) (same). Parents are not, of course, categorically fiduciaries for their adult children, as many cases affirm, because they are not ordinarily entrusted with power over them. See, \textit{e.g.}, Curtis v. Freden, 585 P.2d 993, 998 (Kans. 1978).

\(^{200}\) See sources cited supra \text{\_\_\_\_}.

\(^{201}\) See generally FOX-DECENT, supra note \_; CRIDDLE & FOX-DECENT, supra note \_.

\(^{202}\) See supra sources cited in nn.\_\_\_\_.
The republican theory also supports treating investment advisers as fiduciaries for their clients. Formally speaking, investment advisers do not have legal authority to choose investments for and on behalf of their clients.\(^{203}\) Investment advisers are nonetheless fiduciaries, however, because they hold themselves out as having superior knowledge and expertise in order to induce clients to seek their advice for the purpose of making investment decisions.\(^{204}\) Even if the client remains formally in control of her investment decisions, the fact that a client retains an adviser’s services for the purpose of relying upon her advice makes the relationship one involving the entrustment of de facto power over a client’s legal and practical interests.\(^{205}\) The adviser-advisee relationship therefore triggers fiduciary obligations to provide disinterested advice and receive informed consent to any conflicted transactions.\(^{206}\) The fact that courts ascribe fiduciary duties to advisers poses a difficult challenge for theories of the fiduciary relationship that are premised upon a fiduciary’s exercise of de jure authority.\(^{207}\) But this line of cases harmonizes easily with the republican theory’s insight that fiduciary duties are equally concerned with domination in relationships involving de jure and de facto power.

Some fiduciaries exercise a mixture of de jure and de facto entrusted power. For example, when a patient authorizes a surgeon to operate on her body, making discretionary decisions as the operations unfolds, the surgeon exercises de jure power entrusted by the patient herself. The surgeon therefore assumes fiduciary obligations to honor the patient’s instructions, act with solicitude to the patient’s avowed or avowal-ready interests, and exercise the care expected of members of her profession. Even before surgery begins, however, a surgeon is a fiduciary for her patients when she provides advice on possible treatment options. Although the surgeon-as-adviser does not wield formal control over her patient’s choices, the structure of the advisement relationship is one in which the patient entrusts the surgeon with de facto power to shape and constrain her choices regarding her own medical care. A physician may be a fiduciary, therefore, even if her patient formally retains the ability to reject her advice.\(^{208}\) The same general principles apply to other fiduciary relationships such as attorney-client that combine de jure powers with the provision of professional advice.

---

205 See Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992) (Posner, J.).
206 See Capital Gains, 375 U.S. at 191 (explaining that an adviser’s fiduciary duty of loyalty includes a requirement to provide “disinterested” advice).
207 See, e.g., Hodgkinson v. Simms, [1994] 3 SCR 377, ___ (Sopinka, McLachlin & Major JJ., dissenting) (concluding that an investment advisor is not a fiduciary because if the advisee formally “retains the power and ability to make his or her own decisions”); Miller, supra note __, at ___.
208 In Goldsworthy v. Brickell, [1987] Ch 378, 400, the Court of Appeal of England and Wales held that a doctor could occupy a position of “trust and confidence” even if she was not in a position to “dominate [her patient] in any sense in which that word is generally understood.” Here the word “dominate” is not used as a term of art in the republican sense to refer to the capacity for arbitrary control. Instead, the court’s holding may be best interpreted as affirming that a doctor’s de facto power to shape her patient’s legal or practical interests may be enough to trigger fiduciary duties even if the patient makes the final decision regarding her treatment options.
One important type of de facto power that generates fiduciary duties is control over confidential information. Confidential information is often entrusted to a fiduciary within the context of a broader fiduciary relationship—for example, when a criminal defendant shares incriminating information with her defense attorney or a patient allows a physician to collect sensitive information concerning her physical or emotional health. In such settings, fiduciary law imposes a strict duty of confidentiality. Although not broadly recognized in the academic literature, the entrustment of confidential information constitutes an entrustment of de facto power that is sufficient, in and of itself, to trigger a fiduciary relationship. Thus, fiduciary duties are triggered in other settings involving the entrustment of confidential information, such as when a parishioner confides in a priest or a business organization discloses trade secrets to a public regulator. In these and other contexts, the entrustment of power over a party’s practical interest in the secrecy of confidential information activates fiduciary duties of loyalty, care, and (of course) confidentiality.

Fiduciary relationships formed solely by the entrustment of confidential information are an example of what courts and commentators have sometimes described as “ad hoc” or “informal” fiduciary relationships. Ad hoc fiduciary relationships arise when a particular relationship does not fall within a general category that is recognized as fiduciary (e.g., trust), but qualify for fiduciary duties nonetheless based on specific features of the particular relationship. The republican theory suggests that courts should determine whether an ad hoc fiduciary relationship has formed by asking the following question: does a party hold entrusted power over another’s legal or practical interests?

Applying this test confirms current legal doctrine in some respects and challenges it in other respects. Consistent with prevailing jurisprudence, the republican theory affirms that used car dealers are not ordinarily fiduciaries for their customers, home contractors are not ordinarily fiduciaries for homeowners, and restaurants are not ordinarily fiduciaries for their patrons. Although each of these relationships involves significant

---

209 See Mark A. Hall, Mary Anne Bobinski, and David Orentlicher, Medical Liability and Treatment Relationships 171 (3d ed. 2013) (discussing duties of patient confidentiality); Restatement (Third) of the Law Governing Lawyers §§ 16, 49, 60 (2000) (discussing lawyers’ fiduciary duties to keep confidences).

210 An important recent exception is Jack M. Balkin, Information Fiduciaries and the First Amendment, 49 U.C. Davis L. Rev. 1183, 1186 (2016) (arguing that “online service providers and cloud companies who collect, analyze, use, sell, and distribute personal information should be seen as information fiduciaries toward their customers and end-users”).


214 Id.

215 See Evans v. Taco-Bell Corp., 2005 WL 2333841, at *13 (D.N.H. Sept. 23, 2005) (“It is obvious that the relationship between a fast food restaurant and its patrons is not of this character, even if the patrons have come to depend on the restaurant for quality meals.”).
information asymmetries, generating a risk of opportunism, the relationships are all arms-length; none by definition involves an entrustment of power to one of the parties.\footnote{See Carey Electric Contracting Inc. v. First Nat’l Bank of Elgin, 392 N.E.2d 759, 763 (Ill. 2d Dist. 1979) (“Normal trust between friends or businesses, plus a slightly dominant business position, do not operate to turn a formal, contractual relationship into a confidential or fiduciary relationship.”). Of course, whether a relationship involves entrustment is a factual question that may turn upon shifting societal norms and conventions.} Consequently, these relationships do not automatically involve the kind of trust and confidence that renders a party vulnerable to the kind of opportunism that requires fiduciary duties and remedies.\footnote{Evans, 2005 WL 2333841, at *12 (“[C]onfidence in this context does not equate with simple reliance on another to perform a bargained-for service, but denotes a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence.”) (internal quotation marks and citation omitted).} Instead, the harms that arise within these relationships can be remedied through ordinary contract and tort law claims.

The republican theory also suggests, however, that traditionally arms-length relationships may become fiduciary under limited circumstances. For example, under the republican theory, a used car dealer who requires a customer to submit confidential financial information in an application for debt financing bears a fiduciary obligation not to disclose this entrusted information. Similarly, a home contractor who actively cultivates a homeowner’s trust in order to gain access to his home, then uses that access to take compromising photographs of the homeowner for personal profit, would be liable under the republican theory for breach of fiduciary duty.\footnote{See Council on American-Islamic Relations Action Network, Inc. v. Gaubatz, 31 F. Supp. 3d 237, 257-61 (D.D.C. 2014) (holding that an individual who obtained an internship with an organization in order to take compromising video of the organization for a documentary film would owe fiduciary duties of confidentiality to the organization if he “understood himself to be bound by and violating a duty of confidentiality and non-disclosure”); DeMott, supra note _, at 1275 (arguing that “a poseur like the defendant in Gaubatz should be subject to duties consistent with the guise”).}

A fiduciary relationship arises in these contexts to the extent that one party holds entrusted power over the other’s legal or practical interests.

Taking a step back, this Section has shown that the republican theory helpfully integrates key themes in fiduciary jurisprudence, including trust, confidence, power, dominance, vulnerability, and opportunism. In the past, courts have offered these concepts as rough guideposts to explain which relationships fall within the domain of fiduciary law. But uncertainty about the relationship between these concepts has prevented the case law from coalescing into a coherent interpretive theory of fiduciary law. By connecting fiduciary law back to its historical roots in Roman legal thought and weaving general themes from equity into a principled normative framework, the republican theory brings the defining characteristics of the fiduciary relationship into sharper focus.

C. The Requirements of Fiduciary Loyalty

Fiduciary relationships trigger a number of legal duties, including the
duty of care, the duty to keep and render accounts, and the duty to furnish critical information, but the fiduciary relationship’s cornerstone duty is the duty of loyalty. Despite its central importance, the concept of fiduciary loyalty is deeply contested. As Andrew Gold has demonstrated in a recent study, judges and academics have advanced a variety of different conceptions of fiduciary loyalty, including honoring a hypothetical bargain, fidelity to the instructions and purposes, affirmative devotion to beneficiaries’ interests, fairness and evenhandedness, and the avoidance of conflicts. Gold ultimately concludes that the duty of loyalty has multiple facets, none of which represents the positive “core” of fiduciary loyalty. Whether only some, or all, of these aspects of loyalty are necessary features of fiduciary law continues to divide the legal community. Given the many fields where the fiduciary duty of loyalty applies and the powerful remedies available for breach, it is no great exaggeration to suggest that clarifying the requirements of fiduciary loyalty ranks among the most pressing problems facing private-law theory today.

The republican theory of fiduciary law offers new tools for unlocking this riddle. As the republican theory does not ascribe fiduciary duties to relationships based on inferences about party consent, “fidelity to a hypothetical bargain” does not factor into its vision of fiduciary loyalty except as a (limited) basis for contracting around some loyalty obligations. However, the republican theory’s account of fiduciary duties as liberty-reinforcing legal safeguards does help to explain and justify the traditional loyalty requirements of fidelity to the fiduciary mandate, affirmative devotion to beneficiaries’ interests, the avoidance of conflicts, and fair and even-handed treatment of beneficiaries. In so doing, it provides a powerful justification for the prevailing position in the United States that the duty of loyalty has both proscriptive and prescriptive requirements.

1. Fidelity to Instructions and Purposes

Consider first the suggestions that the duty of loyalty requires a fiduciary to “be true” to her fiduciary mandate’s instructions and purposes. According to the republican theory, fiduciary law authorizes a fiduciary to exercise entrusted power only in a manner that is consistent with instructions and purposes prescribed by her principal or by law. The requirement that

---

219 See RESTATEMENT (THIRD) OF TRUSTS §§ 76-84 (2007).
221 Id. at 190-94.
222 As Lionel Smith has explained, the “duty of loyalty” is best understood as a legal requirement that applies to the exercise of fiduciary power—rather than, strictly speaking, a legal duty. See Lionel D. Smith, Can We Be Obliged To Be Selfless?, in PHILOSOPHICAL FOUNDATIONS, supra note _, at 141.
223 In contrast, Australian courts have held that fiduciary duties are exclusively proscriptive. See Pilmer v Duke Grp. Ltd. (2001) 207 CLR 165, 198; Breen v Williams (1996) 186 CLR 71, 113.
a fiduciary exercise entrusted power in a manner that is faithful to the relationship’s instructions and purposes, however defined, is essential to safeguard principals and beneficiaries from domination.\textsuperscript{225} Under the republican theory, therefore, a person’s acceptance, assertion, or exercise of entrusted power over another’s legal or practical interests automatically triggers a legal requirement to be true to the terms of the trust reposed.

The republican theory rejects the oft-repeated misconception that the duty of loyalty does not apply in the absence of discretionary power.\textsuperscript{226} Under the republican theory, a person is a fiduciary if she holds entrusted power over another’s legal or practical interests even if that power does not contemplate the exercise of discretionary judgment. For this reason, an agent who is given a purely ministerial charge to deposit money in her principal’s bank account, but instead absconds with the money and invests it for her own profit, breaches the fiduciary duty of loyalty.\textsuperscript{227} Under the republican theory, she is liable not only to compensate her principal for the lost funds, but also for disgorge any profits she accrued through her self-dealing. The betrayal of trust entailed in such self-dealing is sufficient to violate the duty of loyalty.

2. Affirmative Devotion to Beneficiaries’ Interests

The republican theory also supports a requirement that fiduciaries pursue the best interests of their beneficiaries with “affirmative devotion.” Fiduciary relationships are distinct from ordinary contractual relationships, as Daniel Markovits has explained, because a contract promisor is required only to “honor her contract,” while a “fiduciary must take the initiative on her beneficiary’s behalf” and “make new sacrifices in the face of unforeseen developments.”\textsuperscript{228} The duty of loyalty therefore requires a fiduciary to act with affirmative devotion, tailoring her actions to advance her beneficiaries’ best interests.

A number of courts have asserted that the requirement of affirmative devotion requires alignment between a fiduciary’s intentions and her beneficiaries’ interests.\textsuperscript{229} In Stone v. Ritter, for example, the Delaware
Supreme Court famously took the position that a corporate “director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation’s best interest.” The proper test for fiduciary loyalty, in other words, is whether the fiduciary has acted in a manner that she reasonably and conscientiously believes to promote the best interests of her beneficiaries.

Purely as a matter of interpersonal ethics, the logic of Stone v. Ritter is unassailable: a fiduciary does not act loyally if she does not believe her actions advance her beneficiaries’ best interests. But should affirmative devotion be enshrined as a legal obligation? The republican theory suggests that the answer is “yes.” This conclusion may not seem particularly surprising, given the emphasis that republicans traditionally have placed on the importance of cultivating civic virtue. But the reasons why affirmative devotion is a legal requirement may require further elaboration.

Under the republican theory, affirmative devotion is not concerned with elevating a fiduciary’s moral rectitude for its own sake, nor is it merely a means for reducing the likelihood of harmful interference. Fiduciaries are required to be true to their mandates and practice affirmative devotion to their beneficiaries’ interests because their intentions are relevant to their beneficiaries’ freedom from domination. Just as a beneficiary may suffer harm from her fiduciary’s actions without being dominated (e.g., when an investment manager makes a prudent, but ultimately unprofitable, investment decision on her behalf), a beneficiary can be dominated without suffering harm (e.g., when a corporate director engages in an unapproved self-interested transaction that happens by stroke of luck to also benefit the corporation). By asserting the prerogative to exercise entrusted power based on reasons that are unrelated to her mandate and the interests of her beneficiaries, a fiduciary would expose her principal and beneficiaries to domination. Under these circumstances, fiduciary power would be dominating even if courts intervened to ensure that a fiduciary’s actions were susceptible to justification based on non-arbitrary reasons. In the absence of informed consent, a fiduciary who retains the capacity to use fiduciary power for her own instrumental purposes wrongs her principal and beneficiaries by betraying the terms of entrusted fiduciary power. Rather than serving as an “animated tool,” she would assert a form of mastery that is inconsistent with the other-regarding character of fiduciary power. The republican theory thus supports the Delaware Supreme Court’s view that affirmative devotion qualifies as an important requirement of fiduciary loyalty.

The fiduciary loyalty requirements of fidelity and affirmative devotion acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.”

230 Stone, 911 A.2d at 370.
231 [Lionel] Smith, supra note __, at 148.
do not apply in equal measure to all fiduciary relationships. As Gold and Miller have observed, some fiduciaries are entrusted with power primarily for the purpose of advancing the interests of designated beneficiaries (e.g., wards, investment trust beneficiaries), while others receive broad purposive mandates that do not specify discrete beneficiaries (e.g., charitable trusts, public corporations). When fiduciary relationships fall on the latter end of the spectrum, fidelity to instructions obviously will predominate over affirmative devotion to beneficiaries’ best interests in certain aspects of a fiduciary’s performance. Consequently, the relative salience of fidelity and affirmative devotion thus depend upon the purpose and design of a particular fiduciary relationship.

3. **Fairness and Evenhandedness**

The duty of loyalty also emancipates beneficiaries from domination by ensuring that they are treated fairly and even-handedly in fiduciary relationships involving rivalrous beneficiary claims. For example, when investors commit their resources to a hedge fund, they not only face the threat that manager might engage in self-dealing, but also the possibility that the fiduciary might arbitrarily confer a disproportionate share of the profits on some favored investors to the detriment of others. In settings such as this, “the discrete fiduciary duty of loyalty is necessarily transformed into duties of fairness and reasonableness in private law cases with multiple beneficiaries whose interests conflict.” Consistent with the republican theory, the duty of loyalty’s requirement of fair and even-handed treatment among beneficiaries emancipates beneficiaries with rivalrous interests by requiring fiduciaries to exercise their entrusted power in a manner that respects beneficiaries’ formal equality.

4. **Conflict Avoidance**

The republican theory of fiduciary law also provides a strong counterpoint to libertarians’ arguments for diluting the duty of loyalty’s uncompromising no-conflict and no-profit rules. As discussed in Part III, libertarian scholars agree that there is nothing inherently immoral about a fiduciary profiting from a conflicted transaction, as long as the transaction also benefits the principal. Accordingly, they tend to characterize the no-conflict and no-profit rules as prophylactic checks against opportunism: by prohibiting all self-interested transactions and profit-taking without a

---


234 FOX-DECENT, supra note _, at 34-35; see also RESTATEMENT (THIRD) OF TRUSTS § 79(1)(a)(4) (providing that “in investing, protecting, and distributing the trust estate, and in other administrative functions, the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust”); P.D. Finn, *The Forgotten “Trust”: The People and the State*, in EQUITY: ISSUES AND TRENDS 138 (1995) (“It is uncontroversial fiduciary law that where a fiduciary serves classes of beneficiaries possessing different rights, . . . the fiduciary is . . . required to act fairly as between different classes of beneficiary in taking decisions which affect the rights and interests of the classes inter se.”).
principal’s consent—regardless of a fiduciary’s intent or whether the beneficiary has been harmed—fiduciary law eliminates a fiduciary’s incentives to abuse her position for her own gain and accordingly lowers the principal’s monitoring costs. Experts have also argued that these rules also correct for information asymmetries by preventing a fiduciary from exploiting the fact that she “controls all evidence of the relationship and can easily conceal wrongdoing from the vulnerable party or the court.”

As Langbein and others argue, however, these concerns can all be addressed in a less onerous way: by placing the burden squarely on fiduciaries to demonstrate that their actions maximized profits (or minimized losses) for their beneficiaries.

This libertarian critique of the no-conflict and no-profit rules is beginning to reshape American fiduciary law. For example, under the Delaware Supreme Court’s most recent formulation of its “entire fairness” test, corporate directors are now permitted pursue conflicted transactions without obtaining fully informed consent from either the disinterested directors or the shareholders as long as they can show after the fact that the transaction was “substantially fair.”

Recent revisions to the Model Business Corporation Act, the Uniform Business Code, and the Uniform Statutory Trust Entity Act likewise allow fiduciaries to conclude conflicted transactions without their beneficiaries’ approval if they can convince courts that the conflicted transactions were objectively “fair.” Several states and the District of Columbia have endorsed this new approach. The Uniform Power of Attorney Act and the Uniform Probate Code likewise have been amended in recent years to discard the no-conflict rule for principal-agent relationships, and over a dozen states have adopted this change. Each of

---

235 Getzler, supra note _, at 586.
236 See CONAGLEN, supra note _, at 460–71; PAUL D. FINN, FIDUCIARY OBLIGATIONS 246–51, 259–65 (1977); Langbein supra note _; Cretney, supra note _ at 161-63, 178; Smith, [Motive] supra note _, at _.
237 See DEL. C. § 144(a)(3) (2010); see also Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983); D. Gordon Smith, _.
238 See MODEL BUS. CORP. ACT § 8.61(b)(3) (providing that conflicted transactions need only “to have been fair to the corporation”); UNIF. BUS. ORGS. C. § 8-507 (2011) (providing that a conflicted transaction is not voidable if “the covered party shows that the transaction is fair to the trust”); UNIF. STAT. TRUST ENTITY ACT § 507 (2013) [hereinafter USTEA] (same).
240 UNIF. POWER OF ATTORNEY ACT (2006), 8B U.L.A. 57 (Supp. 2012) [hereinafter UPOAA]; UNIF. PROB. C. § 5B-114(d) (2010) (“An agent . . . is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.”). But see RESTATEMENT OF AGENCY, supra note _ §§ 801-06 (retaining the traditional no-conflict rule).
241 E.g., 28 ARK. CODE ANN. 28-68-114 (2012) (“An agent . . . is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.”); 12 DEL. CODE § 49A-114(d) (2010) (same); 18-A MAINE REV. STAT. ANN. §50-914(d) (2010) (same); MONTANA C. 72-31-319(4) (2011) (same); OHIO REV. C. § 1337.34(D) (2012) (same); 15 IDAHO CODE ANN. 15-12-114(4) (same); VA. CODE ANN. § 6-2-1612 (2012) (same). To be fair, the primary justification for this change was that many principal-agent relationships involve family members acting as agents for one another, so consent to conflicts is arguably implicit in the nature of the relationship.
these departures from the no-conflict rule is arguably consistent with the libertarian principle that where there is “no harm” to beneficiaries, there is “no foul.” As long as a fiduciary has acted “with care, competence, and diligence in the best interest of the principal,” the thinking goes, the principal has no cause to complain.242

The republican theory of fiduciary law offers a strikingly different perspective. Under the republican theory, a fiduciary’s instrumentalization of entrusted fiduciary power for self-serving ends is a form of betrayal that is inimical to the other-regarding character of the fiduciary relationship, and therefore constitutes a distinctive legal wrong. A party who holds fiduciary power may not use that power to advance her own self-interest unilaterally (i.e., without informed consent), therefore, even if such action would indisputably promote her beneficiaries’ best interests. Instead, she receives fiduciary power in the same juridical capacity as a Roman slave, with no legal authority to use this power in the service of her own ends and, accordingly, no entitlement to retain any profits that may result from transactions associated with the fiduciary office, irrespective of how these profits are generated.243 Republican theory thus challenges recent departures from the traditional no-conflict rule, insisting that a party who occupies a fiduciary office may exercise entrusted power only as an “animated tool” in the service of her beneficiaries.

Significantly, if a fiduciary truly believes that a conflicted transaction will best promote her beneficiaries’ interests, the republican theory’s account of the no-conflict rule would not actually preclude the transaction from taking place. The republican theory simply affirms that the fiduciary must take whatever steps are necessary to cleanse the conflict. She may obtain beneficiaries’ advance consent, allowing her to withhold profits acquired in a personal capacity through the transaction. Or she may voluntarily relinquish the profits she accrued in her personal capacity, just as a Roman slave would be required to relinquish such assets to the pater familias. Either choice would eliminate the conflict and satisfy her duty of loyalty. These options underscore that there is no inherent conflict between a fiduciary acting in her beneficiaries’ “sole interest” while also advancing their “best interests.”

5. The Mandatory Core

Although this Article cannot address every aspect of the duty of loyalty, one final contribution merits brief mention: the theory’s novel justification for fiduciary law’s “mandatory core.”244 Recall that some libertarian scholars have argued that because fiduciary duties are (purportedly) based on contract, all fiduciary duties should be freely waivable.245 Others scholars

---

242 UPOAA, supra note __, § 114(d), 8B U.L.A. 80.
243 See VINTER, supra note __, at 11.
244 Sitkoff, supra note __, at __.
245 See, e.g., Langbein, supra note __, at 658; Butler & Ribstein, supra note __, at 71-72; Easterbrook & Fischel, supra note __, at 432. For a general introduction to mandatory and default
have advanced economic theories that support maintaining certain loyalty obligations as mandatory rules. 246 In perhaps the most sophisticated economic defense of mandatory rules, Robert Sitkoff argues that the duty of loyalty’s “mandatory core” serves two functions: (1) it “insulates fiduciary obligations that the law assumes would not be bargained away by a fully informed, sophisticated principal” 247; and (2) it provides “clean lines of demarcation across types of legal relationships, among other things to minimize third-party information costs.” 248 Fiduciary law’s mandatory rules can therefore be understood as autonomy-reinforcing safeguards that are tailored to the risks of opportunism that manifest in fiduciary relationships.

The republican theory offers a fresh justification for fiduciary law’s mandatory core. Although republicanism generally supports allowing principals to structure fiduciary relationships in ways that depart from fiduciary law’s general rules, 249 this concession to individual choice has a non-negotiable limit: fiduciary relationships may not be structured in a way that subjects beneficiaries’ legal or practical interests to the fiduciary’s alien control.

The non-domination principle lends support for the current features of fiduciary law’s mandatory core. It dictates, for example, that a principal may not authorize a fiduciary to act in bad faith or otherwise violate the terms or purposes of the fiduciary relationship. 250 Beneficiaries may not waive a fiduciary’s duty to provide information relevant to informed consent. 251 In addition, the republican theory supports the idea that waivers of fiduciary duties should be construed narrowly to ensure that consent is fully informed. 252 These features of contemporary fiduciary law are necessary

---

246 See, e.g., __; Sitkoff, supra note __, at __.
249 See 8 DEL. CODE ANN. § 144 (1985) (providing that a self-dealing transaction is not voidable “solely” for self-interest if the “contract or transaction is fair to the corporation as of the time it is authorized, approved or ratified” by a majority of the disinterested directors); Langbein, supra note __, at 659 (observing that trust law permits a trust instrument to set aside the no-conflict rule).
250 See RESTATEMENT (THIRD) OF TRUSTS § 96(1)(a); Sitkoff, supra note __, at 204 (describing these principles as “well settled” in trust law); DeMott, supra note __, at 923 (“A provision in a trust instrument cannot relieve a trustee of liability for any profit derived from a breach of trust, and cannot relieve the trustee of liability for breaches of trust committed intentionally, in bad faith, or with reckless indifference to the interests of the beneficiary.”).
251 See, e.g., Sitkoff, supra note __, at __.
252 See Deborah DeMott, Defining Agency and Its Scope, in COMPARATIVE CONTRACT LAW: A TALE OF TWO LEGAL SYSTEMS __ (Martin Hogg & Larry A. DiMatteo eds., 2015) (“[A] principal’s consent to conduct that would otherwise breach a fiduciary duty requires specificity;”).

---
because they prevent principals and beneficiaries from placing their legal and practical interests under fiduciaries’ “uncontrolled discretion.” Just as courts will not enforce contracts in which one person consents to become another’s slave or involuntary servant, principals and beneficiaries may not contract to subject their legal or practical interests to a fiduciary’s alien control through general waivers of fiduciary duties.

D. Understanding Fiduciary Remedies

An important contribution of the republican theory is the link it forges between the formal legal character of fiduciary power and the remedies that courts have traditionally offered to address breaches of the duty of loyalty. Under the republican theory, constructive trust and disgorgement are appropriate remedies because a fiduciary—like a slave or other dependent in Roman times—is legally incapable of exercising fiduciary power (including holding assets)—except in trust for her beneficiaries.

This aspect of the republican account of fiduciary loyalty resembles the juridical theory of fiduciary relationships that has been articulated and defended by scholars such as Paul Miller and Lionel Smith. In a series of pathbreaking publications, Miller has argued that the distinctive feature of fiduciary relationships is a fiduciary’s possession of “discretionary power over the significant practical interests of another.” Miller contends that a fiduciary “stands in substitution for the beneficiary or a benefactor in exercising a legal capacity that is ordinarily derived from the beneficiary or benefactor’s legal personality.” Because the legal rights exercised by a fiduciary are vested in the beneficiary rather than the fiduciary, “[t]he fiduciary may not treat fiduciary power as an unclaimed means or as a personal means.” Instead, the fiduciary must treat her beneficiary always as the exclusive beneficiary of her exercise of entrusted power. Miller argues further that disgorgement is a proper remedy for breach of the fiduciary duty of loyalty, because within a fiduciary relationship “[n]o one is entitled to gain from the execution of a fiduciary mandate save the beneficiary; to the extent that there are such gains, they belong to the beneficiary.”

253 See Will of Allister, 144 Misc.2d 994, 998 (N.Y. Surrogate’s Court 1989) (holding that a “provision of the will authorizing the retention of assets by the trustee in his uncontrolled discretion without liability for any decrease in value is offensive to public policy” and a “provision exculpating the fiduciary from loss caused by his negligent conduct is void”); Melvin A. Eisenberg, The Limits of Cognition and the Limits of Contract, 47 STAN. L. REV. 211, 249-50 (1995) (arguing that party consent is insufficient to support general waivers of fiduciary duties in light of beneficiaries’ limited ability to anticipate and evaluate potential future conflicts).

254 See U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime . . . , shall exist within the United States, or any place subject to their jurisdiction.”).


256 Miller, supra note _, at 69; see also Miller, supra [__].

257 Miller, supra note _, at 1021.

258 Miller, Remedies, supra note _, at __.
view, therefore, the no-profit rule derives from the simple principle that a beneficiary is entitled to enjoy the full benefits of the exercise of her own legal powers.

Miller’s juridical conception of the fiduciary relationship marks a significant advance over the libertarian theory of fiduciary law, because it successfully uncouples fiduciary duties and remedies from dubious notions of optimal deterrence and prophylactic protection against material harm. As an interpretive theory of American fiduciary law, however, Miller’s theory falls short because it focuses narrowly on legal powers without considering other forms of entrusted power that entail domination. The theory cannot explain, therefore, why courts routinely apply fiduciary duties and remedies to other relationships, such as advisor-advisee, where fiduciaries do not formally exercise another party’s legal capacities.

Lionel Smith also believes that fiduciary duties are juridically constitutive constraints on fiduciary power, but he offers a slightly different account of fiduciary remedies. According to Smith, disgorgement operates as a prophylactic rule to guard against the possibility that a fiduciary might violate the loyalty requirement of affirmative devotion by undertaking a conflicted transaction for the wrong reason. Disgorgement of fiduciary profits is necessary, in other words, to compensate for courts’ inability to surmount the inscrutability of a fiduciary’s true motivations. Smith’s account provides an explanation of fiduciary duties that overcomes the libertarian tradition’s implausible characterization of fiduciary duties as punitive measures, but it is vulnerable to the critique that a fiduciary’s motivations are legally irrelevant. The better view is that fiduciary legal duties—including a fiduciary’s obligation to pursue her beneficiaries’ best interests—are concerned with a fiduciary’s intentions, not her motivations. A fiduciary’s motivations are legally irrelevant under the republican theory because beneficiaries are not subject to arbitrary power if the fiduciary acts in a manner that she reasonably believes to advance the beneficiaries’ best interests. The fact that she may have ulterior motives for acting loyally (e.g., fear of legal sanction) is legally irrelevant.

The republican theory refines previous juridical accounts of fiduciary law by reframing the juridical link between the duty of loyalty and fiduciary remedies. Like Miller and Smith, the republican theory explains how fiduciary remedies flow logically from the juridical structure of fiduciary relationships. Unlike Miller’s approach, however, and consistent with

---

261 Smith, supra note _.
262 Smith, supra note _.
263 Id. at _.
264 Id. at _.
265 See Markovits, supra note _, at 220 (“Legal obligations—both contractual and fiduciary—turn on intentions not motivations.”); but see Lionel Smith, The Motive, Not the Deed, in RATIONALIZING PROPERTY, EQUITY, AND TRUSTS: ESSAYS IN HONOR OF EDWARD BURN (Joshua Getzler ed., 2003) (defending a motive-based account of fiduciary loyalty).
leading judicial decisions, the republican theory suggests that fiduciary duties arise not only in relationships involving the entrustment of de jure power to exercise another’s legal capacity, but also those such as adviser-advisee that involve the entrustment of de facto power. Disgorgement is the appropriate remedy for breach of fiduciary duty because fiduciary law constitutes entrusted power over another’s interests as an other-regarding power that may be held and exercised only for beneficiaries’ exclusive benefit, not because (some) fiduciaries exercise the legal rights of their beneficiaries. While other species of private law such as contract, tort, and property are capable of neutralizing the domination entailed in a private party’s capacity for harmful interference, only fiduciary law is calibrated to neutralize a fiduciary’s capacity to dominate through the violation of trust.

Unlike previous juridical theories of fiduciary remedies, the republican theory is able to explain why disgorgement is justified in settings where fiduciary disloyalty produces gains that principals and beneficiaries would not be entitled to generate for themselves. Consider, for example, the case of a public official who accepts bribes from a third party. Courts routinely hold that public officials who accept bribes violate their duty of loyalty and are obligated to relinquish the bribes to their government employers.266 Disgorgement of bribes presents a puzzle for Miller’s juridical account of fiduciary law, because a public official cannot be understood in any meaningful sense to have been entrusted with authority to extract bribes. Moreover, as Deborah DeMott has observed, even if the concept of entrusted power “is defined more broadly, perhaps as the power to deal with third parties on the principal’s behalf, the facts that the power was used for an illegal end, and thus that the principal could not itself directly use the power to the same end, make it hard to explain why the proceeds of the transaction belong to the principal.”267

During the late 1980s, U.S. courts wrestled with this question in cases involving the federal mail fraud statute,268 as they were asked to decide whether bribery constituted a form of “embezzlement”—i.e., “the fraudulent appropriation to one’s own use of the money or goods entrusted to one’s care by another.”269 In McNally v. United States, the Supreme Court took up this question in a case involving a former Kentucky state official who had abused his office by “participat[ing] in a self-dealing patronage scheme.”270 The Court reversed the official’s conviction on the ground that the trial jury had not been “required to find that the Commonwealth itself was defrauded of

267 DeMott, supra note __, at 912-13.
any money or property."271 Although the majority opinion did not address whether the patronage scheme constituted a breach of the official’s duty of loyalty, it concluded that the official’s withholding of kickbacks from government contractors did not constitute the fraudulent withholding of a governmental “ownership interest” for purposes of the mail fraud statute.272

Writing in dissent, Justice Stevens asserted that the official, as an agent of the government, was duty-bound to deliver anything he received “as a result of his violation of a duty of loyalty to the principal.”273 Accordingly, he suggested that “[t]his duty may fulfill the Court’s ‘money or property’ requirement in most kickback schemes.”274 After McNally, however, the lower federal courts overwhelmingly rejected Justice Stevens’s suggestion.275 Approaching the question from a libertarian perspective, the circuit courts (following Judge Posner’s lead276) asserted that disgorgement of bribes might be justified as a deterrence measure to prevent public corruption, but they flatly denied that this remedy could be based on a governmental property interest in bribes.277

The republican theory helps to explain fiduciary law’s disgorgement remedy, and in doing so, clarifies why the government is entitled to demand disgorgement of bribes as a civil remedy. The theory takes disgorgement on its own terms as a remedy for wrongful withholding of property rather than as a punitive or prophylactic measure. Unlike the juridical theory, however, the republican theory avoids the implausible suggestion that the government has a property right in bribes that logically precedes the fiduciary relationship. Instead, the republican theory suggests that the disgorgement remedy follows from the other-regarding character of the fiduciary office itself. A fiduciary acting within the scope of her office, like a Roman slave, is legally incapable of accepting assets except in constructive trust for her beneficiaries.278 As the Supreme Court has explained in another landmark

---

271 Id. at 360.
272 Id.
274 Id. Significantly, Justice O’Connor joined all of Justice Stevens’s dissent except the concluding section that included this proposal.
275 See, e.g., United States v. Walgren, 885 F.2d 1417, 1422-24 (9th Cir. 1989); United States v. Holzer, 840 F.2d 1343, 1346-48 (7th Cir. 1988), cert. denied 486 U.S. 1035 (1988); United States v. Ochs, 842 F.2d 515, 525 (1st Cir. 1988); United States v. Shelton, 848 F.2d 1485, 1491-92 (10th Cir. 1988) (en banc). But see United States v. Runnels, 833 F.2d 1183, 1186-88 (6th Cir. 1987) (holding that bribes are “a benefit which properly belongs to the country, state, [or other public authority], which is the principal, rather than the official, officer, or employee, who is merely a fiduciary agent” and imposing constructive trust), rev’d and remanded in United States v. Runnels, 842 F.2d 909 (6th Cir. 1988) (en banc).
276 See Holzer, 840 F.2d at 1347 (Posner, J.) (“A constructive trust is imposed on the bribes not because [a public servant] intercepted money intended for the state or failed to account for money received on the state’s account but in order to deter bribery by depriving the bribed official of the benefit of the bribes.”).
277 See id.; Walgren, 885 F.2d at 1422-24; Shelton, 848 F.2d at 1491-92.
278 See RESTATEMENT (SECOND) OF AGENCY § 403 (1958) (“If an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal.”); RESTATEMENT (THIRD) ON RESTITUTION § 197
corruption case, *United States v. Carter*, disgorgement “results not from the subject-matter, but from the fiduciary character of the one against whom it is applied.”279 Hence, disgorgement is not dependent upon a finding that the government would be entitled receive bribery payments in the absence of a public official’s disloyalty (*pace* Miller’s juridical theory), nor is it contingent upon a finding that the government suffered financial or other material harm from the bribery (*pace* libertarian theory).280 Under the republican theory, the fact that a public official’s entrusted position of authority enables him to obtain bribes is enough to trigger the requirement that he hold the assets in trust and relinquish them to his employer for the public’s benefit.281 Constructive trust and disgorgement thus affirm the fiduciary character of public offices by ensuring that “[t]he citizen is not at the mercy of his servants holding positions of public trust.”282

E. The Divergence of Fiduciary Conduct and Decision Rules

The republican theory also helps to explain and justify the deferential standards of review that courts apply across many subfields of fiduciary law.283 Although courts often assert that fiduciaries must unselfishly pursue their principals’ objectives with “utmost good faith,” observing “the highest standards of honor and honesty,”284 they rarely find a breach of fiduciary duty absent evidence of egregious abuse. Perhaps the best known (and most controversial) example of this phenomenon is corporate law’s “business judgment rule,” which calls on courts to defer to the decisions of disinterested directors made deliberatively and in good faith—even if those

---

279 *Carter*, 217 U.S. at 306.
280 See *Reading v. Attorney General*, (1951) A.C. 507, 516 (Porter, J.) (“It is the receipt and possession of the money that matters, not the loss or prejudice to the master.”); Hawai‘i Int’l Fin., Inc. v. Pablo, 488 P.2d 1172, 1175 (Haw. 1971) (“The rule [against a fiduciary retaining a bonus, commission, or other profit from third-parties] is applicable although the profit received by the fiduciary is not at the expense of the beneficiary.”) (quoting *RESTATEMENT ON RESTITUTION*, supra note _, § 197, cmt. c).
281 *Id.* at 620 (“[T]he words ‘fiduciary relationship’ in this setting are used in a wide and loose sense and include, *inter alios*, a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives.”).
284 Grossberg v. Haffenberg, 11 N.E.2d 359, 360 (Ill. 1937); see also *Guth v. Loft*, Inc., 5 A.2d 503, 510 (Del. Ch. 1939) (describing the duty of loyalty as a “rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, . . . affirmatively to protect the interests of the corporation” with “undivided and unselfish loyalty”); Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (asserting that joint venturers, as fiduciaries, owe one another “duty of the finest loyalty”); 123 N.E. 148, 151 (N.Y. 1919) (emphasizing that directors are “held, in official action, to the extreme measure of candor, unselfishness, and good faith).
decisions ultimately harmed the interests of the corporation or its stockholders. Corporate law is hardly unique, however, in its deferential approach to fiduciary decision-making. Courts also apply a healthy measure of deference to fiduciaries’ discretionary judgments in other contexts, from trust law to bankruptcy law to family law. These deferential standards of review have produced a sharp divergence between the legal “conduct rules” that formally regulate fiduciary performance (e.g., diligence, affirmative devotion) and the deferential “decision rules” that govern adjudication (e.g., negligence, good faith).

The republican theory lends support for the idea that a fiduciary’s “duty of the finest loyalty” is a genuine legal obligation, rooted in the legal character of the fiduciary relationship itself, and not merely an aspirational moral or social norm. The strict conduct rules that flow from this general obligation (e.g., fidelity to instructions, affirmative devotion to beneficiaries, fairness and evenhandedness) safeguard liberty by ensuring that a fiduciary lacks the legal capacity to use entrusted power to exercise alien control over the legal or practical interests of her beneficiaries. These conduct rules pervasively regulate fiduciary power.

Recognizing that judicial review can also introduce domination, the republican theory supports deferential review of fiduciaries’ discretionary judgments. In settings where violations of fiduciary duties are within the heartland of judicial expertise (e.g., fraud, irrationality), courts have not hesitated to enforce fiduciary conduct rules strictly. But courts have wisely applied deferential standards of review in settings where de novo judicial review would be more susceptible to arbitrariness, all things considered, than independent fiduciary decision-making (e.g., negligence standard for duty of care claims). Fiduciary law’s deferential decision rules reflect courts’ appreciation that (1) fiduciary law entrusts fiduciaries with the authority to ascertain in the first instance what steps will best respect their principals’

286 E.g., Crabb v. Young, 92 N.Y. 56, 66 (1883) (“While trustees are ... held to great strictness in their dealings with the interests of their beneficiaries, the court will regard them leniently when it appears they have acted in good faith, and if no improper motive can be attributed to them, the court have even excused an apparent breach of trust, unless the negligence is very gross.”).
287 See, e.g., In re Healthco Int’l, Inc., 136 F.3d 45, 50 n.5 (1st Cir. 1998) (when reviewing settlements between creditors and bankruptcy trustees to determine whether they are in the estate’s “best interests,” “[t]he [bankruptcy] judge ... is not to substitute her judgment for that of the trustee, and the trustee’s judgment is to be accorded some deference”) (internal citation and quotation marks omitted).
288 See, e.g., In re S.B., 845 N.W.2d 317 (N.D. 2014) (holding that a court must defer to parents’ judgments regarding the best interests of their children under a grandparent visitation statute).
291 [add cites]
purposes and best advance their beneficiaries’ interests; and (2) courts are often poorly situated, comparatively speaking, to second-guess fiduciaries’ judgments. By simultaneously affirming fiduciary law’s uncompromising conduct rules and applying deferential decision rules, courts sustain fiduciary law’s formal commitment to republican liberty while also ensuring that judicial review does not inadvertently exacerbate domination in fiduciary relationships.

CONCLUSION

Fiduciary law is predicated on the idea that “[n]o man can serve two masters”: “the same person cannot act for himself, and at the same time, with respect to the same matter, as agent for another, whose interest might be in conflict with his; nor can he be allowed to profit by his own wrong, even if such be only constructive wrong.” For nearly three centuries, jurists throughout the common law world have tried to justify this fundamental principle of fiduciary law based on the libertarian theory of freedom as non-interference, arguing that the fiduciary law seeks to deter harmful fiduciary self-dealing and redress the harm caused by fiduciary opportunism. Yet, as scholars who operate within this tradition have begun to recognize, libertarianism does not offer a particularly compelling justification for preventing fiduciaries from serving two masters in transactions where both parties demonstrably stand to profit. Moreover, libertarianism cannot credibly explain why constructive trust and disgorgement are appropriate remedies for fiduciary disloyalty. From a purely libertarian perspective, therefore, fiduciary law’s signature features are easy to dismiss as outdated relics of equity’s Bleak House era.

This Article explains why the rising libertarian critique of fiduciary law is unpersuasive. Fiduciary law’s unique structure reflects a republican commitment to freedom from domination. Fiduciaries are not entitled to serve two masters—their beneficiaries and themselves—because fiduciary law entrusts them with power exclusively for the benefit of their beneficiaries. When fiduciaries engage in conflicted transactions without

292 See, e.g., In re Beidel’s Estate, 13 Pa. D. & C. 2d 29, 31 (Orphan’s Court of Pa., Cumberland Cty. 1958) (“It is . . . the task of the guardian in the performance of its duties to determine whether a proposed expenditure is necessary for the care, maintenance or education of the minor. The Court should not be asked to perform the guardian's function.”).

293 City of Minneapolis v. Canterbury, 142 N.W. 812, 814 (Minn. 1913) (citations and internal quotation marks omitted); see also Pepper v. Litton, 308 U.S. 295, 311 (1939) (stressing that a director “cannot by the intervention of a corporate entity violate the ancient precept against serving two masters”).

294 See id. (characterizing these rules as a “wise policy of the law,” that addresses “the frailty of human nature” by “put[ting] the sting of disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation”) (citations and internal quotation marks omitted).

295 See Langbein, supra note _, at 933 (disputing on libertarian grounds Bogert’s assertion that “[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”).
their beneficiaries’ informed consent, they may or may not harm their beneficiaries’ material interests, but they always wrong their beneficiaries by treating entrusted power, in part, as an instrument for advancing their own unilateral interests. The paradigmatic fiduciary remedies of constructive trust and disgorgement are perfectly suited to remedy this kind of wrong and thereby neutralize the domination that would otherwise plague fiduciary relationships. Contemporary fiduciary law thus continues to affirm Roman law’s republican commitments by empowering and emancipating individuals from domination in the private sphere.