Current Scholarship

Are Bank Fiduciaries Special?

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A growing body of post-crisis legal and economic literature suggests that future financial crises might be averted by tinkering with the internal governance structures of banks and other financial institutions. In particular, contributors to this literature propose tightening the fiduciary duties under which officers and directors of the relevant financial institutions labor. I argue in this symposium article that such proposals are doomed to failure under all circumstances save one – namely, that under which the relevant financial institutions are in whole or in part treated as publicly owned. The argument proceeds in two parts. I first show that the financial dysfunctions that culminate in financial crises are not primarily the products of defects in individual rationality or morality, ubiquitous as such defects of course always are. Rather, I argue, fragility in the financial markets stems from what I elsewhere dub recursive collective action problems, pursuant to which multiple acts of individual rationality aggregate into instances of collective calamity. This form of vulnerability is endemic to banking and financial markets. I next show that the best understanding of fiduciary obligation is that pursuant to which she who is subject to the obligation minimizes the 'space,' or separateness, that subsists between her and the beneficiary of her obligation. Ideal fiduciaries, in other words, stand-in for those to whom they are fiduciaries, while legal allowances for departure from this exacting ideal amount to pragmatic compromises we make with the brute fact of fiduciaries' being separate persons with interests of their own. It follows from these two lines of argument that merely tightening fiduciary duties back up in the case of financial fiduciaries will be no help at all if our object is to address financial fragility. It will simply ensure that fiduciaries behave more as their beneficiaries would behave – beneficiaries whose individually rational behavior is precisely the problem where markets beset by recursive collective action problems are concerned. Because the only way to solve a collective action problem is through collective agency, the only way to fashion a 'fiduciary fix' to financial dysfunction is to reconceive financial fiduciaries as collective agents, not individual agents. And that is to reconceive financial institutions as public institutions.

Hockett, Robert, "Are Bank Fiduciaries Special?," 68 Alabama Law Review 1071 (2017): https://works.bepress.com/robert_hockett/54/