

“Maximalism with an Experimental Twist”: Insider Trading Law at the Supreme Court

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Much has been written about the substance of the Supreme Court’s insider trading jurisprudence. Commentators have argued that the scope of liability is too broad,¹ not broad enough² or maybe just right (although there don’t seem to be many Goldilocks in the bunch). Some, but not all, of these same commentators also try to explain how their preferred normative goals fit (or fail to fit) with the statutory and regulatory language.³ In this short essay, I wish to address a different question. Instead of asking about normative policy goals and questions of statutory and regulatory interpretation, I consider whether there is a particular shape the Court’s insider trading opinions should take. In other words, is there anything we can say about the ideal breadth and depth of the Court’s insider trading opinions?

I argue that the Court’s insider trading jurisprudence should be characterized by what I refer to as “maximalism with an experimental twist.” By “maximalism,” I mean broad-based opinions that go beyond the facts of the particular case and that defer relatively little decision-making power to lower courts.⁴ The “experimental twist” refers to a standards-based approach with respect to those aspects, and only those aspects, of the Court’s insider trading law that rely on policy assumptions—assumptions the Court should test by fostering varied

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1. See, e.g., HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET 77-104 (1966).

2. See, e.g., Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1373–74 (2009).

3. See, e.g., *id.* (explaining how one could fit what is essentially an equal access approach to insider trading within the fraud-based structure of Section 10(b) through the concept of a general “duty to investors”). These efforts to pay attention to the statutory requirements aren’t always undertaken. For example, it is not clear how the property-based view of insider trading—that insider trading is largely about creating and protecting property rights in information—is consistent with the statutory requirement of fraud. See, e.g., Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties Into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1252–57 (1995) (commenting on the “emerging consensus” among academics that insider trading law is best defended as a means of protecting property rights in information without trying to reconcile that consensus theory with the text of the statute).

4. Cf. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-4 (1999) (describing judicial minimalism as “the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided”).

approaches among the lower courts. The experience with these varied approaches can then be transmitted to the Supreme Court at a later date through litigants and amici, thereby allowing the Court to refine those standards and make them more rule-like in light of that additional information.

This maximalist approach (even with the experimental twist) is in conflict with both Chief Justice Roberts's stated preference for narrow, fact-bound decisions,⁵ as well as the Roberts Court's reputation for precisely that type of judicial minimalism.⁶ Considering the following that judicial minimalism has attracted among leading constitutional law scholars,⁷ the type of judicial maximalism described here is also decidedly out of step with current trends in the legal academy. Nevertheless, the maximalist approach is the right one in the insider-trading context because of the nature and unique institutional realities of insider trading law, which are such that all lawmaking power has been effectively delegated to the Court.⁸

This essay consists of two parts: First, I lay out the argument for a maximalist approach to the Court's insider trading jurisprudence, but one with an experimental twist. I then use this simple framework to evaluate the Court's insider trading jurisprudence over the past nearly three decades. I find that it's a mixed bag, with the Court's most recent effort in *Salman v. United States*⁹ being a particularly unfortunate case of a missed opportunity. I conclude by suggesting where the Court might go from here.

5. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to Be Chief Justice of the United States) (stating that as Chief Justice, he would "remember that [his] job [is] to call balls and strikes, and not to pitch or bat").

6. See, e.g., Jonathan H. Adler, *Court Under Roberts Is Most Constrained in Decades*, THE VOLOKH CONSPIRACY (Aug. 1, 2010, 6:01 PM), <http://volokh.com/2010/08/01/court-under-roberts-is-most-restrained-in-decades>.

7. See, e.g., Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"*, 80 B.U. L. REV. 967, 1000 (2000); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1458–59 (2000); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 9 (1998) (approving of judicial minimalism); SUNSTEIN, *supra* note 4, at 8–9.

8. See *infra* notes 18–22 and accompanying text.

9. 137 S. Ct. 420 (2016).

I. THE THEORY

The principal argument in favor of judicial maximalism in the Supreme Court's insider trading jurisprudence begins with the premise that insider-trading law benefits from the type of lawmaking that we tend to associate with legislatures and agencies—broad, rule-bound, prospective-focused, expert-informed. Yet, because of the institutional realities of insider trading law, the only body that appears willing or able to define substantive insider trading law is the Court.¹⁰ For this reason, the Court should incorporate these agency-like attributes into its insider trading jurisprudence. In other words, the Court should adopt a judicial maximalist approach. Let me flesh out each of these claims in turn.

A. Judicial Maximalism for the Court's Insider Trading Jurisprudence . . .

The difference between courts on the one hand and legislatures and agencies on the other is not that legislatures and agencies make the law while courts interpret it. It should be fairly uncontroversial at this late date to observe that even those judges most committed to principles of judicial restraint sometimes end up making law.¹¹ Rather, the difference between these various governmental decision-makers has to do with the types of laws they make and the comparative competencies that they bring to the task. It is a familiar observation from the institutional design literature that agencies and legislatures tend to be better than courts when it comes to lawmaking that is broad, rule-bound, informed by experts and contains substantial prospective clarity.¹² Courts, on the other hand, excel at incremental, ad hoc decision-making that is focused on the facts at hand.¹³

From an institutional design perspective, it seems that insider trading

10. See *infra* notes 17-39 and accompanying text.

11. While this statement might be somewhat more contestable with respect to statutory and constitutional interpretation, it should be fairly obvious and non-controversial with respect to common law, of which federal insider trading law is one species. See, e.g., Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 21 (1985).

12. See, e.g., Michael Burstein, *Rules for Patents*, 52 WM. & MARY L. REV. 1747 (2011) (comparing agencies and courts along these dimensions and arguing that patent law would be better served if promulgated by agencies); Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247 (2011) (the same but in the context of antitrust law).

13. See Burstein, *supra* note 12; and see Haw, *supra* note 12.

law would benefit from the type of lawmaking that agencies and legislatures specialize in. Insider trading law has the potential to affect information sharing among some of the most important actors in our economy,¹⁴ which would seem to place a premium on the need for clear rules rather than muddy standards. It's a fairly technical field, requiring fine-grained policy analysis,¹⁵ and therefore would appear to require a fair amount of expertise. It has to do with the commercial arena, where settled expectations are particularly valuable.¹⁶ And it is subject to the types of penalties—criminal and severe civil penalties¹⁷—that are thought to demand clarity for not just pragmatic but constitutional concerns as well.¹⁸

However, the insider trading context is unusual because of the historic reluctance on the part of both Congress and the SEC to establish the scope of insider trading liability. Despite numerous calls for Congress to act over the years,¹⁹ and notwithstanding (at times) harsh criticism directed at the Court's efforts,²⁰ Congress has deferred completely to the

14. The market cap of the 3,000 largest companies traded on U.S. markets exceeds \$25 trillion. *See U.S. Stock Market Tops \$25 Trillion – Up 1.9 Trillion Since Election* (Jan. 27, 2017), https://seekingalpha.com/article/4040012-u-s-stock-market-tops-25-trillion-1_9-trillion-since-election.

15. The problem is that insider trading has both benefits (including that it can promote market efficiency and serve as a means of incentive compensation) and costs (including that it can undermine market integrity and cause corporations to undertake costly precautionary measures to prevent it from happening). *See, e.g.,* Zachary J. Gubler, *A Unified Theory of Insider Trading Law*, 105 GEO. L.J. 1225, 1265–66 nn.224–26 (2017).

16. *See, e.g.,* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1041 (2007) (observing that “[s]cholars and courts long have noted the damage that shifts in regulatory policy may exact upon reliance interests.”).

17. *See* 15 U.S.C. § 78u-1 (providing a civil penalty of treble damages for insider trading); 15 U.S.C. §§ 77x, 78ff(a) (2012) (providing for a criminal sanction of up to twenty years' imprisonment plus substantial monetary fines of up to \$5 million for an individual for the willful violation of any SEC rule or regulation, including Rule 10b-5).

18. *See* Hervé Gouraige, *Do Federal Courts Have Constitutional Authority to Adjudicate Criminal Insider-Trading Cases?*, 69 RUTGERS U. L. REV. 47, 119–25 (2016) (arguing that the vagueness of the Court's insider trading law might raise constitutional issues in light of the available criminal sanctions).

19. *See, e.g.,* Harvey L. Pitt & Karen L. Shapiro, *The Insider Trading Proscriptions Act of 1987: A Legislative Initiative for a Sorely Needed Clarification of the Law Against Insider Trading*, 39 ALA. L. REV. 415, 416 (1988).

20. Richard M. Phillips & Larry R. Lavoie, *The SEC's Proposed Insider Trading Legislation: Insider Trading Controls, Corporate Secrecy, and Full Disclosure*, 39 ALA. L. REV. 439, 446–50 (1988); Richard W. Painter et al., *Don't Ask, Just Tell: Insider Trading After United States v. O'Hagan*, 84 VA. L. REV. 153, 227–28 (1998); Donna M. Nagy, *Reframing the Misappropriation Theory of Insider Trading Liability: A Post-O'Hagan Suggestion*, 59 OHIO ST. L.J. 1223, 1304 n.373 (1998) (citing sources).

Court's substantive approach to insider trading law.²¹ What few insider trading laws Congress has enacted do little more than nibble around the edges of legal categories created by the Court—for example, extending the Court-made liability rules to control persons and congresspersons and enhancing available remedies.²²

Of course, one might argue that this doesn't reflect a lack of congressional will to act but rather a principal of comity or deference toward the Court, which after all was the first mover in this space when it decided *Chiarella v. United States*²³ in 1980, thereby establishing insider trading liability under Rule 10b-5. If the comity argument were true, then maybe one could argue that there is a constant threat of congressional intervention that affects the Court's opinions, and therefore Congress does influence the content of insider trading law, albeit indirectly.²⁴

This argument of an indirect influence seems unlikely in light of how entrenched Congress' inaction seems to be. The Court didn't actually define insider trading liability until 1980, following at least nineteen years of debate and litigation over whether and how Rule 10b-5 could be used for insider trading purposes.²⁵ In light of this fact, the Court's first mover

21. See, e.g., Jill E. Fisch, *Federal Securities Fraud Litigation as a Lawmaking Partnership*, 93 WASH. U. L. REV. 453, 469-70 (2015) (characterizing the development of the law of securities fraud more generally as consisting of the Court creating the substantive law and then Congress, and the Court, making incremental adjustments later on).

22. Since 1980, Congress has enacted three significant insider trading-related laws: the Insider Trading Sanctions Act of 1984 ("ITSA"), Pub.L. No. 98-376, 98 Stat. 1264 (1984); the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA"), Pub. L. No. 100-704, 102 Stat. 4677 (1988); and the Stop Trading on Congressional Knowledge Act of 2012 ("STOCK Act"), Pub. L. No. 112-105, 126 Stat. 291 (2012). ITSA established the treble damages rule for civil suits involving insider trading. ITSFEA extended the Court's liability rule to control persons and increased criminal fines and maximum jail sentences for criminal convictions. And the Stock Act extended the Court's liability rule to congressmen and women. For a general overview of this history, see Fisch, *supra* note 21, at 476-80.

23. 445 U.S. 222 (1980).

24. Cf. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (arguing that the threat of federal intervention in corporate lawmaking alters the substance of Delaware's corporate law).

25. The nineteen years reflects the period from 1961 until 1980. Rule 10b-5 was adopted in 1942. See Exchange Act Release No. 3230 (May 21, 1942). The SEC began considering in earnest the use of Rule 10b-5 to extend liability to insider trading over impersonal markets under the leadership of Commissioner William Cary, who took the helm in 1961. See Donald C. Langevoort, *Rereading Cady, Roberts: The Ideology and Practice of Insider Trading Law*, 99 COLUM. L. REV. 1319 (1999). That was the same year that the SEC issued its famous Cady, Roberts opinion, see *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961), which laid the groundwork for the Court's adoption of the

status looks less like it was the result of eagerness than of desperation in the face of congressional inaction. And even after this first move, Congress had numerous opportunities to clarify the substantive law but demurred.²⁶ In fact, in 1987, the SEC itself specifically asked Congress to codify the misappropriation theory,²⁷ which had been percolating in the lower courts and causing enormous legal uncertainty.²⁸ Yet, Congress once again refused to act, paving the way for the Court's ultimate adoption of the theory in 1997. Importantly, the Court's 1997 definition of insider trading liability carried some important differences from the SEC's proposed definition.²⁹ In other words, not only has Congress deferred to the Court, but this deference seems to reflect a sustained, consistent long-term policy decision rather than an accident of history that could change at any moment.

What might come as an even greater surprise, however, is that the SEC has taken a similarly deferential approach to the Court's attempts to define insider trading law. Unlike Congress, the SEC has played a hugely important role in the development of insider trading law.³⁰ However, that role has been largely limited to litigation in the federal courts rather than agency rulemaking.³¹ As with Congress, this appears to be a conscious choice. There is no reason why, any time prior to 1980, the SEC couldn't have adopted an insider trading rule pursuant to Section 10(b). Such a rule would have been entitled to significant deference from federal courts, consistent with prevailing administrative law principles.³² But instead, the

classical theory of insider trading in *Chiarella*, which was decided in 1980. See *Chiarella*, 445 U.S. at 222.

26. *Insider Trading Sanctions Act Of 1984: Hearing on H.R. Rep. 98-355 Before the H. Comm. on Energy and Commerce*, 98th Cong. 13 (1983), as reprinted in 1984 U.S.C.C.A.N. 2274, 2286; see also Painter, *supra* note 20, at 201-02.

27. See Jonathan R. Macey, Cato Inst., Cato Inst. Policy Analysis No. 101: SEC's Insider Trading Proposal: Good Politics, Bad Policy (1988), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa101.pdf>; see also *Insider Trading Proscriptions Act of 1987: Hearing Before the Subcomm. on Sec. of the Comm. on Banking, Housing, and Urban Affairs*, 100th Cong. 40 (1987) (statement of David S. Ruder, Chairman, U.S. Sec. & Exch. Comm'n).

28. See, e.g., Carlos J. Cuevas, *The Misappropriation Theory and Rule 10b-5: Deadlock in the Supreme Court*, 13 J. CORP. L. 793, 819-20 (1988) (briefly recounting this history).

29. Compare *Insider Trading Proscriptions Act of 1987*, S. 1380, 100th Cong. (1987), with *United States v. O'Hagan*, 521 U.S. 642 (1997).

30. See Fisch, *supra* note 21, at 480-83 (describing the SEC's role).

31. *Id.*

32. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

SEC decided to take the more indirect litigation approach for shaping the law.³³

It turns out that, in the case of the SEC, the Court's first-mover status is much more consequential than in the case of Congress. At any time, Congress could enact an insider trading law that replaces or substantially modifies the Court's insider trading jurisprudence. The fact that it hasn't, despite many opportunities and even calls to do so,³⁴ is evidence of its implicit delegation of lawmaking authority to the Court. The SEC does not hold a similar power with respect to the Court. Once the Court acted by interpreting the statute (10(b)) and the rule (10b-5) in *Chiarella*, the SEC found itself hemmed in by the Court's interpretation.³⁵ Thus, the SEC's failure to adopt rules since 1980 that would define the substance of insider trading law can't be seen as an attempt to let the Court dominate the space. To be sure, the SEC has tried to clarify the Court's jurisprudence at times, most notably with Rule 10b5-2.³⁶ However, some lower courts have simply dismissed the plain meaning of that rule on the basis that it conflicts with the Court's opinions, which simply underscores the SEC's relatively weak position as an expositor of insider trading law.³⁷

Thus, as a descriptive matter, Congress seems to have implicitly delegated lawmaking authority on insider trading law to the Court, and, even if it has the desire to play a bigger role, the SEC is left with no choice other than to take the Court's lead. In other words, if, as argued above,³⁸ insider trading law is to reflect the type of broad, rule-based, forward-

33. See Fisch, *supra* note 21, at 480-83.

34. See *supra* notes 19-20 and accompanying text.

35. This conclusion follows from the *Chevron* doctrine, under which the court owes the agency no deference if the statute is unambiguous. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (finding that greenhouse gases constitute an "air pollutant" under the Clean Air Act, in contrast with the EPA's preferred interpretation of that language).

36. See 17 C.F.R. § 240.10b5-2 (2017).

37. See, e.g., *SEC v. Yun*, 327 F.3d 1263 (11th Cir. 2003) (opining that, contrary to Rule 10b5-2, a marriage relationship alone is not sufficient to give rise to insider trading liability under Rule 10b-5); *SEC v. Cuban*, 634 F. Supp. 2d 713, 717 (N.D. Tex. 2009), *vacated on other grounds*, 620 F.3d 551 (5th Cir. 2010) (finding that Rule 10b5-2 is invalid to the extent that it creates 10b-5 liability for the breach of a confidentiality agreement); *United States v. Kim*, 184 F. Supp. 2d 1006, 1015 (N.D. Cal. 2002) (stating, in contrast to the language of Rule 10b5-2, that "an express agreement can provide the basis for misappropriation liability only if the express agreement sets forth a relationship with the hallmarks of a fiduciary relationship").

38. See *supra* notes 13-18 and accompanying text.

looking, expert-informed lawmaking that we associate with legislatures and agencies, we can't count on the SEC or Congress to do this. If anyone is going to fill this role, it needs to be the Court. In other words, the Court needs to act more like an agency with respect to its insider trading jurisprudence, taking a maximalist approach to this area of law.³⁹

While insider trading law presents an institutional context that is unusually suited for a maximalist approach to judging, it is still necessary to consider the arguments for judicial minimalism. There are primarily three of them, two of which simply lack force in this context. The third presents a real issue but one that can be mitigated through the experimental twist discussed below.

First, there is the argument that judicial minimalism fosters democratic debate.⁴⁰ In light of Congress's implicit delegation of lawmaking power to the Court, this argument doesn't seem particularly forceful here. The polis can debate all they want. But the legislature doesn't appear to want to get involved in insider trading law.⁴¹ And, the SEC has its hands tied.⁴² In that environment, the democratic debate justification for judicial minimalism simply doesn't carry much weight.

Second, there is the argument that judicial minimalism reduces decision costs,⁴³ which might be of particular concern for a multimember body like the Supreme Court that needs a majority but has to deal with strongly opinionated members who exhibit varied judicial approaches and philosophies, even among those members who seem to share the same broad-based political inclinations.⁴⁴ But, with respect to decision costs, it doesn't seem that the Court has had a particularly difficult time gaining a majority, even in its most maximalist decisions like *United States v. O'Hagan*⁴⁵ and *Chiarella v. United States*⁴⁶ where one would expect these

39. See SUNSTEIN, *supra* note 4, at 10–13 (characterizing “minimalist” opinions as “narrow,” in that they resolve only “the case at hand” and “shallow,” in that they do not provide a broad-based theory in support of the ruling).

40. See, e.g., Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1915 (2006).

41. See *supra* notes 18–29 and accompanying text.

42. See *supra* notes 33–37 and accompanying text.

43. That is to say, the costs, measured in time, energy and resources, of making and justifying a legal decision.

44. See SUNSTEIN, *supra* note 4, at 47.

45. See *O'Hagan*, 521 U.S. 642 (1997). *O'Hagan* was a 6–3 opinion and would have been 7–2 but for Justice Scalia's dissent suggesting that although the majority's approach makes sense

2017] Maximalism with an Experimental Twist 57

simmering conflicts to manifest themselves.⁴⁷ Insider trading law just doesn't trigger the types of disagreement among members of the Court that we see in constitutional law.

The third, and by far the strongest, argument in favor of judicial minimalism (and against judicial maximalism) in the insider trading law context has to do with the error costs⁴⁸ of maximalist decisions.⁴⁹ Insider trading law obviously raises many empirical questions that frankly would seem to strain the competency of the Court. For example, how broadly should the scope of liability be drawn? Should it be limited to insider trading by fiduciaries or should it extend to insider trading by non-fiduciary contractual counterparties or perhaps even to those traders with no relationship to the traders or the source of the information? What effect would broadening the scope of liability have on markets and economic actors? What about tippee liability? Should it be limited to particular types of tips or extend to any type and what effect would this have, for example, on the analyst industry? These questions would be difficult even for an expert agency like the SEC to answer, let alone a generalist court, none of whose members have a background, let alone expertise, in securities regulation. For that reason, these questions clearly pose a challenge to a maximalist approach to the Court's insider trading jurisprudence. However, this concern is substantially mitigated by what I refer to as the "experimental twist."

B. . . . But with an Experimental Twist

To explain the experimental twist, it is useful to return to the claim that judicial maximalism requires the Court to act more like an agency. Error costs are an issue at agencies as well as courts. How do agencies manage

generally, it probably is too broad with respect to criminal convictions like the one in *O'Hagan*. *See id.*

46. *See Chiarella*, 445 U.S. 222 (1980). *Chiarella* was an 8-1 opinion and the dissenter, Chief Justice Burger, was actually in favor of the more maximalist alternative of adopting the misappropriation theory despite the government's failure to submit that theory to the jury. *See id.*

47. For a discussion of why these opinions can be considered maximalist, see *infra* notes 52-72 and accompanying text.

48. That is to say, the risk of getting a decision wrong and the magnitude of the effects of such an error.

49. *See* Sunstein, *supra* note 44, at 49.

them? The answer is that they engage in some type of regulatory experimentation.⁵⁰ They adopt temporary rules that generate data in the short-run that can then be brought to bear on a more permanent decision down the road. Obviously, there are limits on the extent to which a court can engage in such experimentation. But a court can reach similar ends through different means. In particular, the Supreme Court could encourage the lower courts to take different approaches to contested policy questions by adopting standards instead of rules with respect to those contested questions and those alone. After a period of time living with those varied approaches, the Court could then revisit the questions that were the subject of the “experiment.” The lessons learned from the experiment would then be transmitted to the Court through the litigants in the case and amici, which would allow the Court to refine the law to make it gradually more rule-based and therefore more maximalist.⁵¹

As discussed in greater detail below, the Court has essentially taken this experimental approach with respect to two highly contested policy questions—whether insider trading liability should extend beyond traditional fiduciaries and whether tipper liability should require some quid pro quo.⁵² In each of these instances, the Court adopted a standard rather than a rule, which has led to experimentation in different approaches among the lower courts. The Court’s mistake in this area so far has been its failure to revisit those judicial experiments to draw from them the lessons needed to fine-tune the law accordingly.

II. THE COURT’S INSIDER TRADING JURISPRUDENCE IN LIGHT OF THIS FRAMEWORK

How does the approach to judging set forth here—“judicial maximalism with an experimental twist”—apply to the Court’s insider

50. See, e.g., Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129 (2014); Zachary J. Gubler, *Making Experimental Rules Work*, 65 ADMIN. L. REV. 551 (2015).

51. This assumes that the task of judging consists of trying to resolve a specific problem in light of the “best” reading of the law, consistent with the norms of the profession and that amicus briefs provide judges with information that they wouldn’t otherwise receive from litigants. There is evidence that amicus briefs play precisely this role. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 749-50 (2000).

52. See *infra* notes 53-61, 68-73 and accompanying text.

2017] Maximalism with an Experimental Twist 59

trading jurisprudence? As a descriptive matter, this judicial philosophy doesn't explain everything the Court has done. But, it explains parts of what the Court has done, supplies criticisms for other parts, and points us in the right direction for the future.

A. Chiarella v. United States

The Court's opinion in *Chiarella v. United States*⁵³ is a pretty good example of the type of judicial maximalism I describe here. The Court could have held that, whatever Rule 10b-5 means, it doesn't extend to people like Vincent Chiarella, who, as an employee at a financial printer, has no relationship, let alone a fiduciary one, to the traders against whom he traded.⁵⁴ Yet, the Court went further than that, choosing to identify the specific types of relationships that give rise to liability.⁵⁵ That is a relatively maximalist move.

Additionally, the *Chiarella* Court exhibited the experimental twist. In defining the relationships that give rise to liability, the Court adopted a muddy standard instead of a clear rule. It held that liability arises from a fiduciary "or other similar relationship[] of trust and confidence."⁵⁶ That's the experimental twist. In defining the precise boundaries of liability, a highly assumption-laden exercise fraught with uncertainty, the Court adopted a muddy standard. That standard could then theoretically give rise to different approaches in the lower courts and ultimately the opportunity for the Court to re-evaluate the precise contours of that boundary at a time when it could benefit from the information resulting from that experimentation. And in fact, it has had precisely this effect.⁵⁷

53. 445 U.S. 222 (1980).

54. *See id.* at 232-33.

55. *See id.* at 230 ("[S]uch liability is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction"). Admittedly, this pronouncement didn't require the Court to do much more than simply repeat the common law of fraud. Thus, while the opinion said more than was necessary to resolve the factual dispute in the case, its maximalism was limited and not particularly creative.

56. *See id.* at 228.

57. *Compare, e.g.,* *United States v. Libera*, 989 F.2d 596 (2d Cir. 1993), cert. denied, 114 S. Ct. 467 (1993) (finding that the standard requires nothing more than a duty of confidentiality), *with* *United States v. Kim*, 184 F. Supp. 2d 1006, 1015 (N.D. Cal. 2002) (stating, in contrast to the language of Rule 10b5-2, that "an express agreement can provide the basis for misappropriation liability only if the express agreement sets forth a relationship with the hallmarks of a fiduciary relationship").

Thus, *Chiarella* is an example of the approach to insider trading jurisprudence that I am arguing for here. To be sure, as I've argued elsewhere, the substance of the decision was misguided for a number of reasons.⁵⁸ However, as far as the structure of the opinion, which is the concern of this essay, it was pretty good. But only *pretty* good. The biggest mistake that the *Chiarella* Court made was in its refusal to consider the misappropriation theory along with the classical theory.⁵⁹ It was an argument the Government made to the Court, but the Court demurred in light of the fact that the theory hadn't been presented to the jury, and courts are normally unable to affirm a criminal conviction on a theory not presented to the jury.⁶⁰ That may be so, but there was nothing that prevented the Court from announcing how it would have ruled on such a theory had it been presented to the jury. To be sure, such an approach would be highly unusual in the ordinary course of judicial minimalism. But, in terms of judicial maximalism, it would presumably be justifiable and desirable. The Court's failure to take such a maximalist approach has resulted in uncertainty and unfairness that persists to this day.

With a few caveats, *Chiarella* is a pretty good example of maximalism with an experimental twist. However, the whole idea of the experimental twist is that the muddy standards that underlie the experimental approach will be revisited and incrementally refined (and presumably converted into clear, maximalist rules) over time in light of the lessons learned from the lower courts' varied experience, which gets transmitted to the Court through litigants and amici. In other words, for the experimental twist to work, the Court needs to revisit its past experiments, learn from them and incorporate that learning into the law. Yet, the Court really hasn't done that with respect to the *Chiarella* experiment involving the scope of liability. The Court has to this day never refined its "similar relationship of trust and confidence" standard.

58. See Gubler, *supra* note 15, at 1240–52.

59. *Chiarella*, 445 U.S. at 235–36.

60. See *id.*

B. Dirks v. SEC

A similar critique can be made of *Dirks v. SEC*,⁶¹ which, like *Chiarella*, seems, on its face at least, to be a pretty good example of the experimental approach to judicial maximalism. There, the Court had to decide the contours of tipper-tippee liability in a case involving an analyst responsible for uncovering what was, at the time, the most significant case of securities fraud in U.S. history.⁶² It could easily have decided the case on minimalist grounds by simply saying that whatever the scope of tipper-tippee liability might be, it doesn't extend to whistleblowers. However, the *Dirks* Court went further and established the metes and bounds of tipper-tippee liability.⁶³ That is the maximalist part of the opinion.

In establishing the metes and bounds of tipper-tippee liability, the Court was particularly concerned about the effect that an over-broad rule might have on socially beneficial information sharing and in particular the effect on investment analysts, who play an important role in fostering market efficiency.⁶⁴ Consistent with our discussion above, this is precisely the type of question that lends itself well to the experimental twist, calling for a standard rather than a rule. And that is precisely what the *Dirks* Court did: it held that liability turns on whether the tipper “receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings.”⁶⁵ This personal benefit standard allows the lower courts to experiment with different approaches, which could then inform future Supreme Court efforts to refine the test with a more maximalist rule. And the standard has

61. 463 U.S. 646 (1983).

62. Note, *Public Creditors of Financial Institutions: The Case for a Derivative Cause of Action*, 86 YALE L.J. 1422, 1424 n.8 (1977).

63. *Dirks*, 463 U.S. at 663 (“[T]he initial inquiry is whether there has been a breach of duty by the insider. This requires courts to focus on objective criteria, i.e., whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings.”).

64. See *id.* at 661–62 (“In determining whether a tippee is under an obligation to disclose or abstain, it thus is necessary to determine whether the insider’s ‘tip’ constituted a breach of the insider’s fiduciary duty. All disclosures of confidential corporate information are not inconsistent with the duty insiders owe to shareholders. In contrast to the extraordinary facts of this case, the more typical situation in which there will be a question whether disclosure violates the insider’s *Cady, Roberts* duty is when insiders disclose information to analysts.”).

65. *Id.* at 663.

indeed led to different approaches among the lower courts.⁶⁶ However, the learning piece of the puzzle has not yet happened, despite opportunities like *Salman v. United States*.⁶⁷ For that reason, *Dirks*, like *Chiarella* before it, seems to be a good example of the correct approach to the Court's insider trading jurisprudence, but one that falters in the follow-up or lack thereof.

C. *United States v. O'Hagan*

The next lodestar in the Court's insider trading jurisprudence, *United States v. O'Hagan*,⁶⁸ is also a maximalist opinion. The Court could have held that, at the very least, traditional fiduciaries, like the lawyer James O'Hagan, are liable when they trade on information obtained from their principals. The Court went further, however, holding that liability arises from the breach of a duty arising from any fiduciary or other similar relationship of trust or confidence owed to the source of the information.⁶⁹

O'Hagan was insufficiently maximalist in that it failed to clarify the relationship between the misappropriation theory and the classical theory. The *O'Hagan* Court said that "the two theories are complementary, each addressing efforts to capitalize on nonpublic information through the purchase or sale of securities."⁷⁰ This was much too indefinite. Moreover, this indefiniteness can't really be defended on experimental grounds. The precise relationship between the two theories of primary liability doesn't seem to be the type of question—like the effect broad tipper-tippees liability will have on the analyst industry—that could benefit from experimentation. Indeed, it hasn't resulted in much experimentation at all. The lower courts have more or less reached a consensus that the classical and misappropriation theories are distinct and separate theories of liability, the former applying to cases involving classical insiders and the

66. Compare, e.g., *United States v. Newman*, 773 F.3d 438, 454 (2d Cir. 2014) (holding that a gift alone, even if to a family member or close friend, is insufficient to give rise to insider trading liability), with *Salman v. United States*, 792 F.3d 1087 (9th Cir. 2015) (holding that a gift alone to a family member or close friend gives rise to insider trading liability).

67. 137 S. Ct. 420 (2016).

68. 521 U.S. 642 (1997).

69. See *id.* at 652.

70. See *id.* at 652.

latter applying to cases of outsider trading.⁷¹ As I've explained elsewhere, this result has led to absurd outcomes among the lower courts, including, for example, the decision that using material non-public information to trade in debt securities is legal for insiders, but not outsiders, to the issuers of that debt.⁷² Thus, while the *O'Hagan* opinion adopted a (weakly) maximalist approach, it's refusal to go the distance effectively perpetuated the problem created by the Court's failure in *Chiarella* to consider competing theories of liability and their relationship.

D. Salman v. United States

Finally, we come to *Salman v. United States*,⁷³ the Court's most recent foray into the substance of insider trading liability. If *Chiarella* and *O'Hagan* are (albeit imperfect) examples of maximalism with an experimental twist, then *Salman* is the counter-example. In fact, *Salman* is a much better example of judicial minimalism than *Chiarella* or *O'Hagan* is of judicial maximalism. Indeed, in some ways, *Salman* is the platonic ideal of judicial minimalism. The opinion basically does little more than decide the facts of the case before it—whether a gift of information between relatives satisfies the *Dirks* personal benefit test.⁷⁴ The *Salman* Court said that it did, which wasn't all that surprising considering that the *Dirks* Court effectively had said the same thing twenty-three years before, although in dicta.⁷⁵

Although characteristic of the judicial minimalism of the Roberts Court, in the insider trading context, *Salman* represents a real missed opportunity. A more maximalist opinion would have clarified outstanding issues—like the relationships between the classical and misappropriation theories—and it would have revisited some of the experiments that the Court had set up in the past but has not yet considered the resulting lessons learned, for example, the experiment created in *Dirks* testing the correct contours of the personal benefit test.⁷⁶ I see little reason, in the almost

71. See Gubler, *supra* note 15, at 1230 n.22.

72. See *id.* at 1230-31.

73. 137 S. Ct. 420 (2016).

74. See *id.* at 427-28.

75. See *Dirks v. SEC*, 463 U.S. 646, 664 (1983).

76. See *supra* notes 63-67 and accompanying text.

quarter decade since *Dirks*, why the Court does not now have access to the relevant information for making the personal benefit test more rule-based. Similarly, it is well past time for the Court to clarify the meaning of a “similar relationship of trust or confidence,” especially in light of the fact that the SEC’s attempt to do so has been met with resistance among some of the lower courts.⁷⁷ If the Court’s forbearance is due to latent concerns about its lack of expertise, it could simply rely on the SEC, effectively adopting Rule 10b5-2’s definition. Its failure in *Salman* to do any of these things and instead hew to a minimalist approach was an unqualified mistake. Hopefully another case will come along where it might engage in the judicial maximalism demanded by the institutional realities of U.S. insider trading law.

CONCLUSION

In concluding, I should say that judicial minimalism has much to recommend it. But not in the insider trading context, where the only body that is willing and able to engage in lawmaking is the Supreme Court. For that reason, the Court should adopt a maximalist approach to insider trading law, which favors broad-based rules and a willingness to look far beyond the facts of a given case. While the error costs of such an approach are admittedly high, they can be mitigated through an experimental approach – that is to say, the use of standards for discrete, highly contested issues, where the standards are intended to be refined into rules in light of the lessons learned from the lower courts’ varied experience applying the standards. Judicial maximalism with an experimental twist doesn’t do the best job explaining the Court’s insider trading jurisprudence, particularly its most recent efforts. Rather, it reflects an aspiration. The sooner the Court recognizes and adopts that aspiration, the better.

77. See *supra* note 37 and accompanying text.