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## Against Fiduciary Constitutionalism

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AGAINST FIDUCIARY CONSTITUTIONALISM

Samuel L. Bray\* & Paul B. Miller\*\*

*A growing body of scholarship draws connections between fiduciary law and the Constitution. In much of this literature, the Constitution is described as a fiduciary instrument that establishes fiduciary duties, not least for the President of the United States.*

*This Article examines and critiques the claims of fiduciary constitutionalism. Although a range of arguments are made in this literature, there are common failings. Some of these involve a literalistic misreading of the works of leading political philosophers (e.g., Plato and Locke). Other failings involve fiduciary law, such as mistakes about how to identify fiduciary relationships and about the content and enforcement of fiduciary duties. Still other failings sound in constitutional law, including the attempt to locate the genre of the Constitution in the categories of private fiduciary law. These criticisms suggest weaknesses in the new and increasingly influential attempt to develop fiduciary constitutionalism.*

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## INTRODUCTION

Recently, a number of scholars have argued that the U.S. Constitution resembles a fiduciary document, and that it imposes fiduciary duties on various actors, including the President of the United States.<sup>1</sup> When Barack Obama was President, some found in the “fiduciary Constitution”<sup>2</sup> a means by which a court could hold unconstitutional the signature achievement of his administration, the Affordable Care Act.<sup>3</sup> Now others find in fiduciary constitutionalism a means by which a court could find the present incumbent to have violated a proscription on self-dealing.<sup>4</sup> The fiduciary Constitution contains multitudes—everything from a handy

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<sup>1</sup> See, e.g., Gary Lawson & Guy Seidman, “A Great Power of Attorney”: Understanding the Fiduciary Constitution (2017); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *Geo. L.J.* 1, 18 (2018); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 *Harv. L. Rev.* 2111 (2019); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Principles and Public Offices*, in *The Oxford Handbook of Fiduciary Law* 303 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019); Ethan J. Leib & Andrew Kent, *Fiduciary Law and the Law of Public Office: Suggestions for a Research Agenda*, *Wm. & Mary L. Rev.* (forthcoming 2021) (on file with authors); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 *Geo. J.L. & Pub. Pol’y* 463 (2019); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 *Calif. L. Rev.* 699 (2013); Robert G. Natelson, *The Constitution and the Public Trust*, 52 *Buff. L. Rev.* 1077, 1140 (2004) [hereinafter Natelson, *The Constitution and the Public Trust*].

<sup>2</sup> Different scholars writing about what we call the “fiduciary Constitution” might have their own nomenclature. Our choice of terms, however, is not original and is not meant to be pejorative. See Lawson & Seidman, *supra* note 1 (title); Kent et al., *supra* note 1, at 2182; Leib & Shugerman, *supra* note 1 (title); *id.* at 464.

<sup>3</sup> E.g., Lawson & Seidman, *supra* note 1, at 91–98.

<sup>4</sup> See Leib & Shugerman, *supra* note 1, at 468–69, 475.

way for an originalist to justify *Bolling v. Sharpe*<sup>5</sup> to a way for skeptics of the non-delegation doctrine to rein it in.<sup>6</sup> The convenience and malleability of this new constitutional argument should make us wary.

This Article offers a critique of fiduciary constitutionalism, finding it bad fiduciary law and bad constitutional law. We are not the first to criticize fiduciary constitutionalism, and our work therefore builds on that of others, especially Seth Davis and Richard Primus.<sup>7</sup>

It is important at the outset to note that the burgeoning literature in favor of a fiduciary reading of the Constitution means that different scholars make different claims. Some analogize the Constitution to a trust,<sup>8</sup> some to an agency relationship,<sup>9</sup> some to a power of attorney,<sup>10</sup> and some to an attractively all-purpose generic “fiduciary” construct.<sup>11</sup> Some draw a straight line between a fiduciary law of the eighteenth century and the present.<sup>12</sup> Others admit there are differences between past and present, and thus offer a bevy of qualifications and hedges<sup>13</sup>—but those tend to

<sup>5</sup> See Lawson & Seidman, *supra* note 1, at 151–53, 170–71.

<sup>6</sup> See Leib & Shugerman, *supra* note 1, at 479–85.

<sup>7</sup> See generally Seth Davis, *The False Promise of Fiduciary Government*, 89 *Notre Dame L. Rev.* 1145 (2014) (analyzing differences between private fiduciaries and public officials and critiquing the lack of authority for fiduciary constitutionalism); Richard Primus, *The Elephant Problem*, 17 *Geo. J.L. & Pub. Pol’y* 373 (2019) (critically reviewing the evidence and methodology in Lawson & Seidman, *supra* note 1). Others have also criticized the over-extension of fiduciary concepts, albeit in different contexts. E.g., Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 *Harv. L. Rev.* 497 (2019).

<sup>8</sup> See Leib & Shugerman, *supra* note 1, at 477–79.

<sup>9</sup> Lawson & Seidman, *supra* note 1, at 112.

<sup>10</sup> *Id.* at 75 (referring to James Iredell’s quote regarding power of attorney).

<sup>11</sup> Barnett & Bernick, *supra* note 1, at 18–21; see also *id.* at 19 nn.81 & 83 (discussing common fiduciary relationships and duties); cf. Lawson & Seidman, *supra* note 1, at 76 (“[W]e think it close to obvious that the Constitution, as a legal document, is best understood as some kind of agency or fiduciary instrument, whereas the case for viewing it specifically as (or as like) a power of attorney is more attenuated.”); Leib et al., *supra* note 1, at 708, 712–13 (recognizing differences among different kinds of fiduciaries, as well as differences between public and private law, but relying on a general “fiduciary principle”).

<sup>12</sup> See, e.g., Barnett & Bernick, *supra* note 1, at 19–21.

<sup>13</sup> E.g., Lawson & Seidman, *supra* note 1, at 6 (“[W]e are making no claims about the extent to which the meaning we uncover should or must contribute to legal decision making.”); *id.* at 11 (“Again, we frame these interpretative conclusions in hypothetical form: to the extent that the Constitution can be seen as a fiduciary instrument, or in some cases as a fiduciary instrument of a particular kind, certain conclusions about the document’s meaning follow from that identification.”). The hedges and qualifications are more pronounced—and thus the conclusions more circumspect—in the article by Kent, Leib, and Shugerman than in some of the other literature. See, e.g., Kent et al., *supra* note 1, at 2190 (“We do not opine here on the way the framers envisioned enforcing the President’s duty of loyalty and avoiding self-dealing.”).

fall away as soon as the scholars turn to spelling out the “enforceable duties” that they want to see the courts administering.<sup>14</sup> Some of the literature starts out cautious and then gallops away; some of it gallops from the start. But it all tends to be ambitious and thoroughly presentist.

This Article offers three main critiques of fiduciary constitutionalism:

The first is about contemporary fiduciary law. The fiduciary constitutionalists pervasively treat concepts as “fiduciary” that are in fact not limited to fiduciary law and instead have much a broader application, such as good faith.<sup>15</sup> This matters because a point of connection between the Constitution and some area that can be characterized as fiduciary (e.g., trust, agency), as thin as it is, cannot sustain the fiduciary constitutionalist project if it is a point of connection with many areas of law.

The second is about historical anachronism. Some fiduciary constitutionalists rely on a “fiduciary law” of 1789 when there was in fact no such law.<sup>16</sup> There were quite specific legal regimes for trust, agency, bailment, and so on. Some of these were at law, and some were in equity. Their standards of liability were different; their remedies were different; they differed in respect to defenses and the availability of a jury.<sup>17</sup> As other fiduciary constitutionalists concede, there was no pan-subject “fiduciary law” in 1789.<sup>18</sup> This abstraction is fatal to fiduciary constitutionalism.

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<sup>14</sup> E.g., Lawson & Seidman, *supra* note 1, at 7 (“Now to our affirmative project: understanding the fiduciary character of the Constitution is important not simply as a historical matter but also for its contribution to constitutional interpretation.”); *id.* at 11; Leib & Shugerman, *supra* note 1, at 465 (“[T]his article delves further into this language’s [i.e. the Take Care Clause’s] likely meaning, indicating how it can establish enforceable duties for public officials.”); see also Kent et al., *supra* note 1, at 2119 (claiming “that the best historical understanding of the meaning of the Faithful Execution Clauses is that they impose duties that we today—and some in the eighteenth century as well—would call fiduciary”). Richard Primus and Suzanna Sherry note this oscillation in Lawson and Seidman’s argument. Primus, *supra* note 7, at 400, 402–04; Suzanna Sherry, *The Imaginary Constitution*, 17 *Geo. J.L. & Pub. Pol’y* 441, 447–49 (2019) (reviewing Lawson & Seidman, *supra* note 1). For discussion of a similar tendency in Kent et al., *supra* note 1, see *infra* note 87.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> E.g., Barnett & Bernick, *supra* note 1, at 20–21 (asserting that the Constitution’s “organization and language sounds in eighteenth-century fiduciary law”). More cautious on this point is Kent et al., *supra* note 1, at 2179–80 (“[W]hat the three meanings we can attribute to the [Faithful Execution] Clauses have in common is that they are all part of the basic ways the private law constrains fiduciary discretion and power.”).

<sup>17</sup> *Contra* Lawson & Seidman, *supra* note 1, at 62 (“The fiduciary responsibilities of a trustee and an attorney do not differ in any way material to our project.”).

<sup>18</sup> See, e.g., Kent et al., *supra* note 1, 2180–81 (describing the “crystalliz[ing]” of “the ‘private’ fiduciary law we would recognize today” as not occurring in America until late in

The third is about how some fiduciary constitutionalists evade the anachronism problem. They try to escape this problem by tying the Constitution not to a fictional eighteenth-century “fiduciary law” but rather to fiduciary law of the twenty-first century.<sup>19</sup> That interpretive move is certainly available on some theories of constitutional interpretation—theories that would to a substantial degree integrate political morality and constitutional law, or theories that would allow the courts to legitimately turn what was originally a non-fiduciary Constitution into a fiduciary Constitution, creating and developing new fiduciary duties for government officers.<sup>20</sup> But that is not the argument the fiduciary constitutionalists have made to date (though they are of course free to reshape their arguments going forward). Instead, the fiduciary constitutionalists have relied on text and structure as understood at the Founding.<sup>21</sup> And that more-or-less originalist argument does not hold if the Constitution can only be understood as fiduciary in light of *present-day* fiduciary law.

One thing, however, does need to be said in favor of the fiduciary constitutionalists’ claims. It is true that there is a long history in political thought of the use of trust and agency metaphors for governance. This figurative language appears in Plato and Cicero, in Locke and Hume.<sup>22</sup> But this language offers moral guidance and political wisdom, not enforceable duties with remedies that can be awarded by courts. And mere metaphor is not the big game the fiduciary constitutionalists are pursuing. Against this long history of a figurative and legally thin understanding of

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the eighteenth century, and concluding that “a fiduciary law of ‘private’ offices was unlikely to have been plucked off-the-rack by the Philadelphia Convention drafters and applied to public offices”); *id.* at 2179 (“Our historical findings about the original meaning of the Faithful Execution Clauses align with core features of modern fiduciary law . . . .”); Leib & Shugerman, *supra* note 1, at 468 (suggesting doubt about whether “private fiduciary law was itself fully formed at the time of the founding”).

<sup>19</sup> Leib & Shugerman, *supra* note 1, at 468–69 (“[Article II of the U.S. Constitution] uses the language of faith and care to signal to courts and to executive officials that the President was supposed to be held to the same kinds of fiduciary obligations to which corporate officers, trustees, and lawyers are routinely held today in the private sector.”).

<sup>20</sup> But cf. Davis, *supra* note 7, at 1182–95 (discussing whether that is advisable).

<sup>21</sup> See *infra* notes 161 and 164 and accompanying text. We do recognize that there is a spectrum of views about how much the interpretation of the constitutional text should be informed by the legal categories at the time of ratification (as part of context). The more one separates the text from its legal context, the more room there is to integrate constitutional law and political morality, and the less constraint there is from the original understanding (with the familiar virtues and vices of that interpretive equilibrium).

<sup>22</sup> See *infra* Section I.A.

public office as a trust, it becomes easier to recognize the fiduciary constitutionalist project for what it is: an earnest and literalistic misreading of the tradition and an insistence on taking figurative language that works across thousands of years of political theory and treating it as if it were an invocation of an inevitably more particular body of legal or equitable claims and remedies. There is no such body of claims and remedies that can support this move—not a fiduciary law of 1789 (once it is recognized as a fiction), and not present-day fiduciary law (once it is correctly described).

The remainder of this Article proceeds as follows. Part I analyzes the supposed antecedents of fiduciary constitutionalism—both the classical and early modern tradition in political theory and also more recent advances in fiduciary theory with which the fiduciary constitutionalists align themselves. Part II critiques the fiduciary law of fiduciary constitutionalism. Part III critiques the constitutional law of fiduciary constitutionalism. The idea that the Constitution ought to be understood as a fiduciary instrument is a well-meant and seemingly timely entrant into the constitutional discourse of the United States. But taken together, these critiques show that the historical, philosophical, and legal foundations of fiduciary constitutionalism are weak.

### I. THE FIDUCIARY METAPHOR

We will examine below the claims fiduciary constitutionalists make about fiduciary law and constitutional law.<sup>23</sup> In this Part we begin with the supposed antecedents of fiduciary constitutionalism. Its exponents claim that fiduciary constitutionalism is rooted (1) in a tradition of fiduciary political theory that long predates the drafting and ratification of the Constitution, and (2) in the work of pioneering fiduciary scholars, including especially the Australian scholar and judge Paul Finn, who shaped our understanding of modern fiduciary law. Both of these claims might be thought to establish a pedigree for fiduciary constitutionalism. In what follows, we introduce and examine each claim and find them wanting for a similar reason: they fail to recognize the distinction between metaphorical and technical invocation of fiduciary constructs.

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<sup>23</sup> See *infra* Parts II–III.

### A. The Fiduciary Metaphor in Political Theory

Fiduciary constitutionalists assert that there is a pre-modern basis for fiduciary constitutionalism in works of leading philosophers and statesmen—works said by Robert Natelson to belong within the “canon” that influenced the Founders.<sup>24</sup> Particular emphasis has been placed by Natelson and other fiduciary constitutionalists—including Gary Lawson, Ethan Leib, Guy Seidman, and Jed Shugerman—on the writings of Plato, Aristotle, Cicero, Hume, and Locke.<sup>25</sup> Did any of these philosophers espouse fiduciary constitutionalism? As it happens, in classical and early modern political theory there is scant support for a *legal* construction of constitutions or of government in fiduciary terms. One can get to modern fiduciary constitutionalism only by extrapolating significantly on writings in the canon—indeed, by extrapolating to such a significant extent that one changes the sense of allusions to fiduciary concepts.

Begin with Plato and Aristotle. Did either contemplate a legal duty of loyalty as an express or implied term of the occupation of public offices? Did they advert to remedies for misconduct in public office similar to those imposed by fiduciary law on errant fiduciaries in the twenty-first century? The answer to both questions is, simply, *no*. Consider Plato’s *Republic*, where a ruler is, in the familiar English rendering, called a “guardian.” We will give especially close attention to this one word because it is foundational to fiduciary constitutionalists’ characterization of the ideas of Plato.

In the *Republic*, “guardian” is a translation of φύλακες (plural of φύλαξ).<sup>26</sup> This is the noun form of φυλάσσω, a verb used with a wide range of senses, including: “to guard, stand watch”; “to oversee, protect”; “to lie in wait” or “wait for”; “be careful, be cautious”; and “to guard,

<sup>24</sup> See Natelson, *supra* note 1, at 1095–1101.

<sup>25</sup> E.g., Lawson & Seidman, *supra* note 1, at 31–40; Kent et al., *supra* note 1, at 2119 (“[D]ecades of scholarship have traced the idea of public offices as ‘trusts’—private law fiduciary instruments—from Plato through Cicero and Locke . . .”); Leib & Shugerman, *supra* note 1, at 464; Leib et al., *supra* note 1, at 708.

<sup>26</sup> E.g., Plato, *Republic*, II.376c, where “φύλαξ πόλεως” is rendered “guardian of the state” in 1 Plato, *The Republic* 172–73 (Loeb Classical Library, Paul Shorey trans., Harvard Univ. Press rev. ed. 1937). The same term (φύλαξ) also appears throughout Plato’s *Laws*. E.g., Plato, *The Laws*, I.625e, where “φυλακῆς” is rendered “the guards” in *The Laws of Plato* 4 (Thomas L. Pangle trans., 1980); and XII.966b–d, where “τοὺς . . . φύλακας . . . τῶν νόμων” and “τῶν νομοφυλάκων” are rendered “the Guardians of the Laws” by Pangle. *The Laws of Plato*, *supra*, at 371. The instances in the latter passage are translated by R.G. Bury as “wardens of the laws” and “a Law-warden.” 2 Plato, *Laws* 559 (Loeb Classical Library, R.G. Bury trans., 1926).



preserve, maintain.”<sup>27</sup> The noun’s usage is similarly wide, and its glosses include: “guard, keeper, watcher”; “garrison, body of guards”; “guardian, tutor, protector, defender”; and “observer, follower.”<sup>28</sup> In Homeric usage it refers to sentries.<sup>29</sup> Note that these are all references to activities and roles, not to offices in Athenian law. There are other words in the same semantic field. There is a more technical word for a joint guardian or co-trustee (συνεπίτροπος),<sup>30</sup> but Plato does not use it. Nor does he choose κύριος—a term that would more easily connect, in Athenian law and social practice, with persons having powers and duties resembling those of a trustee.<sup>31</sup> Nor does he use ἑφορος, another word for guardian that already had a political association, being used for the “ephors” or magistrates of Sparta.

For the word Plato does choose, φύλαξ, the English word *guardian* is a perfectly good translation. It nicely slides between the sense of keeping

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<sup>27</sup> Franco Montanari, *The Brill Dictionary of Ancient Greek* (Madeleine Goh & Chad Schroeder eds., 2015) (φύλασσω).

<sup>28</sup> Id. (φύλαξ); cf. Blair Campbell, *Paradigms Lost: Classical Athenian Politics in Modern Myth*, 10 *Hist. Pol. Thought* 189, 209 (1989) (emphasizing “incessant vigilance” for the theme of “guardianship” in Greek political thought).

<sup>29</sup> For example, in Book IX of the *Iliad*, the word appears three times (in two forms). See Homer, *The Iliad* bk. IX, lines 66, 80, 85, at 386, 388 (Loeb Classical Library, T.E. Page et al. eds., A.T. Murray trans., Harvard Univ. Press 7th ed. 1960). Translators vary in their choices, but “sentinels,” “guards,” and “sentries” are typical English renderings. See, e.g., id. at 387, 389 (using “sentinels” in each instance, e.g., lines 65–67: “Howbeit for this present let us yield to black night and make ready our supper; and let sentinels [φυλακτῆρες] post themselves severally along the digged ditch without the wall.”); *The Iliad of Homer* 200 (Richmond Lattimore trans., Univ. of Chicago Press 1951) (using “guards” in line 66, “sentries” in line 80, and “sentinels” in line 85); *The Iliad* 175 (Caroline Alexander trans., Ecco 2015) (using “guards” in each instance).

<sup>30</sup> E.g., 4 Demosthenes, *Orations* 28, *Against Aphobus* II.16, at 70–71 (Loeb Classical Library, A.T. Murray trans., 1936) (giving English translation of “co-trustees”); Montanari, *supra* note 27 (translating συνεπίτροπος as “joint keeper or guardian”).

<sup>31</sup> See Virginia J. Hunter, *Policing Athens: Social Control in the Attic Lawsuits*, 420–320 B.C., at 9–13 (1994) (suggesting stewardship as a rough English equivalent and concluding that being a “kyrios then implies not only trusteeship, possession, and use but can in some cases amount to virtual ownership, leaving the institution fraught with ambiguity”). Adriaan Lanni has described the κύριος:

The oldest man in the family (or, in some cases, his adult son) acted as head of the household (*kyrios*), controlling all the household property and serving as guardian for the women and minor males in the family. Although the *kyrios* had the power to dispose of the family wealth as he wished, there was a strong ideological preference for preserving the ancestral property intact for future generations, and it seems that the *kyrios* could even be prosecuted for dissipating his patrimony.

Adriaan Lanni, *Law and Justice in the Courts of Classical Athens* 21 (2006) (footnotes omitted).

watch over something (*standing guard*) and preserving and maintaining something (*guarding* it). But there is one problem with *guardian* as the English translation, namely that it encourages the identification of Plato's φύλαξ with the *guardian* of contemporary law.

And that is exactly the trap the fiduciary constitutionalists have fallen into. Robert Natelson's work is illustrative. Here is the entirety of his discussion of Plato, with emphasis added to the key clause:

Plato's most widely-read work, the *Republic*, outlined an ideal state governed by philosopher-kings called "guardians," *a word carrying the same fiduciary implications to eighteenth century readers as it does to us today*. According to Plato, the purpose of the state was to promote the interest of the entire society, and the guardian was to subordinate his interest to that purpose. The guardian also had a duty of impartiality: "The object of our legislation," Plato wrote, "is not the welfare of any particular class, but of the whole community." Moreover, Plato's guardian had a certain duty of care, particularly the obligation to equip himself with the knowledge and education necessary to make appropriate decisions; governmental administration was an art that untrained people should not attempt.<sup>32</sup>

To start, Natelson seems to be making a claim about the fiduciary implications of the English word *guardian*. Plato, far-sighted as he was, did not use an English word. Natelson does not analyze what Plato said, nor the alternative lexical possibilities, nor whether there were points of contact between his φύλαξ and Athenian law. Even as an analysis of the English word *guardian* Natelson's claims are unsupported. It is not clear what the fiduciary implications are today of any given use of the word *guardian*. It might have the non-technical sense of "keeper" or the technical sense of someone charged with caring for an orphan or disabled person. The "fiduciary implications" of these two senses would need to be explored. Then the semantic range of *guardian* in the late eighteenth century would need to be explored. Then, in order to justify Natelson's claim, the two semantic analyses would need to be compared—and it would be quite striking if there were no cultural-linguistic change in the "fiduciary implications" of the word. Yet even if one were to establish an absolute identity of late eighteenth and early twenty-first century uses of

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<sup>32</sup> Natelson, *supra* note 1, at 1097 (emphasis added) (footnotes omitted) (quoting Plato, *The Republic* 284–85 (H.D.P. Lee trans., 1961)).

the English word *guardian*, it would be irrelevant for establishing that Plato used φύλαξ in a technical, legal, fiduciary sense.

It may seem that we have selected a particularly weak example of an appeal by a fiduciary constitutionalist to Plato. But that is not so. Leading fiduciary scholars repeatedly rely on Natelson's exposition.

Tamar Frankel, for example, praises "Professor Natelson's impressive work," and notes that her references to Plato "have been derived from" that work.<sup>33</sup>

Ethan Leib, David Ponet, and Michael Serota claim: "Applying the fiduciary principle to government officials has an impressive lineage. The notion that government keeps power in trust for its citizenry dates back to Plato, Aristotle, and Cicero: sovereign institutions were thought to hold citizens' interests in a public trust, constrained by fiduciary standards."<sup>34</sup> The authority cited? Natelson.

Evan Bernick, in a recent article on the Take Care Clause, states: "It is . . . easy to understand why the government-citizen relationship has been conceptualized using a fiduciary framework for centuries."<sup>35</sup> The source? Natelson.<sup>36</sup>

Similarly, in their recent article in the *Harvard Law Review*, Andrew Kent, Ethan Leib, and Jed Shugerman say that "decades of scholarship have traced the idea of public offices as 'trusts'—private law fiduciary instruments—from Plato through Cicero and Locke."<sup>37</sup> For this proposition they cite two older secondary sources on Locke and—as their sole authority to support the classical claim—a recent chapter by Ethan Leib and Stephen Galoob.<sup>38</sup> That chapter states: "The conception that government officers possess their offices in trust for subject-beneficiaries dates to Aristotle, Plato, and Cicero."<sup>39</sup> But this sentence is the entirety of

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<sup>33</sup> Tamar Frankel, *Fiduciary Law* 280 (2011).

<sup>34</sup> Leib et al., *supra* note 1, at 708. They cite two articles by Natelson, not only the one already discussed (*The Constitution and the Public Trust*), but also Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 *Tex. Rev. L. & Pol.* 239, 245 (2007). The latter article does not mention Plato and relies on *The Constitution and the Public Trust* for its conclusions about Aristotle and Cicero.

<sup>35</sup> Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 *Geo. L.J.* 1, 22 (2019).

<sup>36</sup> *Id.* at 22 n.128.

<sup>37</sup> Kent et al., *supra* note 1, at 2119.

<sup>38</sup> *Id.* at 2119 n.35.

<sup>39</sup> Leib & Galoob, *supra* note 1, at 304.

their discussion. As authority for this proposition, Leib and Galoob cite Natelson.<sup>40</sup>

The only writers in the fiduciary constitutionalism space who have recognized the weakness of the argument from Plato are Gary Lawson and Guy Seidman, for they choose to emphasize Cicero (about whom more momentarily) and expressly disclaim reliance on Plato.<sup>41</sup> They say:

The rulers of Plato's ideal state (and we will not make anything here of the standard translation of those rulers as "guardians," because there is no reason to think that Plato meant the term to have legal connotations, or even that there were any relevant Greek legal institutions or concepts to which the term might refer) were expected to rule on behalf of the community rather than themselves—and indeed were expected to live a most, for lack of a better term, Spartan life.<sup>42</sup>

The parenthetical qualification is revealing.

And Aristotle? In the *Nicomachean Ethics*, he describes the ruler as a "guardian of justice."<sup>43</sup> Again the same word is used: φύλαξ. Here Natelson is a little more circumspect in drawing implications and contents himself with summary.<sup>44</sup> Again Natelson is apparently the only source relied on in the literature as establishing the ancient Greek origins of a specifically "fiduciary" understanding of public office.<sup>45</sup>

The key question about classical references to "guardians" is what they imply when unadorned by specific indication of their legal significance. Many words used in law are used in technical senses. Return to the English word *guardian*: it can have a technical legal sense which, as a designation attached to a person, office, or relationship, imports

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<sup>40</sup> Id. at 304 n.2. For the two articles by Natelson cited, see *supra* note 34. Similarly, in their article on self-pardons, Leib and Shugerman claim that "[t]he recent re-discovery of the fiduciary foundations of state authority can trace itself back to Aristotle, Plato, and Cicero," but the only authorities cited are the same two articles by Natelson. See Leib & Shugerman, *supra* note 1, at 464 n.1.

<sup>41</sup> Lawson & Seidman, *supra* note 1, at 36.

<sup>42</sup> Id. (footnotes omitted).

<sup>43</sup> Aristotle, *The Nicomachean Ethics of Aristotle* 158 (J.E.C. Welldon trans., London, Macmillan and Co. 7th ed. 1920) (1892); see also Aristotle, *Aristotle's Nicomachean Ethics* bks. V & X, at 37 (F.A. Paley trans., Cambridge, J. Hall & Son 1872) (describing "the ruler" as "the guardian of what is just").

<sup>44</sup> See Natelson, *supra* note 1, at 1097–99.

<sup>45</sup> See, e.g., Lawson & Seidman, *supra* note 1, at 36–37, 181 n.54; Leib & Galoob, *supra* note 1, at 304 n.2; Leib et al., *supra* note 1, at 708 n.43; Leib & Shugerman, *supra* note 1, at 464 n.1.

prevailing law establishing the incidents of legal guardianship. But the word also has a wider colloquial meaning. A guardian in the technical sense was and is subject to a range of legal duties and liabilities, and is endowed with a set of rights and powers to enable him or her to effectively administer the affairs and property of an incapable ward. A guardian in the colloquial sense is just someone who has the care or protection of another. The Guardians of the Galaxy do not have legally enforceable fiduciary duties.

So: should we understand Plato and Aristotle to have been thinking of something like “guardianship” in a technical or colloquial sense? There is no textual indication of a technical legal meaning. The more plausible interpretation is that they meant to emphasize something more amorphous: that statesmen should recognize that theirs is a calling to statecraft, and that the latter implies a moral undertaking of vigilance,<sup>46</sup> as well as an assumption of moral responsibility for the welfare of members of a polity. Rulers are the sentinels—or, if the term could be used without misunderstanding, one might say the night-watchmen—of the people.

Cicero, renowned for his deep learning in law, is also said by proponents of fiduciary constitutionalism to have advocated a conception of government that is recognizably fiduciary in the juridical sense.<sup>47</sup> In *De Officiis*, invoking Plato, he writes that statesmen have been entrusted with the care of citizens, and that they must respect that trust by acting in citizens’ interests: “For the administration of the government, *like the office of a trustee*, must be conducted for the benefit of those entrusted to

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<sup>46</sup> See Campbell, *supra* note 28, at 209 (“[G]uardianship’ (*nomophylakein*) is one of the oldest and most frequently recurrent themes in Athenian discussions of participation. From time immemorial the Areopagus had been officially designated Guardian of the Laws, a position it had retained through the constitutional reorganizations of Solon and Cleisthenes. . . . Fundamental to Athenian political awareness is the belief that the constitution [sic] requires the citizen’s incessant vigilance if it is to preserve its integrity.” (footnotes omitted)).

<sup>47</sup> Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 *Yale L.J.* 1820, 1822 (2016) (“The idea that fiduciary principles apply to public offices (rather than solely to relationships in private law, where fiduciary norms originate) has a long pedigree, with roots in the writings of Cicero, Grotius, Locke, and *The Federalist Papers*.”); Natelson, *supra* note 1, at 1099–1101. Note, however, that in a forthcoming article Leib and Kent offer a more modest claim, and one with which we agree: “[T]he figurative use of trusteeships for conceiving of public offices can trace back to Roman law ideas . . . .” Leib & Kent, *supra* note 1 (manuscript at 4).

one's care, not of those to whom it is entrusted."<sup>48</sup> Here Cicero uses the word *tūtēla* (from which we derive the English *tutelage*). It has a similar non-technical sense of guarding and keeping as well as a technical sense of being the guardian of a minor.<sup>49</sup> Cicero is indeed making an analogy to a trustee of a person, or a guardian in a technical sense. But it is, expressly, an analogy: *like* the office of a trustee. If Cicero meant to suggest that statecraft entails trusteeship or guardianship in a juridical sense, he of all people would have avoided figurative language.<sup>50</sup>

For fiduciary constitutionalists, it is important to see Cicero as standing in continuity with Plato and Aristotle: "Cicero, of course, was not writing on a blank slate. He expressly took Plato as the jumping-off point for his discussion, folding Plato's rules for governance into the fiduciary law of Rome."<sup>51</sup> But once it is clear that Plato and Aristotle were *not* treating rulers as fiduciaries in a legal sense, the connection cuts the other way. That is, Cicero's use of analogy is entirely consistent with Plato and Aristotle's use of a non-technical Greek term for one who watches over or cares for another. Writing self-consciously in this tradition, and drawing on Plato,<sup>52</sup> Cicero is speaking about the moral virtues and duties of the ruler, not about legally enforceable obligations that are incumbent upon a ruler. Indeed, the latter move would have represented a marked departure from Plato and Aristotle.

Finally, scholars have attributed fiduciary concepts of leadership to John Locke,<sup>53</sup> and David Hume has been said to have "promoted the notion that the king had fiduciary-style obligations."<sup>54</sup> Did they? Again,

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<sup>48</sup> Cicero, *De Officiis* ("On Duties") bk. I, at 86 sect. 85–87 (Walter Miller trans., Macmillan Co. 1913) (emphasis added); see also Cicero, *De Officiis*, in *Ethical Writings of Cicero: De Officiis; De Senectute; De Amicitia, and Scipio's Dream* 1, 54 (Andrew P. Peabody ed. & trans., Boston, Little, Brown, & Company 1887) (1883) ("For, as the guardianship of a minor, so the administration of the state is to be conducted for the benefit, not of those to whom it is intrusted, but of those who are intrusted to their care."); Daniel Lee, "The State is a Minor": Fiduciary Concepts of Government in the Roman Law of Guardianship, in *Fiduciary Government* 119 (Evan J. Criddle et al. eds., 2018).

<sup>49</sup> See 2 *Oxford Latin Dictionary* 2199 (P.G.W. Glare ed., 2012) (*tūtēla*).

<sup>50</sup> For discussion of this and other uses by Cicero of the guardianship analogy, see Lawson & Seidman, *supra* note 1, at 33–37.

<sup>51</sup> *Id.* at 36.

<sup>52</sup> Cicero, *De Officiis* ("On Duties") bk. I, at 87 sect. 85 (Walter Miller trans., Macmillan Co. 1913).

<sup>53</sup> David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 *B.U.L. Rev.* 1249, 1254 (2011) ("John Locke and our nation's founders already understood that public officials are fundamentally fiduciaries for the people . . .").

<sup>54</sup> See Natelson, *supra* note 1, at 1107.

the evidence is thin. Hume refers fleetingly in broad terms to public office as a "trust" and to misconduct in public office as a "breach of trust."<sup>55</sup> Locke's more extensive treatment speaks of a "[f]iduciary [p]ower" and "[f]iduciary [t]rust" having been reposed in legislators, and emphasizes that they are removable by the people where in breach of "trust."<sup>56</sup>

But what is meant by references to trust, breach of trust, and the threat of removal? These are evidently not suggestions that public officials engage in public administration in the manner that trustees are required to administer trusts, subject to equitable supervision, regulation, and remedies. The enforcer, as it were, is not a court exercising equitable jurisdiction, but the people imposing discipline through elections or, *in extremis*, by rebellion.<sup>57</sup> Moreover, express trusts provide for the administration of trust property under the terms of a deed or settlement. Yet public office is not premised on an undertaking pursuant to a deed or settlement transferring property to a trustee for administration on specified terms. And although public administration often involves the administration of public property, the administration of property counts for but a small fraction of the objects of public offices. Hume and Locke can therefore not plausibly be taken to have invoked "trust" in the juridical sense.<sup>58</sup> Rather, they appear to have meant something like what Cicero meant by his reference to trusteeship. As Richard Primus puts it, "Locke was using the trust idea as an illustrative metaphor, not as a source of transposable rules."<sup>59</sup>

There is indeed, then, a recognizable tradition that runs from Plato and Aristotle through Cicero to Locke and Hume. It is not that public officials *are* fiduciaries, but that public officials are, in certain respects, *like* fiduciaries. Public officials should exhibit the other-regarding virtues that an idealized Roman guardian and English trustee were called to exhibit.

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<sup>55</sup> Natelson, *supra* note 1, at 1107 n.124 (citing 2 David Hume, *The History of England from the Invasion of Julius Caesar to the Revolution in 1688*, at 41 (Liberty Fund 1983) (1778); 4 *id.* at 177; *id.* at 374).

<sup>56</sup> John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, in *Two Treatises of Government* 217, 369, 376–77 (London, Awnsham Churchill 1690).

<sup>57</sup> *Id.* at 269 ("[W]ho shall be Judge whether the Prince, or Legislative, act contrary to their Trust? . . . *The People shall be [the] Judge . . .*" (emphasis added)).

<sup>58</sup> See Primus, *supra* note 7, at 382–83 ("[T]he leading modern scholars of Locke's political thought have taken the view . . . that Locke was using the idea metaphorically, to make some general points at a high level of abstraction.").

<sup>59</sup> *Id.* at 383.

Public officials must, as a matter of political morality, exercise their mandates in the interests of the polity in general.

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We wish to underscore that we have no quarrel with this tradition of political theory. We do think that public officials—in republics and otherwise—are morally obligated to serve the interests of the people. Our quarrel is with a literalistic misreading of the tradition. In the hands of skillful rhetoricians, the obligation to serve the interests of the people may be expressed figuratively, with analogies, metaphors, allegories, and parables, as shown by works as varied as Cicero's analogy and Jotham's parable.<sup>60</sup> If we say that a good ruler is like a shepherd or that a bad ruler is like a bramble bush, no one misunderstands. It is serious figurative language, but it is figurative language.

### *B. The Fiduciary Metaphor in the Fiduciary Canon*

Understandably, fiduciary constitutionalists' historical claims are largely centered on parsing constitutional text and deciphering the understandings of the Founders. But they have also sought to ground their project in leading work of fiduciary law and theory—works belonging within the “fiduciary canon,” so to speak.

One of the difficulties with this strategy is reflected in the fact that one must refer to this “canon” in scare quotes—not to highlight the special interpretive use to which a body of work is being put by fiduciary constitutionalists (as was true of the political theory canon) but to highlight the thinness of appeals to fiduciary scholarship as canonical. That is not a knock on the quality of scholarly work in this area; it is just to point out that we have yet to develop the historical perspective to be able to tell what might prove canonical and what might not. And—as we will discuss in Part II—that is because fiduciary law has only recently come to be understood as a field in its own right. Not so long ago, lawyers and judges reasoned not in terms of broad fiduciary principles but in terms of the more particularized expression given to them as matter of trust fiduciary law, corporate fiduciary law, agency fiduciary law, and so on.

The “fiduciary canon” being, then, very much under construction, it is difficult to say what works will with time be deemed to belong within it.

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<sup>60</sup> As recounted in the Book of Judges. Judges 9:7–20.



However, one of the early landmarks in the development of the modern, synthetic understanding of fiduciary law is Paul Finn's celebrated *Fiduciary Obligations*.<sup>61</sup> Finn was instrumental in shaping wider understanding of the field.<sup>62</sup> And, conveniently for the fiduciary constitutionalists who cite him approvingly,<sup>63</sup> Finn wrote several essays advocating a fiduciary conception of government.<sup>64</sup> Affairs of state, Finn, argued, are conducted on a kind of implicit public trust. And, he suggested further, in understanding how public officials ought to act, we would do well to think about the possible adaptation to public administration of broadly fiduciary principles.<sup>65</sup> Thus, Finn articulated a fiduciary ideal of government. It was one that he ruefully acknowledged is honored mostly in the breach, but Finn maintained that it is implied by commitments to popular sovereignty and representative government.<sup>66</sup>

Finn has been celebrated as a model lawyer's lawyer and judge's judge.<sup>67</sup> And, being partly responsible for the development of the modern, synthetic understanding of fiduciary law, one should trust that his ideas about the public law implications of fiduciary principles reflect a concern to avoid distortion of private law. Thus, a claim to be taking up a project

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<sup>61</sup> Paul D. Finn, *Fiduciary Obligations* (1977).

<sup>62</sup> See generally Finn's *Law: An Australian Justice* 1–2 (Tim Bonyhady ed., 2016); see also Joshua Getzler, *Fiduciary Principles in English Common Law*, in *The Oxford Handbook of Fiduciary Law*, supra note 1, at 471, 474 n.11 (referring to Finn's writings as one of the “[l]eading treatments of the modern law”); Paul B. Miller, *New Frontiers in Private Fiduciary Law*, in *The Oxford Handbook of Fiduciary Law*, supra note 1, at 891, 892 (referring to Finn's *Fiduciary Obligations* as “of special importance” to the “development of fiduciary scholarship”).

<sup>63</sup> Leib & Shugerman, supra note 1, at 464 n.7 (listing Finn as a member of the fiduciary constitutionalism “school”); Leib et al., supra note 1, at 703 n.14 (describing their own work, and that of others, as but “a spin on Paul Finn’s earlier insights.”).

<sup>64</sup> E.g., Paul Finn, *Public Trusts, Public Fiduciaries*, 38 *Fed. L. Rev.* 335 (2010) [hereinafter Finn, *Public Trusts, Public Fiduciaries*]; Paul Finn, *Public Trust and Public Accountability*, 3 *Griffith L. Rev.* 224 (1994) [hereinafter Finn, *Public Trust and Public Accountability*]; Paul Finn, *The Forgotten “Trust”: The People and the State*, in *Equity: Issues and Trends* 131 (Malcolm Cope ed., 1995).

<sup>65</sup> Cf. Paul B. Miller, *Principles of Public Fiduciary Administration*, in *Boundaries of State, Boundaries of Rights* 251, 251–70 (Tsvi Kahana & Anat Scolnicov eds., 2016) (highlighting differences between private and public fiduciaries).

<sup>66</sup> Paul Finn, *A Sovereign People, A Public Trust*, in 1 *Essays on Law and Government* 1, 14 (Paul D. Finn ed., 1995) (“[The] inexorable logic of popular sovereignty . . . [is that] the donees of . . . powers under our constitutional arrangements . . . [are] the trustees, the fiduciaries, of those powers for the people[.]”).

<sup>67</sup> Finn's *Law*, supra note 62, at 1–2.

Finn started is, potentially, a powerful way of suggesting the fiduciary bona fides of fiduciary constitutionalism.

But is fiduciary constitutionalism an extension of Finn's project? Did his vision of fiduciary government sound in law or in political morality? And to what extent did Finn contemplate the direct extension of fiduciary duties from private law to public law? The answers: it is not an extension of Finn's project, his vision sounds in political morality, and he did not contemplate this direct extension of private fiduciary law to public law. As we will explain, Finn thinks representative government is inherently fiduciary in a legal-theoretical sense, but he does not suppose that constitutions should be construed as fiduciary instruments. And Finn's conception of fiduciary government, like that of his philosophical forebears (including Locke), sounds normatively in political morality, not in law. And Finn was quite explicit in saying that public fiduciary norms are moral norms and are generally not expressed or otherwise incorporated in justiciable standards of conduct of the sort that constrain private fiduciaries.

In Finn's view, constitutions provide a skeletal structure for a system of government—a system which will, as a matter of social reality and political necessity, be developed within the constraints of a constitution but in ways not determined by it.<sup>68</sup> In democratic systems of government, constitutions enable and support a polity's aspiration to communal life on terms of legality. Again, for Finn, the fiduciary ideal of government is not primarily one that speaks to the text and structure of constitutions; rather, it is an extension of the underlying political morality of representative government that republicanism implies. For the fiduciary ideal to be realized, three conditions must obtain within society and government: (1) recognition of, and respect for, popular sovereignty; (2) recognition that popular sovereignty implies representative government, and that prerogative powers of the state thus belong properly to the people, to be exercised on their behalf by public officials acting as public trustees (i.e., acting in a manner mindful of the representative nature of their offices); and (3) recognition that public office, understood as a *sui generis* kind of "trusteeship," implies that public officials must be accountable in some

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<sup>68</sup> Finn, Public Trust and Public Accountability, *supra* note 64, at 226–27 ("[T]he skeletons of our system of government which are our Constitutions are as notable for what they do not say as for what they do. . . . [I]n the main they leave to assumption and inference the conditions upon which public power is given to our officials and the rights and expectations which the people are entitled to have both in and of the governmental system . . .").

meaningful way to the public for the quality of the representation that they provide.<sup>69</sup>

Finn never suggested that constitutions are fiduciary instruments or that they give rise to a fiduciary law of public office akin to that which applies to private fiduciaries. In early work on the “bleak” question whether public “trusteeship provides an outer limitation upon the uses to which official power can be put,” Finn noted that Australian law and politics had yet to provide an “authoritative answer.”<sup>70</sup> In addressing then-proposed mechanisms for improving the accountability of public officials, Finn considered electoral accountability, mechanisms for reducing partisanship generated by party politics, reform of offices of public ombudsmen and auditors general, reform of the bicameral legislative system, and improved internal supervisory systems within government bureaucracy.<sup>71</sup> In other words, he advocated structural reforms of an entirely familiar sort, but did so for reasons of fiduciary political morality. He did not advocate judicial enforcement of fiduciary duties or judicial review of the validity of the exercise of public powers on fiduciary grounds.

In a recent reflection on the legacy of his work on fiduciary government, Finn is quite explicit about its intended limits. Emphasizing that his invocation of the fiduciary concept was largely metaphorical, sounding in political morality rather than in law, Finn observed that “[t]he aphorism—‘nothing is so apt to mislead as a metaphor’—comes to life here.”<sup>72</sup> He emphasized that in “statutory settings we should be slow to embrace expansively principles drawn from the law of trusts and from fiduciary law so as to channel and control official decision making.”<sup>73</sup> We should be reluctant to draw on fiduciary law because: the robustness of extant principles of statutory construction and practices of judicial review “render resort to trust and fiduciary law for grounds of review largely unnecessary”; judicial review on fiduciary grounds would raise new concerns about democratic legitimacy and institutional competence; and it is “unlikely that the characterisation of the State as a trustee of its powers of government for the people . . . will provide workable criteria upon which to found judicial review of official decision making.”<sup>74</sup> He

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<sup>69</sup> Id. at 227–28.

<sup>70</sup> Id. at 232–33.

<sup>71</sup> Id. at 238–41.

<sup>72</sup> Finn, *Public Trusts, Public Fiduciaries*, *supra* note 64, at 339.

<sup>73</sup> Id. at 335.

<sup>74</sup> Id. at 336.

concludes that juridification of the ideal of fiduciary government is “an unnecessary distraction.”<sup>75</sup>

## II. DISTORTIONS OF FIDUCIARY LAW

Fiduciary constitutionalists support a fiduciary conception of government as a matter of legal construction (specifically, of the U.S. Constitution). One could take the more modest position, approving of a fiduciary conception of government as a matter of political morality. Indeed, one of us has elsewhere endorsed a thin conception of fiduciary government animated by a set of broad principles of political morality that are entailments of the representative character of democratic government.<sup>76</sup> That prior work aims to curb some of the excesses wrought by recent enthusiasm for the idea of fiduciary government. It emphasizes that fiduciary political morality is relatively normatively thin and modest in its scope of application.<sup>77</sup> In articulating broad principles of fiduciary political morality, it also emphasizes that much fiduciary *doctrine* familiar to private lawyers is simply inapt to public administration—to the extent that public law is responsive to fiduciary principles, it takes a doctrinal form that is unique to public law, and in many (most) cases the uptake and enforcement of these norms is left to politics.

While doubtlessly well-intentioned, fiduciary constitutionalism demonstrates the aptness of Finn’s observation that “nothing is so apt to mislead as a metaphor.”<sup>78</sup> In this Part, we show how the allure of the

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<sup>75</sup> Id. at 350–51; see also the comments of Australian High Court Justice Stephen Gageler in his commentary on Finn’s legacy in Stephen Gageler, *The Equitable Duty of Loyalty in Public Office*, in Finn’s Law, *supra* note 62, at 131 (“Finn cautiously drew back from suggesting that either legislative or executive power . . . were to be radically re-conceived as being held on some form of judicially enforceable social trust. A suggestion of that kind would have been in direct opposition to the overwhelming popular commitment to democratic processes of self-government which had led to the establishment of representative and responsible government in the Australian colonies . . .”).

<sup>76</sup> Paul B. Miller, *Political (Dis)Trust and Fiduciary Government* at 223, 227, 241, in *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Paul B. Miller & Matthew Harding eds., 2020); Paul B. Miller, *Fiduciary Representation*, in *Fiduciary Government*, *supra* note 48, at 28, 45, 47–48.

<sup>77</sup> Paul B. Miller, *Political (Dis)Trust and Fiduciary Government* at 223, 227, 241, in *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Paul B. Miller & Matthew Harding eds., 2020); see also Paul B. Miller, *Fiduciary Representation*, in *Fiduciary Government*, *supra* note 48, at 28, 45, 47, 48. For criticism, see Evan Fox-Decent, *Challenges To Public Fiduciary Theory: An Assessment*, in *Research Handbook on Fiduciary Law* 379, 379 (D. Gordon Smith & Andrew S. Gold eds., 2018).

<sup>78</sup> Finn, *Public Trusts, Public Fiduciaries*, *supra* note 64, at 339.

metaphor has misled the fiduciary constitutionalists in how they describe fiduciary law.

*A. The (Relative) Modernity of Fiduciary Law*

One of the most puzzling things about fiduciary constitutionalism is that it invokes a relatively new set of legal constructs to explain a very old legal document—the U.S. Constitution—and what its drafters and ratifiers understood it to accomplish. It is now possible, and increasingly common, to talk of fiduciary law as a unitary field: one organized around a few core concepts.<sup>79</sup> The credit for that goes to pioneers like Finn, along with Deborah DeMott,<sup>80</sup> Tamar Frankel,<sup>81</sup> Gordon Smith,<sup>82</sup> and, more recently, a wider cast of scholars who have provided synthetic accounts of the field.<sup>83</sup> But, while fiduciary law is now a recognizable field in its own right, this is a thoroughly modern development. Indeed, it has taken place only within the last fifty years.

If one were to ask a nineteenth-century lawyer about “fiduciary law” and its significance for our understanding of constitutions, constitutionalism, or representative government, one would likely be met with expressions of bafflement. Our hypothetical jurist might simply reply by asking, “What do you mean by fiduciary law?” Or, perhaps, “Do you mean trust law?”<sup>84</sup>

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<sup>79</sup> See generally Part II: A Conceptual Synthesis of Fiduciary Law, in *The Oxford Handbook of Fiduciary Law*, supra note 1, at 367 (referring to fiduciary law as a unitary field).

<sup>80</sup> Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 *Duke L.J.* 879, 879, 880 (discussing the “law of fiduciary obligation” as a field).

<sup>81</sup> Tamar Frankel, *Fiduciary Law*, 71 *Calif. L. Rev.* 795, 797 (1983) (recognizing “the law that governs [fiduciaries] as a distinct body of policies, principles, and rules”).

<sup>82</sup> D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 *Vand. L. Rev.* 1399, 1400 (2002) (crafting a “unified theory of fiduciary duty”).

<sup>83</sup> See especially the work collected in *Philosophical Foundations of Fiduciary Law* (Andrew S. Gold & Paul B. Miller eds., 2014) and *The Oxford Handbook of Fiduciary Law*, supra note 1.

<sup>84</sup> Indeed, this posture is reflected in a rich and venerable line of Commonwealth cases—beginning with *Kinloch v. Secretary of State for India*, [1882] 7 App. Cas. 619 (HL) 625–26 (appeal taken from Eng.)—which rejects the notion that public officials are trustees in an ordinary sense and, sticking with the specific category of fiduciary relationship that had been invoked by litigants, suggests that public officials should instead be deemed fiduciaries in a “higher”—which is to say, moral—sense.

See also the discussion in Gageler, supra note 75, at 128–29 (“The Court of Chancery did not . . . impose all of the equitable obligations of a trustee on holders of public office merely because they might be described as ‘having . . . a public duty to perform’ . . . . Thus, in 1882, Lord Chancellor Selborne was able to distinguish between two distinct kinds of trusts. The

The difficulty is that fiduciary constitutionalism trades on the modern, synthetic understanding of fiduciary law and what are now understood to be its core concepts. Thus, fiduciary constitutionalists invoke the concept of “fiduciary power” in describing in very general terms the “fiduciary relationship[s]” entailed by government.<sup>85</sup> Likewise, they appeal to generic “fiduciary duties” including a “duty of loyalty” and “duty of care” in analyzing constraints on the exercise of powers attached to public offices, in analyzing the text of the U.S. Constitution, and in analyzing the role-related obligations of officials in various branches of government in upholding the Constitution.<sup>86</sup>

By the light of modern fiduciary law, the invocation of these concepts is perfectly intelligible. But it would have been foreign to an eighteenth-century lawyer precisely because legal thought had not yet achieved a synthetic understanding of fiduciary law. Lawyers of times long gone—from ancient Greece and Rome to eighteenth-century Philadelphia—would have been familiar with features of the legal landscape that are *now* analyzed synthetically in fiduciary terms. For example, they clearly were aware of, and preoccupied with, relationships of representation, trust, and fidelity. But that does not allow one to read back into history the conceptual and doctrinal apparatus of a recently synthesized body of law.

Thus, in summary, one way—arguably the key way—in which fiduciary constitutionalism distorts fiduciary law is by presenting it anachronistically. Fiduciary constitutionalists find fiduciary concepts at work during a period in which the concepts had not yet crystallized. These concepts could not then have been operative in the minds of lawyers and politicians, much less in their efforts to translate competing visions of republican government into the text of the Constitution.

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first were trusts in the ‘lower sense,’ being in respect of ‘matters which are the proper subject of equitable jurisdiction to administer’. The second were trusts in the ‘higher sense’, ‘such as might take place between the Crown and public officers discharging . . . duties or functions belonging to the prerogative and authority of the Crown’. The first were ‘within the jurisdiction of and to be administered by the ordinary Courts of Equity’. The second were not. Trusts of that second kind could be labelled ‘political trusts’.” (footnotes omitted)).

<sup>85</sup> See Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 *Denv. U. L. Rev.* 201, 206 (2007); Leib & Galoob, *supra* note 47, at 1825.

<sup>86</sup> See, e.g., Lawson & Seidman, *supra* note 1, at 130–31; Leib & Galoob, *supra* note 47, at 1846–47; Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 *U. Rich. L. Rev.* 191, 211–32 (2001).

*B. Methods of Identifying Fiduciary Relationships*

Consistent with our concern about the ahistorical invocation of fiduciary concepts is a related concern with the way in which fiduciary constitutionalists place a fiduciary construction on the Constitution. As we shall explain, the manner of construction does not align with then-prevailing, and still-dominant, methods of identifying fiduciary relationships.

Fiduciary constitutionalists deploy different strategies—sometimes in combination—in supporting the claim that the U.S. Constitution founds a fiduciary relationship between the U.S. government and American citizens.<sup>87</sup> One is to argue that the relationship meets a formal definition of the fiduciary relationship, drawing on modern fiduciary law or theory.<sup>88</sup> Another is to argue that the relationship has several of the characteristics of recognized fiduciary relationships—power, discretion, trust, inequality, or vulnerability—and so may be considered fiduciary on that basis.<sup>89</sup> A third is to argue by analogy to any of a number of recognized categories of private fiduciary relationship, suggesting that the

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<sup>87</sup> Although much of the literature will straightforwardly say that the Constitution is, or should be treated as if it were, a fiduciary instrument, the claims in the Harvard article of Andrew Kent, Ethan Leib, and Jed Shugerman are more nuanced. They often sound in analogy. E.g., Kent et al., *supra* note 1, at 2192 (“But our findings here at least suggest that the President—by original design—is supposed to be like a fiduciary . . .”). But sometimes not. They expressly claim to be offering a “fiduciary reading,” *id.* at 2112, 2188, and “fiduciary theory,” *id.* at 2178, 2182, of Article II. This ambiguity, or partial but prudent reticence, can be seen in two sentences in the introduction:

We do not claim that the drafters at Philadelphia took ready-made fiduciary law off the shelf and wrote it into Article II. But we do assert that the best historical understanding of the meaning of the Faithful Execution Clauses is that they impose duties that we today—and some in the eighteenth century as well—would call fiduciary.

*Id.* at 2119. Kent, Leib, and Shugerman also refer to “the fiduciary obligations entailed by the Faithful Execution Clauses.” *Id.* at 2181 (concluding that “the project of fiduciary constitutionalism” is not “misguided,” but that it needs revision because the president’s fiduciary obligations “flow at least as much from the law of public office as they do from inchoate private fiduciary law from England”); see also *id.* at 2190 & n.470 (concluding that “our effort here is not to develop clear rules of constitutional law[,]” while also endorsing “the finding of a fiduciary duty of loyalty in the Faithful Execution Clauses” and finding that “the Constitution clearly imposes this set of fiduciary obligations on the President in Article II”).

<sup>88</sup> Leib et al., *supra* note 1, at 705; Leib & Galoob, *supra* note 47, at 1825–26; Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government’s Fiduciary Duty of Care*, 69 Fla. L. Rev. 1385, 1386 (2017).

<sup>89</sup> Leib et al., *supra* note 1, at 706.

strength of the analogy supports the construction.<sup>90</sup> A final strategy is to treat the relationship as an instantiation of a single category of private fiduciary relationship—a power of attorney, express trust, or relationship of agency.<sup>91</sup>

These strategies of argument are innocuous if the purpose is developing a normative political theory, and so one's aim is simply to show how as a matter of political morality democratic government may be viewed as fiduciary. Political theory draws on other legal constructs—notably, contract—in a metaphorical sense in order to illuminate and address core normative problems of government. But it is another thing to suggest, as the fiduciary constitutionalists do, that these strategies support a fiduciary construction of the Constitution as a matter of *law*.<sup>92</sup> Each strategy is incapable of bearing that weight because each ignores established methods of constituting and identifying fiduciary relationships.

The kind of construction that some fiduciary constitutionalists wish to place on the Constitution and American government—i.e., one according to which its fiduciary nature is fixed and inherent, and was recognized as such at the Founding—is unsupported by then-prevailing law on the formation and identification of fiduciary relationships. Consistent with the relative modernity of fiduciary law, until recently courts had not developed or operationalized a general concept of the “fiduciary relationship.” Thus, courts from the eighteenth century until the late twentieth century did not examine a particular relationship, or general category of relationship, and deem it “fiduciary.” Rather, the prevailing approach was to recognize categories of actor or relationship as presumptively subject to duties that we now construe as fiduciary.<sup>93</sup> Under this status-based method of identifying fiduciary relationships, everything (as a matter of law) turns on the existence and weight of legal authority for the fiduciary construal of a given category of actor or

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<sup>90</sup> Id. at 712–13 (defending their efforts at “translation” from private to public law by means of analogy); Natelson, *The Constitution and the Public Trust*, *supra* note 1, at 1090 (drawing an analogy between trustees and government officials for the purpose of establishing that the latter are subject to a duty of impartiality).

<sup>91</sup> Lawson & Seidman, *supra* note 1, at 3–5 (comparing the Constitution to a power-of-attorney relationship); id. at 112 (discussing relationship of agency); Natelson, *The Constitution and the Public Trust*, *supra* note 1, at 1086–87.

<sup>92</sup> Some readers will not follow us in distinguishing between political morality and constitutional law; to the extent that one integrates political morality and constitutional law, this criticism holds less force.

<sup>93</sup> Paul B. Miller, *The Identification of Fiduciary Relationships*, in *The Oxford Handbook of Fiduciary Law*, *supra* note 1, at 367, 370–73.



relationship.<sup>94</sup> Courts *now* sometimes say that status-based fiduciary relationships merit categorical status because they are “inherently” fiduciary.<sup>95</sup> But for most of its history, fiduciary law did not develop from a shared understanding of the characteristics that make a relationship fiduciary; nor were attributions of fiduciary status based on judicial consensus that these characteristics “inhered in” a given kind of relationship.<sup>96</sup> The law instead worked with settled judgements that certain kinds of relationship were apt for the imposition of duties of loyalty and care.

Because fiduciary constitutionalists are making a claim of general fiduciary status in their construal of American government under the Constitution, they face an immediate and insuperable obstacle in convincing the lawyer and judge that they have a *legal* basis for that claim. A lawyer or judge would rightly ask: in what line of cases, or in what piece of legislation, have lawmakers announced or attributed general fiduciary status to the office(s) or relationship(s)? It will not be enough to make vague allusions to ambiguous language (e.g., of trust or fidelity). Settled attributions of fiduciary status are settled precisely because they have been made clear and unambiguous over time. All of which is just to say that, if one wants to argue that the Constitution and the offices or relationships established under it are fiduciary as a matter of law, there is no escaping the demand for clear and compelling authority for that proposition. Fiduciary constitutionalists do not furnish this authority because they cannot; it is not there. If it were, we would be living under fiduciary constitutionalism and not just debating it as a theoretical matter.

We have said enough about legal arguments that should have been made, but tellingly have not been made, by fiduciary constitutionalists. In light of the foregoing, we can now briefly point out the flaws in each of the four strategies of argument that they *have* used.

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<sup>94</sup> *Id.*; see also Paul B. Miller, *The Idea of Status in Fiduciary Law*, in *Contract, Status, and Fiduciary Law* 25, 35–36 (Paul B. Miller & Andrew S. Gold eds., 2016) (explaining that fiduciary status automatically applies to certain relationships and courts tend not to question this fiduciary characterization).

<sup>95</sup> See, e.g., *French v. First Union Sec., Inc.*, 209 F. Supp. 2d 818, 825 (M.D. Tenn. 2002) (finding that “the investor-stockbroker relationship is an inherently fiduciary relationship”).

<sup>96</sup> Miller, *supra* note 93, at 368–69, 371, 373 (“Over time, fiduciary law has come to encompass an increasing number of kinds of relationship to which authoritative attributions of fiduciary status have been made. . . . Additionally or alternatively, various kinds of relationship are declared fiduciary as a matter of judge-made law.”).

First, general definitions of fiduciary relationships are a feature of modern fiduciary law, but they were not operational in the law at the Founding, and so provide no basis for the claim that the Founders intended to form, or were understood by the ratifiers to have succeeded in forming, fiduciary government *in a legal sense* under the Constitution.<sup>97</sup>

Second, resort to isolated relationship characteristics (e.g., power, discretion, trust, vulnerability) in identifying fiduciary relationships is also a feature of modern fiduciary law; it is a methodology that would have been unknown to the Founders and is, in any event, inapt because it is used to support *ad hoc* identification of fiduciary relationships.<sup>98</sup>

Third, reliance on analogies to support the fiduciary construction of a legal relationship had, under then-prevailing law, no weight save as channeled through status-based identification of fiduciary relationships and, as we have already established, there is no authority for that attribution having been made of American government at or near the Founding.

Fourth and finally, the suggestion that the Constitution is fiduciary in the sense that it instantiates an already recognized type of fiduciary mandate or relationship—for example, a trust or power of attorney—fails for the reason that it is unsupportable analytically (being reductive and distorting of the nature of the Constitution as a legal instrument) and historically (being unrecognized at law as an actual trust, power of attorney, etc.). If it is objected that these familiar fiduciary relationships were meant to have been invoked in a metaphorical rather than literal sense, our point will have been conceded.

### *C. The (Limited) Fiduciary Significance of Mechanisms for Conferring Fiduciary Mandates*

One of the core attractions of fiduciary constitutionalism for its proponents is the thought that it provides resources for alternative interpretations of constitutional text. So, consider now the question of what one can infer about the legal character of mechanisms by which

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<sup>97</sup> Davis, *supra* note 7, at 1150 (“[I]t is far from clear that fiduciary government was a background understanding of *legal* rights at the Founding. When the Founders raised the theory of fiduciary government, they often did so in connection with *political* mechanisms—chiefly impeachment and elections—for holding government officials responsible for breaches of the public trust.”).

<sup>98</sup> See Miller, *supra* note 93, at 373–74; Daniel B. Kelly, *Fiduciary Principles in Fact-Based Fiduciary Relationships*, in *The Oxford Handbook of Fiduciary Law*, *supra* note 1, at 3, 6–11.

fiduciaries receive their mandates from the fact that the mechanism is just that—i.e., a legally effective means by which to confer a fiduciary mandate. How are these mechanisms interpreted and constructed as a matter of judicial practice?

Judging by the fiduciary constitutionalists, one would think that if a mechanism confers fiduciary powers, that fact is the central and defining feature of the mechanism, such that it is to be interpreted or constructed as fiduciary in a thorough-going way, and not just a means by which a fiduciary relationship might be formed. That is the implication of the refrain that the Constitution must be understood as a “fiduciary instrument,”<sup>99</sup> and of comparisons drawn between it and trust deeds, corporate charters, and powers of attorney. The “recognition” that the Constitution establishes and confers “fiduciary” powers on governmental institutions and offices is thought to invite, and indeed, to license, sweeping fiduciary reinterpretation of much of the text.

The problem is that this move is unsupported by judicial practice in the interpretation and construction of fiduciary mandates. Private fiduciaries receive mandates by different mechanisms of authorization. Some receive them under a contract of employment, agency agreement, or consent document. Others are granted fiduciary powers under a will, trust deed, or power of attorney. Still others are invested with fiduciary powers by statute (e.g., one that enables, establishes uniform law for, or regularizes a given kind of fiduciary relationship, organization, or institution). Not infrequently, several mechanisms are jointly implicated in the conferral of a given mandate on a fiduciary, and together define its objects and specify terms relating to fiduciary administration.<sup>100</sup> Each can generate problems of interpretation and construction. A familiar problem in trust law, for example, is that of determining whether language used by a settlor in a trust deed results in the conferral of a trust power (to be exercised subject to fiduciary constraints) or a bare power (which need not be exercised at all), and the difficulty of distinguishing instructions (which, amongst other things, limit the exercise of trust powers) and expression of the settlor’s wishes (which may, but need not, be taken into

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<sup>99</sup> Barnett & Bernick, *supra* note 1, at 20; Natelson, *supra* note 34, at 281; Leib & Shugerman, *supra* note 1, at 477.

<sup>100</sup> Consider, for example, the combined effect of a statute of incorporation, a corporation’s articles of incorporation, and agency-related provisions of an employment contract between the corporation and its officers on the mandates wielded by corporate officers relative to a corporation and its shareholders.

account by the trustee). Are all issues of interpretation and construction of trust deeds, agency contracts, medical consent forms, statutes of incorporation and the like resolved by courts through a “fiduciary” lens, on the basis that the instrument confers a fiduciary mandate? Again, the answer is *no*.

Instruments that are legally effective mechanisms for conferring fiduciary powers do other things, including positing or transferring non-fiduciary powers, rights, duties, privileges, and liabilities, and providing for the creation of an institution, organization, relationship, or transaction that has non-fiduciary as well as fiduciary incidents. Because a given instrument can define non-fiduciary as well as fiduciary facets of a relationship, it is not correct to suggest that *all* of its terms are to be given a fiduciary interpretation because it is a “fiduciary instrument.” A difficult question often arises as to whether a given term—normally, a power—should be interpreted as fiduciary or otherwise, and the question cannot be resolved by urging that it appears in a “fiduciary instrument” (i.e., one which provides for powers that are plainly fiduciary). Rather, the non-fiduciary terms of the instrument will fall to be interpreted and constructed in the usual way, with attention to the language used and its possible meaning(s), the structure of the instrument, the intentions of the parties, and so on.

An implication is that even if the Constitution could be viewed as conferring certain powers on fiduciary terms as a matter of black-letter law, that would not license wholesale fiduciary re-imagining of the text in the manner that some fiduciary constitutionalists have supposed. And that, in turn, means a limited return on investment for the fiduciary constitutionalist: the fiduciary frame of analysis cannot, after all, legitimately be taken to resolve longstanding questions of constitutional interpretation and construction.<sup>101</sup> Just as we sometimes struggle mightily with difficult questions of interpretation or construction of a will or trust deed—questions that admit of no easy or completely satisfactory answer, and so may be seedbeds of disagreement—so too we have struggled to parse vague and ambiguous language in the Constitution.<sup>102</sup> A fiduciary theory of the U.S. Constitution offers no principled way around these difficulties.

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<sup>101</sup> See Davis, *supra* note 7, at 1169.

<sup>102</sup> See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. Pa. L. Rev. 1835, 1836 (2016).

*D. Good Faith in Fiduciary Law*

Fiduciary constitutionalists make much of the amorphous concept of “good faith” in supporting a fiduciary construction of the Constitution (especially Article II).<sup>103</sup> Again there is variation among fiduciary constitutionalists, but generally the concept is used in two ways.

First, some fiduciary constitutionalists point to constitutional language indicating expectations of fidelity or good faith, and conclude that the Founders understood the Constitution to be a “fiduciary instrument.”<sup>104</sup> Thus, the language of good faith is treated as diagnostic of the existence of a fiduciary relationship, or set of relationships, at the core of American government.

Second, many fiduciary constitutionalists suggest that expectations of good faith, held by the Founders and expressed in the Constitution, have specific normative entailments. Among them: that the Constitution gives rise to “fiduciary duties,” including a duty of good faith, that constrain the attitude(s) and behavior of public officers in the exercise of official powers and performance of governmental functions.<sup>105</sup> Thus, a public official whose attitude toward the Constitution is one of apparent hostility or indifference, or whose behavior reveals a privileging of self over office or country, is said to violate a constitutional-fiduciary duty of good faith.

As David Pozen has shown, one of the difficulties with the invocation of good faith in constitutional law and politics lies in deciphering its legal meaning(s) and differentiating it from its valence in political discourse.<sup>106</sup> As a legal concept, good faith is amorphous precisely because it is invoked in a variety of different contexts to signify substantively different expectations of persons acting independently or as parties to a relationship or collective endeavor. Good faith means one thing in respect of the performance of contracts, something else in respect of the exercise of property rights (e.g., in “spite” cases), and something else again in tort law (e.g., in the law of defamation) and in fiduciary law. And that is just

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<sup>103</sup> E.g., Kent et al., *supra* note 1, at 2112, 2118, 2178–79, 2190; Barnett & Bernick, *supra* note 1, at 6, 25, 30, 37. Note that Kent, Leib, and Shugerman describe the President as being “like a fiduciary,” rather than as actually being a fiduciary. Kent et al., *supra* note 1, at 2192. Yet they also conclude that the President has “fiduciary obligations,” *id.* at 2119, and they describe their own work as providing a “‘fiduciary’ reading,” *id.* at 2112, and “[f]iduciary [t]heory” of Article II, *id.* at 2178. For discussion, see *supra* note 87.

<sup>104</sup> Kent et al., *supra* note 1, at 2119, 2179.

<sup>105</sup> See Kent et al., *supra* note 1, at 2112, 2118, 2178–79, 2190.

<sup>106</sup> See generally David E. Pozen, *Constitutional Bad Faith*, 129 Harv. L. Rev. 885 (2016).

private law. There is no reason to suppose less variegation in public law, or that constitutional and other modalities of public ordering simply “borrow as found” one of the varieties of good faith found in private law. Added to this complexity are other challenges generated by the distinctive import of good faith in American political culture. As Pozen acutely observes, self-serving claims of fidelity to constitution and country are routine in contemporary politics, as are mudslinging allegations of bad-faith disregard for the common weal.<sup>107</sup> Pozen points out that, judging by the jurisprudence, good faith has had surprisingly little impact on constitutional interpretation and adjudication.<sup>108</sup> And this should be unsurprising when one considers that casual assertions of good faith and allegations of bad faith have (sadly) become background noise in contemporary politics.

None of this should be viewed as particularly auspicious by those who would base a fiduciary theory of the Constitution in part on language of good faith in and surrounding it. Pozen’s work—which does not draw any “fiduciary” implication one way or another—suggests that notions of good faith, at least at present, fail to supply neutral standards of right conduct for public officials.<sup>109</sup> He shows how one might recover the concept and locate clear attitudinal and behavioral standards within it.<sup>110</sup> But that seems, perhaps now more than ever, a utopian project.

Setting to one side macro issues generated by the unsettled place of good faith in law and politics, does experience with the concept of good faith in fiduciary law support the two core uses to which the concept has been put by fiduciary constitutionalists? It does not.

First, the use of language that states an expectation of good faith should not be treated as diagnostic of the presence of a fiduciary relationship in fiduciary law.<sup>111</sup> And for good reason: expectations of good faith are pervasive in social life. Some of these expectations resonate entirely as a

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<sup>107</sup> *Id.* at 887, 918–21, 925, 929–39.

<sup>108</sup> *Id.* at 918 (noting that “judges have frequently ignored constitutional bad faith”).

<sup>109</sup> *Id.* at 944–47.

<sup>110</sup> *Id.* at 951–54.

<sup>111</sup> A similar point can be made about Lawson and Seidman’s faulting Caleb Nelson for not “recognizing [the] agency-law moorings” of the doctrine that a principal power contains within it incidental powers. Lawson & Seidman, *supra* note 1, at 91. But the doctrine has no such moorings. It does appear in agency law, but also in a wide variety of contractual settings. See, e.g., Samuel L. Bray, “Necessary and Proper” and “Cruel and Unusual”: Hendiadys in the Constitution, 102 Va. L. Rev. 687, 757–58 (2016) (discussing incidental powers in the context of a tenancy at will).

matter of personal or political morality. Others, as we have noted earlier, *are* recognized at law. But the expectations, and the recognition given to them, vary widely. Again: some jurisdictions recognize a general duty of good faith in contract law, or a special duty of good faith (or utmost good faith) in some relational contracts; property law responds to injurious acts of owners that are notionally taken within their rights, but in bad faith, in spite cases; tort law makes inquiry into the *fides* of alleged tortfeasors in certain contexts, as it does under qualified privilege and fair comment defenses to liability for defamation. And we have not even come to fiduciary law. We will say more about good faith in fiduciary law in a moment.

But one can already appreciate why language expressing an expectation of good faith is not treated as diagnostic of fiduciary relationships by courts.<sup>112</sup> These expectations are ignored, and properly so, because their pervasiveness makes it difficult to determine their upshot as pretext for legal categorization of particulars (particular acts, interactions, or relationships on which litigation is focused): again, we have expectations of good faith in relation to all manner of social interactions with others, and questions concerning what those expectations connote, whether they are reasonable, and whether and how they should be recognized at law, can only be answered in a context-sensitive way *after* a decision has been made about categorization of conduct that has been put in issue before a court.

Turning to the question of the normative content of the concept of good faith in fiduciary law by way of addressing the second use to which “good faith” is put by fiduciary constitutionalists, we are again confronted with the wider problem of the ahistorical invocation of legal concepts. Did lawyers at the Founding understand “good faith” to have distinctive meaning—and thus, potentially, normative content or effect—as a general “fiduciary” construct? There is no evidence that they did. And it would be surprising to learn otherwise because here, in contrast to other fiduciary concepts (e.g., the fiduciary relationship, or duty of loyalty), synthetic interpretation is still very much in flux. There continues to be debate whether there is such a thing as a general fiduciary concept of good faith, and if so, what it requires of fiduciaries or signifies about rightful

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<sup>112</sup> Accord Khan & Pozen, *supra* note 7, at 523 (recognizing that “all parties involved in all contracts” are required to “act in good faith toward each other[.]” and so the existence of a good-faith requirement does not prove the existence of a fiduciary relationship).

conduct or wrongdoing by a fiduciary.<sup>113</sup> Even in corporate law, where the concept has received more attention than elsewhere, it has been unclear whether good faith is a fiduciary norm, and if so whether it is properly to be understood as independent or a mere entailment of the duty of loyalty.<sup>114</sup>

What does this mean for the claims that a fiduciary notion of good faith grounded in the Constitution constrains the construction of powers devolved by it, and amounts further to a fiduciary duty conditioning the exercise of these powers? As to the former, it would be a mistake to think that “fiduciary good faith” is a settled concept that has a bearing on the interpretation and construction of powers conferred by the Constitution. If, notwithstanding the cautionary notes we have sounded above, it is meaningful as a matter of *modern* law to talk of “fiduciary good faith” at all, it is as a constraint on the exercise of fiduciary powers. That is, good faith is a norm for the guidance of fiduciaries in the performance of their mandates, not for personal or judicial interpretation of same.<sup>115</sup> But, and this brings us to the latter claim, modern fiduciary law does not yet support the invocation of a general fiduciary *duty* of good faith, and so by implication does not permit one to make broad statements about whether the conduct of public officials exemplifies “fiduciary” bad faith. Of course, consistent with Pozen’s analysis, one can advance arguments

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<sup>113</sup> See, e.g., Richard Nolan & Matthew Conaglen, Good Faith: What Does It Mean for Fiduciaries, and What Does It Tell Us About Them?, in *Exploring Private Law* 319, 319–32 (Elise Bant & Matthew Harding eds., 2010) (explaining a general fiduciary duty of good faith unique to the fiduciary context); see also Andrew S. Gold, The Fiduciary Duty of Loyalty in The Oxford Handbook of Fiduciary Law, *supra* note 1, at 385, 390–91 (claiming that a duty of good faith in the fiduciary context does exist as well as fiduciary loyalty); James Penner, Fiduciary Law and Moral Norms, in The Oxford Handbook of Fiduciary Law, *supra* note 1, at 782, 786–87 (describing how the application of the good faith standard operates in the form of “fiduciary loyalty”).

<sup>114</sup> See Hillary A. Sale, Delaware’s Good Faith, 89 Cornell L. Rev. 456, 494–95 (2004); David Rosenberg, Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach, 29 Del. J. Corp. L. 491, 493–95 (2004); Melvin A. Eisenberg, The Duty of Good Faith in Corporate Law, 31 Del. J. Corp. L. 1, 30 (2006); Mariana Pargendler, Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered, 82 Tul. L. Rev. 1315, 1316–17 (2008); Julian Velasco, How Many Fiduciary Duties Are There in Corporate Law?, 83 S. Cal. L. Rev. 1231, 1257–67 (2010); Leo E. Strine, Jr. et al., Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law, 98 Geo. L.J. 629, 691 (2010) (referring to “the debate about whether there was a free-standing ‘fiduciary duty of good faith’ distinct from the duty of loyalty”).

<sup>115</sup> Notice that the suggestion otherwise is circular: the suggestion being that to the extent that one has been invested with a fiduciary power, a norm of good faith controls the construal of any and all other powers one might have received under a “fiduciary instrument.”



about what counts as constitutional bad faith as a matter of political morality. But here, too, fiduciary constitutionalism will have been brought against the will of its proponents to meet with its destiny as a critical normative theory sounding in political morality, untethered from fiduciary law.

*E. Misstating the Nature and Ambit of Fiduciary Obligation*

Fiduciary constitutionalists have argued that understanding the U.S. Constitution as a “fiduciary instrument” enables one to identify a suite of public “fiduciary duties” including, but extending well beyond, the “duty of good faith” discussed above.<sup>116</sup> We underscore that these duties are presented as having a legal (not merely moral) and fiduciary nature (rather than, say, being norms enforced by regulation, criminal law, or the discipline of politics). Thus, the emphasis on the similarity between public and private “fiduciary” duties.<sup>117</sup> As we will explain, many of the claims that fiduciary constitutionalists make about public “fiduciary duties” misrepresent or ignore important features of the law on the nature, ambit, and enforcement of fiduciary duties.

On the nature of fiduciary duties, we again find an example of ahistorical invocation of fiduciary law. Fiduciary constitutionalists speak in broad terms of generic fiduciary duties—of loyalty, care, candor, good faith, obedience, and non-delegation—without noticing that this involves reading back into history constructs that did not exist at the Founding and, in some cases, for centuries afterward. As is true of the generic concept of a “fiduciary relationship,” generic formulations of fiduciary duties are an achievement of the synthetic analysis that has shaped modern fiduciary law.<sup>118</sup> Unsynthesized fiduciary law—the proper reference point for any fiduciary constitutionalism that is rooted in text, history, and structure—knew not generic fiduciary duties but rather particular duties imposed on particular actors whom we now call fiduciaries: duties of loyalty and care *of trustees, of directors, of agents*, and so on. Adjusting for history means that the frame of analysis apt to fiduciary constitutionalism is a level down: reference should be made to the duties of trustees, directors, agents, and guardians (and, consistent with fiduciary constitutionalism’s

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<sup>116</sup> See, e.g., Lawson & Seidman, *supra* note 1, at 47 (identifying a “duty to account,” a “duty of loyalty,” a “duty to follow instructions,” and a duty to “stay within the scope of granted authority”).

<sup>117</sup> *Supra* note 90.

<sup>118</sup> See generally The Oxford Handbook of Fiduciary Law, *supra* note 1.

emphasis on the Founding, the starting point might be on these duties as they stood in late eighteenth-century law).

The difference in historical frame of reference is, again, one that makes a difference to the plausibility of fiduciary constitutionalism. First, the standards of conduct through which “fiduciary” duties were expressed and enforced differed significantly between and across categories of relationship.<sup>119</sup> Second, courts did not invoke a generic conception of the duties or associated standards. Thus, *if* fiduciary constitutionalists were to be able to locate fiduciary duties in the Constitution they would have to do so by construing it as generating a fiduciary mandate of a *particular eighteenth-century type* (e.g., a trust, corporation, or power of attorney) and show that notwithstanding obvious objections<sup>120</sup> some or all of the *duties attached to that type* apply to public officials.

Turn now to the scope of fiduciary obligation. The fiduciary constitutionalism literature gives an impression of breadth—the number and extent of fiduciary duties is extensive. But how many distinctively fiduciary duties are there? The question is difficult to answer because here, too, learned opinion is unsettled.<sup>121</sup> Some think that there is only one fiduciary duty: that of loyalty.<sup>122</sup> American law and scholarship recognizes one more: the duty of care.<sup>123</sup> Any other claim as to the fiduciary character of a duty sometimes—even frequently—imposed on fiduciaries lands one in controversy. So here too, the claims of fiduciary

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<sup>119</sup> For comparative historical assessment of the duty of loyalty in trust law and corporate law, see John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?, 114 Yale L.J. 929, 959–62 (2005).

<sup>120</sup> For example, that the object of public fiduciary administration is government as such, rather than a particular matter of administration of another person or another person’s property.

<sup>121</sup> Cf. Davis, *supra* note 7, at 1149 (noting indeterminacy in fiduciary law, and that “[i]mporting fiduciary law into constitutional and administrative law carries this indeterminacy with it”); Paul B. Miller, A Theory of Fiduciary Liability, 56 McGill L.J. 235, 281–86 (2011) (charting the indeterminacy in fiduciary law); see generally Velasco, *supra* note 114 (canvassing the debate in corporate law).

<sup>122</sup> Matthew Conaglen, Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties 59–60 (2010); see also Matthew Conaglen, The Nature and Function of Fiduciary Loyalty, 121 Law Q.R. 452, 452 (2005).

<sup>123</sup> See generally John C.P. Goldberg, The Fiduciary Duty of Care, in *The Oxford Handbook of Fiduciary Law*, *supra* note 1, at 405, 406–07; see also Joshua Getzler, Duty of Care, in *Breach of Trust* 41, 41–42 (Peter Birks & Arianna Pretto eds., 2002); Christopher M. Bruner, Is the Corporate Director’s Duty of Care a “Fiduciary” Duty? Does it Matter?, 48 Wake Forest L. Rev. 1027, 1028 (2013) (noting the uniqueness of the U.S. approach compared to other common law jurisdictions).

constitutionalism skate across thin ice. There is, notably, little indication of doctrinal or scholarly support for the characterization of some of the referenced duties as fiduciary, including the “duty to follow instructions”<sup>124</sup> and the “duty of non-delegation.”<sup>125</sup>

*F. The Enforcement of Fiduciary Duties and Remedial Regimes*

We turn finally to enforcement. If the Constitution gives rise to fiduciary duties, how are those duties enforced? That is, who has standing to enforce them, how, and in what forum; and in what ways are judges to give effect to the duties through remedies or otherwise? It is telling that fiduciary constitutionalists have little to say about these questions.<sup>126</sup> And not just because there is no evidence of enforcement of fiduciary duties grounded in the Constitution. It is because, even if for argument’s sake one were to suppose that the Constitution generates fiduciary-like duties, the claim that they are fiduciary in the sense familiar to private law is belied by the fact they are not amenable to enforcement by civil suit. Other accounts of fiduciary government that view fiduciary norms as principles of political morality (including Finn’s) can and do point out that these norms are instantiated other than by “fiduciary law” (e.g., in public service regulations on conflicts of interest and, especially, in tort and criminal liability for corruption, breach of trust, and misfeasance in a public office).<sup>127</sup> But because fiduciary constitutionalists insist that the

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<sup>124</sup> See, e.g., Natelson, *The Constitution and the Public Trust*, supra note 1, at 1137–42 (describing the debates around the “duty to follow instructions” in writing the constitution); Natelson, *Judicial Review of Special Interest Spending*, supra note 34, at 255–57 (defining the “duty to follow instructions”).

<sup>125</sup> Lawson & Seidman, supra note 1, at 107–29; see also Leib & Shugerman, supra note 1, at 477–84.

<sup>126</sup> See, e.g., Leib & Shugerman, supra note 1, at 485–89 (raising, but not answering other than in a speculative way, questions about what fiduciary constitutionalism implies for remedies); Lawson & Seidman, supra note 88, at 1393 (raising the issue of enforcement mechanisms and then leaving the question “to another day”); Natelson, supra note 34, at 281–82 (avoiding questions of specific remedies in discussing fiduciary constitutionalism).

<sup>127</sup> Finn, *Public Trusts, Public Fiduciaries*, supra note 64, at 337 n.16 (describing actions in tort for deceit, misfeasance and non-feasance in public office, and observing that recourse lay in law rather than equity). On tort and criminal liability, see generally Robert J. Sadler, *Liability for Misfeasance in a Public Office*, 14 *Sydney L. Rev.* 137 (1992) (exploring the role of the tort of misfeasance for actions of public officials); Richard Harwood, *Criminal Misconduct in a Public Office*, 4 *J. Fin. Crime* 172 (1996) (describing the different treatment criminal law gives to private citizens and those in public positions of trust); Mark Aronson, *Misfeasance in Public Office: A Very Peculiar Tort*, 35 *Melb. U. L. Rev.* 1 (2011) (describing the uniqueness of misfeasance in public office amongst common law torts); Donal Nolan, A

Constitution gives rise to “fiduciary duties” that have much in common with private law fiduciary duties,<sup>128</sup> questions of enforcement are hard to avoid.

Even so, it is not easy for fiduciary constitutionalists to answer such questions, for several reasons. Most germane to fiduciary law is the inconvenient fact that the modern, synthetic understanding of fiduciary law has yet to filter down to enforcement. Causes of action for breach of fiduciary duty are almost always channeled through the primary body of substantive law that applies to the fiduciary. Thus, for example, corporate directors are sued for breach of fiduciary duty in accordance with prevailing legislation (the statute under which the entity was incorporated). The same is true of trustees, agents and other fiduciaries. One cannot circumvent the doctrinal “silos” of fiduciary status in seeking enforcement of a fiduciary duty, save and unless—as is inapt here—one does so by claiming to be in an *ad hoc* fiduciary relationship.

The enforcement question can be further developed with respect to remedies. Although some fiduciary constitutionalists take no position on remedies, others make plentiful suggestions. For example, Kent, Leib, and Shugerman, while not committing themselves to any particular remedial regime for the U.S. Constitution, nevertheless say about English and American practice over a broad swathe of centuries: “the enforcement mechanisms we found for commands of faithful execution run the gamut from judicial enforcement via damages, fines, injunctions, bond forfeiture, and criminal penalties, to impeachment and removal from office.”<sup>129</sup> Of course, this remedial smorgasbord was not, and is not, available for any single kind of fiduciary relationship (and Kent, Leib, and Shugerman do not suggest the contrary).

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Public Law Tort: Understanding Misfeasance in Public Office, *in* Private Law and Power 177 (Kit Barker et al. eds., 2017) (defining the tort of misfeasance in public office as within the realm of public law and discussing analogous concepts).

<sup>128</sup> See, e.g., Kent et al., *supra* note 1, at 2188 (“Our findings vindicate what we have previously called the ‘fiduciary reading . . . of Article II’ because the three major propositions we identify as the substantive original meaning of faithful execution—a subordination of the President to the laws, barring ultra vires action; a no-self-dealing restriction; and a requirement of affirmative diligence and good faith—taken together reflect fundamental obligations that are imposed upon fiduciaries of all kinds.” (quoting Andrew Kent, Ethan Leib & Jed Shugerman, Self-Pardons, Constitutional History, and Article II, *Take Care Blog* (June 16, 2018), <https://takecareblog.com/blog/self-pardons-constitutional-history-and-article-ii> [<https://perma.cc/S5JW-7FGJ>])).

<sup>129</sup> Kent et al., *supra* note 1, at 2120.

Recall that the Constitution is variously said to establish a trust, an agency relationship, or a grant of a power of attorney. But each of these kinds of mandate or relationship had different remedial structures in 1789. And even a presentist focus on contemporary fiduciary law does not solve the problem—today, in 2020, liability is routed through different remedial structures. There is no body of pan-fiduciary remedies to which the fiduciary constitutionalists can appeal. A critical explanation is the different remedial structures of law and equity, including for the categories of fiduciary relationship that grow out of equity or out of law. Consider, for example, the paradigms of trust and agency.

The remedial structure of contemporary agency law has been described this way:

Agency was developed primarily by the courts of law, not the courts of equity. This background has shaped the remedies in agency law in important ways. Consider three.

First, because principals and third parties could sue agents at law, there have traditionally been juries in agency, and these juries could—as is typical with legal claims—award punitive damages. There is thus no controversy about punitive damages in agency. Nor is there any doubt about whether a legal restitutionary remedy is available against an agent.

Second, agency tends to put more emphasis on self-help remedies. In recounting a principal's remedies against an agent, Deborah DeMott begins with self-help: "For starters, the self-help response of terminating the relationship with the agent may prove wise, regardless of its legal aftermath." That response makes sense in the agency context, because the principal tends to be present, uncowed, and able to assert control. Self-help plays a smaller role in equity, which has a long history of helping those who could not help themselves, including beneficiaries who have been cheated by fiduciaries and remain at their mercy.

Third, while trust law was shaped more by suits by beneficiaries against trustees, agency law was shaped more by suits by third parties against principals for the acts of their agents. That difference in the paradigm case meant that for agency the concern was less with performing duties (the perspective of the principal), and more with

allocating losses (the perspective of the injured third party). And losses, of course, are a central concern of tort law.

Agents tend not to have deep pockets. The central question has therefore been the liability of the principal. Thus attention was given, early and often, to the circumstances in which a third party could obtain punitive damages against a principal for the acts of an agent.

Because the remedial concerns of agency have tended to align with those of tort, it is unsurprising that agency tends to outsource the development of its remedial principles. Thus the Restatement (Third) of Agency speaks the language of fiduciary duties, yet those duties do not shape the available remedies to the same extent as in trust law and in fiduciary law more generally. Instead that Restatement looks to the law of tort and the law of restitution to determine the basis for its remedies.<sup>130</sup>

At each one of these points the remedial structure of contemporary trust law is completely different. Trust law was developed in equity.<sup>131</sup> There is no jury for a suit alleging a breach of fiduciary duty by a trustee,<sup>132</sup> and the traditional position is that in trust law there are no punitive damages and no punishments.<sup>133</sup> By contrast, what are available are specifically equitable remedies such as accounting for profits, equitable compensation, and constructive trust.<sup>134</sup> Self-help is minimal—instead, judicial enforcement is much more central, including the courts' exercise of supervisory jurisdiction over trustees.<sup>135</sup> And the paradigm case is not

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<sup>130</sup> Samuel L. Bray, *Fiduciary Remedies*, in *The Oxford Handbook of Fiduciary Law*, supra note 1, at 449, 460–61 (quoting Deborah A. DeMott, *Fiduciary Principles in Agency Law*, in *The Oxford Handbook of Fiduciary Law*, supra note 1, at 23, 38) (footnotes omitted).

<sup>131</sup> See Sir John Baker, *An Introduction to English Legal History* 215 (5th ed. 2019) (including the trust among equity's "permanent additions to the law which survived the abolition of" the Court of Chancery); John H. Langbein, *What ERISA Means by "Equitable"*: The Supreme Court's Trail of Error in *Russell, Mertens*, and *Great-West*, 103 *Colum. L. Rev.* 1317, 1320 (2003) ("The trust remedy tradition grew up in equity and remains, in the words of the *Restatement of Trusts*, 'exclusively equitable.'" (quoting *Restatement (Second) of Trusts* § 197 (1959))).

<sup>132</sup> See Samuel L. Bray, *Equity and the Seventh Amendment* 22 (February 1, 2019) (unpublished manuscript) (on file with authors).

<sup>133</sup> See Samuel L. Bray, *Punitive Damages Against Trustees?*, in *Research Handbook on Fiduciary Law*, supra note 77, at 201, 202 ("The rule is that punitive damages are *not* available against trustees, with an exception for 'the egregious case.'" (quoting the *Restatement (Third) of Trusts* § 100 cmt. d (2003))).

<sup>134</sup> See Bray, supra note 130, at 451–58.

<sup>135</sup> *Id.* at 460.

a suit by a third-party, but rather a suit by (or on behalf of) a victimized beneficiary.<sup>136</sup> In short, “fiduciary law” contains quite different remedial structures: the equitable structure of trust law and the legal structure of agency law.

The fiduciary constitutionalists recognize the importance of remedies to their project. But they are also unwilling to be pinned down.

Lawson and Seidman, for example, note the limitations on suits against the Crown<sup>137</sup> and shy away from confronting the question of what remedies are available to enforce the fiduciary duties they find in the Constitution.<sup>138</sup> Leib and Shugerman are similarly reticent to commit. In a recent article they spend several pages discussing possible remedies for a violation of fiduciary duty by the President, including approaches they call “literalist,” “analogical,” and “translational.”<sup>139</sup> They recognize room for creativity and development in the remedies for those who think the Constitution is “like” a fiduciary document or should be translated as a fiduciary document. For the literalist, though, they offer a list. They say: “Public fiduciary duties, then, can have straightforward (and literal) juridical applications with fairly conventional remedies one would see in the private law: constructive trusts, accounting, injunctions, and damages with a view to disgorgement.”<sup>140</sup> Even so, Leib and Shugerman are unwilling to be pinned down, and they end their discussion of remedies with this note of hesitation: “This isn’t the place to perfect the design of remedies for public fiduciary default. That conversation will surely get richer as the project of fiduciary constitutionalism continues after Lawson and Seidman’s contribution to this important enterprise.”<sup>141</sup>

Because there are different remedial regimes for different kinds of fiduciary relationships, the question of remedy cannot be separated and postponed. Indeed, this failure to identify a remedial regime has upstream

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<sup>136</sup> Cf. *id.* at 461 (“Self-help plays a smaller role in equity, which has a long history of helping those who could not help themselves, including beneficiaries who have been cheated by fiduciaries and remain at their mercy.”).

<sup>137</sup> See Lawson & Seidman, *supra* note 1, at 133.

<sup>138</sup> *Id.* at 133–34 (“We do not need to decide here whether, for example, a writ of mandamus will properly lie against the president. It is enough for us to say that the president is not above the law and to move on, leaving questions of enforcement mechanisms (if any) to another day.”).

<sup>139</sup> See Leib & Shugerman, *supra* note 1, at 485.

<sup>140</sup> *Id.* at 487.

<sup>141</sup> *Id.* at 489; see also Leib & Kent, *supra* note 1 (manuscript at 6 n.15) (including among the remedies for violations of a public trust “impeachments, forfeitures of office, fines, accountings, and other approaches to enforcement”).

consequences for the identification of the fiduciary relationship. If the Constitution did establish determinate fiduciary duties of a kind already known to the law, these would entail similarly known remedies. But if the remedies are unclear, there is further reason to doubt the existence of a fiduciary relationship in the first place.

### III. DISTORTIONS OF CONSTITUTIONAL INTERPRETATION

Some claims about the Constitution present themselves as illuminations—they help us understand what we have been doing all along. Others present themselves as changes of course—they help us see that we should be doing things differently. The modern claims of fiduciary constitutionalism are primarily of the latter sort. If the fiduciary constitutionalists are right, there are newly unearthed duties for government officers—duties sounding in law, and not only in political morality.

This Part considers two of these claims. The first is that the text of the Constitution expressly incorporates fiduciary concepts; the second is that the structure of the Constitution taken as a whole reinforces that it is a fiduciary instrument. This Part also tests these claims as a matter of constitutional tradition—if the Constitution were understood at the Founding as a fiduciary instrument giving rise to legally enforceable fiduciary duties, one would expect those duties to have been enforced. Why were they not enforced and not noticed in the mainstream of the constitutional tradition? Even as we make these critiques, we wish to underscore the pluralism within fiduciary constitutionalism: fiduciary constitutionalists have different perspectives on interpretive methodology, different degrees of confidence about their historical reconstructions, and different views on how easily one can move from the law of 1789 to the law of today.

#### *A. Claims About the Constitution*

A core claim of fiduciary constitutionalism is that the U.S. Constitution, not just as interpreted now but as understood in its original context, is fiduciary in a juridical sense. “The Constitution is a fiduciary instrument,” according to Gary Lawson and Guy Seidman, “and that



characterization carries interpretative consequences in its wake.”<sup>142</sup> Others, such as Andrew Kent, Ethan Leib, and Jed Shugerman do not say the Constitution was a fiduciary instrument, but they still say that Article II should be given a “fiduciary reading.”<sup>143</sup> The bases for such conclusions are standard sources and modalities of constitutional interpretation. These include the text, the historical context in which it was adopted (including legal backdrops<sup>144</sup>), antecedents such as state constitutions and colonial charters, and the structure of the document as a whole. The reliance on these sources suggests a kind of interpretive normalcy, supporting the notion that the claims of the fiduciary constitutionalists are unoriginal.<sup>145</sup>

With respect to the text of the Constitution, the fiduciary constitutionalists have taken two tacks. The first is to focus on specific words or phrases that are said to have a fiduciary connotation. An example is the work of Leib and colleagues. They point to the appearance of the word *faith* and its cognates in the Constitution and presidential oath of office.<sup>146</sup> The President is required to “faithfully execute” the office of President and take care that the laws of the United States are “faithfully executed.”<sup>147</sup> These requirements are subtly different (active versus

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<sup>142</sup> Lawson & Seidman, *supra* note 1, at 11. On the qualifications Lawson and Seidman make, and the tension between those qualifications and the impetus of the argument, see Primus, *supra* note 7, at 400, 402–04; see also Barnett & Bernick, *supra* note 1, at 20 (“The Constitution’s structure and content disclose its character as a fiduciary instrument.”); Leib et al., *supra* note 1, at 709 (“The founding generation understood the relationship between government and governed as a fiduciary one—and those who debated and ultimately adopted the Constitution assumed that it would promote fiduciary standards, controlling the political discretion of officeholders. . . . The Constitution was therefore designed as ‘the fiduciary law of public power,’ delimiting governmental authority and directing it to the benefit of the citizen-beneficiaries.” (quoting Frankel, *supra* note 33, at 279)); Ethan J. Leib, Michael Serota, & David L. Ponet, *Fiduciary Principles and the Jury*, 55 Wm. & Mary L. Rev. 1109, 1122 (2014) (“The founders of the United States . . . also recognized the relevance of fiduciary principles as applied to the public political sphere. Indeed, the U.S. Constitution was thought to be designed as the fiduciary law of public power, delimiting governmental authority and directing it to the benefit of citizen-beneficiaries.” (footnotes omitted)).

<sup>143</sup> For discussion, see *supra* note 87; see also Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution’s Incompatibility Clause*, 4 Duke J. Const. L. & Pub. Pol’y 107, 117 (2009) (“I suggest the President is a holder of an Article VI public trust—a public fiduciary.”).

<sup>144</sup> See generally Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1816 (2012) (describing backdrops as “rules of law that aren’t derivable from the Constitution’s text, but instead are left unaltered by the text, and in fact are protected by the text from various kinds of legal change”).

<sup>145</sup> E.g., Lawson & Seidman, *supra* note 1, at 7 (“[W]e make no claim to originality.”).

<sup>146</sup> Leib & Shugerman, *supra* note 1, at 465–69.

<sup>147</sup> U.S. Const. art. II, § 1, cl. 8; *id.* § 3.

passive voice, different objects), and they are susceptible of various readings.<sup>148</sup> But they are regarded by Leib and colleagues as indicating the Founders' understanding that the presidency is a fiduciary office and that the President's duty to execute the laws is a fiduciary one.<sup>149</sup>

The second tack is to focus is on the substantive meaning of a provision, with the suggestion that it evokes or replicates familiar fiduciary norms. An example is the work of Natelson, writing alone and with others, on the Equal Protection Clause. The language in the clause is not quasi-fiduciary. But, Natelson and colleagues offer, it is most plausibly interpreted as fiduciary insofar as it resonates with a general fiduciary norm of impartiality—a norm that, in private law, requires even-handedness in the administration of property for the benefit of multiple beneficiaries.<sup>150</sup> Similarity in the content of a constitutional norm and a fiduciary norm are, then, offered as evidence that the Founders intended the Constitution to be treated as a “fiduciary instrument.”

Proponents of fiduciary constitutionalism also highlight the “fiduciary” language in the constitutions of colonies and states that preceded the ratification of the U.S. Constitution. For example, Natelson notes that royal charters establishing U.S. colonies devolved authority on colonial government “on trust,” and that the constitutions of Maryland and other

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<sup>148</sup> On the Take Care Clause, see, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 *Yale L.J.* 541 (1994); Goldsmith & Manning, *supra* note 102; John Harrison, *Executive Power* (June 2019) (unpublished manuscript) (on file with authors); Kent et al., *supra* note 1; see generally Michael W. McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution* (forthcoming 2020) (on file with authors); Julian Davis Mortenson, *The Executive Power Clause*, 167 *U. Pa. L. Rev.* 1269 (2020).

<sup>149</sup> Leib & Shugerman, *supra* note 1, at 466 (“Where does this locution about ‘faithful execution’ come from? The language of ‘faith’ feels like no accident: the concept flows from the Latin *fiducia*—meaning faith or trust—the root of the word for the private law fiduciary. . . . The kind of constraints ‘faithful execution’ imposes turn out to look a lot like what we would say today are core fiduciary obligations . . . [and, after cautioning that ‘faithful execution’ is an element of a ‘law of public office’ rather than a fiduciary principle per se, they continue:] there are reasons to see the constraints of ‘faithful execution’ as of a piece with core fiduciary obligations that attach to private law relationships.”); Kent et al., *supra* note 1, at 2112 (referring to theirs as a “‘fiduciary’ reading of the original meaning of the Faithful Execution Clauses”); *id.* at 2119 (“[T]he best historical understanding of the meaning of the Faithful Execution Clauses is that they impose duties that we today—and some in the eighteenth century as well—would call fiduciary.”).

<sup>150</sup> Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 *B.U. L. Rev.* 415, 435–36 (2014); see also Natelson, *The Constitution and the Public Trust*, *supra* note 1, at 1150–58 (analyzing the duty of impartiality).

states refer to various public officials as “trustees of the public.”<sup>151</sup> Lawson and Seidman note that the Massachusetts constitution of 1780 called all legislative, executive, and judicial officers the “substitutes and agents” of the people, while the Pennsylvania constitution of 1776 called legislative and executive officers the people’s “trustees and servants.”<sup>152</sup> It is suggested, therefore, that colonial charters and state constitutions were model fiduciary constitutions upon which the Founders drew in developing the U.S. Constitution.<sup>153</sup>

As for the writings and recorded statements of the Founders, again fiduciary constitutionalists place considerable emphasis on the use of varied “fiduciary” words and phrases such as *trust*, *faith*, *guardian*, *trustee*, and *power of attorney*. According to Natelson, this language indicates that the Founders, inspired by the political theory canon<sup>154</sup> and the text of various state constitutions, wanted to realize an “ideal [of fiduciary government] with real-world legal implications.”<sup>155</sup>

Indeed, Natelson thinks the Founders envisioned no less than five “fiduciary duties” for public officials. First, their concern that the U.S. Constitution be adhered to is offered as evidence that they intended a fiduciary “duty to follow instructions,” realized through provision for limited powers and the Constitution’s assertion of its own supremacy.<sup>156</sup> Second, their concern that the Constitution be fulfilled through prudent administration is offered as support for a fiduciary “duty of reasonable care,” reflected textually in minimum age and residency requirements for

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<sup>151</sup> Natelson, *The Constitution and the Public Trust*, supra note 1, at 1135 (quoting Md. Const. of 1776, art. IV).

<sup>152</sup> Lawson & Seidman, supra note 1, at 43 (quoting Mass. Const. of 1780, part I, art. 5; Pa. Const. of 1776, ch. I, § IV). Lawson and Seidman also cite constitutional provisions of Maryland and Vermont. *Id.* (quoting Md. Const. of 1776, A Declaration of Rights, § IV; Vt. Const. of 1777, ch. I, § V). Note that the language in these state constitutions does not support the conclusion that they establish judicially enforceable fiduciary duties. First, because the language often invokes different legal regimes—e.g., “trustees and servants”—it is not easily understood as importing substantive and remedial law from one of those regimes. Second, the scholars appealing to these state constitutions have not shown the logical corollary of their conclusions, namely a practice in the state courts of interpreting these provisions as imposing justiciable fiduciary duties.

<sup>153</sup> Natelson, *The Constitution and the Public Trust*, supra note 1, at 1135–36. Lawson and Seidman note the absence of any similar fiduciary provisions in the U.S. Constitution, but consider such provisions to merely be “stat[ing] the obvious,” and so “no great consequences flow from their presence or absence.” Lawson & Seidman, supra note 1, at 44–45.

<sup>154</sup> See *infra* Section I.A.

<sup>155</sup> Natelson, *The Constitution and the Public Trust*, supra note 1, at 1136–37.

<sup>156</sup> *Id.* at 1137–41.

legislators and the President, as well as in the presidential veto power over legislation.<sup>157</sup> Third, the concern that public officials demonstrate loyalty to our Constitution and country is furnished as proof that the Constitution was understood by its ratifiers as imposing a fiduciary “duty of loyalty,” reflected textually in U.S. citizenship and residency requirements for the President and members of Congress.<sup>158</sup> Fourth, the concern to ensure that Americans are treated as equals before the law is said to suggest that the Founders intended a fiduciary “duty of impartiality,” reflected textually in rules mandating total numbers and proportionality of representation within the House and formal equality in the allocation of Senate seats to the states.<sup>159</sup> Fifth, and finally, the concern over the accountability of public officials is said to indicate that the Constitution was understood to impose a fiduciary “duty to account,” reflected textually in the provision made for regular elections, the swearing of oaths, and liability to impeachment and removal from office.<sup>160</sup>

In claiming that the Constitution should be understood as “fiduciary,” the fiduciary constitutionalists are quite clear about their methodological premises. They are working broadly from text and structure as understood at the Founding.<sup>161</sup> Their claims are not that a fiduciary reading of the Constitution is the best as a matter of political morality (in the manner of Ronald Dworkin),<sup>162</sup> nor are they arguing that the Constitution is becoming or should become a fiduciary text through common law development and elaboration (in the manner of David Strauss).<sup>163</sup> Rather,

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<sup>157</sup> *Id.* at 1137, 1142–45.

<sup>158</sup> *Id.* at 1137, 1146–48.

<sup>159</sup> *Id.* at 1150–56.

<sup>160</sup> *Id.* at 1137, 1159–66.

<sup>161</sup> Some fiduciary constitutionalists, such as Gary Lawson, are committed originalists. For some others, originalist premises are perhaps adopted *arguendo* or in order to seek common ground among a wide variety of interpretive approaches. Compare Lawson & Seidman, *supra* note 1, at 6–8 (noting originalist views), with Kent et al., *supra* note 1, at 2116–17, 2192 (framing inquiry into “the original meaning of Article II”), and Leib & Shugerman, *supra* note 1, at 485 (suggesting that their argument shows “how rich an enterprise [fiduciary constitutionalism] can be for originalists and non-originalists alike”). For discussion by Lawson and Seidman about how their “modular project” can be used by those with a range of interpretive views, see Gary Lawson & Guy Seidman, *Authors’ Response: An Enquiry Concerning Constitutional Understanding*, 17 *Geo. J.L. & Pub. Pol’y* 491, 502–03 (2019).

<sup>162</sup> E.g., Ronald Dworkin, *Law’s Empire* (1986).

<sup>163</sup> E.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877 (1996).

they are arguing that the text, understood in its original context, is the basis for fiduciary constitutionalism.<sup>164</sup>

### *B. Critiquing the Constitutional Claims*

The claims made by the fiduciary constitutionalists rest especially on text, structure, and history. A common problem for these claims is a failure to agree on what kind of fiduciary document the Constitution is. As noted above, to some fiduciary constitutionalists it is best thought of as a power of attorney, to others a trust, to others an agency relationship, and to others a generic fiduciary instrument (as if there were such a thing).<sup>165</sup> Some (but only some) of the fiduciary constitutionalists appear to treat that disagreement as inconsequential.<sup>166</sup> But it is a problem for the constitutional argument, for it makes it harder to connect the textual references to fiduciary duties that have a defined shape. A pattern of loose association and analogies is, however, exactly what one would expect if the fiduciary claims were rhetorical, rather than legal.

#### *1. Text: The Linguistic Problem*

One textual technique of the fiduciary constitutionalists is pervasive. They find a word or phrase in the Constitution, and then they find that word or phrase in one or more fiduciary contexts. On the basis of this association, they bring trappings of how the word is used in the fiduciary context to the Constitution.<sup>167</sup> To be fair, this is not the sole basis for the

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<sup>164</sup> For the most part, the fiduciary constitutionalist literature does not commit itself to a particular form of originalism. But see Barnett & Bernick, *supra* note 1. Nevertheless, the orientation toward original understanding is very pronounced. See, e.g., Lawson & Seidman, *supra* note 1; Kent et al., *supra* note 1, at 2116–17 (describing their article as “the first substantial effort to pursue the historical origins of the twin commands of faithful execution and to link these findings to the original meaning of Article II,” and while noting that they are not taking positions on methodological disputes, suggesting that their illumination of “original textual meaning” is useful for many kinds of constitutional interpretation (footnote omitted)); *id.* at 2120–21, 2178–80 (reaching conclusions about the “original meaning” of Article II); *id.* at 2192 (concluding their article with these words: “Now that this original meaning is more clear, the Constitution can be applied more faithfully to the vision of the framers.”).

<sup>165</sup> See *supra* notes 8–11 and accompanying text.

<sup>166</sup> E.g., Lawson & Seidman, *supra* note 1, at 62 (“The fiduciary responsibilities of a trustee and an attorney do not differ in any way material to our project.”).

<sup>167</sup> By the figure of speech *metalepsis*, the writer of a text can use a word or phrase that brings with it a larger context, especially from a canonical work. If a person leaving on a trip says “Of arms and the man I sing,” she may be communicating to her listener a large set of

claims of the fiduciary constitutionalists—they also rely on structural features of the Constitution that are said to resemble the structure of a fiduciary mandate or instrument. That argument is taken up below. But the textual arguments tend to have this pattern: this word or phrase is used in fiduciary contexts; ergo it is “fiduciary.”

The basic technique in this argument from linguistic association is flawed. It is not illuminating to say that “x word is used in fiduciary contexts” unless we know the denominator. The words *and* and *but* are frequently used in fiduciary contexts. But no one would think to say that they are therefore “fiduciary.” Although that is a *reductio*, the same point can be made about a number of the textual snippets that are relied on by the fiduciary constitutionalists.

In their recent article *Faithful Execution and Article II*,<sup>168</sup> Kent, Leib, and Shugerman adduce a substantial amount of evidence that many holders of offices throughout English and American history were compelled to swear oaths, and that one characteristic of these oaths was a requirement of “faithful execution.” The exact wording varied—e.g., “well and faithfully perform their offices”<sup>169</sup>—but the pattern is amply demonstrated. Yet there are problems when they move from the historical examples to adduce their constitutional significance.

First, their evidence of undertakings of faithful execution in connection with offices runs far beyond offices to which legally enforceable “fiduciary” duties attach. Their evidence shows a requirement of faithful execution for everyone from medieval coroners<sup>170</sup> to seventeenth-century surveyors<sup>171</sup> and curates<sup>172</sup> to fence-viewers in colonial Connecticut.<sup>173</sup> These persons all had important, public-facing duties, and they needed to perform them well. Their oaths impressed that upon them.<sup>174</sup> But they were not fiduciaries.

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Odyssey-related meanings. But the interpreter bears the burden of argument. On metalepsis, see Richard B. Hays, *Echoes of Scripture in the Gospels* 10–12 (2016).

<sup>168</sup> Kent et al., *supra* note 1.

<sup>169</sup> Id. at 2149 n.214 (quoting *The Spanish Company* 95, 106 (Pauline Croft ed., 1973)).

<sup>170</sup> Id. at 2142.

<sup>171</sup> Id. at 2149–50.

<sup>172</sup> Id. at 2172.

<sup>173</sup> Id. at 2166–67.

<sup>174</sup> Nathan S. Chapman, *Constructing the Original Scope of Constitutional Rights*, 88 *Fordham L. Rev. Online* 46, 58 (2019) (“Whatever else the oath may do, it at least has the possibility to uniquely pique the decision-maker’s conscience . . .”).

Consider another example (one not given by Kent, Leib, and Shugerman): the antecedent of the modern London cabbie. In 1761, the coronation of King George III was expected to bring massive crowds into the city, and the Privy Council gave orders “to Hackney Coachmen and Chairmen, for regulating their attendance and fares on the day of the Coronation.”<sup>175</sup> There had apparently been an agreement by the hackney coachmen and chairmen to raise their fares on Coronation Day. In response,

the Lords of the Privy Council not only ordered that such persons should be out with their Coaches and Chairs by four o’clock in the morning, but that their duty should be faithfully performed without any advance in their demands, under pain of being proceeded against with the utmost severity.<sup>176</sup>

That a duty should be “faithfully performed” is exactly the sort of command that is fastened upon by Kent, Leib, and Shugerman. Yet the coachmen and chairmen were not bound by the law of trusts or of agency. They were not legally accountable as fiduciaries.

Second, Kent, Leib, and Shugerman glide between reference and sense, between association and meaning. At the conclusion of part of their historical survey they offer a section called “Summing Up.” They say: “This period was also consistent in showing that faithful execution *was often tied to* staying within authority and abiding by the law, following the intent of the lawgiver, and eschewing self-dealing and financial corruption.”<sup>177</sup> True, but “was often tied to” is an argument about associations, about the company that this word keeps. In the next sentence they say: “This tripartite *meaning* of faithful execution is consistent for both English and colonial office-holding.”<sup>178</sup> That is a *non sequitur*. It is

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<sup>175</sup> A Faithful Account of the Processions and Ceremonies Observed in the Coronation of the Kings and Queens of England: Exemplified in that of Their Late Most Sacred Majesties King George the Third, and Queen Charlotte: With All the Other Interesting Proceedings Connected with that Magnificent Festival 35 (Richard Thomson ed., 1820).

<sup>176</sup> Id. at 35–36 n.\*.

<sup>177</sup> Kent et al., *supra* note 1, at 2169 (emphasis added) (footnotes omitted); see also id. at 2118 (“[F]aithful execution was repeatedly *associated* in statutes and other legal documents with true, honest, diligent, due, skillful, careful, good faith, and impartial execution of law or office.” (emphasis added)).

<sup>178</sup> Id. at 2169 (emphasis added); see also id. at 2146 (“In reviewing a large number of oaths, we paid careful attention to which words and concepts were frequently associated with faithful execution in statutes, commissions, and similar documents, and cross-referenced those findings with dictionaries *to help define* faithful execution.” (emphasis added)).

a confusion of meaning and association. And it will not work across the breadth of examples that the authors' account is meant to encompass. It also will not work for the Coronation Day coachmen and chairmen—yes, they were prohibited from enriching themselves by using “surge pricing,” so there is some resonance with fiduciary constraints in the bare fact of their being prevented from profiteering. But this is a minimal and uninformative point of association. The coachmen and chairmen were not subject to any definite fiduciary norm. They were not subject to a norm against self-dealing; a coachman could choose to prefer his cousin over another passenger without any requirement of public-regarding motivation. The coachmen and chairmen were not being warned against *ultra vires* actions.

Now our point is not that the President or any other officer of the United States is like a coachman or a coroner. Nor do we mean to suggest that there is any moral justification or excuse for presidential self-dealing or *ultra vires* action. The point is that Kent, Leib, and Shugerman are taking a command that is used in fiduciary contexts and then drawing the conclusion that it is a reliable marker (at least today) of fiduciary contexts. But the fact that it is also used in contexts that are indisputably *not* fiduciary means it is not necessarily such a marker.

Nor can an *association* of a word with certain things yield the conclusion that it *means* those things. Their “tripartite meaning” of “faithfully execute” is unsound. “Faithful execution” can have different resonances, including the resonances implicit in their “tripartite meaning.” But words do not have a kind of enumerated polysemy that is invulnerable to context. A phrase like “faithful execution” will take on the color of its surroundings, because what is faithful depends on what is faithless, and that will vary somewhat from office to office, and from century to century. The specification of a fixed tripartite meaning for “faithful execution” when it appears in “a legal instrument (such as Article II)”<sup>179</sup> is implausible.

At this point it is worth noting some critical qualifications that Kent, Leib, and Shugerman make. They concede that the Constitution does not cross-reference or incorporate an existing body of fiduciary law.<sup>180</sup> As they put it, “[o]ur historical account does not suggest that private fiduciary law was the background for Article II or that it was incorporated by

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<sup>179</sup> Id. at 2178.

<sup>180</sup> Id. at 2119.



reference.”<sup>181</sup> Therefore, to connect their findings about “the law of offices” with fiduciary law, they rely on resemblance with *today’s* fiduciary law.<sup>182</sup> As noted earlier, they also carefully avoid taking a position on how the “fiduciary” duties of the President should be enforced. That reluctance may seem odd, but it is entirely understandable. They cite many parallels to executive officers having to “take care” (e.g., executives after independence in Vermont, New York, and Pennsylvania, and in colonial Pennsylvania from the 1680s<sup>183</sup>), and to swear oaths requiring faithful execution (e.g., 1636 Pilgrim Code of Law for New Plymouth, Fundamental Orders of Connecticut of 1639<sup>184</sup>). But they cite no examples of breach of these undertakings being made a basis for liability in civil suits. Of course, civil suits are the chief mechanism of fiduciary accountability in modern law. So once again there is a disjuncture between what their Founding-era sources support and what obtains doctrinally and analytically under modern fiduciary law.

What is striking, then, is the disconnect between (1) the rich history that Kent, Leib, and Shugerman present about the incidence of faithful execution, especially in oaths of office; and (2) the meager links between that history and the idea that the President is a fiduciary. We find that rich history compelling, and think it should orient our understanding of the executive power toward a concept of faithfulness that is ethical as well as practical. Moreover, Kent, Leib, and Shugerman’s article is more skillful than other fiduciary constitutionalist histories in recognizing change over time, including their recognition that what we now call “fiduciary law” did not exist as such in 1789. But they nevertheless draw *fiduciary* implications from their evidence about *offices*; despite their concessions

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<sup>181</sup> Id. at 2180. Their attempts to tie English trust law to public law in one footnote are entirely speculative: “Lord Chancellor King, who wrote the *Keech* opinion, was surely influenced by an earlier impeachment trial over which he had presided. . . . Lord Chancellor King is very likely to have been fluent in the political theory of John Locke, his cousin and routine correspondent . . . .” Id. at 2180 n.410.

<sup>182</sup> Id. at 2179 (“Our historical findings about the original meaning of the Faithful Execution Clauses align with core features of *modern fiduciary law* . . . .” (emphasis added)); id. at 2181–82 (“*Today*, we might very well call such a mix of empowerment with office and subordination to principal or purpose fiduciary, reinforcing another dimension of the fiduciary theory of Article II.” (footnote omitted) (emphasis added)).

<sup>183</sup> Id. at 2135; see also id. at 2160 (quoting The Charter of Massachusetts Bay (1629), reprinted in 3 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies 1846, 1852 (Francis Newton Thorpe ed., 1909)).

<sup>184</sup> Id. at 2161.

about private fiduciary law not even being background for Article II,<sup>185</sup> they repeatedly suggest that the President is a fiduciary.<sup>186</sup>

In short, there are certain recurring distortions of constitutional law in fiduciary constitutionalism. One is an interpretive error, taking associations as if they were meanings. This can be seen as an over-aggressiveness in finding terms of art, or as a misuse of the figure of speech *metalepsis*.<sup>187</sup> This error finds in the constitutional text more certainty, more closure, than it can really provide.<sup>188</sup>

Another distortion is the forcing of constitutional history into present-day doctrinal categories. It may be that the fiduciary constitutionalists can argue persuasively that we should “translate” what Kent, Leib, and Shugerman call the law of offices into present-day fiduciary language. Indeed, Leib and Galoob have helpfully isolated a looser, “translational” approach to fiduciary political theory.<sup>189</sup> But that is not the project of Lawson and Seidman, and it is not the project of Kent, Leib, and Shugerman in their joint article. Instead, they aim to tell us what the Constitution means by telling us *what the Constitution meant*. But fiduciary constitutionalism, whatever its attractions as normative political theory, is not a reliable guide to the original meaning of the Constitution. It is a presentist distortion.

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<sup>185</sup> *Id.* at 2180.

<sup>186</sup> *Id.* at 2119 (“[T]he Faithful Execution Clauses are substantial textual and historical commitments to what we would today call fiduciary obligations of the President.”); *id.* at 2120 (“Our history supports readings of Article II of the Constitution that limit Presidents to exercise their power only when it is motivated in the public interest rather than in their private self-interest, consistent with fiduciary obligation in the private law.”); *id.* at 2190 (“[T]he finding of a fiduciary duty of loyalty in the Faithful Execution Clauses is an important development . . . .”); *id.* at 2191 (“[T]he President, like all fiduciaries, has significant discretion . . . to promote the best interests of the people, the ultimate beneficiaries of his fiduciary obligation . . . .”).

<sup>187</sup> On *metalepsis*, see *supra* note 167 and accompanying text.

<sup>188</sup> On the Supreme Court’s unwillingness to date to answer foundational questions about the Take Care Clause, see Goldsmith & Manning, *supra* note 102, at 1853–59.

<sup>189</sup> See generally Stephen R. Galoob & Ethan J. Leib, *The Core of Fiduciary Political Theory*, in *Research Handbook on Fiduciary Law*, *supra* note 77, at 401, 414. Leib has shown interest in this more cautious way of developing a fiduciary theory of government in other work. See, e.g., Ethan J. Leib, David L. Ponet, & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 *Harv. L. Rev. F.* 91 (2013); Ethan J. Leib, David L. Ponet, & Michael Serota, *Mapping Public Fiduciary Relationships*, in *Philosophical Foundations of Fiduciary Law*, *supra* note 83, at 388.

## 2. Structure: The Genre-Quest Problem

The fiduciary constitutionalists also make claims about the structure of the Constitution, namely that it has structural affinities with various kinds of fiduciary instruments, and thus that it *is*—or more cautiously, *can be read as if it were*—a fiduciary instrument. The essential quest is one of classification. The fiduciary constitutionalists are offering a claim about “[c]ategorizing the Constitution.”<sup>190</sup> The thought is that if we can only find out what kind of text the Constitution is, then we will know how to read it.

Behind this aspiration is an intuition about the importance of genre in interpretation. But there is an important limitation on genre analysis. Where there are well-established genres, to which authors feel the need to conform, it can be helpful for interpretation to identify the genre. If we understand the sonnet form and know that the author is part of a community in which there was strong adherence to the form, then we can favor an interpretation in which line nine marks a turning point over one in which the turn would come in line ten.

But genre identification is least helpful when a text is *sui generis*, and when multiple different genres can be plausibly asserted, not because the text is all these different things but because it is none of them. That is true to a remarkable extent for the Constitution. Richard Primus has put this point well in his critique of Lawson and Seidman’s book on fiduciary constitutionalism:

Lawson and Seidman recognize that the analogy between the Constitution and powers of attorney is imperfect. They contend, however, that the Constitution is in substance more analogous to a power of attorney than to any other sort of legal instrument. I am not sure that is right. But even if it were, it would be a fallacy to insist that the Constitution should be interpreted as if it were some other sort of legal instrument to which it is analogous, rather than admitting the possibility that [the] Constitution should be interpreted in the specific and distinctive way appropriate for the specific and distinctive kind of law that it is. As Bishop Butler taught, every thing is what it is, and not some other thing.<sup>191</sup>

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<sup>190</sup> That is the title of chapter four of Lawson & Seidman, *supra* note 1, at 49.

<sup>191</sup> Primus, *supra* note 7, at 388 (footnotes omitted).

When a text does not fit into pre-existing genre categories, one can play with all the points of contact, but it will not produce interpretive closure. The genre identification itself will do no work. Each point of similarity will have to be argued out, and it will then stand for whatever it has been shown to be—neither more nor less simply because this point (and not other points) is held in common with some particular genre. And that is true here: because the fiduciary constitutionalists admit, in their careful moments, that their genre identifications are incomplete and imperfect, they cannot carry more weight than their underlying proof.<sup>192</sup> Overlap with texts in a genre is not enough to bring a text into the genre.

### *C. The Constitutional-Tradition Problem*

The Founders invoked different kinds of fiduciary categories when characterizing public office; Natelson's work shows that they mentioned agency, trusteeship, guardianship, and the power of attorney. And some of the Founders had a sophisticated understanding of law.<sup>193</sup> They knew what agency, trusteeship, guardianship, and the like consisted of. They thus knew that as a *legal* matter these positions were understood differently in law and equity. The nature of the respective mandates of the trustee, agent, and guardian, the mechanisms by which those mandates are constituted, and the powers and objects normally specified for them all varied (and still vary) significantly. Recognizing this, what should one gather from the fact that the Founders referred interchangeably to agents, trustees, and guardians? If the Founders did think the proposed Constitution imposed legally enforceable fiduciary duties, how would that have affected the ratification debates? After ratification, what should we expect to find if the Founding generation thought the Constitution was a fiduciary instrument? And how would the fiduciary concept recur throughout the central debates of our constitutional tradition?

One place to look is not only the ratification debates, but also the major constitutional controversies in the first decade of the new country. Richard Primus has noted that the claims of Lawson and Seidman about

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<sup>192</sup> For example, Lawson and Seidman concede that "[t]he U.S. Constitution rather plainly does not look exactly like an eighteenth-century power of attorney," Lawson & Seidman, *supra* note 1, at 49, and they admit that the dissimilarities "do cabin somewhat the kinds of claims" they can make, *id.* at 55.

<sup>193</sup> A leading example is James Wilson, whose legal practice is summarized in William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. Pa. J. Const. L. 901, 904–14 (2008).

the fiduciary Constitution are belied by a void where all of the contemporaneous debate should be. This is so in the debate at ratification,<sup>194</sup> and as Primus shows it is also true in the subsequent decade: in all of the major constitutional controversies of the 1790s, the fiduciary Constitution is missing in action.<sup>195</sup>

The same point can be made about the claims of Kent, Leib, and Shugerman. In their own words, in the ratification debates “the disputes were mild with regard to the components of Article II central to our project.”<sup>196</sup> But the disputes would not have been mild if the proposal had been that the President and other federal officers had fiduciary duties, particularly if they were enforceable by courts.<sup>197</sup> If any such enforceable duties were an innovation—as they would have been, given the lack of any such suits against the king or the state governors—would they not have drawn remark? Would supporters of ratification not have wanted to point to this fact, in order to allay fears about the new executive? And would supporters of a strong national government not have had concern that state equity courts could entertain claims against the President, and even supervise the President in his performance of his duties, just as they supervised trustees? If not, why not?

When we move past the Founding generation, it is remarkable how little support the fiduciary constitutionalists have found in our constitutional tradition. Consider, for example, Joseph Story. If the fiduciary constitutionalists are right, then Justice Story’s treatises—some of the most learned and certainly some of the most influential in nineteenth-century America—should tell the tale. He wrote the leading

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<sup>194</sup> See Primus, *supra* note 7, at 388–96; see also John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter? A Commentary on “A Great Power of Attorney”: Understanding the Fiduciary Constitution* by Gary Lawson and Guy Seidman, 17 *Geo. J.L. & Pub. Pol’y* 407, 414–15 (2019).

<sup>195</sup> Primus, *supra* note 7, at 396–98; see also Sherry, *supra* note 14, at 452 (“Lawson and Seidman omit any mention of the history of what the Founding generation *did* once the Constitution was ratified and the federal government began operations.”).

<sup>196</sup> Kent et al., *supra* note 1, at 2123.

<sup>197</sup> Kent, Leib, and Shugerman do not commit to any particular non-impeachment enforcement—they say “[w]e do not opine *here* on the way the framers envisioned enforcing the President’s duty of loyalty and avoiding self-dealing.” *Id.* at 2190 (emphasis added). But other work by two of the authors is not so reticent. See Leib & Shugerman, *supra* note 1, at 486–87 (claiming that there is “plenty of caselaw” supporting “straightforward judicial remedies for breaches of public fiduciary obligations” and claiming that “[p]ublic fiduciary duties . . . can have straightforward (and literal) juridical applications with fairly conventional remedies one would see in the private law: constructive trusts, accounting, injunctions, and damages with a view to disgorgement”).

treatise of the century on constitutional law<sup>198</sup>: he should have treated the Constitution as a fiduciary document. But he does not. He does on rare occasions use the language of public trust. But it is metaphorical. For example, he describes the Senate as having a great public trust because to it is committed the trial of impeachments.<sup>199</sup> But it would not be plausible to think that because the Senate has a public trust in the trial of impeachments, Senators may be sued in federal court regarding their verdict. Never does Story describe elected officials of the United States as being subject to the claims and remedies of trust law.<sup>200</sup>

Was this because of any lack of familiarity with trust instruments? That could not be a serious claim: Story also wrote the leading nineteenth-century treatise on equity,<sup>201</sup> which included a brief introduction to trust law.<sup>202</sup> And he wrote the leading nineteenth-century treatises on agency<sup>203</sup> and on bailments.<sup>204</sup> If the U.S. Constitution were a fiduciary document, then Joseph Story would have presented it that way. But he does not.<sup>205</sup>

How could Joseph Story fail to treat the Constitution as a fiduciary instrument? One possibility is that the fiduciary nature of the Constitution was forgotten—but the gap between the Founding and Story's judicial service is too slight. Another is that Story suppressed this key to the

<sup>198</sup> Joseph Story, *Commentaries on the Constitution of the United States with a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution*, 3 vols. (Hilliard, Gray & Co. 1833).

<sup>199</sup> 2 *id.* at 218 ("The [constitutional] convention appears to have been very strongly impressed with the difficulty of constituting a suitable tribunal [for the trial of an impeachment]; and finally came to the result, that the senate was the most fit depository of this exalted trust.").

<sup>200</sup> To the contrary, he emphasized political mechanisms. See *id.* at 70 ("The aim of every political constitution is, or ought to be, first to obtain for rulers men, who possess most wisdom to discern, and most virtue to pursue the common good of the society; and, in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue their public trust. Various means may be resorted to for this purpose; and doubtless one of the most efficient is the frequency of elections." (quoting in part from *The Federalist* No. 57 (James Madison))).

<sup>201</sup> 2 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (Boston, Charles C. Little & James Brown 1839).

<sup>202</sup> *Id.* at 228–45.

<sup>203</sup> Joseph Story, *Commentaries on the Law of Agency, as a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law* (Boston, Charles C. Little & James Brown 1839).

<sup>204</sup> Joseph Story, *Commentaries on the Law of Bailments, with Illustrations from the Civil and the Foreign Law* (Boston, Charles C. Little & James Brown 1846).

<sup>205</sup> Thus Story can be cited by Lawson and Seidman for a "strict view of the authority granted by powers of attorney in the early nineteenth century," Lawson & Seidman, *supra* note 1, at 105–06, even while they fail to note that Story did not view the Constitution in this light.

interpretation of the Constitution; that is hardly plausible, since it would have been remarked, and Story's own incentive would have been to allow each of his branches of learning to inform the others. The final possibility, and the only one that to us seems plausible, is that Story understood that the "fiduciary" descriptions of the Constitution sounded in political morality, not in law.

#### CONCLUSION

There is a long tradition, going back to Plato and Cicero, of speaking of a "ship of state." There is also a body of law that provides specific duties for, and remedies against, the captain and crew of ships: admiralty. Both that political theory tradition and that body of law were known to the Founders. Indeed, there may well be terms in the Constitution that were used in shipping contracts to regulate the conduct of the skipper. Do the President and officers of the United States have duties enforceable in admiralty? An affirmative conclusion is implausible. But an argument somewhat like this one is at the heart of fiduciary constitutionalism.

This increasingly influential, and admittedly diverse, school of thought has much to offer—it promises to add legal constraints at just the right places (wherever you think those might be), while also adding flexibility at just the points where it is needed. But it involves significant distortions of fiduciary law and constitutional law. Fiduciary constitutionalists tend to rely on a modern synthetic understanding of fiduciary law that was simply not available at the Founding. They rely on contestable claims about how fiduciary relationships are identified and how fiduciary mandates are granted and constructed. And they treat as "fiduciary duties" some legal rules that are not duties, and some duties that are not fiduciary.

If the fiduciary constitutionalists (following Finn) had framed their project as an exercise in critical normative political theory, sounding in political morality rather than in law, they would be free to advocate a fiduciary reframing of public law, a new constitutional vision. Or, if they had chosen to ground their constitutional arguments in a living Constitution or an evolving common-law Constitution, they could have argued that we are moving toward a fiduciary Constitution. But they have not done so, at least not yet. They have framed their project as constitutional interpretation grounded in fiduciary law and the Founding era. That is the foundation on which the structure rests.