

Against Fiduciary Constitutionalism

Samuel L. Bray¹ & Paul B. Miller²

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—mistakes about how to identify fiduciary relationships, about the content and enforcement of fiduciary duties, and about the relationship of fiduciary status to good faith. Still other failings sound in constitutional law—linguistic confusions and an impossible attempt to locate the genre of the Constitution in the categories of private fiduciary law. These criticisms suggest fundamental weaknesses in the new and increasingly influential attempt to develop fiduciary constitutionalism.

¹ Professor of Law, Notre Dame Law School.

² Professor of Law, Associate Dean for International and Graduate Programs, and Director of the Notre Dame Program on Private Law, Notre Dame Law School. The authors are grateful for comments from Evan Criddle, Evan Fox-Decent, Joshua Getzler, Andrew Gold, Albert Horsting, Andrew Kent, Gary Lawson, Ethan Leib, Ben McFarlane, Michael McConnell, Richard Re, Lionel Smith, and Larry Solum, as well as attendees at the Third Annual International Fiduciary Law Conference held at Trinity College, Cambridge.

Table of Contents

Introduction	3
I. The Fiduciary Metaphor	7
A. The Fiduciary Metaphor in Political Theory	7
B. The Fiduciary Metaphor in the Fiduciary Canon	14
II. Distortions of Fiduciary Law	18
A. The (Relative) Modernity of Fiduciary Law	19
B. Methods of Identifying Fiduciary Relationships	21
C. The (Limited) Fiduciary Significance of Mechanisms for Conferring Fiduciary Mandates	24
D. Good Faith in Fiduciary Law	26
E. Misstating the Nature and Ambit of Fiduciary Obligation	30
F. The Enforcement of Fiduciary Duties and Remedial Regimes	32
III. Distortions of Constitutional Interpretation	37
A. Claims About the Constitution	37
B. Critiquing the Constitutional Claims	42
1. Text: The Linguistic Problem	42
2. Structure: The Genre-Quest Problem	47
C. The Constitutional-Tradition Problem	49
Conclusion	51

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.³ When Barack Obama was president, some found in the “fiduciary Constitution”⁴ a means by which a court could hold unconstitutional the signature achievement of his administration, the Affordable Care Act.⁵ 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.⁶ The fiduciary Constitution contains multitudes—everything from a handy way for an originalist to justify *Bolling v. Sharpe*⁷ to a way for skeptics of the non-delegation doctrine to rein it in.⁸ 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,

³ 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); Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L. J. 1 (2019); 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 & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardon and Non-Delegation*, 17 GEO. J. L. & PUB. POL’Y 463 (2019); Ethan J. Leib, David L. Ponet, and Michael Serota, *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699 (2013); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004).

⁴ Different scholars writing about 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 3 (titled “*A Great Power of Attorney*”: *Understanding the Fiduciary Constitution*); Kent, Leib, & Shugerman, *supra* note 3, at 2182 (“But where other fiduciary constitutionalists have struggled is in figuring out how to get from analogy to clear legal duty”); Leib & Shugerman, *supra* note 3 (titled *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*); *id.* at 464 (“[Lawson and Seidman’s] book is impressive in laying further groundwork to the project of what we might call fiduciary constitutionalism.”).

⁵ E.g., LAWSON & SEIDMAN, *supra* note 3, at 91-98.

⁶ E.g., Leib & Shugerman, *supra* note 3.

⁷ See LAWSON & SEIDMAN, *supra* note 3, at 151-153, 170-171.

⁸ See Leib & Shugerman, *supra* note 3.

especially Seth Davis and Richard Primus.⁹ And 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,¹⁰ some to an agency relationship,¹¹ some to a power of attorney,¹² and some to an attractively all-purpose generic “fiduciary” construct.¹³ Some draw a straight line between the fiduciary law of 1789 and the present.¹⁴ Others admit there are differences, and thus offer a bevy of qualifications and hedges¹⁵ – but those tend to fall away as soon as the scholars turn to spelling out the “enforceable duties” that they want to see the courts administering.¹⁶ Some of the literature starts out cautious and then gallops

⁹ Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145 (2014); Richard Primus, *The Elephant Problem*, 17 GEO. J. L. & PUB. POL’Y 373 (2019) (reviewing GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION). 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).

¹⁰ See Leib & Shugerman, *supra* note 3, at 477-479.

¹¹ LAWSON & SEIDMAN, *supra* note 3, at 112.

¹² See LAWSON & SEIDMAN, *supra* note 3, at 75.

¹³ Barnett & Bernick, *supra* note 3, at 18-21; see also *id.* at 19 nn.81 & 83; cf. LAWSON & SEIDMAN, *supra* note 3, 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, Ponet, & Serota, *supra* note 3, at 708, 712-713 (recognizing differences among different kinds of fiduciaries, as well as differences between public and private law, but relying on a general “fiduciary principle”).

¹⁴ See, *e.g.*, Barnett & Bernick, *supra* note 3, at 19-21.

¹⁵ *E.g.*, Lawson & Seidman, *supra* note 3, 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 interpretive 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.”); Kent, Leib, & Shugerman, *supra* note 3, at 2190 (disclaiming any intention to offer “clear rules of constitutional law” and retreating from “opin[ing] here on the way the framers envisioned enforcing the President’s duty of loyalty and avoiding self-dealing”). The hedges and qualifications are more pronounced—and thus the conclusions more circumspect—in Kent, Leib, & Shugerman, *supra* note 3 than in some of the other literature. *E.g.*, *id.* at 2190 (“We do not opine here on the way the framers envisioned enforcing the President’s duty of loyalty and avoiding self-dealing.”).

¹⁶ *E.g.*, LAWSON & SEIDMAN, *supra* note 3, 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 (“The Constitution is a fiduciary instrument best categorized as a power of attorney, and that characterization carries interpretive consequences in its wake.”); Leib & Shugerman, *supra*

away; some of it gallops from the start. All of it is ambitious and thoroughly presentist.

This Article offers three main critiques of fiduciary constitutionalism:

First, the fiduciary constitutionalists misdescribe fiduciary law. They pervasively treat concepts as “fiduciary” that are in fact not limited to fiduciary law and instead have much broader application, such as good faith.¹⁷ 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 held in common by many areas of law.

Second, most fiduciary constitutionalists rely on a fictional “fiduciary law” of 1789¹⁸ when there was in fact no such law. 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.¹⁹ As some of the fiduciary constitutionalists concede, there was no pan-subject “fiduciary law” in 1789.²⁰ This abstraction is fatal to fiduciary constitutionalism.

Third, efforts by some fiduciary constitutionalists to escape this problem by analogizing the Constitution to *fiduciary law of the twenty-first century*²¹ cannot

note 3, 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, Leib, & Shugerman, *supra* note 3, 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 the oscillation in Lawson and Seidman’s argument. Primus, *supra* note 9, at 400, 402-404; Suzanna Sherry, *The Imaginary Constitution*, 17 GEO. J. L. & PUB. POL’Y 441, 447-449 (2019) (reviewing GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION). For discussion of a similar tendency in Kent, Leib, & Shugerman, *supra* note 3, *see infra* note 84.

¹⁷ *See infra* Part II.

¹⁸ *E.g.*, Barnett & Bernick, *supra* note 3, at 21 (asserting of the Constitution that “[t]his organization and structure sounds in eighteenth-century fiduciary law”). More cautious on this point is Kent, Leib, & Shugerman, *supra* note 3.

¹⁹ *Contra* LAWSON & SEIDMAN, *supra* note 3, at 62 (“The fiduciary responsibilities of a trustee and an attorney do not differ in any way material to our project.”).

²⁰ *E.g.*, Kent, Leib, & Shugerman, *supra* note 3, at 2179 (“Our historical findings about the original meaning of the Faithful Execution Clauses align with core features of modern fiduciary law”); *id.* at 2180-2181; Leib & Shugerman, *supra* note 3, at 468.

²¹ Leib & Shugerman, *supra* note 3, at 468-469 (“[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

be justified in light of text and historical context. There are of course theories of constitutional interpretation that could allow the courts to create fiduciary duties, i.e., to make a non-fiduciary Constitution into a fiduciary Constitution.²² But that is not the argument the fiduciary constitutionalists make. They rely on text and structure as understood at the Founding.²³ And that does not work 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 both ancient and early modern political thought, of the use of trust and agency metaphors for governance. This figurative language appears in Plato and Cicero, in Locke and Hume.²⁴ 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 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, 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 the fictive “fiduciary law” of 1789, and not present day fiduciary law.

The remainder of this Article proceeds as follows. Part I analyzes the supposed antecedents to 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. Taken together, these critiques show that the historical, philosophical, and legal foundations of fiduciary constitutionalism are not strong. 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 its reception

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.”).

²² *But cf.* Davis, *supra* note 9 (discussing whether that is advisable).

²³ *See infra* notes 146 and 149.

²⁴ *See infra* Part I.A.

has been driven more by the intensity of the demand than by the quality of the supply.

I. THE FIDUCIARY METAPHOR

We will examine below the claims fiduciary constitutionalists make about fiduciary law and constitutional law.²⁵ In this Part, however, 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 are meant 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.

A. The Fiduciary Metaphor in Political Theory

Fiduciary constitutionalists assert that there is a pre-modern historical basis for fiduciary constitutionalism in works of leading philosophers and statesmen – works said by Robert Natelson to belong within the “canon” of great books that influenced the Founders.²⁶ 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.²⁷ Did any of these philosophers espouse fiduciary constitutionalism? As it happens, classical and early modern political theory provide scant support for a *legal* construction of constitutions or of government in fiduciary terms. One can get to modern fiduciary constitutionalism only by extrapolating

²⁵ See *infra* Parts II-III.

²⁶ See Natelson, *supra* note 3, at 1095-1101.

²⁷ E.g., LAWSON & SEIDMAN, *supra* note 3, at 31-40; Kent, Leib, & Shugerman, *supra* note 3, at 2119 (“decades 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 3, at 464 (“The recent re-discovery of the fiduciary foundations of state authority can trace itself back to Aristotle, Plato, and Cicero.”); Leib, Ponet, & Serota, *supra* note 3, at 708 (“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.”).

significantly on writings in the canon – indeed, by extrapolating to such a significant extent that one changes the sense of allusions to fiduciary concepts.

Consider first 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).²⁸ 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, preserve, maintain.”²⁹ 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.”³⁰ Note that these are all references to activities, 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 (συνεπίτροπος),³¹ 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.³²

²⁸ E.g., Plato, *Republic*, II.376c, where “φύλαξ πόλεως” is rendered “guardian of the state” in 1 PLATO, THE *REPUBLIC* 173 (Paul Shorey trans., 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* 371. The instances in the latter passage are translated by Bury as “wardens of the laws” and “a Law-warden.” 2 PLATO, *LAWS* 559 (R. G. Bury trans. 1926).

²⁹ FRANCO MONTANARI, THE *BRILL DICTIONARY OF ANCIENT GREEK*, 2314-2315 (Madeleine Goh & Chad Schroeder eds. English ed., 2015) (φυλάσσω).

³⁰ *Id.* at 2314 (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).

³¹ E.g., Demosthenes, *Against Aphobos*, II.16.

³² 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

For the word Plato does choose, φύλαξ, the English word *guardian* is a perfectly good translation. It nicely slides between the sense of keeping 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."³³

To start with, Natelson is 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 makes no attempt to 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

some cases, his adult son) acted as head of the household (*kurios*), controlling all the household property and serving as guardian for the women and minor males in the family. Although the *kurios* 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 *kurios* could even be prosecuted for dissipating his patrimony." ADRIAAN LANNI, LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS 21 (2006) (footnotes omitted).

³³ Natelson, *supra* note 3, at 1097.

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 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. Work by leading fiduciary scholars repeatedly relies on Natelson’s exposition.

Tamar Frankel, for example, relies on “Professor Natelson’s impressive work,” and admits that her references to Plato “have been derived from” that work.³⁴

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.”³⁵ 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 the fiduciary framework for centuries.”³⁶ The source? Natelson.

Similarly, in their recent article in the Harvard Law Review, Andrew Kent, Ethan Leib, and Jed Shugerman say that “decades of scholarship has traced the idea of public offices as ‘trusts’ – private law fiduciary instruments – from Plato through Cicero and Locke.”³⁷ 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. That chapter contains this

³⁴ TAMAR FRANKEL, FIDUCIARY LAW 280 (2011).

³⁵ Leib, Ponet, & Serota, *supra* note 3, at 708. They cite two articles by Natelson, not only the one already discussed (*The Constitution and the Public Trust*) but also Natelson, *supra* note 30. The latter article does not mention Plato and it relies on *The Constitution and the Public Trust* for its conclusions about Aristotle and Cicero.

³⁶ Bernick, *supra* note 3, at 22.

³⁷ Kent, Leib, & Shugerman, *supra* note 3, at 8.

promising proposition: “The conception that government officers possess their offices in trust for subject-beneficiaries dates to Aristotle, Plato, and Cicero.”³⁸ But that sentence is the entirety of the discussion. And who do Leib and Galoob cite for that proposition? Natelson.³⁹

The only writers in the fiduciary constitutionalism space who seem alert to 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 any reliance on Plato.⁴⁰ 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 any 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.”⁴¹ That parenthetical qualification is revealing.

And Aristotle? In the *Nicomachean Ethics*, he describes the ruler as “the guardian of justice.”⁴² Again the same word is used: φύλαξ. Here Natelson is a little more circumspect in drawing implications, and contents himself with summary.⁴³ Again Natelson is apparently the only source relied on in the fiduciary constitutionalist literature as establishing ancient Greek origins of a specifically “fiduciary” understanding of public office.⁴⁴

The key question about classical references to “guardians” is what they imply when unadorned by specific indication of their legal significance. Many

³⁸ Leib & Galoob, *supra* note 3, at 304.

³⁹ *Id.* at 322 n.2. On the two articles by Natelson cited, see *supra* note 35. Similarly, in their article on self-pardons, Leib and Shugerman claim that “The 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 3, at 464.

⁴⁰ LAWSON & SEIDMAN, *supra* note 3, at 36.

⁴¹ *Id.* Unfortunately, when a leading constitutional law textbook includes a several-page excerpt from Lawson and Seidman, it surgically excises the parenthetical qualification. RANDY E. BARNETT & JOSH BLACKMAN, CONSTITUTIONAL STRUCTURE: CASES IN CONTEXT 28 (2d ed. 2018).

⁴² ARISTOTLE, NICOMACHEAN ETHICS, V.6.5.

⁴³ See Natelson, *supra* note 3, at 1097-1099.

⁴⁴ See, e.g., LAWSON & SEIDMAN, *supra* note 3, at 36-37, 181 n.54; Leib & Galoob, *supra* note 3, at 304, 322 n.2; Leib, Ponet, & Serota, *supra* note 3, at 708 n.43; Leib & Shugerman, *supra* note 3, at 464 n.1.

words used in law are used in technical senses. Return to the English word *guardian*: it can have a technical legal sense according to which, as a designation attached to a person, office, or relationship, it imports 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 an idea that is more amorphous in its import: that statesmen should recognize that theirs is a calling to statecraft, and that the latter implies a moral undertaking of vigilance,⁴⁵ 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.

Now 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.⁴⁶ In *De Officiis*, expressly 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, treating their office “like a guardianship” (or in some translations, “like a trusteeship”).⁴⁷ 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.⁴⁸ Cicero is indeed making an analogy to a guardian in the technical sense. But it is, expressly, an analogy: *like* a guardianship. If Cicero meant to suggest that

⁴⁵ See Campbell, *supra* note 30, at 209.

⁴⁶ Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L. J. 1820, 1822 (2016); Natelson, *supra* note 3, at 1099-1101.

⁴⁷ Cicero, *De Officiis* (“On Duties”), Bk. I, sect. 85; see also 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).

⁴⁸ See 2 OXFORD LATIN DICTIONARY 2199 (P. G. W. Glare ed., 2nd ed. 2012) (*tūtēla*).

statecraft entails guardianship in the juridical sense, he of all people would have avoided figurative language.⁴⁹

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.”⁵⁰ 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 invocation of the office of guardianship of a minor *by 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,⁵¹ Cicero is speaking about the moral virtues and duties of the ruler, not legally enforceable obligations that are incumbent upon a ruler. Indeed, the latter move would have represented a marked departure from Plato and Aristotle.

Finally, David Hume and John Locke have been said to have “promoted the notion that the king had fiduciary-style obligations.”⁵² Did they? Again, 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.”⁵³ Locke’s more extensive treatment speaks of a “fiduciary power” and “fiduciary trust” having been reposed in legislators, and emphasizes that they are removable by the People where in breach of “trust.”⁵⁴

But what is meant by references to trust, breach of trust, by the threat of removal? These are evidently not suggestions that public officials engage in public administration in the manner that trustees are required administer trusts, subject to equitable remedies imposed on trustees. The enforcer, as it were, is not a court exercising equitable jurisdiction, but the People imposing electoral

⁴⁹ For discussion of this and other uses by Cicero of the guardianship analogy, see LAWSON & SEIDMAN, *supra* note 3, at 33-37.

⁵⁰ *Id.* at 36.

⁵¹ Cicero, *supra* note 47, at Bk. I, sect. 85.

⁵² See Natelson, *supra* note 3, at 1107. See also 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.”).

⁵³ DAVID HUME, *THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688* (Liberty Fund 1983), 41, 177, 374 (cited by Natelson, *supra* note 3, at 1107).

⁵⁴ JOHN LOCKE, *OF CIVIL GOVERNMENT: SECOND TREATISE* (Awnsham Churchill 1690), 110, 116-117, 129, 149.

discipline or, *in extremis*, by engaging in popular revolt.⁵⁵ 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.⁵⁶ Rather, they appear to have meant something like what Cicero meant by his reference to guardianship. As Richard Primus puts it, “Locke was using the trust idea as an illustrative metaphor, not as a source of transposable rules.”⁵⁷

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

* * *

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, from Cicero’s analogy to Jotham’s parable.⁵⁸ 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 still 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

⁵⁵ *Id.* at 203-204 (“Who shall be judge whether the prince or legislative act contrary to their trust? ... *The people shall be the judge...*” (emphasis supplied)).

⁵⁶ See Primus, *supra* note 9, at 382-383.

⁵⁷ Primus, *supra* note 9, at 383.

⁵⁸ As recounted in chapter nine of the Book of Judges.

Founders. But to establish intellectual credibility, 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 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. However, one of the early landmarks in the development of the modern, synthetic, understanding of fiduciary law is Paul Finn’s celebrated *Fiduciary Obligations*.⁵⁹ Finn was instrumental in shaping wider understanding of the field.⁶⁰ And, conveniently for the fiduciary constitutionalists who cite him approvingly,⁶¹ Finn wrote several essays advocating a fiduciary conception of government.⁶² 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

⁵⁹ PAUL D. FINN, *FIDUCIARY OBLIGATIONS* (1977).

⁶⁰ FINN’S LAW: AN AUSTRALIAN JUSTICE (Tony Bonyhady ed., 2016); *see also* MATTHEW CONAGLEN, *FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES* (2011); and Paul B. Miller, *New Frontiers in Private Fiduciary Law*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW*, *supra* note 3.

⁶¹ Leib & Shugerman, *supra* note 3, at 464, nt. 7 (listing Finn as a member of the fiduciary constitutionalism “school”); Leib, Ponet, & Serota, *supra* note 3, at 703, n.14 (describing their own work, and that of others, as but “a spin on Paul Finn’s earlier insights.”)

⁶² Paul D. Finn, *Public Trusts, Public Fiduciaries*, 38 FED. L. REV. 335 (2010); Paul D. Finn, *Public Trust and Public Accountability*, 3 GRIFFITH L. REV. 224 (1994); and Paul D. Finn, *The Forgotten ‘Trust’: The People and the State*, in *EQUITY: ISSUES AND TRENDS* 131 (Malcolm Cope ed., 1995).

administration of broadly fiduciary principles.⁶³ 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.⁶⁴

Finn has been celebrated as a model lawyer's lawyer and judge's judge.⁶⁵ 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 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 or constitutional text should be construed as fiduciary instruments; 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 but 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.⁶⁶ In democratic systems of government, constitutions enable

⁶³ Compare Paul B. Miller, *Principles of Public Fiduciary Administration*, in *BOUNDARIES OF STATE, BOUNDARIES OF RIGHT* (Tsvi Kahana & Anat Scolnicov eds., 2016).

⁶⁴ Paul D. Finn, *A Sovereign People, A Public Trust*, in *Essays on Law and Government* (Paul D. Finn ed., 1995), at 14 (“[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.”).

⁶⁵ Bonyhady, *supra* note 64.

⁶⁶ Finn, *Public Trust and Public Accountability*, *supra* note 66, at 226-227 (“[T]he skeletons of our system of government which are our Constitutions are as notable for what they do not

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 meaningful way to the public for the quality of the representation that they provide.⁶⁷

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."⁶⁸ 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.⁶⁹ 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 "the aphorism – 'nothing is so apt to

say as for what they do ... in the main they leave to assumption and inference the conditions upon which public power is given to officials and the rights and expectation which the people are entitled to have both in and of the governmental system.").

⁶⁷ *Id.* at 227-228.

⁶⁸ *Id.* at 232-233.

⁶⁹ *Id.* at 238-241.

mislead as a metaphor’ – comes to life here.”⁷⁰ 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.”⁷¹ 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.”⁷² He concludes that juridification of the ideal of fiduciary government is “an unnecessary distraction.”⁷³

II. DISTORTIONS OF FIDUCIARY LAW

In Part I, we questioned whether the history of political theory has direct antecedents of fiduciary constitutionalism. We showed that the sources relied upon by fiduciary constitutionalists support a fiduciary conception of government as a matter of *political morality* but not a fiduciary rendering of the U.S. Constitution as matter of *legal construction*.

Consistent with this, one of us has elsewhere endorsed a thin conception of fiduciary government understood as a set of broad principles of political morality that reflect entailments of the representative character of democratic government.⁷⁴ That 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 in content and modest in its

⁷⁰ Finn, *Public Trusts, Public Fiduciaries*, *supra* note 66, at 339.

⁷¹ *Ibid.*

⁷² *Id.* at 336.

⁷³ *Id.* at 350; 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 60, at 131 (“Finn cautiously drew back from suggesting that either legislative or executive power were to be radically reconceived 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.”)

⁷⁴ Paul B. Miller, *Fiduciary Representation*, in FIDUCIARY GOVERNMENT, *supra* note 53.

scope of application.⁷⁵ 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 moral norms, 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 more apt to mislead than a metaphor.” In this Part, we show how the allure of the 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.⁷⁶ The credit for that goes to pioneers like Finn, along with Deborah DeMott,⁷⁷ Tamar Frankel,⁷⁸ Gordon Smith,⁷⁹ and, more recently, a wider cast of scholars who have provided synthetic accounts of the field.⁸⁰ But, while fiduciary law is now a recognizable field in its own right, this is a thoroughly modern development. Indeed, it is one that has taken place only within the last 50 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

⁷⁵ *Ibid.* See also Paul B. Miller, *Political (Dis)Trust and Fiduciary Government*, in *FIDUCIARIES AND TRUST: ETHICS, POLITICS, ECONOMICS AND LAW* (Paul B. Miller & Matthew Harding eds., 2020). For criticism, see Evan Fox-Decent, *Challenges to Public Fiduciary Theory: An Assessment*, in *RESEARCH HANDBOOK ON FIDUCIARY LAW* (D. Gordon Smith & Andrew S. Gold eds., 2018).

⁷⁶ See generally *THE OXFORD HANDBOOK OF FIDUCIARY LAW*, *supra* note 3.

⁷⁷ Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 878 (1988).

⁷⁸ Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795 (1983).

⁷⁹ D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399 (2002).

⁸⁰ 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 3.

bafflement. Our hypothetical jurist might simply reply by asking “what do you mean by fiduciary law?” Or, perhaps, “do you mean trust law?”⁸¹

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.⁸² Likewise, they appeal to “fiduciary duties” including the “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.⁸³

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

⁸¹ 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, 625-626 – 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 73, at 128-129 (“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 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’.”).

⁸² Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 206 (2007); Leib & Galoob, *supra* note 46, at 1825.

⁸³ See, e.g., Lawson and Seidman, *supra* note 27; Leib & Galoob, *supra* note 46, at 1846-1847; Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191 (2001) at 211-232.

read back into history the conceptual and doctrinal apparatus of a recently synthesized body of law.

Thus, in summary, one – arguably the key – way in which fiduciary constitutionalism distorts fiduciary law is by presenting it in an ahistorical way, “finding” fiduciary concepts at work during a period in which they had not yet crystallized and so could not 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.

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.⁸⁴ One is to argue that the relationship meets a formal definition of the fiduciary

⁸⁴ 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, Leib, & Shugerman, *supra* note 3, 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, 21811, 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 it that 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”).

relationship, drawing on modern fiduciary law or theory.⁸⁵ 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.⁸⁶ A third is to argue by analogy to any of a number of recognized categories of private fiduciary relationship, with the suggestion that the strength of the analogy supports the construction.⁸⁷ 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.⁸⁸

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 even resolve 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*. 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

⁸⁵ Leib, Ponet, & Serota, *supra* note 3, at 705; Leib & Galoob, *supra* note 46, at 1825-1826; Lawson and Seidman, *supra* note 27, at 1386.

⁸⁶ Leib, Ponet, & Serota, *supra* note 3, at 706.

⁸⁷ *Id.* at 706, 709; Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1090, 1120.

⁸⁸ LAWSON AND SEIDMAN, *supra* note 3; Natelson, *The Constitution and the Public Trust*, *supra* note 3.

presumptively subject to duties that we now construe as fiduciary.⁸⁹ 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 relationship.⁹⁰ Courts *now* sometimes say that status-based fiduciary relationships merit categorical status because they are “inherently” fiduciary. But for most of its history, fiduciary law did not develop from a shared understanding of the characteristics that make a relationship fiduciary, much less were attributions of fiduciary status based on judicial consensus that these characteristics “inhered in” a given kind of relationship. 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 (who, unlike political theorists, are bound by precedent) that they have a *legal* basis for that claim. They 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’ve 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 isn’t 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, by fiduciary constitutionalists in supporting a fiduciary construction of American government under the Constitution. 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.

⁸⁹ Paul B. Miller, *The Identification of Fiduciary Relationships*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3, at 370-373.

⁹⁰ *Ibid.* See also Paul B. Miller, *The Idea of Status in Fiduciary Law*, in CONTRACT, STATUS, AND FIDUCIARY LAW 25 (Paul B. Miller and Andrew S. Gold eds., 2016), at 35-36.

First, general definitions of fiduciary relationships are a feature of modern fiduciary law, 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 believed by contemporaneous lawmakers to have succeeded in forming, fiduciary government *in a legal sense* under the Constitution.

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 only to support *ad hoc* identification of fiduciary relationships.⁹¹

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've 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 kinds of fiduciary relationship were meant to have been invoked in a metaphorical rather than literal sense, our point will have been made.

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 “fiduciary” interpretations of constitutional text. So, consider now the question what one can infer about the legal character of mechanisms by which 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 conventional fiduciary law?

⁹¹ Miller, *supra* note 89, at 373-374; Daniel B. Kelly, *Fiduciary Principles in Fact-Based Fiduciary Relationships*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3, at 6-11.

Judging by the fiduciary constitutionalists, one would think that the fact that a given mechanism confers fiduciary powers is a central or controlling feature of it, such that it is itself to be interpreted or constructed as fiduciary, 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,”⁹² 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 fiduciary law. 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.⁹³ 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 needn’t 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 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 besides, including positing or transferring non-fiduciary

⁹² Barnett & Bernick, *supra* note 3, at 20; Natelson, *supra* note 30, at 281; Leib & Shugerman, *supra* note 3, at 477.

⁹³ 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.

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 say 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 blackletter 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.⁹⁴ 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.⁹⁵ A fiduciary theory of the U.S. Constitution offers no principled way around these difficulties.

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).⁹⁶ Again there is variation among fiduciary constitutionalists, but generally the concept is used in two ways.

⁹⁴ See Davis, *supra* note 9, at 1169.

⁹⁵ See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016).

⁹⁶ E.g., Kent, Leib, & Shugerman, *supra* note 3, at 2178, 2179, 2190; Leib & Shugerman, *supra* note 3, at 2112, 2118 and 2179; Barnett & Bernick, *supra* note 3, at 6, 25, 30, and 37. Note that Kent, Leib, and Shugerman describe the president as being “like a fiduciary,”

First, some fiduciary constitutionalists suggest that language indicating expectations of fidelity or good faith is found in the Constitution, and that the historical record shows that the Founders understood the Constitution to be a “fiduciary instrument.” 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.⁹⁷ 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 the latter from its valence in political discourse.⁹⁸ 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’s just 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

rather than as actually being a fiduciary. Yet they also conclude that the president has “fiduciary obligations,” and they describe their own work as providing a “fiduciary reading” and “fiduciary theory” of Article II. For discussion, see *supra* note 84.

⁹⁷ See Kent, Leib, & Shugerman, *supra* note 3; Leib & Shugerman, *supra* note 3.

⁹⁸ David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016).

bad-faith disregard for the common weal.⁹⁹ Pozen points out that, judging by the jurisprudence, good faith has had surprisingly little impact on constitutional interpretation and adjudication.¹⁰⁰ 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 notions of good faith, at least since weaponized, have failed to supply neutral standards of right conduct for public officials.¹⁰¹ He shows how one might recover the concept and locate clear attitudinal and behavioral standards within it.¹⁰² 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 concept should not be treated as diagnostic of the presence of a fiduciary relationship in fiduciary law.¹⁰³ And for good reason: expectations of good faith are pervasive in social life. Some of these expectations resonate entirely as a matter of personal or political morality. Others, as we have noted earlier, *are* recognized at law. But the underlying 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 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

⁹⁹ *Id.* at 887 and 918-939.

¹⁰⁰ *Id.* at 896-918.

¹⁰¹ *Id.* at 944-947.

¹⁰² *Id.* at 951-954.

¹⁰³ 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 3, 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, 757-758 (2016) (recounting Chief Justice Marshall's discussion of a tenancy at will).

contexts, as it does under qualified privilege and fair comment defenses to liability for defamation. And we haven't even come to fiduciary law. We will say more about good faith in fiduciary law in a moment. But one can already appreciate why expectations of good faith are not treated as diagnostic of fiduciary relationships by courts.¹⁰⁴ 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 – 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 conduct or wrongdoing by a fiduciary.¹⁰⁵ 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 independent or a mere entailment of the duty of loyalty.¹⁰⁶

¹⁰⁴ Accord Khan & Pozen, *supra* note 9, at 523.

¹⁰⁵ See, e.g., Richard Nolan and Matthew Conaglen, *Good Faith: What Does it Mean for Fiduciaries, and What Does it Tell Us About Them?* in EXPLORING PRIVATE LAW (Elise Bant and Matthew Harding eds., 2010); Andrew Gold, *The Fiduciary Duty of Loyalty* in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3; James Penner, *Fiduciary Law and Moral Norms*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3.

¹⁰⁶ See Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456 (2003); David Rosenberg, *Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach*, 29 DEL. J. CORP. L. 491 (2004); Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1 (2006); Mariana Pargendler, *Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered*, 82 TUL. L. REV. 1315 (2008);

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 normative construct that has a bearing on the interpretation and construction of powers conferred by the Constitution. If, notwithstanding the cautionary notes we’ve 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.¹⁰⁷ 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 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

As we have observed earlier, 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.¹⁰⁸ 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 repeated emphasis on the close similarity

Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?* 83 S. CAL. L. REV. 1231 (2010); Leo E. Strine et al., *Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629 (2010).

¹⁰⁷ 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.”

¹⁰⁸ See, e.g., LAWSON & SEIDMAN, *supra* note 3, 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”).

between public and private “fiduciary” duties.¹⁰⁹ 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 seeming to notice 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 and brought it into view as a field in its own right. 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 emphasis on the Founding, the focus ought to 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. 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 objections¹¹⁰ some or all of the *duties attached to that type* apply to public officials.

¹⁰⁹ *Supra* note 88.

¹¹⁰ 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.

Turn now to fiduciary obligation. The fiduciary constitutionalism literature gives an impression of breadth with respect to fiduciary obligations—the number and extent of fiduciary duties is extensive. But how many distinctively fiduciary duties are there? The question is difficult to answer with confidence or precision because here, too, learned opinion is unsettled.¹¹¹ Some lawyers and judges think that there is only one fiduciary duty: that of loyalty.¹¹² North American law and scholarship recognizes one more: the duty of care.¹¹³ 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 constitutionalism skate across thin ice. There is, notably, little indication of doctrinal or scholarly support for some of the duties that some fiduciary constitutionalists style fiduciary, including the “duty to follow instructions”¹¹⁴ and the “duty of non-delegation.”¹¹⁵

F. The Enforcement of Fiduciary Duties and Remedial Regimes

We turn finally to enforcement. If the Constitution is to be understood as giving 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.¹¹⁶ And not just because

¹¹¹ Cf. Davis, *supra* note 9, at 1149 (noting indeterminacy in fiduciary law, and that “[i]mporting fiduciary law into constitutional and administrative law carries in this indeterminacy with it”); Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235 (2011) (charting the indeterminacy in fiduciary law) at 281-286; Velasco, *supra* note 109 (canvassing the debate in corporate law).

¹¹² CONAGLEN, *supra* note 64, at 32-58; see also Matthew Conaglen, *The Nature and Function of Fiduciary Loyalty*, 121 L.Q.R. 452 (2005).

¹¹³ See generally John C.P. Goldberg, *The Fiduciary Duty of Care*, THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3; see also Joshua Getzler, *Duty of Care, in BREACH OF TRUST* (Peter Birks and Arianna Pretto eds., 2002); and Christopher M. Bruner, *Is the Corporate Director’s Duty of Care a ‘Fiduciary’ Duty? Does it Matter?* 48 WAKE FOREST L. REV. 1027 (2013).

¹¹⁴ Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1137-1142; Natelson, *Judicial Review of Special Interest Spending*, *supra* note 30, at 255-257.

¹¹⁵ LAWSON & SEIDMAN, *supra* note 3, at 107-129; Leib & Shugerman, *supra* note 3, at 477-484.

¹¹⁶ See, e.g., Leib & Shugerman, *supra* note 3, at 485-489 (raising, but not answering other than in a speculative way, questions about what fiduciary constitutionalism implies for remedies); *id.* at 489; Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis*

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).¹¹⁷ But because fiduciary constitutionalists insist that the Constitution gives rise to "fiduciary duties" that have much in common with private law fiduciary duties,¹¹⁸ 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. There are no recognized *general* causes of action for breach of fiduciary duty in a status-based fiduciary relationship. Rather, causes of action are 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.

Inquiry and the Federal Government's Fiduciary Duty of Care, 69 FLA. L. REV. 1385, 1393 (2017); Natelson, *Judicial Review of Special Interest Spending*, *supra* note 30, at 281-282.

¹¹⁷ Finn, *Public Trusts, Public Fiduciaries*, *supra* note 62, 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 generally, see Robert J. Sadler, *Liability for Misfeasance in a Public Office*, 14 SYDNEY L. REV. 137 (1992); Richard Harwood, *Criminal Misconduct in a Public Office*, 4 J. FIN. CRIME 172 (1996); Mark Aronson, *Misfeasance in Public Office: A Very Peculiar Tort*, 35 MELB. U. L. REV. 1 (2011); and Donal Nolan, *A Public Law Tort: Understanding Misfeasance in a Public Office*, in *PRIVATE LAW AND POWER* (Kit Barker et al. eds., 2017).

¹¹⁸ See, e.g., Kent, Leib, & Shugerman, *supra* note 3, 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.").

The enforcement question can be further developed with respect to remedies. Although some fiduciary constitutionalists take no position on possible 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.”¹¹⁹ Of course (and Kent, Leib, and Shugerman do not suggest the contrary), this remedial smorgasbord was not, and is not, available for any single kind of fiduciary relationship.

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 2019, 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 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

¹¹⁹ Kent, Leib, & Shugerman, *supra* note 3, at 2020.

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.¹²⁰

At each one of these points the remedial structure of trust law is completely different. Trust law was developed in equity.¹²¹ There are no juries in trust law,¹²² and the traditional position is that there are no punitive damages and no

¹²⁰ Samuel L. Bray, *Fiduciary Remedies*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3, at 460-461 (quoting Deborah A. DeMott, *Fiduciary Principles in Agency Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3, at 38) (endnotes omitted).

¹²¹ 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.'").

¹²² See Samuel L. Bray, *Equity and the Seventh Amendment* (draft).

punishment.¹²³ By contrast, what are available are specifically equitable remedies such as accounting for profits, equitable compensation, constructive trust, and equitable lien. Self-help is minimal – instead, judicial enforcement is much more central, including the courts’ exercise of supervisory jurisdiction over trustees. And the paradigm case is not a suit by a third-party, but rather a suit by (or on behalf of) a victimized beneficiary. 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,¹²⁴ and shy away from confronting the question of what remedies are available to enforce the fiduciary duties they find in the Constitution.¹²⁵ 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.”¹²⁶ 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 trust, accounting, injunctions, and damages with a view to disgorgement.” 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.”¹²⁷

¹²³ See Samuel L. Bray, *Punitive Damages Against Trustees?*, in RESEARCH HANDBOOK ON FIDUCIARY LAW, *supra* note 75.

¹²⁴ See LAWSON & SEIDMAN, *supra* note 3, at 133.

¹²⁵ *Id.* at 133-134 (“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.”).

¹²⁶ See Leib & Shugerman, *supra* note 3, at 485.

¹²⁷ *Id.* at 489.

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 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, that reality casts doubt on 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 – not duties sounding in political morality but ones that have the crisp, sharp edge of law, enforceable by courts.

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?

A. Claims About the Constitution

A core historical claim of fiduciary constitutionalism is that the drafters and ratifiers of the U.S. Constitution understood it as fiduciary in a juridical sense. “The Constitution is a fiduciary instrument,” according to Gary Lawson and Guy Seidman, “and that characterization carries interpretive consequences in its wake.”¹²⁸ Others, such as Andrew Kent, Ethan Leib, and Jed Shugerman do not

¹²⁸ LAWSON & SEIDMAN, *supra* note 3, 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 9, at 400, 402-404. See also Barnett & Bernick, *supra* note 3, 20 (“The Constitution’s structure and content disclose its character as a fiduciary instrument.”); Leib, Ponet, & Serota, *supra* note 3, at 709 (“The founding generation understood the relationship

say the Constitution was a fiduciary instrument, but they still say it imposes fiduciary duties on the president and that Article II should be given a “fiduciary reading.”¹²⁹ The bases for such conclusions are standard sources and modalities of constitutional interpretation. These include the text itself, the historical context in which the text was adopted (including legal backdrops¹³⁰), antecedents such as state constitutions and colonial charters, and the structure of the document as a whole. These sources suggest a kind of interpretive normalcy, supporting the notion that the claims of the fiduciary constitutionalists are unoriginal.¹³¹

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 cognates in the Constitution and Presidential oath of office.¹³² The President is required to “faithfully execute” the office of president and take care that the laws of the United States are “faithfully executed.” These requirements are subtly different (active versus passive, different objects), and they are susceptible of various readings.¹³³ But they are said by Leib and colleagues to indicate the Founders’

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.”); 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 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.”).

¹²⁹ For discussion, see *supra* note 84.

¹³⁰ Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

¹³¹ *E.g.*, LAWSON & SEIDMAN, *supra* note 3, at 7 (“[W]e make no claim to originality.”).

¹³² Leib & Shugerman, *supra* note 3, at 465-469.

¹³³ 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 95; John Harrison, *Executive Power* (draft); Kent, Leib and Shugerman, *supra* note 3; Michael W. McConnell, *The President Who Would Not Be King: Executive Power and the Constitution* (Tanner Lectures 2018); Julian Davis Mortenson, *The Executive Power Clause*, 167 U. PA. L. REV. (forthcoming).

understanding that the presidency is a fiduciary office and to indicate that the President's mandate to uphold our laws is a fiduciary one.¹³⁴

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.¹³⁵ 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 constitution of Maryland and other states refers to various public officials as “trustees of the public.”¹³⁶ 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.”¹³⁷ It is suggested, therefore, that colonial charters and

¹³⁴ Leib and Shugerman, *supra* note 3, 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, Leib and Shugerman, *supra* note 3, at 2112 (referring to theirs as a “‘fiduciary’ reading of the original meaning of the Faithful Execution Clauses”) and 2119 (“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.”)

¹³⁵ Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1150-1158; Gary Lawson, Guy I. Seidman and Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B. U. L. REV. 415, 435-446 (2014).

¹³⁶ Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1135.

¹³⁷ LAWSON & SEIDMAN, *supra* note 3, at 43. Lawson and Seidman also cite constitutional provisions of Maryland and Vermont. Note that the language in these state constitutions does not support the conclusion that they establish judicially enforceable fiduciary duties.

state constitutions were model fiduciary constitutions upon which the Founders drew in developing the U.S. Constitution.¹³⁸

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*, *power of attorney*. According to Natelson, this language indicates that the Founders, inspired by the political theory canon¹³⁹ and the text of various state constitutions, wanted to realize an “ideal [of fiduciary government] with real-world legal implications.”¹⁴⁰

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 Preamble’s assertion of the Constitution’s supremacy.¹⁴¹ 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 legislators and the President, as well as in the Presidential veto power over legislation.¹⁴² 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.¹⁴³ 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

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.

¹³⁸ Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1135-1136. Lawson and Seidman note the absence of any similar provision 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 3, at 45.

¹³⁹ See *infra* Part I.A.

¹⁴⁰ Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1137.

¹⁴¹ *Id.* at 1137-1142.

¹⁴² *Id.* at 1142-1145.

¹⁴³ *Id.* at 1146-1150.

House and formal equality in the allocation of Senate seats to the states.¹⁴⁴ 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.¹⁴⁵

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.¹⁴⁶ 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 Dworkin¹⁴⁷), 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 Strauss¹⁴⁸). Rather, they are arguing that the text, understood in its original context, is the basis for fiduciary constitutionalism.¹⁴⁹

¹⁴⁴ *Id.* at 1150-1158.

¹⁴⁵ *Id.* at 1159-1168.

¹⁴⁶ 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. *Cf.* LAWSON & SEIDMAN, *supra* note 3, at 6-7 (noting originalist views); Kent, Leib, & Shugerman, *supra* note 3, at 2116-2217, 2192 (framing inquiry into “the original meaning of Article II”); *cf.* Leib & Shugerman, *supra* note 3, 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, 502-503 (2019).

¹⁴⁷ *E.g.*, RONALD DWORKIN, *LAW’S EMPIRE* (1986).

¹⁴⁸ *E.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

¹⁴⁹ For the most part, the fiduciary constitutionalist literature does not commit itself to a particular form of originalism. *But see* Barnett & Bernick, *supra* note 3. Nevertheless, the orientation toward original understanding is very pronounced. *See, e.g.*, LAWSON & SEIDMAN, *supra* note 3; Kent, Leib, & Shugerman, *supra* note 3, at 2116-2117 (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); *id.* at 2120-2121, 2178-2180 (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.”).

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).¹⁵⁰ Some (but only some) of the fiduciary constitutionalists appear to treat that disagreement as inconsequential.¹⁵¹ 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.¹⁵² To be fair, this is not the sole basis for the 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 all 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.” And 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.

¹⁵⁰ See *supra* notes 10-13 and accompanying text.

¹⁵¹ E.g., LAWSON & SEIDMAN, *supra* note 3, at 62 (“The fiduciary responsibilities of a trustee and an attorney do not differ in any way material to our project.”).

¹⁵² 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 hearer a large set of *Odyssey*-related meanings. See RICHARD B. HAYS, *ECHOES OF SCRIPTURE IN THE GOSPELS* 10-12 (2017). But the interpreter bears the burden of argument.

In their recent article *Faithful Execution and Article II*,¹⁵³ 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”¹⁵⁴— 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 own evidence shows a requirement of faithful execution for everyone from medieval coroners¹⁵⁵ to seventeenth-century surveyors¹⁵⁶ and curates¹⁵⁷ to fence-viewers in colonial Connecticut.¹⁵⁸ These persons all had important duties, public-facing ones, and they needed to perform them well. Their oaths impressed that upon them.¹⁵⁹ But they were not fiduciaries.

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.”¹⁶⁰ 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

¹⁵³ Kent, Leib, & Shugerman, *supra* note 3.

¹⁵⁴ *Id.* at 2149 n.214.

¹⁵⁵ Kent, Leib, & Shugerman, *supra* note 3, at 2142.

¹⁵⁶ *Id.* at 2150.

¹⁵⁷ *Id.* at 2172.

¹⁵⁸ *Id.* at 2167.

¹⁵⁹ Cf. 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 . . .”).

¹⁶⁰ 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 35 (Richard Thomson ed. 1820).

with the utmost severity.”¹⁶¹ 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 chairman were not bound by the law of trusts or of agency. They were not 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.”¹⁶² 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.”¹⁶³ That is a *non sequitur*. It is a basic confusion of meaning and association, and of sense and reference. 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 chairman 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 might be used in fiduciary contexts and then drawing the conclusion that it is a

¹⁶¹ *Id.* at 35-36 n. *.

¹⁶² Kent, Leib, & Shugerman, *supra* note 3, at 2169 (emphasis added); *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, impartial execution of law or office” (emphasis added)).

¹⁶³ *Id.* (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)).

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 cannot be 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 linguistically fallacious. 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)”¹⁶⁴ 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.¹⁶⁵ 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 reference.”¹⁶⁶ Therefore, to connect their findings about “the law of offices” with fiduciary law, they rely on resemblance with *today’s* fiduciary law.¹⁶⁷ 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 1680s¹⁶⁸), and to swear

¹⁶⁴ Kent, Leib, & Shugerman, *supra* note 3, at 2178.

¹⁶⁵ *Id.* at 2119 (“We do not claim that the drafters at Philadelphia took ready-made fiduciary law off the shelf and wrote it into Article II.”).

¹⁶⁶ *Id.* at 2180. Their attempts to tie English trust law to public law in footnote 410 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.

¹⁶⁷ *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 (“*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.” (emphasis added)).

¹⁶⁸ *Id.* at 2135; *see also id.* at 2160 (charter of Massachusetts Bay Colony).

oaths requiring faithful execution (e.g., 1636 Pilgrim Code of Law for New Plymouth, Fundamental Orders of Connecticut of 1639¹⁶⁹). 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, speculative, and presentist 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 feel constrained to draw *fiduciary* implications from their evidence about *offices*; despite their concessions about private fiduciary law not even being background for Article II,¹⁷⁰ they explicitly and repeatedly claim that the President is a fiduciary.¹⁷¹ Even if the pull of the present moment is disregarded, it is hard not to see the path-dependence of legal scholarship. If fiduciary constitutionalism was not the idea *du jour*, this article could have been written – and would have been argued more persuasively – without the fiduciary gloss.

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

¹⁶⁹ *Id.* at 2161.

¹⁷⁰ *Id.* at 2180.

¹⁷¹ *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 in their private self-interest, consistent with fiduciary obligation in 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 [The President must] promote the best interests of the people, the ultimate beneficiaries of his fiduciary obligation.”).

of art, or as a misuse of the figure of speech metalepsis.¹⁷² This error finds in the constitutional text more certainty, more closure, than it can really provide.¹⁷³

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.¹⁷⁴ 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 meant*, and thus what the Constitution means. 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.

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 “categorizing the Constitution.”¹⁷⁵ 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

¹⁷² On metalepsis, see *supra* note 152.

¹⁷³ Cf. Goldsmith & Manning, *supra* note 95.

¹⁷⁴ Stephen R. Galoob & Ethan J. Leib, *The Core of Fiduciary Political Theory*, in RESEARCH HANDBOOK ON FIDUCIARY LAW, *supra* note 75, 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., David L. Ponet, Ethan J. Leib, & Michael Serota, *Translating Fiduciary Principles Into Public Law*, 126 HARV. L. REV. 671 (2013); Ethan J. Leib, David L. Ponet, & Michael Serota, *Mapping Public Fiduciary Relationships*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 80.

¹⁷⁵ That is the title of chapter four of LAWSON & SEIDMAN, *supra* note 3, at 49.

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*, 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.¹⁷⁶

When a text does not fit into preexisting 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 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.¹⁷⁷ Overlap with a genre does not bring a text into the genre.

¹⁷⁶ Primus, *supra* note 9, at 388 (footnotes omitted).

¹⁷⁷ 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,” *id.* at 49, and they admit that the dissimilarities “do cabin somewhat the kinds of claims” they can make, *id.* at 55. Less carefully, they suggest that James Iredell “got it exactly right” when he called the Constitution the grant of a power of attorney. *Id.* at 75. Lawson and Seidman, however, are not as committed to that one particular identification as the quotation in the preceding sentence would suggest. See Lawson & Seidman, *supra* note 146, at 504-507.

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. They knew what agency, trusteeship, guardianship, and the like consisted of. They thus knew that as a *legal* matter these positions were understood differently at law. 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 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 did impose 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 the fiduciary Constitution are belied by a void where all of the contemporaneous debate should be. This is so in the debate at ratification,¹⁷⁸ 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.¹⁷⁹ There is a whole pack of dogs, and none bark.

The same point can be made about the fiduciary Constitution 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."¹⁸⁰ But the disputes would not have been mild if the proposal had been

¹⁷⁸ See Primus, *supra* note 9, at 388-396; 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, 414-416 (2019).

¹⁷⁹ Primus, *supra* note 9, at 396-398; see also Sherry, *supra* note 16 ("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.").

¹⁸⁰ *Id.* at 2123.

that the President and other federal officers had fiduciary duties, particularly if they were enforceable by courts.¹⁸¹ 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?

Even 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 treatise of the century on constitutional law: 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 strictly metaphorical. For example, he describes the Senate as having a great public trust because to it is committed the trial of impeachments. 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 the officers of the United States as being subject to the claims and remedies of trust law.

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, including trust law. And he wrote the leading nineteenth-century treatises on agency and bailments. If the U.S. Constitution were a

¹⁸¹ Kent, Leib, and Shugerman do not commit to any particular non-impeachment enforcement—they say “We do not opine *here* on the way the framers envisioned enforcing the President’s duty of loyalty and avoiding self-dealing,” Kent, Leib, & Shugerman, *supra* note 3, at 2190 (emphasis added)—but other work by two of the authors is not so reticent. See Leib & Shugerman, *supra* note 3, at 486-487 (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”).

fiduciary document, then Joseph Story of all people should have presented it that way. But he does not.¹⁸²

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 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, those who are the captain and crew of ships: admiralty. And 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 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), and to add 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 misunderstand how fiduciary relationships are identified and how fiduciary mandates are granted and constructed. And they claim 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

¹⁸² 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 3, at 105-106, even while they fail to note that Story did not view the Constitution in this light.

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 should move toward a fiduciary Constitution. But those are not the paths they have chosen, at least not so far. In framing their project as one of constitutional interpretation grounded in fiduciary law and the Founding Era, they have to prove faithful to the legal materials from which they draw.