Three Modalities of (Originalist) Fiduciary Constitutionalism

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THREE MODALITIES OF (ORIGINALIST) FIDUCIARY CONSTITUTIONALISM

Ethan J. Leib*

ABSTRACT

There is an ongoing body of scholarship in contemporary constitutional theory and legal history that can be labeled “fiduciary constitutionalism.” Some have wanted to strangle this work in its cradle, offering an argument pitched “against fiduciary constitutionalism,” full stop.

But because there are enough different modalities of fiduciary constitutionalism – and particularly originalist varieties of it at the center of recent critiques – it is worth getting clearer about some methodological commitments of this work to help evaluate its promise and potential pitfalls. This paper develops the ambitions, successes, and deficiencies of three modalities of historical and originalist argument that link American constitutionalism with the law and theory that constrains those with especial discretion and control over the legal and practical resources of beneficiaries known as fiduciary governance. Probing primary and secondary research in fiduciary constitutionalism can help show its value and limitations for legal historians and constitutional theorists alike.

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There is an ongoing body of scholarship in contemporary constitutional theory that can be labeled “fiduciary constitutionalism.”¹ Some have wanted to strangle this work in its cradle, offering an argument pitched “against fiduciary constitutionalism,” full stop.² But because there are enough different modalities of fiduciary constitutionalism – and particularly originalist varieties of it at the center of recent critiques – it is worth getting clearer about some methodological and historiographical commitments of this work to help evaluate its promise and potential pitfalls.

Some strands of non-originalist fiduciary constitutionalism aim to use concepts from private fiduciary law – the law of equity and trusts, the law governing lawyers, agency law, some central parts of corporate law – to illuminate theoretical problems of contemporary democratic and constitutional governance, such as the problem of how best to guard guardians who may have structural conflicts of interest.³ This literature only occasionally deals specifically with the


³ See, e.g., FIDUCIARY GOVERNMENT (Evan Criddle et al. eds., 2018).
doctrines of American constitutional law and only occasionally seeks to root its arguments in American constitutional history. Whether or not scholars embrace the usefulness of reasoning through analogies from private law into political theory, few want to do aggressive analogy policing here and even fiduciary constitutionalists’ harshest critics do not think there is an urgent problem with using private law ideas to do some political theorizing.5

A second variety of fiduciary constitutionalism is more self-consciously legal and practical. It asks, among other questions, how concepts, structures, and remedies from private fiduciary law might be deployed in currently-existing legal systems to improve public administration.6 Again here, so long as the connections between public law’s institutional design and private fiduciary law remain mostly analogical or metaphorical, few are especially exercised about such intellectual efforts, even if not all find the work illuminating or persuasive.

Even a third species of fiduciary constitutionalism, one that uses language and lessons from fiduciary law to make arguments of a “living constitutionalism” variety about the best interpretation of the U.S. Constitution today, is not at the center of critique by constitutional historians.7 Because these non-originalist normative arguments rely on analogy and metaphor, too, such work similarly can be evaluated according to its usefulness and its alignment with contemporary values and mores rather than compared against historical evidence.8

But another strain of fiduciary constitutionalism – one broadly originalist in orientation – does rely on truth claims about constitutional history to suggest that federal government officials can be thought in meaningful ways to be bound by fiduciary duties. This is the core target of Samuel Bray and Paul Miller, who seek to debunk claims that – as they describe them – the U.S.

5 See generally Bray & Miller, supra note 2, at 1482, 1492. I address (together with Andrew Kent) some of Bray and Miller’s overconfidence that political theorists invoking these metaphors were not using fiduciary ideas in a juridical sense in Ethan J. Leib & Andrew Kent, Fiduciary Law and the Law of Public Office, 62 WM. & MARY L. REV. 1297 (2021).
6 An exemplar of this vein of work might be Scott R. Bauries, The Education Duty, 47 WAKE FOREST L. REV. 705 (2012).
8 There are still serious efforts to remind fiduciary political theorists that the discourse of fiduciary government can be linked to colonialism and oppression rather than redemption – as a matter of history and theory. See Seth Davis, American Colonialism and Constitutional Redemption, 105 CALIF. L. REV. 1751 (2017); Andrew Fitzmaurice, Sovereign Trusteeship and Empire, 16 THEORETICAL INQ. L. 447 (2015); Lea Ypi, What’s Wrong with Colonialism, 41 PHIL. & PUB. AFF. 158 (2013). I have addressed this literature, however inadequately, in Stephen R. Galoob & Ethan J. Leib, Fiduciary Political Theory and Legitimacy, in FIDUCIARY GOVERNMENT, supra note 3, at 163, 164-66.
Constitution as *originally intended or understood* was “a fiduciary instrument that establishes fiduciary duties, not least for the President of the United States.”

But this broadside attack actually mashes up three distinct (though sometimes overlapping and mutually reinforcing) originalist methodologies. Disaggregating them in what follows will be useful to help evaluate how historians and constitutional theorists committed to some form of original meaning as essential to the constitutional project should think about this project of fiduciary constitutionalism. In Part I below, I distinguish among three originalist modalities fiduciary constitutionalists employ: I’ll call them “instrument-type,” “clause-bound,” and “conceptual foundations” originalism to help overdraw the distinctions among different ways to see fiduciary obligation as being pertinent to American constitutional law as an originalist matter. Even if fiduciary constitutionalists of the originalist strain mix-and-match from among these modalities some of the time, helping to differentiate the forms of argument should be clarifying for work that will continue to develop the relevant histories that support fiduciary constitutionalism.

In Part II, after explicating the centrality of political theory and historical method to “conceptual foundations” originalism, I’ll briefly lay out how certain kinds of fiduciary political theorizing were actually taken up in the framing of the Constitution, providing some more historical support for this originalist methodology. Ultimately, it may overstate the case to call the whole of the Constitution a “fiduciary instrument” that makes every single federal officer a fiduciary in a legal sense as an originalist matter. But it is also warranted by the evidence that juridical conceptions of the fiduciary nature of offices influenced at least some of the framers’ ways of thinking about federal officers under the U.S. Constitution, especially the President of the United States. That historical evidence further underwrites why fiduciary constitutionalism should remain central to debates about the original meaning of the Constitution.

I. THREE WAYS OF DOING ORIGINALIST FIDUCIARY CONSTITUTIONALISM

Here I lay out how a set of originalist fiduciary constitutionalists have gone about rendering their claims that federal government officials can be thought to be fiduciaries in some legal sense.

A. “Instrument-type” originalism

Some suggest that the whole of the U.S. constitutional project is “fiduciary” insofar as the document was drafted to be most like a “power of attorney,” binding each and every officer under the Constitution to fiduciary law as it existed at the time of ratification. As Gary Lawson and Guy Seidman have acknowledged in their originalist book that most directly takes this pathway, such an exercise must be seen as principally analogical. This approach doesn’t prevent Lawson and Seidman from drawing some originalist legal conclusions based in analogizing the Constitution to a fiduciary “power of attorney.” But it isn’t setting as its task understanding the retail original public meanings of words in the first instance.

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9 Bray & Miller, *supra* note 2, at 1479.
10 *Lawson & Seidman, supra* note 1.
11 *Id.* at 4, 38, 54-56.
12 *E.g., id.* at 91-99 (finding Obamacare to be unconstitutional).
This is not to say wholesale efforts to get at what kind of document the Constitution was intended to be cannot provide insight into ultimate word-level interpretation; surely it can even if we want to say that the Constitution was rather *sui generis* and was only loosely based on a power of attorney (or some other instrument) in certain respects. But this form of originalist work – reasoning by analogy about what kind of instrument the Constitution may be in order to infuse specific words or legal design choices with meanings that originalist interpreters can implement at the case level – is some distance from mainstream workaday originalism. Yet since the thesis Lawson and Seidman proffer is predicated on historical evidence for their analogical claim (it was the framers themselves that embraced the analogy, they argue), this kind of work comes within the ambit of originalist fiduciary constitutionalism in my typology. For example, they draw on James Iredell’s argument at the North Carolina ratifying convention that the Constitution is a “great power of attorney”13 and emphasize morphological characteristics of the Constitution that appeared in many powers of attorney documents at the time of the framing to support their claims.14

Some work in a similar vein might also be my effort with Shugerman to think about what it might mean to cast the Constitution as more like a trust instrument than a power of attorney; another analogical exercise, to be sure, calibrated to derive lessons for the non-delegation doctrine as an originalist matter.15 As we argue, “even an originalist of a certain sort should be able to say that if the original meaning of the Constitution was that it was like a trust document that was supposed to last for generations . . ., the delegation rules which were only adopted implicitly through vague default rules often observed in the breach could adapt to better reasoned common law over time. That better-reasoned common law now widely permits delegation. Thus, fiduciary constitutionalism leads not to revisionism about the non-delegation doctrine in the modern age—but helps explain the broad outlines of the contemporary approach to it.”16 This set of claims about “instrument-type” flows from several overt invocations of the language of trust and trusteeship not only in the document itself but in surrounding debates about the adoption of the Constitution and state colonial charters, in which officers were routinely talked about as trustees. Not your mother’s originalism, perhaps, but a genuine way to pursue an historical inquiry into what type of document the framers intended to set in motion and to develop answers to interpretive questions and interpretive conventions that might follow from that instrument type.

14 LAWSON & SEIDMAN, supra note 1 (emphasizing the language of “ordain” and “establish” in preambles and fiduciary instruments more generally).
15 See Leib & Shugerman, supra note 1, at 477-84
16 Id. at 482-83 (citing Gareth H. Jones, Delegation by Trustees: A Reappraisal, 22 MOD. L. REV. 381, 381-82 (1959) (arguing – based on common law cases from 1754, 1838, 1841, and 1883 – that the “principle of delegates non potest delegare could not be applied in its full rigor” from “an early date”). Admittedly, the contemporary approach to the doctrine is in flux on the current Court.
Another species of this work might grow out of John Mikhail’s effort to focus attention on the various ways the Constitution is most like a corporate charter. Although he also has much to say about the “necessary and proper” clause (a methodology that might be more firmly in the camp of “clause-bound” methods to be taken up next), he also clearly believes that “the Constitution of the United States is a corporate charter, or at least that it is more appropriately regarded as a corporate charter than as any other eighteenth-century legal instrument, such as a statute, contract, treaty, or trust.” And it is the Constitution’s status as a corporate charter – a type of instrument understood well by its framers – that vests the government with certain kinds of fiduciary powers like the promotion of common defense and general welfare for the beneficiaries of the document. Another implication of the status of the document as a corporate charter that Shugerman and I are currently developing may be that certain default rules surrounding removal of executive officers should be seen to track those of corporate charters, since the rules about removal are famously underdetermined by the text of the Constitution.

B. “Clause-bound” originalism

Others – in some respects more conventionally – train attention on specific clauses of the Constitution and argue that they were drafted to incorporate by reference extant fiduciary law. This incorporationist strategy is workaday public meaning originalism: recall, for example, Justice Scalia’s argument that the Eighth Amendment’s ban on “cruel and unusual punishment” had to be seen as limited to restraining the state only at the punishment stage rather than during an interrogation. Corey Brettschneider offered a different clause-bound originalist take, highlighting that the words in the Eighth Amendment were taken directly from the British Bill of Rights from 1689 – and more likely incorporated that document’s then-extant understanding of the word “punishment,” which was more capacious.

Fiduciary constitutionalists using this modality of originalism find fiduciary original public meanings in clauses such as the “general welfare” clause or the “necessary and proper” clause, both in Article I. Natelson is an exemplar here – and much of his work argues that features of

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18 U.S. CONST. art. 1, sec. 8.
20 Mikhail, supra note 13, at 408.
21 E.g., GARY LAWSON ET AL., supra note 1; Natelson, Judicial Review, supra note 1.
our constitutional text intentionally incorporate doctrines of fiduciary law that were extant at the time of adoption. In a prescient parry of the Bray and Miller critique to come, Natelson directly tackles the question of whether the talk of fiduciarity around the time of framing was “anything more than rhetoric or fancy.” He claims that the “historical record makes this improbable” because the framers themselves understood fiduciary law so well (as lawyers and/or employers of fiduciaries) and appreciated how to apply “fiduciary standards to government.” One example Natelson emphasizes is that John Rutledge was a chancellor and chief equity officer in South Carolina, so would be well-positioned to know fiduciary jurisprudence and the role that the word “proper” would serve in incorporating fiduciary standards into the Constitution through the “necessary and proper” clause.

This work relies on historical claims and evidence and is generally committed to the idea that there was an extant and trans-substantive fiduciary law from which the framers drew deliberately, a contention some have reasonable cast some doubts upon on account of how inchoate the field of “fiduciary law” as we know it today actually seems to have been at the time of the Founding. But whether or not fiduciary law was in place sufficiently to be incorporated by framers, the idea of fiduciary constraint for officeholders – as a matter of law rather than mere political rhetoric – could provide important background to evaluate the public meanings of the words in the Constitution, something “conceptual foundations” fiduciary constitutionalists have urged, specifically.

C. “Conceptual foundations” originalism

A third approach – one I have taken in my most recent work with Professors Kent and Shugerman – can be called “conceptual foundations” originalism. It is distinct from the previous two methods (though of course some “clause-bound” originalists might draw from this modality, as well). For example, in Faithful Execution and Article II, after setting out our view of the historical meaning of the duties in the presidential oath clause and “take care” clause of Article II, we observed that these duties “look a lot like fiduciary duties in the private law as they are understood today.” We say the duties are “fiduciary-like,” “consistent with fiduciary obligation in the private law” today, and “something like core fiduciary obligations.” So it is our view that

26 Natelson, Judicial Review, supra note 1, at 248.
27 Id.
28 Natelson, supra note 25, at 285-86 (“The four lawyers who drafted the [“necessary and proper”] clause at the federal convention would have been aware of fiduciary concerns, because they all knew their equity jurisprudence. All four [Rutledge, especially] were among the most respected and knowledgeable attorneys in their home states.”).
29 See Leib & Kent, supra note 5, at 1337-42.
30 See Faithful Execution, supra note 1.
31 Id. at 2119, 2112.
32 Id. at 2120.
33 Id. at 2181.
34 Id. at 2120.
the Constitution did not expressly incorporate fiduciary law: 35 “We do not claim that the [Constitution] drafters at Philadelphia took ready-made fiduciary law off the shelf and wrote it into Article II.” 36 It is certainly possible that widespread talk about officers being agents, trustees, and guardians at the time of the Founding wasn’t idle chatter and had some incorporationist intent; but our analysis of “faithful execution” left us reasonably confident that the framers sought to constrain at least one office – the office of the President – with duties that today resonate as fiduciary obligations.

_Faithful Execution_ isn’t the only work that pursues a method like this one. For another example, Zephyr Teachout’s work finds an “anti-corruption principle” deeply embedded in the Constitution as an originalist matter. To develop her “conceptual foundations” originalism, she draws not only on textual cues and clauses but also the history of ideas. 37 Her work openly draws on Republican histories of the Founding from Bernard Bailyn 38 and J.G.A. Pocock 39 to bring concerns about corruption to the center of the constitutional project, also citing directly from explicit references to corruption in the convention and ratification debates by the likes of Madison, Morris, Mason, and Wilson – and also Patrick Henry, Hamilton, and Pierce Butler.

Not all originalists accept this method; 40 in the age of public meaning originalism and widespread availability of accessible corpora to perform _corpus linguistics_ searches about the more narrow usages of specific bits of text, “clause bound” originalism probably reigns supreme among originalist modalities. 41 In some respects, relying too heavily on the political theory the framers

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35 While Bray and Miller occasionally note these important distinctions among practitioners of fiduciary constitutionalism, they nevertheless pervasively lump all three originalist methods together. More lumping errors occur in the Bray and Miller paper because they include within their critique some papers that contain no serious historical analysis at all but are instead engaged in entirely different projects. _Faithful Execution_ attempts to execute a disciplined historical argument about constitutional meaning that could satisfy originalists. Yet Bray and Miller repeatedly cite and criticize Leib, Ponet, & Serota, _supra_ note 7, a work largely sounding in political and legal theory with a mere overture to historical argument that is not disciplined originalism by any definition; indeed, its historical argument (collapsed together with a section purporting to be a “functional argument”) included evidence from judicial impeachments spanning the years 1640 to 2010, _id_. at 714-17.

36 _Faithful Execution, supra_ note 1, at 2119.

37 See, e.g., Zephyr Teachout, _The Anti-Corruption Principle_, 94 _Cornell L. Rev._ 341 (2009). Teachout invokes Montesquieu, Machiavelli, and Plutach as influences on the framers who, like the political theorists who influenced them, were preoccupied with corruption.

38 See _Bailyn, supra_ note 1 (cited in Teachout, _supra_ note 37, at 348).

39 See _Pocock, supra_ note 1 (cited in Teachout, _supra_ note 37, at 348).


relied upon themselves feels like a kind of *purposivist* rather than *textualist* originalism. But as I’ll explain more in Part II, that doesn’t make it any less historical or originalist a method.

D. The Differences Modalities Make

The different originalist methods produce practical differences in legal analysis. For example, one area that separates different originalist fiduciary constitutionalists is in what remedies scholars think are appropriate for possible breaches of fiduciary or fiduciary-like obligations stemming from offices created under the Constitution. The “conceptual foundations” work in *Faithful Execution* drew no firm conclusions about how to enforce fiduciary obligations because that historical research found a wide assortment of remedies in connection with different offices: we said they “run the gamut from judicial enforcement via damages, fines, injunctions, bond forfeiture, and criminal penalties, to impeachment and removal from office.” 42 We looked at hundreds of years of statutes, resolves, charters, and commissions creating and empowering officers from England and the American colonies prior to 1776, the post-independence American states, and the short-lived U.S. national government existing until 1787. To the extent the framers would have had familiarity with these other offices with “faithful execution” duties, they would have been unlikely to have been “incorporating” only one particular mode of enforcement since there was so much variation in the relevant history. As for remedies for a U.S. President’s violation of faithful execution duties, besides pointing to impeachment, we expressly reserved the question about enforcement: “We do not opine here on the way the framers envisioned enforcing the President’s duty of loyalty and avoiding self-dealing. But certainly impeachment was a common method to enforce fiduciary obligations, and one featured prominently in the U.S. Constitution.” 43 To put it another way, “conceptual foundations” originalism demarcates a relevant standard of conduct but not the standards or mechanics of review.

But others doing originalist fiduciary constitutionalism have offered some more confident legal conclusions about the right kinds of remedies that should be judicially available to address fiduciary defaults in constitutional law. For example, Lawson and Seidman think that the

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42 *Faithful Execution*, supra note 1, at 2120.

43 *Id.* at 2190; *see also id.* at 2120. In a later paper, Shugerman and I do begin – gingerly – to start thinking more deeply about remedies. *See generally Leib & Shugerman, supra* note 1, at Part IV (“Remedies”). Here, too, we remained open-ended about the right way to enforce constitutional duties of a fiduciary flavor, highlighting that remedies will vary depending on one’s approach to fiduciary constitutionalism. In that paper, we consider a range of modalities of constitutional interpretation and suggest that remedial configurations could vary depending on one’s methodological commitments. That discussion is much broader than the originalist one that is at the center of the Bray and Miller critique, so it is inappropriate to lump its remedial discussion – calibrated to address non-originalist fiduciary constitutionalism, as well – with the historical work offered in *Faithful Execution*, supra note 1.
“Constitution-as-fiduciary-instrument” analogy (1) requires the conclusion that Obamacare is unconstitutional; (2) provides a remedy for the captain in *U.S. v. Yates* who was convicted for throwing some fish overboard because the relevant regulations about fish size were made by an agency and were therefore unconstitutional; and (3) vindicates the Supreme Court’s ruling in *Bolling v. Sharpe*.

Natelson also develops legal conclusions that he believes follow from his incorporationist approach. Here is a summary about his views about what the fiduciary constitutionalist ought to think about the “necessary and proper” clause:

The role of the Necessary and Proper Clause was to indicate to future public officials and citizens that:

- Unlike Congress under the Articles of Confederation, Congress under the Constitution would enjoy fairly broad incidental powers just as other agents enjoyed incidental powers under prevailing rules of common law and equity.

- These incidental powers were limited to those that were, bona fide, adopted to further the exercise of the express powers.

- The Clause required congressional laws to accord with fiduciary standards roughly similar to those governing agents in the private sector. In other words, Congress was to remain within its (somewhat restricted) realm of authority, and proceed in good faith, with reasonable care, and with impartiality and loyalty toward its constituents.

- Congressional compliance with the rules of the Clause was to be monitored by the President, the people, and the courts.

Thus, enforcing the original meaning of the Necessary and Proper Clause would require a higher standard of judicial review than courts currently apply to federal spending and legislation.

For Natelson, the purportedly fiduciary origins of clauses in the Constitution (rather than at the document-as-instrument level, as with Lawson and Seidman) supplies meaning and produces judicial remedies.

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44 Lawson & Seidman, *supra* note 1, at 91-99 (commenting on *NFIB v. Sebelius*, 567 U.S. 519 (2012)).
46 Lawson & Seidman, *supra* note 1, at 126
47 *Id.* at 170-71 (commenting on *Bolling v. Sharpe*, 347 U.S. 497 (1954)).
By contrast, the “conceptual foundations” originalism in *Faithful Execution* remains more modest both because the range of offices that the framers drew upon suggests very little fixity about remedial approaches and because “conceptual foundations” originalists are less sure *incorporation* is the right way to think about the fiduciary background that gave rise to some features of our Constitution. ⁴⁹ Although this type of originalism doesn’t ignore original public meaning of text, it is also insistently that clause-level analysis be situated in an historical narrative about the law and political theory of public office, how it was changing in England in the centuries leading up to the Founding and around the time of the Revolution, and the goals to which sets of phrases were used to delineate expectations of officers. One might even see this method as a kind of purposivist “mischief rule” – as applied to constitutional rather than statutory interpretation to furnish insight on how to make probabilistic judgment calls about original meaning.⁵⁰ To be sure, “clause-bound” originalists pay respect to their Lockean political philosophy all the time, but it is “conceptual foundations” originalists who start with the history of ideas rather than phrases and clauses.

Two final points of contrast between the “conceptual foundations” fiduciary originalists and the others (who surely don’t wholly ignore historical and politico-theoretic context). First, central to Lawson and Seidman’s “instrument-type” originalism is to claim that since the Constitution is *like* a fiduciary instrument, the *conventions of interpretation* that were applicable to fiduciary instruments at the time of the Founding ought to be applied against any authorizations to the federal government under the instrument, particularly the interpretive canons associated with powers of attorney which commanded strict interpretation.⁵¹ This may squeeze a little too much interpretive juice out of an analogy. The more holistic and probabilistic method of “conceptual

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⁴⁹ The most significant substantive problem with Bray and Miller’s article is their misplaced confidence that they know what the Constitution was understood to mean at the Founding. Their project is entirely a critical review of others’ scholarship. Yet they assert and imply frequently that they know that the Constitution was understood to be entirely “non-fiduciary.” Bray & Miller, supra note 2, at 1483. See also id. at 1502 (stating that there is no evidence that “the Constitution and the offices or relationships established under it” were fiduciary); id. at 1503 (accusing fiduciary constitutionalists of “distorting” the meaning of the Constitution). However, they do not seriously engage the intellectual history of Article II and the presidency, nor the Constitution more generally. They do not engage the political and intellectual history of the seventeenth century struggles against the Stuarts that so influenced the thinking of American founders. Ultimately, their article gestures at some learning on the development of office, trust, account, and guardianship, and briefly mentions Locke and Hume, but has no sustained focus on the political theory sources that are central to “conceptual foundations” originalism.

⁵⁰ For a recent effort to provide a nuanced perspective on the statutory “mischief rule” that might work even for textualists, see (isn’t it ironic?) Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021).

⁵¹ See also Leib & Shugerman, supra note 1, at 488 (“[E]ven if [Lawson and Seidman] are right that the Constitution is *like* a power of attorney, it does not follow that interpretive canons and remedial design associated with those kinds of documents should necessarily apply.”).
foundations” originalism, by contrast, uses more political theory and less interpretive confidence to suggest possible interpretations of provisions of the Constitution.

Second, Natelson’s clause-bound originalism, although also engaging political theory and history to provide some context to word-level meaning, remains more committed, on balance, to letting clauses signal wholesale importation of previously-extant law. For the “conceptual foundations” originalist, little turns on the precise state of fiduciary law as of 1787, since the “conceptual foundations” originalists are more sure that political theory can become constitutional law as an originalist matter (as I’ll argue in the next Part), rather than having any confidence about the fiduciary nature of constitutional law as a whole.

II. LAW, HISTORY, AND POLITICAL THEORY

Some who are hostile to fiduciary constitutionalism seem committed to a rigid binary: either all the discussion about the fiduciary nature of public office in the history of political thought surrounding the Founding of the U.S. Constitution must be seen as mere metaphor – or it is “juridical” and was thought to have hard-nosed legal consequences through direct application and robust remedies. The critics appear to concede, as they must, that “conceptual foundations” fiduciary constitutionalists have presented voluminous evidence that concepts and language today called fiduciary were pervasive in Anglo-American political thought about the appropriate behavior of officeholders in the lead-up to the Founding. But they seem to think there are only two possible ways to understand this historical evidence. One option might be that the Constitution is “literally” and “juridically” a fiduciary instrument, and that the U.S. presidency is “literally” and “juridically” a fiduciary office, such that the Constitution was originally understood to include as constitutional limits on the President all of the exact same doctrines, structures, and judicial remedies found in extant private fiduciary law for trustees, guardians, or similar actors. But as I showed in Part I, that particular rendering isn’t how “conceptual foundations” originalism works. As I wrote with my co-authors in Faithful Execution (and have elaborated in more recent work, too), so-called “private fiduciary law” that we recognize today wasn’t really settled early enough to be directly imported into U.S. constitutional law as an originalist matter.

The only other possible reading of the evidence some critics permit, however, is that all of the fiduciary language in legal sources defining the contours of appropriate office-holding – “faithful execution” duties, for example – was simply “moral guidance and political wisdom” or

52 Aside from all Faithful Execution, supra note 1, offers on this score, other historians working outside the idiom of lawyerly constitutional theory agree, as well. See generally Mark Knights, Corruption as the Abuse of Entrusted Power, in PREVENIRE LA CORRUZIONE: QUESTIONI E MODELLI EMERGENTI TRA DIRITTO, ETICA ED ECONOMIA 149 (Nicoletta Parisi, Gian Luca Potesta, & Dino Rinosauri, eds. 2018); J.S. Maloy, THE COLONIAL AMERICAN ORIGINS OF MODERN DEMOCRATIC THOUGHT (2008); Mark Knights, TRUST AND DISTRUST: CORRUPTION IN OFFICE IN BRITAIN AND ITS EMPIRE, 1600-1850 ch. 4 (OUP 2021).
53 See generally Leib & Kent, supra note 5.
54 See Faithful Execution, supra note 1, at 2180-81.
55 Bray & Miller, supra note 2, at 1483.
“political morality,” not law of any kind, and certainly nothing that imposes anything more than loose ethical though unenforceable duties on the President. But this binary way of thinking isn’t good history—nor is it good constitutional law.

To be sure, there are many examples of seventeenth and eighteenth century speakers using fiduciary language in a nontechnical sense to make analogical claims about the proper behavior of government officials. Consider Cato’s Letters, influential political essays by John Trenchard and Thomas Gordon (published in the early 1720s in Britain). They argued that public office, including the monarchy, is a “trust;” rulers and lesser magistrates must be accountable to the people; if “corrupt . . . magistrates” “breach” their trust with impunity, the office “in time . . . will be considered no longer as a trust, but an estate.” It would be plausible to argue that they were not saying that the British monarch was literally or juridically a trustee here, subject to the legal duties and remedies imposed by Chancery on other trustees (though they did contemplate criminal sanctions for some breaches of trust). For the “instrument-type” originalist whose work moves quickly from analogy to law, perhaps more caution is warranted with these maneuvers.

But the concession that often political writers used analogies that weren’t clearly meant to be legal constructs does not amount to an argument that no political theory seeps its way into the meaning of the Constitution as operational constitutional law. Indeed, it is rather difficult to insist on a rigid distinction between the political theory of the framers (and their influences) and what ended up as the meaning of the Constitution as an originalist matter. Some of the most important historical works bearing on the U.S. Constitution produced in recent decades are histories of the political thought of the Founding generation. As Martin Flaherty has put it, “the ideas underlying the Constitution cannot be understood without also understanding the constitutional ideas that came before.” And so works examining the political ideas motivating the American Revolution, the intellectual origins of the republicanism of the American revolutionary and

56 Id. at 1495.
58 Letter No. 75 (May 1722), in 2 id. at 550, 552; Letter No. 115 (Feb. 1722), in 2 id. at 803, 806.
59 Letter No. 75 (May 1722), in 2 id. at 550, 556.
60 Letter No. 20 (Mar. 1720), in 1 id. at 138, 142.
61 See Mikhail, supra note 17, at 414 (arguing that Iredell’s invocation of powers of attorney to explain the Constitution – on which so much of Lawson and Seidman’s book is built – was “metaphor or analogy, nothing more”); id. at 415 (“[T]here appear to be no published cases or controversies in which the analogy between the Constitution and a power of attorney did any real work.”).
64 See BAILYN, supra note 1.
Founding generations, the shifting meaning of popular sovereignty, the tradition of “Commonwealth” writing in Britain in the late seventeenth and eighteenth centuries, and the influence of Calvinist thought on American constitutionalism – among many other potential examples one could proffer – are all rightly understood to be important sources for understanding the ideologies, preoccupations, fears, and goals of the American framers. It is therefore a wholly legible originalism (what I am calling “conceptual foundations” originalism) that appreciates that the very language the framers used and the structural choices they set in motion were suffused with these ideologies, preoccupations, fears, goals, and political theory. By understanding the “mischiefs” of government the Founding generation found aversive, we can get a better handle on what the words they used meant and what safeguards they built to avoid outcomes they wanted to avoid. Thus, figuring out what “faithful execution” means as a matter of constitutional law for a head of state requires not only making analogies to the other types of instruments in which such language appeared or finding other textual uses in various corpora but also delving deeply into the purposes such language was likely to serve for those who married their political theory to their institutional design project in the Constitution. In this way, theory – understood through its history – can become law.

But it was not just the history of political thought that leads fiduciary constitutionalists to draw upon ideas of “juridical” trust – and it wasn’t just an American innovation to think about constraining officers with fiduciary duties through the law. Even as early as 1642, Henry Parker understood the highest executive office – the King – to be genuinely fiduciary, in a legal sense rather than a merely metaphoric sense. The breach of a King’s fiduciary duties of trust was “punishable by Law for it.” Whatever the mechanisms of law Parker envisioned here, this isn’t mere metaphor or abstract political theory; legal duties attach to the trust of public office. As a new book length study makes clear, too, the notion of public office as a trust “had great discursive power” but also “juridical importance.”

65 See POCOCK, supra note 1.
69 Indeed, one doesn’t need to buy the centuries of history Faithful Execution reconstructs to show how legal meanings of office drew upon and influenced legal conceptions of trust; other historians have vindicated such connections as well. E.g., Knights, supra note 52, at 152.
70 HENRY PARKER, OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES 4 (London 1642) (“The word Trust is frequent in the Kings Papers, and therefore I conceive the King does admit that his interest in the Crowne is not absolute, or by a mere donation of the people, but in part conditionate and fiduciary . . . for the behoofe of the people.”).
71 Id. at 8, 10.
72 KNIGHTS, supra note 52.
Critics of fiduciary constitutionalism make much of the fact that the remedial structure for breaches of public trust don’t obviously align with the remedial structure of breaches in private fiduciary law.\(^{73}\) As I emphasized above, however, private fiduciary law and its remedies were largely inchoate at the time of the Framing so it likely couldn’t be used as a model for copying or direct borrowing by the framers themselves. But there is more to say here, too. Bray and Miller are emphatic that the enforcement mechanisms for public fiduciary-like obligations only sound in “political” rather than “legal” remedies. Yet even granting that a beneficiary subject cannot walk into a court of equity and ask for restitution as perhaps might be paradigmatic in modern private law,\(^{74}\) in a case of a default of a public law norm that has a fiduciary flavor, it is hard to understand why making a claim of breach in courts of impeachment that have trials and convictions is not “legal” or evidence of a “legal” duty. It is also hard to understand why statutory schemes that furnish legal remedies for defaults of conflicts of interest law vindicating a fiduciary conception of office wouldn’t also be thought to be “legal” rather than “mere” political theory and metaphor. To wit, there is no dearth of evidence that impeachment trials and statutory law provide legal content to the idea of a public office as a public trust in the centuries leading up to the Founding,\(^ {75}\) which would have furnished background meaning to the words of the Constitution as well. So even if the idea of trust was doing political-theoretic work in “legitimising resistance to the monarch” and “dissolv[ing] duties of obedience” by subjects in early manifestations,\(^ {76}\) it was also ballasted by a legal scaffolding for generations before the U.S. Constitution came onto the global scene. The “conceptual foundations” originalists that are willing to allow a form of purposivism can draw on both the history of political thought and the legal history that is animated by it.

Constitutionalism itself – in England first – was seen as part of the project of giving legal form to ideas of trust that were there to contour and limit sovereign power. Recent historical work ties the project of constitution-making directly to a delineation of a trusteeship, emphasizing the need for constitutions to “mak[e] clear and secure the power” given through “faithful execution” of a “trust.”\(^ {77}\) This basic legal approach to public office also took root in the colonies, where auditing and impeachment were the primary legal mechanisms of account.\(^ {78}\) And when one sees an ur-concept of fiduciary governance as about legal mechanisms of account,\(^ {79}\) it is much easier to see just how fundamentally the public constitutional law of office looks like a regime of

\(^{73}\) Bray & Miller, \textit{supra} note 2, at 1514-15.

\(^{74}\) Even this is somewhat contestable, since the cause of action for “misbehavior in office” was coming into its own around the time of the Framing on the other side of the Atlantic. \textit{See} Rex v. Bembridge [1783] E.R. 170.

\(^{75}\) Knights, \textit{supra} note 52, at 165-66.

\(^{76}\) \textit{Id.} at 158.

\(^{77}\) An Agreement of the People for a Firme and Present Peace, upon Grounds of Common-right and Freedom 8 (1647) (cited by Knights, \textit{supra} note 52, at 161).

\(^{78}\) \textit{See generally} MALOY, \textit{supra} note 52.

fiduciary governance. As Philip Petit argues, “republicanism always had a juridical cast in which a central place was given to the notion of rights—customary, legal, and constitutional rights—as bulwarks against absolute power.” The project of constitutionalism, then, and American constitutionalism more specifically, was an effort (among many others) to make concrete and legal the republican ideas of trust that may have started as discourse and metaphor in some contexts but were ultimately made concrete law. Not quite the way Natelson envisions it, admittedly, because the process was more dynamic and reciprocal than it was a one-way ratchet. But all the same, political theory was made law through founding constitutional moments.

Understanding this evolution of how legal trusts made their way into public law enables originalist interpreters to appreciate better how words would have been used at the time they were reduced to writing and ratified. Jurists and institutional designers active in constitutional politics in the middle and end of the eighteenth century would have drawn on the language and law of trust and faithful execution, knowing that in doing so they weren’t just using flowery language from political theory trying their hands at moral suasion but that they were actually creating and establishing offices that were going to trigger legal consequences for breach of some kinds of duties we would now call fiduciary, even if the legal consequences for breach were going to be different from breaches in other office contexts from more “private” law. Ultimately, historical work on the original meaning of the Constitution can’t ignore the relevance of the political theory of fiduciary governance – and the interpretations it brings to bear on the original public meaning of the Constitution.

CONCLUSION

There is substantial originalist capital being invested in uncovering how public offices – particularly the presidency – might have been designed both to empower and to restrict officers with a suite of permissions and restrictions that look to the modern eye to have a fiduciary character. Those holding office under the U.S. Constitution should be seen as continuous in certain respects with office-holders in what we would today see as private law (though was less clearly delineated as such at the Founding). trusteeships, guardianships, corporate directorships. But the

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82 For further development of these themes, see Daniel Lee, Popular Sovereignty in Early Modern Constitutional Thought 273-315 (2016).
83 How public law affect trusts reciprocally is a story for another day.
84 At the Founding, the public or private status of many offices was unstable and fluid. See, e.g., David Ciepley, Beyond Public and Private: Toward a Political Theory of the Corporation, 107 Am. Pol. Sci. Rev. 139, 139 (2013) (“Before the nineteenth century, corporations were not viewed as private. It was taken for granted that they owed their existence and rights to the government that chartered them.”); Pauline Maier, The Revolutionary Origins of the American Corporation, 50 Wm & M. Q. 51, 55 (1993) (“Categories familiar to us—above all, those that separate public from private corporations—are the inventions of nineteenth-century jurists.”); Conal Condren, Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices 54 (2006) (“[An officer] is a person of double capacity
effort to make this case historically has taken at least three forms: “instrument-type” arguments; “clause-bound” arguments; and “conceptual foundations” arguments. I have tried to explore the reaches and limits of these modalities of argumentation in this Essay – highlighting the continuing promise and identifying some pitfalls of this kind of work. There remains more historical work to be done to uncover the relationship between the kind of law the framers set in motion when they adopted the Constitution and the modes of enforcement they anticipated – even for those who do not see themselves as bound by those remedial approaches in the modern state. But “conceptual foundations” originalists have at least cogently and persuasively established something significant: that the Constitution should be read in light of the law of office as it was developing at the time of the Founding – and that law had many dimensions of fiduciarity. Those dimensions were unlikely to have been incorporated off-the-rack into the new Constitution but their animating principles and the mischief the framers were trying to avoid help supply the original meaning of the document.

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public and private.’” (quoting SAMUEL BUTLER, CHARACTERS 295 (1667-69)); id. at 216 (“[T]here is no moral difference between a monarch’s betrayal of trust and any other who holds an office; physicians, parents, masters, patrons, husbands and the pilots of ships.”) (citing SAMUEL RUTHERFORD, LEX, REX Q.28 (1644). In light of the lack of fixity of the private and public spheres in the period leading up to the American Revolution, Bray and Miller’s insistence on the exclusively “private” nature of fiduciary law seems unjustified historically.