

The Constitution and the Public Trust

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[G]overnments are in fact . . . agents and trustees of the people . . .
— James Madison¹

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1. THE FEDERALIST NO. 46, *infra* note 2, at 243 (James Madison).

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I. INTRODUCTION

In *Lawrence v. Texas*,³ the Supreme Court ruled that a Texas statute criminalizing homosexual sodomy conflicted with the liberty interest of the Due Process Clause of the Fourteenth Amendment.⁴ The opinion was written by Justice Kennedy, who was joined by four of his colleagues.⁵ Justice O'Connor concurred in the judgment, basing her conclusion not on a due process basis, but on the Equal Protection Clause:⁶

We have consistently held . . . that some objectives, such as "a bare . . . desire to harm a politically unpopular group," are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.⁷

Much of the rhetoric of modern democratic politics seems based on a "bare desire" to harm politically unpopular groups. The letters column of many daily newspapers, and the speeches of many politicians, are filled with attacks on such groups—not merely, or even chiefly, homosexuals, but also corporations, bureaucrats, resident aliens, and "the rich," to name a few. Targeted legislation sometimes is the result. As Justice O'Connor suggests, the Equal Protection

3. 539 U.S. 558 (2003).

4. The Due Process Clause of the Fourteenth Amendment reads, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

5. The court stated:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence, 539 U.S. at 578-79.

6. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

7. 539 U.S. at 580 (O'Connor, J., concurring).

Clause sets limits beyond which these official attacks cannot go.

In an immediate sense, the Equal Protection Clause emerged from the Civil War and Reconstruction.⁸ Yet the underlying standard—that government agents have an obligation of impartiality to those they serve—was part of a fiduciary ideal of government service that was omnipresent years earlier, when the Constitution was drafted, debated, and ratified.

When the federal constitutional convention met in 1787, most of the state constitutions already contained fiduciary language.⁹ At the federal convention, ideals of fiduciary government were enunciated by James Madison,¹⁰ Alexander Hamilton,¹¹ Pierce Butler,¹² Nathaniel Gorham,¹³ Gouverneur Morris,¹⁴ Elbridge Gerry,¹⁵ Luther Martin,¹⁶ Rufus King,¹⁷ and John Dickinson.¹⁸ During the ensuing

8. *E.g.*, CHEMERINSKY, *supra* note 2, at 526.

9. *See infra* Part IV.E.2.

10. James Madison, Journal (June 7, 1787), *reprinted in* 1 FARRAND, RECORDS, *supra* note 2, at 152 (referring to the Roman tribunes “fulfilling [public] trust”); *id.* at 361 (June 21, 1787) (referring to the “trust” of representatives); *id.* at 428 (June 26, 1787) (stating that senators ought to be “Guardians of justice and general Good”); 2 *id.* at 66 (stating of the executive, “[h]e might betray his trust to foreign powers”).

11. 1 *id.* at 290 (June 18, 1787) (“public trust”); *id.* at 424 (June 26, 1787) (stating that the House of Representatives was to be “particularly the guardians of the poorer orders”).

12. *Id.* at 391 (June 23, 1787) (paraphrasing Montesquieu as stating that “it is unwise to entrust persons with power, which by being abused operates to the advantage of those entrusted with it.”).

13. 2 *id.* at 42 (July 18, 1787) (referring to the executive’s “faithful discharge of his trust”).

14. *Id.* at 52 (July 19, 1787) (“It is necessary then that the Executive Magistrate should be the guardian of the people . . .”); *id.* at 53 (arguing for popular election of the chief magistrate so he will be the guardian of the people); *id.* at 68 (July 20, 1787) (speaking of impeachment as a remedy for breach of trust); *id.* at 76 (July 21, 1787) (stating that the legislature should be the guardian of liberty); *id.* at 104 (July 24, 1787) (speaking of identity of interest as preventing an abuse of trust); *id.* at 541 (Sept. 7, 1787) (referring to the President as “the general Guardian of the National interests”).

15. *Id.* at 170 (June 8, 1787) (discussing the national legislature’s proposed veto over state laws and his own role as a delegate); 2 *id.* at 75 (July 21, 1787) (stating that judges should be the guardians of the rights of the people).

16. 1 *id.* at 453 (June 28, 1787) (referring to state governments as the guardians of the people).

17. *Id.* at 502 (June 30, 1787) (expressing the hope that the general government will be “the guardian of the state rights”).

public debate over the Constitution, leading proponents of the new government repeatedly characterized officials as the people's servants, agents, guardians, or trustees. Among these proponents were Madison,¹⁹ Dickinson,²⁰ John Jay,²¹ Tench Coxe,²² George Washington,²³ James Kent (the future New York Chancellor and treatise-writer),²⁴ and many others.²⁵ This was a subject on which there was no disagree-

18. 2 *id.* at 123 (referring to "public trust").

19. *E.g.*, THE FEDERALIST NO. 49, *supra* note 2, at 263 (discussing the nature of the legislative "public trust"); *id.* NO. 55, at 289 (denying that Congress was likely to "betray the solemn trust committed to them"); *id.* NO. 57, at 295 (referring to republican officeholders' "public trust"); *id.* NO. 63 at 325 (stating the need for a small senate to better protect the "public trust").

20. Dickinson promoted ratification of the Constitution in his "Letters of Fabius." *See, e.g.*, *Fabius II*, PENN. MERCURY, Apr. 19, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 2, at 122 ("federal trustees"); *id.* at 124 ("undue influence"); *id.* at 124-25 (affirming that presidential electors will reject suggestions "derived from *partiality*"); *id.* at 125 (referring to the senate's "trust" in acquiring and preserving information); *Fabius IV*, PENN. MERCURY, Apr. 19, 1788, *reprinted in* 17 *id.* at 180 (stating that government is a trust for the benefit of the governed). *See also* STILLÉ, *supra* note 2, at 204 (quoting Dickinson as referring to a representative as "a trustee for my countryman," and noting a corresponding duty for the representative to subordinate his own interest to those he serves).

21. FORD, PAMPHLETS, *supra* note 2, at 77.

22. *Id.* at 146; Tench Coxe, *An American Citizen III*, PHILA. INDEP. GAZETTEER, Sept. 29, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 273 (referring to public officers as "servants of the people").

23. George Washington, *To the Executives of the States*, PROVIDENCE U.S. CHRON., Mar. 15, 1783, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 70 (referring to his military command as a "public trust"); Letters from George Washington to Marquis de Lafayette (Apr. 28 & May 1, 1788), *in* 17 DOCUMENTARY HISTORY, *supra* note 2, at 235 (stating that the Constitution guards against "undue influence in the choice of President").

24. *A Country Federalist*, POUGHKEEPSIE COUNTRY J., Dec. 19, 1787, *reprinted in* 19 DOCUMENTARY HISTORY, *supra* note 2, at 430, 433 (writing as "A Country Federalist").

25. In addition to the citations collected *infra* in Part V, see Letter from Roger Sherman to Unknown Recipient (Dec. 8, 1787), *in* HUTSON, SUPPLEMENT, *supra* note 2, at 286 ("In every government there is a trust, which may be abused"); *Marcus IV*, NORFOLK & PORTSMOUTH J., Mar. 12, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 380-81 (James Iredell, writing as "Marcus," speaking of powers being "entrusted"); Letter from Benjamin Rush to David Ramsay (Apr. 14, 1788), *in* 17 *id.* at 96 (calling legislators the people's "servants," speaking of "trusting . . . power," and referring to "men entrusted with power"); *A Citizen of New York*, N.Y. DAILY ADVERTISER, Sept. 26, 1787, *reprinted in* 19 *id.* at 54 (calling the Presidency a trust); *Curtius III*, N.Y. DAILY ADVERTISER, Nov. 3, 1787, *reprinted in* 19 *id.* at 174-75 (referring to "office[s] of place or trust"); *Cincinnatus*, LANSINGBURGH N. CENTINEL, Oct. 15, 1787, *reprinted in* 19 *id.* at 87-88 ("Why then should we be more fearful or cautious in entrusting them with power than we now are in trusting the officers of our

ment from the Constitution's opponents. They very often used the same kind of language, and based their own arguments on fiduciary principles as well.²⁶

The same was true at the state conventions that met to ratify or reject the Constitution.²⁷ Indeed, the delegates at

present government, who are also chosen by and from among ourselves?"); THE FEDERALIST NO. 59, *supra* note 2, at 310 (Alexander Hamilton) (stating that the union should not "be committed to the guardianship of any but those whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust"); FRIENDS, *supra* note 2, at 383 (Noah Webster, describing a delegate's "trust").

John Adams had opined in 1765 in his "Dissertation on the Canon and Feudal Law," that "[r]ulers are no more than attorneys, agents, and trustees, for the people." ADAMS, WRITINGS, *supra* note 2, at 28. He repeated this sentiment the following year under the pseudonym "The Earl of Clarendon." *Id.* at 54. Cf. WILSON, *supra* note 2, at 300 (stating in one of his 1790 lectures that Congress is "intrusted" with legislative power).

26. E.g., *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, PENN. PACKET, Dec. 18, 1787, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 2, at 618, 636-37 (claiming that "[t]his large state is to have but ten members in that Congress which is to have the liberty, property, and dearest concerns of every individual in this vast country at absolute command, and even these ten persons, who are to be our only guardians . . ."); *Americanus I*, VA. IND. CHRON., Dec. 5, 1787, reprinted in 8 *id.* at 200-01 (stating that public officials are the servants of the people); *id.* at 246 (referring to the authority with which the senate was to be "entrusted"); *Remarks Relative to a Bill of Rights*, Maryland Convention (Apr. 12, 1788), in 17 *id.* at 92 ("A Citizen of the State of Maryland," relying on Lord Abington's trust theory of government); *A Republican*, N.Y. J., Sept. 6, 1787, reprinted in 19 *id.* at 16, 18 (stating that the governor "is from office, one of the guardians of our liberties"); *Observations on Government*, Nov. 3, 1787, reprinted in 19 *id.* at 181, 184 ("A Farmer of New-Jersey," referring to "[t]he powers that must necessarily be intrusted in the hands of the President"); *Cato IV*, N.Y. J., Nov. 8, 1787, reprinted in *id.* at 195-96 (referring to "the deposit of vast trusts in the hands of a single magistrate"); 4 STORING, ANTI-FEDERALIST, *supra* note 2, at 25 ("John DeWitt," arguing that "The form [of the constitution] is the mode in which the people choose to direct their affairs, and the magistrates are but trustees to put that mode in force"); *id.* at 26 (referring to "places of honour and trust"); *id.* at 27 (referring to "careful guardians of the rights of their constituents"); 6 *id.* at 108 ("Sydney," Robert Yates, stating that "we ought deliberately to trace the extent and tendency of the trust we are about to repose, under the conviction that a re-assumption of that trust will at least be difficult, if not impracticable").

27. Fisher Ames, Massachusetts Convention (Jan. 11, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 8-9 (stating that "by their servants [the people] govern . . . they delegate that power, which they cannot use themselves, to their trustees."); Fisher Ames (Jan. 19, 1788), in *id.* at 46 (referring to the "trust" of government); William Symmes (Jan. 22, 1788), in *id.* at 71 (referring to Congress as "trustees"); Rev. Shute (Jan. 30, 1788), in *id.* at 119 (referring to national offices as "national trusts").

Robert R. Livingston, New York Convention (June 23, 1788) in 2 ELLIOT'S DEBATES, *supra* note 2, at 293 (referring to national offices as "stations of trust"); Alexander Hamilton, in *id.* at 398 (referring to "trust" and "confidence");

the Maryland convention described themselves *formally* as "trustees of the public."²⁸ The Virginia convention narrowly approved the Constitution, but with a recommendation that a "declaration or bill of rights" be added, including the proclamation, "That all power is naturally invested in, and consequently derived from, the people; that magistrates therefore are their trustees and agents, at all times amenable to them."²⁹ The new federal Constitution itself referred in several places to "public Trust"³⁰ and to public offices being "of Trust."³¹

I have not been able to find a single public pronouncement in the constitutional debate contending or implying that the comparison of government officials and private fiduciaries was inapt. The fiduciary metaphor seems to rank just below "liberty" and "republicanism" as an element of the ideology of the day.

Although the founders frequently used the metaphors of guardianship, master-servant, and agency to describe the

id. at 388 (referring to governmental agencies as "guardians" and "stewards"); Thomas Tredwell (July 2, 1788), *in id.* at 404-05 (repeatedly using the language of "trust").

James Wilson, Pennsylvania Convention (Dec. 1, 4, 1787) *in* 2 ELLIOT'S DEBATES, *supra* note 2, at 293 at 443-44, 459, 480 (using the language of public trust); Thomas M'Kean (Dec. 11, 1787), *in id.* at 530 (telling the delegates that their duty "is a sacred trust"); *id.* at 533 (referring to the trust in the Senate).

Charles Pinckney, South Carolina legislature, considering whether to hold a ratifying convention (June 16, 1788) *in* 4 *id.* at 256 (speaking of "intrust" rights to the legislature); John Julius Pringle, *in id.* at 270 (mentioning "betraying" of public trust); Edward Rutledge, *in id.* at 276 (referring to abuse of trust by Senators or the President); General Pinckney (June 17, 1788), *in id.* at 281 (referring to impeachment as a remedy for breach of public trust).

Governor Edmund Randolph, Virginia Convention (June 10, 1788), *in* 3 *id.* at 204 ("A man of abilities and character, of any sect whatever, may be admitted to any office or public trust under the United States."); John Marshall, *in id.* at 225 ("You cannot exercise the powers of government personally yourselves. You must trust to agents."); *id.* at 657 (June 27, 1788) (proposed amendment to Constitution stating, "That all power is naturally invested in, and consequently derived from, the people; that magistrates therefore are their trustees and agents, at all times amenable to them.").

28. Maryland Convention (Apr. 21, 1788), *in* 2 *id.* at 556; *cf. Reports of the Constitutional Convention Proceedings*, PENN. HERALD, July 28, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 125 (describing the federal convention as an "important trust").

29. Virginia Convention (June 27, 1788), *in id.* at 657.

30. U.S. CONST. art. VI, cl. 3.

31. U.S. CONST. art. I, § 3, cl. 7 ("Office of . . . Trust"); *id.*, art. I, § 9, cl. 8; *id.*, art. II, § 1, cl. 2 ("Office of Trust").

relationship between elector and elected, the phrase they used most often was “public trust.” In this article, therefore, I often refer to the ideal of fiduciary government as the *public trust doctrine*. The Founders’ public trust doctrine was far more comprehensive than modern tenets that share the name.³²

Justice Stephen Breyer has pointed out that the “general purposes” behind the Constitution—the values the document was designed to further—should assist courts in construing the Constitution, just as the underlying goals of any other document assist in understanding it.³³ In this Article, I explore whether the recurrent references to the public trust were merely empty phrases or whether it really was a “general purpose” of the founders to impose fiduciary standards on the federal government. After concluding that the latter is true, I then explore what some implications of that finding that might be.

Part I of this Article is this Introduction. Part II lists some fiduciary duties potentially applicable to government. Part III summarizes for the reader the process by which the Constitution was drafted, debated, and ratified. Part IV examines works by some of the Founders’ favorite political and legal authors and finds that those authors frequently advocated imposing fiduciary standards on government offi-

32. One modern “public trust doctrine” is that the state holds lands submerged beneath navigable waterways in public trust. The leading case is *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892). Another modern public trust doctrine is the rule, applied in some states, that some or all natural resources are held in public trust. See, e.g., CONN. GEN. STAT. § 22a-15 (1958):

Declaration of policy[:]

It is hereby found and declared that there is a public trust in the air, water and other natural resources of the state of Connecticut and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction.

For short surveys of the doctrine and citations to the literature, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); James R. Rasband, *The Public Trust Doctrine, A Tragedy of the Common Law*, 77 TEX. L. REV. 1335 (1999) (reviewing BONNIE J. MCCAY, *OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY* (1998)).

33. Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 247-48 (2002) (“[The Constitution’s] handful of general purposes will inform judicial interpretation of many individual provisions that do not refer directly to the general objective in question.”).

cial. Part V discusses the role of public trust concepts in the drafting, submission, and ratification of the Constitution. Part VI suggests some implications for modern American constitutional interpretation, while Part VII summarizes my conclusions.

II. SOME FIDUCIARY DUTIES POTENTIALLY APPLICABLE TO GOVERNMENT OFFICIALS

If the public trust doctrine has a meaning beyond the romantic, it is that public officials are legally bound to (appropriately adapted) standards borrowed from the law regulating private fiduciaries.³⁴ Generally speaking, the law applying to private fiduciaries imposes higher standards on managers as the potential consequences of breach of duty become more serious, and as it becomes more difficult for beneficiaries to avoid those consequences.³⁵ In the public sector, of course, the consequences of governmental abuse can be very serious, potentially including not merely the loss of a citizen's property, but of life, liberty, or reputation. Avoidance of consequences of governmental abuse is difficult, because while citizens can elect most higher officials, the bureaucracy is effectively beyond direct citizen control and exit from the government-citizen relationship requires physically removing oneself from the government's territorial jurisdiction.³⁶ For these reasons, the logic of fiduciary law suggests that the standards of conduct binding public trustees ought to be fairly demanding.³⁷

In addition to certain obvious moral norms, such as not absconding with the public till, there are at least five broad fiduciary obligations potentially relevant to government officials: (1) the duty to follow instructions, (2) the duty of reasonable care, (3) the duty of loyalty, (4) the duty of impartiality, and (5) the duty to account. The first of these is the obligation to act in accordance with the purpose and

34. See Natelson, *The Government as Fiduciary*, *supra* note 2, and sources cited therein, for the rules of fiduciary government and an historical application.

35. See *id.* at 194-98.

36. See *id.* at 199-200. In contrast, escape from an undesirable corporate board of directors usually entails no more than sale of stock.

37. See *id.* at 200.

rules of the relationship as set forth in the governing instruments.³⁸ In the government context, this means that officials should work only in accordance with the purposes of their offices and honor the rules set by pre-established law and administrative regulations. The duty of reasonable care³⁹ applies irrespective of good intent⁴⁰ and comprehends obligations to manage assets competently,⁴¹ select and supervise agents diligently,⁴² and undertake appropriate factual and legal investigations⁴³ before making decisions. The duty of loyalty is the fiduciary's obligation to subordinate his own interests to the welfare of the beneficiaries.⁴⁴ Acting in a self-serving way ("self-dealing") violates the duty of loyalty because of the risk that the fiduciary may be enriched at the expense of the beneficiary.⁴⁵ The duty of impartiality requires the decision maker to avoid favoring some beneficiaries over others, unless otherwise directed by

38. BOGERT & BOGERT, *supra* note 2, § 541 at 161-62.

39. *Id.* § 541, at 167 ("[T]he trustee is required to manifest the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question"); see also BOGERT & HESS, *supra* note 2, § 612, at 13; RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

40. BOGERT & BOGERT, *supra* note 2, § 541, at 177 ("[T]he duty to use the care and skill of an ordinarily prudent man is absolute. The fact that the trustee was honest and well intentioned will not excuse him from the manifestation of the required amount of diligence and prudence.").

41. *Cf. id.* § 541, at 167; RESTATEMENT (SECOND) OF TRUSTS § 179 (1959) (duty to keep funds separate); see also BOGERT & BOGERT, *supra* note 2, § 541, at 160-61 (duty to collect and preserve trust principal); RESTATEMENT (SECOND) OF TRUSTS § 177 (1959) (duty to enforce claims).

42. See GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, HANDBOOK OF THE LAW OF TRUSTS 335 (5th ed. 1973) (duty to use reasonable care in selection and supervision of agents); RESTATEMENT (SECOND) OF TRUSTS, § 171 (1959).

43. See, e.g., RESTATEMENT (THIRD) OF TRUSTS (PRUDENT INVESTOR RULE) § 227 cmt. h, (1992) (mentioning investigation as part of a prudent investment strategy). See also BOGERT & HESS, *supra* note 2, at 32-36 (using expert advice in investing).

44. BOGERT & BOGERT, *supra* note 2, § 543, at 217; RESTATEMENT (SECOND) OF TRUSTS § 170 (1959). The extent of the required subordination depends on the sort of relationship in which the duty arises. For example, the manager who is also a beneficiary, such as a general partner, need not subordinate his interest as completely as a private trustee. Arguably, such a common-enterprise relationship is not truly fiduciary, but occupies a point on the spectrum between arms-length and truly fiduciary relationships. See Natelson, *The Government as Fiduciary*, *supra* note 2, at 197-98.

45. E.g., BOGERT & BOGERT, *supra* note 2, § 543(A), at 271 (explaining that trustees are not permitted to buy at their own sales).

the governing documents.⁴⁶ Thus, a trustee, for example, must act with due regard to each beneficiary's respective interests.⁴⁷ By analogy, public trustees should avoid targeting particular constituencies for favor or for punishment. Finally, the fiduciary has a duty to account for his conduct, including an obligation to repair any harm caused by breach.⁴⁸ (In the public context today, the duty to account is

46. RESTATEMENT (SECOND) OF TRUSTS § 183 (1959):

§ 183. Duty to Deal Impartially with Beneficiaries[:]

When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.

Comment:

a. The rule stated in this Section is applicable whether the beneficiaries' interests in the trust property are concurrent or successive.

On this point, see also BOGERT & BOGERT, *supra* note 2, § 541, at 163-66; BOGERT & HESS, *supra* note 2, § 612, at 49-57.

47. RESTATEMENT (SECOND) OF TRUSTS § 232 (1959):

§ 232. Impartiality between Successive Beneficiaries[:]

If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.

Comment:

a. The rule stated in this Section is an application of the broader rule stated in § 183 that where there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them. That rule is applicable whether the beneficiaries are entitled to interests in the trust property simultaneously or successively. . . .

d. To what duties the Section is applicable. The rule stated in this Section is applicable to the duty of the trustee in making or continuing investments, to the general management of the trust estate, the making of repairs and replacements and to the allocation of receipts and expenditures between principal and income accounts.

See also BOGERT & BOGERT, *supra* note 2, § 541, at 171.

sharply limited.)⁴⁹ Only if fiduciaries honor all these duties, does the law grant them a fairly broad realm of managerial discretion.⁵⁰

As we shall see, the Founders' definition of public trust comprehended all five of these standards.

III. THE PROCESS OF CONSTITUTIONAL APPROVAL

A knowledge of the process by which the Constitution was drafted, debated, and ratified is helpful in understanding how particular values, such as the public trust doctrine, influenced the meaning of the instrument. By 1786, most opinion makers had concluded that the Articles of Confederation were not an adequate frame for American government, and that a stronger central authority was needed. Successive calls for change came from Congress, the Commonwealth of Virginia, the Annapolis Convention (attended by five states), and then again from Congress. In response, twelve states sent delegates to a Constitutional Convention that met in Philadelphia from May to September, 1787.⁵¹

48. See RESTATEMENT (SECOND) OF TRUSTS § 173 (1959) (trustee's duty to furnish information to beneficiary); *id.* § 243 (explaining that breach of trust may result in reduced or no compensation).

49. Natelson, *The Government as Fiduciary*, *supra* note 2, at 200-02.

50. Even trustees, possibly the most constrained of fiduciaries, enjoy significant discretion within the limits of their fiduciary duties. See RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) (explaining that where discretion is granted to a trustee, the exercise is not subject to control of a court except to prevent abuse); RESTATEMENT (THIRD) OF TRUSTS (PRUDENT INVESTOR RULE) § 227, cmt. b, illus. 3-4 (supporting discretion of trustee exercised in compliance with fiduciary duties, despite investment losses). See also *id.* § 171, cmt. f (delegation of authority); *id.* § 228, cmt. g (investment).

Managers of corporations, where (unlike governmental entities) exit by the beneficiaries is usually easy (by sale of shares), have somewhat more discretion. This is reflected by the "Business Judgment Rule." See HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS* 661-63 (3d ed. 1983).

51. This course of events has been documented too many times to require detailed citation. See, e.g., Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787* (1966); McDonald, *supra* note 2; Rossiter, *supra* note 2.

Although most people agreed that the central government should have more authority, there was sharp disagreement about how much more. The balance of power between states and central government was the central issue in the ensuing constitutional debates, and other disputes—such as the debates about the composition of Congress and the advisability of a bill of rights—were largely derivative of it.⁵² The disagreement among the general public was reflected at the Federal Constitutional Convention, but with a significant qualification: Among Convention delegates there was a higher percentage of “nationalists” than among the voting public. The Convention majority initially leaned toward a plan of government propounded by the Virginia delegation (the “Virginia Plan”) that would have created a national government with sweeping and indefinite authority and with power to veto state laws.⁵³ As the deliberations wore on, however, the Convention began to realize that so much nationalism was perhaps unwise and certainly too strong for public consumption. During the last two months of the convention, therefore, the delegates

52. For example, whether one believed Congress should be unicameral or bicameral and whether one believed it should represent the states or the people generally turned on how much power that person thought Congress should have. Advocates of a weak Congress, such as the promoters of the New Jersey Plan at the federal convention, tended to favor unicameralism and representation by states. See James Madison, *Journal* (June 15, 1787), reprinted in 1 FARRAND, *RECORDS*, *supra* note 2, at 242-45). Advocates of a strong Congress, such as the promoters of the Virginia Plan, *id.* at 20-22 (May 29, 1787), virtually all favored bicameralism and some sort of “proportional” representation—that is, representation by population, wealth, or financial contribution. This coincidence was not an accident; it flowed from a shared principle of political science: the more power a government has, the more firmly it should rest on the people. Thus, a nationalist like Rufus King could describe per capita state voting as a “vicious principle of representation,” even when limited to one house, *id.* at 490 (June 30, 1787), while Oliver Ellsworth, who favored per capita representation in the Senate, complemented it with his desire for more decentralization. *Id.* at 492. Similarly, the Bill of Rights was adopted to please mostly those who advocated a weak federal system—the conditional anti-federalists. See *infra* note 57 and accompanying text. The Bill of Rights, of course, is mostly a list of things the federal government may not do. See U.S. CONST. amends. I-X.

53. For a copy of the Virginia Plan, see James Madison, *Journal* (May 29, 1787), reprinted in 1 FARRAND, *RECORDS*, *supra* note 2, at 20-22.

gradually diluted the plan. The final version projected a central government that, while a good deal stronger than the Confederation Congress, was limited to defined and enumerated powers.⁵⁴

When reported on September 17, 1787, the Constitution was only a proposal, a sort of public offer. By the terms of the offer, acceptance would require ratification by popular conventions in nine of the thirteen states.⁵⁵

The offer was followed by a vigorous public debate over whether to accept. Those favoring ratification called themselves "federalists," and they tagged their opponents as "anti-federalists."⁵⁶ The labels stuck. Opponents were themselves split into two major subgroups, which we may call "unconditional anti-federalists" and "conditional anti-federalists." The former opposed the Constitution under any circumstances. The latter would agree to ratification if provided with certain safeguards.⁵⁷ Most of these safeguards involved assurances that the central government would be weak enough to leave broad powers in the states and broad rights with the people.

In December, 1787 and January, 1788 the federalist faction won decisive victories in five states: Conventions in Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut all ratified by wide margins.⁵⁸ Among the re-

54. The course of this process is discussed in Natelson, *Enumerated*, *supra* note 2.

55. U.S. CONST. art. VII. Congress served only a transmittal role. The Convention forwarded the document to Congress, which neither approved nor disapproved it, but sent it on to the states.

56. *None of the Well-Born Conspirators*, PHILA. FREEMAN'S J., Apr. 23, 1788, reprinted in 17 DOCUMENTARY HISTORY, *supra* note 2, at 203 (editorial comment).

57. A letter from William Fleming contains an example of conditional anti-federalist sentiment: "[F]rom the above you will see that I am for the Constitution with such amendments as will secure the liberty of the Subject." Letter from William Fleming to Thomas Madison (Feb. 19, 1788), in 16 DOCUMENTARY HISTORY, *supra* note 2, at 141.

58. See the chronology at 2 DOCUMENTARY HISTORY, *supra* note 2, at 19-25.

maining states, only in Maryland⁵⁹ were the proponents of the Constitution so strong. To win in any of the other remaining states, they needed to form a coalition with the conditional anti-federalists. Accordingly, the federalists issued reassuring representations as to the meaning of certain parts of the Constitution,⁶⁰ such as the General Welfare Clause,⁶¹ that anti-federalists had found ambiguous or threatening.⁶² In addition, the federalists entered into a gentlemen's agreement with the conditional anti-federalists to the effect that, once the Constitution was ratified, it would be amended to scale back the prerogatives of the central government. This gentlemen's agreement resulted in the Bill of Rights.

The federalists' decision to compromise persuaded enough conditional anti-federalists to obtain ratification in the remaining states.⁶³ Induced by the federalists' represen-

59. The Maryland convention ratified in April by a 63-11 margin, *id.* at 23, and refused to propose amendments, Address to the People of Maryland (Apr. 20, 1788) in 2 ELLIOT'S DEBATES, *supra* note 2, at 548-49, 555. The rejected amendments also are printed in 17 DOCUMENTARY HISTORY, *supra* note 2, at 240-41. They begin with the statement, "That it be declared that all Persons entrusted with the Legislative or Executive Powers of Government, are the Trustees and Servants of the Public, and as such accountable for their Conduct."). Although not adopted by the Maryland convention, the proposed amendments were reprinted all over America. *Id.* at 237-38.

60. See, e.g., Letter from George Washington to Marquis de Lafayette (Apr. 28, 1788), in 17 DOCUMENTARY HISTORY, *supra* note 2, at 233, 235 ("[T]here are many things in the Constitution, which only need to be explained, in order to prove equally satisfactory to all parties."). The content of some important federalist representations are discussed in detail in Natelson, *Enumerated*, *supra* note 2.

61. U.S. CONST. art I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States . . .").

62. For example, in response to anti-federalist claims that the General Welfare Clause could be interpreted to grant plenary power to Congress, federalists responded that it was not a grant but a limitation of power. Natelson, *General Welfare*, *supra* note 2, at 38-44.

63. Massachusetts may serve as an example. While the final vote at the state ratifying convention was still undecided, Governor John Hancock, whose previous stance on the Constitution had been unknown, offered a formula for

tations and by the gentlemen's agreement, delegates in Massachusetts, New Hampshire, Virginia, and New York approved the document by narrow margins. South Carolina approved by a somewhat wider margin.⁶⁴ North Carolina and Rhode Island refused to ratify until the new federal Congress actually had approved the Bill of Rights and sent it to the states for ratification.⁶⁵ Thus was the grand constitutional bargain proposed, negotiated, and approved. The surviving records of that process tell us much about the values the Constitution embodied.⁶⁶

IV. THE FOUNDERS' POLITICAL AND LEGAL CANON

A. *Contents of the Canon*

The participants in the constitutional debates were great readers. Books were relatively scarce, however, so they tended to read many of the same things. Surveying the Founders' literary canon offers valuable insight into what they thought—and why they thought as they did.

The starting point of the canon, of course, was the Bible. Next came the classics of ancient Greece and Rome, often perused in the original languages.⁶⁷ The Founders also studied more recent European philosophers, particularly

ratification that included recommended amendments. Samuel Adams, hitherto an anti-federalist, then switched sides, assuring ratification by a 53%-47% majority. Adams' decisive convention speech is located at 2 ELLIOT'S DEBATES, *supra* note 2, at 130-33.

64. The convention vote in Massachusetts was 187-168, in New Hampshire 57-47, in New York 30-27, in Virginia 89-79, and in South Carolina 149-73. All of these states ratified only after proposing amendments. 2 DOCUMENTARY HISTORY, *supra* note 2, at 23-24.

65. Both North Carolina and Rhode Island had effectively rejected the Constitution previously. Subsequent ratification in Rhode Island was still close (34-32). See 2 DOCUMENTARY HISTORY, *supra* note 2, at 19-25 for the ratification chronology.

66. See *infra* Part V.

67. See generally RICHARD, *supra* note 2, at 12-38 (providing a general overview of the education system in the founding generation).

Niccolo Machiavelli⁶⁸ and Baron Montesquieu,⁶⁹ and read widely among English political theorists of the seventeenth and eighteenth centuries. They did not much approve of the justifications for royal power they found in the works of King James I, Robert Filmer, or David Hume,⁷⁰ but they read with approbation English "country party"⁷¹ theorists such as John Milton, James Harrington, Algernon Sidney, John Locke, Henry St. James Bolingbroke, and Richard Price.⁷² They also perused popular law books featuring po-

68. I have not focused on Machiavelli in the pages that follow. However, his *Discourses on Livy* occasionally use fiduciary language (most often "guardian" or "guardianship") to describe public duties. See generally NICCOLO MACHIAVELLI, DISCOURSES UPON THE FIRST TEN BOOKS OF TITUS LIVY (attributed to Henry Neville trans., 1675), available at http://www.constitution.org/mac/disclivy_.htm (last visited Dec. 10, 2004). For examples of citation of Machiavelli during the ratification debates, see *Centinel III*, PHILA. INDEP. GAZETTEER, Nov. 8, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 2, at 58; MERCY WARREN, A COLUMBIAN PATRIOT: OBSERVATIONS ON THE CONSTITUTION (1788), reprinted in 16 *id.* at 282.

69. On Montesquieu's influence, see *infra* notes 247-254 and accompanying text.

70. See *infra* Part IV.C.

71. The term was used to refer to those who generally opposed the king's pretensions, in opposition to the "court party." See, e.g., 5 HUME, *supra* note 2, at 243; see also MCDONALD, *supra* note 2, at 59, who also uses the term "English Opposition" to describe this group.

72. Thus, John Adams praised the "revolution principles" of "Aristotle and Plato, of Livy and Cicero, and Sidney, Harrington, and Locke" JOHN ADAMS, NOVANGLUS; OR: A HISTORY OF THE DISPUTE WITH AMERICA, FROM ITS ORIGIN, IN 1754, TO THE PRESENT TIME, reprinted in ADAMS, WRITINGS, *supra* note 2, at 147, 152. Hamilton's notes for his famous June 18, 1787 convention speech contain the following reference: "Aristotle—Cicero Montesquieu—Neckar." 1 FARRAND, RECORDS, *supra* note 2, at 308. Historian Carl J. Richard tells us:

After the Stamp Act of 1765, many theses applied the political principles of Aristotle, Cicero, and Polybius to the debates concerning independence and the Constitution. Samuel Adams had anticipated these issues in his own master's thesis, delivered in flawless Latin in 1743. In answer to the title question "Whether It Be Lawful to Resist the Supreme Magistrate, if the Commonwealth Cannot Be Otherwise Preserved," Adams resoundingly asserted: absolutely!

RICHARD, *supra* note 2, at 24.

litical observations amid their legal expositions.⁷³ Many of these works, in one form or other, promoted elements of the public trust doctrine.

B. *The Classical Core: Plato, Aristotle, Cicero*

Plato's most widely-read work, the *Republic*,⁷⁴ 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.⁷⁵ According to Plato, the purpose of the state was to promote the interest of the entire society,⁷⁶ and the guardian was to subordinate his interest to that purpose.⁷⁷ 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."⁷⁸ 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.⁷⁹

Aristotle's *Politics*⁸⁰ was a survey and assessment of existing and possible state constitutions. The *Politics*

73. Legal writers are discussed *infra* Part IV.E.1.

74. As a fixture in contemporary education, Plato was cited occasionally during the public debate over ratification. See, e.g., THE FEDERALIST NO. 49, *supra* note 2, at 283 (Madison). For a critical citation, see Letter from Edmund Pendleton to Nathaniel Pendleton, Jr. (Oct. 10, 1787) in 13 DOCUMENTARY HISTORY, *supra* note 2, at 357-58.

75. See *infra* Part IV.E.1.b.

76. PLATO, *supra* note 2, at 164.

77. *Id.* at 71.

78. *Id.* at 284-85.

79. See *id.* at 249-50.

80. In 1790, James Wilson quoted Hugo Grotius (about whom, see *infra* notes 112-117 and accompanying text), stating: "Among philosophers, Aristotle deservedly holds the chief place." RICHARD, *supra* note 2, at 230. In 1783, when

praised those constitutions that “aim at the common advantage,” as opposed to those “that aim at the rulers’ own advantage only.”⁸¹ Aristotle’s mentor Plato had introduced the notion that there were three simple forms of government; monarchy, aristocracy, and democracy; and three perversions thereof; tyranny, oligarchy, and mob rule.⁸² Aristotle modified this matrix slightly, and used a trust principle to distinguish the simple forms from the perversions: His first three forms—kingship, aristocracy, and *politeia* (a democratic constitutional republic)—were ruled for the common advantage.⁸³ The three perversions—tyranny, oligarchy, and democracy—were administered for the advantage of the rulers. Thus, “tyranny is monarchy ruling in the interest of the monarch, oligarchy government in the interest of the rich, democracy government in the interest of the poor, and none of these forms governs with regard to the profit of the community.”⁸⁴

Aristotle’s *Nicomachean Ethics* described the duty of the civil magistrate as being the “guardian of the Just and therefore of the Equal.”⁸⁵ Magistrates were expected to be governed by the law.⁸⁶ Because the magistrate was the guardian of equality, he should proceed impartially. He should, therefore, distribute benefits strictly in accordance with legal justice, and should not seize a disproportionate share of good things for himself—otherwise he would become a tyrant.⁸⁷ Thus, the sort of justice a magistrate

James Madison was a member of Congress and headed a committee charged with recommending books for congressional use, he placed Aristotle’s *Politics* at the top of the list. RICHARD, *supra* note 2, at 140. Madison referred to Aristotle’s political philosophy, with attribution, in at least one later public paper. *See id.* at 156.

81. ARISTOTLE, *POLITICS*, *supra* note 2, at 205.

82. *See* RICHARD, *supra* note 2, at 124.

83. *See* ARISTOTLE, *POLITICS*, *supra* note 2, at 207.

84. *Id.*

85. ARISTOTLE, *ETHICS*, *supra* note 2, at 123.

86. *See id.* at 123.

87. *See id.*

doled out to citizens was not the sort that a parent gave to children, for children belonged to the parent, while citizens were not the property of the magistrate.⁸⁸

A special hero to many in the founding generation was Marcus Tullius Cicero (106-43 B.C.), the Roman republican statesman, orator, and political philosopher.⁸⁹ Most educated people had read his leading works, along with those of other Romans, in Latin as well as in English.⁹⁰ One of Cicero's most admired tracts, *de Officiis* ("On Duties"),⁹¹ dealt at length with the standards appropriate for public officials.

In his discussion of public duties in *de Officiis*, Cicero took as a starting point the passages from Plato's *Republic* discussed above.⁹² However, he altered their import slightly in a way that a modern (or eighteenth century) reader would recognize as more precisely fiduciary. Cicero, it may be recalled, was a great lawyer and the Romans had well-developed law governing agency and testamentary trusts. The following passage demonstrates how Cicero's language communicates, particularly to the reader of Latin, the notion of fiduciary government. It is a translation of a por-

88. *Id.* at 124.

89. RICHARD, *supra* note 2, at 57 (listing Cato the Younger, Brutus, Cassius, and Cicero as "[t]he founders' principal Roman heroes"). Cicero was a special favorite of James Wilson, *id.* at 65, 175-77, and John Adams, *id.* at 61-63, 178. Wilson's *Works* are replete with references to Cicero. See WILSON, *supra* note 2, at 859 (index).

90. See, e.g., RICHARD, *supra* note 2, at 19. An example of Cicero's pervasive influence on style and pattern of thought is the way the anti-federalist essayist the "Impartial Examiner" introduced his subject: From the standpoint of a foreigner looking in. Both the device and the style (notably of his fourth sentence) are distinctly reminiscent of the introduction to Cicero's oration *Pro Caelio*. 8 DOCUMENTARY HISTORY, *supra* note 2, at 387-88. Both passages are too long to reproduce here.

91. Besides being influential among the learned, *de Officiis* was occasionally cited in the newspapers during the ratification debates. See, e.g., A REVIEW OF THE CONSTITUTION PROPOSED BY THE LATE CONVENTION BY A FEDERAL REPUBLICAN (Oct. 28, 1787), reprinted in 3 STORING, *supra* note 2, at 65-66, 86 (an anti-federalist writer).

92. See *supra* notes 74-79 and accompanying text.

tion of *de Officiis* with the Roman fiduciary terms [in brackets]:

For those who are to take charge of the affairs of government should keep in mind two rules of Plato: first, to so exercise guardianship [*tueantur*] of the good of the citizens that whatever they do they focus on it, forgetful of their own interests; second, that they care for [*curent*, a term used of agents and guardians] the entire body of the state lest, while they guard [*tuentur*] some part they desert the rest. For just like a guardianship [*tutela*], the agency [*procuratio*] of the state must be carried on for the good of those whose interest was entrusted [*commissi*, related to *fidei commissum*, a testamentary trust], not for those to whom it was entrusted [*commissa*]. Now, those who consult the interests of a part of the citizens and neglect another part, introduce into the state a most wicked element—sedition and party strife.⁹³

Note that amid the mass of fiduciary language were the substantive assertions that a public official has the fiduciary's duties of subordination of interest and of impartiality. Other passages enjoined the magistrate to proceed in strict accordance with justice and the rule of law, and to subordinate his own interest to them. Thus, Cicero wrote, "[the magistrate] will not expose anyone to hatred or disrepute by groundless charges." On the contrary, "he will surely cleave to justice and honour so closely that he will submit to any loss, however heavy, rather than be untrue to them, and will face death itself rather than renounce them."⁹⁴ Further, "they who administer the government should be like the laws,

93. CICERO, *supra* note 2, at 87. The translation of this particular passage is mine, however, not Walter Miller's. The original is as follows:

Omnino qui rei publicae praefuturi sunt duo Platonis praecepta teneant: unum, ut utilitatem civium sic tueantur, ut, quaecumque agunt, ad eam referant obliti commodorum suorum, alterum, ut totum corpus rei publicae curent, ne, dum partem aliquam tuentur, reliquas deserant. Ut enim tutela, sic procuratio rei publicae ad eorum utilitatem, qui commissi sunt, non ad eorum, quibus commissum est, gerenda est. Qui autem parti civium consulunt, partem neglegunt, rem perniciosissimam in civitatem inducunt, seditionem atque discordiam.

See also *id.* at 89-91 (explaining that government ought not to be administered for the personal satisfaction of the magistrates).

94. *Id.* at 89 (Walter Miller's translation).

which are led to inflict punishment not by wrath but by justice,”⁹⁵ for the fiduciary, like others involved in the transactions of daily life, had the duty of good faith.⁹⁶

Cicero added the following passage, in which I have again flagged fiduciary terms [in brackets]:

It is, then, peculiarly the place of a magistrate to bear in mind that he represents the state and that it is his duty to uphold its honour and its dignity, to enforce the law [*servare leges*—more literally, “to observe the laws”], to dispense to all their constitutional rights, and to remember that all this has been committed to him as a sacred trust [*fidei suae commissa*].

The private individual ought first, in private relations, to live on fair and equal terms with his fellow-citizens, with a spirit neither servile and groveling nor yet domineering; and second, in matters pertaining to the state, to labour for her peace and honour; for such a man we are accustomed to esteem and call a good citizen.⁹⁷

C. *The Bible: According to King James*

In Britain the view that the Bible enjoins strict fiduciary-style duties on rulers had been popularized, not by opponents of the Crown, but by some of its staunchest de-

95. *Id.* at 91 (Walter Miller’s translation).

96. *See id.* at 341 (Walter Miller’s translation):

It was Quintus Scaevola, the pontifex maximus, who used to attach the greatest importance to all questions of arbitration to which the formula was appended “as good faith requires”; and he held that the expression “good faith” had a very extensive application, for it was employed in trusteeships and partnerships, in trusts and commissions, in buying and selling, in hiring and letting—in a word, in all the transactions on which the social relations of daily life depend

97. *Id.* at 126 (Walter Miller’s translation). The original is as follows:

Est igitur proprium munus magistratus intellegere se gerere personam civitatis debereque eius dignitatem et decus sustinere, servare leges, iura describere, ea fidei suae commissa meminisse. Privatum autem oportet aequo et pari cum civibus iure vivere neque summissum et abiectum neque se efferentem, tum in re publica ea velle, quae tranquilla et honesta sint; talem enim solemus et sentire bonum civem et dicere.

fenders. The best-known of these was himself a king of England. This was James Stuart, who served as James VI of Scotland (from 1567, shortly after his first birthday, until his death in 1625) and as James I of England (1603-1625).⁹⁸

King James is rightfully famous for commissioning scholars to produce what became one of the finest literary works in the English language: the King James Version of the Bible. But James was somewhat of a scholar in his own right. A few years before ascending the English throne, he had propounded his view of kingship in several major publications, the most important of which was his essay, *The Trew Law of Free Monarchies*.⁹⁹ In view of James' identification with the doctrine of divine right, one reading the *Trew Law* may be surprised to see how rigorous were his standards for royal conduct. James is considered an advocate of divine right not because he thought the king was free of rules, but only because of how he thought the rules should be enforced: by the final judgment of God rather than by rebellious subjects. He may have absorbed the latter idea from the pronouncements of his English predecessor, Queen Elizabeth.¹⁰⁰

James' thesis was that a king occupied a position vis-à-vis his subjects analogous to that of a father over his chil-

98. A very useful, if somewhat enthusiastic, Web portal devoted to James is available at <http://www.jesus-is-lord.com/kinginde.htm> (last visited Sept. 9, 2004).

99. JAMES STUART, *supra* note 2.

100. In 1567, James' mother, Mary Queen of Scots, had been accused of forming a conspiracy with the Earl of Bothwel whereby she promised to marry him after they arranged the murder of her husband. After her husband was killed and she had married Bothwel, her subjects rose in revolt. Through an ambassador, Queen Elizabeth exhorted the Scots to restore Mary to the throne, stating that:

[I]t belonged not to them to reform, much less to punish, the mal-administration of their prince; and the only arms, which subjects could in any case lawfully employ against the supreme authority, were entreaties, counsels, and representations: That if these expedients failed, they were next to appeal by their prayers to Heaven; and wait with patience till the Almighty, in whose hands are the hearts of princes, should be pleased to turn them to justice and to mercy.

4 HUME, *supra* note 2, at 97-98.

dren.¹⁰¹ A father's moral obligation was an exacting one, but a father's violation of that obligation did not give his children a right to kill or rebel against him. Judgment on a trespassing father (or king) would be imposed by the hand of God.¹⁰²

James' argument relied heavily on biblical analysis. In a single two-page passage in the *Trew Law*, for example, James cited the first and second Books of Kings, the second Book of Chronicles, the first Book of Samuel, Romans, Jeremiah, and Psalms, as well as other passages.¹⁰³ James deduced from the Bible that a sovereign had the duty to dispense justice to the people, establish and enforce laws that benefited the people rather than the sovereign, enforce the state religion, and defend the nation from foreign enemies.¹⁰⁴ The sovereign likewise should refrain from using his power for private purposes at the expense of his subjects. James said a king who violated this maxim was a tyrant.¹⁰⁵ Finally, the sovereign should follow the law: "a good king will not only delight to rule his subjects by the law but even will conform himself [to it] in his own actions."¹⁰⁶

In summary, James argued that the Bible mandated that the monarch act

as a loving father and careful watchman, caring for [his subjects] more than for himself, knowing himself to be ordained for them and they not for him, and therefore countable to that great God who placed him as his lieutenant over them upon the peril of his soul to procure the weal [welfare] of both souls and bodies, as far as in him lieth, all of them that are committed to his charge.¹⁰⁷

101. JAMES STUART, *supra* note 2, at 73-74.

102. *See id.* at 66.

103. *Id.* at 55-56.

104. *See id.*; see also the same author's *Basilikon Doron* in JAMES STUART, *supra* note 2 at 85 ("Kingly Gift," an essay about royal power and obligations written for his son and heir apparent).

105. JAMES STUART, *supra* note 2, at 62.

106. *Id.* at 72.

107. *Id.* at 56-57.

James' ill-fated¹⁰⁸ son and successor, Charles I, seems to have inherited a similar view of kingship. In a letter addressed to his own son (later Charles II), the king wrote, "I had rather You should be *Charls le Bon*, than *le Grand*, Good, than Great . . . and dispose You to those Princely endowments and employments, which will most gain the love and intend the welfare of those, over whom God shall place you."¹⁰⁹ Charles further admonished the heir apparent to protect the established church, keep the public peace, follow the law (while sometimes mitigating its rigor), and pursue the good of the community by remaining impartial and above faction.¹¹⁰ On another occasion, Charles explicitly employed fiduciary language, speaking of the "legal trust" imposed by law on the Crown to remove Catholics from the royal court.¹¹¹

In 1625, the year of James' death, the great Dutch jurist Hugo Grotius published *De Jure Belli et Pacis*.¹¹² Although his monarchical sentiments cannot have been popular with the Founders, *De Jure* became part of their legal canon.¹¹³

108. He was beheaded by rebellious subjects in 1649.

109. CHARLES STUART, *supra* note 2, at 210-11.

110. *Id.* at 211 (maintaining "Gods [sic] glory," the church, and public peace); *id.* at 215 (governing in accordance with law, using prerogative to mitigate its rigor); *id.* at 216 (remaining above faction for the good of the community); *id.* at 217 (remaining impartial).

111. Speech to the Lords and Commons, Apr. 28, 1641 in CHARLES STUART, *supra* note 2, at 9. See also *infra* note 130 and accompanying text.

112. GROTIUS, *supra* note 2. The title sometimes is rendered, "De Jure Belli ac Pacis," using an alternative Latin word for "and."

113. The contestants in the constitutional debate occasionally relied on Grotius, but not, of course, for his royalism. Thus, on the federalist side, he was quoted by Madison and Hamilton, THE FEDERALIST NO. 20, *supra* note 2 (James Madison & Alexander Hamilton), at 103; *id.* NO. 84 (Alexander Hamilton) at 485; and on the anti-federalist side, by "Brutus." See *Brutus* XI, N.Y. J., Jan. 31, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 2, at 512, 514. In 1760, the young John Adams recorded a number of legal works he had read, but regretted that he had yet to "read any part of the best authors, Pufendorf and Grotius." WARREN, *supra* note 2, at 172. By 1774, Adams had repaired this defect, for he cited both in his *Novanglus*. ADAMS, WRITINGS, *supra* note 2, at 204, 206 (citing Grotius); *id.* at 208 (relying on Pufendorf). In his 1790 lectures

Like James and Charles, Grotius took the position that the king was not accountable to the people for his actions. He conceded that “in most governments, the good of the governed is the object.”¹¹⁴ Further, he accepted the fiduciary model of government, using the Roman law terms for “guardianship,” “guardian,” and “ward.” However, he turned that model against those who argued that kings should be accountable to their subjects:

But it does not follow, as our opponents infer, that peoples are superior to kings: for guardianship [*tutela*, the Roman law equivalent] is for the sake of the ward [*pupilli causa*], and yet the guardian has authority over the ward. And we are not to allow them to urge that if a guardian [*tutorem*] neglects his duty to the ward, he may be superseded; and that therefore kings may be so. For this is the case with a guardian, because he has a superior, (the State);¹¹⁵ but in political government, because he cannot have an infinite gradation of superiors, we must stop at some person or body, whose transgressions, having no superior judge, are the province of God¹¹⁶

Nevertheless, Grotius did concede some areas of official accountability:

[F]or he who has to appoint a magistrate is bound to the republic to elect one who is worthy; and the republic has a right to demand this: and therefore, if by an unworthy election he has produced damage to the republic, he is bound to make it good.¹¹⁷

on law, James Wilson repeatedly cited Grotius. 1 WILSON, *supra* note 2, at 80, 107, 110, 111, 149-50, 151, 192.

114. 1 GROTIUS, *supra* note 2, at 124-25.

115. Regarding the phrase “For this is the case with a guardian, because he has a superior, (the State),” the original text says merely, “Nam in tutore hoc procedit, qui superiorem habet.” *Id.*

116. *Id.*

117. 2 *id.* at 190. In an older, unattributed English translation of this work currently available at <http://www.geocities.com/Athens/Thebes/8098> (last visited Sept. 7, 2004), the following words appear: “[K]ingdoms are not so much a patrimony, which may be alienated at pleasure, as a trust, placed in the hands of the sovereign for the benefit of his people.” However, the original, located in Book 3, Chapter 20 § 5, does not support that translation. It actually reads,

Robert Filmer's 1680 book, the *Patriarcha*, was the most important statement of the royalist position in its time. In the *Patriarcha*, Filmer elaborated on James' contentions, including the father-child analogy¹¹⁸ and the fiduciary norms honored by the virtuous king.¹¹⁹ Filmer made even more extensive use of the Bible than James.¹²⁰ Members of the founding generation who had not read Filmer directly became familiar with his arguments through the popular rebuttal by Algernon Sidney.¹²¹

"regnum habentes non in patrimonio sed tanquam in usufructu, paciscendo alienare non valent." 3 GROTIUS, *supra* note 2, at 324. The meaning is, "those holding a kingdom [do so] not as a patrimony but as a life estate [*in usufructu*], and they do not have the power to transfer it by treaty" (my translation).

118. FILMER, *supra* note 2:

The father of a family governs by no other law than by his own will, not by the laws and wills of his sons or servants. There is no nation that allows children any action or remedy for being unjustly governed; and yet, for all this, every father is bound by the law of nature to do his best for the preservation of his family. But much more is a king always tied by the same law of nature to keep this general ground, that the safety of the kingdom be his chief law; he must remember that the profit of every man in particular, and of all together in general, is not always one and the same; and that the public is to be preferred before the private

119. FILMER, *supra* note 2:

Now albeit kings who make the laws be, as King James teacheth us, above the laws, yet will they rule their subjects by the law And although a king do frame all his actions to be according to the laws, yet he is not bound thereto but at his good will and for good example, or so far forth as the general law of the safety of the commonweal doth naturally bind him By this means are all kings, even tyrants and conquerors, bound to preserve the lands, goods, liberties, and lives of all their subjects, not by any municipal law of the land so much as the natural law of a father, which binds them to ratify the acts of their forefathers and predecessors in things necessary for the public good of their subjects.

120. For example, in the first chapter of the *Patriarcha* alone, Filmer cited the stories of Adam, Noah, Abraham, Isaac and Jacob, Moses, and Joshua, among others. *See id.*

121. *See infra* notes 151-56 and accompanying text.

Two royalists more respected than James or Filmer were David Hume¹²² and Sir Francis Bacon.¹²³ Both promoted the notion that the king had fiduciary-style obligations. Hume's *History of England* (final lifetime edition: 1778) repeatedly referred to public service in fiduciary terms.¹²⁴ Bacon had

122. For a favorable reference to Hume during the ratification controversy, see Nicholas Collin, *A Foreign Spectator: An Essay on the Means of Promoting Federal Sentiments in the United States I*, PHILA. INDEP. GAZETTEER, Aug 6, 1787, reprinted in FRIENDS, *supra* note 2, at 406, 426. During the founding era, Hume seems to have been universally classed as a royalist, but his work was one of only a handful that John Adams requested his wife Abigail to send to him while he was in New York. See Letter from John Adams to Abigail Adams (May 24, 1789), in *Adams Family Papers*, available at <http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=L17890524ja> (last visited Dec. 10, 2004).

Having plowed through all six volumes of Hume's *History* (an exercise not at all displeasing), I found his royalism rather tepid. He was a strong advocate of the limitations imposed on the monarchy by the "Glorious Revolution" of 1688. See 6 HUME, *supra* note 2, at 496-520. Where he seems to have departed most significantly from country party doctrine is in his conclusion that the limitations imposed on the Crown after the reign of Elizabeth were not expressions of ancient Anglo-Saxon liberties, but desirable innovations. See, e.g., *id.* at 531-34. This theme runs through the last three volumes of his work. Typical of his approach is the discussion of James II's use of the dispensing power, the king's prerogative to refuse to enforce inconvenient legislation. *Id.* at 472-76.

123. John Dickinson once described Bacon as "the greatest man that ever livd" [sic]. H. Trevor Colbourn, *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754-1756*, 86 PA. MAG. OF HIST. & BIOGRAPHY 241, 280 (1962). James Wilson referred to him as "the profound and penetrating Bacon." WILSON, *supra* note 2, at 149.

124. E.g., 2 HUME, *supra* note 2, at 41 (referring to the "breach of trust" of the official "Committee of 24 Barons" in 1261); 3 *id.* at 446 (paraphrasing favorably the advice of the Holy Roman Emperor Charles V to his son, Philip II of Spain, that "the great and only duty of a prince [is] the study of his people's happiness" and "the sole end of government, the felicity of the nations committed to [the ruler's] care"); 4 *id.* at 177 (referring to officeholders "who received trust or emolument from the public"); *id.* at 374 (referring to "the trust committed to" members of Parliament); 5 *id.* at 245 (referring to judges as "guardians of law and liberty," and suggesting that in the case discussed, they breached their duty); *id.* at 355 (referring to members of Parliament as "guardians to the laws"); 6 *id.* at 237 (referring to the king's financial trust). See also *infra* notes 129-30 and accompanying text.

recommended that kings remain impartial toward the country's various "factions" (special interests):

The motions of factions under the King ought to be like the motions (as the astronomers speak) of the inferior orbs, which may have their proper motions [i.e., their own motions], but yet still are quietly carried by the higher motion of "primum mobile."¹²⁵

D. *English Puritan and "Country Party" Figures*

When even the firmest advocates of royal prerogative acknowledged that rulers ought to act as fiduciaries, it is not surprising that those who challenged royal power would agree. Writing in the eighteenth century, Hume credited the origins of then-current ideas of liberty to the English Puritans.¹²⁶ This was a group among which fiduciary language was prominent in political discourse. For example, Hume dated modern notions of Parliamentary freedom from February 9, 1576, during the reign of Elizabeth I. The occasion was a speech on the floor by Peter Wentworth, a Puritan member of the House of Commons. As reported by Hume, Wentworth's oration sounded themes that later became all-

125. BACON, *supra* note 2, at 271. Note that Bacon carefully avoided the then-contentious issue of which orbs circled which. This was not the only time Bacon used the planetary simile. *See id.* at 115. *Primum mobile* means "first mover," that is, the impetus for the system. Readers familiar with the proceedings of the federal constitutional convention may recall that John Dickinson borrowed this solar system simile to describe the proposed relationship between the central government and the states. *See* James Madison, Journal (June 15, 1787), reprinted in 1 FARRAND, RECORDS, *supra* note 2, at 152-53.

126. 4 HUME, *supra* note 2, at 145-46:

So absolute, indeed, was the authority of the crown [under Elizabeth I], that the precious spark of liberty had been kindled, and was preserved, by the puritans alone; and it was to this sect, whose principles appear so frivolous and habits so ridiculous, that the English owe the whole freedom of the constitution.

See also id. at 368 ("[T]he noble principles of liberty took root, and spreading themselves, under the shelter of puritanical absurdities, became fashionable among the people.").

important: the inestimable value of liberty, the need for freedom of speech in Parliament, the dignity of Parliament as a partner with the Crown, and the following fiduciary language:

That as the parliament was the *great guardian of the laws*, they ought to have liberty to *discharge their trust*, and to maintain that authority, whence even kings themselves derive their being: That a king was constituted such by law, and though he was not dependant [sic] on man, yet he *was subordinate to God and the law, and was obliged to make their prescriptions, not his own will, the rule of his conduct*¹²⁷

For his temerity Elizabeth committed Wentworth to prison, but released him a month later, by “her special grace and favour.”¹²⁸

During the following century, the Puritans made a bid for supreme power, attaining it with the beheading of Charles I in 1649. During the struggle leading up to that moment, Oliver Cromwell, then the chief power in the army, issued a remonstrance to Parliament in which he reminded the legislature that they were but “servants and trustees of the people.”¹²⁹ During the trial of Charles I the Puritan prosecution asserted that as a king, Charles was a trustee—a claim the king admitted.¹³⁰

In 1648, the Puritan poet and polemicist John Milton published *The Tenure of Kings and Magistrates*.¹³¹ This tract

127. *Id.* at 179 (emphasis added).

128. *Id.* at 180.

129. 5 *id.* at 529.

130. *Id.* at 535-56.

131. JOHN MILTON, *The Tenure of Kings and Magistrates*, in MILTON, *supra* note 2 at 52. Milton was occasionally cited in the public debate on the Constitution. See, e.g., *Cincinnatus II*, N.Y. J., Nov. 8, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 2, at 11 (an antifederalist); *The Landholder XII*, CONN. COURANT, Mar. 17, 1788, reprinted in 16 *id.* at 405 (“A Landholder” was Oliver Ellsworth, a national convention delegate and federalist, citing an episode from *Paradise Lost*); see also BAILYN, *supra* note 2, at 39 (speaking of “inheritors of seventeenth-century libertarianism . . . descending from Milton and Harrington through Neville, Sidney, and Locke”).

relied on Aristotle's *Politics* and many other sources, but most extensively on the Bible, to demonstrate (according to the subtitle) "[t]hat it is Lawfull, and hath been held so through all Ages, for any, who have the Power, to call to account a Tyrant, or wicked King." Milton argued that public officers were the "Deputies and Commissioners" of the people who were "intrusted" with the task of furthering common justice.¹³² A king or magistrate was subject to the law, and also subject to discipline if he "prov'd unfaithfull to his trust."¹³³ Like a trustee, a king had an obligation to rule for the good of his charges and to be impartial among factions; otherwise, he was a tyrant.¹³⁴

In both his *Tenure of Kings and Magistrates* and his sequel, the *Defence of the People of England*,¹³⁵ Milton relied on the example set by the Roman Emperor Trajan, perhaps the exemplar of the fiduciary-style ruler.¹³⁶ Milton at least three times referred to an old story in which Trajan was said to have presented his praetorian prefect with a sword, along with the comment, "To you I commit this [sword] as a protection for me if I do good; but if [I do] otherwise, then against me"¹³⁷—the point being, of course, that a ruler was responsible to his subjects for any abuse of authority. Moreover, Milton noted that when the Scots had established the infant

132. MILTON, *supra* note 131, at 60 ("It being thus manifest that the power of Kings and Magistrates is nothing else, but what is only derivative, transferr'd and committed to them in trust from the People, to the Common good of them all . . .").

133. *Id.* at 59-60; JOHN MILTON, *Defence of the People of England*, in MILTON, *supra* note 2, at 99, 128-29, 254-55.

134. MILTON, *Defence of the People of England*, in MILTON, *supra* note 2, at 66.

135. *Id.* at 99.

136. For the principles of Trajan's government, see generally Natelson, *The Government as Fiduciary*, *supra* note 2.

137. "*Tibi istum ad munimentum mei committo, si recte agam; sin aliter in me magis.*" The story is told in SEXTUS AURELIUS VICTOR, BRIEF IMPERIAL LIVES, at 139 (a fourth-century book of short imperial biographies, in Latin). Milton refers to it in *The Tenure of Kings and Magistrates*, *supra* note 131, at 62, 75, and in *Defence of the People of England*, *supra* note 133, at 243-44 (The translation in the text of Trajan's comment is mine).

James VI [James I of England] on their throne, they struck on their coins the phrase, "*Pro me; si merear, in me*" (for me; if I deserve it, against me).¹³⁸

Three years later, the Puritans drafted their *Instrument of Government*—the first constitution for their kingless republic. The document included several references to the trust duties of officials.¹³⁹ Their second constitution, the *Humble Petition and Advice*, contains similar references, including the specific phrase, "public trust."¹⁴⁰

In 1656, with England still under Puritan control, James Harrington published his *Commonwealth of Oceana*, a work that proved particularly influential during the American founding era.¹⁴¹ Harrington argued that it was not sufficient for kings to be accountable only to God. "As an estate in trust becomes a man's own if he be not answerable for it, so the power of a magistracy not accountable to the people, from

138. See MILTON, *supra* note 2, at 75.

139. The "Instrument of Government" is available at <http://www.fordham.edu/halsall/mod/1653intrumentgovt.html> (last visited Sept. 7, 2004). Relevant references include Article XXV:

And in case of corruption, or other miscarriage in any of the Council in their trust . . . and, in the interval of Parliaments, the major part of the Council, with the consent of the Lord Protector, may, for corruption or other miscarriage as aforesaid, suspend any of their number from the exercise of their trust

and Article XLII: "That each person of the Council shall, before they enter upon their trust, take and subscribe an oath, that they will be true and faithful in their trust." *Id.*

140. See <http://www.constitution.org/eng/conpur102.htm> (last visited Dec. 10, 2004). Relevant portions include, *inter alia*, Article 11 ("civil trust") and Article 13 ("office or place of public trust").

141. For references to Harrington during the constitutional debates, see, for example, COLLIN, *supra* note 122, at 426; Edmund Pendleton, Virginia Convention (June 12, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 294. For a critical citation from Pendleton, see Letter from Edmund Pendleton to Nathaniel Pendleton, Jr., *supra* note 74, at 358. Benjamin Rush used "Harrington" as his pseudonym in a federalist essay. See Benjamin Rush, *Harrington*, PA. GAZETTE, May 30, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 2, at 116.

whom it was received, becoming of private use, the commonwealth loses her liberty."¹⁴²

The monarchy was restored in 1660. Yet the influence of the public trust doctrine persisted—and was transported to America. In 1662, Charles II granted a royal charter to the "Governor and Company of the English colony of Connecticut in New-England, in America." The charter specified that the grant was "upon Trust, and for the Use and Benefit of Themselves and their Associates, Freemen of the said Colony, their Heirs and Assigns"—that is, the governor and company were to serve as the trustees not only for their present associates, but for the colony's future free inhabitants.¹⁴³ The charter issued the next year for Rhode Island also featured public trust language,¹⁴⁴ as did the 1732 charter for Georgia.¹⁴⁵

During the century following the Restoration, politically active Englishmen tended to divide into advocates and opponents of royal power. The supporters of the sovereign came to be known as the "court party," the opponents as the "coun-

142. JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA* 171 (J.G.A. Pocock ed., 1992) [hereinafter HARRINGTON], available at <http://www.constitution.org/jh/oceana.htm> (last visited Dec. 10, 2004).

143. See CHARTER OF CONNECTICUT (1662), available at <http://www.nhinet.org/ccs/docs/conn1662.htm> (last visited Dec. 10, 2004). The earlier charters of Virginia and Massachusetts contain no such trust language. See FIRST CHARTER OF VIRGINIA (Apr. 6, 1606), available at <http://www.nhinet.org/ccs/docs/va-1.htm>; SECOND CHARTER OF VIRGINIA (May 23, 1609), available at <http://www.nhi-net.org/ccs/docs/va-2.htm>; THIRD CHARTER OF VIRGINIA (Mar. 12, 1612), available at <http://www.nhinet.org/ccs/docs/va-3.htm>; FIRST CHARTER OF MASSACHUSETTS (Mar. 4, 1629), available at <http://www.nhinet.org/ccs/docs/mass-1.htm> (all sites last visited Dec. 10, 2004).

144. CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663), available at <http://www.yale.edu/lawweb/avalon/states/ri04.htm> (last visited Dec. 10, 2004) ("Into the sayd Governour and Companv, and their successours, forever, vpon trust, for the vse and benefit of themselves and their associates, ffreemen of the sayd Collony").

145. GA. CHARTER *passim* (1732), available at <http://www.yale.edu/lawweb/avalon/states/ga01.htm> (last visited Dec. 10, 2004).

try party.”¹⁴⁶ These usually are thought of, respectively, as the forerunners of the Tory and Whig parties.¹⁴⁷ However, the coincidence was by no means perfect. Thus, during the long Whig administration of Robert Walpole (1721-42),¹⁴⁸ avowed Tories, notably Henry St. John Bolingbroke, assumed a country party stance.¹⁴⁹ In any event, the American founding generation borrowed heavily from country party theorists (whatever their formal party affiliations) in constructing their own political philosophy.¹⁵⁰

Country party polemics included a healthy dose of public trust doctrine. The earliest writer of this character, in composition if not in publication date, was Algernon Sidney, a transitional figure between Puritan republic and Restoration era.¹⁵¹ Sidney’s principal work, the “Discourses Concerning Government” was presented as a rebuttal to

146. For a discussion of these terms, see 6 HUME, *supra* note 2, at 307-08. For a general use of them, see 5 *id.* at 243 (country party) and 6 *id.* at 248, 276, 293, 296, 365, 379; see also BAILYN, *supra* note 2, at 35-36, 43-44.

147. 6 HUME, *supra* note 2, at 381, 387.

148. BAILYN, *supra* note 2, at 395-36. For a brief biography of Walpole, see *Sir Robert Walpole, 1721-42, Whig*, 10 DOWNING STREET, available at <http://www.number-10.gov.uk/output/Page174.asp> (last visited Dec. 10, 2004).

149. See *Henry St. John Bolingbroke (1678-1751)*, in THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY, available at <http://www.utm.edu/research/iep/b/bolingbr.htm> (last visited Dec. 10, 2004).

150. See, e.g., *infra* notes 151, 157, 169, 180, 189, 193 and accompanying text, describing founding-era citation to the writers named.

151. For a brief biography of Sidney, see R.W. DYSON, *DICTIONARY OF SEVENTEENTH-CENTURY BRITISH PHILOSOPHERS* (2000), available at <http://www.thoemmes.com/dictionaries/sidney.htm> (last visited Dec. 10, 2004). On his influence on the founding generation, see BAILYN, *supra* note 2, at 39, 143-44, 148-49. For an example of a federalist citing him during the ratification debate, see Edmund Pendleton, Virginia Convention (June 12, 1788), in 3 ELLIOT’S DEBATES, *supra* note 2, at 294. For examples of anti-federalists citing him, see John DeWitt, *To the Free Citizens of the Commonwealth of Massachusetts V*, AM. HERALD (Boston), Oct.-Dec. 1787, reprinted in 4 STORING, *supra* note 2, at 37; *Cincinnatus II*, *supra* note 131, at 11; *Cato V*, N.Y. J., Nov. 22, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 2, at 184; *Tamony, To the Freeholders of America*, VA. INDEP. CHRON., Jan. 9, 1788, reprinted in 15 *id.* at 324.

Filmer. This work described government in general as a trust,¹⁵² and identified specific standards thereby imposed on government officials. Among those standards were honoring the rules imposed by law,¹⁵³ subordinating one's own interest to the public good,¹⁵⁴ not converting public resources to one's own benefit,¹⁵⁵ and selecting competent agents.¹⁵⁶

152. *E.g.*, SIDNEY, *supra* note 2, at 21 ("But in plain English, the inconvenience with which such as he endeavour to affright us, is no more than that he or they, to whom the power is given, may be restrained or chastised, if they betray their trust"); *id.* at 257 ("any offices of trust, honour or profit"); *id.* at 475 ("If [a king] fail of this, he performs not his trust"); *id.* at 483 ("he had broken the trust reposed in him").

See also id. at 530-31:

But it not being reasonable that everyone should in this case do what he pleased, it was thought fit that the king with his council (which always consisted of the *proceres* and *magnates regni*) should judge what numbers of men, and what places deserved to be made corporations or bodies politick, and to enjoy those privileges, by which he did not confer upon them anything that was his, but according to the trust reposed in him for the publick good. This indeed increases the honor of the person entrusted, and adds weight to the obligation incumbent upon him; but can never change the nature of the thing, so as to make that an inherent, which is only a delegated power. And as parliaments, when occasion required, have been assembled, have refus'd to be dissolved till their work was finished, have severely punished those who went about to persuade kings, that such matters depended absolutely upon their will, and made laws to the contrary: 'tis not to be imagined, that they would not also have interposed their authority in matters of charters, if it had been observed that any king had notoriously abused the trust reposed in him, and turned the power to his private advantage, with which he was entrusted for the publick good.

153. *Id.* at 113.

154. *Id.* at 791 ("Government is instituted for the good of society. A lawful king seeks the common good, and governing is not an advantage to the governors, but a burden.").

155. *Id.* at 185.

156. *Id.* at 466 (judges must be learned and competent).

John Locke's hugely influential¹⁵⁷ *Second Treatise on Civil Government* examined at length the implications of public trust doctrine.¹⁵⁸ Like Milton, Harrington, and Sidney, Locke maintained that officials must act consistently with the purposes of the governmental trust: the good of the people and the security of their persons, liberty, and property.¹⁵⁹ Locke (as did Francis Hutcheson after him) added that when officials violate those purposes of government, their authority—like the authority of private trustees in analogous circumstances—is subject to forfeiture.¹⁶⁰ Hence,

157. Locke was repeatedly cited during the constitutional debates. See, e.g., James Madison, Journal (June 27, 1787), reprinted in 1 FARRAND, RECORDS, *supra* note 2, at 437-38 (Luther Martin, speaking at the federal convention); John DeWitt, *To the Free Citizens of the Commonwealth of Massachusetts* (1787), reprinted in 4 STORING, *supra* note 2, at 37 (an antifederalist author); *Cato III*, N.Y. J., Oct. 25, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 2, at 473 ("Cato," an anti-federalist author, was likely Governor George Clinton of New York); *Cincinnatus II*, *supra* note 131, at 11 (an anti-federalist); *Tamony*, *supra* note 151, at 324 (an anti-federalist author); Benjamin Rush, CHARLESTON COLUMBIAN HERALD (Apr. 14, 1787), reprinted in 17 *id.* at 97 (a federalist author); Edmund Pendleton, Virginia Convention (June 12, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 294 (a federalist).

James Wilson's repeated references to Locke in his own works are referenced in 2 WILSON, *supra* note 2, at 866 (index).

158. LOCKE, *supra* note 2, *passim*; *id.* at 18 ("nor under the dominion of any will, or restraint of any law, but what that legislative shall enact according to the trust put in it"); *id.* at 110 ("to the legislative, acting pursuant to their trust"); *id.* at 113-14 ("the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of nature"); *id.* at 116-17 ("But government, into whosoever hands it is put, being, as I have before shown, entrusted with this condition, and for this end, that men might have and secure their properties"); *id.* at 129 ("The power of assembling and dismissing the legislative, placed in the executive, gives not the executive a superiority over it, but is a fiduciary trust placed in him for the safety of the people.").

159. LOCKE, *supra* note 2, at 144-45; see also *id.* at 118-19.

160. *Id.* at 183-84 ("There is, therefore, secondly another way whereby governments are dissolved, and that is when the legislative or the prince, either of them, act contrary to their trust. First, The legislative acts against the trust reposed in them when they endeavour to invade the property of the subject, and

the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them; for all power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited¹⁶¹

Executive officers were also trustees: "The power of assembling and dismissing the legislative, placed in the executive, gives not the executive a superiority over it, but is a fiduciary trust placed in him for the safety of the people" ¹⁶² It was a breach of that trust for the executive to "corrupt" lawmakers—that is, to create conditions of fear or dependency that might cause them to commit their votes before the debate over an issue has commenced. The reason was that a "corrupt" legislator—like any agent with interests different from those of the principal—easily can forget his duty to follow the rules of the trust and his obligations of loyalty, care, and impartiality.¹⁶³

to make themselves or any part of the community, masters or arbitrary disposers of the lives, liberties, or fortunes of the people.").

For Hutcheson's less-developed views on public trust, see FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE IN TWO TREATISES 192-93 (Wolfgang Leidhold ed., 2004) (1725).

161. LOCKE, *supra* note 2, at 149.

162. *Id.* at 129; *see also id.* at 136 (executive is a trustee in use of the prerogative); *id.* at 185 (executive's trust duty not to corrupt the legislature).

163. LOCKE, *supra* note 2, at 185-86. I find this to be a particularly interesting and timely passage in these days of the pork-barrel broker-state:

What I have said here concerning the legislative in general, holds true also concerning the supreme executor He acts also contrary to his trust when he either employs the force, treasure, and offices of the society, to corrupt the representatives, and gain them to his purposes; or openly pre-engages the electors, and prescribes to their choice such whom he has by solicitations, threats, promises, or otherwise won to his designs, and employs them to bring in such, who have promised beforehand what to vote and what to enact For the people having reserved to themselves the choice of their representatives as the fence to their properties, could do it for no other end but that they might always be freely chosen, and, so chosen, freely act and advise as the necessity of the commonwealth and the public good should, upon

According to Locke, public officials should not engage self-dealing:

[G]overnment . . . being . . . entrusted with this condition, and for this end, that men might have and secure their properties, the prince, or senate, however it may have power to make laws for the regulating of property between the subjects one amongst another, yet can never have a power to take to themselves the whole, or any part of the subject's property, without their own consent. For this would be in effect to leave them no property at all.¹⁶⁴

Moreover, Locke held that public officials must treat beneficiaries (citizens and interest groups) impartially. Officials "are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the countryman at plough."¹⁶⁵ Legislators were not permitted to delegate their discretion.¹⁶⁶

Locke agreed with other country party writers that judgment for a breach of fiduciary duty must come from the people—divine disapproval was not sufficient:

Here, it is likely, the common question will be made: Who shall be judge whether the prince or legislative act contrary to their trust? . . . To this I reply: The people shall be judge; for who shall be judge whether the trustee or deputy acts well and according to the trust reposed in him, but he who deposes him, and must, by having deposed him, have still the power to discard him when he

examination and mature debate be judged to require. This those who give their votes before they hear the debate, and have weighed the reasons on all sides, are not capable of doing. To prepare such an assembly as this, and endeavour to set up the declared abettors of his own will for the true representatives of the people and the law-makers of the society, is certainly as great a breach of trust . . .

Cf. Natelson, Sympathy and Independence, supra note 2, at 382-407 (discussing the Founders' ideal of independent citizens and decision makers, including the independence of branches of government from each other).

164. LOCKE, *supra* note 2, at 116-17.

165. *Id.* at 119.

166. LOCKE, *supra* note 2, at 119; *cf.* 3 HUME, *supra* note 2, at 338 (implicit in faith reposed in a trustee is assumption that discretion not be delegated).

fails in his trust? If this be reasonable in particular cases of private men, why should it be otherwise in that of the greatest moment, where the welfare of millions is concerned, and also where the evil, if not prevented, is greater, and the redress very difficult, dear, and dangerous?¹⁶⁷

Note also the final point: If strict rules of conduct are important in a private context, then they are even more important "where the welfare of millions is concerned," "the evil . . . is greater" and the remedy "very difficult, dear, and dangerous." As suggested earlier,¹⁶⁸ this view is consistent with the pattern of private fiduciary law.

In the early 1720s, John Trenchard and Thomas Gordon published "Cato's Letters," a series of essays provoked by government policies leading to the speculative South Sea Bubble.¹⁶⁹ Relying explicitly on Aristotle's *Nicomedian Ethics*,¹⁷⁰ "Cato" wrote that, "Power in a free state, is a trust committed by all to one or a few, to watch for the security, and pursue the interest, of all,"¹⁷¹ and that "Men who have a trust frankly bestowed upon them by the people, to frequently betray that trust, become conspirators against their benefactors, and turn the sword upon those who gave it; insomuch that in the greatest part of the earth, people are happy if they can defend themselves against their defenders."¹⁷² Like Locke,¹⁷³ Trenchard and Gordon argued that

167. LOCKE, *supra* note 2, at 203-04.

168. Natelson, *The Government as Fiduciary*, *supra* note 35 and accompanying text.

169. On the influence of Cato's Letters on the Founding, see BAILYN, *supra* note 2, at 40-44, 55.

170. 2 CATO'S LETTERS, *supra* note 2, at 558.

171. 1 *id.* at 179; *see also id.* at 111 ("The administration of government is nothing else, but the attendance of the trustees of the people upon the interest and affairs of the people"); ROBBINS, *supra* note 2, at 118 (saying of "Cato's" views that "Government was a trust committed by all, or nearly all, to one or a few who ought be bounded by restraints.").

172. 1 CATO'S LETTERS, *supra* note 2, at 179; *see also id.* at 142 (stating that breaches of public trust should be punished with severity).

173. LOCKE, *supra* note 164 and accompanying text.

breaches of public trust were greater than merely private breaches.¹⁷⁴ From this it followed that the standards imposed on public trustees ought to be high:

[Government] is therefore a trust, which ought to be bounded with many and strong restraints, because power renders men wanton, insolent to others, and fond of themselves. Every violation therefore of this trust, where such violation is considerable, ought to meet with proportionable punishment; and the smallest violation of it ought to meet with some, because indulgence to the least faults of magistrates may be cruelty to a whole people.¹⁷⁵

Trenchard and Gordon considered it a breach of trust to trammel freedom of speech,¹⁷⁶ to divert public resources to private purposes,¹⁷⁷ or not to follow the law and other “fixed and stated rules.”¹⁷⁸ Executing the public trust did not require a superman: “Honesty, diligence, and plain sense, are the only talents necessary for the executing of this trust; and the public good is its only end.”¹⁷⁹

Henry St. John Bolingbroke (1678-1751)¹⁸⁰ wrote the influential *Dissertation Upon Parties*, another composition

174. 1 CATO'S LETTERS, *supra* note 2, at 141.

175. *Id.* at 267; *see also* 2 *id.* at 550-51.

176. 1 *id.* at 110.

177. *Id.* at 76.

178. 1 *id.* at 186.

179. 1 *id.* at 267.

180. On Bolingbroke's influence in the founding generation, *see* BAILYN, *supra* note 2, at 39-40, 45-48, 55.

In his famous sketches of other delegates at the national convention, William Pierce he wrote of Alexander Hamilton that, “His language is not always equal, sometimes didactic like Bolingbroke's at others light and tripping like Stern's.” William Pierce, *Character Sketches of Delegates to the Federal Convention* (1787), reprinted in 3 FARRAND, RECORDS, *supra* note 2, at 89. *See also* H. Trevor Colbourn (ed.), *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754-1756*, 86 PA. MAG. OF HIST. & BIOGRAPHY 419, 449 (1962) (John Dickinson's knowledge of, and appreciation for, Bolingbroke); 1 WILSON, *supra* note 2, at 90-91, 195, 309, 317 n.g. (James

relying on the public trust doctrine.¹⁸¹ Bolingbroke listed four principal duties arising from the trust reposed in the King and in members of parliament: The first two were to preserve liberty¹⁸² and to preserve the Constitution¹⁸³—obligations analogous to the duty of the private trustee to follow the instructions set forth in the trust instrument. The third principal duty was to prevent the sort of “corruption” of the legislature by the executive against which John Locke had inveighed.¹⁸⁴ The fourth was the obligation to exercise care—that is, to administer the government competently.¹⁸⁵ Bolingbroke observed that to a certain extent the British constitution provided correctives for breaches of trust, such as Parliament’s power to check the king¹⁸⁶ and the people’s power to check Parliament through frequent elections.¹⁸⁷

A later work of the same genre was James Burgh’s *Political Disquisitions* (1774),¹⁸⁸ another favorite of the founding generation.¹⁸⁹ Burgh focused on the trust duty¹⁹⁰ of

Wilson’s mostly appreciative comments on Bolingbroke in the course of his 1790 lectures).

181. *E.g.*, BOLINGBROKE, *supra* note 2, at 45-46, 95, 100-02, 106-07, 117-18, 158.

182. *E.g.*, *id.* at 101.

183. *E.g.*, 2 *id.* at 95.

184. *Supra* note 160 and accompanying text.

185. *E.g.*, 2 BOLINGBROKE, *supra* note 2, at 100-01, 158.

186. *E.g.*, *id.* at 101.

187. *E.g.*, *id.* at 102, 118.

188. Historian Caroline Robbins assessed the *Disquisitions* as “perhaps the most important political treatise which appeared in England in the first half of the reign of George III.” ROBBINS, *supra* note 2, at 357. Relevant excerpts may be found in 1 THE FOUNDERS’ CONSTITUTION, *supra* note 2, ch. 2, doc. 6, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch2s6.html> (last visited Dec. 10, 2004).

189. On Burgh’s popularity, see BAILYN, *supra* note 2, at 51, 55. On occasion, Burgh’s *Political Disquisitions* was cited by name in the constitutional debates. See, e.g., A Democratic Federalist, PA. HERALD, Oct. 17, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 2, at 390 (an anti-federalist writer); THE FEDERALIST NO. 56, *supra* note 2, at 294 (James Madison). Sometimes Burgh

legislators to represent faithfully the interests of their constituents. His work is particularly notable for its emphasis on the duty of public trustees to account for their conduct. Like Locke, he pointed out that private trustees have a duty to account for their conduct, and that the far greater power of public trustees suggests that the standard regulating them ought to be higher rather than lower.¹⁹¹ Burgh argued that the possibility of defeat for re-election was "a very inadequate punishment."¹⁹²

By the time of the American Revolution, therefore, both defenders and opponents of the Crown had adopted public trust views of government. Both sides agreed that public officials were bound by fiduciary-style obligations. Their chief disagreement was on the question, "To whom are malfeasant officials accountable?" In 1778, the influential liberal British

was cited without the name of the work given. See, e.g., 19 DOCUMENTARY HISTORY, *supra* note 2, at 116-17 (an anti-federalist writer).

For James Wilson's citation of the *Political Disquisitions* in 1790, see 1 WILSON, *supra* note 2, at 108.

190. Burgh sometimes used the term "procurator," a Roman law word, as a substitute for "trustee."

191. 1 THE FOUNDERS' CONSTITUTION, *supra* note 2, ch. 2, doc. 6, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch2s6.html> (last visited Dec. 10, 2004):

Milton and Locke bring very substantial arguments for calling even kings, with all their sacred majesty, their jure divino, and their impeccability (kings can do no wrong) to account, if they govern in any manner inconsistent with the good of the people. How much more lords, or commons, who have never even challenged to themselves any divine attributes? Jam. I. owned himself to be the great servant of the state.

"Who, says *Locke*, shall be judge, whether his trustee, or his deputy [are not members of the house of commons *trustees* and *deputies* in the strictest sense of the word?] acts well, and according to the trust reposed in him, but he, who deposes him, and must, by having deposed him, have still power to discard him, when he fails in his trust? If this be reason in particular cases of private men, why should it be otherwise in cases of the greatest moment, where the welfare of millions is concerned!"

192. *Id.*

clergyman, Richard Price,¹⁹³ summed up the dispute in this way:

There are two accounts, directly opposite to one another, which have been given of the origin of civil government. One of them is that "civil government is an expedient contrived by human prudence for gaining security against oppression, and that, consequently, the power of civil governors is a delegation or trust from the people for accomplishing this end."

The other account is that "civil government is an ordinance of the Deity, by which the body of mankind are given up to the will of a few, and, consequently, that it is a trust from the Deity, in the exercise of which civil governors are accountable only to him."¹⁹⁴

Price added that "[t]he question which of these accounts we ought to receive is important in the highest degree." Price cast his vote for the Whig view that officials were accountable to the people. He helpfully inserted his own partial list of trust standards: Obey the law, avoid self-dealing, resist foreign influence, and do not postpone scheduled elections.¹⁹⁵ Yet for our purposes, the points of contemporary argument are less important than the point of unity: Virtually all contemporary English political writers agreed that public officials should adhere to standards comparable to those imposed on private sector fiduciaries.¹⁹⁶ Many—if not all—Whig

193. For Price's public trust ideas, see ROBBINS, *supra* note 2, at 331. Price was a friend and neighbor of James Burgh, *id.* at 358, whose public trust notions are discussed at *supra* notes 188-92 and accompanying text.

Price was regularly cited during the ratification debates. See, e.g., Robert Yates, Journal (June 27, 1787), *reprinted in* 1 FARRAND, RECORDS, *supra* note 2, at 441 (Luther Martin); *Fabius IX*, PA. MERCURY, May 1, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 2, at 265 (John Dickinson, a delegate to the national convention and a federalist); Luther Martin, *Genuine Information IV*, BALTIMORE MD. GAZETTE, Jan. 8, 1788, *reprinted in* 15 *id.* at 301 (then an anti-federalist); *Tamony*, *supra* note 151, at 323 (an anti-federalist).

194. PRICE, *supra* note 2.

195. *Id.* "Self-dealing" is my inclusive term for two items mentioned by Price: Members of Parliament accepting bribes and nominating themselves for executive office.

196. Richard Price is remembered as a provoking cause of Edmund Burke's *Reflections on the Revolution in France*, which is cast as a rebuttal to a sermon

writers would have agreed with Price when he wrote that “[parliaments] possess no power beyond the limits of the trust for the execution of which they were formed. If they contradict this trust, they betray their constituents and dissolve themselves.”¹⁹⁷

by Price. Yet the *Reflections* also feature much public trust language. See Edmund Burke, *Reflections on the Revolution in France* (1790), available at http://www.constitution.org/eb/rev_fran.htm (last visited Sept. 29, 2004):

The interest of that portion of social arrangement is a trust in the hands of all those who compose it; and as none but bad men would justify it in abuse, none but traitors would barter it away for their own personal advantage.

That he may secure some liberty, [the citizen] makes a surrender in trust of the whole of it.

All persons possessing any portion of power ought to be strongly and awfully impressed with an idea that they act in trust, and that they are to account for their conduct in that trust.

This [British] government . . . is a trustee for the whole, and not for the parts.

And so forth.

197. RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA (1776), available at http://www.constitution.org/price/price_3.htm (last visited Sept. 29, 2004); cf. LOCKE, *supra* note 2, at 106 (“[T]he power of the society or legislative constituted by them can never be supposed to extend farther than the common good, but is obliged to secure every one’s property by providing against those three defects above mentioned that made the state of nature so unsafe and uneasy.”).

John Dickinson expressed similar sentiments, see Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN ST. L. REV. 415, 437 (2003). So also did Edmund Randolph. See Edmund Randolph, Virginia Convention (June 13, 18, 1788), in 3 ELLIOT, DEBATES, *supra* note 2, at 362-63, 504-05 (speaking at the Virginia ratifying convention on the limitations of the treaty power); see also James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), available at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html (last visited Dec. 29, 2004):

Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both

E. *The Founders' Canon of Legal Sources*

1. Text writers

a. Lawyers' Roles in the Founding. Lawyers assumed a leading role in the American founding. Nearly two-thirds of the delegates to the Constitutional Convention had received formal training in the law.¹⁹⁸ During the battle over ratification, lawyers were prominent among both federalists and anti-federalists. At the Virginia ratifying convention, for example, the burden of the federalist arguments was carried by Chancellor Edmund Pendleton, Governor Edmund Randolph, Congressman James Madison, George Nicholas, Francis Corbin, and John Marshall—all lawyers. The leading anti-federalist spokesman, former Governor Patrick Henry, was a lawyer, as were his lieutenants, William Grayson and James Monroe (the future President). Some of the salient public essayists on both sides of the question were lawyers: On the federalist side, there were Alexander Hamilton and John Jay of New York, James Madison of Virginia, Noah Webster of Connecticut, and Alexander Contee Hanson of Maryland—to name only a few. On the anti-federalist side, Judge Robert Yates of New York was the likely author of the “Brutus” papers.¹⁹⁹ Governor George Clinton, another New York lawyer, was a likely author of “Cato.”²⁰⁰ Many, if not most, of the lawyers among

derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants.

198. See ROSSITER, *supra* note 2, at 147.

199. See *Brutus I*, N.Y. J., Oct. 18, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 2, at 411.

200. On Clinton's career, see *A Republican*, N.Y. J., Sept. 6, 1787, reprinted in 13 *id.* at 141 n.2; on Paul Leicester Ford's belief that he authored the *Cato* letters, see *id.* at 255. Another possible author, Abraham Yates, Jr., was also a lawyer. For his biography, see Stefan Bielski, *Abraham Yates, Jr.*, available

the founders had extensive experience in private law, of which the law of fiduciaries is a part, and were accustomed to thinking of government in private law terms.²⁰¹

The views expressed within the contemporary canon of available legal works²⁰² on both private fiduciary obligations and on public service offer further evidence on the content of prevailing ideas of public service.

b. Duties of Private Fiduciaries. The broad standards of private fiduciary conduct, particularly the duties of agents, guardians, executors, and trustees, were not greatly different from what they are today. Guardianship had assumed its modern form as early as the thirteenth century, and the guardian no longer held a position of profit, but one of fiduciary responsibility.²⁰³ As for an executor, Charles Viner's treatise held that he was "no more than a Trustee made by the Testator."²⁰⁴ Agents were full-fledged fiduciaries also.²⁰⁵

at <http://www.nysm.nysed.gov/albany/bios/y/ayjranb.html> (last visited Dec. 29, 2004). For an overview of the dispute, see 2 STORING, ANTI-FEDERALIST, *supra* note 2, at 102-103.

201. Natelson, *Necessary and Proper*, *supra* note 2 (discussing the private law practices of the members of the Constitution's committee of detail); *see also* Letter from Edmund Pendleton to Richard Henry Lee, June 14, 1788, *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 2, at 1625-26 (comparing the people's grant of power to various real estate conveyances and to the agency).

202. The canon is described in WARREN, *supra* note 2, at 157-87.

203. 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 444 (1959). Apparently, the duties of guardians and trustees were very similar to each other. 1 STORY, *supra* note 2, at 316, 446.

204. 20 VINER, *supra* note 2, at 509. The edition I used is in the Biddle Library at the University of Pennsylvania Law School. It was used in America around the time of the founding.

205. For a modern-sounding summary of the fiduciary duties of agents written just a few years after the American Founding, see PALEY, *supra* note 2, at 4 (stating that an agent is "bound to use the utmost diligence and care in the execution of his trust"); *id.* at 9 (describing agent's obligation of loyalty); *see also* 1 KNIGHTLY D'ANVERS, A GENERAL ABRIDGMENT OF THE COMMON LAW 609 (2d. ed. 1725) (attorney in fact must act only within the authority given); 3 VINER, *supra* note 2, at 278 (conflating attorneys in fact and in law with

Eighteenth-century fiduciary law was, of course, administered by the courts of equity. "Trust," said one maxim, "is a creature of Equity, and to be governed and disposed by its Rules."²⁰⁶ In administering fiduciary law, the chancellors closely followed Roman concepts, as the Scottish jurist Lord Kames made plain in his popular treatise on equity.²⁰⁷ According to Lord Mansfield,²⁰⁸ trust law had been placed "on a true foundation" when Lord Nottingham was chancellor late in the previous century: "By steadily pursuing, from plain principles, trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law [had] been raised."²⁰⁹

As to the content of the rules governing fiduciaries, the contemporary sources make clear that by the time of the

guardians); 20 *id.* at 509 (guardians as trustees). So also were joint mortgagees trustees for each other and a husband acting for his wife. *Id.* The case of servants was similar. 15 *id.* at 309 (discussing servant's scope of authority). The editions of Viner and D'Anvers that I consulted are both in the Biddle Library at the University of Pennsylvania Law School, and were used in America in the eighteenth century.

206. PRINCIPIA LEGIS ET AEQUITATIS 116 ("T.B." ed., 1753).

207. See KAMES, *supra* note 2, at 243-44 ("where a subject is vested in a trustee for behoof of a third party, the children *nascituri* [about to be born] of a marriage for example. A trust of this nature [is] analogous to a *fideicommissary* settlement among the Romans").

The book was used in America as well as in Britain. Kames was one of Thomas Jefferson's favorite authors, and three editions of this particular book were in Jefferson's library. GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 201 (Houghton Mifflin 2002) (1978). James Wilson cited him repeatedly during his 1790 lectures on law, misspelling his name "Kaims." See WILSON, *supra* note 2, at 90-91, 100, 195, 484-48. Kames made an occasional appearance in the ratification debates. See, e.g., *Centinel XI* (Jan. 16, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 2, at 389; "A Foreign Spectator," *An Essay on the Means of Promoting Federal Sentiments in the United States* (Aug. 17, 1787), reprinted in FRIENDS, *supra* note 2, at 418.

208. Lord Chief Justice of the Court of King's Bench, 1756-88. A brief biography is available at <http://law.wlu.edu/faculty/history/brockenbrough/mansfield.htm> (last visited Dec. 10, 2004).

209. *Burgess v. Wheate*, 1 Eden 177, 223, 28 Eng. Rep. 652, 670 (1757) (opinion of Mansfield, C.J.).

American Founding, the fundamental fiduciary responsibilities were already well established. An anonymous 1751 tract by a lawyer at Gray's Inn (one of London's Inns of Court for training law students) said of the duties of charitable trustees, "Trustees for a charity may improve for the benefit of the charity, but can do no act to prejudice it."²¹⁰ Similarly, an anonymous English treatise of 1737 stated that "no Act of the Trustee shall prejudice the Cestui que Trust."²¹¹ Henry Swinburne wrote that the duties of an executor required him to be "prudent, diligent, and faithful"—that is, not "ignorant, negligent, or unfaithful" in the "discharge [of] that Trust."²¹² Lord Kames referred to the guardian's duties (Kames used the civil law term "tutor") to

210. THE GROUNDS AND RUDIMENTS OF LAW AND EQUITY, ALPHABETICALLY DIGESTED, BY A GENTLEMAN OF THE MIDDLE TEMPLE 486 (1751).

211. A TREATISE OF EQUITY, *supra* note 2, at 72; *see also* GENERAL ABRIDGEMENT, *supra* note 2, at 384 (similar statement); *cf.* EDWARD BURTENSHAW SUGDEN, A PRACTICAL TREATISE OF POWERS 391 (1808) (referring obliquely to the duty of a trustee not to "increase the income of the tenant for life at the expense of the persons entitled to the inheritance"—that is, to the fiduciary duty of impartiality).

212. 1 HENRY SWINBURNE, A TREATISE ON TESTAMENTS AND LAST WILLS 417 (6th ed. 1743); *cf.* 20 VINER, *supra* note 2, at 521 (stating that cestui que trust must hold trustee harmless for expenses, but only those laid out "honestly and fairly, without a Possibility of being a Gainer" (i.e., there could be no conflict of interest). The edition of Swinburne I consulted is in the Biddle Library at the University of Pennsylvania Law School, and was used in America in the eighteenth century.

For other examples of the duty of care imposed on fiduciaries, see A TREATISE OF EQUITY, *supra* note 2, at 74 (opining that in strong cases of negligence, a trustee may be chargeable with "imaginary Values," i.e., speculative damages); *cf.* 1 STORY, *supra* note 2, at 446; 2 *id.* at 510-12, 514, 517.

The strict duty of care for agents was clearly described in PALEY, *supra* note 2, at 4-6, but I have not included it in the text for Paley's work was written a few years after the founding.

proceed in good faith²¹³ and act "to the best of his skill for the good of his pupil [ward]."²¹⁴

By the eighteenth century, both private guardians and private trustees had an absolute duty to eschew self-dealing. Lord Kames includes this modern-sounding passage:

But equity goes farther, and prohibits a trustee from making any profit by his management, directly or indirectly. However innocent an act of this nature may be in itself, it is poisonous with regard to its consequences; for if any opportunity be given for making profit in this manner, a trustee will lose sight of his duty, and soon learn to direct his management chiefly or solely for his own profit. It is solely upon this foundation that a tutor [guardian] is barred from making profit, by purchasing debts due by his pupil [ward], or rights affecting his estate²¹⁵

Similarly, Charles Viner summarized the law as providing that "no Trustee, or any Person acting under a Trustee, can ever be a Purchaser [from the trust] on Account of the great Inlet [sic] to Fraud."²¹⁶

c. Application to Government. The Anglo-American legal canon, consisting of both works of civil and common law, explicitly and repeatedly promoted the application of fiduciary norms to government. One of the most celebrated

213. See KAMES, *supra* note 2, at 108 (intention to disadvantage ward is tortious); cf. 2 STORY, *supra* note 2, at 510.

214. KAMES, *supra* note 2, at 108. Accordingly, guardians were under a duty to account to their wards, see GENERAL ABRIDGEMENT, *supra* note 2, at 263.

215. KAMES, *supra* note 2, at 255; cf. GENERAL ABRIDGEMENT, *supra* note 2, at 384 (self-dealing trustee who later purchases for consideration land he sold still holds it subject to the trust); A TREATISE OF EQUITY, *supra* note 2, at 73 (opining that trustees are to be uncompensated); see also 1 STORY, *supra* note 2, at 317-18, 446. Story relies at this point almost entirely on English cases, many from the eighteenth century or earlier. Relevant to the theme of this Article is that, to support his point on self-dealing, Story quotes a Roman legal opinion from Justinian's *Digest* involving a breach of trust by a public magistrate. 2 *id.* at 519-20.

216. 13 VINER, *supra* note 2, at 540.

civilians—influential not only among lawyers,²¹⁷ but also referenced during the public debate over ratification²¹⁸—was Samuel Von Pufendorf.²¹⁹ This is the same Pufendorf, by the way, cited several times in *Pierson v. Post*,²²⁰ the immortal New York “fox chasing” case still regularly inflicted on American law students.²²¹ Pufendorf’s *De Officio Hominis et Civis* was published in 1682 and translated into English in 1691 by Andrew Tooke as *The Whole Duty of Man*, According to the Law of Nature.²²²

Pufendorf’s treatise included a chapter on the duty of rulers that, while not using the terms “trust” or “fiduciary,” included a list of restrictions that were clearly fiduciary in nature: A ruler should conduct affairs for the public good.²²³ He should promote economic prosperity²²⁴ and defend the nation.²²⁵ The ruler must apply himself “with the utmost

217. Around 1760, one of the leaders of the New York bar recommended Pufendorf to the young John Jay. WARREN, *supra* note 2, at 170. The same year, the young John Adams recorded a number of legal works he had read, but regretted that he had yet to “read any part of the best authors *Pufendorf* and *Grotius*.” *Id.* at 172. In his 1790 lectures on law, James Wilson repeatedly cited Pufendorf. WILSON, *supra* note 2, at 870.

218. See, e.g., *Cincinnatus V*, N.Y. J., Nov. 29, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 2, at 308 (an anti-federalist author). James Wilson cited Pufendorf at the Pennsylvania ratifying convention. James Wilson, Pennsylvania Convention (Dec. 4, 1787), in 2 ELLIOT’S DEBATES, *supra* note 2, at 454. William Grayson made a slighting reference at the Virginia convention in a context that showed many delegates had heard the name. William Grayson, Virginia Convention (June 13, 1788), in 3 *id.* at 350.

219. See PUFENDORF, *supra* note 2. An English translation is also available at <http://www.constitution.org/puf/puf-dut.htm> (last visited Dec. 10, 2004).

220. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

221. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 19-22 (5th ed. 2002).

222. PUFENDORF, *supra* note 2, at ix.

223. See *id.* at 215.

224. See *id.* at 219.

225. See *id.* at 220

Diligence, to the Study of *whatever may conduce to give him a perfect Comprehension of the Affairs belonging to a Person in his Station.*"²²⁶ The ruler should perfect the virtues necessary for his office.²²⁷ He should choose as his agents, "Men of Probity and Sense, experienced in Business, and skilful in the Ways of the World."²²⁸ He should adopt suitable laws, which should be easy to read and not excessive in number.²²⁹ He should enforce the laws equally and without favor, and inflict punishments proportionate to the gravity of the offense.²³⁰ He should keep taxes as light as possible,²³¹ promote the Christian religion²³² and hinder the growth of factions.²³³

This list was similar to that proposed by another widely-read civilian, Emmerich Vattel. Vattel's *The Law of Nations or the Principles of Natural Law* was published in French in 1758 and introduced to the United States in 1775, where its acceptance was rapid.²³⁴ James Madison cited it at the federal convention,²³⁵ and James Wilson did so at the Pennsylvania ratifying convention.²³⁶ Vattel's list of official

226. *Id.* at 215.

227. *See id.*

228. *Id.*

229. *See id.* at 216.

230. *See id.* at 217.

231. *See id.* at 219.

232. *See id.* at 216.

233. *See id.* at 220.

234. *See* Albert de Lapradelle, *Introduction to Vattel*, *supra* note 2, at xxx (George D. Gregory trans.).

235. *See* James Madison, *Journal* (June 27, 1787), *reprinted in* 1 FARRAND, *RECORDS*, *supra* note 2, at 437-38, 440.

236. *See* James Wilson, *Pennsylvania Convention* (Dec. 4, 1787), *in* 2 ELLIOT'S *DEBATES*, *supra* note 2, at 454.

obligations was similar to that of Pufendorf, and unlike Pufendorf, he employed explicit trust language.²³⁷

Vattel maintained that government is established for the common good,²³⁸ and the ruler's power is accordingly limited.²³⁹ A ruler who abuses his trust can forfeit his authority.²⁴⁰ The ruler should obey and enforce the law,²⁴¹ choose good ministers,²⁴² avoid self-dealing,²⁴³ and become knowledgeable about the state he rules.²⁴⁴ The ruler should defend the state²⁴⁵ and improve its overall condition.²⁴⁶

Baron Montesquieu's *Spirit of Laws* was more about politics than about law, and the founding generation made it one of their favorite books of political theory. Indeed, the records of the constitutional debates contain numerous references to "the celebrated Montesquieu"²⁴⁷ and "the great

237. See, e.g., VATTEL, *supra* note 2, at 21.

238. *Id.* at 20.

239. *Id.* at 22.

240. *Id.*

241. *Id.*

242. *Id.* at 21.

243. *Id.* at 20-21.

244. *Id.* at 21-22.

245. *Id.* at 21.

246. *Id.*

247. E.g., THE FEDERALIST NO. 47, *supra* note 2, at 250 (James Madison); *id.* NO. 78, at 402 n. (Alexander Hamilton); George Nicholas, Virginia Convention (June 12, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 247; Edmund Randolph, Virginia Convention (June 16, 1788), in *id.* at 84; see also Dissent of the Minority of the Convention, The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents (Dec. 18, 1787), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 2, at 629. This is only a sample of a large number.

Montesquieu.²⁴⁸ He was cited repeatedly by federalists and anti-federalists alike in newspaper columns²⁴⁹ and in convention debates.²⁵⁰

The Spirit of Laws contains public trust language.²⁵¹ Montesquieu opined that a magistrate in a popular government was subject to the direction of the laws.²⁵² He said that in republics a citizen “entrusted” with public employment—indeed, any citizen—ought “to live, to act, and to think” for the sake of his fellow citizens alone.²⁵³ The common good was the proper goal of republics. He famously preferred small

248. John Williams, New York Convention (June 27, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 340; John Dawson, Virginia Convention (June 24, 1788), in 3 *id.* at 612.

249. His name appears in THE FEDERALIST NO. 9, *supra* note 2, at 41-44 (Alexander Hamilton); *id.* NO. 78, at 434 (Alexander Hamilton); *id.* NO. 43, at 225 (James Madison); *id.* NO. 47, at 269-72 (James Madison). Examples of anti-federalist citations include A FEDERAL REPUBLICAN, A REVIEW OF THE CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA (1787), *reprinted in* 3 STORING, *supra* note 2, at 69, 73, 77; *Centinel I*, PHILA. INDEP. GAZETEER, Oct. 5, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 332; *An Old Whig II*, PHILA. INDEP. GAZETEER, Oct. 17, 1787, *reprinted in id.* at 401.

250. Massachusetts Convention (1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 13 (Gen. Heath), 14 (Gen. Brooks), 16-17 (Christopher Gore), 126-28 (James Bowdoin) (all federalists); Melancton Smith, New York Convention (June 20, 1788), in *id.* at 224 (an anti-federalist); James Wilson, Pennsylvania Convention (1787), in *id.* at 421, 482 (a federalist); Virginia Convention (1788), in *id.* at 84 (Edmund Randolph, federalist), 165 (Patrick Henry, anti-federalist), 279-80, 288 (William Grayson, anti-federalist), 294 (Edmund Pendleton, federalist).

251. Montesquieu often wrote of a government official being “entrusted” with power. In addition to the references in the text, see MONTESQUIEU, *supra* note 2, at 4 (“The people are extremely well qualified for choosing those whom they are to entrust with part of their authority.”); *id.* at 15 (“This love is peculiar to democracies. In these alone the government is entrusted to private citizens.” [in Montesquieu's taxonomy, republics were divided into aristocracies and democracies]); *id.* at 73 (“[T]he conduct of him who is entrusted with the executive power” and “a subject entrusted with the administration of public affairs”). There are many other illustrations.

252. See MONTESQUIEU, *supra* note 2, at 9.

253. See *id.* at 31.

over large republics partly because he believed that in larger republics impartial dedication to the common good was less likely than in smaller ones.²⁵⁴

By 1787, William Blackstone's *Commentaries* had become the standard elementary law book in America.²⁵⁵ Like Montesquieu, Blackstone's popularity spread far beyond the bounds of the legal profession, and he was cited often during the constitutional debate.²⁵⁶ Blackstone identified legislators, judges, and magistrates as being in public trust,²⁵⁷ noting

254. *See id.* at 56:

In an extensive republic there are men of large fortunes, and consequently of less moderation; there are trusts too considerable to be placed in any single subject; he has interests of his own; he soon begins to think that he may be happy and glorious, by oppressing his fellow-citizens; and that he may raise himself to grandeur on the ruins of his country.

In an extensive republic the public good is sacrificed to a thousand private views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is more obvious, better understood, and more within the reach of every citizen; abuses have less extent, and of course are less protected.

255. On Blackstone's influence, see WARREN, *supra* note 2, at 177-80.

256. For example, at the Philadelphia convention, Blackstone was cited by Alexander Hamilton, *see* 1 FARRAND, RECORDS, *supra* note 2, at 472, and John Dickinson, *see* 2 *id.* at 448. At the state ratifying conventions, several delegates resorted to Blackstone. *See, e.g.,* James Wilson, Explanatory of the General Principles of the Proposed Federal Constitution (1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 348; Virginia Convention (1788), *in* 3 ELLIOT'S DEBATES, *supra* note 2, at 501 (James Madison), 506 (George Nicholas), 544 (Patrick Henry). Blackstone also appeared in pamphlets and newspaper commentaries. *See, e.g.,* *Plain Truth: Reply to an Officer of the Late Continental Army*, PHILA. INDEP. GAZETEER, Nov. 7, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 219; WILLIAM BARTON, ON THE PROPRIETY OF INVESTING CONGRESS WITH POWER TO REGULATE TRADE OF THE UNITED STATES (1787), *reprinted in* 13 *id.* at 53; *West-Chester Farmer*, N.Y. DAILY ADVERTISER, June 8, 1787, *reprinted in id.* at 128-29; THE FEDERALIST NO. 69, *supra* note 2, at 357, 359 (Alexander Hamilton); *id.* NO. 84, at 444 (Alexander Hamilton). These are only a sample of a large number of convention references.

257. 1 BLACKSTONE, *supra* note 2, at *10 (members of Parliament), *12 (judges), *50 (legislative power), *56 (executive power), *161 (Parliament); *see also id.* at *13 ("those who are entrusted by their country to maintain, to

that, unlike some other offices, offices of public trust could not be incorporeal hereditaments;²⁵⁸ and he reported that those who violated the public trust through maladministration could be impeached.²⁵⁹

2. Existing State Constitutions

The royal charters governing several of the American colonies had been granted "upon Trust" for the benefit of the settlers in those colonies.²⁶⁰ After adoption of the Declaration of Independence, the drafters of most of the state constitutions similarly resorted to the public trust doctrine. To be sure, several constitutions employed the terms "trust" or "public trust" merely as synonyms for public office. Thus, the constitution of Delaware referred to a member of the executive council "remain[ing] in trust for three years from the time of his being elected,"²⁶¹ members of the legislative and privy councils serving as "justices of the peace for the whole State, during their continuance in trust,"²⁶² and so forth.²⁶³

administer, and to amend [the laws]"), *48 (entrusting the "reins of government"), *49 (stating that in a monarchy government "[the sovereign power] is entrusted in the hands of a single person").

258. 2 *id.* at *37.

259. 4 *id.* at *122.

260. *See supra* notes 143-145 and accompanying text.

261. DEL. CONST. of 1776, art. IV, *available at* <http://www.yale.edu/lawweb/avalon/states/de02.htm> (last visited Dec. 10, 2004).

262. *Id.* art. XII.

263. *Id.* art. XXII ("Every person who shall be chosen a member of either house, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take the following oath, or affirmation . . ."). Among the state constitutions with similar usages were Georgia, Maryland, and Massachusetts. *See, e.g.,* GA. CONST. of 1777, arts. XI, XV, *available at* <http://www.yale.edu/lawweb/avalon/states/ga02.htm> (last visited Dec. 10, 2004); MD. CONST. of 1776, arts. XXXI, XXXII, XXXV, XXXIX, LII-LV, *available at* <http://www.yale.edu/lawweb/avalon/states/ma02.htm> (last visited Dec. 10, 2004); MASS. CONST. of 1780, Part the Second, ch. I, § 2, art. VIII, *available at* <http://www.nhinet.org/ccs/docs/ma-1780.htm> (last visited Dec. 10, 2004); *id.* ch. VI, art. I; *id.* ch. II, § 3, art. II; *see also* N.C. CONST. of 1776, arts. XII, XXXII, *available at* <http://www.yale.edu/lawweb/avalon/states/nc02.htm> (last visited Dec. 10, 2004).

However, other state constitutions were more specific about the nature of government as a public trust. For example, the constitution of Maryland provided

That all persons invested with the legislative or executive powers of government are the trustees of the public, and, as such, accountable for their conduct; wherefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government.²⁶⁴

Similar statements of public trust doctrine were inserted into the constitutions of Pennsylvania,²⁶⁵ Virginia,²⁶⁶ and of the incipient state of Vermont.²⁶⁷ These were the constitu-

edu/law/web/avalon/states/nc07.htm (last visited Dec. 10, 2004); N.J. CONST. of 1776, art. XIX, *available at* <http://www.yale.edu/lawweb/avalon/states/nj15.htm> (last visited Dec. 10, 2004); N.Y. CONST. of 1777, art. XXXIII, *available at* <http://www.yale.edu/awweb/avalon/states/ny01.htm> (last visited Dec. 10, 2004); S.C. CONST. of 1778, art. XXXVI, *available at* <http://www.yale.edu/lawweb/avalon/states/sc02.htm> (last visited Dec. 10, 2004).

264. MD. CONST. of 1776, art. IV, *available at* <http://www.yale.edu/lawweb/avalon/states/ma02.htm> (last visited Dec. 10, 2004).

265. PA. CONST. of 1776, art. IV, *available at* <http://www.yale.edu/lawweb/avalon/states/pa08.htm> (last visited Dec. 10, 2004) (“That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.”).

266. VA. CONST. of 1776, § 2, *available at* <http://www.yale.edu/lawweb/avalon/states/va05.htm> (last visited Dec. 10, 2004) (“That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.”).

267. VT. CONST. of 1786, ch. I, art. VI, *available at* <http://www.yale.edu/lawweb/avalon/states/vt02.htm> (last visited Dec. 10, 2004) (“That all power being originally inherent in, and consequently derived from the people; therefore, all officers of government, whether legislative or executive, are their trustees and servants, and at all times, in a legal way, accountable to them.”); *see also* VT. CONST. of 1777, ch. 1, art. V, *available at* <http://www.yale.edu/lawweb/avalon/states/vt01.htm> (last visited Dec. 10, 2004). *Accord* MASS. CONST. of 1780, Part the First, art. V (“All power residing originally in the people, and being derived from them, the several magistrates and officers of government vested with authority, whether legislative, executive, or judicial,

tions under which the various states commissioned their delegates to the national convention in Philadelphia. In other words, these were the constitutions from which the convention delegates derived their authority.

V. THE U.S. CONSTITUTION AND THE PUBLIC TRUST

A by-product of the constitutional debate of 1787-91 was an outpouring of transcripts, letters, notes, newspaper articles and essays, pamphlets, broadsides, and transcribed orations. From this record, examined in the light of the Founders' literary canon,²⁶⁸ we can deduce in many cases²⁶⁹ the purposes and "original meaning"²⁷⁰ of constitutional clauses that today seem unclear. We also can discern the prevalence of the public trust doctrine.²⁷¹ Like the concepts of republicanism,²⁷² "sympathy," and "independence,"²⁷³ the

are the substitutes and agents, and are at all times accountable to them"), available at <http://www.nhinet.org/ccs/docs/ma-1780.htm> (last visited Dec. 10, 2004).

268. See *supra* Part IV.

269. Not all cases, of course. On some clauses the record is not sufficient. On others, people on one or both sides were hopelessly divided.

270. See generally JACK N. RAKOVE, *ORIGINAL MEANINGS* (1996); Randy E. Barnett, *An Originalism for Non-Originalists*, 45 LOY. L. REV. 611 (1999); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretative Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1133, 1144-48 (2003).

271. For example, the term "public trust" appears seven times in THE FEDERALIST, *supra* note 2, available at <http://www.constitution.org/fed/federali.txt> (last visited Dec. 10, 2004). The term "guardian" or "guardianship" appears twenty times. The terms "public servant" (or analogous usages), "trustee," and "agent" also appear very frequently throughout the publication.

272. See, e.g., MCDONALD, *supra* note 2, at 4-5.

273. See Natelson, *Sympathy and Independence*, *supra* note 2, at 353 (discussing the founding generation's widely shared views that (1) in a republic, citizens should be independent decision makers; (2) the decision-making branches of government should be independent of each other; and (3) government should be "sympathetic" with the people). For an influential contemporary discussion of the value and meaning of "sympathy," see generally ADAM SMITH, *THE THEORY OF*

public trust doctrine seems to have been an ideal that almost everyone agreed on. As we shall see, moreover, it was an ideal with real-world legal implications.

This Part V discusses the direct role of the public trust doctrine in the drafting, submission, and ratification of the Constitution. This part is divided into five subparts, each discussing the founding generation's adherence to one of the five fiduciary standards listed above as potentially applicable to government officials. These are the duty to follow instructions, the duty of reasonable care, the duty of loyalty, the duty of impartiality, and the duty to account.

A. *The Duty to Follow Instructions*

The law imposes on private fiduciaries a duty to follow instructions—that is, to comply with the purposes and rules of the relationship.²⁷⁴ For the participants in the constitutional debate, the analogous public duty was to comply with rules designed to serve the sole legitimate purpose of government: the promotion of the common good or general welfare.²⁷⁵ “P. Valerius Agricola,” a federalist author, reflected the dominant social compact view when he wrote:

MORAL SENTIMENTS (D.D. Raphael & A. L. Macfie eds., 1982) (1759), *available at* <http://www.econlib.org/library/Smith/smMS.html> (last visited Dec. 10, 2004).

274. See *supra* note 38 and accompanying text.

275. See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 53-65 (1969) (illustrating that the founding generation's republicanism included the notion that the state existed for the public good). Cf. William Barton, *On the Propriety of Investing Congress with the Power to Regulate the Trade of the United States* (1787), reprinted in 13 DOCUMENTARY HISTORY, *supra* note 2, at 52 (“It is the business of congress to promote the ‘mutual and general welfare’ of ALL the states, and their duty to consult the interests of EACH, so far as is compatible with those of the whole.”); *Impartial*, INDEP. GAZETTEER, Oct. 16, 1787, reprinted in 2 *id.* at *644 (microfiche supplement) (“The great and ultimate end of government is the happiness and prosperity of the people.”); Letter from Richard Henry Lee to Samuel Adams (Apr. 28, 1778), reprinted in 17 *id.* at 230 (writing that the states must be “confederated for the common good”); Letter from Roger Sherman (Dec. 8, 1777), in 14 *id.* at 389 (“In order to [have] a well regulated government, the legislature Should [sic] be dependant on the people, and be vested with a plenitude [sic] of power, for all the purposes, for which it is instituted, to be exercised for the public good, as occasion may require, powers are dangerous only when trust in

It was then, that the individual, impelled by fear and attentive to the suggestions of reason, *intrusted* a portion of his natural liberty to the care of community, which became thus enabled to afford him protection against the dangers incident to a state of nature

* * * *

From a review of the foregoing observations, we may then infer, that the design of civil government is, the security and happiness of community, and by no means the aggrandisement of an individual or a few²⁷⁶

The participants believed that government should receive sufficient powers to execute its trust.²⁷⁷ However, care should be taken not to give government too much authority. The *Pennsylvania Herald* opined that “all power is a delegation from the people for their own advantage [and] no greater portion of it should be any where entrusted than is

officers not under the controul [sic] of the laws.”) (alteration in original); Letter from George Washington to John Armstrong, Sr. (Apr. 25, 1788), *reprinted in* 17 *id.* at 215 (writing of the “general welfare” and “general interest”).

276. *P. Valerius Agricola*, ALB. GAZ., Nov. 8, 1787, *reprinted in* 19 *id.* at 188 (emphasis added); *see also Cincinnatus*, LANSINGBURGH N. CENTINEL, Oct. 15, 1787, *reprinted in* 19 *id.* at 87 (“Cincinnatus” the federalist, as distinguished from the author, “Cincinnatus,” in volume 13):

From the first formation of society, it has ever been found absolutely necessary for the welfare, happiness and good of mankind, that they should give up a part of their liberties *in trust* for the preservation of the remainder.

As individuals, we have by our present excellent [New York] constitution, given those powers which were conceived necessary for our welfare to our fellow citizens and neighbours, chosen by ourselves; and of our own free will they have the preservation of our lives, liberties and properties *entrusted* to their care.

Id. (emphasis added).

277. THE FEDERALIST NO. 23, *supra* note 2, at 113 (Alexander Hamilton) (arguing “that government ought to be clothed with all the powers requisite to complete execution of its trust”); John Marshall, Virginia Convention (June 10, 1788), *in* 3 ELLIOT’S DEBATES, *supra* note 2, at 225 (making essentially the same argument).

necessary to accomplish the end proposed.”²⁷⁸ Both federalists²⁷⁹ and anti-federalists agreed that an official exceeding the scope of his limited powers thereby breached the public trust. An anti-federalist writer, “A Citizen of Maryland,” quoted Lord Abington with approval:

My idea of government . . . , to speak as a lawyer would do, is, that the legislatures are the *trustees* of the people, the constitution the *deed of gift*, wherein they stood seized to *uses* only, and *those uses being named*, they cannot depart from them; but for their due performance are accountable to those by whose conveyance the trust was made. The *right* is therefore *fiduciary*, the power *limited*²⁸⁰

The drafters of the Constitution included several provisions designed to promote and enforce the duty to follow

278. Editorial, PA. HERALD, June 9, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 131.

279. *See, e.g.*, ALEXANDER CONTEE HANSON, REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT, ADDRESSED TO THE CITIZENS OF THE UNITED STATES OF AMERICA, AND PARTICULARLY TO THE PEOPLE OF MARYLAND (1788), *reprinted in* 15 *id.* at 536 (arguing from a federalist perspective that exceeding one’s powers is a breach of trust and implying, although not stating, that impeachment is the remedy).

280. LUTHER MARTIN, A CITIZEN OF THE STATE OF MARYLAND: REMARKS RELATIVE TO THE BILL OF RIGHTS (1788), *reprinted in* 17 *id.* at 92. For another anti-federalist statement of the public trust doctrine, see *The Impartial Examiner I*, VA. INDEP. CHRON., Feb. 20, 1788, *reprinted in* 8 *id.* at 389:

These are in all just governments laid down as a foundation to the *civil compact*, which contains a *covenant* between *each* with *all*, that they shall enter into one society to be governed by the same powers; establishes for that purpose the *frame* of government; and consequently creates a *Convention* [i.e., an agreement] between *every* member, binding those, who shall at any time be intrusted with power, to a faithful administration of their trust according to the form of the *civil policy*, which they have so constituted, and obliging all to a due obedience therein.

See also The Impartial Examiner I, VA. INDEP. CHRON., Feb. 27, 1788, *reprinted in id.* at 420 (stating that those entrusted with political power should observe two essential rules: “first in having no other view than the general good of all without any regard to private interest; and secondly, to take equal care of the whole body of the community, so as not to favor one part more than another”).

instructions. In the Preamble,²⁸¹ they set forth the purposes of the trust, including the promotion of the “general Welfare.” They enumerated the powers of Congress,²⁸² President,²⁸³ and courts²⁸⁴ so as to instruct federal fiduciaries on what they could and could not do. The Constitution was to be the “supreme Law of the Land,”²⁸⁵ thereby empowering courts to invalidate statutes and other official actions outside the scope of, or otherwise in violation of, the rules of the trust.²⁸⁶

281. U.S. CONST. pmb.:

We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

282. *Id.* art. I, § 8.

283. *Id.* art. II, §§ 2, 3.

284. *Id.* art. III, § 2.

285. *Id.* art. VI, cl. 2.

286. Federal laws became the supreme law of the land only to the extent they that were enacted pursuant to “the *enumerated* and *legitimate* objects” of federal jurisdiction. THE FEDERALIST NO. 27, *supra* note 2, at 135 (Alexander Hamilton).

The prospective power of the courts to invalidate unconstitutional federal actions was repeatedly referenced during the ratification debates. *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 THE FOUNDERS’ CONSTITUTION, *supra* note 2, ch. 17, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch17s22.html> (last visited Sept. 25, 2004); THE FEDERALIST NO. 16, *supra* note 2, at 117 (Alexander Hamilton); *id.* NO. 44, at 285-86 (James Madison); James Sullivan, *Cassius XI*, MASS. GAZETTE, Dec. 25, 1787, reprinted in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 43, 46 (Paul Leicester Ford ed., 1892). *See also* Oliver Ellsworth’s comments (later chief justice of the United States) at the Connecticut ratifying convention:

If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon

While fully subscribing to the public trust doctrine, anti-federalists argued that the Constitution would not do an adequate job of forcing government officials to honor the rules. Among other contentions, they maintained that the Constitution should have specified with greater precision exactly what federal officials were and were not permitted to do. The comments of the anti-federalist essayist “John DeWitt” were typical:

A people, entering into society, surrender such a part of their natural rights, as shall be necessary for the existence of that society. They are so precious in themselves, that they would never be parted with, did not the preservation of the remainder require it. They are *entrusted* in the hands of those, who are very willing to receive them, who are naturally fond of exercising of them, and whose passions are always striving to make a bad use of them.— They are conveyed by a written compact, expressing those which are given up, and the mode in which those reserved shall be secured. Language is so easy of explanation, and so difficult is it by words to convey exact ideas, that the party to be governed cannot be too explicit. The line cannot be drawn with too much precision and accuracy.²⁸⁷

The “Citizen of the State of Maryland” had the same concern: “I do not perceive in the new constitution, *those uses named*, for which the administration of government is entrusted; no directing principles, sufficient for security of

the general government, the law is void; and upright, independent judges will declare it to be so.

On the Power of Congress to Lay Taxes (Jan. 7, 1788), in 2 ELLIOT’S DEBATES, *supra* note 2, at 196. For still further examples, see James Wilson, Pennsylvania Convention (Dec. 4, 1787), in *id.* at 446, 478, 489; Virginia Convention (1788), in 3 *id.* at 324-25, 541 (Patrick Henry praising the practice of the Virginia courts in invalidating unconstitutional legislation, and wondering whether the federal judiciary would have the fortitude to do the same); *id.* at 443 (George Nicholas arguing “if [Congress] exceed[s] these powers, the judiciary will declare it void”); *id.* at 548 (Edmund Pendleton); *id.* at 553 (John Marshall); John Steele, North Carolina Convention (July 25, 1788), in 4 *id.* at 71.

287. John DeWitt, *To the Free Citizens of the Commonwealth of Massachusetts II*, AM. HERALD (Boston), Oct.-Dec. 1787, reprinted in 4 STORING, ANTI-FEDERALIST, *supra* note 2, at 21 (emphasis added), available at <http://www.constitution.org/afp/dewitt02.htm> (last visited Dec. 10, 2004).

life, liberty, property, and freedom in trade; and therefore, as a supplement, a declaration or bill of rights is evidently wanting²⁸⁸

As part of the constitutional settlement, therefore, the first ten amendments²⁸⁹ were added to define the rules of the trust more carefully and narrowly.²⁹⁰

B. *The Duty of Reasonable Care*

Authors in the founding generation's literary canon had contended that public officials had a duty of care.²⁹¹ There is every indication that the participants on both sides of the debate agreed. On the federalist side, James Madison stressed the need for officials to acquire sufficient knowledge to execute their functions,²⁹² and argued for a governmental structure that would minimize official "indiscretions."²⁹³

288. LUTHER MARTIN, *supra* note 280, at 92.

289. U.S. CONST. amends. I-X.

290. *See, e.g.*, Natelson, *Enumerated*, *supra* note 2, at 473-75, 479.

291. *See supra* notes 79 (Plato), 117 (Grotius), 156 (Sidney on the duty to select competent agents), 179 ("Cato" on diligence), 185 (Bolingbroke) and accompanying text.

292. James Madison, Journal (June 21, 1787), *reprinted in* 1 FARRAND, RECORDS, *supra* note 2, at 361 (arguing that representatives should have a longer term than one year to provide them with "the time requisite for new members who would always form a large proportion, to acquire that knowledge of the affairs of the States in general without which their trust could not be usefully discharged"); *see also* THE FEDERALIST NO. 57, *supra* note 2, at 295 (James Madison) ("The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society.").

293. *See, e.g.*, James Madison, Journal (June 7, 1787), *reprinted in* 1 FARRAND, RECORDS, *supra* note 2, at 151-52 (arguing against a large Senate because "[t]he more the representatives of the people therefore were multiplied, the more they partook of the infirmities of their constituents, the more liable they became to be divided among themselves either from their own indiscretions or the artifices of the opposite factions, and of course the less capable of fulfilling their trust"); *see also id.* at 421-22 (June 26, 1787) (stating "[i]n this they wd. be governed by the same prudence which has prevailed in organizing the subordinate departments of Govt. where all business liable to

Nathaniel Gorham of Massachusetts (a former President of Congress and the chairman of the federal convention's committee of the whole) emphasized the national executive's duty to select competent agents.²⁹⁴ On the anti-federalist side, George Clinton, the Governor of New York, writing as "Cato," reflected the views of Locke and of an earlier "Cato"—Trenchard and Gordon—by asserting that public administration calls for a higher standard of care than that applicable to the private sector. Clinton firmly rejected the "good enough for government work" attitude that so often characterizes public administration today:

In your private concerns and affairs of life you deliberate with caution, and act with prudence; your public concerns require a caution and prudence, in a ratio, suited to the difference and dignity of the subject. The disposal of your reputation and of your lives and property, is more momentous than a contract for a farm, or the sale of a bale of goods; in the former, if you are negligent or inattentive, the ambitious and despotic will entrap you in their toils, and bind you with the cord of power from which you, and your posterity, may never be freed; and if the possibility should exist, it carries along with it consequences that will make your community totter to its center: in the latter, it is a mere loss of a little property, which more circumspection, or assiduity, may repair.²⁹⁵

In order to promote care in government, the drafters of the Constitution imposed minimum age and residency requirements on Representatives,²⁹⁶ Senators,²⁹⁷ and the

abuses is made to pass thro' separate hands, the one being a check on the other"); James Madison, *Journal* (July 20, 1787), *reprinted in* 2 *id.* at 65 (discussing remedies for lack of capacity and other breaches of trust).

294. Nathaniel Gorham, *Journal* (July 18, 1787), *reprinted in* 2 *id.* at 42 (arguing that "[a]s the Executive will be responsible in point of character at least, for a judicious and faithful discharge of his trust, he will be careful to look through all the States for proper characters").

295. *Cato I*, N.Y. J., Sept. 27, 1787, *reprinted in* 19 DOCUMENTARY HISTORY, *supra* note 2, at 59-60.

296. U.S. CONST. art. I, § 2, cl. 2.

297. *Id.* art. I, § 3, cl. 3.

President.²⁹⁸ They inserted an executive veto partly to serve as a safeguard against improvident legislation.²⁹⁹ They added other safeguards against carelessness as well: the President's power to insist that department heads' advice be in writing,³⁰⁰ the Senate's prerogative to approve or reject nominations,³⁰¹ and representation from relatively small districts so legislators would be knowledgeable about, as well as sympathetic with, the people they were representing.³⁰²

Predictably, federalist authors hailed these provisions during the ensuing debates. By way of illustration, Tench Coxe, one of the most prolific advocates of the Constitution, wrote of the President, that he "*must be matured by the experience of years, and being born among us, his character at thirty-five must be fully understood. Wisdom, virtue, and*

298. *Id.* art. II, § 1, cl. 5.

299. *See, e.g.*, the discussion of the role of the Presidential veto in THE FEDERALIST NO. 73, *supra* note 2, at 381 (Alexander Hamilton).

300. U.S. CONST. art. II, § 2, cl. 1.

301. *Id.* art. II, § 2, cl. 2. On the role of this provision in increasing the likelihood that competent people would be appointed, see THE FEDERALIST NO. 66, *supra* note 2, at 345 (Alexander Hamilton).

302. *See, e.g.*, James Madison, Journal (July 26, 1787), *reprinted in* 2 FARRAND, RECORDS, *supra* note 2, at 123-24:

It was politic as well as just that the interests & rights of every class should be duly represented & understood in the public Councils. It was a provision every where established that the Country should be divided into districts & representatives taken from each, in order that the Legislative Assembly might equally understand & sympathise, with the rights of the people in every part of the Community. It was not less proper that every class of Citizens should have an opportunity of making their rights be felt & understood in the public Councils.

See also Melancton Smith, New York Convention (June 20, 1788), *in* 2 ELLIOT'S DEBATES, *supra* note 2, at 245:

The idea that naturally suggests itself to our minds, when we speak of representatives, is, that they resemble those they represent. They should be a true picture of the people, possess a knowledge of their circumstances and their wants, sympathize in all their distresses, and be disposed to seek their true interests.

active qualities of mind and body can alone make him the first servant of a free and enlightened people.”³⁰³ Of representatives, Coxe said, “At twenty-one a young man is made the guardian of his *own* interests, *but he cannot for a few years more be entrusted with the affairs of the nation.*”³⁰⁴

While conceding that the principle was sound, anti-federalists feared the Constitution did not go far enough in securing that principle. “Brutus” (perhaps Judge Robert Yates, a federal convention delegate from New York) argued that under the Constitution, “the representation in the legislature is not so formed as to give reasonable ground for public trust.”³⁰⁵ The pseudonymous author maintained:

A legislature should pursue the good of the community with fidelity; and will not be turned aside from their duty by private interest, or corrupted by undue influence; and that they will have such a zeal for the good for those whom they represent, as to excite them to be diligent [sic] in their service [However, Congress under the Constitution] will not be viewed by the people as part of themselves, but as a body distinct from them, and having separate interests to pursue; the consequence will be, that a perpetual jealousy will exist in the minds of the people against them; their conduct will be narrowly watched; their measures scrutinized; and their laws opposed, evaded, or reluctantly obeyed. This is natural, and exactly corresponds with the conduct of individuals toward those in whose hands they intrust important concerns.³⁰⁶

303. Tench Coxe, *An American Citizen I*, PHILA. INDEP. GAZETTEER, Sept. 26, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 2, at 250. On the age requirement as promoting knowledge and wisdom, see also THE FEDERALIST NO. 62, *supra* note 2, at 319 (James Madison); *id.* NO. 64, at 333 (John Jay).

304. Tench Coxe, *An American Citizen III*, *supra* note 22, at 272-73.

305. *Brutus IV*, N.Y. J., Nov. 29, 1787, reprinted in 19 DOCUMENTARY HISTORY, *supra* note 2, at 313.

306. *Id.* at 316. “Brutus” then went on to say that when one entrusts concerns to a neighbor, the neighbor is trusted more than a stranger, who is watched with suspicion. *Id.* at 316-17.

C. The Duty of Loyalty

Algernon Sidney had written that “[g]overnment is not instituted for the good of the Governor, but of the governed; and Power is not an Advantage, but a Burden.”³⁰⁷ At the national convention, Hamilton argued for long terms for senators to “induce the sacrifices of private affairs which an acceptance of public trust would require, so as to ensure the services of the best Citizens.”³⁰⁸ Pierce Butler of South Carolina contended for strong barriers against the executive “corrupting” legislators by granting them offices.³⁰⁹ Madison sought mechanisms to prevent the President from betraying his trust by accepting bribes, stealing, or benefiting from unfavorable dealings with foreign powers.³¹⁰ Gouverneur Morris

307. SIDNEY, *supra* note 2, at 91. For a founding-generation sentiment along the same lines, see *P. Valerius Agricola*, *supra* note 276, at 188 (“[T]he design of civil government is, the security and happiness of community, and by not means the aggrandisement of an individual or a few . . .”).

308. James Madison, *Journal* (June 18, 1787), *reprinted in* 1 FARRAND, *RECORDS*, *supra* note 2, at 289-90.

309. *Id.* at 391 (June 23, 1787).

310. 2 *id.* at 65-66 (July 20, 1787):

[I]t [is] indispensable that some provision should be made for defending the Community agst [sic] the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers. The case of the Executive Magistracy was very distinguishable, from that of the Legislative or of any other public body, holding offices of limited duration. It could not be presumed that all or even a majority of the members of an Assembly would either lose their capacity for discharging, or be bribed to betray, their trust. Besides the restraints of their personal integrity & honor, the difficulty of acting in concert for purposes of corruption was a security to the public. And if one or a few members only should be seduced, the soundness of the remaining members, would maintain the integrity and fidelity of the body. In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.

Cf. THE FEDERALIST NO. 22, *supra* note 2, at 109 (Alexander Hamilton):

of Pennsylvania pointed out that when there is identity of interest between trustee and beneficiary, breaches are less likely.³¹¹ He also argued for impeachment as a proper remedy for breach of trust.³¹²

The proposed Constitution contained various provisions designed to render federal officials loyal to the public, with

In republics, persons elevated from the mass of the community, by the suffrages of their fellow-citizens, to stations of great pre-eminence and power, may find compensations for betraying their trust, which to any but minds actuated by superior virtue, may appear to exceed the proportion of interest they have in the common stock, and to overbalance the obligations of duty. Hence it is, that history furnishes us with so many mortifying examples of the prevalency [sic] of foreign corruption in republican governments.

311. James Madison, *Journal* (July 24, 1787), *reprinted in* 2 FARRAND, RECORDS, *supra* note 2, at 104:

The Legislature is worthy of unbounded confidence in some respects, and liable to equal distrust in others. When their interest coincides precisely with that of their Constituents, as happens in many of their Acts, no abuse of trust is to be apprehended. When a strong personal interest happens to be opposed to the general interest, the Legislature can not be too much distrusted.

Cf. Letter from Roger Sherman (Dec. 8, 1787), *in* HUTSON, SUPPLEMENT, *supra* note 2, at 286:

In every government there is a trust, which may be abused; but the greatest security against abuse is, that the interest of those in whom the powers of government are vested is the same as that of the people they govern, and that they are dependent on the suffrage of the people for their appointment to and continuance in office.

312. James Madison, *Journal* (July 20, 1787), *reprinted in* 2 FARRAND, *supra* note 2, at 68:

Mr. Govr. Morris's [sic] opinion had been changed by the arguments used in the discussion. He was now sensible of the necessity of impeachments, if the Executive was to continue for any time in office. Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst [sic] it by displacing him.

as few conflicting interests as possible. The drafters sought to make each branch of government—federal and state, legislative, executive, and judicial—relatively independent from the others' undue influence.³¹³ To prevent executive and state "corruption" of Congress, Senators and Representatives were privileged from arrest in most cases, and their statements on the floor immune.³¹⁴ Moreover, Senators and Representatives were not to serve in the executive branch nor accept, even on resignation, newly-created or newly-enhanced executive offices.³¹⁵ Correspondingly, to prevent congressional corruption of the President, the legislature could not vary his compensation during his term.³¹⁶ To reduce the chances of foreign corruption of the President, only natural-born citizens could be elected to that office.³¹⁷ To reduce the chances of foreign corruption of the Senate, age and length-of-residency requirements were imposed.³¹⁸ To reduce the likelihood of factional corruption, the President

313. See generally Natelson, *Sympathy and Independence*, *supra* note 2, at 390-405.

314. U.S. CONST. art. I, § 6, cl. 1.

315. *Id.* art. I, § 6, cl. 2; see also THE FEDERALIST NO. 76, *supra* note 2, at 395 (Alexander Hamilton) (stating that the ban on executive office-holding by members of Congress "guards against the danger of executive influence upon the legislative body"). This value seems to have been forgotten in some state constitutions. In the author's state (Montana), for example, a large proportion of the legislature typically consists of public employees or retired public employee-pensioners. The author's observation is that those legislators almost never vote against the interest of the agencies that pay their salaries or pensions. The Founders abused such people with the epithet, "placemen." See, e.g., John Williams, New York Convention (June 21, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 241; Tench Coxe, *An American Citizen III*, PHILA. INDEP. GAZETTEER, Sept. 29, 1788), reprinted in FRIENDS, *supra* note 2, at 467; Hugh Williamson, Remarks on the New Plan of Government (Feb. 1788), reprinted in *id.* at 277.

316. U.S. CONST. art. II., § 1, cl. 7; see also THE FEDERALIST NO. 73, *supra* note 2, at 379-80 (Alexander Hamilton).

317. U.S. CONST. art. II, § 1, cl. 5.

318. *Id.* art. I, § 3, cl. 3; THE FEDERALIST NO. 62, *supra* note 2, at 319 (James Madison).

was to be selected in the most impartial manner the drafters could design.³¹⁹

Anti-federalists agreed that public officials should be loyal,³²⁰ but, on this point as well, contended that the Constitution did not do a thorough enough job. We have seen that “Brutus” averred that Congress would not be sufficiently representative to ensure against self-dealing or the perception of same.³²¹ When federalists tried to reassure the public by pointing out that one should not exaggerate official propensity to disloyalty,³²² the anti-federalist “A Newport Man” opined:

319. John Dickinson, *Fabius II*, PA. MERCURY, Apr. 15, 1787, reprinted in 17 DOCUMENTARY HISTORY, *supra* note 2, at 124-25 (writing that the electoral college was constructed so that “utterly vain will be the unreasonable suggestions derived from *partiality*”); THE FEDERALIST NO. 68, *supra* note 2, at 352-53 (Alexander Hamilton) (defending the mode of election of the President as protecting against “prostitut[ing] votes,” “corruption,” and “bias”).

320. See, e.g., *Cato III*, *supra* note 157, at 474:

“It is natural,” says Montesquieu, “to a republic to have only a small territory, otherwise it cannot long subsist: in a large one, there are men of large fortunes, and consequently of less moderation; there are too great deposits to intrust in the hands of a single subject, an ambitious person soon becomes sensible that he may be happy, great, and glorious by oppressing his fellow citizens, and that he might raise himself to grandeur, on the ruins of his country. In large republics, the public good is sacrificed to a thousand views”

See also *The Impartial Examiner I*, *supra* note 280, at 420 (arguing as a “true maxim that those, who are entrusted with the exercise of the higher powers of government, ought to observe two essential rules: first in having no other view than the general good of all without any regard to private interest; and secondly, to take equal care of the whole body of the community, so as not to favor one part more than another”).

321. *Supra* notes 300-01 and accompanying text.

322. E.g., *A Country Federalist*, POUGHKEEPSIE COUNTRY J., Dec. 19, 1787, reprinted in 19 DOCUMENTARY HISTORY, *supra* note 2, at 433 (James Kent) (stating that “[t]here is a possibility indeed that rulers when seated in the government by the hands of the people, may turn tyrants and abuse their trust,” but alleging that such a breach is unlikely because of sentiments of gratitude, habits through education, philosophy, natural benevolence, and possibility of defeat for reelection).

We are told that the Trustees of our powers and freedom, being mostly married men, and all of them inhabitants and proprietors of the country, is an ample security against an abuse of power Again, our country is compared to a ship of which we are all part owners, and, from thence 'tis gravely concluded that no officer can ever betray or abuse his trust; but that men will sacrifice the public to their private interest, is a saying too well known to need repeating, and the instances of designed shipwrecks, and ships run away with by a combination of masters, supercargoes, and part owners, is so great that nothing can equal them, but those instances in which pretended patriots and politicians have raised themselves and families to power and greatness, by destroying that freedom, and those laws, they were chosen to defend.³²³

D. *The Duty of Impartiality*

Sometimes there is a clash of interests among those whom a fiduciary serves. In a private family trust, for example, an investment may yield a high income for life tenants while impairing the remaindermen's stake in the trust principal. In a corporation, a proposed resolution may benefit one class of shareholders while prejudicing another. When there is a clash of interests, unless otherwise directed or authorized by the trust instrument, a fiduciary must manage so as to avoid favoritism.³²⁴

The fiduciary duty of impartiality presents particular challenges in the government setting, where conflicts of interest within the citizenry are common. Yet the founding generation valued no public trust duty more than impartiality.³²⁵ Both federalists and anti-federalists condemned

323. *A Newport Man*, NEWPORT MERCURY, Mar. 3, 1788, reprinted in 4 STORING, ANTI-FEDERALIST, *supra* note 2, at 252-53.

324. See sources cited *supra* notes 46-47.

325. John Adams, who tended to be out front, had expressed publicly these views earlier than others in the founding generation. See, e.g., ADAMS, WRITINGS, *supra* note 2, at 288-89 (writing under his "Novanglus" pseudonym of 1774); see also James Madison, *Memorial and Remonstrance against Religious Assessments* (June 10, 1785), at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html (last visited Dec. 10, 2004) (arguing against a bill for assessing citizens for the support of religious establishments on the ground that, "[a]s the Bill violates equality by subjecting some to

government decisions that favored one or more “factions,”³²⁶ even if the favored group(s) comprised a majority of the population.³²⁷ For example, they condemned as breaches of trust government actions creating “monopolies,” by which they meant trade restrictions disadvantaging some groups for the enrichment of others.³²⁸ Federalists, such as Virginia

peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions” and praying that those who would pass the bill would not “violate the trust committed to them”). Many writers on the Founding have noted the contemporary dislike for “factions” or “parties,” but few, if any, seem to have connected this attitude to the broader public trust doctrine. This is somewhat surprising, given the conspicuous connection between impartiality and the trust doctrine in two of the most central works in the Founders’ literary canon: Cicero’s *de Officiis* and Locke’s *On Civil Government*. See *supra* notes 93 (Cicero), 161-63 (Locke) and accompanying text.

326. *E.g.*, Noah Webster, *A Citizen of America* (Oct. 17, 1787), reprinted in *FRIENDS*, *supra* note 2, at 383 (writing of the need for impartiality and calling it a breach of trust for a member of Congress to vote for his own state’s interest rather than the public interest); *A Farmer III*, MD. GAZETTE, Mar. 7, 1788, reprinted in 5 *STORING, ANTI-FEDERALIST*, *supra* note 2, at 31 (an anti-federalist praising officeholders who “have no local attachments, partial interests, or private views to gratify”); Letter from James Madison to George Washington (Oct. 18, 1787), reprinted in 13 *DOCUMENTARY HISTORY*, *supra* note 2, at 408 (suggesting that granting monopolies would be a breach of trust and outside Congress’ enumerated powers); *An Admirer of Anti-Federal Men*, N.Y. DAILY ADVERTISER, July 26, 1787, reprinted in 19 *id.* at 15 (“They [the friends of liberty] see, with silent detestation, the low bias towards popularity, which evidently influences the conduct of those, from whom we have a right to expect examples of strict virtue and rigid impartiality . . . [Moreover, during the war,] no partial interests induced us to sacrifice continental benefits to individual or even local advantages.”); see also GARRY WILLS, *JAMES MADISON* 32-33 (2002) (defining Madison’s view of legislation as judicial-style arbitration “with neutral umpires weighing competing interests, to strike a just balance”).

327. See, *e.g.*, *THE FEDERALIST* NO. 10, *supra* note 2, at 43, 45 (James Madison); William Grayson, Virginia Convention (June 18, 1788), in 3 *ELLIOT’S DEBATES*, *supra* note 2, at 491-92; see also JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* 287 (Leonard W. Levy ed., Da Capo Press 1971) (1787) (“It may sound oddly [sic] to say that the majority is a faction; but it is, nevertheless, literally just. If the majority are partial to their own favour, if they refuse to deny [sic: should be “grant”] a perfect equality to every member of the minority, they are a faction . . .”).

328. Letter from James Madison to George Washington, *supra* note 326, at 408 (suggesting that granting monopolies would be a breach of trust and

Governor Edmund Randolph, quieted the fears of those who thought the new government might cede territories in the West by denying, in accordance with Whig doctrine, the inherent power of government to cede some of its territory without the consent of the inhabitants, for that would sacrifice the interests of some for the benefit of others.³²⁹ When government did not act impartially, it was attributed to conspiracies or “intrigue,” “corruption,”³³⁰ or “undue influence” (note the trust term)³³¹ among officeholders and one or

outside Congress’ enumerated powers); see also *Agrippa VI*, MA. GAZETTE, Dec. 14, 1787, reprinted in 4 STORING, ANTI-FEDERALIST, *supra* note 2, at 80, available at <http://www.constitution.org/afp/agrippa.htm> (last visited Dec. 10, 2004) (an anti-federalist writer); Noah Webster, *America*, N.Y. DAILY ADVERTISER, Dec. 31, 1787, reprinted in FRIENDS, *supra* note 2, at 171 (stating that government should “prevent any exclusive rights”).

See *The Case of Monopolies*, 11 Coke Rep. 84b, 86b, 77 Eng. Rep. 1260, 1263 (1602) (holding a monopoly of playing cards to be contrary to law, partly on the ground that “every grant made in grievance or prejudice of the subject is void”). The great proto-Whig jurist Sir Edward Coke had argued the case in favor of the government, but used his position as the reporter of the case to praise the decision. For a recent summary of the long Whig struggle against “monopolies,” see Timothy Sandefur, *The Right to Earn a Living*, 6 CHAPMAN L. REV. 207, 209-31 (2003).

329. Edmund Randolph, Virginia Convention (June 13, 1788), in 3 ELLIOT, DEBATES, *supra* note 2, at 362-63, 504-05; see also *id.* at 501 (James Madison speaking on restrictions on the British king’s treaty power). For the *ultra vires* nature of breaches of trust, see *supra* note 197 and accompanying text. For Grotius’ previous recognition of the same principles, see *supra* note 117.

330. *E.g.*, James Madison, Journal, (July 17, 1787), reprinted in 2 FARRAND, RECORDS, *supra* note 2, at 31 (Col. Mason) (“It is curious to remark the different language held at different times. At one moment we are told that the Legislature is entitled to thorough confidence, and to indefinite power. At another, that it will be governed by intrigue & corruption, and cannot be trusted at all.”); see also *A Newport Man*, *supra* note 323, at 252. The anti-federalist author noted of federalist arguments that

Again, our country is compared to a ship of which we are all part owners, and, from thence ‘tis gravely concluded that no officer can ever betray or abuse his trust; but that men will sacrifice the public to their private interest, is a saying too well known to need repeating, and the instances of designed shipwrecks, and ships run away with by a combination of masters, supercargoes, and part owners

more “factions,” “combinations” or “juntos” seeking governmental favors at common expense.³³² Even when such “corruption” was not technically illegal, it was a violation of the public trust. On the other hand, the term “impartial” seems to have had extremely favorable connotations.

The drafters of the Constitution were deeply concerned about potential “corruption” in the proposed federal government,³³³ and took pains to ensure that government remained as impartial as possible—both toward citizens and toward states. To promote the principle of impartiality among citizens, apportionment of the House of Representatives was based approximately on population.³³⁴ Representatives were made numerous to render more difficult the creation of “combinations” and “juntos” leading to “corruption.”³³⁵ A

331. *E.g.*, *The Impartial Examiner III*, VA. INDEP. CHRON., June 4, 1787, reprinted in 10 DOCUMENTARY HISTORY, *supra* note 2, at 1577 (stating that undue influence leads to partiality).

332. The frequency of the use of these terms is captured by computer text searches of the following: in THE FEDERALIST, *supra* note 2, the term “faction” is used in this sense forty-four times, “combination” thirty times, and “junto”—more of an anti-federalist term—once; in MORTON BORDEN, THE ANTIFEDERALIST PAPERS (1965), an edited compilation of some of the best anti-federalist productions (but about twenty-nine percent shorter than The Federalist), “combination” appears fifteen times, “faction” ten, and “junto” six times. These figures are approximate, because sometimes they (especially “combination”) may be used in different or overlapping senses. *See also* WILSON, *supra* note 2, at 294 (stressing the need for impartiality in executive appointments and the desirability, therefore, of a single executive to forestall “combinations”).

333. *See, e.g.*, James Madison, Journal (Sept. 8, 1787), reprinted in 2 FARRAND, RECORDS, *supra* note 2, at 551:

Mr Govr Morris thought no other tribunal than the Senate could be trusted. The Supreme Court were too few in number and might be warped or corrupted. He was agst. [sic] a dependence of the Executive on the Legislature, considering the Legislative tyranny the great danger to be apprehended; but there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out.

334. U.S. CONST. art. I, § 2, cl. 3.

335. *E.g.*, James Madison, Journal (Sept. 7, 1787), reprinted in 2 FARRAND, RECORDS, *supra* note 2, at 536; Wilson Nicholas, Virginia Convention (June 4,

single rather than a plural executive was established.³³⁶ The Constitution forbade the new government from passing bills of attainder or ex post facto laws,³³⁷ granting titles of nobility,³³⁸ or abusing the charge of treason.³³⁹ The Senate was to try impeachments,³⁴⁰ in part because it was seen as the most impartial forum for doing so.³⁴¹

To embody the principle of impartiality among states, each state was to have two Senators.³⁴² Direct taxes were to be apportioned among the states according to a set formula.³⁴³ The federal capital was to be in no single state,³⁴⁴ the better to ensure impartiality.³⁴⁵ Congress was not permitted to discriminate against the commerce in some states to

1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 12 ("[F]or the more the representatives increase in number, the greater the influence of the people in the government . . ."). John Dickinson was at first uncertain about the advantages of numerosity, see *Fabius II*, *supra* note 319, at 122, but shortly thereafter seemed to concede its desirability. *Id.* at 124.

336. WILSON, *supra* note 2, at 294.

337. U.S. CONST. art. I, § 9, cl. 3 (the ban on bills of attainder and ex post facto laws). States were similarly forbidden. *Id.* art. I, § 10, cl. 1.

338. U.S. CONST. art. I, § 9, cl. 8. States were put under the same constraint. *Id.* art. I, § 10, cl. 1.

339. U.S. CONST. art. III, § 3.

340. *Id.* art. I, § 3, cl. 6.

341. THE FEDERALIST NO. 66, *supra* note 2, at 647 (Alexander Hamilton) (defending use of Senate as a court for impeachments because it will be "as difficult as possible for them to combine in any interest opposite to that of the public good"). On the general impartiality of the Senate, see James Madison, Journal (June 26, 1787), reprinted in 1 FARRAND, RECORDS, *supra* note 2, at 427-28.

342. U.S. CONST. art. I, § 3, cl. 1; see also *Impartial*, *supra* note 275, at *644, *647 (defending the Senate as necessary to "restrain the large states from having improper advantages over the small ones").

343. See *id.* art. I, § 2, cl. 3.

344. See *id.* art. I, § 8, cl. 17.

345. THE FEDERALIST NO. 43, *supra* note 2, at 222-23 (James Madison).

the preference of others,³⁴⁶ and states were protected against changes in the number of Senators³⁴⁷ or unwanted combinations and divisions.³⁴⁸

Several clauses worked to promote impartiality toward both citizens and states. Congress was restricted by the General Welfare Clause, designed to prohibit taxes used to fund projects serving primarily partial or local interests.³⁴⁹ Partly to promote impartiality, the convention chose to create a unitary rather than plural executive.³⁵⁰ The executive's veto power, and Congress' two-thirds override, were tools to encourage enactment only of impartial legislation.³⁵¹ The

346. U.S. CONST. art. I, § 2, cl. 3 (apportionment of direct taxes); *id.* art. I, § 8, cl.1 (uniformity in imposts and excises); *id.* art. I, § 9, cl. 6 (no preference given to particular states in revenue or commerce).

347. U.S. CONST. art. V.

348. *Id.* art. IV, § 3.

349. *Id.* art. I, § 8, cl. 1. On the original meaning and subsequent misinterpretation of this clause, see generally Natelson, *General Welfare*, *supra* note 2.

350. Pierce Butler (June 2, 1787), in 1 FARRAND, RECORDS, *supra* note 2, at 88 (speaking at the federal convention); *id.* at 139 (Elbridge Gerry, speaking at the same convention); 2 *id.* at 31 (Gouverneur Morris stating of executive officers, "Appointments made by numerous bodies, are always worse than those made by single responsible individuals, or by the people at large.").

351. THE FEDERALIST NO. 73, *supra* note 2, at 381 (Alexander Hamilton) (saying that the veto "establishes a salutary check upon the legislative body, calculated to guard the community against the *effects of faction*, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body") (emphasis added).

The President was an impartial force because, in the words of Madison, he would be a "national officer, acting for and equally sympathising with every part of the U. States [sic]." James Madison, Journal (July 21, 1787), reprinted in 2 FARRAND RECORDS, *supra* note 2, at 81. Cf. James Monroe, Virginia Convention Debates, in 3 ELLIOT'S DEBATES, *supra* note 2, at 488 ("He ought to depend on the people of America for his appointment and continuance in office; he ought also to be responsible, in an equal degree, to all the states.").

The ability of the executive veto to ensure impartiality eventually was undermined by the practice of "logrolling"—including multiple special interest items in one bill. By 1861, the problem had been identified, and the drafters of

Privileges and Immunities Clause prevented discrimination among citizens because of state of residence.³⁵² To ensure impartiality in judging both among citizens and states, federal judges were to hold office during good behavior³⁵³ and Congress could not diminish any judge's compensation.³⁵⁴

Surveying the drafters' work after completion, "Curtius," a federalist writer, praised it as impartial—that "if any partiality is shewn, it is in favor of the weak"³⁵⁵—and that in certain particulars it followed the British model, "a Government once justly dear to us—then let us enquire, where, among foreign nations, are the people who may boast like Britons? In what country is justice more impartially administered"³⁵⁶ Curtius exhorted his readers, "Unbiassed and impartial, examine, then, for yourselves, how worthy that

the Confederate constitution included a "single subject" requirement. CONFED. CONST. art. I, § 9, cl. 20, *available at* <http://www.us.constitution.net/csa.html#A/sec9> (last visited Dec. 10, 2004) ("Every law, or resolution having the force of law, shall relate to but one subject, and that shall be expressed in the title."). Many, if not most, states have such a requirement today. *See, e.g.,* Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995); Town of Brilliant v. City of Winfield, 752 So. 2d 1192 (Ala. 1999); State v. Fugate, 26 P.3d 802 (Ore. 2001).

352. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *see also* Saenz v. Roe, 526 U.S. 489, 501-02 (1999) (discussing the Clause as limiting discrimination by a state against non-residents); THE FEDERALIST NO. 80, *supra* note 2, at 413-14 (Alexander Hamilton) (making clear that the clause was designed to prevent both partiality and interstate conflict).

353. U.S. CONST. art. III, § 1; *see also* THE FEDERALIST NO. 78, *supra* note 2, at 402 (Alexander Hamilton) (calling life tenure "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws").

354. U.S. CONST. art. III, § 1; *see also* THE FEDERALIST NO. 79, *supra* note 2, at 408 (Alexander Hamilton) ("Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support In the general course of human nature, a power over a man's subsistence amounts to a power over his will.").

355. *Curtius I*, N.Y. DAILY ADVERTISER, Sept. 29, 1787, *reprinted in* 19 DOCUMENTARY HISTORY, *supra* note 2, at 63, 64.

356. *Id.* at 64.

system of Government is, which the collected wisdom of the nation has recommended to your acceptance.”³⁵⁷

Yet again, anti-federalists agreed in principle, but not on application. The anti-federalist “Impartial Examiner” argued:

If it be a true maxim that those, who are entrusted with the exercise of the higher powers of government, ought to observe two essential rules: first in having no other view than the general good of all without any regard to private interest; and secondly, to take equal care of the whole body of the community, so as not to favor one part more than another: it is apparent that under the proposed constitution, this general confederated society, made up of thirteen different states, will have very little security for obtaining an observance, either of the one, or of the other, rule.³⁵⁸

More specific was the position of “Agrippa” (John Winthrop), a Massachusetts anti-federalist: “I believe it is universally true, that acts made to favour a part of the community are wrong in principle,”³⁵⁹ he wrote; “[t]he perfection of government depends on the equality of its operation, as far as human affairs will admit, upon all parts of the empire, and upon all citizens.”³⁶⁰ In “Agrippa’s” view, however, the Constitution would not create an impartial government: Congress would have authority to grant special privileges to some people—such relics of the royal prerogative as exclusive trading charters³⁶¹ and other monopolies.³⁶² (Madison

357. *Id.*

358. *The Impartial Examiner I*, *supra* note 280, at 420.

359. See *Agrippa III*, MA. GAZETTE, Nov. 30, 1787, reprinted in 4 STORING, ANTI-FEDERALIST, *supra* note 2, at 73-74.

360. *Id.* at 82; see also *id.* at 100 (“The first principle of a just government is, that it shall operate equally.”).

361. See *id.* at 80; see also *id.* at 104.

362. See *id.* at 86. For the same charge see also Sydney, *To the Citizens of the State of New York* (June 13-14, 1788), in 6 STORING, ANTI-FEDERALIST, *supra* note 2, at 112 (Robert Yates); George Mason, *Objections to the Constitution* (Oct. 7, 1787), reprinted in 13 DOCUMENTARY HISTORY, *supra* note 2, at 350; cf. 5 HUME, *supra* note 2, at 114.

disagreed, thinking the Constitution gave Congress no power to so breach its trust.)³⁶³ Further, taxation would impact the states unequally.³⁶⁴ “In a republic,” Agrippa wrote, “we ought to guard, as much as possible, against the predominance of any particular interest. It is the object of government to protect them all.”³⁶⁵

Another opponent, “A Federal Republican,” criticized the Constitution for, in his view, not being impartial among states. He condemned the abandonment of per capita state voting in the House of Representatives: “Here is a change of which the citizens of the United States, who are less governed by principles of private interest, than those of true and impartial justice should beware.”³⁶⁶

A related line of attack was the anti-federalist claim that the new Congress would not be sufficiently numerous to prevent “corruption.” The “Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania To Their Constituents” contended that

The representation is unsafe, because in the exercise of such great powers and trusts, it is so exposed to corruption and undue influence, by the gift of the numerous places of honor and emoluments at the disposal of the executive; by the arts and address of the great and designing; and by direct bribery.³⁶⁷

Much federalist effort was taken up in reassuring the public that the Constitution would, in fact, promote impartiality in government.³⁶⁸

363. See Letter from James Madison to George Washington, *supra* note 326, at 408.

364. See Agrippa VII, MA. GAZETTE, Dec. 18, 1787, reprinted in 4 STORING, ANTI-FEDERALIST, *supra* note 2, at 83.

365. Agrippa XIV, MA. GAZETTE, Jan. 29, 1788, reprinted in *id.* at 105.

366. A Federal Republican, A Review of the Constitution Proposed by the Late Convention (Oct. 28, 1787), in 3 *id.* at 71.

367. The Address and Reasons of Dissent of the Minority of the Convention, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 2, at 618, 632.

368. See, e.g., THE FEDERALIST NO. 10, *supra* note 2, at 48 (James Madison) (opining that a federalized republic will weaken the interests of particular

E. *The Duty to Account*

We have seen that, while there was not much difference between English court party and country party thought on the *duties* of rulers, those groups did differ as to whom rulers were immediately *accountable*.³⁶⁹ All the Founders followed the country party line that government officials should be accountable to the people for breach of trust.³⁷⁰ They also

factions); *id.* NO. 66, at 647 (Alexander Hamilton) (defending the use of the Senate as a court for impeachments because it will be “as difficult as possible for them to combine in any interest opposite to that of the public good”); *id.* NO. 68, at 352-53 (Alexander Hamilton) (defending the mode of election of the President as protecting against “prostitu[ing] votes,” “corruption,” and “bias”); *see also Curtius I*, *supra* note 355, at 63; *Impartial*, *supra* note 275, at *644-46:

By this Constitution . . . the intent of the Representative will correspond with that of his constituents. Every measure that is prejudiced to the people will be equally so to those whom they appoint to govern them. They cannot betray their electors without injuring themselves

Every social and generous affection will concur with the interest of the Representatives, in animating them to an honest and faithful discharge of their important trust.

369. *See supra* Part IV.C-D.

370. *See, e.g.,* John Julius Pringle, South Carolina Convention (Jan. 16, 1788), in 4 ELLIOT’S DEBATES, *supra* note 2, at 270; John Marshall, Virginia Convention (June 2, 1788), in 3 *id.* at 233; *id.* at 657 (setting forth Virginia’s proposed amendments to the Constitution, one of which would have stated, “That all power is naturally invested in, and consequently derived from, the people; that magistrates therefore are their *trustees* and *agents*, at all times amenable to them.”); *see also* William Paca, *Amendment proposed in the Maryland Convention* (Apr. 29, 1788), reprinted in 17 DOCUMENTARY HISTORY, *supra* note 2, at 240 (setting forth the Maryland convention’s rejected amendments, which read in part, “That it be declared that all Persons entrusted with the Legislative or Executive Powers of Government, are the Trustees and Servants of the Public, and as such accountable for their Conduct”); A *Citizen of the State of Maryland*, *Remarks Relative to a Bill of Rights* (Luther Martin, ed.), reprinted in *id.* at 92 (an anti-federalist, quoting Lord Abingdon and writing that “for their due performance [legislators] are accountable to those by whose conveyance the trust was made”).

were realistic enough about human nature to know that there would be frequent breaches of trust.³⁷¹

If a public official committed a crime, he (immediately or eventually)³⁷² could be held accountable under the criminal law.³⁷³ To breach one's public trust was not necessarily to commit a crime, however. As Hamilton observed, "Men, in

371. See THE FEDERALIST NO. 15, *supra* note 2, at 73-74 (Alexander Hamilton):

Power controlled or abridged is almost always the rival and enemy of that power by which it is controlled or abridged. This simple proposition will teach us how little reason there is to expect, that the persons intrusted with the administration of the affairs of the particular members of a confederacy will at all times be ready, with perfect good-humor, and an unbiased regard to the public weal, to execute the resolutions or decrees of the general authority. The reverse of this results from the constitution of human nature.

Id. NO. 22, *supra* note 2, at 109 (Alexander Hamilton):

In republics, persons elevated from the mass of the community, by the suffrages of their fellow-citizens, to stations of great pre-eminence and power, may find compensations for betraying their trust, which, to any but minds animated and guided by superior virtue, may appear to exceed the proportion of interest they have in the common stock, and to overbalance the obligations of duty.

See also *id.* NO. 62, *supra* note 2, at 321 (James Madison) ("It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust."); *A Newport Man*, *supra* note 323, at 252 ("[B]ut that men will sacrifice the public to their private interest, is a saying too well known to need repeating . . ."); Samuel Willard, Massachusetts Convention (Jan. 9, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 68 (stating that "where power had been trusted to men, whether in great or small bodies, they had always abused it").

372. There is a constitutional dispute as to whether a President can be prosecuted while in office, or if he must be removed first. See CHEMERINSKY, *supra* note 2, at 263.

373. See, e.g., Edward Rutledge, South Carolina Convention (Jan. 16, 1788), in 4 ELLIOT'S DEBATES, *supra* note 2, at 276 ("If the President or the senators abused their trust, they were liable to impeachment and punishment; and the fewer that were concerned in the abuse of the trust, the more certain would be the punishment.").

public trust, will much oftener act in such a manner as to render them unworthy of being any longer trusted, than in such a manner as to make them obnoxious to legal punishment.³⁷⁴ It was therefore necessary to devise ways to respond to non-criminal breaches.

One way was to constitute the system to prevent most breaches from happening. The Constitution contained various devices of this sort. Although the drafters rejected term limits,³⁷⁵ they did provide for frequent elections,³⁷⁶ which they thought would be the most important mechanism for promoting accountability.³⁷⁷ They rejected religious tests,³⁷⁸

374. THE FEDERALIST NO. 70, *supra* note 2, at 366 (Alexander Hamilton).

375. While "rotation in office" sometimes was justified on trust grounds, it also was rejected on those grounds. *See, e.g.*, Robert R. Livingston, New York Convention (June 17, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 293 ("This rotation is an absurd species of ostracism—a mode of proscribing eminent merit, and banishing from stations of trust those who have filled them with the greatest faithfulness.").

376. *See* U.S. CONST. art. I, § 2, cl. 1 (establishing two year terms for representatives); *id.* art. I, § 3, cl. 1 (six year terms for senators); *id.* art. II, § 1, cl. 1 (establishing four year terms for the President).

377. *See, e.g.*, THE FEDERALIST NO. 57, *supra* note 2, at 295-96 (James Madison):

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one, is such a limitation of the term of appointments as will maintain a proper responsibility to the people.

See also id. NO. 37, *supra* note 2, at 181 (Madison):

The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people, by a short duration of their appointments; and that even during this short period the trust should be placed not in a few, but a number of hands.

but they did require the President, members of Congress, and other officeholders to take solemn oaths that they would carry out their duties.³⁷⁹

Preventing breaches of trust was another reason for dividing the federal government into three,³⁸⁰ and Congress into two, branches.³⁸¹ The unitary nature of the executive

378. U.S. CONST. art. VI, cl. 3.

At the Massachusetts ratifying convention, federalist Rev. Daniel Shute explained why a religious test was rejected:

To establish a religious test as a qualification for offices in the proposed federal Constitution, it appears to me, sir, would be attended with injurious consequences to some individuals, and with no advantage to the whole.

By the injurious consequences to individuals, I mean, that some, who, in every other respect, are qualified to fill some important post in government, will be excluded by their not being able to stand the religious test; which I take to be a privation of part of their civil rights.

Nor is there to me any conceivable advantage, sir, that would result to the whole from such a test. Unprincipled and dishonest men will not hesitate to subscribe to *any thing* that may open the way for their advancement, and put them into a situation the better to execute their base and iniquitous designs. Honest men alone, therefore, however well qualified to serve the public, would be excluded by it, and their country be deprived of the benefit of their abilities.

In this great and extensive empire, there is, and will be, a great variety of sentiments in religion among its inhabitants. Upon the plan of a religious test, the question, I think, must be, Who shall be excluded from national trusts?

2 ELLIOT'S DEBATES, *supra* note 2, at 118-19.

379. U.S. CONST. art. II, § 1, cl. 8; *id.* art. VI, cl. 3.

380. Alexander Hamilton, New York Convention (June 17, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 398; John Julis Pringle, South Carolina Convention (Jan. 16, 1788), in *id.* at 269.

381. See THE FEDERALIST NO. 62, *supra* note 2, at 321 (James Madison):

It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove unfaithful to

would make it harder for politicians in executive positions to shift responsibility to others.³⁸² Further tending to prevent breaches of trust were the President's power to require that department chiefs put their opinions in writing³⁸³ and the rule that money be spent only pursuant to a regular appropriations procedure.³⁸⁴ As trustees and agents for different purposes,³⁸⁵ state officials and federal officials each were charged with preventing the others' usurpations.³⁸⁶

their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government.

See also Charles Pinckney, South Carolina Convention (Jan. 16, 1788), in 4 ELLIOT'S DEBATES, *supra* note 2, at 256.

382. THE FEDERALIST NO. 70, *supra* note 2, at 366 (Alexander Hamilton):

Men, in public trust, will much oftener act in such a manner as to render them unworthy of being any longer trusted, than in such a manner as to make them obnoxious to legal punishment. But the multiplication of the Executive adds to the difficulty of detection in either case.

383. See U.S. CONST. art. II, § 2, cl. 1.

384. See U.S. CONST. art. I, § 9, cl. 7.

385. See, e.g., THE FEDERALIST NO. 46, *supra* note 2, at 243 (James Madison) ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes."); see also Gilbert Livingston, New York Convention (June 17, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 388-89:

It will serve to impress both the general government, as well as the particular state governments, with this important idea—that they conjointly are the guardians of the rights of the whole American family, different parts of the administration of the concerns of which being intrusted to them respectively. In the one case, Congress, as the head, will take care of the general concerns of the whole: in the other, the particular legislatures, as the stewards of the people, will attend to the more minute affairs.

386. *Fabius*, PENN. MERCURY (Apr. 17, 1788), reprinted in 17 DOCUMENTARY HISTORY, *supra* note 2, at 170-71 (John Dickinson):

The Constitution contained provisions that could *both* prevent and remedy breaches of trust. Besides discouraging breach, frequent elections offered a way to remove those who had not met their obligations. In the same prevent-and-remedy category one might place (1) the nation's federal structure,³⁸⁷ (2) the usually-public nature of legislative journals,³⁸⁸ (3) the requirement that the President's reasons for vetoing a bill be printed in one of the journals,³⁸⁹ and (4) the courts' power to invalidate government actions that violated the federal Constitution.³⁹⁰ The last was particularly important as a remedy because legislators were not to be person-

In short, the government of each State is, and is to be, *sovereign* and *supreme* in *all* matters that *relate* to each state *only*. It is to be *subordinate* barely in *those* matters that *relate to the whole*; and it will be their own faults, if the several states suffer the *federal sovereignty* to interfere in things of their respective jurisdictions. An instance of such interference with regard to *any single state*, will be a dangerous *precedent* as to *all*, and therefore will be guarded against *by all*, as the trustees or servants of the several states will not dare, if they retain their senses, so to violate the *independent sovereignty* of their respective states

387. On preventing, see generally THE FEDERALIST NO. 10, *supra* note 2, (James Madison). On remedying, see *id.* NO. 28 at 138 (Alexander Hamilton):

In a single state, if the persons intrusted with supreme power become usurpers, the different parcels, subdivisions, or districts of which it consists, having no distinct government in each, can take no regular measures for defense. The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair. The usurpers, clothed with the forms of legal authority, can too often crush the opposition in embryo. The smaller the extent of the territory, the more difficult will it be for the people to form a regular or systematic plan of opposition, and the more easy will it be to defeat their early efforts. Intelligence can be more speedily obtained of their preparations and movements, and the military force in the possession of the usurpers can be more rapidly directed against the part where the opposition has begun. In this situation there must be a peculiar coincidence of circumstances to insure success to the popular resistance.

388. See U.S. CONST. art. I, § 5, cl. 3.

389. See *id.* art. I, § 7, cl. 2.

390. See *id.* art. VI, cl. 2; see also *supra* note 286.

ally liable for their votes on the floor of Congress.³⁹¹ That may be why many vocal members of the founding generation looked forward to judges defending vigorously the integrity of the Constitution against overreaching federal officials.³⁹²

Impeachment was the principal punitive measure associated in the public mind with breach of trust.³⁹³ At the national convention, Madison

thought it indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of speculation or oppression. He might betray his trust to foreign powers. The case of the Executive Magistracy was very distinguishable, from that of the Legislative or of any other public body, holding offices of limited duration. It could not be presumed that all or even a majority of the members of an Assembly would either lose their capacity for discharging, or be bribed to betray, their trust In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption

391. THE FEDERALIST NO. 66, *supra* note 2, at 347 (Alexander Hamilton) (“[T]he members of [the Senate] should be exempt from punishment for acts done in a collective capacity.”).

392. *See supra* note 286. Thus, the historical facts are quite different from the suggestions, occasionally heard, that the U.S. Supreme Court invented judicial review in *Marbury v. Madison*, 5 U.S. (Cranch) 137 (1803).

393. In addition to the sources cited immediately *infra*, see, e.g., Edward Rutledge, South Carolina Convention (Jan. 16, 1788), in 4 ELLIOT’S DEBATES, *supra* note 2, at 276 (referring to impeachment as a remedy for breach of public trust); Gen. Charles Coatsworth Pinckney, South Carolina Convention (Jan. 17, 1788), in *id.* at 281 (same); *Publicola, Address to the Freemen of North Carolina* (Mar. 27, 1788), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 2, at 497 (stating that remedy for abuse of trust is impeachment); HANSON, *supra* note 279, at 536 (stating that exceeding one’s powers is a breach of trust and implying, although not stating, that impeachment is the remedy); *Americanus*, VA. INDEP. CHRONICLE (Dec. 5, 1787), reprinted in 8 DOCUMENTARY HISTORY, *supra* note 2, at 200-01, 203 (stating, after noting that President was to be the servant of the people, that the remedy for exceeding power would be impeachment).

was more within the compass of probable events, and either of them might be fatal to the Republic.³⁹⁴

Gouverneur Morris, who at one time had doubts about the wisdom of including an impeachment clause, changed his mind shortly after hearing Madison:

Mr. Govr. Morris . . . was now sensible of the necessity of impeachments, if the Executive was to continue for any time in office. Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst it by displacing him.³⁹⁵

Under the force of such arguments, the drafters provided in the Constitution for a process of impeachment and removal from office.³⁹⁶

In ensuing debate, Alexander Hamilton underscored the role that impeachment would play as a remedy for breach of public trust.³⁹⁷ Moreover, he defended the Constitution's scheme for trials in the Senate, since that body had the necessary independence to make a fair determination.³⁹⁸

394. James Madison, Journal (July 20, 1788), *reprinted in* 2 FARRAND, RECORDS, *supra* note 2, at 65-66; *see also* A Citizen of Philadelphia, *Remarks on the Address of Sixteen Members* (Oct. 18, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 303 (federalist author argues for impeachment as a remedy for "corruption"). On the contemporary meaning of "corruption," *see supra* notes 160-163 and accompanying text.

395. James Madison, Journal (July 20, 1788), *reprinted in* 2 FARRAND, RECORDS, *supra* note 2, at 68.

396. *See* U.S. CONST. art. II, § 4.

397. THE FEDERALIST NO. 65, *supra* note 2, at 338 (Alexander Hamilton):

A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.

398. *Id.* NO. 66 at 346-47 (Alexander Hamilton):

As was true of other public trust issues, the anti-federalists firmly agreed on the principle of accountability, but thought the Constitution was defective in that regard: the terms were too long,³⁹⁹ there would be an insufficient identity of interest between officeholders and their constituents,⁴⁰⁰ the powers of the federal government were not sufficiently restricted,⁴⁰¹ and the courts might not have sufficient “forti-

A fourth objection to the Senate in the capacity of a court of impeachments, is derived from its union with the Executive in the power of making treaties. This, it has been said, would constitute the senators their own judges, in every case of a corrupt or perfidious execution of that trust.

* * * *

The truth is, that in all such cases it is essential to the freedom and to the necessary independence of the deliberations of the body, that the members of it should be exempt from punishment for acts done in a collective capacity; and the security to the society must depend on the care which is taken to confide the trust to proper hands, to make it their interest to execute it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good.

399. See, e.g., *Cato V*, N.Y. J. (Nov. 22, 1787), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 2, at 184 (favoring annual elections).

400. See, e.g., *Centinel I*, *supra* note 249, at 331 (“I believe it will be found that the form of government, which holds those entrusted with power in the greatest responsibility to their constituents, the best calculated for freemen.”); *Brutus III*, N.Y. J. (Nov. 15, 1787), reprinted in 19 DOCUMENTARY HISTORY, *supra* note 2, at 256, 314 (complaining that small representation will encourage “corruption”).

401. Anti-federalists assailed three granted powers in particular: (1) the General Welfare Clause, e.g., John Williams, New York Ratifying Convention (1787), in 2 ELLIOT’S DEBATES, *supra* note 2, at 338; Letter From Silas Lee to George Thatcher, Jan. 23, 1788, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 2, at 782; (2) the Taxation Clause, e.g., Mr. Bodman, Massachusetts Ratifying Convention (1787), in 2 ELLIOT’S DEBATES, *supra* note 2, at 60; and (3) the Necessary and Proper Clause, e.g., George Mason, Objections of the Hon. George Mason to the Proposed Federal Constitution, in 1 ELLIOT’S DEBATES, *supra* note 2, at 494, 496; Robert Whitehill, Pennsylvania Convention Debates (Nov. 30, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 2, at 426; Letter From William Russell to William Fleming, Jan. 25, 1788, reprinted in 8 *id.* at 323-24 (claiming that clause would give Congress plenary power).

tude" to strike down unconstitutional usurpations.⁴⁰² They worried that those great engines of government accountability—freedom of speech and press—might not be sufficiently protected.⁴⁰³ Accordingly, the final constitutional bargain provided for a bill of rights as an additional assurance of accountability.

VI. SOME IMPLICATIONS FOR CONSTITUTIONAL INTERPRETATION

When a court interprets a constitutional provision of uncertain meaning, it should, as Justice Breyer opined, consider the "handful of general purposes"⁴⁰⁴ behind the document. If one possible interpretation complies with the ideals the Founders sought to implement while a second does not, then the first is to be favored. We have seen that one of the Founders' "general purposes" was to construct a government that would, to the extent practicable, operate according to certain fiduciary norms.

This Article is primarily a work of constitutional history. It is not within its scope to engage in a detailed discussion of how the public trust doctrine may affect interpretation of particular constitutional provisions. In other fora, however, the question is worthy of detailed examination. In a recent article, I applied public trust analysis to the General Welfare Clause.⁴⁰⁵ In this Part, I summarize my conclusions there,

402. Patrick Henry, Virginia Convention (1787), in 3 ELLIOT'S DEBATES, *supra* note 2, at 324-25:

The honorable gentleman did our [Virginia] judiciary honor in saying that they had firmness to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts. Are you sure that your federal judiciary will act thus?

403. See, e.g., *Address of the Seceding Assemblymen*, Oct. 2, 1788, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 2, at 296 (press); *Centinel I*, *supra* note 249, at 329 (speech and press).

404. *Supra* note 33 and accompanying text.

405. See U.S. CONST. art. I, § 8, cl. 1, discussed in Natelson, *General Welfare*, *supra* note 2.

and then suggest other avenues scholars may wish to explore.

A. *The General Welfare Clause*

The Constitution grants Congress the “Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States.”⁴⁰⁶ Some commentators have interpreted this provision as granting open-ended power to Congress to legislate for whatever it deems the “general welfare.”⁴⁰⁷ The Supreme Court, while rejecting this position, has ruled that the Clause grants Congress open-ended authority to *spend* for what Congress deems the “general welfare.”⁴⁰⁸ We have seen, however, that at the time the Constitution was adopted, the phrase “general welfare” was associated with a trust-style *restriction* on government power. The phrase was used in promoting the view that an exercise of government authority was legitimate only if it advanced the general welfare.⁴⁰⁹

My study of the history behind the General Welfare Clause led me to conclude that the portion of the Taxation Clause following the word “Excises” was not designed to grant any power at all.⁴¹⁰ Like other qualifying phrases in Article I, Section 8,⁴¹¹ it served to limit the grant immediately

406. U.S. CONST. art. I, § 8, cl. 1.

407. The various interpretations, and the original purpose, of this clause are discussed in Natelson, *General Welfare*, *supra* note 2.

408. The Supreme Court adopted this position by dicta in *United States v. Butler*, 297 U.S. 1 (1936), and has followed it in cases such as *South Dakota v. Dole*, 483 U.S. 203 (1987), *Oklahoma v. Civil Serv. Comm’n*, 330 U.S. 127 (1947), *Helvering v. Davis*, 301 U.S. 619 (1937) and *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

409. *Supra* note 272 and accompanying text.

410. Natelson, *General Welfare*, *supra* note 2.

411. *E.g.*, U.S. CONST. art. I, § 8, cl. 4 (requiring bankruptcy legislation to be “uniform”); *id.* cl. 8 (impliedly limiting the power to “promote the Progress of Science and useful Arts” to copyright and patent powers); *id.* cl. 12 (limiting military appropriations to two years); *id.* cl. 16 (restricting federal control of the

preceding—i.e., the taxing power. The idea was to implement the fiduciary duty of impartiality⁴¹² by assuring that Congress could acquire revenues designated only for projects of general benefit, not for projects benefiting primarily localities or special interests.

B. *Impeachment and Removal from Office*

The Constitution authorizes the House of Representatives to impeach federal officers for “high Crimes and Misdemeanors.”⁴¹³ The Constitution designates the Senate as the court for trial.⁴¹⁴ There is a long-standing interpretative dispute over whether an impeachable “Misdemeanor” must constitute a violation of criminal law.⁴¹⁵ Although the answer is far from certain,⁴¹⁶ the founding generation’s

militia); *id.* cl. 17 (limiting the capital district to ten miles square); *see also infra* Part VI.B (discussing the limiting force of the word “proper” in the Necessary and Proper Clause.

412. Natelson, *General Welfare*, *supra* note 2, at 53.

413. U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

414. U.S. CONST. art. I, § 3, cl. 6.

415. CHEMERINSKY, *supra* note 2, at 278.

This dispute flared up again during the time leading up to and during the impeachment of President Clinton. *See, e.g.,* L. Darnell Weeden, *Essay: The Clinton Impeachment Indicates a Presidential Impeachable Offense Is Only Limited by Constitutional Process and Congress’ Political Compass Directive*, 27 WM. MITCHELL L. REV. 2499, 2500-01 (2001); Gary L. McDowell, “High Crimes and Misdemeanors”: *Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626 (1999).

416. For example, at one point, Blackstone suggests that all misdemeanors are crimes. 4 BLACKSTONE, *supra* note 2, at 5 (stating that “crime” and “misdemeanor” are words “which, properly speaking, are mere synonymous terms”). *But see id.* at 122 (stating that one can be impeached for maladministration). Moreover, the respectable anti-federalist writer “Brutus” clearly suggested that a mere lack of care or undue expansion of powers would not be a ground for impeachment, *Brutus XI*, N.Y.J. (Dec. 27, 1788), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 113, at 512.

devotion to the public trust doctrine supports the view that impeachment was to be a potential response to *any* significant breach of fiduciary duty.

Accordingly, at the federal convention Madison listed as impeachable offenses some outside the criminal law.⁴¹⁷ During the ratification debate, Hamilton affirmed that impeachment was the remedy for breach of public trust,⁴¹⁸ and that one could violate that trust without committing a crime.⁴¹⁹ Other contemporary writers suggested the same.⁴²⁰ Thus, a public trust interpretation of the Constitution might support impeachment and removal of an official for such non-criminal acts as violating the fiduciary duty of care.

C. *The Necessary and Proper Clause*

Public trust doctrine similarly can help us address the age-old question of what the word “proper” means in the

417. *Supra* note 391 and accompanying text (including as potential breaches, “incapacity, negligence or perfidy”).

418. *See supra* note 397 and accompanying text.

419. *See supra* note 382 and accompanying text.

420. *E.g., Aristides, Remarks on the Proposed Plan* (Jan. 31, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 279, at 536 (strongly implying such); BLACKSTONE, *supra* note 2, at 121 (stating that an officer can be impeached for mere “maladministration”); FRIENDS, *supra* note 2, at 101 (Tench Coxe, stating that it would be an impeachable offense to violate states’ rights or offend against the peace and dignity of the commonwealth), 472 (same, stating, “If convicted on impeachment . . . he cannot be fined, imprisoned or punished, but only may be disqualified from doing public mischief by losing his office, and his capacity to hold another. If the nature of his offense, besides its danger to the country, should be criminal in itself . . . he may be tried for such crime.”); *see also id.* at 385 (Noah Webster, stating that Senators may be impeached for “malpractices”), 393 (same, stating that officers who violate the General Welfare Clause are subject to impeachment).

Samuel Johnson’s contemporary dictionary contains the following definition of misdemeanor: “Offense; ill-behaviour; something less than an atrocious crime.” SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (no pagination).

Necessary and Proper Clause.⁴²¹ In *McCulloch v. Maryland*,⁴²² the Supreme Court, speaking through Chief Justice John Marshall (who had served as a federalist spokesman at the Virginia ratifying convention), established that “necessary” does not mean a law must be strictly necessary. A law can be legally “necessary” if only reasonably necessary or convenient.⁴²³ This is consistent with the private fiduciary doctrine insulating ordinary exercises of discretion from judicial review.⁴²⁴

As to the additional phrase “and proper,” Marshall offered only a clue. Although he emphasized that the Clause as a whole was there primarily to *grant* rather than *limit* power,⁴²⁵ he also suggested that to be within the scope of the grant, the law must be proper or “appropriate.”⁴²⁶ If so, then “and proper” signals a qualification on the power to legislate, much as the General Welfare Clause signals a limit on the power to tax.⁴²⁷

421. U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

422. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

423. 17 U.S. at 413 (“[W]e find that it [necessary] frequently imports no more than that one thing is convenient, or useful, or essential to another.”).

424. *See supra* note 50.

425. *McCulloch*, 17 U.S. at 419-20; *cf.* THE FEDERALIST NO. 33, *supra* note 2, at 158-59 (Alexander Hamilton) (opining that the Clause really adds no substantive power at all).

426. *McCulloch*, 17 U.S. at 421 (“all means which are appropriate”).

427. *See supra* Part VI.A.

Actually, the Clause was designed to be, and was sold to the ratifying public as, neither a grant nor a limitation but a mere rule of construction. The “grant” part of the Clause was a duplicated power given elsewhere in the Constitution, and the “limitation” was a recital of a fiduciary restriction the founders believed inherent in all legitimate government. *See* Robert G. Natelson, *Necessary and Proper*, *supra* note 2 (forthcoming 2005) for a fuller discussion.

As to the nature of the qualification: If a “general purpose”⁴²⁸ of the Constitution is to erect a fiduciary government, then any law violating fundamental fiduciary norms is not a “proper” one. By this interpretation, one effect of Necessary and Proper Clause is to place such a law outside Congressional authority. Similarly, since a statute cannot authorize a breach of trust, then any administrative action pursuant to statute, but constituting a breach, is also *ultra vires*. As it turns out, this interpretation also has significant historical support.⁴²⁹

If the term “and proper” refers to the requirement that Congressional legislation meet fiduciary norms, then the Necessary and Proper Clause imposes a duty of impartiality—or, as it usually is called in modern constitutional parlance, “equal protection.” The Fourteenth Amendment explicitly imposes equal protection standards on the states⁴³⁰ but not on the federal government. In 1954 the Supreme Court interpreted the Fifth Amendment Due Process Clause as applying some equal protection require-

428. *Supra* note 33 and accompanying text.

429. Natelson, *Necessary and Proper*, *supra* note 2.

430. U.S. CONST. amend. XIV, § 1 applies only to the states (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws”).

The Equal Protection Clause is only one example of the Constitution’s ad hoc application of trust-style duties to the states. *See also, e.g.*, U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”); *id.* amend. XIII (denying the states the power to recognize slavery); *id.* amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); *id.* amend. XIV, § 2 (protecting pro-rata representation); *id.* amend. XV (prohibiting denial of the right to vote due to race); *id.* amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

ments to the federal government.⁴³¹ This holding can be questioned on several grounds, not the least of which is that there is no textual basis for it.⁴³² If, however, the Necessary and Proper Clause applies trust standards to congressional (and therefore administrative) decision making, then Fifth Amendment “equal protection” is largely, if not entirely, superfluous.

D. Discrete and Insular Minorities and the Due Process Clause: One Possible Implication

We now come full circle to the question of how government treats discrete and insular minorities—at issue in *Lawrence*.⁴³³ That case invalidated a state rather than a federal statute. On the other hand, if the Constitution imposes trust duties on the federal government, then Congress is required to comply with even more stringent normative standards than are the states. So federal laws designed to harm particular groups are at least as vulnerable to constitutional challenge as comparable state laws.

Discriminatory federal legislation not invalid under some other Constitutional provision currently is reviewed under the Fifth Amendment’s Due Process Clause. In a due process examination, the court balances the justification for the statute with the nature of the disabilities the statute imposes. Yet this due process jurisprudence has yielded grossly disparate treatment of different “discrete and insu-

431. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Fifth Amendment Due Process Clause reads, “No person shall . . . be deprived of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. V.

432. On the contrary, the separate guarantees of equal protection and due process in the Fourteenth Amendment suggest that one is not contained in the other.

The *Bolling* court’s justification for its holding was short and cursory. Professor Bernard Siegen has argued, however, that at least in the economic sphere there is some warrant for the use of the due process clause to assure equal protection. Siegen, *supra* note 2, at 77-81. Discussion of this issue is beyond the scope of this article.

433. *Lawrence v. Texas*, 539 U.S. 558 (2003).

lar minorities.”⁴³⁴ Through the use of fluctuating standards of review and prioritization of constitutional rights, due process jurisprudence has come to embody the notions that (1) all citizens are equal, but some citizens are more equal than others and (2) all constitutional rights are equal, but some rights are more equal than others.⁴³⁵

The Supreme Court has defended this course of adjudication on the ground that some groups need less judicial protection because they enjoy more political muscle.⁴³⁶ Whatever the theoretical merits of this approach,⁴³⁷ the current of actual cases does not always flow in that direction. On the contrary, the Supreme Court has bestowed heightened protection on groups well-organized politically and unlikely to disappear—as it did in *Lawrence*⁴³⁸—while denying it to groups liable to be destroyed by the very legislation the Court sustains.⁴³⁹

434. The quoted language derives from the famous “footnote 4” in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

435. Cf. GEORGE ORWELL, *ANIMAL FARM* (1945), available at <http://www.online-literature.com/orwell/animalfarm/10/> (last visited Dec. 10, 2004) (“ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS”).

436. Cf. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (justifying deferential rational basis review on the ground that “the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.”).

437. The merits seem debatable. The Constitution is a document for all citizens all the time, not merely for who happen at the moment to be underrepresented in the political process.

438. 539 U.S. 558 (2003). See also *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (pointing out that homosexuals, also protected in this case, comprised “a politically powerful minority”).

439. Thus, in *Carolene Products*, the Supreme Court sustained a statute enacted at the behest of the wealthy and powerful dairy industry. See *Miller*, *supra* note 2, at 404. The victimized company, *Carolene Products*, was “relegated to a marginal legal existence,” *id.* at 413, although on altered facts it later recovered the ability to sell its product. *Id.* at 415.

Other examples of how the courts’ refusal to protect economic minorities can result in their entire or near destruction include *New Orleans v. Dukes*, 427

The incongruities are particularly glaring in cases where the challenged legislation was directed against groups distinguished by alterable characteristics—that is, by characteristics such as source of sustenance, place of residence, religion, and general lifestyle. In *U.S. Department of Agriculture v. Moreno*,⁴⁴⁰ for example, the Supreme Court invalidated a federal statute denying food stamps to unrelated persons in the same household because it found that one purpose of the legislation was to attack people who followed the “hippy” lifestyle. As we Children of the Sixties recall, the “hippy lifestyle” was a product of *voluntary* decisions to engage in promiscuity and drug use, while living at the expense of others. Yet the court defended this subculture with a heightened rational basis test: “rational basis with bite.”⁴⁴¹

When urged to protect groups that are trying to earn their own livings, the modern Court has expressed no similar solicitude. It applies a much weaker version of the “rational basis test”⁴⁴² when reviewing statutes that throw people out of formerly-lawful work, or otherwise upset economic relationships. As observed by Professor Erwin Chemerinsky, since the Supreme Court’s decision in *United States v. Carolene Products*⁴⁴³ nearly seventy years ago, “not

U.S. 297 (1976) (sustaining ordinance against newly-established street vendors, who then were forced out of business) and *Kafka v. Hagener*, 176 F. Supp. 2d 1037 (D. Mont. 2001) (sustaining on “rational basis” test a state law destroying all established Montana game farm businesses).

440. 413 U.S. 528 (1973).

441. This version of the rational basis test is discussed in CHEMERINSKY, *supra* note 2, at 417.

That the court in *Moreno* applied the more exacting version of the rational basis test is shown by its failure to search assiduously for unstated goals the legislation might serve. It refused to consider, as abandoned by the government, the basis of protection of morality, 413 U.S. at 535 n.7, and it failed to mention the possible goal of the promotion of marriage and the benefits fostered by marriage.

442. The rational basis test sustains laws if they have some conceivable connection to a legitimate government purpose, even if there is no evidence that the legislature ever considered that purpose. See CHEMERINSKY, *supra* note 2, at 414-15.

443. 304 U.S. 144 (1938).

one state or federal economic regulation has been found unconstitutional as infringing liberty of contract as protected by the due process clauses of the Fifth and Fourteen Amendments.⁴⁴⁴

Professor Geoffrey P. Miller has outlined the policy consequences of this course of adjudication: “[*Caroline Products*] freed the forces of interest group politics from the stumbling block of the federal courts”—resulting in “the unrivaled primacy of interest groups in American politics”⁴⁴⁵ No wonder modern due process jurisprudence has been subject to withering criticism.⁴⁴⁶

If the courts were to apply public trust doctrine to constitutional interpretation, a very broad area of legislative discretion would remain,⁴⁴⁷ but the discordant standards of review probably would have to be abandoned. The judicial permissiveness of *Carlene Products* intercedes little check when government imposes barriers to competition designed to enrich some interests at the expense of others:⁴⁴⁸ Under the

444. CHEMERINSKY, *supra* note 2, at 491.

Given that the Fifth Amendment is deemed to include a federal equal protection requirement, *Bolling v. Sharpe*, 347 U.S. 497 (1954), and the continued viability of substantive due process in many other areas, CHEMERINSKY, *supra* note 2, at 638-39; *cf.* *Lawrence v. Texas*, 539 U.S. 558 (2003) (homosexual sodomy), this is an extraordinary record.

445. Miller, *supra* note 2, at 399.

446. *E.g.*, Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3 (1999); Siegan, *supra* note 2, at 75-119; Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173 (2003).

447. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 50 (trustees have wide fields of non-reviewable discretion).

448. On the role of this case as a protector of special interest legislation, *see* Miller, *supra* note 2.

For Supreme Court cases decided according to the same principles, but under the Fourteenth Amendment Due Process Clause, *see* *New Orleans v. Dukes*, 427 U.S. 297 (1976) (sustaining ordinance effectively throwing out of business pushcart vendors who had not previously operated in the New Orleans French Quarter for at least eight years); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding law putting non-attorney debt adjusters out of business);

current interpretive regime, proof that a legislative majority acted to loot its political foes and enrich its friends is simply irrelevant, so long as the majority, theoretically, "could have" acted for some "conceivable" legitimate state interest.⁴⁴⁹

That this accorded with the Founders' vision is unlikely. On the contrary, it was precisely legislation of this sort that the Founders denounced as a profound breach of the public trust.⁴⁵⁰

VII. CONCLUSION

As Justice Breyer argues, the Constitution must be interpreted in light of its "handful of general purposes." This Article has demonstrated that one of those general purposes was to erect a government in which public officials would be bound by fiduciary duties to honor the law, exercise reasonable care, remain loyal to the public interest, exercise their power in a reasonably impartial fashion, and account for violations of these duties. This does not mean that the Constitution authorizes judges to assume the management of government from elected politicians. It does mean, however, that the Constitution was designed to foster among public officials the same tenets of decency and care that the law imposed on their counterparts in private life.

Williamson v. Lee Optical, 348 U.S. 483 (1955) (sustaining law benefiting optometrists and ophthalmologists at the expense of opticians and consumers); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (sustaining anti-competitive licensing arrangement); cf. CHEMERINSKY, *supra* note 2, at 536-38.

449. See, e.g., FCC v. Beach Communications, 508 U.S. 307 (1993).

450. For the public trust duty of impartiality as protecting against such arrangements, see *supra* note 326 and accompanying text.