

JUDICIAL REVIEW OF SPECIAL INTEREST SPENDING:
THE GENERAL WELFARE CLAUSE AND THE FIDUCIARY
LAW OF THE FOUNDERS

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Researching this article required extensive use of Founding-Era legal sources not customarily consulted by American legal scholars. I am particularly grateful to many helpful and intelligent librarians. These include the staff and administration of the Bodleian Law Library, University of Oxford; Dr. Norma Aubertin-Potter, chief librarian of the Codrington Library at All-Souls College, University of Oxford; Dr. Vanessa Hayward, Keeper of the Middle Temple Library, London, and her staff; Ms. Virginia Dunn and her staff at the Library of Virginia, Richmond; and Professors Stacey Gordon, Phil Cousineau; and Bob Peck, all at the Jameson Law Library at The University of Montana.

I would also like to thank Sarah Morath, The University of Montana School of Law Class of 2007, for research assistance, and the staff of Thomson-Gale's *Eighteenth Century Collections Online*.

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I. INTRODUCTION

In the 2006 elections, Democrats broke twelve years of congressional Republican rule, taking control of both houses of Congress.¹ The Democrats' victory may have been attributable in

1. *Bibliographical Note.* This footnote collects alphabetically the secondary sources cited more than once in this Article. The sources and, when applicable, short form citations are as follows:

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THOMAS BLOUNT, *A LAW-Dictionary and Glossary Interpreting Such Difficult and Obscure Words and Terms, as are Found either in our Common or Statute, Ancient or Modern, Laws* (3d ed., The Savoy, Edward Sayer 1717).

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JOHN COWELL (or “Cowel”), *A LAW DICTIONARY: OR THE INTERPRETER* (The Savoy, Edward Sayer 1727) [hereinafter COWELL, DICTIONARY].

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TIMOTHY CUNNINGHAM, *A NEW AND COMPLETE LAW DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW* (3d ed., London 1783).

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THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed. 1907) [hereinafter ELLIOT'S DEBATES].

J. L. DE LOLME, *THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT* (London 1790).

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GEORGE DUKE, *THE LAW OF CHARITABLE USES* (London, W. Clarke and Sons 1805).

John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001).

THE FEDERALIST (Isaac Kramnick ed., 1987).

A GENERAL TREATISE OF NAVAL TRADE AND COMMERCE AS FOUNDED ON THE LAWS AND STATUTES OF THIS REALM (The Savoy, Henry Lintot 1753) [hereinafter NAVAL TRADE].

A GENTLEMAN OF THE INNER-TEMPLE, LAWS CONCERNING MASTERS AND SERVANTS (London 1767) [hereinafter MASTERS & SERVANTS].

A GENTLEMAN OF THE MIDDLE TEMPLE, A GENERAL ABRIDGMENT OF CASES IN EQUITY ARGUED AND ADJUDGED IN THE HIGH COURT OF CHANCERY, &c. (4th ed., The Savoy, Henry Lintot 1756) [hereinafter GENERAL ABRIDGMENT].

JOHN GODOLPHIN, *THE ORPHAN'S LEGACY: OR, A TESTAMENTARY ABRIDGMENT* (London, Richard Atkins & Edward Atkins 1701).

GILES JACOB, *A NEW LAW-DICTIONARY* (The Savoy, Henry Lintot 1750).

part to public dissatisfaction with special interest spending and the corruption it spawned. Especially notable had been the stunning increase in congressional “earmarks”—designations in appropriation bills that money be spent only for particular projects in particular locations²—a practice that President Bush also has decried.³

Certainly there is widespread sentiment that Congress is spending too much time ladling from the pork barrel and conniving with the lobbyists thereby accommodated. Pork barrel spending is, on balance, wasteful in the sense that it significantly

SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London 1756).

JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT, *in* TWO TREATISES OF GOVERNMENT (Thomas I. Cook ed., Hafner Publ'g Co. 1947) (1690) [hereinafter SECOND TREATISE OF CIVIL GOVERNMENT].

GERARD MALYNES, CONSUETUDO VEL LEX MERCATORIA, OR THE ANCIENT LAW-MERCHANT (London, Adam Islip 1622).

CHARLES MOLLOY, DE JURE MARITIMO ET NAVALI, OR A TREATISE OF AFFAIRS MARITIME AND OF COMMERCE (9th ed., London 1769).

Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004) [hereinafter Natelson, *Necessary and Proper*].

Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter Natelson, *Trust*].

Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003) [hereinafter Natelson, *General Welfare*].

Robert G. Natelson, *The Founders' Hermeneutic*, 68 OHIO ST. L.J. (forthcoming 2007) [hereinafter Natelson, *Founders*].

WILLIAM NELSON, AN ABRIDGMENT OF THE COMMON LAW: BEING A COLLECTION OF THE PRINCIPAL CASES ARGUED AND ADJUDGED IN THE SEVERAL COURTS OF WESTMINSTER HALL (The Savoy, Edward Sayer 1725–1726).

WILLIAM PETYT, *JUS PARLIAMENTARIUM*: OR, THE ANTIEN POWER, JURISDICTION, RIGHTS, LIBERTIES, AND PRIVILEGES, OF THE MOST HIGH COURT OR PARLIAMENT (London 1741).

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HENRY SWINBURNE, A TREATISE OF TESTAMENTS AND LAST WILLS (6th ed., The Savoy, Edward Sayer 1743).

William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005).

A TREATISE OF EQUITY (Dublin 1756).

CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY (2d ed., London 1791–1795).

2. See, e.g., David D. Kirkpatrick, *As Power Shifts in New Congress, Pork May Linger*, N.Y. TIMES, Nov. 26, 2006, § 1, at 1 (discussing the practice of earmarks, attacks by the Democrats on the practice in the 2006 campaign, and the likely persistence of that practice in the new Democratic Congress).

3. INVESTORS BUSINESS DAILY, Feb. 7, 2007, p.1 (reproducing photograph showing the President holding up a hefty paper stack of earmarks as part of a speech criticizing the practice).

reduces aggregate social welfare.⁴ In 1996, a Republican Congress admitted as much, and attempted to curb the practice by granting a line item veto to the President.⁵ That effort proved abortive.⁶ Earmarking in particular continued to grow at an astonishing rate. During the ensuing eight years, the annual number of earmarks rose from around 3,000 to over 14,000.⁷

Because of strong congressional incentives toward special interest spending, a mere change in party control is unlikely to bring a lasting cure.⁸ Moreover, since 1936, when the Supreme Court converted the Taxation Clause of Article I, Section 8 into an omnibus “Taxing-and-Spending Clause,”⁹ the Court invariably has deferred to congressional determination that spending programs, no matter how narrowly targeted or remote from enumerated purposes, somehow “provide for . . . the general Welfare of the United States.”¹⁰

Virginia’s Solicitor General recently argued that, based on the Supreme Court’s language in a recent Spending Power case, more searching judicial review may be forthcoming.¹¹ Thus far, it has not been, and judging by the state of the literature, few legal academics seem particularly concerned about the matter.¹²

4. Baker, *supra* note 1, at 199–217 (explaining how current federal spending policies reduce aggregate social welfare).

5. *Clinton v. City of New York*, 524 U.S. 417, 420–21 (1998) (invalidating the Line Item Veto Act).

6. *Id.* at 448.

7. See Sunlight Foundation, Earmarks FAQ, <http://www.sunlightfoundation.com/earmarksFAQ> (last visited Apr. 12, 2007); cf. RONALD D. UTT, THE HERITAGE FOUNDATION, HOW CONGRESSIONAL EARMARKS AND PORK-BARREL SPENDING UNDERMINE STATE AND LOCAL DECISIONMAKING (1999), <http://www.heritage.org/Research/Budget/BG1266.cfm> (showing between 1985 and 1999 a 573% rise in agricultural earmarks and other large rises in every other category except military construction).

8. See *supra* note 2.

9. See *United States v. Butler*, 297 U.S. 1, 66 (1936) (holding that the Clause included the power to spend for unenumerated purposes). By its original meaning, the Clause gave no power to spend (other than to hire revenue officers and the like), while the general welfare limitation restricted the kind of expenses that could be funded with taxation. Natelson, *General Welfare*, *supra* note 1.

10. U.S. CONST. art. I, § 8, cl. 1; see CHEMERINSKY, *supra* note 1, at 275, 278 (explaining the broad scope of the spending power under current Supreme Court interpretation).

11. William E. Thro, *Federalism and Separation of Powers: The Spending Clause Implications of Rumsfeld v. Forum for Academic and Individual Rights*, 7 *ENGAGE* 81 (2006) (arguing that the *FAIR* case signaled the Court’s desire to limit the Taxing-and-Spending Clause to the scope of the other enumerated powers).

12. Academics tend to benefit (at least in the short term) from this spending. In addition to general education spending appropriated pursuant to the Constitution’s supposed omnibus spending power, academics perceive themselves as benefiting from

Two notable exceptions are Professors Lynn Baker and John Eastman. They maintain that, at least beyond a certain point, special interest spending is not just a practical problem, but may have negative constitutional implications: that it may violate the “general Welfare” limitation in the Taxing-and-Spending Clause.¹³ They contend that more rigorous judicial review is in order.¹⁴

As I have shown previously, the “general Welfare” limitation was one of a number of provisions inserted to impose fiduciary-style rules on the new federal government—in this case the duty of impartiality.¹⁵ This Article explores the fiduciary law of the founding generation to determine whether it was part of the constitutional design for the Judiciary to review special interest appropriations, and, if so, how the courts might proceed. My findings suggest that, at least from the standpoint of the original understanding of the Constitution, prior judicial deference to the Legislature has been excessive: Professors Eastman and Baker are on solid constitutional ground in arguing for a more searching standard of review.

II. FOUNDING ERA SUPPORT FOR FIDUCIARY STANDARDS OF GOVERNMENT: IN GENERAL

A. *The Rhetoric*

Justice Stephen Breyer has pointed out that the purposes motivating the Founders’ adoption of the Constitution should guide judges in interpreting the document’s specific provisions.¹⁶ Presumably, therefore, the Founders’¹⁷ motivating

special interest “earmarks.” See, e.g., *HUD Projects Approved for UM, Western Montana*, MISSOULIAN, July 18, 2006, <http://www.missoulian.com/articles/2006/07/18/web/webnews/wnews69.txt> (reporting efforts by then-Senator Conrad Burns to secure federal funding for a building for the University of Montana School of Law). It is difficult to identify a national, as opposed to local (or any), benefit from many of these projects.

13. 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 . . .”).

14. See generally Baker, *supra* note 1 (proposing judicial review of congressional spending practices); Eastman, *supra* note 1 (arguing for reassertion of original understanding of “general Welfare” as a limitation on the powers of Congress).

15. Natelson, *General Welfare*, *supra* note 1, at 53.

16. 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.”).

purposes are relevant to interpreting the “general Welfare” language in the Taxing-and-Spending Clause.

One such purpose, and a very important one, was to adopt for America a federal government whose conduct would mimic that of the private-law fiduciary.¹⁸ This was to be accomplished both by the manner in which the government was structured and by imposing on public officials obligations comparable to those owed by their private sector counterparts.¹⁹

The Founders did not invent this idea. Elements of the fiduciary model extend back to Aristotle and Cicero;²⁰ and during the English constitutional struggle of the seventeenth and eighteenth centuries, it had emerged as a principal criterion of free government.²¹ The Founders themselves gleaned it from their reading of the Greco-Roman classics and from English Whig philosophers such as John Locke. As elaborated by Locke, the terms of the social compact were that citizens conveyed to government certain powers (alienable rights) so those citizens could enjoy more fully the powers retained (inalienable rights), *and that the government had a fiduciary obligation to manage properly what had been entrusted to it.*²² By the time of the American

17. I include within this term the delegates to the federal convention, leading figures in the ratification conventions, and others who contributed significantly to the public debate, including leading Anti-Federalists. To describe the participating public generally, I use the term “founding generation.”

18. See generally Natelson, *Trust*, *supra* note 1, at 1178 (comparing Founding Era texts and concluding that “one of [the] general purposes [of the Constitution] was to erect a government in which public officials would be bound by fiduciary duties . . .”). On the other hand, there is no evidence that the Founders understood the Constitution to impose general fiduciary standards on the states. Under the unamended Constitution, the standards of adjudication described here are most applicable to *federal*, not state, actions. Of course, the Constitution, both in its original text and as amended, does impose a few *specific* fiduciary-style rules on the states, particularly the duty of impartiality. See, e.g., U.S. CONST. art. I, § 10, cl. 1 (prohibiting the states from passing bills of attainder or ex post facto laws); *id.* amend. XIV, § 1 (forbidding states from depriving any person of equal protection of the laws).

Since the publication of *The Constitution and the Public Trust*, Natelson, *supra* note 1, I have discovered a single contemporaneous commentator who dissented from the fiduciary model: Noah Webster, outspoken Federalist and future lexicographer. Giles Hickory, N.Y. AM. MAG (Feb. 1, 1788), in 20 DOCUMENTARY HISTORY, *supra* note 1, at 738, 741, 743 (opposing the agency theory of government).

19. Natelson, *Trust*, *supra* note 1, at 1164, 1178 (comparing Founding Era texts); see generally *infra* Part II.B.

20. Natelson, *Trust*, *supra* note 1, at 1095–98 (tracing public trust theory from the founding generation’s classical canon through the debates over and provisions of the Constitution).

21. *Id.* at 1108–23.

22. SECOND TREATISE OF CIVIL GOVERNMENT § 136, at 190 (“[T]he community put the legislative power into such hands as they think fit with this trust, that they shall be

Founding, this view of government was accepted almost universally among British and American Whigs and among many Tories. Essayists,²³ politicians,²⁴ and lawyers²⁵ all routinely reaffirmed that public officials were merely the trustees, agents, guardians, or servants of the people.²⁶

It was in this philosophical atmosphere that the Constitution was drafted, debated, and ratified. The drafters structured the instrument so as to harness and subdue “factions” to the cause of

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.”); *see also id.* § 139, at 192 (“But government, into whatsoever 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.* § 156, at 200 (“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”).

23. Natelson, *Trust*, *supra* note 1, at 1118–23 (citing various writers); *see also* DE LOLME, *supra* note 1, at 258 (referring to public officials as “intrusted” and as “Guardians”); *id.* at 283 (stating that by concentrating the executive authority in the king, British electors “can appoint Trustees, and yet not give themselves Masters”); *id.* at 284 (reciting results when an official “abused the trust of the People”); PETYT, *supra* note 1, at 393 (“As the Premises are of a Power in the King only fiduciary, and in Point of Trust and Government.”).

24. Natelson, *Trust*, *supra* note 1, at 1083–87 (citing various politicians); *see also* Edmund Burke, *Thoughts on the Cause of the Present Discontents* (1770), reprinted in 1 SELECT WORKS OF EDMUND BURKE 118 (1999) (E. J. Payne ed., 1874) (calling all parts of government “trustees for the people”); *id.* at 123 (referring to the “trust” of the House of Commons); *id.* at 147 (“When the public man omits to put himself in a situation of doing his duty with effect, it is an omission that frustrates the purposes of the trust almost as much as if he had formally betrayed it.”); Newspaper Report of the Senate Debates (Feb. 1, 1788), in 20 DOCUMENTARY HISTORY, *supra* note 1, at 716, 717 (reporting New York state senator James Duane as referring to public officials as “guardians . . . of the people”).

25. Natelson, *Trust*, *supra* note 1, at 1124–34; *see also* JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 98 (2d ed., London 1766) (“The sum of my argument is, That civil government is of God, that the administrators of it were originally the whole people: that they might have devolved it on whom they pleased: that this devolution is fiduciary, for the good of the whole.”).

Courts often referred to non-assignable government offices as being of public trust, *e.g.*, *Rex v. Horne*, 2 Cowp. 672, 688, 98 Eng. Rep. 1300, 1308 (K.B. 1777) (referring indirectly to King’s government as being in public trust); *Rowning v. Goodchild*, 2 Bl. W. 906, 908, 96 Eng. Rep. 536, 537 (C.P. 1773) (holding deputy postmaster in a position of public trust), and bound by trust duties, *e.g.*, *Bagshaw v. Bossley*, 4 T.R. 78, 81, 100 Eng. Rep. 904, 905 (K.B. 1790) (stating that one holding a public trust is not entitled to impose private conditions on performance of his duty); *Allen v. Hearn*, 1 T. R. 56, 59, 99 Eng. Rep. 969, 971 (K.B. 1785) (reporting losing counsel as arguing that “motives of partiality, prejudice, affection, or resentment, which are so highly criminal in other public trusts” should not bar an individual voter from betting on the outcome of an election); *Horsley v. Bell*, Amb. 770, 773, 27 Eng. Rep. 494, 495 (Ch. 1778) (holding road commissioners personally liable for breach of public trust); *Barret v. Glubb*, 2 Bl. W. 1052, 1053, 96 Eng. Rep. 619, 620 (C.P. 1776) (stating that office of public trust must be void of pecuniary consideration).

26. Natelson, *Trust*, *supra* note 1, at 1082–87.

impartiality and the general welfare.²⁷ Debaters praised or criticized the Constitution according to how well they thought it would serve the fiduciary ideal.²⁸ By approving the proposal, the ratifiers brought into being, in James Iredell's words, a "great power of attorney"²⁹—an instrument erecting a new fiduciary relationship between governors and governed.

B. *Was It Only Rhetoric?*

One might fairly inquire as to whether such talk was anything more than rhetoric or fancy. The historical record makes this improbable. The reason the founding generation found the fiduciary analogy so powerful was that fiduciary law and management had an immediate, real-world impact upon them. In a way in which most people today do not, they *knew* what being a fiduciary actually meant, and they understood the implications of applying fiduciary standards to government.

Recall that a majority of those who drafted the Constitution and guided it to ratification were lawyers who were, or had been, in private practice.³⁰ Most of the others were men of affairs of the sort who employed fiduciaries—managers, factors, and so forth—in their personal business enterprises.³¹ Members of the founding generation who were neither lawyers nor businessmen often gained personal knowledge of the relevant standards by serving as fiduciaries themselves. The shorter life expectancy of the time³² left far more decedents' and orphans' estates to

27. Natelson, *Trust*, *supra* note 1, at 1036–68; *see also* THE FEDERALIST NO. 10 (James Madison) (arguing that government should be structured to control faction).

28. Natelson, *Trust*, *supra* note 1, at 1036–68.

29. Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 28, 1788), *in* 4 ELLIOT'S DEBATES, *supra* note 1, at 1, 148 (remarks of James Iredell). James Iredell, then a state judge, was a friend of James Wilson, the Federalist floor leader at the North Carolina convention, and later Associate Justice of the United States Supreme Court.

30. ROSSITER, *supra* note 1, at 79–137 (providing short biographies of the delegates to the federal convention).

31. For example, planters made wide use of commodity factors (brokers) to sell their crops abroad and the larger planters served as factors themselves. LOUIS B. WRIGHT, *THE CULTURAL LIFE OF THE AMERICAN COLONIES 1607–1763*, at 7, 11–12 (1957).

32. At the close of the eighteenth century, the British life expectancy at birth was about thirty-six years. GARY M. WALTON, *A BRIEF HISTORY OF HUMAN PROGRESS* 6 (2005). Even among the nobility, it was under fifty. STONE, *supra* note 1, at 71. In Massachusetts in 1850, life expectancy at birth was only 38.3 years for males and 40.5 years for females. HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 56 (William Lerner ed., 1975). At age fifty-five, John Dickinson was one of the oldest delegates to the federal convention. ROSSITER, *supra* note 1, at 110 (stating that Dickinson was born in 1732); *id.* at 250 (calling him "a victim of old age"); *id.* at 148 (stating that the average

administer per capita, creating a need for guardians, executors, administrators, and trustees.³³ Affective relationships among family members were much stronger in the eighteenth century than in periods immediately prior, and such obligations were honored accordingly.³⁴ And general knowledge of the law was more widely spread among the public than it is today,³⁵ as one can perceive when one reads the public debates, so often carried on in explicitly legal terms.³⁶

What was the source of this fiduciary law so important among the Founders? What was its content? These questions are addressed in the next two parts.

III. SOURCES OF EIGHTEENTH CENTURY FIDUCIARY LAW

Both before and immediately after the American Revolution, American fiduciary law was a plant still firmly rooted in England. Aside from the few American precedents (which I have woven, along with the English material, into the footnotes in Part III), one found this law in English books. American judges and lawyers cited those books copiously and without reserve.³⁷

age of the delegates was about forty-three); *see also* STONE, *supra* note 1, at 66–75 (providing a range of information on life expectancy and the effects of early mortality).

33. My examination of eighteenth century Virginia fiduciary documents in the Library of Virginia in Richmond (the state library) revealed no institutional fiduciaries employed. All fiduciaries were individuals. Moreover, fiduciaries usually served in teams of two or three for each estate, thereby raising the total number who served. The courts seem to have taken fiduciary duties seriously. All fiduciaries seem to have posted hefty bonds (commonly between £100 and £1,000) and were required to file detailed accounts. I also found many examples of complaints to the courts about the conduct of particular fiduciaries. (Representative documents on file with the author.)

34. STONE, *supra* note 1, at 118–19 (noting that a general theme of his extensive study was the great warming of intra-family sentiment from the sixteenth to eighteenth centuries).

35. DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE 197* (1958) (“In Virginia, for example, the landed aristocracy did much of their own law work rather than create a new class of colonial lawyers.”). For other indicia of the prevalence of legal activity among laymen, *see id.* at 197–202; *see also id.* at 205 (noting a “pervasiveness of legal competence among American men of affairs”); LOUIS B. WRIGHT, *THE CULTURAL LIFE OF THE AMERICAN COLONIES 1607–1763*, at 15 (1957) (“The Maryland planters prided themselves on their familiarity with the principles and practice of law, for legal knowledge was regarded as a necessary accomplishment of a gentleman.”); *id.* at 128 (“[E]very man had to be his own lawyer . . .”).

36. *See, e.g.*, Timoleon, *NEW YORK JOURNAL*, EXTRAORDINARY Nov. 1, 1787, in 13 *DOCUMENTARY HISTORY*, *supra* note 1, at 534, 535 (postulating the value of judicial opinions under the new Constitution). Many, many other examples could be cited.

37. *See, e.g.*, *Rapalje v. Emory*, 2 U.S. 51, 54 (1790) (citing Lord Mansfield in Cowper’s Reports); *Price v. Ralston*, 2 U.S. 60, 62, 64 (Pa. Ct. Com. Pl. 1790) (citing Atkins and Vesey’s Reports); *see also id.* at 63 (citing VINER, *supra* note 1); *Moale v. Tyson*, 2 H. & McH. 387, 1789 WL 166, at *3 (Md. Gen. Ct. 1789) (citing various English sources

The eighteenth century English legal bibliography, in list form, spanned nearly *three hundred pages* in John Worrall's catalogue, the *Bibliotheca Legum Angliae*.³⁸ Yet today when a court or commentator wants to make a point about eighteenth century law, he is likely to go no farther than Blackstone or Coke; the other English materials are under-known, under-appreciated, and under-used.³⁹

Those materials included thousands of cases in scores of volumes of "nominate reports," so called because they were named for their compilers.⁴⁰ A few of the most popular⁴¹ were the reports of Coke,⁴² Plowden,⁴³ Salkeld,⁴⁴ and Ventris.⁴⁵ There were six competing law dictionaries, of which the most popular was authored by Giles Jacob.⁴⁶ Jacob's work, like most of the

throughout, including Plowden's *Commentaries*, BACON, *supra* note 1, D'ANVERS, *supra* note 1, Salkeld's Reports, and others). All of these cases deal with fiduciary issues.

38. JOHN WORRALL, *BIBLIOTHECA LEGUM ANGLIAE, PART I, OR, A CATALOGUE OF THE COMMON AND STATUTE LAW BOOKS OF THIS REALM* (London 1788). The Latin words in the title mean "Library of the Laws of England."

39. In a search in the Westlaw "journals and law reviews" (JLR) database on October 7, 2006, the query "'Edward Coke' /s Institutes" produced 514 articles and "'William Blackstone' /s commentaries" produced 4,844. However, there were only fifty articles citing any works in Giles Jacob's copious bibliography (all to his law dictionary), only fifteen to Thomas Blount, and the query "Edmund Plowden"—an author the founding generation considered in the same general rank as Coke and Blackstone—produced only thirty-four entries. Even more sparse were citations to Knightly D'Anvers's popular (although incomplete) *Abridgment*. D'ANVERS, *supra* note 1. There were two, and both were mine. The most astonishing statistic is that Charles Viner's *Abridgment*—the most extensive of his day—was cited in only thirty-eight articles, two of which were mine. VINER, *supra* note 1.

40. See generally JOHN WILLIAM WALLACE, *THE REPORTERS ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS* (Boston, Soule & Bugbee 1882) (discussing the biographies, methodology, and relative reputations of the various English case reporters).

41. See, e.g., *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754–1756*, 86 PA. MAG. HIST. & BIOGRAPHY 241, 417 (H. Trevor Colbourn ed., 1962) (setting forth the content of Dickinson's letters from London to his parents). His references are to Coke, *id.* at 257, 422, 441, 451, Plowden, *id.* at 257, 423, 451, Salkeld, *id.* at 451, and Ventris, *id.* at 451. He also mentions Littleton—perhaps Coke's commentary on his work. *Id.* at 423.

42. Allen D. Boyer, *Coke, Sir Edward (1552–1634)*, in *THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (2004–2005) (containing a short biography).

43. Christopher W. Brooks, *Plowden, Edmund (c.1518–1585)*, in *THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (2004–2005).

44. W. R. Williams, *rev. Anne Pimlott Baker, Salkeld, William (1671–1715)*, in *THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (2004–2005).

45. Paul D. Halliday, *Ventris, Sir Peyton (1645–1691)*, in *THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (2004–2005).

46. BLOUNT, *supra* note 1; COWELL, *DICTIONARY*, *supra* note 1; CUNNINGHAM, *supra* note 1; JACOB, *supra* note 1; JOHN RASTELL, *LES TERMES DE LA LEY: OR, CERTAIN DIFFICULT AND OBSCURE WORDS AND TERMS OF THE COMMON LAWS AND STATUTES OF THIS REALM NOW IN USE, EXPOUNDED AND EXPLAINED* (London, Richard Atkins & Edward Atkins

others, was actually more of an encyclopedia than a dictionary, featuring extensive exposition on the law of substance and procedure. There were summary textbooks: not only the *Institutes* of Coke⁴⁷ and the *Commentaries* of Blackstone,⁴⁸ but works by Thomas Wood,⁴⁹ Henry Finch,⁵⁰ and John Fortescue.⁵¹ Other treatises examined discrete subjects, including fiduciary subjects, such as trusts,⁵² estates,⁵³ charitable uses,⁵⁴ and general equity.⁵⁵ There was an abundance of form-books⁵⁶ and—more impressively—multi-volume “abridgments” or “digests” that organized English law by topic. These included the comprehensive digests authored by Matthew Bacon,⁵⁷ John Comyns,⁵⁸ Knightly D’Anvers,⁵⁹ John Lilly,⁶⁰ William Nelson,⁶¹ and Charles Viner,⁶² and the more specialized digests covering the

1708); THE STUDENT’S LAW DICTIONARY; COMPLEAT ENGLISH LAW-EXPOSITOR (The Savoy, Edward Sayer 1740). On the popularity of these works, see JOHNSON, *supra* note 1, at 59–64.

47. COKE, *supra* note 1.

48. Blackstone’s *Commentaries* were not published until 1765–1769. See Wilfrid Prest, *Blackstone, Sir William (1723–1780)*, in THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004–2005).

49. THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND: OR, THE LAWS OF ENGLAND IN THEIR NATURAL ORDER, ACCORDING TO COMMON USE (8th ed., The Savoy, Henry Lintot 1754).

50. HENRY FINCH, LAW OR DISCOURSE THEREOF (The Savoy, Henry Lintot 1759).

51. JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE (John Selden ed. & trans., The Savoy, Edward Sayer 1737).

52. GEOFFREY GILBERT, THE LAW OF USES AND TRUSTS (2d ed., The Savoy, Edward Sayer 1741).

53. GODOLPHIN, *supra* note 1; SWINBURNE, *supra* note 1.

54. DUKE, *supra* note 1.

55. See, e.g., HENRY HOME & LORD KAMES, PRINCIPLES OF EQUITY (3d ed., Edinburgh 1778); A TREATISE OF EQUITY, *supra* note 1.

56. E.g., GILBERT HORSMAN, PRECEDENTS IN CONVEYANCING, SETTLED AND APPROVED (London 1785); GILES JACOB, THE ACCOMPLISH’D CONVEYANCER (The Savoy, Edward Sayer 1714–15). For the relevance of conveyancing books to constitutional law, see Natelson, *Necessary and Proper*, *supra* note 1, at 273–76.

57. BACON, *supra* note 1.

58. COMYNS, *supra* note 1.

59. D’ANVERS, *supra* note 1.

60. JOHN LILLY, THE PRACTICAL REGISTER: OR, A GENERAL ABRIDGMENT OF THE LAW (2d ed., The Savoy, Edward Sayer 1745).

61. NELSON, *supra* note 1.

62. VINER, *supra* note 1. Charles Viner subsequently endowed the Vinerian Chair in Common Law at Oxford under the condition that William Blackstone be the first occupant. He thus made Blackstone’s *Commentaries* possible. See David Ibbetson, *Viner, Charles (bap. 1678, d. 1756)*, in THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004–2005). On the influence of his “Abridgment,” see W. S. HOLDSWORTH, CHARLES VINER AND THE ABRIDGMENTS OF ENGLISH LAW (1923).

output of particular courts.⁶³ It is among such authorities as these—as well as in the stray American case that followed them—that one finds the law that governed fiduciaries in the founding generation.

IV. SUMMARY OF EIGHTEENTH CENTURY FIDUCIARY LAW

A. *Kinds of Fiduciaries*

In the eighteenth century, fiduciary terminology and categories were somewhat different from those we are accustomed to. For example, the terms “agent”⁶⁴ and “fiduciary” were much less common than they are today, while the word “servant” was much more common and of much broader application. The principal categories of fiduciaries who worked in subordination to their principals⁶⁵ consisted of the following, in alphabetical order:

- *Administrators*, then as now, were fiduciaries who managed an intestate’s estate on behalf of the creditors and successors in interest.⁶⁶
- *Attorneys* were either public or private. *Public attorneys* were attorneys at law, and *private attorneys* were agents for other purposes, especially those who held authority

63. GENERAL ABRIDGMENT, *supra* note 1; A GENTLEMAN OF LINCOLN’S INN, A DIGEST OF ADJUDGED CASES IN THE COURT OF KING’S BENCH FROM THE REVOLUTION TO THE PRESENT PERIOD (London, W. Strahan & M. Woodfall 1775).

64. “Agent” did not always have fiduciary connotations. See JACOB, *supra* note 1 (unpaginated) (defining the phrase “Agent and Patient”: “Agent and Patient, Is when a Person is [both] the Doer of a Thing, and the Party to whom done”). The connection is closer to the Latin originals than it is today: *agere*, to do, and *pati*, to suffer or permit.

65. Thus, the list excludes partners and receivers. Cf. *James v. Browne*, 1 U.S. (1 Dall.) 339 (Pa. 1788) (granting accounting among partners); *Tillier v. Whitehead*, 1 U.S. (1 Dall.) 269, 269–70 (Pa. 1788) (“And it was said by M’Kean, Chief Justice, that this case could not be properly compared with the case of an attorney without power of substitution; for, the attorney cannot exceed the letter of his authority, being nothing more than an agent himself. But each partner is a principal; and it is implied in the very nature of their connection, that each has a right to depute and appoint a clerk to act for both, in matters relative to their joint interest.”).

66. JACOB, *supra* note 1 (unpaginated) (defining “administrator” as “one that hath the Goods of a Man dying Intestate committed to his Charge by the Ordinary, for which he is accountable when thereunto required”). The term also could refer to one administering an estate where there was a will, but where there was no named executor or the named executor did not serve. SWINBURNE, *supra* note 1, at 380. The executor’s duty was somewhat higher toward creditors than legatees. *Appeal of Brown*, 1 U.S. (1 Dall.) 311, 312 (Pa. 1788).

under a power of attorney—or “letter of attorney” as it usually was called.⁶⁷

- *Bailiffs* served as agents for public agencies (such as bailiffs of courts) but more frequently as managers of manors⁶⁸ or for older infants.⁶⁹
- *Executors* administered estates pursuant to a will.⁷⁰
- *Factors* represented merchants conducting business in remote locations⁷¹ and generally were “private attorneys”—that is, agents operating under powers of attorney.⁷²
- *Guardians*, then as now, administered the estates of incompetents or infants.⁷³
- *Servants* included not only menial servants⁷⁴—the sense in which we use the word today—but any agent

67. JACOB, *supra* note 1 (unpaginated) (defining “Attorney” as “he that is appointed by another Man to do any Thing in his Absence. An *Attorney* is either publick . . . Or private, upon Occasion for any particular Business, who is commonly made by Letter of *Attorney*. . . . An Infant ought not to appear by *Attorney*, but by Guardian; for he cannot make an *Attorney*, but the Court may assign him a Guardian. . . . An Ideot is not to appear by an *Attorney*, but in proper Person. A Corporation cannot appear otherwise than by *Attorney*, who is made by Deed under the Seal of the Corporation”) *See also* Tillier v. Whitehead, 1 U.S. (1 Dall.) at 270 (“[T]he attorney cannot exceed the letter of his authority, being nothing more than an agent himself.”).

68. JACOB, *supra* note 1 (unpaginated) (listing under the entry for “bailiff,” several kinds of bailiff, most of which are public officials, followed by “*Bailiffs of Manors* are those that collect their Rents, and levy their Fines and Amercements These *Bailiffs* may do any Thing for the Benefit of their Masters, and it shall stand good till the Master disagrees; but they can do nothing to the Prejudice of their Masters *Bailiffs of Husbandry* are belonging to private Men of good Estates, and have the Disposal of the Under-Servants, every Man to his Labour; they also sell Trees, repair Houses, Hedges, &c. and gather up the Profits of the Land for their Lord and Master, for which they render Accounts yearly, &c.”); 3 VINER, *supra* note 1, at 538–40 (discussing the duties of bailiffs almost entirely in the context of manors).

69. In the 1770s, the age line between administration by guardian and bailiff was fourteen years. Perkins v. Turner, 1 H. & McH. 400, 400 (Md. Provincial Ct. 1771).

70. JACOB, *supra* note 1 (unpaginated) (defining “executor” as “one that is appointed by a Man’s last Will and Testament, to have the Execution thereof after his Decease, and the Disposing of all the Testator’s Substance according to the Tenor of the Will”).

71. JACOB, *supra* note 1 (unpaginated) (defining factor as “Factor, Is a *Merchant’s* Agent residing beyond the Seas, or in any remote Parts, constituted by Letter or Power of Attorney”); 2 NAVAL TRADE, *supra* note 1, at 447 (defining “factor”).

72. 2 NAVAL TRADE, *supra* note 1, at 447 (“[A] Factor is a Merchant’s Agent, residing beyond the Seas or in any remote Parts, constituted by Letter or Power of Attorney to sell Goods and Merchandize, and otherwise act for his Principal.”).

73. JACOB, *supra* note 1 (unpaginated) (defining “guardian” as “Guardian . . . [s]ignifies him that hath the Charge or Custody of any Person or Thing; but most commonly he who hath the Custody and Education of such Persons as are not of Sufficient Discretion to guide themselves and their own Affairs, as Children and Ideots, (usually the former)”; A TREATISE OF EQUITY, *supra* note 1, at 163–67 (describing the duties of guardians); *see also* COWELL, INSTITUTES, *supra* note 1, at 50 (“Our Lawes are very carefull in point of trusting Guardians . . .”).

performing tasks for one in a trade or profession.⁷⁵ Among the more dignified category of servants were bailiffs,⁷⁶ stewards, and—by some accounts—factors,⁷⁷ all of whom were agents as well as servants.⁷⁸

- *Stewards* could encompass almost any kind of general agent. A steward often worked for a particular public official or aristocrat, or administered a manor. Stewards often received their authority by powers of attorney.
- *Trustees*, technically, held legal title only to land, not to goods, for the benefit of another, since the word “trust” was still synonymous with the real estate term “use.”⁷⁹

Thus, in likening public officials—such as Members of Congress—to agents, guardians, trustees, and servants (a category that included bailiffs, factors, and stewards), the founders covered all common kinds of fiduciaries except administrators and executors. However, those two categories were closely analogized to trustees⁸⁰ and attorneys.⁸¹

74. MASTERS & SERVANTS, *supra* note 1, at 2 (calling servants “domestics”).

75. *E.g.*, Osgood v. Grosvenor, 1 Root 89 (Conn. Super. Ct. 1784) (referring to a public agent as a “servant to the public”); JACOB, *supra* note 1 (unpaginated) (defining the term “servant”); MASTERS & SERVANTS, *supra* note 1, at 83 (discussing attorneys’ clerks); *id.* at 114 (discussing apprentices); *id.* at 226 (listing “Labourers, Journeymen, Artificers, Handicraftmen, and other Workmen”).

76. JACOB, *supra* note 1 (unpaginated) (referring in the definition of “servant” to a bailiff as a kind of servant); 3 VINER, *supra* note 1, at 538 (stating that a bailiff is a servant).

77. In the early seventeenth century, factors were distinguished from servants. *See, e.g.*, MALYNES, *supra* note 1, at 111 (distinguishing the two). But by the Founding Era, at least some commentators included factors as servants. 3 BACON, *supra* note 1, at 587 (stating that a factor “is in Nature of a Servant”); 2 MOLLOY, *supra* note 1, at 327 (stating that a factor is a kind of servant).

78. JACOB, *supra* note 1 (unpaginated) (defining “factor” as a kind of merchant’s agent); *id.* (defining steward as “Steward . . . [i]s as much as to say a Man appointed in my Place or *Stead*”); 3 VINER, *supra* note 1, at 538–40 (discussing activities of bailiffs).

79. A TREATISE OF EQUITY, *supra* note 1, at 104 (“Now an Use is a Trust, or Confidence, which is not issuing out of the Land, but as a Thing collateral, annexed in Privity to the Estate, and to the Person concerning the Land, *viz.* that *Cestuy que Use* should take the Profits, and that the Terre-Tenant should make Estates according to his Direction”); 21 VINER, *supra* note 1, at 493 (“Trusts are *of the same nature now that uses were at the common law.*”).

80. Arrowsmith v. Van Harlingen’s Ex’rs, 1 N.J.L. 26 (N.J. 1790) (holding that an executor is a trustee); Burwell v. Ogilby, 2 Va. Colonial Dec. B105 (Va. Gen. Ct. 1740) (stating that an administrator is “in the nature of a Trustee”); *see also* 1 GENERAL ABRIDGMENT, *supra* note 1, at 243 (referring to executor who owes money to the deceased’s next of kin as a “Trustee”); 2 *id.* at 421 (stating “An Executor from his name is but a *Trustee*”); SWINBURNE, *supra* note 1, at 417 (speaking of an executor’s “trust”).

81. 11 VINER, *supra* note 1, at 54 (“EXECUTOR is but an *attorney* for the deceased.”).

B. *The Process of Generalization*

Despite the fragmented nature of the field, English and American lawyers understood that common principles underlay all of these categories. The term *fiduciary* was used of the offices and duties of executors and administrators,⁸² stewards and bailiffs,⁸³ and of the relationship of master and apprentice.⁸⁴ One who had control of the real estate interests of another—such as a trustee for a *cestui que use*⁸⁵ or the possessor for the holder of a future interest⁸⁶—likewise was considered a fiduciary.

The eighteenth century exemplar of the fiduciary was the trustee. The trustee's fiduciary obligations had been particularly well worked out in the law of charitable trusts,⁸⁷ but the general duties owed by the charitable trustee were not essentially different from those owed by other trustees.⁸⁸ When eighteenth century lawyers generalized about fiduciaries and fiduciary duties, they referred to "trustees," "trusts," and "breach of trust." A person who presumed to be an infant's guardian was "look'd upon as Trustee for the Infant."⁸⁹ A servant who stole his master's goods was said to be guilty of a "breach of trust."⁹⁰ An

82. COWELL, *DICTIONARY*, *supra* note 1 (unpaginated) (defining "oeconomicus:" "Oeconomicus. This Word was used for the Executor of a last Will and Testament, as the Person who had the *Oeconomy* or fiduciary Disposal of the Goods of the Party deceased.").

83. JACOB, *supra* note 1 (unpaginated) (defining "dapiser:" "But by Degrees it was used for any fiduciary Servant, especially the Chief Steward or Head Bailiff of an Honour or Manor.").

84. MASTERS & SERVANTS, *supra* note 1, at 153–54 (noting that fiduciary contract is personal, so apprentice not bound to executrix: "The Binding was to the *Man*, to learn *his* Art, and serve *him*, without (b) any Mention of Executors; and as the Words are confined, so is the Nature of the Contract; for it is fiduciary, and the Lad is bound from a personal Knowledge of the Integrity and Ability of the Master.").

85. WILLIAM BLACKSTONE, 3 COMMENTARIES *51 ("But when, about the end of the reign of king Edward III, uses of land were introduced, and, though totally discountenanced by the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy . . .").

86. *See, e.g.*, *Garth v. Cotton*, 1 Ves. Sr. 547, 555, 27 Eng. Rep. 1196, 1199 (Ch. 1750) (stating that the Tenant is a sort of Fiduciary to the Lord); *Bishop of Winchester v. Knight*, 1 P. Wms. 406, 407, 24 Eng. Rep. 447, 447 (Ch. 1717) (stating the same).

87. *E.g.*, DUKE, *supra* note 1, at 569–87; A TREATISE OF EQUITY, *supra* note 1, at 157–63; 4 VINER, *supra* note 1, at 476–501.

88. *See, e.g.*, 4 VINER, *supra* note 1, at 494 ("Trustees for charitable uses are no otherwise or further *chargeable* than any other trustee is . . .").

89. A TREATISE OF EQUITY, *supra* note 1, at 164; *see also* 2 GENERAL ABRIDGMENT, *supra* note 1, at 484 ("Guardians appointed by Will . . . are only Trustees . . .").

90. CUNNINGHAM, *supra* note 1 (unpaginated) (stating, in discussion of "apprentice," "if a man had delivered goods to his servant to keep, or carry for him, and he carried them away *animo furandi*; this was considered only a breach of trust, but not felony.").

executor or administrator was a kind of trustee,⁹¹ and his default was characterized as a breach of trust.⁹² Latin pleadings commonly identified the English equivalent of the word *fiduciarius* as “trustee,”⁹³ and a 1769 Maryland case records the eminent American lawyer Daniel Dulaney as using “trust” in a similarly broad way.⁹⁴ The records contain many other instances of this usage,⁹⁵ which encouraged generalization within the law of fiduciaries and application of standards common to all.⁹⁶

C. *Fiduciary Duties in Eighteenth Century Law*

The duties owed by trustees, administrators, executors, guardians, and the various kinds of “servants” were somewhat similar to those imposed on their modern counterparts. Of particular significance were the following:

1. The Duty to Follow Instructions and Remain Within Authority

Fiduciaries were required to honor the rules creating their power⁹⁷ and therefore had an absolute obligation to remain

91. *Arrowsmith v. Van Harlingen’s Ex’rs*, 1 N.J.L. 26 (N.J. 1790) (holding that an executor is a trustee); *Burwell v. Ogilby*, 2 Va. Colonial Dec. B105 (Va. Gen. Ct. 1740) (stating that an administrator is “in the nature of a Trustee”); see also 1 GENERAL ABRIDGMENT, *supra* note 1, at 243 (referring to executor who owes money to the deceased’s next of kin as a “Trustee”); 2 *id.* at 421 (stating “An Executor from his name is but a *Trustee*”); SWINBURNE, *supra* note 1, at 417 (speaking of an executor’s “trust”).

92. GODOLPHIN, *supra* note 1, at 203 (discussing the effect of an administrator’s or executor’s mismanagement of his “trust”).

93. *Graves v. Hatchet*, 1 Lut. 415, 416, 125 Eng. Rep. 218, 218 (C.P. 1605) (referring to “fiduciarios, Anglice [in English] Trustees”); see also *Buxton v. Nelson*, 1 Lut. 635, 635, 125 Eng. Rep. 333, 333 (C.P. 1704) (stating the same).

94. *Belt v. Hepburn*, 4 H. & McH. 512, 512 (Md. Prov. Ct. 1769) (quoting Dulaney as stating, “for the very definition of trust is where there is such a ‘confidence between parties that no action at law will lie; but is merely a case for the consideration of equity”).

95. *E.g.*, 2 NAVAL TRADE, *supra* note 1, at 450 (“[A] factor is in Nature only of a Trustee for his principal.”); see also 3 BACON, *supra* note 1, at 589 (stating the same); GODOLPHIN, *supra* note 1, at 203 (“A *Devastavit* or Waste in the Executor or Administrator is, when he doth mis-administer the Goods or Chattels of the deceased, or mis-manage that trust which is reposed in him . . .”).

96. See, *e.g.*, A TREATISE OF EQUITY, *supra* note 1, at 143–48 (in the course of discussing duties of trustees, mentioning the related duties of factors, receivers, mortgagees, bailiffs, and guardians); 21 VINER, *supra* note 1, at 523 (stating that a “[t]rustee shall *not* be charged with imaginary values, but only as a bailiff”).

97. *E.g.*, 4 VINER, *supra* note 1, at 491 (“A Corporation for a Charity are but Trustees for the Charity, and may *improve*, but not do any thing in Prejudice of the Charity, or in Breach of the Founder’s Rules . . .”); *id.* at 493 (stating that it is a “Mis-employment” to give property “against the Intent and Meaning of the Giver or Founder”).

within their authority.⁹⁸ They were disabled from changing unilaterally the scope or nature of the fiduciary relationship.⁹⁹ If a fiduciary did not act within his power, it was irrelevant whether or not he acted reasonably.¹⁰⁰

The meaning of the instrument creating the fiduciary relationship—including the scope of authority—was interpreted according to the intent of the person or persons who executed that instrument.¹⁰¹ The court sought out the makers' subjective intent, where available.¹⁰² A fiduciary's authority encompassed implied¹⁰³ as well as express powers but otherwise was construed

98. *Lyon v. Ide*, 1 D. Chip. 46, 52 (Vt. 1790) (“But a person acting under authority must pursue that authority; nor can he act by virtue of his authority, and in his private capacity, in the same instrument.”); *Tillier v. Whitehead*, 1 U.S. (1 Dall.) 269, 270 (Pa. 1788) (“[T]he attorney cannot exceed the letter of his authority, being nothing more than an agent himself.”); *Goodwin v. Gibbons*, 4 Burr. 2107, 2109, 98 Eng. Rep. 100, 100 (K.B. 1767) (stating that an attorney who exceeds his power may be treated as a trespasser); 2 MOLLOY, *supra* note 1, at 327 (citing the maxim that one who “*exceeds his Commission, shall lose his Factorage*”).

99. 5 BACON, *supra* note 1, at 398 (stating that trustees cannot change the nature of the trust).

100. *Menzey v. Walker*, Cas. T. Talbot 72, 76–77, 25 Eng. Rep. 669, 671 (Ch. 1735) (stating that question of reasonableness does not arise if the terms of the power have been violated).

101. *Taylor ex dimiss. Atkyns v. Horde*, 1 Burr. 60, 97, 97 Eng. Rep. 190, 224 (K.B. 1757). Of powers created in equity:

The intent of parties who gave the power, ought to gain every construction. He to whom it is given, has a right to enjoy the full exercise of it: they over whose estate it is given, have a right to say “it shall not be exceeded.” The conditions shall not be evaded; it shall be strictly pursued, in form and substance: and all acts done under a special authority, not agreeable thereto, nor warranted thereby, must be void.

Id.

See also *Zouch ex dimiss. Woolston v. Woolston*, 2 Burr. 1136, 1146, 97 Eng. Rep. 752, 758 (K.B. 1761) (stating that the same rules of construction of powers ought to apply at law as in equity) (Mansfield, C.J.); 1 BACON, *supra* note 1, at 199 (noting that letter of attorney is interpreted to effectuate the intent of the parties); 21 VINER, *supra* note 1, at 496 (“In the Construction of a Trust, the *Intent* of the Party is to govern, and Courts of Equity have always in Cases of Trusts taken the same Rules of expounding Trust, and of pursuing the Intentions of the Parties therein, *as in Cases of Wills*, and that even in Point of Limitations of Estates, where the Letter is to be as strictly pursued as in any Case.”). Construction of wills was notably governed by subjective intent. For a general discussion of how documents were construed to effectuate intent, see generally Natelson, *Founders*, *supra* note 1.

102. See generally Natelson, *Founders*, *supra* note 1 (discussing the interpretive norms of the founding generation and disputing earlier claims that subjective intent was disregarded).

103. See, e.g., 3 VINER, *supra* note 1, at 304 (“The Attorney’s Authority is twofold, viz. *expressed* in the Warrant, or *implied* in Law . . .”). On the subject of implied authority in eighteenth century law, see Natelson, *Necessary and Proper*, *supra* note 1, at 273–84; Robert G. Natelson, *Tempering the Commerce Power*, 68 MONT. L. REV. (forthcoming 2007).

strictly rather than expansively.¹⁰⁴ Where the document was silent about the scope of authority, resort was made to custom and prior law. For example, there were widely accepted understandings of what authority customarily was granted or denied to bailiffs of manors¹⁰⁵ and factors.¹⁰⁶

2. The Duties of Loyalty and Good Faith

Fiduciaries were to represent their beneficiaries honestly and with undivided loyalty and not act in a way prejudicial to them.¹⁰⁷ An early Virginia case stated of a trustee, “He was bound in Conscience to Act for [the beneficiary’s] Benefit and not for his own.”¹⁰⁸ Self-dealing was a breach of trust.¹⁰⁹ John Godolphin’s

104. See *Rex v. Croke*, 1 Cowp. 26, 29, 98 Eng. Rep. 948, 950 (K.B. 1774) (holding that statutory power to take property must be “strictly pursued”); JACOB, *supra* note 1 (unpaginated) (defining “Letter of Attorney” and stating, “[i]n Cases of *Letters of Attorney*, the Authority must be strictly pursued”). But see *Earl of Darlington v. Pulteney*, 1 Cowp. 260, 266–67, 98 Eng. Rep. 1075, 1078 (K.B. 1775) (holding that where power is for a meritorious purpose, the forms of its exercise need not be followed strictly if not so intended).

105. The level of legal detail can be seen in the third volume of *A General Abridgment of Law and Equity*, 3 VINER, *supra* note 1, at 538–40. Bailiffs of manors could lease the estate’s piscary for years, but not the possessory interest, 4 *id.* at 538, lease the land at will, reserving a rent, but not gratuitously, *id.*, pay the master’s rents out of the proceeds of the manor but not otherwise, *id.* at 539, repair houses, but not build them, *id.* at 539–40, repair tiled roofs, but not replace thatch with tile, *id.* at 539, and so forth. See, e.g., 1 BACON, *supra* note 1, at 235–36 (listing matters within and without the authority of the bailiffs of lords of manors).

106. There is a considerable literature on the duties and authority of factors. See, e.g., 2 MOLLOY, *supra* note 1, at 326–33 (1769) (detailing many different types and aspects of factors); 2 NAVAL TRADE, *supra* note 1, at 447–59 (1753) (describing factors, agents, and supercargoes); WYNDHAM BEAWES, *LEX MERCATORIA REDIVIVA: OR, THE MERCHANT’S DIRECTORY* 41–44 (1771) (covering many areas of commerce). For an early American case, see *Price v. Ralston*, 2 U.S. (2 Dall.) 60 (Pa. C.P. 1790) (settling a dispute between a creditor and a trustee).

107. E.g., *Arrowsmith v. Van Harlingen’s Ex’rs*, 1 N.J.L. 26 (1790) (holding that an executor is a trustee who would not be permitted to profit at the expense of the testator); 5 BACON, *supra* note 1, at 396 (stating that it violates the trust if trustees to preserve contingent remainders join in suffering common recovery); A TREATISE OF EQUITY, *supra* note 1, at 142 (“[N]o Act of the Trustee shall prejudice the *Cestuy que Trust* . . .”); *id.* at 161 (stating that trustees for a charity may do nothing prejudicial to the charity); 4 VINER, *supra* note 1, at 492 (“A corporation for a charity are but trustees for the charity, and may *improve*, but not do any thing in prejudice of the charity . . .”); *id.* at 493 (“It shall be accounted and called a mis-employment of a gift or disposition to charitable uses, in all cases where there is found *any breach of trust, falsity, non-employment, concealment, mis-government, or conversion in and about the lands, rents, goods, money &c.* given to the use, against the intent and meaning of the giver or founder.”).

108. *Godwin v. Morris*, 1 Va. Colonial Dec. R80, R80 (Va. General Ct. 1732).

109. 2 MOLLOY, *supra* note 1, at 329 (“Fidelity, Diligence and Honesty are expected from the Factor . . .”); see also *Bellinger v. Gervais*, 1 S.C. Eq. (1 Des.) 174 (S.C. Eq. 1790) (holding that an agent was absolved from effects of inflation on currency in his possession when he did not use the money for his own purposes); *Pettifer’s Case*, 5 Co. Rep. 32a, 32a–32b, 77 Eng. Rep. 102, 102 (K.B. 1603) (stating that executors are

popular treatise on estate administration presented as an example the sale of the “deceased’s Goods much under value, specially if in a fraudulent way, as, to [the executor’s] near Friends, to his own use, or to have money under-hand, or the like.”¹¹⁰

3. The Duty of Care

Fiduciaries were not insurers of everything that might go wrong under their administration,¹¹¹ that is, for “meer [sic] accident”¹¹² or for cases in which the beneficiary was at fault.¹¹³ There was, nonetheless, a basic duty of care.¹¹⁴ The “reasonable

chargeable to creditors for goods of deceased sold by executors for their own benefit); 2 BACON, *supra* note 1, at 686 (guardian who made self-dealing conveyance was subject to loss of guardianship and treble damages, and the conveyance was voidable); 2 MOLLOY, *supra* note 1, at 332 (stating that the questions that can arise of factors “would be *in infinitum*: However, these are to be the Standard Rules which should govern their Actions, *viz.* Honesty, Faithfulness, Diligence, and observing of Commission, or Instructions”).

110. GODOLPHIN, *supra* note 1, at 204.

111. *See, e.g.*, 2 BACON, *supra* note 1, at 437–38 (distinguishing cases in which executors were at fault, and therefore liable, from cases in which they were not at fault, and not liable); *cf.* Bellinger v. Gervais, 1 S.C. Eq. (1 Des. Eq.) 174 (S.C. Eq. 1790) (holding that an agent was not responsible for effects of inflation on currency in his possession); 3 BACON, *supra* note 1, at 564 (“If a Man commits Money to his Servant to carry to such a Place, and he is robbed, the Servant shall not answer for it; for a Servant only undertakes for his Diligence and Fidelity, and not for the Strength and Security of his Defence . . .”); GODOLPHIN, *supra* note 1, at 198–99 (executor or administrator without fault not chargeable for mere loss of suit); *id.* at 206 (“But for an Executor or Administrator, without fraud, to sell the Goods of the deceased under value, especially where more cannot be conveniently made of them, is no waste.”); A TREATISE OF EQUITY, *supra* note 1, at 145–46 (stating that a trustee or factor is not liable for money lost through a robbery); 21 VINER, *supra* note 1, at 523 (“If a trustee lets out Money to supposed able men (though they fail,) he shall not be charged for more than he received.”).

112. 3 BACON, *supra* note 1, at 565.

113. 2 JOHN LILLY, THE PRACTICAL REGISTER: OR, A GENERAL ABRIDGMENT OF THE LAW 625 (The Savoy, Edward Sayer 1719) (“A Man makes two Trustees for an Infant, A. and B. who both accept the Trust: A. one of them, takes all the Profits, and was in Arrear one Thousand Pounds, and unable to satisfy: And it was resolved, That B. being only a Party intrusted, shall not be answerable for more than came to his Hands; For it was the Fault of him who reposed a Trust in such a Man who was not able to pay.”); 1 NELSON, *supra* note 1, at 172 (“An Executor or Administrator shall never be charged *de bonis propriis*, but where he doth some Wrong; as by *selling* the Testator’s Goods, and converting the Money to his own Use, or by *wasting* them, or by pleading what is False . . .”).

114. *See, e.g.*, 2 MOLLOY, *supra* note 1, at 329 (“Fidelity, Diligence and Honesty are expected from the Factor . . .”); *see also id.* at 332 (stating that the questions that can arise of factors “would be *in infinitum*: However, there are to be the Standard Rules which should govern their Actions, *viz.* Honesty, Faithfulness, Diligence, and observing of Commission, or Instructions”).

man” standard seems not to have been in use yet,¹¹⁵ but the duty was expressed as an obligation not to neglect the business nor to be guilty of “folly or negligence”¹¹⁶ or, in some cases, as an obligation to avoid “supine”¹¹⁷ or “extreme” negligence¹¹⁸ or *crassa neglegentia* (gross negligence).¹¹⁹ If a fiduciary acted in an “unreasonable or indiscrete” way, a court might simply correct the action,¹²⁰ but the court also could hold fiduciaries liable for affirmative negligent acts or—somewhat less readily¹²¹—for neglect.¹²²

115. Cf. A TREATISE OF EQUITY, *supra* note 1, at 166–67 (stating that a “prudent Master of a Family” standard was used in Roman law, while suggesting it was not then the law of England).

116. 3 BACON, *supra* note 1, at 564–65 (stating that where a servant got a bank bill from another and not from Sir Stephen as instructed [although still drawn on Sir Stephen], the servant was not liable when Sir Stephen failed, as this was “meer Accident,” not folly or negligence); DUKE, *supra* note 1, at 25 (stating that, in the context of charitable trusts, breaches of duty included “Abuses, breaches of Trusts, *Negligences*, *Misemployments*, *not Employing*, *Concealing*, *Defrauding*, *Mis-converting*, or *Mis-government* of the same Lands” (emphasis added)); A TREATISE OF EQUITY, *supra* note 1, at 146 (describing liability of joint trustees due to negligence).

117. A TREATISE OF EQUITY, *supra* note 1, at 145 (stating that in cases of supine negligence based on strong proof, a trustee may be charged for more than he received).

118. 4 VINER, *supra* note 1, at 496 (“The governors of a free-school *joined in a long lease of houses at 5 l. a year, though worth 50 l. a year*. The lords commissioners decreed the assignee of this lease to surrender it back, and ordered the lessee and the governors to pay 70 l. costs. And Ld. C. King affirmed the decree as to the surrendering, but reduced the costs to 50 l. and thought there was no reason that the charity should pay the costs, but that the lessee who was to have the benefit should; and that the governors, though not guilty of corruption, nor were to gain any thing, yet ought to pay some *costs for their extreme negligence*.”).

119. *Pitt v. Yalden*, 4 Burr. 2060, 2061, 98 Eng. Rep. 74, 75 (K.B. 1767) (holding attorneys who erred understandably not liable in absence of *crassa neglegentia*).

120. 1 GENERAL ABRIDGMENT, *supra* note 1, at 344–45 (stating that a court can correct an “unreasonable or indiscrete” use of an executor’s power).

121. Liability was not generally imposed for merely permissive waste. 2 BACON, *supra* note 1, at 685 (“At Common Law, both a Prohibition of Waste and an Action of Waste lay against a Guardian in Chivalry and a Guardian in Socage, for a voluntary, but not for permissive Waste, or Waste done by a Stranger.”).

122. *See, e.g.*, 2 BACON, *supra* note 1, at 685 (“If a Guardian suffereth a Stranger to cut down Timber-Trees, or to prostrate any of the Houses, and doth not, according to his Duty and Office as Guardian, endeavor to keep and preserve the Inheritance of the Ward in his Custody and keeping, and doth not prohibit and withstand the Wrong-doer; this shall be taken in Law for his Consent . . .”); 3 *id.* at 564 (“So if a Servant, that drives his Master’s Cart, by his Negligence suffers the Cattle to perish, an Action upon the Case lies against him.”); *id.* (“If a Man deliver a Horse to his Servant to go to Market, or a Bag of Money to carry to London, which he neglects to do, the Master may have an Action of Account or Detinue against him.”); GODOLPHIN, *supra* note 1, at 198 (“An Executor may make himself chargeable of his own proper Goods, either by *Omission* or by *Commission*.”); 21 VINER, *supra* note 1, at 524 (stating, as to a trustee, “But he shall be charged *in Case of Supine Negligence* with more than he received, but then the Proof must be very strong.”).

A fiduciary had to apply good business sense.¹²³ Thus, if authorized to hire agents, the fiduciary had to exercise care in doing so.¹²⁴ When a factor was authorized to sell on credit, extending credit for an unreasonable time rendered the factor liable to his principal. An executor or administrator who dissipated the deceased's property through imprudent management was liable in an action called *devastavit*.¹²⁵ Among the acts interdicted were improperly releasing the estate's cause of action, paying debts out of priority, spending too much on the deceased's funeral, paying legacies when an insufficient sum remained to settle debts, issuing a release of debt without payment, and paying a contract or bond that was legally void for usury.¹²⁶

4. The Duty to Exercise Personal Discretion

When not authorized in the instrument creating the relationship, fiduciary duties were non-delegable. The applicable rule was *delegatus non potest delegare*.¹²⁷ As Matthew Bacon phrased it in his *Abridgment*, "One who has an Authority to do an Act for another, must execute it himself, and cannot

123. See 2 MOLLOY, *supra* note 1, at 331 (stating that a factor must "have a careful Eye" with respect to letters of credit); see also 2 NAVAL TRADE, *supra* note 1, at 448 ("[A] bare Commission to a Factor to sell and dispose of Goods, is not a sufficient Authority for the Factor to trust any Person, or to give a farther Day of Payment than the Day of Sale of the Goods And by the general Power of doing as if it were his own, he may not trust out to an unreasonable Time, viz. beyond one, two or three Months, &c. the usual time allowed for the Commodities disposed of; if he does, he shall be answerable to his Principal out of his own Estate.").

124. See 21 VINER, *supra* note 1, at 525 ("If one *devise* to Trustees, and by express Clause therein gives them *Power to appoint Agents* to manage the Land, and they *appoint one then solvent*, and good, tho' after he prove insolvent, they shall not answer for him; [otherwise] if he were not solvent at the Time at which he was nominated. *But if* there were *no such Direction* or Power in the Will, the Trustees are bound to answer for her [sic] Agents at all Events."); see also MALYNES, *supra* note 1, at 111 ("Factors therefore must be very carefull, to follow the Commissions given them, very orderly and punctually; and because Merchants are not able to prescribe everie thing, so exactly unto their Factors as is convenient, it behooveth them to make good choice of the persons which they doe employ, for their welfare dependeth upon Trafficke.").

125. See GODOLPHIN, *supra* note 1, at 198 (noting that when an executor "does something that is a waste in him, . . . thereupon a *Devastavit* [is brought] in return against him"); see also *id.* at 203 ("A *Devastavit* or Waste in the Executor or other Administrator is when he doth mis-administer the Goods or Chattels of the deceased, or mis-manage that trust which is reposed in him . . .").

126. GODOLPHIN, *supra* note 1, at 203–06.

127. See, e.g., *Alexander v. Alexander*, 2 Ves. Sr. 640, 643, 28 Eng. Rep. 408, 410 (Ch. 1755) ("[I]f there is a power to A. of personal trust or confidence, to exercise his judgment and discretion, A. cannot say this money shall be appointed by the discretion of B. for *delegatus non potest delegare*.").

transfer it to another; for this being a Trust and Confidence reposed in the Party, cannot be assigned to a Stranger.”¹²⁸ In England, positions whose holder could assign them to others were designated “offices of profit,” but positions that were unassignable without prior authorization were “offices of trust.”¹²⁹

If a fiduciary did delegate power without prior authorization, he was absolutely liable for any resulting damage.¹³⁰ When the instrument specifically authorized delegation, the fiduciary was expected to follow appropriate standards, including the standard of care, in choosing agents.¹³¹ If delegation was authorized but an agent violated his own duties, the fiduciary was liable if the choice of agent was made negligently or otherwise in breach of duty. If delegation was authorized and the agent breached, the fiduciary was not liable if not at fault.¹³²

5. The Duty to Account

Fiduciaries then, as now, were expected to account to those for whom they worked.¹³³ This could involve accounting for

128. 1 BACON, *supra* note 1, at 203 (pointing out that for that reason an executor with authority to sell cannot sell by attorney); *see also* Combe’s Case, 9 Co. Rep. 75a, 76a, 77 Eng. Rep. 843, 844 (K.B. 1613) (“[I]f a man has a bare authority coupled with a trust, as executors have to sell land they cannot sell by attorney; but if a man has authority [sic], as absolute owner of the land, there he may do it by attorney”); *cf.* 21 VINER, *supra* note 1, at 525 (“Where there are 4 Trustees to grant Leases, and a Lease is made by Authority of 3 only, it is a Breach of Trust, and such Lessee can have no Relief in Equity.”); *see also id.* at 535 (stating the same).

129. *E.g.*, Dennis v. Loving, Hardres 424, 425–26, 145 Eng. Rep. 529, 529, 530 (Exch. 1668).

130. 21 VINER, *supra* note 1, at 525 (“But if there were no such direction or power [to appoint] in the will, the trustees are bound to answer for her [sic] agents at all events”); *id.* at 534 (“If one trustee directs the payment of the trust-money over to the other, . . . he charges and makes himself liable for the default of the other.”).

131. *See, e.g., id.* at 525 (“If one devise to trustees, and by express clause therein gives them power to appoint agents to manage the land, and they appoint one then solvent, and good, though after he prove insolvent, they shall not answer for him; [otherwise] if he were not solvent at the time at which he was nominated.”).

132. *See, e.g., id.* (stating that if trustees are given power to appoint agents, the trustees are not liable for the agent’s insolvency if he was solvent at the time appointed).

133. *See* 1 GENERAL ABRIDGMENT, *supra* note 1, at 5–7 (discussing the duties of factors, executors, and trustees, among others, to account); *id.* at 244 (citing examples of the executor’s duty to account); *id.* at 261–63 (discussing rules pertaining to accounting by guardians); *id.* at 397–98 (discussing rules pertaining to accounting by trustees); A TREATISE OF EQUITY, *supra* note 1, at 167 (“[I]n Chancery . . . an Infant might call his Guardian to an Account, even during his Minority, if there fell out any Thing that made it necessary.”).

profits¹³⁴ or repairing from the fiduciary's own assets any damage arising from a breach of his obligations,¹³⁵ including interest for money improperly retained.¹³⁶ Fiduciaries were entitled to indemnification for expenses incurred during the rightful conduct of their duties.¹³⁷

6. The Duty of Impartiality and Its Relevance to Special Interest Appropriations

The duty of impartiality inherent in the Founders' fiduciary law is especially relevant to the issue of special interest spending. In absence of a specific rule to the contrary (such as the rule permitting a creditor-executor to pay himself before he paid other creditors),¹³⁸ the common law courts favored impartiality

In *James v. Browne*, 1 U.S. (1 Dall.) 339, 339–40 (Pa. 1788), which granted an accounting among partners, Judge McLean noted that the common law action of accounting had fallen out of use because the chancellor granted an easier remedy.

134. 2 GENERAL ABRIDGMENT, *supra* note 1, at 5 (referring to the obligation of a trustee to disgorge profits made by investing the trust corpus); 21 VINER, *supra* note 1, at 524 (stating that a trustee properly using the money of another is accountable for profits made with it).

135. See *infra* Part IV.D; see also COWELL, INSTITUTES, *supra* note 1, at 119 (setting forth executor's duty to account); *id.* at 120 (setting forth administrator's duty to account); 2 GENERAL ABRIDGMENT, *supra* note 1, at 5 (referring to the obligation of a trustee to reimburse a trust for money lost due to failure to invest at interest); 2 NAVAL TRADE, *supra* note 1, at 456 ("A Factor is accountable for all lawful Goods which come safe to his Hands . . ."); 4 VINER, *supra* note 1, at 488 (following Attorney-General v. Mayor of Coventry, 2 Vern. 397, 400, 23 Eng. Rep. 856, 858 (H.L. 1700) (holding that when land in a charitable trust rose in value, the charities were to be "augmented in proportion")); *id.* at 493 ("If trustees lease the land at an under-value, the commissioners may order the trustees, or the tenant, as they shall see cause, to make it up."); *id.* at 494 ("Feoffees of a charity having mis-employed the Rents &c. were decreed to account, and the trust to be transferred to such persons as the judge of assise shall nominate . . . Trustees for charitable uses are no otherwise or further chargeable than any other trustee is . . ."); 21 *id.* at 525 ("Where a trust is put in one person, and another whose interest is entrusted to him is damnified by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damnified.").

136. See *Lomax v. Pendleton*, 7 Va. (3 Call) 538, 541 (1790) (holding trustee liable for interest on retained funds).

137. See 21 VINER, *supra* note 1, at 521 ("It is a rule, that the *cesty* [sic] *que Trust* ought to save the trustee harmless as to all damages relating to the trust; and it is within the reason of that rule, that where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which *cesty que trust* is discharged from being liable for a vastly greater sum lent, or from a plain and great Hazard of being so, the trustee ought to be repaid.").

138. See GODOLPHIN, *supra* note 1, at 216 (stating that under the common law, an executor, if a creditor, could satisfy his debt before the other creditors, if those creditors have no special priority, and that it was otherwise under civil and ecclesiastical law); cf. 4 VINER, *supra* note 1, at 490 (describing a case, subsequently reversed, in which a court wrongly ordered distribution to the Executor to the exclusion of charity to the poor within and without London, in apparent violation of the controlling language).

among members of the same class.¹³⁹ One reason the common law courts took a dim view of monopolies was that monopolies benefited some at the expense of others.¹⁴⁰ The bias of the High Court of Chancery—the source of most fiduciary law—toward impartiality was even stronger.¹⁴¹ In the absence of instructions to the contrary, the chancellor required fiduciaries who represented more than one beneficiary to treat them all fairly. For example, a broker acting for both the purchaser of stock and the creditor who financed the purchase was a trustee for both and could not sell prematurely for the benefit of the creditor and the prejudice of the purchaser.¹⁴²

In the event of loss to the parties, the same principle of impartiality governed.¹⁴³ If an executor found an estate insufficient to pay all general legacies, he was to abate all in

139. *E.g.*, *Letheullier v. Tracey*, Amb. 221, 221, 27 Eng. Rep. 146, 146 (Ch. 1754) (recounting the argument of counsel, including the later Lord Mansfield, that in the absence of the testator's direction to the contrary, great grandchildren not in being should be treated equally).

140. *See* *Case of Monopolies*, 11 Co. Rep. 84b, 86b, 77 Eng. Rep. 1260, 1263 (K.B. 1602) (stating, among the reasons for rejection of monopolies, "The sole trade of any . . . monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees . . ."); *see also* *The Case of the Tailors, &c. of Ipswich*, 11 Co. Rep. 53a, 53b, 77 Eng. Rep. 1218, 1219 (K.B. 1614) (stating that "the common law abhors all monopolies"—although the reason given in this case is that monopolies promote idleness); 2 *NAVAL TRADE*, *supra* note 1, at 45 ("A Monopoly is an Allowance of the King by his Grant, Commission, or otherwise, to any Person or Persons, for the sole buying, selling, making, working or using of any thing, by which other Persons are restrained of any Freedom or Liberty that they had before, or hindered in their lawful Trade. Tho' a Monopoly may be more truly defined to be, a Kind of Commerce in buying, selling, exchanging, or bartering, usurped by a few, and sometimes but by one Person, and forestalled from all others, to his or their private Gain, and to the Hurt and Detriment of other Men . . .").

141. *See* *GODOLPHIN*, *supra* note 1, at 216 (stating that under the common law, if an executor was also a creditor, the executor would satisfy his debt before the other creditors, but that under civil law [i.e., equity] and ecclesiastical law, the executor held no priority over other creditors).

142. *See, e.g.*, 2 *GENERAL ABRIDGMENT*, *supra* note 1, at 746 (citing an example of a broker acting as trustee for two parties and affirming the nature of his independent fiduciary duty to each); 21 *VINER*, *supra* note 1, at 511 (affirming that under English law, a broker acting on behalf of two parties to a transaction is trustee for both and thus has an independent fiduciary duty towards each party).

143. *See* 2 *MOLLOY*, *supra* note 1, at 328 (stating that if a factor serves several merchants and there is a loss, then all merchants must bear loss equally); 21 *VINER*, *supra* note 1, at 530 ("Trustee having paid a portion to an elder daughter at the time it was due, and the *estate decaying*, so that the others must come short, and not having taken security, must make good the loss to the rest, abating proportionably out of each party's share according to the loss.").

proportion.¹⁴⁴ Similarly, in the absence of a direction to the contrary, when the value of the estate of a fiduciary fluctuated, those for whom the estate was administered were all to benefit or lose in fair proportion.¹⁴⁵

In the century before the American Founding, the English chancellors decided a line of cases that defined how far a fiduciary could go in adopting “special interest appropriations” in a private sector context. In each case, a prior instrument—generally a will or marriage settlement—had granted a power of appointment allowing the power holder to distribute assets among persons in a class. Instruments granting the fiduciary this sort of discretion were said to create a “general trust,” as opposed to a “fixed trust,” where the governing instrument specified each person’s share in advance.¹⁴⁶ In cases of “general trust,” the court had to decide the permissible extent to which the power holder could depart from the principle of impartiality.

In keeping with the rule that fiduciaries must obey instructions, the power holder was bound to follow any criteria the donor had prescribed to guide the holder’s discretion. In *Carr v. Bedford*, the testator had left the residue of his estate for his executor to distribute among certain kin “according to their most need.”¹⁴⁷ The testator had ordered further that “a Care and Regard” should be shown to a particular nephew.¹⁴⁸ The court

144. See 1 GENERAL ABRIDGMENT, *supra* note 1, at 298–99 (stating that, while specific legacies have priority, general legacies must abate in proportion, even if the testator specified that a particular general legacy should be “paid in the first Place”).

145. See 4 VINER, *supra* note 1, at 488 (discussing the disposition of additional benefits from the rise in value of the corpus of a charitable trust and noting that when the land in a charitable trust rises in value, “the charities [are] to be augmented in proportion”); A TREATISE OF EQUITY, *supra* note 1, at 161–63 (describing the same cases and principle); 21 VINER, *supra* note 1, at 530 (“Trustee having paid a portion to an elder daughter at the time it was due, and the *estate decaying*, so that the others must come short, and not having taken security, must make good the loss to the rest, abating proportionably out of each party’s share according to the loss.”).

A case to the contrary, relying on the apparent contrary language of the deed, was reversed by the House of Lords. *Attorney-General v. Mayor of Coventry*, 2 Vern. 397, 23 Eng. Rep. 856 (Ch. 1700). For the reversal, see *id.* at 858 (“[T]he dismissal was reversed, and the defendants ordered to account for the improved value of the land, and the charities to be augmented in proportion.”).

146. See *Civil v. Rich*, 2 Chan. Cas. 309, 309–10, 22 Eng. Rep. 815, 815 (Ch. 1679) (discussing distribution of a general trust bequeathed in a will); see also *Weld v. Lady Wentworth*, 23 Rep. T. Finch 139, 141, 23 Eng. Rep. 76, 77 (Ch. 1674) (holding that an Act of Parliament had created a general rather than a special trust).

147. 2 Ch. Rep. 146, 146–47, 21 Eng. Rep. 641, 641–42 (Ch. 1678–1679).

148. *Id.* at 642.

directed the executor to exercise his discretion according to those criteria and observed that the executor was empowered to bestow more on the nephew than on others. Likewise, in *Civil v. Rich*, decided the same year, the testator had left “all the Residue of his Estate . . . to Sir Charles Rich . . . in Trust with him, wherewith to reward his Children and Grandchildren according to their Demerit [sic].”¹⁴⁹ Rich gave all the property in his control to one member of the class. The court upheld this exercise of discretion, stating that the executor “is to give or distribute according to their Demerits; therefore he is Judge.”¹⁵⁰

However, in *Craker v. Parrott* the testator specified no criteria by which his executrix, his second wife, should distribute his estate among his four daughters, other than a grant of power to distribute “as she shall think fit.”¹⁵¹ The executrix bestowed £1,074 on one child, £257 on each of two others, but only £50 on the eldest, who, unlike the others, was the testator’s daughter by an earlier wife.¹⁵² This was held to be an unduly partial distribution and was set aside.¹⁵³ The chancellor opined that the testator’s purpose apparently had been to keep the children in obedience to the executrix while she was a widow.¹⁵⁴ After she remarried, “he seems to give her a more arbitrary Power; but that doth not make the Children rightless.”¹⁵⁵

What “rights” the children might have in such a situation was clarified somewhat in *Gibson v. Kinven*.¹⁵⁶ There, the testator had given his wife, as executrix, a power of appointment among his three surviving children.¹⁵⁷ She provided well for two, but left the plaintiff only five shillings.¹⁵⁸ The case report tells us:

[T]he *Lord Chancellor* decreed for the plaintiff; for that the distribution in this case was so very unequal, and that without any good reason shewn [sic] to warrant it: and therefore he

149. 2 Chan. Cas. at 309, 22 Eng. Rep. at 815.

150. *Id.*

151. 2 Ch. Cas. 228, 228, 22 Eng. Rep. 921, 921 (Ch. 1677).

152. *Id.* at 922.

153. *Id.*

154. *Id.*

155. *Id.*

156. 1 Vern. 66, 23 Eng. Rep. 315 (Ch. 1682).

157. *Id.*

158. *Id.*

thought fit to rectify it in this case, and could not do it otherwise than by decreeing an equal distribution.¹⁵⁹

Thus, the “right” retained by a member of the class was not to be disadvantaged without some sort of good cause. This was confirmed in *Wall v. Thurbane*, where the chancellor indicated that equity would intervene if a member of the class were excluded due merely to “causeless displeasure,”¹⁶⁰ and again in *Astry v. Astry*.¹⁶¹ On the other hand, in *Thomas v. Thomas*, the court allowed the widow to disinherit a child without cause—but only because of the unique wording in the will.¹⁶² The court made it clear that, otherwise, a fiduciary’s exercise of discretion was subject to judicial review. The difference was that the power at issue in *Thomas* was a “power special and particular, that the wife might dispose to one or more; and not like the cases of a general trust in the executrix to distribute amongst the younger children at discretion; there an unreasonable and indiscreet disposition may be controlled by a Court of Equity”¹⁶³

Throughout the eighteenth century, the High Court of Chancery worked out what did, and did not, constitute reasons supporting an exercise of discretion by the holder of a power of appointment. Essentially, permissible reasons were those the donor himself would have applied, rather than reasons that served primarily the purposes of the power holder. As *Craker* demonstrated, for example, the fact that the donor’s child was born of a woman other than the power holder was not a legitimate reason.¹⁶⁴ Yet the fact that the donor already had settled a substantial sum on one child, leaving the others in greater need, was a legitimate basis for favoring the others.¹⁶⁵ In this, as in other cases, the chancellor permitted partiality in a

159. *Id.* at 316.

160. 1 Vern. 414, 414, 23 Eng. Rep. 555, 555 (Ch. 1686).

161. Prec. Chan. 256, 256, 24 Eng. Rep. 124, 124 (Ch. 1706) (citing *Wall v. Thurbane* for the principle that a power of appointment may be exercised unequally so long as it is not done in an illusory manner).

162. 2 Vern. 513, 513, 23 Eng. Rep. 928, 928 (Ch. 1705).

163. *Id.* (emphasis added); see 1 GENERAL ABRIDGMENT, *supra* note 1, at 344–45 (citing *Thomas* and making the same assertion); see also *Craker v. Parrott*, 2 Ch. Cas. 228, 230, 22 Eng. Rep. 921, 922 (Ch. 1677) (reporter’s note) (“Equity will in many Cases control the unequal Acts of Trustees, Guardians, &c. though by the Deed or Will they are vested with a discretionary or arbitrary Power.”).

164. 2 Ch. Cas. at 230, 22 Eng. Rep. at 922.

165. See, e.g., *Burrell v. Burrell*, Amb. 660, 660, 27 Eng. Rep. 428, 428 (Ch. 1768) (upholding the choice by the testator’s wife to distribute the estate primarily to four daughters to the detriment of a son who was adequately provided for by other means).

smaller context so as to promote impartiality in a larger.¹⁶⁶ Still another permissible ground for discrimination was the fact that the disfavored child had disobediently made an improvident marriage.¹⁶⁷ In general, the court was more likely to defer to the power holder's discretion when the imbalance in the disposition was small but require a truly compelling justification when the imbalance was larger.¹⁶⁸

D. *Proto-Judicial Review: Remedies Imposed on Defaulting Fiduciaries*

A court could impose damages on a fiduciary who acted outside his authority¹⁶⁹ or was guilty of negligence, partiality,¹⁷⁰ or other breach.¹⁷¹ For example, an administrator or executor guilty

166. See, e.g., *Duke of Bridgwater v. Egerton*, 2 Ves. Sr. 121, 123–24, 28 Eng. Rep. 80, 81 (Ch. 1750–1751) (involving a father's testamentary exercise of a power of appointment granted by a prior marriage settlement and stating, “[The father/testator/power holder] might have made a very material difference between [the children]; which power the court would not take from the father, *provided he made a reasonable provision according to the intent of the settlement*. He intended, what should be raised under that term should go to the daughters, who were properly to be provided for by money-portions, and to provide for the plaintiff [son] in another manner. *In his will he does not say their portions but fortunes; which is their whole fortune in the world.*” (emphasis added)).

167. See *Maddison v. Andrew*, 1 Ves. Sr. 57, 59, 27 Eng. Rep. 889, 889 (Ch. 1747) (distributing a smaller share of the estate to testator's daughter who married without parental consent).

168. See, e.g., *id.* at 890 (“[I]f she [the power holder] makes an inequality, the court will not enter into the motives of it, unless it be illusory; as in a case where a mother, having such a power, gave only an eleventh part to a step-daughter. Yet even where but a trifle has been given to one, if that child by misbehaviour deserved it (though it must be very gross indeed) the court will not vary it.”); cf. *Alexander v. Alexander*, 2 Ves. Sr. 640, 640, 28 Eng. Rep. 408, 408 (Ch. 1755) (holding that it was within the power of a mother to unfairly distribute a deceased father's estate to his children by giving only £100 of a nearly £6000 sum to one of his daughters).

169. See 2 MOLLOY, *supra* note 1, at 329 (stating that a factor is personally liable for acting outside his authority); see also 3 BACON, *supra* note 1, at 564 (referring to recovery in an action on the case against a servant who by neglect allows his master's cattle to die and recovery in account or detinue against a servant who neglects his duty).

170. 2 NAVAL TRADE, *supra* note 1, at 448 (stating that a factor who improperly grants credit “shall be answerable to his Principal out of his own Estate”); 4 VINER, *supra* note 1, at 496 (recording the imposition of damages on charitable trustees because of their “extreme negligence”); 21 *id.* at 525 (“Where a Trust is put in one Person, and another whose Interest is intrusted to him is damnified by the *Neglect* of such as that Person employs in the Discharge of that Trust, he shall answer for it to the Party damnified.”).

171. See COWELL, INSTITUTES, *supra* note 1, at 51 (“Nor shall he [the guardian] take any thing of the Land of the Heir as he being underage, more then the ordinary customs and reasonable Services. And this without destruction or waste either of men or goods; which if he shall do, whether there do any prohibition precede or not, he shall loose his ward and pay Damages.”). If the guardian damaged the land, the ward had an action for waste. *Id.* at 52; see also *Pettifer's Case*, 5 Co. Rep. 32a, 32a–32b, 77 Eng. Rep. 102, 102 (K.B. 1603) (reporting dicta to the effect that executors are chargeable to creditors for goods of deceased sold by executors for their own benefit); DUKE, *supra* note 1, at 23–24 (damages chargeable for lease entered into as a result of a breach of trust); GODOLPHIN,

of a breach that caused injury to creditors was liable for simple damages in an action *de bonis propriis* (“from his own goods”).¹⁷² Moreover, there were remedies beyond that of simple damages. In equity, these included treble damages;¹⁷³ specific performance instead of, or in addition to, damages;¹⁷⁴ and reformation of documents executed in violation of duty. Thus, if a fiduciary had executed a lease at an improperly low rent, the court could order the rent increased.¹⁷⁵

Additionally, an equity court finding an act to be in breach of duty could simply invalidate it. Authority was strictly construed, and *ultra vires* acts could be treated as void,¹⁷⁶ as when courts nullified wrongful conveyances against those with notice of the wrong.¹⁷⁷ Title arising from a breach of trust was not good,¹⁷⁸

supra note 1, at 198 (discussing liability in *devastavit* for waste); 21 VINER, *supra* note 1, at 531 (“Cesty [sic] que trust in an action on the case against his trustee, shall recover for breach of trust in damages.”); *id.* at 533 (“If upon the Proofs or Circumstances, the Court be satisfied that there by [intentional fraud], or any evil Practice, Fraud, or ill Intent in him that permitted his *Companion to receive the whole Profits*, he may be charg’d, tho’ he received nothing.”).

172. See, e.g., 1 NELSON, *supra* note 1, at 172–76 (discussing when an administrator is and is not liable to creditors).

173. See 2 BACON, *supra* note 1, at 686 (stating that treble damages are awarded when a guardian of a minor’s trust is found guilty of waste).

174. DUKE, *supra* note 1, at 26–27 (stating that in addition to damages assessed, a decree required executors to repair, build, and maintain property in trust).

175. *Id.* at 33 (noting that where tenant was undercharged so rent was insufficient for purpose of relieving the poor, then chancery ordered that rent be increased).

176. See 1 COMYNS, *supra* note 1, at 458 (stating that authority must be strictly “pursued” and acts in contravention of it are void).

177. See 2 BACON, *supra* note 1, at 686 (stating that a guardian’s wrongful conveyance was voidable); DUKE, *supra* note 1, at 23–24 (stating that lease entered into as a result of a breach of trust was void); *id.* at 33 (referring to cancellation of leases executed for less than true value); 3 VINER, *supra* note 1, at 538 (stating that a bailiff “may make a Lease at Will, if he reserves a Rent; but if he reserves no Rent the Lease is void”); 4 *id.*, *supra* note 1, at 490 (reporting that a lease made to defraud a charitable trust was void); *id.* at 492 (reporting that where “Charity-lands were leased at a great under-value,” the lease was declared void); *id.* at 493 (“If a lessee of land given to such a use [charity] *does waste* and destruction upon the land . . . this is a mis-employment” and “the commissioners may decree the lease to be void and surrendered, and that the lessee shall make a recompence.”); *id.* at 496 (“The governors of a free-school *joined in a long lease of Houses at 5 l. a year, though worth 50 l. a Year*. The lords commissioners decreed the assignee of this lease to surrender it back, and ordered the lessee and the governors to pay 70 l. costs. And Ld. C. King affirm’d the decree as to the surrendering, but reduced the costs.”).

On the role of notice, see 21 VINER, *supra* note 1, at 528 (stating, if title passes through a breach of trust, “whoever claimed under this conveyance, having notice of the trust . . . should be liable to make good the estate”).

178. 21 VINER, *supra* note 1, at 527 (“This would be a breach of trust, and the title not good.”).

unless the purchaser was bona fide.¹⁷⁹ Finally, a court could—and sometimes did—remove a defaulting fiduciary from his position.¹⁸⁰

We now advance two centuries to apply this law to the questions before us: Do the courts have a role in reviewing special interest spending under the Taxing-and-Spending Clause¹⁸¹ for compliance with the “general Welfare” limitation—and, if so, what criteria for review should courts apply?

V. APPLYING THE FOUNDERS’ STANDARDS TO SPECIAL INTEREST SPENDING

A. *The Threshold Question: Propriety of Judicial Oversight*

At least three kinds of non-criminal fiduciary breaches can occur in the congressional scramble for special interest appropriations. First, Members of Congress absorbed with obtaining federal support for local projects can neglect their duty of care, since they have less time and energy to spend on important national issues. The Constitution seems to have rejected the idea of punishing a legislator for this sort of breach, beyond the possibility of expulsion from the applicable House¹⁸² or defeat for reelection. Individual Members of Congress are not subject to impeachment,¹⁸³ the traditional remedy for breach of trust.¹⁸⁴ Indeed, the Founders’ fiduciary law offers no precedent

179. *Id.* at 531 (“[T]he Plaintiff should *enjoy* the lands *against the defendant*, and all claiming under him that had notice of the trust. And if the lease were sold to such as had no notice of the trust, then the *defendant shall pay* to the plaintiff so much money as the lease was worth.”).

180. *E.g.*, 2 BACON, *supra* note 1, at 686 (stating that a defaulting guardian is subject to loss of guardianship); 4 VINER, *supra* note 1, at 494 (“Feoffees of a charity having *mis-employed the rents &c.* were *decreed to account*, and the trust to be transferred to such persons as the judge of assise shall nominate . . .”); 21 *id.* at 532 (“A trustee was removed out of the trust, though much against his will.”).

Originally, a defaulting factor always lost his position. Subsequently, the more common remedy was damages. 2 MOLLOY, *supra* note 1, at 327 (“*He that exceeds his Commission, shall lose his Factorage.* But Time and Experience hath taught them to know better Things; for now it is . . . *His Purse must pay for it.*”); see also MALYNES, *supra* note 1, at 111 (making the same point).

181. U.S. CONST. art. I, § 8, cl. 1.

182. *Id.* § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.”).

183. *Id.* art. II, § 4 (limiting impeachment to “The President, Vice President and all civil Officers of the United States”).

184. In the Anglo-American tradition, the scope of “high crimes and misdemeanors” has been closely congruent with the breach of public trust. Documenting this point

for judicial imposition of remedies on individual legislators who breach non-criminal public trust duties,¹⁸⁵ and, of course, the Constitution specifically interdicts judges from doing so.¹⁸⁶ In any event, judicial inquiry into how individual legislators balance their responsibilities as both representatives of their constituents and employees of the nation¹⁸⁷ would be a difficult sort of inquiry and liable to abuse.

Second, appropriations may exceed the limits of congressional powers for reasons other than a breach of the rule of impartiality. While the Supreme Court now adheres to the position that the Taxation Clause¹⁸⁸ is a Taxing-and-Spending Clause—that is, it contains an independent, implied power to spend for the general welfare¹⁸⁹—the Court also has said that there are theoretical limits. For example, the Court has said it would invalidate a condition in a grant-in-aid to the states that

would take another article (which will likely be forthcoming). For some eighteenth century examples, see ABSTRACT OF THE ARTICLES OF CHARGE, ANSWER, AND EVIDENCE, UPON THE IMPEACHMENT OF WARREN HASTINGS, ESQ. 21, 69 (1788) (alleging Hastings's breach of trust); 20 H.L. JOUR. 197 (1715), *available at* <http://www.british-history.ac.uk/report.asp?compid=38481&strquery=articles%20of%20impeachment%20a%20gainst> (setting forth the articles of impeachment of the Earl of Strafford, accusing him of "Breach of . . . several Trusts"); 20 H.L. JOUR. 136–44 (1715), *available at* <http://www.british-history.ac.uk/report.asp?compid=38455&strquery=articles%20of%20impeachment%20of%20high%20crimes> (setting forth the articles of impeachment of the Earl of Oxford, accusing him of several breaches of trust); 16 H.L. JOUR. 744–45 (1701), *available at* <http://www.british-history.ac.uk/report.asp?compid=13922&strquery=articles%20of%20impeachment%20a%20gainst> (setting forth the articles of impeachment of Lord Halifax, also accusing him of breach of trust).

185. Damages were imposed on *executive* officers who breached their duties. *See* *Horsley v. Bell*, Amb. 770, 773, 27 Eng. Rep. 494, 495 (Ch. 1778) (holding road commissioners personally liable for breach of public trust); *Rowning v. Goodchild*, 2 Bl. W. 906, 908, 96 Eng. Rep. 536, 536 (C.P. 1773) (holding that an action on the case lay against a deputy postmaster who failed to deliver letters).

186. *See* U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives shall . . . be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

187. *See id.* (providing that "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.").

188. *See id.*, § 8, cl. 1.

189. *See* *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (finding that the withholding of federal highway funds to a state with a minimum drinking age below twenty-one was a valid use of Congress's spending power); *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (stating that Congress can spend money in aid of the general welfare); *Steward Machine Co. v. Davis*, 301 U.S. 548, 586–87 (1937) (discussing the spending power for the general welfare in relation to the Social Security Act); *United States v. Butler*, 297 U.S. 1, 74–75 (1936) (stating that the Taxing-and-Spending clause has limits).

was coercive or unrelated to the purpose of the grant.¹⁹⁰ Third, special interest appropriations can violate the fiduciary norm of impartiality—the rule that, in the absence of a prescription to the contrary in the governing instrument, fiduciaries managing property for more than one beneficiary have a duty to treat all beneficiaries impartially.¹⁹¹

With judicial review unavailable in breaches of the first kind, one still may ask whether judicial review is appropriate in breaches of the second or third kind.

An influential school of thought contends that courts should not police the boundary of federal powers outside the area of enumerated rights: that such matters should be determined primarily through the political process.¹⁹² The Supreme Court adopted this position in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁹³ only to abandon it seven years later in *New York v. United States*.¹⁹⁴ When illuminated by the Founders' fiduciary law and the ratification record, the choice between *Garcia* and *New York* is not difficult. In fiduciary jurisprudence, Anglo-American courts had long held that power must be construed strictly, and they commonly invalidated actions that were *ultra vires* otherwise in violation of fiduciary duty.¹⁹⁵ And while English courts could not void acts of Parliament, they could and did impose damages on executive branch officials who violated their public trust.¹⁹⁶

That the Founding Era record shows judicial nullification of *ultra vires* congressional acts to have been expected now seems beyond doubt.¹⁹⁷ The Constitution rejected the notion of Parliamentary omni-competence in favor of a list worthy of a

190. *Dole*, 483 U.S. at 211 (stating that such conditions would be unconstitutional).

191. See *supra* Part IV.C.6.

192. The argument that policing the limits of Congress's enumerated powers should be left to the political process as structured by the federal system, and that the courts have little role to play, is generally associated with Professors Herbert Wechsler and Jesse Choper. See Baker, *supra* note 1, at 219 n.75 (collecting relevant writings).

193. 469 U.S. 528, 552 (1985) (relying on writings of Wechsler and Choper to conclude, "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

194. 505 U.S. 144, 181–82 (1992) (striking down a federal law as exceeding federal authority and invading the state sphere).

195. See *supra* note 176 and accompanying text.

196. See *Horsley v. Bell*, Amb. 770, 773, 27 Eng. Rep. 494, 495 (Ch. 1778).

197. Important recent scholarship documenting the point includes works by Barnett, *supra* note 1 and Treanor, *supra* note 1.

“great power of attorney.”¹⁹⁸ Prevailing Whig political theory held that actions in breach of public trust—and specifically those in excess of authority—were void.¹⁹⁹ During the Confederation Era, American courts asserted and exercised a competence to void laws that violated the Articles or applicable state constitutions.²⁰⁰ During the ratification debates, Federalist spokesmen affirmed that the same approach would apply under the Constitution. When Anti-Federalists argued that Congress might over-creatively interpret its mandate and exceed its

198. See *supra* note 29 and accompanying text.

199. For example, the liberal British minister and influential political commentator Richard Price had written, “[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.” RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA (1776), reprinted in CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA 15 (David S. Berkowitz & Samuel E. Thorne eds., 1979); see also The Debates in the Convention of the Commonwealth of Virginia (June 18, 1788), in 3 ELLIOT’S DEBATES, *supra* note 1, at 1, 501 (remarks of James Madison) (stating that even the British king was not empowered to “dismember the empire”); cf. SECOND TREATISE OF CIVIL GOVERNMENT, *supra* note 1, § 131 at 186 (“[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. Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN STATE L. REV. 415, 437 (2003). James Madison offered analogous thoughts as well:

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 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.

JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in BASIC DOCUMENTS RELATING TO THE RELIGIOUS CLAUSES OF THE FIRST AMENDMENT 7, 8 (1965).

See also Harry Innes to John Brown, Danville, Ky. (Dec. 7, 1787), in 8 DOCUMENTARY HISTORY, *supra* note 1, at 221, 221–22 (stating in items 3d through 10th that Congress had no more right to disadvantage some citizens for the benefit of others by ceding navigation of the Mississippi than it had to close the Chesapeake). Brown was a Virginia state senator and delegate to Congress. Innes was the attorney general for the District of Kentucky.

200. See Treanor, *supra* note 1, at 473–541 (discussing thirty-one pre-*Marbury* American cases in which statutes were struck down as unconstitutional); *id.* at 541–54 (discussing seven additional cases in which at least one judge on a court concluded that a statute was unconstitutional); see especially *id.* at 473–97 (discussing pre-Constitution cases).

powers,²⁰¹ part of the Federalist response was that any *ultra vires* actions could be judicially nullified. Illustrative are comments by future Chief Justice John Marshall at the Virginia ratifying convention:

Can [Congress] go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.²⁰²

The historical record shows a fair number of examples of Federalists taking this position,²⁰³ and Anti-Federalists, far from disagreeing, insisted on it.²⁰⁴ As a practical matter, they had a point: if impeachment is unavailable and voters, unable to change the rules of a distasteful game, feel forced to reward those who play it well, then there is little alternative to judicial review.

B. *The Standard of Review for Special Interest Appropriations*

1. The Basic Standard for the Exercise of Discretion

The Founders' fiduciary law was that if the instrument creating the fiduciary's powers granted discretion, then that discretion had to be exercised in accordance within any guidelines specified in the instrument.²⁰⁵ When no grounds were specified—as when the instrument authorized the fiduciary to

201. Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L. J. 469, 473–75 (2003) (collecting and summarizing Anti-Federalist objections).

202. The Debates in the Convention of the Commonwealth of Virginia (June 20, 1788), in 3 ELLIOT'S DEBATES, *supra* note 1, at 1, 553 (remarks of John Marshall).

203. *See, e.g., id.* at 443 (remarks of George Nicholas) (“[W]ho is to determine the extent of such [federal] powers? I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void, or else the people will have a right to declare it void.”); *see also* Barnett, *supra* note 1, at 121–29 (collecting quotations from the federal convention, the state ratifying convention, and the period immediately after ratification and before adoption of the Bill of Rights); *see generally id.* (reciting many references to judicial review during the Founding Era); *see also* Treanor, *supra* note 1 (analyzing the application of judicial review in both state and federal case law prior to *Marbury v. Madison*).

204. *See, e.g.,* The Debates in the Convention of the Commonwealth of Virginia (June 12, 1788), in 3 ELLIOT'S DEBATES, *supra* note 1, at 1, 325 (remarks of Patrick Henry) (opposing the Constitution and expressing fear that federal courts might not emulate Virginia's courts in opposing unconstitutional acts).

205. *See supra* notes 147–150 and accompanying text.

act “as he or she shall see fit”—then he or she still had to show good cause for any significant deviations from the principle of equality.²⁰⁶ “Good cause” meant that the fiduciary’s disposition had to further some purpose that would have been shared by the maker of the instrument, not merely some personal cause of the fiduciary.²⁰⁷ The courts invalidated or reformed dispositions that violated these standards.²⁰⁸

The Constitution is an instrument that grants Congress power to appropriate money. It specifically mentions appropriations,²⁰⁹ and it grants enumerated powers that require money to execute them.²¹⁰ The Necessary and Proper Clause²¹¹ clarifies that Congress is to enjoy discretion over how to execute its enumerated powers.²¹² Current Supreme Court doctrine also empowers Congress to appropriate at its discretion for non-enumerated purposes.²¹³

If the Constitution had granted Congress power to appropriate “as it sees fit”—that is, with no explicit standards to guide its discretion—the Founding Era standard of review would have been that of “good cause.”²¹⁴ Under that standard, if an appropriation bill challenged in court disproportionately benefits some interests over others or some localities over others, then Congress would have to show that its actual purpose was legitimate and the appropriation was rationally related to that purpose. This standard of review would be similar to “rational basis with bite,” the standard routinely applied in

206. See *supra* notes 151–155 and accompanying text.

207. See *supra* note 165 and accompanying text.

208. See, e.g., *supra* note 159 and accompanying text.

209. See U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”); *id.* § 8, cl. 12 (“[B]ut no Appropriation of Money to that Use shall be for a longer Term than two Years.”).

210. E.g., *id.* (“To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”).

211. *Id.* art. I, § 9, cl. 18 (“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.”); see generally Natelson, *Necessary and Proper*, *supra* note 1 (discussing the role of the Necessary and Proper Clause).

212. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“[T]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it.”).

213. See *supra* note 10 and accompanying text.

214. See *supra* notes 151–155 and accompanying text.

substantive due process cases before 1937 and still employed in selected cases today.²¹⁵ We shall further discuss that standard presently.²¹⁶

2. Does the “General Welfare” Limitation Raise the Level of Discretion?

Yet, it may be objected, the Constitution does not grant Congress power to spend “as it sees fit.” It grants power to spend for the general welfare.²¹⁷ Perhaps that means the appropriate standard of review is higher than “rational basis with bite.” One’s response to this objection depends, obviously, on how one construes the “general Welfare” limitation. My response is that the phrase is merely declaratory of a limitation the Founders believed inherent in free government and does not have force beyond that.

The Whig tradition had glorified the ideal of public servants rising above “corruption” (promotion of private and local interests) and governing as disinterested guardians of the public good or general welfare.²¹⁸ Virtually all the participants in the constitutional debate who addressed the issue—whatever their views on the Constitution—seem to have adopted this view. All confessed a commitment to embedding it into the foundations of American government. James Madison, for example, reflected

215. In “*Lochner*-Era” cases such as *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923), the courts sustained laws infringing constitutional rights if (a) the legislature’s actual purpose (not any conceivable purpose) was legitimate and (b) the means selected were reasonably related to the actual purpose. In *Meyer*, the Court stated, “The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.” *Id.*; cf. *Lawrence v. Texas*, 539 U.S. 558, 582–85 (2003) (assuming that the legislative purpose for an anti-sodomy law was moral and declining to consider other possible bases for the law).

216. See *infra* Part V.B.3.

217. 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.”).

218. See, e.g., BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 46–48 (3d prtng. 1970) (citing, among other points, Bolingbroke’s ideal of the “Patriot Prince”); see also *id.* at 84–85 (citing Edmund Burke’s description of Parliament as “a *deliberative* assembly of *one* nation, with *one* interest, that of the whole, where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole”).

For another view of the Whig concept of the “public good”—also called “good of the whole,” “general good and safety,” and various other terms presaging “common Defence and general Welfare”—see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 53–65 (1969).

the near-universal consensus when he wrote that government officials should be “*impartial* guardians of a common interest”²¹⁹ and when he suggested that for the federal government to grant a monopoly would be a breach of trust and outside its enumerated powers.²²⁰ The records of the federal convention contain numerous comments about the need to promote governmental impartiality,²²¹ and the instrument that convention produced contains numerous provisions designed to do so: provisions to ensure that naturalization and bankruptcy laws are uniform;²²² to prevent conflicts of interest;²²³ to ensure regularity in the spending process;²²⁴ to render uniform all duties, imposts, and excises;²²⁵ to apportion direct taxes among states;²²⁶ and to

219. THE FEDERALIST NO. 46, *supra* note 1, at 299 (emphasis added); *see also* THE FEDERALIST NO. 54, *supra* note 1, at 335 (James Madison) (arguing that the census should be conducted impartially); THE FEDERALIST NO. 57, *supra* note 1, at 343 (James Madison) (urging that representation in House of Representatives should be “scrupulously impartial to the rights and pretensions of every class and description of citizens”).

220. James Madison to George Washington, New York (Oct. 18, 1787), in 13 DOCUMENTARY HISTORY, *supra* note 1, at 408, 408.

221. *See, e.g.*, 1 FARRAND, *supra* note 1, at 88 (reporting Pierce Butler as stating that unity in the executive will promote impartiality); *id.* at 139 (reporting Elbridge Gerry as making the same point); *id.* at 427–28 (reporting Madison as stating that several aspects of the Senate would promote impartiality in the body); *id.* at 580 (reporting Edmund Randolph speaking on the importance of an impartial census); 2 *id.* at 42 (reporting Gouverneur Morris speaking on the importance of an impartial impeachment trial); *id.* at 124 (reporting James Madison speaking on impartiality in representation); *id.* at 288 (reporting that Oliver Ellsworth affirmed the desirability of impartial rewards for merit).

222. *E.g.*, U.S. CONST. art I, § 8, cl. 4 (“To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.”).

223. *Id.* art I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”); *id.* art. II, § 1, cl. 7 (“The President shall . . . receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”).

224. *See id.* art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

225. *See id.* art I, § 8, cl. 1 (“[A]ll Duties, Imposts and Excises shall be uniform throughout the United States.”).

226. *See id.* art I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . .”).

treat sea ports equally.²²⁷ Other provisions structured federal institutions, such as the executive, the Senate, and the Electoral College, so as to advance governmental impartiality.²²⁸ The word “proper” in the Necessary and Proper Clause²²⁹ apparently was inserted to communicate that the Congress’s use of incidental means was subject to the standards of public trust.²³⁰

The importance of impartiality to the founding generation is reflected in the singular fact that, despite all the protections for impartiality imbedded in the proposed Constitution, Anti-Federalists still thought they could score points by arguing that those protections were insufficient. “Agrippa” (John Winthrop), for example, laid down a basic standard of government impartiality early in his series of essays for the *Massachusetts Gazette*: “I believe that it is universally true, that acts made to favour a part of the community are wrong in principle,”²³¹ and “[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 the citizens.”²³² He contended that the Constitution might enable Congress to treat the country unequally—by granting exclusive trading charters and other monopolies,²³³ by imposing taxes that impacted various parts of

227. See *id.* art I, § 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”).

228. See I FARRAND, *supra* note 1, at 88 (reporting Pierce Butler’s comments on the impartiality of the proposed chief executive); *id.* at 139 (reporting Elbridge Gerry’s comments on the impartiality of the proposed chief executive); *id.* at 427–28 (reporting James Madison’s comments on the impartiality of the proposed Senate); Fabius II, PA. MERCURY (Apr. 15, 1788), in 17 DOCUMENTARY HISTORY, *supra* note 1, at 120, 124–25 (expressing John Dickinson’s opinion that the Electoral College was constructed so that “utterly vain will be the unreasonable suggestions derived from *partiality*”).

229. U.S. CONST. art. I, § 8, cl. 18 (“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.”).

230. See Natelson, *Necessary and Proper*, *supra* note 1, at 284–85 (discussing the appropriate inferences to be derived from the Founders’ use of “proper”); see also 2 FARRAND, *supra* note 1, at 391 (reporting James Wilson’s thoughts at the federal convention to the effect that judges would declare “improper” laws void).

231. Agrippa III, MASS. GAZETTE (Nov. 30, 1787), in 4 DOCUMENTARY HISTORY, *supra* note 1, at 342, 352.

232. Agrippa VII, MASS. GAZETTE (Dec. 18, 1787), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 483, 484–85; see also Agrippa XII, MASS. GAZETTE (Jan. 18, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 741, 742 (“The first principle of a just government is, that it shall operate equally.”).

233. See Agrippa VI, MASS. GAZETTE (Dec. 14, 1787), in 4 DOCUMENTARY HISTORY, *supra* note 1, at 426, 428 (arguing that exclusive grants “defeat the trade of the out-ports, and are also injurious to the general commerce”); see also Agrippa XIV, MASS. GAZETTE

the country differently,²³⁴ or by alienating part of a state to a foreign power.²³⁵ “In a republick,” he said, “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.”²³⁶ To better assure his impartial ideal, “Agrippa” proposed a bill of rights and various other measures.²³⁷

The Federalists responded by telling the public that the Constitution would create an impartial government. John Dickinson’s “Fabius” essays dwelt extensively on the goals of general or common welfare, as opposed to welfare merely local or partial.²³⁸ He reassured his audience that the new federal authority was limited to matters pertaining to the general welfare and did not extend to local or special interests, which were reserved to the states.²³⁹ When Anti-Federalists at the Virginia ratifying convention expressed fear that the new

(Jan. 25, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 797, 798 (condemning “exclusive charters”); Agrippa IX, MASS. GAZETTE (Dec. 28, 1787), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 540, 540 (arguing that the Constitution ought to limit the treaty power to prevent monopolies and other types of unequal treatment of the states).

234. See Agrippa VII, MASS. GAZETTE (Dec. 18, 1787), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 483, 485 (explaining the economic ramifications of implementing different types and degrees of taxes in the different states).

235. See Agrippa IX, MASS. GAZETTE (Dec. 28, 1787), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 540, 540 (arguing that the Constitution ought to limit the treaty power to prevent alienation of part of a state without consent of that state’s legislature); see also Agrippa X, MASS. GAZETTE (Jan. 1, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 576, 577–78 (suggesting a resolution to effectuate the proposal to limit treaty power as previously discussed).

236. Agrippa XIV, MASS. GAZETTE (Jan. 25, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 797, 798 (contrasting this ideal with the granting of commercial monopolies). Another Anti-Federalist who lauded the ideal of governmental impartiality was James Monroe, the future President. See *The Debates in the Convention of the Commonwealth of Virginia* (June 10, 1788), in 3 ELLIOT’S DEBATES, *supra* note 1, at 1, 208–09 (remarks of James Monroe) (seeking to preserve the post-revolutionary fact that “the entire government [was] in the hands of one order of people only—freemen; not of nobles and freemen.”).

237. See Agrippa XVI, MASS. GAZETTE (Feb. 5, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 863, 864 (proposing a bill of rights and means to capitalize upon the advantages of a strong system of separation of powers and checks and balances); see also Agrippa X, MASS. GAZETTE (Jan. 1, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 576, 577–78 (suggesting resolutions to better assure equal treatment); Agrippa IX, MASS. GAZETTE (Dec. 28, 1787), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 540, 540 (arguing that the Constitution ought to limit the treaty power to prevent various kinds of unequal treatment).

238. E.g., Fabius V, PA. MERCURY (Apr. 22, 1788), in 17 DOCUMENTARY HISTORY, *supra* note 1, at 195; Fabius I, PA. MERCURY (Apr. 12, 1788), in 17 DOCUMENTARY HISTORY, *supra* note 1, at 74.

239. See Fabius VIII, PA. MERCURY (Apr. 29, 1788), in 17 DOCUMENTARY HISTORY, *supra* note 1, at 246, 249 (affirming that each state will possess “every power proper for governing within its own limits for its own purposes, and also for acting as a member of the union”).

government might use its treaty power to transfer to foreign powers territory important to Westerners, Edmund Randolph rose in defense:

To make a treaty to alienate any part of the United States, will amount to a declaration of war against the inhabitants of the alienated part, and a general absolution from allegiance. They will never abandon this great right. . . . The gentleman wishes us to show him a clause which shall preclude Congress from giving away this right. It is first incumbent upon him to show where the right is given up. *There is a prohibition naturally resulting from the nature of things, it being contradictory and repugnant to reason, and the law of nature and nations, to yield the most valuable right of a community, for the exclusive benefit of one particular part of it.*²⁴⁰

Presumably to avoid “a declaration of war,” the courts were to have the power and duty to invalidate “partial” measures. In *The Federalist*, Alexander Hamilton argued for judicial independence by citing their obligation to “guard the Constitution and the rights of individuals” against measures that “occasion . . . serious oppressions of the minor party in the community.”²⁴¹ Hamilton added,

[I]t is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws.²⁴²

This overwhelming consensus among the Founders that impartiality was inherent in free government—typified by quotations such as that of Randolph—probably rendered an explicit general welfare limitation unnecessary from their point of view, except as a restatement of what they thought obvious. The phrase “general Welfare” sounds a lot like the fiduciary term “general trust,”²⁴³ and to the Founders, the government was

240. The Debates in the Convention of the Commonwealth of Virginia (June 13, 1788), in 3 ELLIOT'S DEBATES, *supra* note 1, at 1, 362 (remarks of Peyton Randolph) (emphasis added); see also *id.* at 509 (remarks of Francis Corbin) (“He also contended that the empire could not be dismembered without the consent of the part dismembered.”).

241. THE FEDERALIST NO. 78, *supra* note 1, at 440.

242. *Id.* at 441.

243. See *supra* note 146 and accompanying text.

to be a general trust anyway, whether or not there was any general welfare language in it. So the importance of the underlying value to the Founders has the paradoxical effect of weakening the claim of the explicit language to any additional substantive force. This leaves us with a standard of review for appropriations higher than that now applied (if any is really applied), but not high enough to be intrusive or unworkable: when a special interest appropriation is challenged, the government must justify any apparent partiality by showing how the appropriation furthers an actual, legitimate purpose.

3. Further Clarifying the Standard of Review

Under this formulation, a federal spending program can be upheld in one of two ways: First, if Congress relies *only* on its putative authority under the Taxing-and-Spending Clause to justify an appropriation, then it must show that the appropriation furthers primarily a general goal—rather than some special interest goal.²⁴⁴ Consistent with the Founders' understanding of fiduciary law, the government may show that an apparently partial appropriation really serves the common good when considered in context with other measures.²⁴⁵

Alternatively, Congress may show that an apparently partial appropriation furthers an actual, legitimate purpose. In this context, a legitimate purpose is execution of one of the federal government's enumerated powers. The enumerated power selected cannot be merely the spending power, since that would make the standard of review self-referential and meaningless. If an appropriation does serve to execute an enumerated power, then the spending is authorized by the incidental powers doctrine (embodied in the Necessary and Proper Clause), and reliance on the spending component of the Taxing-and-Spending Clause is unnecessary. The requirement that the claimed purpose be the actual purpose (rather than any conceivable purpose) fits not only the Founders' fiduciary law, but also Chief Justice Marshall's dictum in *McCulloch v.*

244. My own view is that the "general Welfare" limitation applies to all expenditures funded with taxes, not merely to those used for non-enumerated purposes, but my reasoning assumes the Supreme Court's current interpretation of the "Spending Clause." See Natelson, *General Welfare*, *supra* note 1, at 19.

245. See *supra* notes 165 & 166 and accompanying text.

Maryland—apparently inspired by a comment by Coke²⁴⁶—that a Congressional action must derive from a sincere effort to execute an enumerated power, not as a pretext for accomplishing anything else.²⁴⁷

VI. CONCLUSION

The founding generation—both Federalists and Anti-Federalists—conceived of the rightful relationship of governed and government as a fiduciary one. The fiduciary model had become dominant in the English constitutional struggle in the two centuries before the American Founding, and that model was central to how Americans understood free government. Moreover, official compliance with fiduciary standards was not a mere hortatory ideal. It was an expectation made reasonable by the Founders' experience with those standards, both in the private and public sectors. The rules required private and public fiduciaries to remain within the scope of their authority; to exercise their authority personally in absence of a prescription to the contrary; and to serve loyally, carefully, and impartially. Authority could be implied as well as express, but grants of authority were narrowly construed. The courts remedied breaches of duty through various remedies, including invalidation of acts in breach of trust.

The Constitution was conceived of as a fiduciary instrument, instituting, to the extent practicable, fiduciary standards. The participants in the ratification debates tested and ultimately adopted the Constitution with the understanding that it would promote those standards. The founding generation empowered American courts to void measures that violated the public trust.

The Founders' fiduciary law, therefore, provides a background aid to constitutional adjudication. That law strongly

246. Case of Monopolies, 11 Co. Rep. 84b, 88b, 77 Eng. Rep. 1260, 1266 (K.B. 1602) (including reporter's comment, "*privilegia quae re vera sunt in praejudicium reipublicae, magis tamen speciosa habent frontispicia, et boni publici praetextum, quam bonae et legales concessionis, sed praetextu licili non debet admitti illicitum.*") (translated as "privileges that really are prejudicial to the state frequently have handsome outside appearances and a pretext as being for the general good—as if they were good and legal grants; but an impermissible thing should not be permitted on a permissible pretext.")

247. *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819) (stating that Congress may not, under the Necessary and Proper Clause, recite an express power as a mere "pretext" for regulating something else); see also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 613 (Carolina Academic Press 1987) (1833) (stating that the means selected under the Necessary and Proper Clause must be "*bonâ fide* [i.e., in good faith], appropriate to the end").

suggests that judges have a constitutional obligation to invalidate acts that exceed the scope of the federal government's express or implied enumerated powers and that this includes the duty to strike down congressional appropriations that exceed congressional discretion by violating the requirement of impartiality encapsulated in the "general Welfare" limitation.

The Founders' fiduciary law also provides the courts with a standard by which to review appropriations alleged to violate that limitation. If the appropriation, when considered in overall context, appears to serve primarily a local or special interest rather than the general interest, then the government has the burden of justifying it by "good cause." This means the government must show that Congress intended the measure to execute an enumerated power (other than the spending power) and that the measure actually furthers execution of (i.e., is rationally related to) that power.

Obviously, a great deal of federal spending would easily pass such a test. Opponents of the pork barrel may take comfort in the likelihood that some would not.