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Fiduciary Constitutionalism: Implications for Self- Pardons and Non-Delegation

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Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation

ETHAN J. LEIB AND JED HANDELSMAN SHUGERMAN*

ABSTRACT

The idea that public servants hold their offices in trust for subject-beneficiaries and that a sovereign’s exercise of its political power must be constrained by fiduciary standards—like the duties of loyalty and care—is not new. But scholars are collecting more and more evidence that the framers of the U.S. Constitution may have sought to constrain public power in ways that we would today call fiduciary. In this article, we explore some important legal conclusions that follow from fiduciary constitutionalism.

After developing some historical links between private fiduciary instruments and state and federal constitutions, we opine on what a fiduciary constitution may mean for modern issues in constitutional law. First, we argue that fiduciary constraint has implications for the legal validity of presidential pardons that are not efforts to pursue the public interest. Because the core duty of all fiduciaries is to be loyal to beneficiaries and not to pursue their own self-interest, pardons in derogation of a president’s fiduciary obligation—the command of “faithful execution” in Article II—are invalid. Second, we suggest that when we properly conceive of parts of the Constitution as best analogized to a trust instrument, we can both appreciate where the non-delegation doctrine came from and why it is consistent with the original meaning of the Constitution to have a more relaxed rule about delegation today. By way of conclusion, we meditate upon how to convert legal conclusions that flow from fiduciary features of the Constitution into remedies that make sense for the potentially sui generis fiduciary law of constitutional law.

TABLE OF CONTENTS

INTRODUCTION	464
I. “FAITHFUL EXECUTION” AND FIDUCIARY CONSTITUTIONALISM.	465
II. LEGAL IMPLICATIONS: THE PARDON POWER	469

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A. <i>A Brief History of the Pardon Power</i>	471
B. <i>The Pardon Power and “Faithful Execution”</i>	474
III. LEGAL IMPLICATIONS: NON-DELEGATION	477
IV. REMEDIES	485
CONCLUSION	489

INTRODUCTION

The recent re-discovery of the fiduciary foundations of state authority can trace itself back to Aristotle, Plato, and Cicero.¹ The idea that public servants hold their offices in trust for subject-beneficiaries and that a sovereign’s exercise of its political power must be constrained by fiduciary standards—like the duties of loyalty and care—is not new.² But some have started to claim that this is not just a feature of abstract political theory. Indeed, some argue that the framers of the U.S. Constitution rather self-consciously sought to design “the fiduciary law of public power”³ in which the government’s “conduct would mimic that of the private-law fiduciary.”⁴ The newest effort to excavate this constitutional history—an enterprise which might be said to have been commenced in earnest by Robert Natelson⁵—is Gary Lawson and Guy Seidman’s “*A Great Power of Attorney: Understanding the Fiduciary Constitution*.”⁶ The book is impressive in laying further groundwork to the project of what we might call fiduciary constitutionalism.⁷

Rather than summarizing the work of Natelson, Lawson, and Seidman here we emphasize one seemingly explicit invocation of the fiduciary constraints of public

1. See generally Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239 (2007) [hereinafter Natelson, *Judicial Review*]; Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004).

2. See Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 NOTRE DAME L. REV. 1073, 1090 (2012).

3. TAMAR FRANKEL, FIDUCIARY LAW 284–87 (2010).

4. Natelson, *Judicial Review*, *supra* note 1, at 245.

5. See *supra* note 1.

6. GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017).

7. This school might be said to include Natelson, Lawson, and Seidman—but also Paul Finn, and, perhaps, Seth Barrett Tillman. See Paul Finn, *Public Trust and Accountability*, 3 GRIFFITH L. REV. 224 (1994); Paul Finn, *The Forgotten “Trust”: The People and the State*, in EQUITY: ISSUES AND TRENDS 131 (Malcolm Cope ed., 1995); Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1, 20–21 (2012); Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180, 203, 207 (2013); see also Ethan J. Leib & Stephen R. Galoob, *Fiduciary Principles and Public Offices*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan Criddle, Paul Miller & Robert Sitkoff eds., 2018) (developing some lessons of fiduciary constitutionalism for the Emoluments Clause, administrative law, and the law of judging).

officials in the Constitution's text and structure—and then opine on what this fiduciary rendering of parts of the Constitution may mean for modern issues in constitutional law. In particular, in Part I we explore the Constitution's requirement that the President “take Care that the Laws be faithfully executed”⁸ and the requirement that he take an oath to “faithfully execute the Office of President of the United States.”⁹ Lawson and Seidman note this language on a few pages in their most recent book—and speculate about its potential meaning.¹⁰ But this article delves further into this language's likely meaning, indicating how it can establish enforceable duties for public officials.¹¹ We observe where these provisions likely came from—and how they serve as further evidence of the fiduciary nature of the U.S. Constitution, at least with respect to the President's duties.

Although Lawson and Seidman often disclaim legal conclusions from their factual findings about the kind of instrument they claim the Constitution is,¹² Parts II and III embrace two upshots for concluding that the Constitution has substantial fiduciary features that trigger fiduciary obligations. In Part II, for example, we argue that the fiduciary constraint the Constitution imposes upon the President has implications for the legal validity of pardons that are not efforts to pursue the public interest. Because the core duty of all fiduciaries is to be loyal to beneficiaries and not to pursue their own self-interest, pardons in derogation of a president's fiduciary obligation are invalid. And in Part III, we argue that when properly analogized to a trust instrument, rather than a power of attorney as Lawson and Seidman prefer, we can both appreciate where the non-delegation doctrine came from—the default rule of trust law at the time of the framing forbade delegation—and why it is consistent with the original meaning of the Constitution to have a much relaxed rule about delegation today, as trust law now does. Finally, in Part IV, we explore how to convert legal conclusions that flow from fiduciary dimensions of the Constitution into remedies that make sense for the potentially *sui generis* fiduciary law that is constitutional law.

I. “FAITHFUL EXECUTION” AND FIDUCIARY CONSTITUTIONALISM

Article II, Section 3 of the U.S. Constitution directs that the President “shall take Care that the Laws be faithfully executed.” Often called the “take Care” clause, the underemphasized command upon the Executive here is about “faithful execution.” Underscoring the centrality of the directive is the fact that the only

8. U.S. CONST. art. II, § 3.

9. *Id.* art. II, § 1. Without calling these duties fiduciary—and focusing on “good faith” rather than the core fiduciary duty of loyalty—David Pozen has recently ruminated on the import of these clauses. See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 907–08 (2016) (exploring the significance of the “faithful execution clause”).

10. See LAWSON & SEIDMAN, *supra* note 6, at 128–29, 131.

11. Our much more detailed historical claims are developed in a substantial new article with Andrew Kent. See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019).

12. LAWSON & SEIDMAN, *supra* note 6, at 6, 7, 8, 169–70.

oath with a precise formulation detailed in the Constitution is the one taken by the President: “I do solemnly swear (or affirm) that I will *faithfully execute* the Office of President of the United States.” The Constitution refers to many offices as “Offices of Trust,”¹³ invoking the legal concept of trusteeship, but the President’s faithfulness is the one most explicitly required by the document.

Where does this locution about “faithful execution” come from? The language of “faith” here feels like no accident: the concept flows from the Latin *fiducia*—meaning faith or trust—the root of the word for the private law fiduciary. New historical work we developed with Andrew Kent tells a story about how these words, commands, and oaths had been used for centuries—at least since Magna Carta in 1215—as a way to constrain the discretion of public officials.¹⁴ The kind of constraints “faithful execution” imposes turn out to look a lot like what we would say today are core fiduciary obligations: proscriptions against conflicts of interest and self-dealing, and affirmative obligations to diligently and carefully pursue the authorizations (and only those authorizations) conferred upon the public officials.¹⁵ From high level executive officers to more ministerial officeholders with some access to the public fisc, commands of faithful execution appear in statutes and oaths for centuries in Anglo-American history leading up to the founding.

Although based on this historical research we do not conclude that “faithful execution” was drawn from private fiduciary instruments as much as it was embedded for a long while in what might be called a “law of public office,” there are reasons to see the constraints of “faithful execution” as of a piece with core fiduciary obligations that attach to private law relationships. And private law instruments seeking to impose fiduciary-like obligations also pick up on the language of faithful execution. Records show invocations of the language of “faithful execution” in many private law fiduciary relationships: trusts,¹⁶

13. See U.S. CONST. art. I, § 3, cl. 7 (“Office of honor, Trust or Profit under the United States”); *id.* art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”); *id.* art. II, § 1, cl. 2 (“[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”); *id.* art. VI, § 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”). For more on these clauses and their constitutional import, see Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution’s Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL’Y 107, 116–17 (2009); Will Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016), <https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/> [<https://perma.cc/7NVK-33WA>].

14. See Kent et al., *supra* note 11.

15. *Id.*

16. Okeden v. Walter (1738) 25 Eng. Rep. 1061; West T. Hard. 514; Okeden v. Okeden (1738) 26 Eng. Rep. 345; 1 Atk 551; Killick v. Flexney (1792) 29 Eng. Rep. 830; 4 Bro CC 161; 7 SIR JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 692 (London, A. Strahan 5th ed. 1822) (“[T]he court will interfere, in a summary way, to compel [the attorney] faithfully to execute the trust reposed in him . . .”); WILLIAM BLAIR, THE PROBATE LAWS OF MASSACHUSETTS: DIGESTED AND ARRANGED (Boston, Hilliard, Gray, Little & Wilkins 1829) (same vis-à-vis wills); FRANKLIN G. COMSTOCK, A DIGEST OF THE LAW OF

wills,¹⁷ corporate charters,¹⁸ bailments,¹⁹ and statutes on factors and brokers²⁰ from the seventeenth century through the early nineteenth. There are also references in master-apprentice documents, which create duties comparable to fiduciary guardianship.²¹ The same phrasing also appears in English statutes and cases referring to public officials.²² In short, there are multifarious public and private officers

EXECUTORS AND ADMINISTRATORS, GUARDIAN AND WARD, AND DOWER 228 (Hartford, H.F. Sumner & Co. 1832) (same in Connecticut vis-à-vis the “faithful performance” of trusts).

17. *Countess of Plymouth v. Throgmorton* (1795) 91 Eng. Rep. 642; 2 Salk. 784; EARDLEY MITFORD, *THE LAW OF WILLS, CODICILS AND REVOCATIONS* 4, 105 (London, W. Stratford 3d ed. 1803); JAMES BARRY BIRD, *THE LAWS RESPECTING WILLS, TESTAMENTS AND CODICILS, AND EXECUTORS, ADMINISTRATORS AND GUARDIANS* 58 (London, W. Clarke 4th ed. 1802); FRANCOIS-XAVIER MARTIN, *TREATISE ON THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS: ACCORDING TO THE LAW OF NORTH-CAROLINA* (Newbern, Martin & Ogden 1803); SIR SAMUEL TOLLER, *THE LAW OF EXECUTORS AND ADMINISTRATORS* 81 (London, J. Butterworth 3rd ed. 1814); *FORMS OF PRECEDENTS, FOR THE USE OF JUSTICES OF THE PEACE, SHERIFFS, CORONERS, AND CONSTABLES IN THE STATE OF TENNESSEE* 136–37 (Nashville, T.G. Bradford 2d ed. 1818) (requiring “faithful adherence” from apprenticeships); *id.* at 147 (from guardians); *id.* at 112 (for a sheriff’s oath for collection of taxes); *id.* at 116 (and for constables); JOHN BROTHERTON, *EXECUTORS AND ADMINISTRATORS INSTRUCTOR* 54 (New York, J.C. Totten 1829); THOMAS ATTWOOD BRIDGEN, *THE OFFICE OF SURROGATE, AND EXECUTOR’S AND ADMINISTRATOR’S GUIDE: WITH PRECEDENTS AND FORMS SUITED TO ALL CASES IN RELATION TO THE DUTIES OF EXECUTORS AND ADMINISTRATORS* (Albany, W. Gould 1825); COMSTOCK, *supra* note 16, at 381.

18. GEORGE CAWSTON, *THE EARLY CHARTERED COMPANIES, A.D. 1296–1858*, at 281 (London, E. Arnold 1896) (reprinting the Hudson Bay Company charter during the reign of Charles II); CHARLES ANSELL, *A TREATISE ON FRIENDLY SOCIETIES* 189 (London, Baldwin and Cradock 1835) (treasurers of “friendly societies”); *cf.* 2 GEORGE DALE COLLINSON, *A TREATISE ON THE LAW CONCERNING IDIOTS, LUNATICS, AND OTHER PERSONS NON COMPOTES MENTIS* (London, W. Reed 1812) (treasurers of hospitals); TOULMIN SMITH, *ENGLISH GILDS: THE ORIGINAL ORDINANCES OF MORE THAN ONE HUNDRED EARLY ENGLISH GILDS* (London, N. Trübner & Co. 1892) (fourteenth and fifteenth century charters); 9 W.M. BYTHEWOOD, *A SELECTION OF PRECEDENTS . . . FORMING A SYSTEM OF CONVEYANCING* (London, S. Sweet 2d ed. 1828) (treasurers and overseers); Anon. (1790) 98 Eng. Rep. 792; Lofft 546 (Lord Mansfield) (office of master of a school).

19. 2 WILLIAM BLACKSTONE, *COMMENTARIES* *452; *see also* Ryan S. Killian, Faithfully Interpreting ‘Faithfully’ (Feb. 17, 2014) (unpublished manuscript), ssrn.com/abstract=2226297 [<https://perma.cc/THL3-5XCJ>] (noting in a short essay on contemporaneous usage of “faithful execution” that the phrase was found in Blackstone, that it was “boilerplate,” a “term of art,” but also an example of the “anti-corruption principle animating the Constitution”).

20. JOHN ARCHIBALD RUSSELL, *A TREATISE ON THE LAWS RELATING TO FACTORS AND BROKERS* 8, 347 (London, S. Sweet 1844).

21. For a late-nineteenth-century master-apprentice example, *see* THOMAS KEY, *A COMPENDIUM OF PRECEDENTS IN CONVEYANCING* (London, W. Maxwell & Son 1878).

22. SIR RICHARD PHILLIPS, *AN EPITOME OF THE LAWS & CONSTITUTION OF ENGLAND* 45 (London 1816); ABRAHAM JONES LE CRAS, *THE LAWS, CUSTOMS AND PRIVILEGES, AND THEIR ADMINISTRATION, IN THE ISLAND OF JERSEY* (London, Longman 1839); WILLIAM ALEXANDER ABRAM, *MEMORIALS OF THE PRESTON GUILDS* at 56 (Preston, G. Toulmin 1862) (citing statutes on seventeenth-century mayors in England); GEORGE ATKINSON, *A PRACTICAL TREATISE ON SHERIFF-LAW* (Londong, T. Blenkarn 2d ed. 1847); CAMERON CHURCHILL, *THE LAW OF THE OFFICE AND DUTIES OF THE SHERIFF* (London, Stevens & Son 1879); WILLIAM HENRY WATSON, *A PRACTICAL TREATISE ON THE LAW RELATING TO THE OFFICE AND DUTY OF SHERIFF* (London, S. Sweet 1827) (sheriffs); THOMAS POYNTER, *A CONCISE VIEW OF THE DOCTRINE AND PRACTICE OF THE ECCLESIASTICAL COURTS IN DOCTORS’ COMMONS* (London, 2d ed. 1824); JOSEPH NEWELL, *INQUEST JURYMEN* (London, Knight & Lacey 1825) (justices of the peace); 2 JOHN CORRIE CARTER, *ROGERS ON ELECTIONS* (London, Stevens & Sons, 14th ed. 1885–1886) (election commissioners); JAMES CRANSTOUN, *BROOKE’S TREATISE ON THE OFFICE AND PRACTICE OF A NOTARY OF ENGLAND* (8th ed. 1925).

that get commanded to do their job faithfully—from American colonial charters²³ to other private and public officials at the time of the founding²⁴—and courts treat that language as legally significant,²⁵ triggering what we would today call fiduciary obligations. For public officers, this means avoiding acting in one’s self-interest and being oriented to the public interest.

Thus, the framers’ adaptation of frequently-used “faithful execution” language underscores much of the evidence furnished by Natelson, Lawson, and Seidman to show that the framers used the Constitution to trigger fiduciary obligations upon public officers (though we are somewhat less convinced private fiduciary law was itself fully formed at the time of the founding). Part of the key to seeing it this way is in Article II’s mode of constraining the exercise of the President’s powers under the Constitution. It uses the language of faith and care to signal to courts and to executive officials that the President was supposed to be held to the

23. GRANT OF THE PROVINCE OF MAINE (1639), http://avalon.law.yale.edu/17th_century/me02.asp [<https://perma.cc/C6B5-6TKV>] (“And likewise to all or any Inhabitants and others that shalbee or remayne within the said Province and Premises of them for the true and faithfull execucon and performance of their severall charges and places.”); GOVERNMENT OF RHODE ISLAND (1641), http://avalon.law.yale.edu/17th_century/ri02.asp [<https://perma.cc/YUL4-GLKM>]; GOVERNMENT OF NEW HAVEN COLONY (1643), http://avalon.law.yale.edu/17th_century/ct02.asp [<https://perma.cc/E2NP-MX8Y>] (“Thirdly, to impose an oath upon all the magistrates, for the faithful discharge of the trust committed to them, according to their best abilities, and to call them to account for the breach of any lawes established, or for other misdemeanors, and to censure them, as the quality of the opulence shall require”); CONCESSIONS AND AGREEMENTS OF THE LORDS PROPRIETORS OF THE PROVINCE OF CAROLINA (1665), http://avalon.law.yale.edu/17th_century/nc03.asp [<https://perma.cc/2DUM-4TU9>]; CHARTER OF GEORGIA (1732), http://avalon.law.yale.edu/18th_century/ga01.asp [<https://perma.cc/EVN6-YQZL>] (officers “shall severally take an oath for the faithful and due execution of their trust”); THE FUNDAMENTAL CONSTITUTIONS FOR THE PROVINCE OF EAST NEW JERSEY IN AMERICA (1683), http://avalon.law.yale.edu/17th_century/nj10.asp [<https://perma.cc/7UX2-UAUV>] (“[Officers] and all other persons of public trust, shall before they enter actually upon the exercise of any of the employs of the Province, solemnly promise and subscribe to be true and faithful to the king of England, his heirs and successors, and to the Proprietors, and he shall well and faithfully discharge his office in all things according to his commission, as by these fundamental constitutions is confirmed, the true right of liberty and property, as well as the just ballance both of the Proprietors among themselves, and betwixt them and the people.”); FRAME OF GOVERNMENT OF PENNSYLVANIA (1696), http://avalon.law.yale.edu/17th_century/pa06.asp [<https://perma.cc/B5FA-6Q4V>]; COMMISSION OF JOHN CUTT (1680), http://avalon.law.yale.edu/17th_century/nh08.asp [<https://perma.cc/2AB5-EFSC>] (New Hampshire); THE CONCESSION AND AGREEMENT OF THE LORDS PROPRIETORS OF THE PROVINCE OF NEW CAESAREA, OR NEW JERSEY, TO AND WITH ALL AND EVERY THE ADVENTURERS AND ALL SUCH AS SHALL SETTLE OR PLANT THERE (1664), http://avalon.law.yale.edu/17th_century/nj02.asp [<https://perma.cc/NC3M-3SU2>]; CONCESSIONS AND AGREEMENTS OF THE LORDS PROPRIETORS OF THE PROVINCE OF CAROLINA (1665), http://avalon.law.yale.edu/17th_century/nc03.asp [<https://perma.cc/CQ8M-CP7T>]; MARTIN, *supra* note 17, at 9 (oath of coroners); SAMUEL BAYARD, AN ABSTRACT OF THOSE LAWS OF THE UNITED STATES (New York 1804).

24. See BENJAMIN FRANKLIN, SOME ACCOUNT OF THE PENNSYLVANIA HOSPITAL (1754), *reprinted in* 5 THE PAPERS OF BENJAMIN FRANKLIN 283 (Leonard W. Labaree ed., 1962); Bond Letter from Benjamin Franklin and Robert Grace to Elliott Bengier (April 25, 1744), *reprinted in* 2 THE PAPERS OF BENJAMIN FRANKLIN, *supra* at 408.

25. Pender v. Herle (1725) 1 Eng. Rep. 1462; 3 Bro. P.C. 505 (oaths for mayor); Whitfield v. Lord Le Despener (1778) 98 Eng. Rep. 1344; 2 Cowp. 754 (post-masters and legal liability); King v. Fearnley (1786) 99 Eng. Rep. 1115; 1 T.R. 316 (town’s overseer of the poor), Drake v. Sikes (1797) 101 Eng. Rep. 883; 7 T.R. 113 (1797) (bailiff); Coningsby v. Steed (1795) 88 Eng. Rep. 140; 8 Mod. 192 (bailiff).

same kinds of fiduciary obligations to which corporate officers, trustees, and lawyers are routinely held today in the private sector. Those duties prohibit self-dealing and acting under a conflict of interest. And they also routinely disable the ability of fiduciaries to delegate their core obligations under the fiduciary instrument.

The commands of “faithful execution” are not ultimately religious (remember the No Religious Test Clause)²⁶ or abstract. They are used to constrain the exercise of power under the Constitution. Lawson and Seidman invite such an application of “fiduciary constitutionalism” briefly at the end of their Chapter Six: “When the Constitution says the President must ‘take Care that the Laws be faithfully executed,’ is it referring to any particular concrete set of obligations that amount to taking care? And when the President exercises a nondelegable function, such as the pardon power or the commander-in-chief power, to what standards can the President justly be held?”²⁷ While they leave these questions open, we seek to address some aspects of those questions. We spell out two legal conclusions below that follow from the fact that the Constitution seems to impose at least some fiduciary obligations on officeholders: first about the President’s pardon power (Part II) and then about the non-delegation doctrine (Part III). In Part II, we suggest how fiduciary obligations that flow from Article II constrain the pardon power—and in Part III we assume *arguendo* with Lawson and Seidman that core fiduciary obligations can attach to other officeholders under the Constitution, notwithstanding the fact that they do not all—as a constitutional matter—take on the same duties and oaths that presidents must under the document.

II. LEGAL IMPLICATIONS: THE PARDON POWER

In the nineteenth century, the Supreme Court, drawing on the pardon’s royal origins, described the pardon power as “intrusted . . . without limit.”²⁸ However, in the twentieth century, the Court shifted its understanding of the pardon and conceived of some limitations. Initially, the Court had adopted a justification for the pardon based on “grace,” derived from an interpretation of the royal prerogative. But Oliver Wendell Holmes distanced the pardon from these English religious roots. In *Biddle v. Petrovich*, he framed the pardon as a public good, not a personal prerogative, embedding it within a constitutional structure: “A pardon in our days is not a private act of grace from an individual happening to possess

26. U.S. CONST. art. VI, cl. 3 (“[N]o religious test shall ever be required as a qualification to any office or public trust under the United States.”).

27. LAWSON & SEIDMAN, *supra* note 6, at 129.

28. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) (“To the executive alone is intrusted the power of pardon, and it is granted without limit.”); *see also* *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (“The [pardon] power thus conferred is unlimited.”).

power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served.”²⁹

More recently, the Supreme Court and lower courts have suggested that, even though the pardon power is broad, it might be limited by the Constitution itself. In *Schick v. Reed*, for example, the Court upheld a conditional pardon and explained:

The draftsmen of Art. II, § 2, spoke in terms of a “prerogative” of the President, which ought not be “fettered or embarrassed.” In light of the English common law from which such language was drawn, the conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution but which are not specifically provided for by statute.³⁰

But the Court added:

The plain purpose of the broad power conferred by [the pardon clause] was to allow plenary authority in the President to “forgive” the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable . . . [T]he pardoning power is an enumerated power of the Constitution and . . . its limitations, if any, must be found in the Constitution itself.³¹

The pardon power is plenary, so Congress may not restrict it; but *Schick* acknowledges that the Constitution itself does set limits. For example, the pardon power may be limited by the Fourteenth Amendment.³² If a president announced a blanket pardon for a racial or religious group—or perhaps a preferential policy for female pardon applicants—the Equal Protection Clause (reverse incorporated against the federal government through the Fifth Amendment) would likely curtail such pardons. Writing for four Justices in a concurrence in another case,

29. *Biddle v. Petrovich*, 274 U.S. 480, 486 (1927) (holding that the person receiving a pardon commuting a death sentence could not refuse it). For a particularly thorough and helpful discussion, see Brian C. Kalt, *Pardon Me? The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 805 (1996).

30. *Schick v. Reed*, 419 U.S. 256, 263 (1974).

31. *Id.* at 267. Lower courts have followed this lead to acknowledge that there may be constitutional limits on the pardon power. See *Kass v. Reno*, 83 F.3d 1186, 1193 (10th Cir. 1996); *Virgin Islands v. Gereau*, 592 F.2d 192, 195 (3d Cir. 1979); *Carchedi v. Rhodes*, 560 F. Supp. 1010, 1014 (S.D. Ohio 1982) (citing *Schick* for the conclusion that the pardon power is “almost absolute” but is still limited by the Constitution itself).

32. *Cf. Osborne v. Folmar*, 735 F.2d 1316, 1317 (11th Cir. 1984) (holding that equal protection limits state pardons); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 617 (1991) (“If the President acted for racially discriminatory reasons and granted clemency to all white applicants for pardons, while denying clemency to all black applicants, the judiciary could review and presumably invalidate such use of the clemency power on equal protection grounds.”).

Justice O'Connor said of state clemency proceedings that “[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.”³³ This principle is consistent with the basic idea that there are likely limits to arbitrary exercises of a pardon power.

Others have made equal protection arguments and structural arguments about the separation of powers to limit the pardon power.³⁴ When a president pardoned a contempt of court conviction, for example, challengers raised structural arguments about judicial independence and the separation of powers. But the Supreme Court rejected vague non-textual theories of pardon limitation.³⁵ Here we suggest—consistent with *Schick* and the command of “faithful execution” in the Constitution itself—that meaningful limits are embedded in the original constitutional text from 1787.

A. A Brief History of the Pardon Power

The pardon power of the U.S. Constitution has roots in England’s absolute royal prerogative.³⁶ In 1700, through the Act of Settlement, Parliament limited the King’s pardon power by making it inapplicable to cases of impeachment.³⁷ The King then broadly delegated his pardon power to the executive authority in the colonies.³⁸ Further, both the Virginia Charter of 1609 and the Charter of New England in 1620 granted “full and absolute Power and Authority to correct, punish, pardon, govern, and rule.”³⁹ However, after the Revolutionary War, some

33. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring).

34. *See id.* Brian Kalt makes a structural and a purposive argument about self-dealing—but without focus on the “faithful execution” language, which we think is most relevant:

The federal government is structured to prevent self-dealing, as evidenced by several constitutional provisions. A member of Congress, for instance, cannot simultaneously hold another federal office, and cannot resign to take a job that was created or whose pay was increased during that term of Congress. Congress cannot legislate a pay raise for itself that takes effect before the next congressional election, and the presidential salary cannot be increased without an intervening presidential election. The President also cannot receive any other ‘emolument’ from the United States besides his salary. In other words, federal lawmakers cannot create or enhance plush, high-paying government jobs for themselves, at least not without letting the voters review the decision.

Kalt, *supra* note 29, at 794.

35. *Ex Parte Grossman*, 267 U.S. 87, 119–20 (1925) (observing that the Constitution nowhere expressly declares that the three branches of the Government shall be kept separate and independent).

36. James Pfiffner, *Pardon Power*, in *THE HERITAGE GUIDE TO THE CONSTITUTION*, HERITAGE FOUND. (David F. Forte ed., 2014), <https://www.heritage.org/constitution/#!/articles/2/essays/89/pardon-power> [<https://perma.cc/LM46-86MF>]. For a more in-depth history on the Prerogative of Kings, see William Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476–96 (1977).

37. *See* Duker, *supra* note 36, at 496.

38. *Id.* at 497; Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 204 (1999).

39. Duker, *supra* note 36, at 497. For a more complete history on the early colonial charters, see *id.* at 497–500.

states vested the pardon power with the legislature *and* the executive—and Georgia and New Hampshire vested it exclusively with the legislature.⁴⁰

Neither the New Jersey Plan nor the Virginia Plan included an executive pardon power. Instead, the pardon was debated during the Convention itself.⁴¹ And the Act of Settlement was used as a model for the pardon power in the U.S. Constitution.⁴² In debates, Roger Sherman introduced a limit to the power “to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate.”⁴³ Alexander Hamilton supported this idea initially.⁴⁴ The possibility of a shared power between the executive and legislative—just as several states had done—was, however, ultimately rejected.⁴⁵ Luther Martin then suggested a ban on pre-conviction pardons, as Massachusetts had done. But he withdrew this proposal after James Wilson noted that pretrial pardons might be necessary to persuade co-conspirators to testify against their ringleaders.⁴⁶

Eventually, some delegates argued that treason should be excluded from the pardon power. Edmund Randolph observed that the President should not have the power to pardon for treason because “[t]he President may himself be guilty.”⁴⁷ A presidential power to pardon treason, Randolph said, would be “too great a trust The Traytors may be his own instruments.”⁴⁸ James Wilson opposed Randolph’s suggestion to specify treason as beyond the pardon power.⁴⁹ And Wilson’s specific reply was telling: “[I]f [the President] be himself a party to the guilt he can be impeached and prosecuted.”⁵⁰ Wilson took it as a given that the President could and would be prosecuted later—suggesting that he did not imagine preemptive self-pardons would be a plausible protection.⁵¹ The final vote of 8-2 (by state) for the ultimately broad language followed Wilson’s view that the pardon power includes pardons for treason and is vested solely in the President.⁵²

40. *Id.* at 500–01 (including examples of the Georgia, Delaware, New Hampshire, Massachusetts and New Jersey constitutions); Nida & Spiro, *supra* note 38, at 204.

41. Duker, *supra* note 36, at 501.

42. *Id.* (citing 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, at 380 (John Elliot ed., 1845) [hereinafter ELLIOT’S DEBATES]).

43. *Id.* (citing 5 ELLIOT’S DEBATES, *supra* note 42, at 480).

44. W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 15 (1941).

45. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 419 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

46. *Id.* at 426.

47. Nida & Spiro, *supra* note 38, at 206 (citing 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 571 (Gaillard Hunt & James Brown Scott eds., 1987) (1787)).

48. 2 FARRAND’S RECORDS, *supra* note 45, at 626.

49. *Id.*

50. *Id.*

51. See Andrew Kent, Ethan J. Leib & Jed Shugerman, *Self-Pardons, Constitutional History, and Article II*, TAKE CARE BLOG (June 16, 2018), <https://takecareblog.com/blog/self-pardons-constitutional-history-and-article-ii> [https://perma.cc/F52F-EPV8].

52. Hamilton later embraced a broad pardon power that encompassed the power to pardon treason. See THE FEDERALIST PAPERS No. 74, at 423 (Alexander Hamilton) (Penguin Classics 1987).

But Wilson himself did not appear to conceive of self-pardons as a plausible option nor as a potential problem.⁵³

In fact, at Pennsylvania's ratifying convention, Wilson elaborated that the President must be legally accountable and was a skeptic of presidential immunity:

[The President] is placed high, and is possessed of power far from being contemptible; yet not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment.⁵⁴

Wilson seems to suggest again that the President should not have any special immunities. This paragraph is not clear evidence that Wilson understood that the pardon power did not include the prerogative of self-pardons, but in combination with his argument at the convention debates, it appears that the person who was the most vocal and instrumental in providing for a broad presidential pardon power nonetheless did not imagine self-pardons—and probably would not have supported such a use of the pardon power. Given that he believed the President was “far from being above the laws,” he may also have found self-protective pardons for the practical purpose of immunity problematic, too. Framers were no doubt troubled by a potential scenario in which the President had co-conspirators in an act of treason, but they did not focus on this problem, nor offer real solutions other than impeachment and prosecution. This is some evidence of the breadth of the pardon power, but also reveals at least the limit of self-dealing pardons.

Yet one can be intertextual rather than intentionalist here: The reach of the pardon power is informed by the President's constitutional oath and his textual responsibility to “take Care that the Laws be faithfully executed.” It is ultimately this twin set of commands rather than whatever may have been in Wilson's mind that clarifies the deep import of the President's fiduciary obligations that flow from Article II.

However, Wilson, the framer who introduced the phrase “faithful execution” into the text of the Constitution in the summer of 1787,⁵⁵ may also have cryptically suggested a kind of good-faith self-pardon as a defense of the Executive Branch. Wilson, in a long speech in the ratification debates, first suggested that statutes, after being enacted, must not be left “a dead letter” but should be

53. 2 FARRAND'S RECORDS, *supra* note 45, at 626–27; *see also* Kalt, *supra* note 29, at 787.

54. 5 DEBATES, *supra* note 41, at 480. For more on Wilson's skepticism of presidential immunity, *see* Kalt, *supra* note 29, at 787; and William F. Allen, Note, *President Clinton's Claim of Temporary Immunity*, 11 J.L. & POL. 555, 583–84 (1995).

55. Report of Committee of Detail, IX, in 2 FARRAND'S RECORDS, *supra* note 45, at 171–72. For full discussion of the confusing historical record on these origins and timing at Philadelphia, *see* Kent, Leib, & Shugerman, *supra* note 11.

“honestly and faithfully executed.”⁵⁶ Later, Wilson also argued for the judiciary’s power to invalidate legislation, and then added, “[i]n the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.”⁵⁷

Wilson’s utterance here is ambiguous. He did not refer to any clause of the Constitution, so it is unclear what would be the basis, the scope, or the application of this power. Some scholars have cited Wilson’s statement here as originalist support for departmentalism—an executive power to decline to execute a law that a president believes is unconstitutional.⁵⁸ Wilson may indeed have been asserting such a power. But he may instead have been referring to the President’s pardon power (or a veto power, in an imprecise way). Those are the clauses that expressly give the President the power to check Congress on legislation.

Wilson’s suggestion here would make sense in the context of pardons. If a president viewed a standing criminal statute as unconstitutional, it would be too late to use his veto. But he could use his pardon power to negate punishments based on that statute. And if Congress had passed statutes that might be used to punish the President for his use of executive powers, and if the President viewed that, in good faith, as an encroachment upon the Executive Branch and the separation of powers, the President might protect both himself and the presidency with an arguably faithful self-pardon, however paradoxical that seems. This exception for self-pardons would turn on a complicated interpretation of what constitutes a good-faith interpretation of presidential power.

B. *The Pardon Power and “Faithful Execution”*

As we explained above in Part I, the command of presidential “faithful execution” in Article II creates a duty for the President that prohibits his self-dealing, disables his acting under a conflict of interest, and more generally requires that he act in the public’s interest rather than his own. Let’s return again to Oliver Wendell Holmes in *Biddle*: “A pardon . . . is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the *public welfare* will be better served.”⁵⁹ The pardon thus represents not personal prerogative, but requires that it be exercised only in the public welfare, according to the “Constitutional scheme.” That scheme, as Lawson, Seidman, and Natelson properly instruct us, is that the presidency is a “public trust” that has fiduciary obligations. Moreover, the office of the President—unlike other public officials under

56. Statement of James Wilson at the Pennsylvania Ratifying Convention (Dec. 1, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 448, 450 (John P. Kaminski & Gaspare J. Saladino eds., 1988)

57. *Id.* at 451.

58. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 920–22 (1990); Michael B. Rappaport, *The President’s Veto and the Constitution*, 87 NW. U. L. REV. 735, 767–68 (1993).

59. *Biddle v. Petrovich*, 274 U.S. 480, 486 (1927) (emphasis added).

the Constitution—has very personally delineated obligations, as evidenced by the oath and the obligation of “faithful execution.”

It is remarkable that some early state constitutions put the pardon power texts so close to their “faithful execution” texts. The Pennsylvania Constitution of 1776 put the two texts immediately next to each other within Section 20.⁶⁰ The New York Constitution of 1777 puts the two sections next to each other, in Sections 18 and 19,⁶¹ and so does the Connecticut Constitution of 1818.⁶²

Thus, the President may not pardon himself or pardon his closest associates for self-interested reasons. This is not because of something James Wilson uttered in debate but because of the oath the President utters when he is installed in his office and because his job requires “faithful execution.”⁶³ Self-pardons should not pass legal muster (with the one potential exception we note above) because they would violate what we might call the fiduciary law of public office. If the President tries to pardon himself, he is engaged in blatant self-dealing, transgressing both his oath and the primary prohibition to which he is subject as a fiduciary officer. If the President pardons associates primarily out of a motivation to protect his private interests, those pardons should also be invalid as disloyal to the public welfare.

One might review the debates in the Convention and in ratification and find a dog that did not bark: if Wilson and other framers were troubled by treasonous conspiracies and pardons for co-conspirators, why didn’t any of them invoke the “faithful execution” clauses as a solution already in the text?

One answer is that the Convention and ratification debates could not consider all of the applications of the various clauses. It is too much to expect that the framers would have worked through all of the implications of the interplay between broader duties, specific powers, and hypothetical applications. By September 1787, as these debates were happening, the Constitution had just emerged from the Committee of Detail and then the Committee of Style, and the window for completing the proposed Constitution was closing, just as they were reading a full draft for the first time. Most of them had been assembled since May, through a hot summer, and there were still many details to work through as patience was running thin and expectations for

60. See PA. CONST. of 1776, § 20 (“And [the president of the Pennsylvania] shall have power to grant pardons and remit fines, in all cases whatsoever, except in cases of impeachment; and in cases of treason and murder, shall have power to grant reprieves, but not to pardon, until the end of the next sessions of assembly; but there shall be no REMISSION or mitigation of punishments on impeachments, except by act of the legislature; they are also to take care that the laws be faithfully executed.”).

61. N.Y. CONST. of 1777, §§ 19–20.

62. CONN. CONST. of 1818, art. IV, § 8.

63. We previewed this argument in Jed Shugerman & Ethan J. Leib, *This Overlooked Part of the Constitution Could Stop Trump from Abusing His Pardon Power*, WASH. POST (Mar. 14, 2016), <http://wapo.st/2pdoIzK> [<https://perma.cc/ENC8-CVYD>]; Ethan J. Leib & Jed Shugerman, *Mueller’s Recourse*, SLATE (Mar. 19, 2018), <https://slate.com/news-and-politics/2018/03/if-a-trump-official-fires-the-special-counsel-to-protect-trump-mueller-can-sue-to-keep-his-job.html> [<https://perma.cc/4PXJ-HHEZ>]. Some of our language here is drawn from these essays.

submission for ratification were looming urgently. These September debates generally focused on the final wording clause by clause, more than the relationships among the clauses. Moreover, the Convention debates are thin and incomplete,⁶⁴ and what remains preserved from the ratification debates is also far from complete. Constitutional interpretation often turns on intertextual readings that the framers themselves did not make explicit.

The rule cannot be, however, that any pardon that might further a president's self-interest is invalid. That wouldn't track fiduciary law, which must permit some possibility of mixed motives in the pursuit of the beneficiary's best interests—and it wouldn't be a workable rule of law. The question is rather whether the pardon is chiefly for the narrow self-interest of the President and clearly against the public interest. Perhaps a prime example of a pardon that might have been invalid under this framework was President Bill Clinton's pardon of Marc Rich, whose former wife Denise Rich had made significant donations to the Clinton library and to Mrs. Clinton's Senate campaign. Clinton's pardon of Susan McDougal, a Whitewater witness who refused to testify, might also be open to question from this fiduciary perspective. Neither of these pardons appear to promote the public interest, and they apparently were driven exclusively by self-interest.⁶⁵ Ultimately, a president is not allowed to put his own interests over the public interest as a fiduciary. That is as true in the exercise of his pardon power as it is in any other law he must "faithfully execute."

What are the applications to the presidential pardons of Sheriff Joe Arpaio—public interest or self-interest?—or to hypothetical pardons for President Trump's inner circle and family members? Such questions would require much more factual investigation than we can perform here, and those applications are beyond the scope of this initial foray into the way the "faithful execution" commands interface with the pardon power. And as noted above, a presidential self-pardon as a good-faith constitutional defense of the Executive Branch might arguably be valid, but would also raise complicated questions about motives, departmentalism, and judicial deference.

Even if a general rule against self-pardons may be difficult to administer, our argument here can be summarized: Article II's fiduciary duties provide a textual basis to limit the President's power to pardon, which is not absolute. The pardon power is limited by the text of the Constitution and requires the President to exercise it loyally and carefully, only in the public interest and not in his self-interest. That is a constitutional minimum that flows from the fiduciary duties of his office.

64. MARY SARAH BILDER, *MADISON'S HAND passim* (2015).

65. Richard L. Berke, *The Clinton Pardons: This Time, Clintons Find Their Support Buckling from Weight of New Woes*, N.Y. TIMES, Feb. 23, 2001.

III. LEGAL IMPLICATIONS: NON-DELEGATION

In this Part, we take it as a given that Lawson and Seidman—with Natelson before them—plausibly claim that the Constitution is some form of fiduciary instrument. The implications of that claim—which is not entailed directly by the “faithful execution” clauses themselves—are that other officeholders also have fiduciary obligations. One of the important payoffs of seeing the Constitution as a fiduciary instrument more broadly is that it helps us to see where the core of the “non-delegation doctrine” came from.⁶⁶ If the document was fashioned as a fiduciary entrustment to public officials, it is easier to make sense of where the idea comes from that officers should not delegate away the core of what they have been entrusted to do under the Constitution. It was black-letter law in the eighteenth century that certain kinds of fiduciaries had to presume that the important work they undertook was non-delegable. Lawson and Seidman insightfully trace the roots of the “non-delegation doctrine” to this structural fact about federal officers under the Constitution. They provide an enlightening explanation for something otherwise somewhat mysterious: the document actually says nothing about delegation—and the so-called “vesting clauses” that start each of the first three Articles, giving the three branches of government their core powers, do not demarcate anything about exclusivity or delegation.⁶⁷ Lawson and Seidman’s book thus furnishes a nice breakthrough here, highlighting some background law that might have been incorporated into controlling the public fiduciaries of our government. Even though not all officeholders were commanded to faithfully execute their offices nor to take an oath to do the same, it is wholly plausible to conclude from other sources that the framers imagined that representatives were supposed to be “agents” or “trustees” (both of which are fiduciary offices).

Yet Lawson and Seidman focus too much on the narrow non-delegation rules surrounding powers of attorney, and do not furnish us compelling reasons to carry forward old default rules for modern times. It is, of course, possible that the Constitution’s likeness to a power of attorney (albeit of a *sui generis* kind) could be translated into a strong presumption against delegation which might remain with us to this day. Yet very little *argument* actually appears in the book to lead to these kinds of conclusions.

At one point, Lawson and Seidman write: “[W]e are quite confident that no interpretive consequence of any significance turns on whether the Constitution is seen as a power of attorney or a trust.”⁶⁸ They think there “is no obvious corpus”

66. See LAWSON & SEIDMAN, *supra* note 6, at 107–29 (discussing fiduciary constitutionalism’s lessons for delegations and subdelegations).

67. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (enforcing a “non-delegation” doctrine in part based on Art. I, sec. 1, the legislature’s “vesting clause”); *but see Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 489 (2001) (Stevens, J., concurring) (arguing that the vesting clauses “do not purport to limit the authority of either recipient of power to delegate authority to others”).

68. LAWSON & SEIDMAN, *supra* note 6, at 61. They do admit later in the book, however, that real interpretive consequences would flow from finding the Constitution to be a fiduciary instrument closer

for a trust and so reject that analogy in favor of the power of attorney.⁶⁹ Yet the word “attorney” appears nowhere in the document—and the word “trust” appears four times.⁷⁰ Moreover, all powers of attorney expire upon the death of the principal,⁷¹ whereas it is routine for trusts to outlive their settlors. Still, they claim that “the fiduciary responsibilities of a trustee and an attorney do not differ in any way material to our project.”⁷²

Indeed, the book so often runs together the agent and the trustee that you might forget that from Locke and onward, *trusteeship* for governmental officials is the most common political paradigm.⁷³ This links with one of the great debates in the theory of political representation, of course, which considers whether a democratic representative is best understood as a “delegate” of a constituent-principal on the one hand, or as a “trustee” for the constituent on the other.⁷⁴ Simply put (and put in an overly simplistic dichotomy), the “delegate” works under very strict control with instructions from constituents that need to be executed; the “trustee” has a much wider berth of discretion to act within her authority.⁷⁵ Both idealized forms of democratic representation are subspecies of the fiduciary form, true enough.⁷⁶ But when one appreciates that the framers rejected instruction and recall⁷⁷—and used the word trustee and the concept of trust way more often than they used the agency conception explicitly—one wonders whether the trust law paradigm isn’t a better fit from which to engage in analogical reasoning.

to a corporate charter. *Id.* at 105–07. Yet in their delegation discussion, they emphasize that “it does not matter what kind of agency instrument best describes the Constitution [because the non-delegation] principle cuts across the entire family of agency instruments.” *Id.* at 112.

69. *Id.* at 61.

70. See *supra* note 13. Lawson and Seidman acknowledge and explain away this evidence. See LAWSON & SEIDMAN, *supra* note 6, at 31.

71. See 1 JOHN HOUSTON MERRILL, THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 446–47 (1887) (collecting cases).

72. LAWSON & SEIDMAN, *supra* note 6, at 62.

73. See JOHN LOCKE, SECOND TREATISE: AN ESSAY CONCERNING THE TRUE, ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT, in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (Ian Shapiro ed., Yale Univ. Press 2003) (1690); C.E. VAUGHAN, STUDIES IN THE HISTORY OF POLITICAL PHILOSOPHY 143–57 (1939); J.W. GOUGH, JOHN LOCKE’S POLITICAL PHILOSOPHY 136–71 (1950).

74. See generally HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).

75. See Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. 178 (2012).

76. *Id.*

77. *E.g.*, 1 ANNALS OF CONGRESS 703–76 (J. Gales ed., 1789) (rejecting a proposal to guarantee in the First Amendment a right of the people “to instruct their representatives”); Vikram David Amar, *The People Made Me Do: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1066–67 (2000) (observing that some state constitutions had a recall process at the time of the founding but that the framers opted against recall for federal officers). For evidence that constituent instructions were common notwithstanding the choice not to make it a right in the Constitution, see Kris W. Kobach, *May “We the People” Speak? The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1 (1999).

Trusteeship was explicit in, at least, the Pennsylvania Declaration of Rights,⁷⁸ the Maryland Declaration of Rights,⁷⁹ and the Connecticut Charter.⁸⁰

And there is, we suspect, a difference between trusteeship as the relevant model and the power of attorney/agency model: On many of the fundamental lessons the book draws, edging closer to trusteeship may give both higher demands of loyalty from fiduciaries,⁸¹ but also more permission for delegation. Public fiduciaries would still be subject to *ultra vires* analysis for going beyond their mandates. And analysis of sub-delegations would still be relevant.⁸² But that analysis would likely be more forgiving of delegations because of important realities surrounding the non-delegation doctrine in trust law, to which we now turn.

The old non-delegation doctrine that comes from trust law has been deemed “murky,”⁸³ even if one can tease out several justifications for why it was a long-standing default rule.⁸⁴ One has to do with a worry about proper succession: “[i]f total delegation of the trust were permitted, the trustee could effectively install a successor trustee in the guise of agency without complying with the safeguards of trustee succession.”⁸⁵ The application of this anxiety to democratic governance is palpable: By delegating lawmaking power away to agencies, there is a real concern that the modes of democratic decision-making that are supposed to inhere in the people and their representatives is cordoned away in harder to reach corners of the government.

A second justification of the old non-delegation rule for trusts was “the notion that the personality of the trustee is sometimes central to the purposes of the

78. See PA. CONST. of 1776 (“[A]ll officers of government . . . are . . . trustees [of the people].”).

79. See MD. CONST. of 1776 (“[A]ll persons invested with the legislative or executive powers of government are the trustees of the public.”).

80. See CHARTER OF CONNECTICUT (1662), http://avalon.law.yale.edu/17th_century/ct03.asp [<https://perma.cc/2MGL-5AKV>] (granting a royal charter to the Governor and Company of the English Colony of Connecticut upon trust for the benefit of settlers residing in that colony).

81. See 2 AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS 1298 § 170 (1967) (“There are other fiduciaries such as guardians, executors or administrators, receivers, agents, attorneys, corporate directors or officers, partners, and joint adventurers. In some relations the fiduciary element is more intense than in others; it is peculiarly intense in the case of trust.”).

82. See *id.* at 1388 § 171 (“Another fundamental duty owed by the trustee to the beneficiaries of the trust is the duty not to delegate to others the administration of the trust.”); see also THOMAS LEWIN, PRACTICAL TREATISE ON THE LAW OF TRUSTS AND TRUSTEES 131 (London, A. Maxwell & Son 1839) (“The office of trustee, being one of personal confidence, cannot be delegated.”); CHANTAL STEBBINGS, THE PRIVATE TRUSTEE IN VICTORIAN ENGLAND 106 (2001) (invoking the maxim “*delegatus non potest delegare*” from EDWARD BURTENSHAW SUGDEN, A PRACTICAL TREATISE OF POWERS 175 (London, Luke Hansard & Sons 3d ed. 1821)); Elizabeth E. Baringhaus, *Trustee’s Power to Delegate: A Comparative View*, 50 NOTRE DAME L. REV. 273, 273 (1974) (“The traditional view of the courts in both England and America was that a trustee could not rid himself of his obligation as trustee by delegating his authority to another.”).

83. John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 650 (1996).

84. See John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 MO. L. REV. 105 (1994).

85. *Id.* at 107.

trust.”⁸⁶ Given that the American political system is not, and has never been, a system of proportional representation in which voters select party slates, it would be reasonable to conclude that the individual personality of the public officer is sufficiently important that a default rule against delegation protects against “defeat[ing] the purpose and the reliance of [voters] in creating the trust.”⁸⁷

A third, and final, justification is cost-centered: the non-delegation doctrine (“clumsily”) seeks to prevent a trust from having to pay twice—for a trustee and a manager.⁸⁸ This preoccupation with “double-dipping” could apply in politics too: we pay our officers to do their work, not pass the buck, as it were, and then require the taxpayer to fund expensive bureaucracies.

As much sense as we can make about the old rule against delegation in trust law based in these justifications (and their plausible applications to politics), it is important to realize that “no version of the nondelegation rule proscribes all delegation [I]ndeed, it has been commonplace under the [old common law] non-delegation rule for trustees to employ lawyers, accountants, investment advisors, brokers, and other specialized service providers.”⁸⁹ Even when drafters of the *Restatement of Trusts* “codified” the non-delegation rule, they had to admit that they could not identify any “clear-cut line dividing the acts which a trustee can properly delegate from those which he cannot properly delegate.”⁹⁰ They settled on a list of illustrative factors, which most agreed allows de facto delegation across the board.⁹¹ What this means is that anyone trying to design a public non-delegation rule based on trust law principles will bump up against the same line-drawing problems which tend to erode the import of the doctrine. Moreover, as a practical matter, since the old non-delegation presumption for trusts was a mere default rule, sophisticated settlors drafted their trust instruments around it.⁹² Between erosion because of hard line-drawing and settlors’ lack of interest in underscoring the rule, the latest *Restatement*⁹³ relaxes the old non-delegation doctrine: “The circumstances of modern life that have resulted in ever greater specialization and expertise elsewhere in economic and administrative life affect trust administration as well.”⁹⁴

Lawrence Lessig’s *Fidelity in Translation* teaches that old legal notions should continue to have significance, but their shape and applications must be translated and updated as the context and times change.⁹⁵ Here, the core principles of fiduciary duties may be embedded in the Constitution, but the shape and application of those duties might need to change over time. Both the law of private trusteeship

86. *Id.*

87. *Id.*

88. *Id.* at 108.

89. *Id.*

90. *Id.* (quoting RESTATEMENT (SECOND) OF TRUSTS § 171 cmt. d (AM. LAW INST. 1959)).

91. *Id.* at 109.

92. *Id.*

93. See RESTATEMENT (THIRD) OF TRUSTS § 171 (AM. LAW INST. 1992).

94. Langbein, *supra* note 84, at 110.

95. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

and the necessities of administration require a translation and updating as the non-delegation doctrine is as moribund as a trust law rule as it is in constitutional law.

The “new” rule—which had already been in effect for many classes of trusts for decades before the adoption of the current *Restatement*⁹⁶—not only permits many delegations but may even *require* a trustee to delegate matters outside its expertise: a trustee “may sometimes have a duty . . . to delegate [investment] function . . . in such manner as a prudent investor would delegate under the circumstances.”⁹⁷ And under these delegations, the trustee pursuant to the Uniform Prudent Investor Act must employ “care, skill, and caution . . . in selecting agents, in formulating the terms of the delegation, and in reviewing ‘the agent’s performance and compliance with the terms of the delegation.’”⁹⁸ The intention is to “strike the appropriate balance between the advantages and hazards of delegation.”⁹⁹

As a general matter, this effort to “strike the balance” about delegation with a dose of pragmatism, functionalism, and realism seems about as essential for administration of the public trust as it is for private trusts. The “new” pro-delegation rule—which shifts the default rule but did not disturb practice substantially—makes good sense for the public sphere, too.¹⁰⁰ Thus, although it may be true at some level to say that the framers set in motion trustees with a presumption of the older non-delegation rule, it seems unclear why they wouldn’t have also understood the private fiduciary law of trust administration to be subject to common law development. Lawson and Seidman seem to agree that the relevant beneficiary for our governmental fiduciaries is always “We the People” and our “posterity.”¹⁰¹ How do we take care of our posterity if we don’t adjust to the new fiduciary law that is the agreed-upon better way to administer our trusts in the modern complex world? Lawson and Seidman do a great job of explaining where the non-delegation doctrine comes from: Locke and Hume, from whom

96. As Langbein, recounts: “In recent decades a variety of special-purpose statutes reversed the nondelegation rule for investment and other specialized functions[:] the Uniform Trustees’ Powers Act in 1964, the Uniform Management of Institutional Funds Act in 1972, and ERISA, the federal pension reform law, in 1974.” Langbein, *supra* note 83, at 652.

97. RESTATEMENT (THIRD) OF TRUSTS § 171 cmt. j (AM. LAW INST. 1992).

98. Langbein, *supra* note 83, at 652–53 (quoting UNIF. PRUDENT INVESTOR ACT § 9(a)(3) (UNIF. LAW COMM’N 1994)).

99. UNIF. PRUDENT INVESTOR ACT § 9 cmt. (UNIF. LAW COMM’N 1994). Section 807 of the Uniform Trust Code and section 80 of the Restatement (Third) of Trusts essentially “extend[] the delegation rule of Section 9 of the Uniform Prudent Investor Act to all functions of trusteeship.” ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 660 (10th ed. 2017).

100. And such is the modern law. *See* *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“Our jurisprudence [about delegation] has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress can simply not do its job absent an ability to delegate power under broad general directives.”).

101. LAWSON & SEIDMAN, *supra* note 6, at 50–51, 131, 145. For more discussion on the problem of figuring out the relevant beneficiaries of public fiduciaries, see Ethan J. Leib, David L. Ponet & Michael Serota, *Mapping Public Fiduciary Relationships*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 388 (Andrew Gold & Paul Miller eds., 2014).

the framers learned some of their political theory, also imagined governmental trusts with the old non-delegation rule in place.¹⁰² But not wanting Congress to waste its time on intricacies of regulation seems like the way to have a living trust document that will work for ourselves and our posterity.

There is obviously an interpretive dispute embedded in the discussion here. Some kinds of originalists might say: if the framers created a trust in a world where “no delegation” was the norm, that must be the kind of trust we should live under today. Notwithstanding lots of protest by Lawson and Seidman that they are declining to engage in “practical constitutional adjudication” with “real-world” application,¹⁰³ they do sometimes reach clear legal conclusions. In their discussion of the recent Supreme Court case *Yates v. United States*¹⁰⁴—a case in which one Captain Yates was convicted of a federal crime for throwing under-sized fish overboard after the Coast Guard sought to use them as evidence against him—they conclude that the predicate regulation Yates violated¹⁰⁵ (itself promulgated under an authorizing statute)¹⁰⁶ was “pretty obviously” “unconstitutional.”¹⁰⁷ “Assuming Congress has power to enact fishery plans pursuant to its power to regulate commerce, Congress does not exercise that power by telling executive agents to enact fishery plans.”¹⁰⁸

But there is a long way from observing that the Constitution is some kind of fiduciary instrument in some respects to the claim that all interpretive conventions of those instruments are locked in time. Indeed, if the beneficiary is, after all, “posterity,” the framers probably shouldn’t be read to lock in a *mere default rule*¹⁰⁹ at the time of the settling of the trust. It seems perfectly permissible to infer a “meta-intent” for the law to adapt to the ages, with whatever default rules (on delegation and otherwise) emerge in the common law over time.¹¹⁰ That is, even an originalist of a certain sort should be able to say that if the original meaning of the Constitution was that it was like a trust document that was supposed to last for generations and for the benefit of “posterity,” the delegation rules which were only adopted implicitly through vague default rules often observed in the

102. See Natelson, *The Constitution and the Public Trust*, *supra* note 1, at 1117 (citing Locke and Hume); LAWSON & SEIDMAN, *supra* note 6, at 117 (citing LOCKE, *supra* note 67, § 117).

103. LAWSON & SEIDMAN, *supra* note 6, at 104. It is not for nothing that Steven Calabresi praises the book on its jacket for being a “must read” “about judicial interpretation” and “judicial review.” A reader could be forgiven for thinking that Lawson and Seidman, for all their protestations, *e.g.*, *id.* at 6, 7, 8, 169–70, have pretty specific lessons for how cases should be decided based on their theory of “mere” meaning rather than adjudication.

104. 135 S. Ct. 1074 (2015).

105. 50 C.F.R. § 622.37(d)(2)(ii) (2007).

106. 16 U.S.C. §§ 1852, 1854, 1857(1)(A) (2012).

107. LAWSON & SEIDMAN, *supra* note 6, at 126.

108. *Id.*

109. They realize that the background norm here—even as applied to powers of attorney—was always capable of being drafted around. *Id.* at 115. True enough, the opt-out is supposed to be explicit. But it seems of continuing relevance that the rule was always optional rather than mandatory.

110. Ironically, perhaps, the canonical example of a meta-intent by Framers to adapt law through the ages rather than freeze it in time is antitrust law.

breach¹¹¹ could adapt to better reasoned common law over time. That better-reasoned common law now widely permits delegation. Thus, fiduciary constitutionalism leads not to revisionism about the non-delegation doctrine in the modern age—but helps explain the broad outlines of the contemporary approach to it.

Not everything, however, about delegation default rules was left vague and implicit in the document. As we explored above, Article II requires that the Executive—the President—has a special role in his capacity as public fiduciary: he must “take Care that the Laws be faithfully executed.”¹¹² This unique role would seem to intervene in background delegation law in a way that perhaps would not be as susceptible to tracking the common law over time.¹¹³

To wit, modern fiduciary law also protects trustees from liability “for the decisions or actions of the agent to whom the function was delegated.”¹¹⁴ “Instead, an aggrieved beneficiary must look exclusively to the agent, who ‘owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.’”¹¹⁵ The Uniform Trust Code is similar on this point: the trustee is supposed to use “care, skill, and caution in selecting, instructing, and monitoring an agent”—and then is “not liable for any negligence or misconduct of the agent.”¹¹⁶ Rather, the agent is substituted for the trustee and “assumes a fiduciary role with fiduciary responsibility.”¹¹⁷ This modern fiduciary law tells us that the agencies that get delegations from legislators, for example, must themselves take on a fiduciary role—something consistent with a wide range of sources about administrative law and modern administrative governance.¹¹⁸ However, the President’s role to “oversee and supervise” that his entire branch is faithfully executing the law (from the requirement that he “take Care that the Laws be faithfully executed” in

111. See, e.g., Gareth H. Jones, *Delegation by Trustees: A Reappraisal*, 22 MOD. L. REV. 381, 381–82 (1959) (arguing—based on common law cases from 1754, 1838, 1841, and 1883—that the “principle of *delegates non potest delegare* could not be applied in its full rigor” from “an early date”); SCOTT, *supra* note 75, at 1388 § 171 (“This does not mean, of course, that the trustee must personally perform every act which may be necessary or proper in the execution of the trust. He can properly permit others to perform acts which he cannot reasonably be required to perform.”).

112. U.S. CONST. art. II, § 3.

113. For recent insightful deep dives on faithful execution, see Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 215 (2015); Killian, *supra* note 19; Kent, Leib & Shugerman, *supra* note 11.

114. UNIF. PRUDENT INVESTOR ACT § 9(c) (UNIF. LAW COMM’N 1994).

115. Langbein, *supra* note 83, at 653 (quoting UNIF. PRUDENT INVESTOR ACT § 9(b) (UNIF. LAW COMM’N 1994)).

116. SITKOFF & DUKEMINIER, *supra* note 99, at 661 (citing UNIF. TRUST CODE § 807(c) (UNIF. LAW COMM’N 2000)).

117. UNIF. TRUST CODE § 807 cmt. g. (UNIF. LAW COMM’N 2000).

118. On fiduciary public administration, see, for example, Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1866–68 (2016); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 466 (2010); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 121 (2006); Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271, 1280 (2010).

the passive voice) is explicit:¹¹⁹ his agents do not merely stand in for him and assume the fiduciary role themselves, immunizing him from liability. Rather, he himself is commanded to take ultimate responsibility for the failures of his agents. That doesn't mean his agents and agencies aren't themselves fiduciaries—but the modern rule of effective immunity for the delegating trustee when that trustee is the President seems inapplicable because of the textual command that opts out of the default fiduciary law on that point.

In sum, a careful study of the background non-delegation norms for trusts helps reveal that Lawson and Seidman are correct to bring to our attention where the otherwise mystifying doctrine came from. However, being more precise about how those norms were really implemented and developed over time—and how they were explicitly articulated when the drafters wanted to depart from common law defaults—helps us understand how our modern non-delegation jurisprudence is, after all, rather faithful to the original design.

* * *

These two discussions about what a fiduciary constitution may mean for us today do not exhaust the contemporary import of the project of fiduciary constitutionalism. There are likely to be further applications and studies, and deeper dives into historical sources. As we have hinted elsewhere, we suspect there are also lessons fiduciary constitutionalism provides in limiting executive removal authority.¹²⁰ The requirements of faithfulness in the Executive Branch probably also have

119. LAWSON & SEIDMAN, *supra* note 6, at 128. In an ironic twist, perhaps, Lawson & Seidman see “both a necessity and custom or usage for chief executives to rely on subordinates for most of the actual implementation of law,” *id.*, and therefore find most delegations within the executive branch wholly unproblematic even under the old non-delegation rule that they think is carried over from the Founding. What they get out of Article II, § 3 is that the duty of oversight is non-delegable; we think that provision is an explicit reminder that whatever default about non-delegation applies to other public fiduciaries, the President has a continuing legal obligation to maintain the faith of his agents and to maintain the fiduciary decision-making within the administrative state. Seth Barrett Tillman has suggested that the “faithful execution” language does not give the president authority to execute the law directly because of its passive language (“that the Laws be faithfully executed”). Seth Barrett Tillman, *Ex Parte Merryman*, *Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 535 n.129, 538 n.134 (2016). Tillman cites Taney’s lower court opinion in *Ex Parte Merryman* (“[The President] is not authorized to execute the[] [laws] himself or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution”). However, the rest of Taney’s sentence is clarifying: “he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution.” 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (emphasis added). In *Merryman*, the issue was interbranch conflict over habeas corpus. In the case of pardons, the Constitution explicitly assigns that duty to the President. When the President takes care that the pardon power be faithfully executed, the faithful execution clause extends a fiduciary duty directly to the President. The text of faithful execution clause, then, even if one adopts Taney’s reading, imposes a supervisory duty of faithful execution when other officers exercise the power, and imposes a direct duty of faithful execution when the President exercises the power. Passive voice does not automatically make all execution by third parties. Moreover, in case there had been any perceived ambiguity on this question, the Constitution’s presidential oath imposes this duty directly upon the President.

120. See generally *supra* note 63.

implications for agency statutory interpretation¹²¹—and the judicial review thereof. We leave these teasers here only to underscore how many legal conclusions have yet to be fully worked out now that Lawson and Seidman (and Natelson before them) have gotten fiduciary constitutionalism squarely on the agenda, showing how rich an enterprise it can be for originalists and non-originalists alike.

IV. REMEDIES

Having established some legal conclusions that might follow from fiduciary constitutionalism, there are still a large set of remaining questions about how to vindicate fiduciary entrustment to public officials. Should we simply apply modern private-law fiduciary duties in federal court against officeholders? Who should have standing to enforce these fiduciary duties? Are the provisions for elections and impeachment the primary enforcement mechanisms for “generalized grievances” otherwise irremediable through civil process? To some extent, the answers to these hard design questions turn on whether fiduciary constitutionalism should be seen as a “literalist,” “analogical,” or “translational” project.¹²²

A “literalist” approaches political relationships as literal manifestations of fiduciary relationships. For the literalist, public officials just *are* fiduciaries with all of the legal requirements that pertain thereto. Evan Fox-Decent’s work might be an exemplar of the literalist approach in the context of fiduciary political theory (of which fiduciary constitutionalism might be a subspecies).¹²³ Fox-Decent essentially argues that fiduciary principles are “fractal” in nature because they “retain[] the same fundamental normative structure on any scale,”¹²⁴ from “parent-child relations through to the state-subject relationship.”¹²⁵

An “analogical” approach, by contrast, suggests that because certain domains of political life bear a close resemblance to private fiduciary relationships, several features of public law ought to track at least the broad outline of private fiduciary law.¹²⁶ And a third “translational” orientation takes the *sui generis* structure of public law to be a starting point, but looks to apply private fiduciary law to it through interpretation. Indeed, the translational approach reconfigures fiduciary

121. See Aaron Saiger, *Agencies’ Obligations to Interpret the Statute*, 69 VAND. L. REV. 1231 (2016).

122. One of us discusses these modalities in Stephen R. Galoob & Ethan J. Leib, *The Core of Fiduciary Political Theory*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 401, 413–17 (D. Gordon Smith & Andrew S. Gold eds., 2018). We draw on that discussion in what follows.

123. See EVAN FOX-DECENT, SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY (2011).

124. *Id.* at 113.

125. *Id.* at 48.

126. Examples here include Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 49 GA. L. REV. 949 (2014); Malcolm Thorburn, *Justifications, Power, and Authority*, 117 YALE L.J. 1070, 1098–103 (2008); Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845 (2013).

principles to adapt them in light of the distinctive purposes and challenges of the public sphere.¹²⁷

The more literal the approach, the easier it might be to assume relatively straightforward judicial remedies for breaches of public fiduciary obligations. And there is plenty of caselaw supporting that direct application in the courtroom.¹²⁸ Here is how one state court puts it:

These [public fiduciary] obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office The citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations except through the medium of the ballot, the pressure of public opinion or criminal prosecution. He may secure relief in the civil courts . . . through an action brought in his own name.¹²⁹

And there are cases in federal courts, too: One found an inspector at the Department of Agriculture to have enforceable public fiduciary obligations to the United States;¹³⁰ another enforced a fiduciary duty of confidentiality against a former CIA agent.¹³¹ Even English courts at the time of the founding were holding public officers directly liable for breaches of their public fiduciary obligations through damages¹³² and indictment.¹³³ English treatises suggested that violations of the duties of “faithful execution” could lead to forfeiture of office or civil liability.¹³⁴ And although some early courts took more modest positions about

127. An example of this approach is Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 706 (2013).

128. One of us discusses some of these cases in Leib & Galoob, *supra* note 118.

129. *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 222 (N.J. 1952); *see also* *Cty. of Cook v. Barrett*, 344 N.E.2d 540 (Ill. Ct. App. 1975).

130. *See* *United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964).

131. *See* *Snepp v. United States*, 444 U.S. 507 (1980).

132. *See* *Horsley v. Bell* (1778) 27 Eng. Rep. 494, 495; *Amb. 770, 773* (Ch.); *see also* 1 RICHARD BURN, *ECCLESIASTICAL LAW* 56 (London, 7th ed. 1809) (observing that if an apparitor [a civil servant who is paid from a public treasury] does not faithfully execute his office, “an action on the case at common law will lie against the apparitor for the falsehood committed by him in his office, besides the punishment inflicted on him by the ecclesiastical court for such a breach of trust.”).

133. *See* *R v. Bembridge* (1783) 99 Eng. Rep. 679; 22 How. St. Tr. 1, 155–56 (Lord Mansfield). For a later application in Australia, *see* *R v. Boston* [1923] 33 CLR 386, 400 (finding that paying a member of Parliament to put pressure on another public official is a crime even if the objective was lawful and beneficial to the state because members must “act with fidelity and with a single-mindedness for the welfare for the community”).

134. COMSTOCK, *supra* note 16, at 228 (An action may lie against an administrator “upon his bond for faithful administration” if “it appear [sic] that the money was received by him” or “if, afterwards, that he has been cited to render an account by the judge of probate.”); WILLIAM CRUISE, *A DIGEST OF THE LAWS OF ENGLAND RESPECTING REAL PROPERTY* 144 § 92 (London, A. Strahan 2d ed. 1818) (“[I]n the grant of every office, there is a condition implied, that the grantee shall execute it faithfully;” if not, “the office is forfeited.”).

direct enforcement as a matter of equity,¹³⁵ one thought the right approach was to use mandamus to compel public fiduciaries to perform their duties.¹³⁶ Public fiduciary duties, then, can have straightforward (and literal) juridical applications with fairly conventional remedies one would see in the private law: constructive trusts, accounting, injunctions, and damages with a view to disgorgement.¹³⁷

Yet translational approaches to fiduciary constitutionalism might emphasize some of the more site-specific remedies public law designs for breaches of the public trust: impeachment, electoral accountability, and modalities of informal oversight.¹³⁸ There may be parallels to these forms of vindication and remediation for fiduciary default in the private law, too. But the “translationalist” should calibrate her remedial scheme to the special purposes of the public sphere and the complexity associated with representing huge classes of beneficiaries with adverse political interests and preferences.¹³⁹

For those committed to analogical reasoning—and Lawson and Seidman are pretty explicit that they embrace their “Constitution as fiduciary instrument” as a mere analogical approach¹⁴⁰—it is harder to say what the right kinds of remedies ought to be for fiduciary defaults by public officers. Indeed, if fiduciary constitutionalism is “only” an analogical enterprise, it does not seem obvious that the same interpretive and remedial conventions should apply to powers of attorney

135. See *Attorney-General v. Brown* (1818) 37 Eng. Rep. 138, 163; 1 Wils. 323, 383–84 (Ch.) (holding commissioners, in a decision by Lord Chancellor Eldon, to a fiduciary duty to account to the AG flowing from a statutory creation of a trust for charitable purposes). *Accord* *Attorney-General v. Heelis* (1824) 57 Eng. Rep. 270, 274; 2 Sim & St 67, 76–77 (Ch.).

136. See *Drewry v. Barnes* (1826) 38 Eng. Rep. 511, 514–15; 3 Russ 94, 104–05 (Ch.).

137. See, e.g., *United States v. Carter*, 217 U.S. 286, 306 (1910) (holding that “under [no] circumstances [shall] a public official . . . retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent” because “it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received”). See also *Bowes v. City of Toronto*, (1858) 11 Moo. 463; 14 Eng. Rep. 770 (Can.) (holding a mayor’s profit from a conflicted transaction in trust for the city). This Canadian court observed: “With regard to members of a Legislature . . . who vote in support of their private interests; if that ever happens, there may possibly be insurmountable difficulties in the way of the practical application of some acknowledged principles by Courts of civil justice, which Courts, however, are nevertheless bound to apply those principles where they can be applied.” *Id.* at 524. In another direct application of public fiduciary duties in the High Court of Australia, a contract was set aside as against public policy because it contemplated using the services of a member of the Parliament of Victoria in a capacity that would focus him on “considerations of personal gain or profit,” disallowed by his status as a fiduciary for the public interest. *Horne v Barber* (1920) 27 HCA 494, 501 (Rich, J).

138. For the history of using fiduciary standards in impeachment trials, see E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025 (1975); Leib, Ponet & Serota, *supra* note 127, at 715–17. For discussion of other political enforcement mechanisms, see *id.* at 705, 728–30. For some historical evidence that failing to be faithful to an office could lead to its forfeiture, see 3 CRUISE, *supra* note 134, at 144 § 92 (“[I]n the grant of every office, there is a condition implied, that the grantee shall execute it faithfully;” if not, “the office is forfeited.”).

139. For an example of “remedial equilibration” in public fiduciary law, see Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013).

140. See LAWSON & SEIDMAN, *supra* note 6, at 4, 38, 54–56.

and constitutional offices. That is, even if the authors are right that the Constitution is *like* a power of attorney, it does not follow that interpretive canons and remedial design associated with those kinds of documents should necessarily apply.¹⁴¹ Lawson and Seidman’s confidence about *NFIB v. Sebelius*,¹⁴² *Yates v. United States*,¹⁴³ and *Bolling v. Sharpe*¹⁴⁴ notwithstanding, the analogist has a lot of work to do to get from observation about similarity to interpretive canon and remedy.

Whatever one’s mode of fiduciary constitutionalism—literal, analogical, or translational—it is not hard to see how it can be vindicated with respect to the limitations on the pardon power we specify in Part II. A prosecutor who seeks to prosecute a defendant with a pardon—and who doubts the validity of such a pardon on grounds of faithless self-protection—can proceed with her prosecution. When the defendant invokes the pardon for a dismissal, a federal district court could rule on whether the pardon was faithful or in derogation of the law against self-dealing. Even if a president succeeds in releasing a pardoned criminal, a successor president would not have to recognize an invalid pardon and could seek to detain that criminal again. The convicted criminal would surely bring a civil habeas action, challenging the legality of the detention and re-imprisonment. But this habeas action would open an inquiry into the faithfulness and validity of the pardon.

The extent to which courts will entertain the limits on the pardon power of the President that we have delineated here is as yet untested. If one assumes that the pardon power is absolute and unlimited, our suggestions here may seem alien and preposterous. But, as we showed in Part II, the law of the pardon power is that it is not absolute. Courts have explained that it is constrained by the rest of the Constitution and it is conventionally the duty of the courts to enforce this constraint.

Ultimately, as we’ve shown here, fiduciary constitutionalism, in whatever modality, furnishes important legal conclusions—whether one is an originalist or non-originalist about the meaning of the document. But there is precious little to tell us whether the general fiduciary obligations of public office (outside the

141. Even supposing the interpretive canons of powers of attorney bind interpreters today, these canons do not take us much further than “construe the authorizations strictly” rather than “liberally.” This may be enough for the authors to get them where they want to go, but a basic course on statutory interpretation would highlight that this kind of canon is observed mostly in the breach. Judges and other interpreters find canons this vague hard to take especially seriously—and framing effects of how a question is posed have a dramatic effect on what is perceived as “strict construction” and what is a “liberal construction.”

142. 567 U.S. 519 (2012). LAWSON & SEIDMAN, *supra* note 6, at 91–99, conclude that Obamacare was unconstitutional because of the *analogy* of the Constitution to powers of attorney.

143. 135 S. Ct. 1074 (2015). LAWSON & SEIDMAN, *supra* note 6, at 126, conclude that the regulations under which Yates was convicted were unconstitutional because of the *analogy* of the Constitution to powers of attorney.

144. 347 U.S. 497 (1954). LAWSON & SEIDMAN, *supra* note 6, at 170–71, conclude that the case was “easy . . . to decide” because of the *analogy* of the Constitution to powers of attorney.

specific obligations of the office of President) should be enforced in courts or through impeachment or other political mechanisms. There is plenty of evidence through the ages that these non-statutory duties are justiciable in courts, but there is also a long tradition of using other mechanisms of enforcement, whether for pragmatic or other structural reasons, the further up the chain of command one gets.¹⁴⁵ This isn't the place to perfect the design of remedies for public fiduciary default. That conversation will surely get richer as the project of fiduciary constitutionalism continues after Lawson and Seidman's contribution to this important enterprise.

CONCLUSION

Thanks to the important work of Robert Natelson, Gary Lawson, and Guy Seidman, more people are beginning to see more fiduciary dimensions of the Constitution's design. We have sought to add to their core findings of fact by exploring the ways "faithful execution" and the constitutional oath, in particular, reinforce certain fiduciary obligations that apply against the President, limiting his powers. And actual legal conclusions about how we should be governing ourselves and organizing our politics would seem to follow if we are to take these fiduciary obligations seriously. Whether these legal conclusions are to be vindicated in the courtroom, through elections, or by impeachments remains a pressing conversation within fiduciary constitutionalism. But as we have detailed here, for hundreds of years courts have found at least some breaches of the public trust justiciable, and we expect more courts and scholars to be weighing in on these issues in the coming years, which will help us figure out how to design a calibrated remedial approach to be faithful to the fiduciary dimensions of our Constitution.

145. See Lionel Smith, *Loyalty and Politics: From Case Law to Statute Law*, 9 J. EQUITY 130 (2015); Stephen Gageler, *The Equitable Duty of Loyalty in Public Office*, in FINN'S LAW: AN AUSTRALIAN JUSTICE 126 (Tim Bonyhady ed., 2016).