

## FIDUCIARY LAW AND THE LAW OF PUBLIC OFFICE

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### ABSTRACT

*A law of public office crystallized in Anglo-American law in the seventeenth and eighteenth centuries. This body of law—defined and enforced through a mix of oaths, statutes, criminal and civil case law, impeachments, and legislative investigations—imposed core duties on holders of public executive offices: officials needed to serve the public good, not their own private interests; were barred from acting *ultra vires*; could often be required to account to the public for their conduct in office; and needed to act with impartiality, honesty, and diligence. Officeholding came to be viewed as conditional, with officers removable for misdeeds. These substantive duties within the law of public office—even if not its enforcement structure—reflected something that looks similar to modern fiduciary duties of loyalty and care.*

*In this Article, we extend the historical record describing this law of public office and make several new historical and theoretical claims. First, there are reasons to suspect that what we identify as the law of public office and what are now generally considered private fiduciary duties developed together and influenced each other. During the critical centuries we explore, the duties of officeholders such as trustees, executors, and corporate directors were*

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*developing alongside the duties of public officials such as tax collectors and government commissioners. Parliament and other actors repeatedly used the language of trust, trusteeship, guardianship, and account to define the law of public offices. Additionally, public law concerns about abuse of power and the need for honesty, fidelity, and altruism in service of others may have seeped from public law into private fiduciary law. Influential political theory about the monarchy and lesser magistrates also used trust and related legal language to set forth a fiduciary conception of public officeholding; the theoretical developments in political theory not only drew from legal concepts but also may have helped shape them.*

*One Article cannot decisively establish whether the similarities in language, concepts, and timing were mere coincidence or rather evidence of some conscious codevelopment in the law of public offices and fiduciary law. Proving (or disproving) actual causal relationships will need to be the work of the future. We conclude with some potential implications for our research, should further work continue to confirm our findings here. In short, fiduciary political theorists should be less anxious about drawing from private law models, and private law fiduciary theorists might need to be less insistent on the purity of the private sphere. Our research agenda invites more mutual learning—both historically and for law and institutions today.*

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## INTRODUCTION

Public law theorists who want to draw on fiduciary law to learn more about their subjects employ a conventional narrative: fiduciary law is private law but can be analogized or translated to illuminate relationships in public law.<sup>1</sup> However, the relationship between private and public fiduciary law may be more complex—historically, causally, and conceptually—than one of analogy or translation.<sup>2</sup> We aim here to begin making the case that the public-private distinction in fiduciary law is more porous than has been understood thus far and to explore some of the potential consequences of that finding, if it is correct.

Our contribution begins with describing a distinctive law of public office that emerged over centuries in England—a body of rules, oaths, practices, and norms defining what it meant to carry out the duties of public executive office properly. This law of public office crystallized in important ways in the seventeenth century.<sup>3</sup> In anachronistically modern terms, we can say that some of this law's prominent features look similar to the fiduciary duties of care and loyalty, as we see them today.<sup>4</sup> The law of public office often drew upon the language of trust, trusteeship, guardianship, and account to describe its claims that government officials needed to serve the public good, not their own private interests; could not act *ultra vires*; could be required to account to the public for their conduct in office; needed to act with impartiality, honesty, and diligence; and could be removed from office for misdeeds.<sup>5</sup> Imposing these norms

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1. See, e.g., Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 986-88 (2014); Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 871-75 (2013); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 706-13 (2013). One of us once saw things this conventional way too. See Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 705-12 (2013).

2. Our first sense that the public-private distinction in fiduciary law needed more attention came from historical work for Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2180-82 (2019).

3. See *infra* Part I.C.

4. See Kent et al., *supra* note 2, at 2118-19.

5. See *infra* Part I.C.

on officeholders was not merely ethical or rhetorical, nor was this emergent ideology mere political theory; hard law controlled officers' conduct and motives.<sup>6</sup> Parliament legislated to impose oaths, requirements to account, and rules of correct official behavior.<sup>7</sup> Parliament used its investigatory powers to correct wrongdoing by public officials.<sup>8</sup> And both the Crown and, at times, private litigants could invoke the courts when officers failed in performance, rendering the law of public office oftentimes plainly juridical.<sup>9</sup>

Seventeenth century political theory also drew upon the trust, account, and guardianship language (while providing a framework supporting fiduciary development of the law of public office), especially the republican thought of John Locke, John Milton, James Harrington, Marchamont Nedham, and the Levellers, among others.<sup>10</sup> Arguing against divine rights monarchists, and drawing on Calvinist and Lutheran thinking on resistance to tyranny, these theorists claimed that government is created through a delegation of power with the people's consent; power must be exercised under the law solely for the people's benefit; and rulers can be opposed and deposed when the rules governing the monarch or other ruler are violated and the people's rights endangered.<sup>11</sup> As we hope to show, while these developments in political theory took inspiration from

6. *See infra* Part I.C.

7. *See infra* Part I.C.

8. *See infra* Part I.C.

9. *See infra* Parts I.A-C.

10. *See infra* Part I.C. Of course, some have seen important distance between the "republicans" and the "commonwealthman." *See generally* J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975). Fox-Decent has also engaged in a provocative rereading of Hobbes that takes "trust" and "fiduciary power" to the center of Hobbes's own conception of legal authority. *See* EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* 1-22 (2011). We do not address Hobbes here.

11. *See infra* Part I.C. Daniel Lee's study of the French "monarchomach" writers (particularly François Hotman (1524-1590), Philippe de Mornay (1549-1623), and Theodore Beza (1519-1605)), who developed an early conception of popular sovereignty in opposition to royalist absolutists while drawing on a "juridical" framework of Roman private law, suggests that a longer version of our story should start earlier than the periods on which we focus here. *See* Daniel Lee, *Private Law Models for Public Law Concepts: The Roman Law Theory of Dominium in the Monarchomach Doctrine of Popular Sovereignty*, 70 *REV. POL.* 370, 375-76 (2008). For Lee's account of how this Roman private law makes its way to English constitutional thought in the Stuart period, see DANIEL LEE, *POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT* 273-315 (2016). Our research invites more work on these connections.

a discourse that sounded in fiduciary government, the positive law of office similarly drew upon developing conceptions of loyalty, care, and account.<sup>12</sup>

Although Cromwellian repression and then the restoration of the monarchy in 1660 meant that the most radical of these ideas would lay dormant for a time, these concepts continued to influence English thought and governance, including in the North American colonies.<sup>13</sup> Putting aside the violent and revolutionary implications of some of the claims in this body of political thought, the views advanced by those thinkers about the ultimate source of political authority (popular sovereignty) and the proper view of public office (created and bounded by standing laws that constrained authorizations; aimed at the public good, not private gain; and properly marked by honesty and impartial execution) are conventional wisdom today in Anglo-American law and political culture.<sup>14</sup>

Running parallel and occasionally overlapping with important developments in the law of public office, the private law of trusts started taking its modern form in the period running from the late 1600s into the early 1800s.<sup>15</sup> While the common law of account was ancient and the figurative use of trusteeships for conceiving of public offices can trace back to Roman law ideas,<sup>16</sup> it is hard to ignore a fertile period of apparent codevelopment that occurred in this period we study. Just as public law developed parameters for holding public officers accountable through judicial, political, and moral frameworks, the common law and equity also concretized

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12. As Pocock has shown, the legal language of “precedent, common law and ancient custom” was used to carry on “English political argument” during the seventeenth century, and political ideas were influenced in important ways by the legal terminology which helped frame the debates. J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* xi (rev. ed. 1987). We suggest in what follows that the legal language of trusts was similarly generative for political theory, but also that political theory may well have helped influence the development of both the public law of offices and fiduciary law.

13. See *infra* Parts I.C, II.

14. See *infra* Part II.

15. See *infra* Parts I.B-D.

16. See MARCUS TULLIUS CICERO, *DE OFFICIIS* bk. I, § 85, at 86-87 (Walter Miller trans., 1913); see also Daniel Lee, “*The State is a Minor*”: *Fiduciary Concepts of Government in the Roman Law of Guardianship*, in *FIDUCIARY GOVERNMENT* 119, 119-23 (Evan J. Criddle et al. eds., 2018).

their approaches to constraining private fiduciaries—doctrines and remedies that remain with us to this day.<sup>17</sup>

During the time period we investigate, modern distinctions between public and private office did not yet fully exist; that fact supports our effort to problematize those distinctions.<sup>18</sup> For instance, corporations were created by statute or royal charter, and corporate directors were viewed in many ways as public officials.<sup>19</sup> What are today quintessential private fiduciary offices, such as guardian, executor, or administrator, could sometimes be created and filled with a specific named person by statute.<sup>20</sup>

The history we relate here tells us something important about the possibility of mutual learning between the fiduciary aspects of the law of public offices and private fiduciary law and suggests caution about treating these bodies of law as if they come from entirely different sources.<sup>21</sup> We are not the first to notice fiduciary language and concepts in the work of some seventeenth century English thinkers.<sup>22</sup> Our contribution here, and suggestion for future research, is to note the striking coincidences of timing, language,

17. See *infra* Part I.D.

18. See *infra* Parts I.B-C.

19. See DAVID KERSHAW, *THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW* 290-92 (2018).

20. See, e.g., An Act to Appoint Trustees to Take Care of the Person and Property of Joseph Ensor, an Ideot, ch. 13, 1783 Md. Laws para. 2 (appointing named people trustees and requiring that they post a bond with security “for the faithful execution and discharge of the trust committed to them by this act, and to comply with the directions thereof, and in all things faithfully to perform their duty as trustees ... and to preserve his property from waste or damage; and annually (or oftener if required by the chancellor) to render an account”).

21. Getzler, from whom we have learned so much, sometimes goes even further to argue that “accountability is the key concept, and historically, account duties spring from English feudal law and society where no neat split could be made between public and private.” Joshua Getzler, “As If.” *Accountability and Counterfactual Trust*, 91 B.U. L. REV. 973, 976 (2011) [hereinafter Getzler, “As If.”] (emphasis omitted). The connection between private fiduciary loyalty and its historical linkage to tax collection in manorial accounting is developed in Amir N. Licht, *Lord Eldon Redux: Information Asymmetry, Accountability and Fiduciary Loyalty*, 37 OXFORD J. LEGAL STUDS. 770, 773, 784-86 (2017). Even if all fiduciary obligation—private and public—has its roots in accounting, it remains instructive to examine critical points of contact and development in matters of trust in the time period upon which we focus here. If anything, Getzler’s and Licht’s stories about accounting and accountability as the relevant original category from which private and public fiduciary law sprouted only reinforce the need to problematize the public-private distinction.

22. See, e.g., FOX-DECENT, *supra* note 10, at 3-4; Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 996-97, 996 n.16 (2017).

and conceptual apparatus in the development of private fiduciary duties, this body of political theory, and the law of public office—coincidences that may suggest direct influence and borrowing.

Obviously, the historical connections between the duties that constrain public and private offices—and their manifestations in public and private law<sup>23</sup>—do not entail a need for full harmonization in the respective rules that control different kinds of fiduciaries.<sup>24</sup> Even within the private law areas that are part of modern private fiduciary law—for instance, agency, partnership, trust law, corporate law, and the law governing lawyers—we do not see or expect to see perfect harmonization. Different institutions, political economies, and local design problems generate differences in applications of the duties of loyalty and care. We do not claim that public offices were understood to be literally the same thing as what today we call private law fiduciary offices. For instance, a tax collector neither was nor is literally a trustee, subject to every precise duty, legal relationship, and remedy imposed by Chancery.<sup>25</sup> But there were undoubtedly similarities in how the duties of the office-holders were discussed. Understanding those similarities should not be ignored by an approach, seen in a recent article by Samuel Bray and Paul Miller, that in effect argues that either there is shown to be an exact identity between private fiduciary law and the law of public office—and all their pertinent remedies—or else scholars exploring linkages are engaged in “failings,” “misreading[s],” and “mistakes.”<sup>26</sup>

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23. The idea that public fiduciary law has no “juridical” content—central to the argument in Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479 (2020)—is belied by hundreds of years of public law, which has used oaths and institutions to reinforce the positive law of sustaining the public trust, along with remedies of impeachments, forfeitures of office, fines, accountings, and other approaches to enforcement. See generally Kent et al., *supra* note 2.

24. Some efforts might be read to go too far in collapsing the public-private law distinction in fiduciary fields. See David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 140-41, 152, 154 (2013); Evan Fox-Decent, *The Constitution of Equity*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 116, 129-30 (Dennis Klimchuk et al. eds., 2020).

25. See Bray & Miller, *supra* note 23, at 1498-99 n.84.

26. *Id.* at 1479; see also *id.* at 1526 n.181 (stating that our “attempts to tie English trust law to public law” in a prior article were “entirely speculative”). Our hope is that what follows vindicates our earlier speculation.

In this Article, we can do no more than sketch support for the suggestion that it may no longer be appropriate for public law scholars working with fiduciary concepts to think they are misappropriating ideas wholly extrinsic to public law. We want to plant and grow the idea that we very well might not have the fiduciary law we know today in the private law without some cross-pollination from the law of public office and republican political theory in the seventeenth century and to tentatively explore some of the implications for this new perspective on the public-private distinction in fiduciary law.

The remainder of this Article proceeds in two main parts. Part I contains historical description and analysis, tracing the genesis and evolution of private fiduciary law, the law of public office, and related political theory, which rejected royal absolutism and viewed government office, including the monarchy, as conditionally granted for the good of the people. As noted, we argue that there may have been not only coincidental timing but also codevelopment and borrowing. Part II sketches some implications of viewing the public law office and private fiduciary law as having common roots.

#### I. THE CO-EVOLUTION OF FIDUCIARY LAW, THE LAW OF PUBLIC OFFICE, AND REPUBLICAN POLITICAL THEORY

In this Part, we take a first cut at setting out evidence of the striking linguistic and conceptual similarity, as well as apparent contemporaneity of development—mostly centered in a fertile period of a little over a century starting in the early 1600s—of fiduciary law, the law of public office, and seventeenth- and eighteenth-century English political theory of the republican variety.

Let us also say a word about method before we lay out the evidence. During the time period we examine, words such as “trust” and “account” (and their variants) had and still have today, ordinary meanings as well as specifically legal ones. Dating back to the medieval period, the *Oxford English Dictionary* finds that the noun “trust” meant, among other things, “[f]irm belief in the reliability, truth, or ability of someone or something; confidence or faith in a

person or thing.”<sup>27</sup> For just as long, the verb “account” has had the ordinary meaning “[t]o render a reckoning.... To present an account or reckoning of (one’s actions, etc.); to answer for, to explain or justify.”<sup>28</sup> The specifically legal usages probably grew out of pre-existing ordinary meaning. In reading historical documents, we have tried to pay careful attention to the biographies of authors, grammar, context, and other clues to ascertain whether writers used words in a legal or ordinary sense. Sometimes it seemed pretty clear to us which was which; other times it was more difficult to tell. Even judicial opinions sometimes use casual language rather than technical concepts. Political tracts and treatises likewise vary in their absorption of legal language.

We pause to note this here because additional research is needed to determine whether the many uses of language that sound in a fiduciary and legal register were in fact self-consciously so used, or whether instead some kind of osmotic process was underway in which legal meanings and ordinary meanings interacted. Our effort to reconstruct the development of the law of public office alongside developments in trust and fiduciary law below focuses on what we take to be significant legal uses of relevant terms, but more work will be necessary to differentiate more clearly ordinary usages from more technical legal ones in our corpora of material.

Section A charts the beginnings of what ultimately gets concretized as the law of public office. In Section B, we furnish a prehistory of what eventually becomes recognized as fiduciary law. Section C explains a critical junction when republican political theory intervenes to affect the history of the law of public office. Finally, in Section D, we gesture at how these developments may have influenced modern fiduciary law.

### *A. The Emergence of a Law of Public Office*

This Section begins tracing the development of a law of public office that, over time, came to have important resemblances to what we now call private law fiduciary duties. As we will show, there are clear linguistic and conceptual similarities between this emerging

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27. *Trust*, OXFORD ENGLISH DICTIONARY (3d ed. 2015), <https://perma.cc/7G6B-BFZV>.

28. *Account*, OXFORD ENGLISH DICTIONARY (3d ed. 2015), <https://perma.cc/7SYE-FQPR>.

law of public office and what became known as fiduciary duties.<sup>29</sup> In England, a vast number of public and quasi-public offices were required by some combination of oath, legal command, and custom to observe a minimum of three requirements, a tripartite framework we have called the duty of “faithful execution” in previous work.<sup>30</sup> As the law developed over time, officeholders had “an affirmative duty to act diligently, honestly, skillfully, and impartially in the best interest of the public,” were “restrain[ed] against self-dealing and corruption,” and were instructed to “stay within the authorization of the law and the office.”<sup>31</sup> Obligations to account were often present too.

Our prior research found these requirements focused on the middling and lower level executive offices, the whole pyramid of officialdom except the very top, which was made up of officers who were largely “amateur, part-time and unsalaried” in the seventeenth century.<sup>32</sup> However, there is a sense in which all public offices came—over a long period of time—to have similar minimum duties of faithful execution. Impeachments of peers who served in public roles directly under the king in the seventeenth and eighteenth centuries suggest as much, as does the gradual hemming in of the monarchy, namely the growth of Parliamentary supremacy,<sup>33</sup> the reduction of the prerogative,<sup>34</sup> the insistence that the ruler serve

29. See *infra* Part I.C.

30. See Kent et al., *supra* note 2, at 2141-44.

31. See *id.* at 2141.

32. Mark Goldie, *The Unacknowledged Republic: Officeholding in Early Modern England*, in *THE POLITICS OF THE EXCLUDED, c. 1500-1850*, at 153, 154 (Tim Harris ed., 2001). The most senior state officers serving the king took oaths promising things like secrecy and to “well and truly ... counsel the King.” See Form of the Oath of Those of the King’s Council, *reprinted in* 1 *STATUTES OF THE REALM* 248, 248 (London, Dawson of Pall Mall 1963) (1810). Justices of royal courts were directed to “do equal Law and Execution of right to all our Subjects, rich and poor, without having regard to any Person” and swore an oath to “take [no] Fee nor Robe of any Man, but of Ourselves [the King], and ... take no Gift nor Reward by themselves, nor by other, privily nor apertly, of any Man that hath to do before them by any Way.” Ordinance for the Justices 1346, 20 Edw. 3 c. 13, *reprinted in* 1 *STATUTES OF THE REALM, supra*, at 303, 303-04.

33. See JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 27-29 (1999); HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 207-08, 222-28 (2003); Kent et al., *supra* note 2, at 2157-59.

34. See JOHN BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 105-06 (5th ed. 2019); BERMAN, *supra* note 33, at 207-08, 222-28; 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*136-37,

the public good, not private interests,<sup>35</sup> the imposition by Parliament of an independent judiciary;<sup>36</sup> and the stunning implications of two depositions of kings and one regicide in the seventeenth century.<sup>37</sup>

The faithful execution framework can be seen in nascent form in the thirteenth century, though its origins could be older still. Use of government office for private gain was common at this time and for centuries later.<sup>38</sup> Many officials in the medieval and early modern period “paid the Crown for their offices and then farmed out the offices to deputies, while keeping most of the fees and emoluments of office for themselves.”<sup>39</sup> As Gerald Aylmer describes it, “offices under the Crown were often treated like pieces of private property,” held on life tenure, and “sometimes even described as ‘freeholds.’”<sup>40</sup> Many offices could be, and were, sold or devised.<sup>41</sup>

Most famously, the English kingship was understood to be both an “estate” and an “office,” in the words of Sir John Fortescue, Chief Justice of King’s Bench in the fifteenth century and the most important constitutional thinker of his time.<sup>42</sup> The language of private property was not accidental; Fortescue and others at the time understood kingship to be a *dominium reale*.<sup>43</sup> The Latin term

\*156, \*183, \*257; 4 *id.* at \*391-92; Kent et al., *supra* note 2, at 2159.

35. See, e.g., ACT OF SETTLEMENT 1700-01, 12 & 13 Will. 3 c. 2, *reprinted in 7 STATUTES OF THE REALM*, *supra* note 32, at 636, 637 (“That in case the Crown and Imperiall Dignity of this Realm shall hereafter come to any Person not being a Native of this Kingdom of England this Nation be not obliged to ingage in any Warr for the Defence of any Dominions or Territories which do not belong to the Crown of England without the Consent of Parliament.”).

36. *Id.* (requiring that judges’ commissions be made during good behavior, not during the pleasure of the monarch); see also BERMAN, *supra* note 33, at 227.

37. See BERMAN, *supra* note 33, at 225 (stating that after the Glorious Revolution “it was clear that Parliament ... had the right to make and unmake kings”).

38. See G. E. AYLMER, *THE KING’S SERVANTS: THE CIVIL SERVICE OF CHARLES I, 1625-1642*, at 106 (1961) [hereinafter AYLMER, KING’S SERVANTS].

39. See Kent et al., *supra* note 2, at 2144 (citing K.W. SWART, *SALE OF OFFICES IN THE SEVENTEENTH CENTURY 45-48* (1980)).

40. AYLMER, KING’S SERVANTS, *supra* note 38, at 106, 227; see also 2 BLACKSTONE, *supra* note 34, at \*36.

41. 4 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 520 (3d ed. 1945) (discussing “the feudal confusion of office and property”).

42. S.B. CHRIMES, *ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY* 14 (1936) (quoting JOHN FORTESCUE, *GOVERNANCE OF ENGLAND* viii (Oxford, C. Plummer ed., 1885)).

43. J.H. BURNS, *LORDSHIP, KINGSHIP, AND EMPIRE: THE IDEA OF MONARCHY, 1400-1525*, at 60 (1992); see also CHRIMES, *supra* note 42, at 12 (discussing how Fortescue viewed the English kingship as a “public office” and also “real property” owned by the king).

*dominium* had several significations (including “lordship”<sup>44</sup>), but an important meaning, from Roman property law, was “absolute and exclusive right of ownership and control,” as distinguished from tenures in which someone might have use, possession, or occupation.<sup>45</sup> Thus, the kingship was understood to be literally real property owned by the king (among other things), from which it followed that the king’s heirs could inherit it.<sup>46</sup>

Turning back again to lesser magistrates, the profit motive often led men to seek public office. Officials were paid in a bewildering variety of ways: salaries or stipends from the Crown, often called fees; annuities and pensions; room and board; livery (a uniform, more or less); perquisites in kind from the Crown; and fees for service, gratuities, and gifts from the public, sometimes authorized by law or immemorial custom, sometimes not.<sup>47</sup> Under these legal and material circumstances, it is easy to see why officeholders and the wider public understood public offices as aimed at private enrichment at least as much as the public good.

Part of the story of the emergence of rules of faithful execution of public office is a slow professionalization and reform of these practices, and the gradual transformation of office from private property for private gain into disinterested public service. During the reign of Edward VI (1547-1553), Parliament passed the Sale of Offices Act—which banned the sale of any public office relating to the administration of justice, taxation and customs, and the surveying or auditing of the King’s properties.<sup>48</sup> Offenders against the Act forfeited their offices and were debarred from holding them again.<sup>49</sup> An earlier statute barred any senior Crown officeholder from appointing a lower officer “for any Gift or Brocage, Favour or Affection.”<sup>50</sup>

44. BAKER, *supra* note 34, at 241.

45. BURNS, *supra* note 43, at 18.

46. *Id.* at 60-61; CHRIMES, *supra* note 42, at 12.

47. AYLMER, KING’S SERVANTS, *supra* note 38, at 160-61.

48. Sale of Offices Act 1551, 5 & 6 Edw. 6 c. 16, *reprinted in* 4 STATUTES OF THE REALM, *supra* note 32, at 151, 152; *see also* G. E. AYLMER, THE STATE’S SERVANTS: THE CIVIL SERVICE OF THE ENGLISH REPUBLIC, 1649-1660, at 78 (1973) [hereinafter AYLMER, STATE’S SERVANTS].

49. Sale of Offices Act 1551, 5 & 6 Edw. 6 c. 16, §§ 2, 5, *reprinted in* 4 STATUTES OF THE REALM, *supra* note 32, at 152.

50. 1388, 12 Rich. 2 c. 2, *reprinted in* 2 STATUTES OF THE REALM, *supra* note 32, at 55. Brocage meant “[t]he corrupt farming or jobbing of offices; the price or bribe paid unlawfully

The action and practice of account was another important part of the developing law of public offices. By the thirteenth century, royal and manorial courts enforced the duty to account for monies spent and received by public, quasi-public, and private feudal officials, such as sheriffs, tax collectors, bailiffs, agents, receivers, chamberlains, and others.<sup>51</sup> Accounting also occurred politically rather than in court. It sometimes “played out in public as political theatre,” occurring “by the motion of peers in great councils, backed by the threat of impeachment or trial for treason.”<sup>52</sup>

Before continuing with this story of the advancing law of public office, we turn to early developments in the law of uses and trusts, which were central to the emergence in England of what is now known as private fiduciary law.

### *B. The Emergence of Private Fiduciary Law in England*

We start with a sketch of the prehistory of private fiduciary law in England as it has been conventionally understood,<sup>53</sup> beginning with a survey or census of English landholding just before 1100.<sup>54</sup> The famous Domesday Book noted lands that were held to the use of someone else.<sup>55</sup> These temporary custodial arrangements—set up

for any office or place of trust.” *Brocage*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

51. See generally JOHN SABAPATHY, OFFICERS AND ACCOUNTABILITY IN MEDIEVAL ENGLAND 1170-1300 (2014) (discussing the duties of public officials and their accountability); Joshua Getzler, *Fiduciary Principles in English Common Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 471 (Evan J. Criddle et al. eds., 2019) [hereinafter Getzler, *Fiduciary Principles*] (examining accountability generally and its common law enforcement in particular).

52. Getzler, *Fiduciary Principles*, *supra* note 51, at 478.

53. We put to one side the debate about how much of this ultimately traces back to concepts from Roman law. See generally ERNEST VINTER, A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIP AND RESULTING TRUSTS 1-13 (3d ed. 1955) (aiming to establish links between Anglo-American fiduciary law and Roman law); Richard Helmholz, *Trusts in English Ecclesiastical Courts 1300-1640*, in ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE 153, 167-71 (Richard Helmholz & Reinhard Zimmermann eds., 1998) (questioning whether Roman law was the source of the English trust).

54. For a summary of English feudal arrangements in the aftermath of the Norman conquest of 1066, see BAKER, *supra* note 34, at 241-50. At its most basic, feudalism was a pyramidal system of hierarchical land tenures emanating from the king on down, in which land tenure and land transfers were associated with fealty and legal obligations to one’s lord, including military service and financial payments of various kinds. See *id.*

55. David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011, 1016 (2011). Lands were held for the use of others prior to the time of Domesday Book. See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW

when a landowner might have been off on a religious pilgrimage or crusade, for example—permitted protofiduciary accounting within the common law, long before equity took up the constellation of issues created by these “uses.”<sup>56</sup> Moreover, these accounting systems of intramanorial management to control the bailiffs and stewards overseeing the land in the 1100s were also applied to “public officials, who might be granted mandates and resources by the Crown and Parliament”; their “[i]ncompetent management and defalcations could lead to claims for an account.”<sup>57</sup>

By the 1200s, statutes created remedies against lords who abused their guardianships, actions that did not yet focus on mandating altruism for “fiduciaries” but did set up enforceable regimes for a kind of abuse of office.<sup>58</sup> The office of lord had obligations directed to both the Crown and to the tenant for the tenant’s protection.<sup>59</sup> The Statute of Marlborough of 1267, for example, protected the guardianships of lords from having fiefdoms conveyed out from under them—but it also imposed special duties upon them.<sup>60</sup>

Ecclesiastical courts, which had jurisdiction over wills and “violation of oaths” more generally, developed rules that today we would call fiduciary.<sup>61</sup> The most common scenarios in which these courts were involved were overseeing charitable bequests—generally to the church or religious orders—and bequests to children, including the supervision of a guardian.<sup>62</sup> For example, when Franciscans came to England, they needed to remain in poverty but

BEFORE THE TIME OF EDWARD I 238-44 (1898).

56. See Getzler, *Fiduciary Principles*, *supra* note 51, at 475-76 (exploring accounting as a social function that arises naturally before it becomes law); Licht, *supra* note 21, at 786-87 (discussing common law accounting in the form of manorial lords taking action “against bailiffs who refused to render accounts”). For more on the custodial arrangements in the following century, see generally Joseph Biancalana, *Thirteenth-Century Custodia*, 22 J. LEGAL HIST. 14 (2001).

57. Getzler, *Fiduciary Principles*, *supra* note 51, at 478.

58. See Biancalana, *supra* note 56, at 23; Mike MacNair, *Development of Uses and Trusts: Contract or Property, and European Influences and Images*, in 66 STUDI URBINATIA - SCIENZE GIURIDICHE, POLITICHE ED ECONOMICHE 305, 308-09 (2015).

59. See, e.g., Provisions of Westminster 1259, 43 Hen. 3, *reprinted in* 1 STATUTES OF THE REALM, *supra* note 32, at 8.

60. See Getzler, *Fiduciary Principle*, *supra* note 51, at 480-81.

61. See Helmholz, *supra* note 53, at 154.

62. See RICHARD H. HELMHOLZ, 1 THE OXFORD HISTORY OF THE LAWS OF ENGLAND: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S, at 418-20 (2004).

also have a place to live and pray; accordingly, in the early thirteenth century, they began to have third-party trustees hold their land for their use.<sup>63</sup> Charitable fiduciaries needed to be approved by the court and were subject to accountings.<sup>64</sup> Richard Helmholz finds that “[g]uardians were subject to continuing supervision and control by the courts,” which could remove them from office and impose financial penalties for misuse of funds.<sup>65</sup>

The 1300s saw the increasing development of a social practice called “feoffment to uses,”<sup>66</sup> used to evade various feudal obligations and strictures, among other purposes that continue to be debated.<sup>67</sup> Feudal taxation principally occurred upon the grant or inheritance of an estate in land; preventing those occurrences while still transferring property could defer or prevent taxation, withholding revenue from the king.<sup>68</sup> The common law did not allow a freehold estate to be left by will, but many people wanted to devise their property.<sup>69</sup> The Statutes of Mortmain prevented transfer of estates to corporations (which were often ecclesiastical bodies) without royal consent; because incorporeal legal entities would never die, taxation was deferred indefinitely—hence the king’s displeasure at the prospect.<sup>70</sup> Still, many people wished to care for their immortal souls by giving property to religious bodies, particularly as death was approaching, and could not secure royal permission.<sup>71</sup> For these and

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63. See Helmholz, *supra* note 53, at 156.

64. HELMHOLZ, *supra* note 62, at 418.

65. See *id.* at 420.

66. A “feoffment” is a form of land conveyance, namely a “grant in fee simple. It is made by a ‘feoffor’ to a ‘feoffee.’” BAKER, *supra* note 34, at 268 n.5.

67. Robert Palmer rejects the explanation for “uses” that focuses on feudal incidents and prefers an explanation that emphasized the use’s “redistribut[ion of] wealth from the magnates to the gentry” with the magnates’ cooperation because it promoted “the ethical objectives supported by governmental policy: paying debts, giving full value to purchasers, strengthening governance in the family, providing for one’s soul.” ROBERT C. PALMER, *ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348-1381: A TRANSFORMATION OF GOVERNANCE AND LAW* 133 (1993).

68. BAKER, *supra* note 34, at 263-64; F. W. Maitland, *Trust and Corporation*, in STATE, TRUST AND CORPORATION 75, 84-85 (David Runciman & Magnus Ryan eds., 2003); Seipp, *supra* note 55, at 1015.

69. BAKER, *supra* note 34, at 268 n.9; Maitland, *supra* note 68, at 84.

70. BAKER, *supra* note 34, at 262-63.

71. *Id.* at 271-72.

other reasons, the practice of “uses” developed and spread rapidly and widely.<sup>72</sup>

In its most basic form, a use worked as follows. The legal owner of an estate in land who wished to avoid one of the above prohibitions or problems would transfer bare legal title to a third party—often more than one—on the condition that the land be held for the beneficial enjoyment and use of others.<sup>73</sup> The original landholder would “enfeoff” the land to feoffees for the use of the beneficiary, later called the *cestuy que use*.<sup>74</sup>

However, the beneficiary had no remedy in the common law for feoffees who misbehaved—and the feoffees had full legal title, could sell or grant the land, and could sue and be sued in relation to the land.<sup>75</sup> The realization of the grantor’s wishes depended initially on the good faith and conscience of the feoffees. Without a remedy in common law courts, eventually other fora such as the ecclesiastical courts and the Chancery stepped up as courts of conscience.<sup>76</sup> Evasion of feudal duties through uses was known to the king and Parliament, but the practice of someone having legal title to be used for the benefit of someone else was already well entrenched.<sup>77</sup>

The early fifteenth century saw both ecclesiastical courts and chancellors starting to act more regularly on complaints that feoffees to uses were violating feoffors’ instructions.<sup>78</sup> By the mid-1400s, petitions in Parliament mentioned the language of “trust”

72. *Id.*; Maitland, *supra* note 68, at 87. Palmer traces the rise of the social use to the Black Plague and attributes the growth of the use to what he assumes must have been more favorable attitudes in Chancery to their enforcement in 1359 or 1369. See PALMER, *supra* note 67, at 114, 116.

73. BAKER, *supra* note 34, at 267-69.

74. *Id.*; Seipp, *supra* note 55, at 1015.

75. 6 JOHN BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483-1558*, at 654-55 (2003); Seipp, *supra* note 55, at 1016. For more on the development of uses in the fourteenth century and beyond, see generally Joseph Biancalana, *Medieval Uses*, in *ITINERA FIDUCIAE*, *supra* note 53, at 111.

76. HELMHOLZ, *supra* note 62, at 421-22; BAKER, *supra* note 34, at 270; Seipp, *supra* note 55, at 1016; PALMER, *supra* note 67, at 112, 115, 127-28.

77. Seipp, *supra* note 55, at 1017 (“In 1402 the House of Commons prayed for a remedy ... against ‘disloyal’ feoffees.... [But n]o statute was passed.”).

78. See R.H. Helmholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503, 1513 (1979) (discussing the increase in ecclesiastical jurisdiction); Biancalana, *supra* note 75, at 149 (putting the first record of a chancellor’s enforcement at 1409); BAKER, *supra* note 34, at 270 (finding settled Chancery jurisdiction over uses by the 1420s).

instead of “use,” and two cases called uses “trusts” or “confidences.”<sup>79</sup> By the middle of the fifteenth century, these cases were disappearing from the ecclesiastical docket,<sup>80</sup> though as late as 1481, executors needed to get “ecclesiastical court permission for any self-dealing.”<sup>81</sup> Still, once the Chancery court mostly took over the docket, equity trust enforcement started in earnest.<sup>82</sup> The reported cases starting in the fifteenth century commonly show that granting legal title in land upon “trust and confidence” for the beneficial use of someone else was treated by the courts as the hallmark of the creation of a use.<sup>83</sup> The early 1500s saw some action in the common law courts, which treated the holding of a feoffee to a feoffor’s instruction as enforceable and heard arguments about executors’ self-dealing as improper.<sup>84</sup> However, the main case law development occurred later in the Chancery courts in equity.

During the reign of Henry VIII (1509-1547), the King was tired of the lost revenue caused by the legal fiction of uses.<sup>85</sup> Accordingly, he started making efforts to delegitimize feoffment to uses including by litigating against them as frauds.<sup>86</sup> Yet he had to contend with centuries of widespread practice, statutes that recognized that uses existed, and lawyers, chancellors, and judges who had been complicit in the use for so long.<sup>87</sup> The King employed a test case in Chancery to force judges to agree that because land could not pass by will neither could a use of land pass by will.<sup>88</sup> Because the decision threw so many wills and uses into a state of great instability,

79. Seipp, *supra* note 55, at 1024.

80. HELMHOLZ, *supra* note 62, at 422-23; Seipp, *supra* note 55, at 1017.

81. Seipp, *supra* note 55, at 1035 n.181.

82. Palmer tends to put equity jurisdiction’s commencement closer to the Black Plague (say 1349-1370), see PALMER, *supra* note 67, at 109-10, 114, 116, 127-30, but even he does not see “the major jurisdiction of the chancellor’s court” enforcing uses until the mid-fifteenth century, *id.* at 111.

83. Seipp, *supra* note 55, at 1025-26.

84. See *id.* at 1023. In Christopher St. German’s dialogues in *Doctor and Student*, which was widely read by law students and considers the divergence of the common law from commands of conscience, “feoffment to uses” were acknowledged to be adjudicated in Chancery court. *Id.* at 1020 (citing ST. GERMAN, DOCTOR AND STUDENT, at *First Dialogue*, prologue, fol. 1b (1528), reprinted in 91 S.S. 3 (1974)).

85. BAKER, *supra* note 34, at 272-73; Seipp, *supra* note 55, at 1028.

86. BAKER, *supra* note 34, at 273-74; Seipp, *supra* note 55, at 1030-31.

87. See Seipp, *supra* note 55, at 1032.

88. BAKER, *supra* note 34, at 274; Joshua Getzler, *Duty of Care*, in BREACH OF TRUST 41, 43 (Peter Birks & Arianna Pretto eds., 2002) [hereinafter Getzler, *Duty of Care*].

Parliament acted quickly and enacted the Statute of Uses in 1536. Simply put, this complex statute reunited legal and beneficial ownership in the *cestuy que use*, while delivering significant revenue to the Crown.<sup>89</sup>

After this statute, though “sweepingly expressed,” the Chancery still had room to exercise a conscience jurisdiction concerning equitable interests in land.<sup>90</sup> Some of the types of uses that escaped the reach of the statute—for instance, active uses in which the feoffee had duties to perform, such as managing an estate or providing for charitable distributions—became known as trusts as they were nurtured over time by the Chancery court.<sup>91</sup> Trusts became very common and gained legal solidity over the years; by the later seventeenth century they were recognized as real property, inheritable, and part of a deceased beneficiary’s assets for the purposes of administering an estate.<sup>92</sup>

Early on, “[t]he personal element in trusting”—often expressed through the formula that “trust and confidence” were placed in the trustee—was prominent in the case law.<sup>93</sup> As Maitland relates, “[s]oon the Trust became very busy” and “[a]lmost every well-to-do man was a trustee.”<sup>94</sup> As we discuss below, the language of trusts and trustees spread far in England, into the law of public office and sophisticated political thought.<sup>95</sup> According to Holdsworth, “[t]rusts

89. BAKER, *supra* note 34, at 275; 2 BLACKSTONE, *supra* note 34, at \*333; Seipp, *supra* note 55, at 1033-34. Helmholz has the ecclesiastical courts holding trustees to “faithful accounting[s]” in the second half of the sixteenth century, with punishments of imprisonment and excommunication for “unfaithful’ trustee[s].” Helmholz, *supra* note 53, at 166.

90. BAKER, *supra* note 34, at 309.

91. *Id.* at 309-11; THEODORE F.T. PLUNKNETT, A CONCISE HISTORY OF THE COMMON LAW 598-99 (5th ed. 1956); Getzler, *Duty of Care*, *supra* note 88, at 43-44.

92. BAKER, *supra* note 34, at 328-29.

93. Neil Jones, *Trusts Litigation in Chancery After the Statute of Uses: The First Fifty Years*, in LAW AND LEGAL PROCESS: SUBSTANTIVE LAW AND PROCEDURE IN ENGLISH LEGAL HISTORY 103, 105 (Matthew Dyson & David Ibbetson eds., 2013); *cf.* Cook v. Fountain (1676) 36 Eng. Rep. 984, 985 (noting that Lord Chief Justice North observed that “men usually trust them most whom they love best: uses at common law were nothing else but secret confidences”).

94. Maitland, *supra* note 68, at 96-97. Similarly, “an astonishingly high proportion of early modern people held office”; one scholar estimates that around 1700, one in twenty adult males were holding public office at any given time, which could mean about one half had done so within a decade. Goldie, *supra* note 32, at 161. Thus, English legal and political elites were experienced with the trust as well as the duties and rules of public officeholding.

95. The word “fiduciary” started being used in English, generally to refer to a trustee, by

... from the sixteenth century onwards played” a significant role “in the development of our public law” because of the prominence of that legal form in “commercial, religious, political, and social life.”<sup>96</sup>

For our purposes, the most interesting feature of the development of trust law, in addition to the wide diffusion of its linguistic and conceptual categories into the law of public office, political theory, and common speech, is the growth and delineation of the duties of trustees. From early on, a core requirement of trust law was that the trustee was bound to do whatever was mandated by the trust instrument and to refrain from doing anything prohibited.<sup>97</sup> What we call today the duty of care of the trustee was shaped in the seventeenth century in the Chancery court; Getzler suggests that “a duty to manage with due care” developed from requirements that trustees account for receipt of property.<sup>98</sup>

We now turn back to the developing law of public office and anti-absolutist political theory, to begin tracing in earnest the role of the concepts of trust and account.

### *C. The Crucial Seventeenth Century: The Law of Public Office and Republican Political Thought*

We see the seventeenth century as a critical period, during which conceptual and linguistic, and perhaps causal linkages of codevelopment, became manifest among the law of public office, private fiduciary law, and English political thought, particularly republican theory. These developments involved the monarchy, lesser public offices, and offices today we call private fiduciary offices.

#### *1. The Contested Idea of Monarchy*

As the law of public offices and fiduciary law developed, important strands of English political theory moved from considering public offices, especially the kingship, as the personal property of the holder to seeing them held temporarily and conditionally, in a

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the late sixteenth century. See Getzler, *Fiduciary Principles*, *supra* note 51, at 472-73.

96. 4 HOLDSWORTH, *supra* note 41, at 408.

97. See F.W. MAITLAND, *EQUITY: ALSO THE FORMS OF ACTION AT COMMON LAW* 98 (1929).

98. Getzler, *Duty of Care*, *supra* note 88, at 44.

fiduciary fashion. The language of trust and trusteeship figured prominently in these writings.

As discussed above, in late medieval constitutional thought in England, the king held a dual public office and private estate or real property *dominium*, which included the right to transfer by inheritance.<sup>99</sup> Holding the office as property did not exclude good governance, however. The ancient idea persisted that a king must, to avoid being a tyrant, pursue the good of his people rather than self-interest. For instance, the medieval English legal treatise known as *Bracton* taught that the king “must rule justly and ‘for the common profit of all the realm,’” preserve the peace, defend the Church, and enforce and abide by the laws of the land.<sup>100</sup> Medieval constitutional thought invoked biblical verses and the metaphor of a shepherd to describe the duty of the king to pursue the good of the people.<sup>101</sup> For instance, God, through his prophet Ezekiel, said, “Woe be to the shepherds of Israel that do feed themselves! should not the shepherds feed the flocks?” and described King David as a shepherd for his people.<sup>102</sup> The idea that English kings were bound by contract and oath—their coronation oath—to rule justly, legally, and for the people’s benefit was old as well.<sup>103</sup>

Although older ideas persisted, newer theoretical views of the monarchy competed in England in the seventeenth century. These debates are significant for public officeholding, more generally because the office of the king was the most visible and important

99. See *supra* notes 42-46 and accompanying text.

100. CHARLES HOWARD MCILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST: FROM THE GREEKS TO THE END OF THE MIDDLE AGES* 194-95 (1932) (quoting *Bracton*). Daniel Lee has argued that the Roman law concept of a private guardianship, “entrusted to act for the benefit and care of their wards,” was used as an analogy for the king or ruler’s proper approach to ruling his people in medieval political thought. Lee, *supra* note 16, at 123.

101. See, e.g., ST. THOMAS AQUINAS, *ON KINGSHIP, TO THE KING OF CYPRUS* 7-9 (Gerald B. Phelan trans., 1967); see also CONAL CONDREN, *ARGUMENT AND AUTHORITY IN EARLY MODERN ENGLAND: THE PRESUPPOSITION OF OATHS AND OFFICES* 19-20, 101 (2006) (noting that, in medieval English thought, officeholders were said to be shepherds who needed to protect and tend to their flocks).

102. *Ezekiel* 34:2, 37:24 (King James).

103. See CHRIMES, *supra* note 42, at 17; DAVID MARTIN JONES, *CONSCIENCE AND ALLEGIANCE IN SEVENTEENTH CENTURY ENGLAND: THE POLITICAL SIGNIFICANCE OF OATHS AND ENGAGEMENTS* 19 (1999); EDWARD VALLANCE, *REVOLUTIONARY ENGLAND AND THE NATIONAL COVENANT: STATE OATHS, PROTESTANTISM AND THE POLITICAL NATION, 1553-1682*, at 19 (2005).

public office in the realm. There were deep disagreements in the seventeenth century about the origin or basis of the monarch's right to rule and the logical corollaries about the accountability of monarchs and lesser magistrates.

James I (1603-1625) and his son Charles I (1625-1649) contended that: "[t]he monarch's authority ... came from God, from traditional custom, and from the law of nature," rather than from any contractual or consensual relationship with the people;<sup>104</sup> the monarch should follow but was not legally bound to follow the law;<sup>105</sup> and the monarch was accountable only to God, and the people's duty was to obey their king.<sup>106</sup> On a related view, the ancient constitution of the English people, dating back before the Norman Conquest and observed in practice since then, established a contractual relationship between the monarch and the people under which the power to rule was to be limited by law made with consent of the people through their representatives.<sup>107</sup> The king was legally untouchable and accountable only to God, but accountability was ensured because the monarch could act only through magistrates who were themselves bound by law and accountable at law in various ways.<sup>108</sup>

More radical views came out of Lutheran and Calvinist theology and political theory, shaped by oppression by both the Catholic Church and Catholic rulers, on the one hand, and conservative, traditional Protestant rulers such as Henry VIII and Elizabeth I of England, on the other. Although many differences existed among

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104. JAMES T. KLOPPENBERG, *TOWARD DEMOCRACY: THE STRUGGLE FOR SELF-RULE IN EUROPEAN AND AMERICAN THOUGHT* 96 (2016).

105. BERMAN, *supra* note 33, at 237.

106. *Id.* at 235; *see also* JOHN NEVILLE FIGGIS, *THE DIVINE RIGHT OF KINGS* 5-6 (2d ed. 1922) (summarizing the doctrine of the divine right of kings: "(1) Monarchy is a divinely ordained institution. (2) Hereditary right is indefeasible.... (3) Kings are accountable to God alone.... (4) Non-resistance and passive obedience are enjoined by God").

107. *See* BERMAN, *supra* note 33, at 262; KLOPPENBERG, *supra* note 104, at 101-02; Joyce Lee Malcolm, *Introduction* to 1 *THE STRUGGLE FOR SOVEREIGNTY: SEVENTEENTH-CENTURY ENGLISH POLITICAL TRACTS* xix, xxiv (Joyce Lee Malcolm ed., 1999) [hereinafter *THE STRUGGLE FOR SOVEREIGNTY*]; *see also* EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 57 (1988) (noting that the idea of divine right of kings to rule coexisted with a notion of "[s]ome vague sort of popular consent or choice in the distant past, renewed from time to time in the coronation ceremony").

108. *See, e.g.*, MATTHEW HALE, *THE PREROGATIVES OF THE KING* 14-15 (D.E.C. Yale ed., 1976). Hale likely wrote most of this text during the interregnum and substantially completed it by the early 1660s. *See id.* at xxiv-xxvi.

the various radical Protestant theories of politics, common themes included: the right to rule is ordained by God,<sup>109</sup> but men are naturally free and so government over them is the product of their consent; Christian rulers must govern in a godly and lawful way, for the benefit of the people, not themselves; and rulers who flagrantly violate the conditions under which they rule might be disobeyed and may, perhaps—this was enormously controversial—be actively resisted and removed from office.<sup>110</sup> As we will see, the conception of public office as fiduciary came to prevail, even while there was persistent disagreement about whether resistance of unjust or un-Christian monarchs was lawful.<sup>111</sup>

## 2. *Seventeenth Century Battles over the Nature of Officeholding Before the Civil Wars*

Moving from high theory about the monarchy to concrete political battles, we see that starting in the early seventeenth century Parliament and other actors attacked corruption, overreaching, and misgovernment by Stuart kings, often with a focus on abuses related to public offices and on the Stuarts' pretensions to exercise absolutist rule.<sup>112</sup> Near the end of James I's reign, Parliament

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109. See *Romans* 13:1 (King James) (“[T]he powers that be are ordained of God.”). For this view expressed by Martin Luther and John Calvin, see 2 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE AGE OF REFORMATION* 15, 193 (1978); BERMAN, *supra* note 33, at 97; DAVID D. HALL, *THE PURITANS: A TRANSATLANTIC HISTORY* 25 (2019).

110. See SKINNER, *supra* note 109, at 237-38, 300-01, 347-48; JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* 114-17, 119-21, 134-41, 200-03 (2007); HALL, *supra* note 109, at 25, 36-37, 106-07; BERMAN, *supra* note 33, at 42-44, 66-67, 85-86, 90; JULIAN H. FRANKLIN, *JOHN LOCKE AND THE THEORY OF SOVEREIGNTY: MIXED MONARCHY AND THE RIGHT OF RESISTANCE IN THE POLITICAL THOUGHT OF THE ENGLISH REVOLUTION* 1-52 (1978); John Coffey, *Religious Thought*, in *THE OXFORD HANDBOOK OF THE ENGLISH REVOLUTION* 447, 457-58 (Michael J. Braddick ed., 2015) [hereinafter BRADDICK, HANDBOOK].

111. See *infra* Part I.D.

112. There were, of course, a wide array of issues that caused conflict between the Stuarts, on the one hand, and Parliaments and other groups and interests in England and Scotland, on the other. For instance, fear of Stuart sympathy for Roman Catholicism was an enormous flash point, as were related disputes about governance, doctrine, ritual, and toleration of dissent for Protestant England. See PHILIP EDWARDS, *THE MAKING OF THE MODERN ENGLISH STATE, 1460-1660*, at 284-331 (2001). Also controversial were attempts by James I and Charles I to fund their activities without calling a Parliament; the Crown's creation of prerogative courts, without Parliamentary consent, which did not follow common law procedures; the

investigated and drafted bills against officers taking excessive fees and against the Crown creating unauthorized new offices and selling existing ones, but James I ended these attempts at increasing official accountability by proroguing the Parliament.<sup>113</sup> James I, and later his son Charles I, was repeatedly pressured to appoint royal commissions to investigate financial abuses in public offices.<sup>114</sup> Edward Coke, the preeminent jurist of James I's time, argued that only Parliament could create new offices and new oaths for existing offices, that one who abuses a public office forfeits it, and that no officer holding a public office created by Parliament could act in excess of the lawful authority of the office.<sup>115</sup> For centuries before Coke, statutes and common law allowed criminal actions against certain public officers who abused their offices.<sup>116</sup>

Parliaments in the time of James I and Charles I used their powers to investigate, denounce, and impeach royal officials who were excessive in their use of public office for private gain or otherwise failed to faithfully execute their offices.<sup>117</sup> Impeachments of ministers and other royal officials condemned them for betrayal of "trust,"<sup>118</sup> "unfaithfulness and carelessness,"<sup>119</sup> acting "contrary to his oath, and the faith and trust reposed in him,"<sup>120</sup> and

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imprisonment of subjects without ordinary judicial process; and whether foreign policy should be guided by support for Protestant coreligionists or other bases. On these disputes and how they led to civil war, see, for example, *id.* For a useful, longer study, see generally MICHAEL BRADDICK, *GOD'S FURY, ENGLAND'S FIRE: A NEW HISTORY OF THE ENGLISH CIVIL WARS* (2009) [hereinafter BRADDICK, *GOD'S FURY*].

113. AYLMER, *KING'S SERVANTS*, *supra* note 38, at 188-90.

114. *See id.* at 189-93.

115. *See, e.g.*, MATTHEW BACON, *Offices and Officers*, in 3 *A NEW ABRIDGEMENT OF THE LAW*, (A)-(B) (Dublin, Luke White 1793); 2 T. CUNNINGHAM, *Office*, in *A NEW AND COMPLETE LAW-Dictionary* (2d ed. 1771); GILES JACOB, *Office*, in *A NEW LAW DICTIONARY* (London, W. Strahan & W. Woodfall, 10th ed. 1783).

116. 1346, 20 Edw. 3 c. 6; 4 BLACKSTONE, *supra* note 34, at \*139-40.

117. *See* AYLMER, *KING'S SERVANTS*, *supra* note 38, at 188-95, 228-29.

118. *See Proceedings Against Sir Edward Herbert, [Knight] the King's Attorney General, upon an Impeachment for High Crimes and Misdemeanors: 17 Charles I. A.D. 1642*, in 4 *A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783*, at 119, 120, 123, 125 (T.B. Howell ed., London, T.C. Hansard 1816) [hereinafter *STATE TRIALS AND PROCEEDINGS*].

119. *Resolutions on Religion Drawn by a Sub-committee of the House of Commons*, in *THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660*, at 77, 77 (Samuel Rawson Gardiner ed., Oxford, Clarendon Press 1905) [hereinafter *PURITAN REVOLUTION*].

120. *Proceedings Against Sir Richard Gurney, [Knight and Baronet] Lord Mayor of London*,

“neglect[ing] the just performance of his said Office and Duty, and [having] broken the said Trust therewith committed unto him.”<sup>121</sup>

### 3. *Kingship and Officeholding During the Interregnum*

During Parliamentary rule and the Commonwealth regime,<sup>122</sup> attempts to reform abuses of public office for personal gain included an increase in fixed salaries, attacks on fees for service and bribery, a move from life to pleasure (at will) or good behavior tenure, a reduction in sales of office, and a more frequent imposition of accounting.<sup>123</sup> Aylmer, the leading historian of seventeenth century English administration, writes of a preoccupation by Parliament and political writers during the Commonwealth with “the idea of admitting only properly qualified office-holders and of ending venality.”<sup>124</sup> Parliament’s famous Nineteen Propositions of 1642, part of its attempts to negotiate a settlement with Charles I that would greatly hem in the monarchy, argued that the great offices of state—for instance, Lord Chancellor, Lord Admiral, Secretaries of State, and chief justices—should be chosen only with the consent

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*on an Impeachment of High Crimes and Misdemeanors: 18 Charles I. A.D. 1642*, in STATE TRIALS AND PROCEEDINGS, *supra* note 118, at 159, 161.

121. *The Commons Declaration and Impeachment Against the Duke of Buckingham*, in THE ANNALS OF KING JAMES AND KING CHARLES THE FIRST 151, 151-56 (1681); see also 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, 1040 (1975) (documenting a “public trust theory” of the impeachments, in which “acting contrary to oath, to the duty of the official position, to the great trust reposed in the accused by the King, and to the laws of the Realm” were key elements).

122. Parliamentary rule over a good part of England began in 1642, as the English Civil War started. (King Charles I had already been engaged in fighting a rebellion in Scotland since 1639.) *The First English Civil War (1642-46)*, BRITANNICA, <https://www.britannica.com/event/English-Civil-Wars/The-first-English-Civil-War-1642-46> [<https://perma.cc/A728-GNGJ>]. A Commonwealth was proclaimed by the Parliamentary side in 1649, after Charles I was tried and executed by an extraordinary court of members of Parliament and Army officers. *Protectorate: English Government*, BRITANNICA, <https://www.britannica.com/topic/Protectorate-English-government> [<https://perma.cc/97W6-8Q7N>]. The Commonwealth formally lasted until the restoration of the monarchy under Charles II in 1660. *Id.* But the late Commonwealth period starting in 1653, when Oliver Cromwell became Lord Protector, is often referred to as the Protectorate. *Id.*

123. AYLMER, KING’S SERVANTS, *supra* note 38, at 433-34; AYLMER, STATE’S SERVANTS, *supra* note 48, at 82-83, 107, 114-15.

124. AYLMER, STATE’S SERVANTS, *supra* note 48, at 291.

of both houses of Parliament and should hold office during good behavior, not at will at the pleasure of the king.<sup>125</sup>

In statutes, and in denunciation and impeachment by Parliament, the language of trust crept into the public law of the faithful execution of office. The landmark Sale of Offices Act of Edward VI's time had described the revenue offices that could not be treated as personal property as services "of Truste."<sup>126</sup> Parliament began occasionally using the language of "truste and confidence" to describe its relationship to the monarch and other public officials in statutes.<sup>127</sup> It appears that trust talk about public office increased significantly during the seventeenth century, especially during the Commonwealth period. For instance, one statute from the early seventeenth century appointed public officials to handle money for the benefit of farmers and apprentices, and then provided that

if any of the parties appointed and trusted by this Act ... shall in any pointe or degree breake the trust and confidence in them in this behalf reposed, or shall comitt any other Misdemeanor or Offence in [misemploying] of the said [sums] of Money ... or in doing any other Act or Acts contrary to their dutie and the true intent and meaning of this Act [commissions shall issue for the trial of the offenders].<sup>128</sup>

Parliamentary ordinances of the Commonwealth and the Protectorate described certain public offices as "trusts," "places of [t]rust," "office[s] of [t]rust," and the like.<sup>129</sup> Also during those periods some

125. *Nineteen Propositions Made by Both Houses of Parliament to the King's Most Excellent Majestie: With His Majesties Answer Thereunto* (York, Robert Barker printer 1642), in 1 THE STRUGGLE FOR SOVEREIGNTY, *supra* note 107, at 145, 149-52 [hereinafter *Nineteen Propositions and King's Answers*]. On the Nineteen Propositions, see BRADDICK, GOD'S FURY, *supra* note 112, at 192-93, 210, 297.

126. Sale of Offices Act 1551, 5 & 6 Edw. 6 c. 16 § 1, *reprinted in* 4 STATUTES OF THE REALM, *supra* note 32, at 151-52.

127. *See, e.g.*, Treason Act 1554, 1 & 2 Phil. & M. c. 10, § 4, *reprinted in* 4 STATUTES OF THE REALM, *supra* note 32, at 255, 256; 1640, 16 Car. c. 17, § 1, *reprinted in* 5 STATUTES OF THE REALM, *supra* note 32, at 120 (directing commissioners to negotiate a treaty).

128. 1609-10, 7 Jac. c. 3, § 6, *reprinted in* 4 STATUTES OF THE REALM, *supra* note 32, at 1157, 1159.

129. *See, e.g.*, An Ordinance to Disable Any Person Within the City of London and Liberties Thereof, to Be of the Common-Councell, or in Any Office of Trust Within the Said City, that Shall Not Take the Late Solemne League and Covenant 1643, *reprinted in* 1 ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 359 (C.H. Firth & R.S. Rait eds., 1911)

offices responsible for handling public money were called “[t]rustees” and given statutory duties to account.<sup>130</sup> The Self-Denying Ordinance of 1645 required members of Parliament to resign any other civil or military offices they held and declared that officeholders “shall have no profit out of any such office, other than a competent salary for the execution of the same, in such manner as both Houses of Parliament shall order and ordain.”<sup>131</sup> Many types of offices had express faithful execution duties as well by statute. Even in the absence of such definition from statute, it came “to be agreed, [t]hat in the Grant of every Office whatsoever, there is this Condition implied by common Reason, that the Grantee ought to execute it diligently and faithfully.”<sup>132</sup> All magistrates and judges were accountable to the people as well as the king, because they were entrusted by the people with their offices and duties.<sup>133</sup>

During Parliament’s long struggle with Charles I, which would ultimately end with his trial and execution in 1649,<sup>134</sup> documents from Parliament and other sources conceived of the king as holding an office of trust granted by and for the benefit of the people.<sup>135</sup> A broadsheet published by the House of Commons in 1643, advancing its view that Parliament should control the militia, despite a statute

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(describing London government offices as “publi[c] [o]ffices and places of [t]rust”); An Act for Subscribing the Engagement 1649-50, *reprinted in* 2 ACTS AND ORDINANCES OF THE INTERREGNUM, *supra*, at 325 (imposing a loyalty oath on “all and every person ... hold[ing] ... any [p]lace or [o]ffice of [t]rust or [p]rofit, or any [p]lace or [e]mployment of publi[c] [t]rust whatsoever”); An Act for Transferring the Powers of the Committee for Indem[n]ity 1652, *reprinted in* 2 ACTS AND ORDINANCES OF THE INTERREGNUM, *supra*, at 588, 590 (providing that commissioners who would determine the indemnity due to persons who acted for Parliament during the civil wars must take an oath: “I will, according to my best skill and knowledge, faithfully discharge the [t]rust committed unto me”).

130. See An Act for the Further Explanation of a Former Act, Entitled “An Act for the Selling the Fee-Farm Rents Belonging to the Commonwealth of England, Formerly Payable to the Crown of England, Dutchy of Lancaster, and Dutchy of Cornwall” 1650, *reprinted in* 2 ACTS AND ORDINANCES OF THE INTERREGNUM, *supra* note 129, at 412, 418.

131. The Self-Denying Ordinance, *reprinted in* PURITAN REVOLUTION, *supra* note 119, at 287, 288. On the Self-Denying Ordinance, see BRADDICK, GOD’S FURY, *supra* note 112, at 351-53, 370-71.

132. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 167 (E. Richardson & C. Lintot eds., 4th ed. 1762).

133. JOHN COOK, REDINTEGRATIO AMORIS, OR A UNION OF HEARTS 12 (London, Giles Calvert printer 1647).

134. Philip Baker, *The Regicide*, in BRADDICK, HANDBOOK, *supra* note 110, at 154.

135. See, e.g., Declaration of the Houses in Defence of the Militia Ordinance, in PURITAN REVOLUTION, *supra* note 119, at 254, 256.

vesting control in the king, described the king's power over the militia as one held in trust for "the good and preservation" of the commonwealth, and argued that this followed from an "equitable" reading of the statute, one consistent with "the public good."<sup>136</sup> Henry Parker, one of the most talented publicists for Parliament's views and the likely author of the broadsheet, noted how frequently Charles I used the word "trust" in statements on his kingship.<sup>137</sup> Parker leapt on this word, writing that "the King does admit that his interest in the Crowne is not absolute, or by a [mere] donation of the people, but in part conditionate and fiduciary."<sup>138</sup> "Power is originally inherent in the people," wrote Parker, and the fiduciary nature of the grant in trust to a ruler meant that the power and the office must be used solely for the benefit of the people.<sup>139</sup> Among the consequences following from the fiduciary nature of the office is that "power [held] of trust ... is ever revocable."<sup>140</sup>

Parker was right: Charles I did admit that he held a trust, but he argued that it was both "God" and "the Law" that had "intrusted" him with power, not the people.<sup>141</sup> Charles I conceded that power was to him "intrusted ... for the good of [the] people."<sup>142</sup> "The end" or purpose of his "Monarchie" was this "Trust" that he must "discharge," accountable to God and the law but not to the people.<sup>143</sup> Charles I rejected Parliament's demands for consent to appointments and high officers serving during pleasure, but in doing so he adopted Parliament's locution of speaking of those offices as "places of Trust."<sup>144</sup>

136. John Lilburne, 'On the 150th Page': An Untitled Broadsheet of August 1645, in *THE ENGLISH LEVELLERS* 3, 3 (Andrew Sharp ed., 1998) (quoting AN EXACT COLLECTION OF THE PARLIAMENT'S REMONSTRANCES, DECLARATIONS, ETC. 150 (1642)).

137. HENRY PARKER, OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES 4 (London 1642). For a brief discussion of Parker's work, see Ted Vallance, *Political Thought*, in BRADDICK, HANDBOOK, *supra* note 110, at 430, 437-38.

138. PARKER, *supra* note 137, at 4.

139. *Id.* at 1, 3, 20, 25.

140. Richard Overton with William Walwyn, *A Remonstrance of Many Thousand Citizens*, in *THE ENGLISH LEVELLERS*, *supra* note 136, at 33, 33. On Parker and others making this point about the revocability of the King's trust by the people, see MORGAN, *supra* note 107, at 58, 62-63.

141. *Nineteen Propositions and King's Answers*, *supra* note 125, at 154, 158, 164, 168.

142. *Id.* at 154.

143. *Id.* at 169.

144. *Id.* at 159.

Some writers besides Parker used the term fiduciary to describe the office of the monarch. Samuel Rutherford, an influential Scottish Presbyterian pastor and theologian who preached several times to the English Parliament during the civil war period, wrote that the king's power to rule "is a fiducarie power, or a power of trust," with the trust imposed on the king "by God" and "by the people."<sup>145</sup> Rutherford also called the king "a Tutor," a "Patron," and someone safeguarding the people's "inheritance," from which it follows that the king must act lawfully and in accordance with God's laws for the best interests of the people.<sup>146</sup> The grant in trust of the office and the right to rule was "conditionall," and the people through their representatives had a right to resist if the king abused his office or undermined the safety and security of the laws or the true religion.<sup>147</sup>

When Parliament abolished the monarchy and peerage and adopted the Commonwealth government in 1648, its published justification stated at the outset that the monarchy was an "office," one instituted by "the People" for "the protection and good of them who chose him, and for their better government, according to such laws as they did consent unto," and that "very few [monarchs] have performed the trust of that office with righteousness, and due care of their subjects good."<sup>148</sup> The documents from 1649 charging and convicting Charles I described him as "trusted with a limited power to govern by and according to the laws of the land, and not otherwise; and by his trust, oath and office, being obliged to use the power committed to him, for the good and benefit of the people."<sup>149</sup> Charles I instead acted tyrannically, violated his oath, failed to

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145. SAMUEL RUTHERFORD, *LEX, REX: THE LAW AND THE PRINCE* 124, 129 (London 1644). On Rutherford's authorship of *Lex, Rex* and his acts and views, see WITTE, *supra* note 110, at 137, 220, 224; HALL, *supra* note 109, at 119, 243, 246, 268, 298, 307-08. For a book length treatment, see generally JOHN COFFEY, *POLITICS, RELIGION AND THE BRITISH REVOLUTIONS: THE MIND OF SAMUEL RUTHERFORD* (1997).

146. RUTHERFORD, *supra* note 145, at 124, 126.

147. *Id.* at 103, 124-26.

148. Declaration of the Commons, Stating Their Reasons for Establishing a Commonwealth, in 3 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 1292, 1293 (London, T. Curson Hansard printer 1808).

149. *The Trial of Charles Stuart, King of England; Before the High Court of Justice, for High Treason: 24 Charles I. A.D. 1649*, in STATE TRIAL AND PROCEEDINGS, *supra* note 118, at 990, 1070-72.

follow the law, made war on his people, and violated their rights and liberties.<sup>150</sup>

A few weeks after Charles I's execution, the poet and republican theorist John Milton published *The Tenure of Kings and Magistrates*, which used arguments sounding in trust, contract, and oath to justify the regicide. According to Milton, "the power of Kings and Magistrates is nothing else, but what is onely derivative, transferrd, and committed to them in trust from the people, to the Common good of them all, in whom the power yet remains fundamentally."<sup>151</sup> The king's coronation oath bound the king to act for the people's interest and within the bounds of law; "if the King ... prov'd unfaithfull to his trust," the people were released from their allegiance and might "depose and put to death th[e]ir tyrannous King[]." <sup>152</sup>

Journalist and propagandist Marchamont Nedham published an important work of republican political theory the next year, which also figured officeholders, including the monarch, as trustees: "if any Kingly Form be tolerable, it must be that which is by Election, chosen by the Peoples Representatives, and made an Officer of Trust by them, to whom they are to be accountable."<sup>153</sup> Nedham's work also explored the ideas that the people's consent lay at the root of any legitimate political power and that structures to provide accountability of rulers are necessary.<sup>154</sup> James Harrington's influential 1656 work, *The Commonwealth of Oceana*, used an analogy to trusts to stress the importance of official accountability: "As an estate in trust becomes a man's own if he be not answerable for it, so, the power of a magistracy not accountable unto the people from whom it was received becoming of private use, the commonwealth loses her liberty."<sup>155</sup>

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150. For more on the charges and theories used to support the regicide, see generally SARAH BARBER, *REGICIDE AND REPUBLICANISM: POLITICS AND ETHICS IN THE ENGLISH REVOLUTION, 1646-1659* (1998); Baker, *supra* note 134, at 154-65.

151. JOHN MILTON, *THE TENURE OF KINGS AND MAGISTRATES* 12 (William Talbot Allison ed., Henry Holt & Co. 1911) (1649).

152. *Id.* at 11, 26.

153. MARCHAMONT NEDHAM, *THE EXCELLENCIE OF A FREE-STATE; OR, THE RIGHT CONSTITUTION OF A COMMONWEALTH* 41 (Blair Worden ed., Liberty Fund, Inc. 2011) (1656).

154. See Blair Worden, *Marchamont Nedham and the Beginnings of English Republicanism, 1649-1656*, in *REPUBLICANISM, LIBERTY, AND COMMERCIAL SOCIETY, 1649-1776*, at 45, 69-70 (David Wootton ed., 1994).

155. JAMES HARRINGTON, *The Commonwealth of Oceana*, in *THE COMMONWEALTH OF*

#### 4. *Restoration of the Monarchy and the Continuation of Fiduciary Theories of Kingship and Officeholding*

As the Commonwealth gave way to the Protectorate under Oliver Cromwell, the most radical—and violent—extensions of the ideas of fiduciary government were no longer welcome. Reform of public officeholding slowed or reversed somewhat, for instance concerning life versus pleasure tenure.<sup>156</sup> After Cromwell died and his weak son attempted to rule, restoration of the Stuart monarchy soon followed in 1660 under Charles II, the son of Charles I.<sup>157</sup> One might have guessed that the Restoration would have resulted in a rejection of the ideals, practices, and reforms of the previous decades. But the law and practice of faithful execution and the theory of fiduciary government survived and even prospered, albeit in a safer form that accepted a balanced system of monarchy and Parliament and viewed the execution of Charles I as murder rather than the people's lawful right to accountable government.<sup>158</sup>

Looking first at civil administration, Aylmer documents that after the Restoration, the government converted even more offices from life tenure to tenure during pleasure in the mid- to late 1660s in order for the government “to exercise closer control over its servants.”<sup>159</sup> For centuries, “[r]eversary grants of [public] offices

OCEANA AND A SYSTEM OF POLITICS 1, 171 (J.G.A. Pocock ed., Cambridge Univ. Press 1992) (1656). Harrington here was using the literary device of speaking his thoughts through a character's voice, in this instance, “the Archon,” from the Greek word meaning lawgiver. See BENJAMIN WOODFORD, PERCEPTIONS OF A MONARCHY WITHOUT A KING: REACTIONS TO OLIVER CROMWELL'S POWER 164-65 (2013). On Harrington's views, including those quoted in the main text, see Blair Worden, *James Harrington and The Commonwealth of Oceana, 1656, in REPUBLICANISM, LIBERTY, AND COMMERCIAL SOCIETY, 1649-1656*, *supra* note 154, at 82, 108-09.

156. See G.E. AYLMEYER, THE CROWN'S SERVANTS: GOVERNMENT AND CIVIL SERVICE UNDER CHARLES II, 1660-1685, at 93 (2002) [hereinafter AYLMEYER, CROWN'S SERVANTS].

157. See *id.* at 244-45.

158. The trial and execution of Charles I had not been widely popular on the Parliamentary-Army side of the conflict even at the time it occurred. As part of the Restoration settlement, Parliament in 1660 had living “regicides”—those men intimately involved in passing judgment of execution on Charles I—put to death. See Lorna Clymer, *Cromwell's Head and Milton's Hair: Corpse Theory in Spectacular Bodies of the Interregnum*, in 40 EIGHTEENTH CENTURY 91, 97, 99 (1999). The corpses of a few already deceased ones, such as Cromwell, were exhumed, hanged, and beheaded. *Id.* at 91. For further discussion on the response to the execution of Charles I, see ROBERT TOMBS, THE ENGLISH AND THEIR HISTORY 239-41, 252 (2015).

159. AYLMEYER, CROWN'S SERVANTS, *supra* note 156, at 93-94.

were ... long-established and widespread,” but the practice almost entirely ceased during the interregnum and did not substantially resume after the Restoration.<sup>160</sup> During the Commonwealth, Parliament markedly increased both the use of salaries as a form of compensation and the amount of salaries.<sup>161</sup> The reason had been that both salaries themselves (instead of fees for service) and “adequate pay help[ed] to make people less dishonest.”<sup>162</sup> Salarization remained in place for some public offices after 1660, but the revived Stuart system tolerated and increased the fee-for-service model for paying public officers.<sup>163</sup> By modern standards, public officers likely engaged in significant self-dealing and corruption; however, from a long-term retrospective view, we can see the gradual but clear development of “faithful execution” norms and laws.

In creating offices, Parliament continued this trend. As described above, officeholders came to have “an affirmative duty to act diligently, honestly, skillfully, and impartially in the best interest of the public”; were “restrain[ed] against self-dealing and corruption”; and were instructed to “stay within the authorization of the law and the office.”<sup>164</sup> A substantial body of case law fleshed out and gave legal bite to the faithful execution duties of public officers. At common law, “any publick officer [was] indictable for misbehaviour in his office”<sup>165</sup> or could be pursued by criminal information at the suit of the Crown or a private prosecutor.<sup>166</sup> Statutes buttressed the common law by providing for actions against specific public officers.<sup>167</sup> A widely used law dictionary explained that “having the King’s commission to execute” an office makes the position “a trust, and the breach of it is punishable.”<sup>168</sup> As a popular

160. *Id.* at 95.

161. *See* AYLMEYER, STATE’S SERVANTS, *supra* note 48, at 107.

162. *Id.* at 110.

163. *See* AYLMEYER, CROWN’S SERVANTS, *supra* note 156, at 101-02, 108.

164. *See* Kent et al., *supra* note 2, at 2141.

165. Anonymous (1704) 87 Eng. Rep. 853, 853.

166. *See, e.g.*, Bassett v. Godschall (1770) 95 Eng. Rep. 967, 968.

167. *See, e.g.*, 3 BACON, *supra* note 115, § Offices & Officers (N) (“There can be no Doubt but that all Officers, whether such by the Common Law, or made pursuant to Statute, are punishable for Corruption and oppressive Proceedings, according to the Nature and Heinousness of the Offence, either by Indictment, Attachment, Action at the Suit of the Party injured, Loss of their Offices, [etc.]”).

168. 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY § Action (London,

treatise described the law, there were three types of “Offences under the Degree of capital” committed by public officers: “1. Neglect, or Breach of Duty. 2. Bribery. 3. Extortion.”<sup>169</sup> The kinds of neglect and breach of duty— misdemeanors, failures to demean oneself appropriately in public office—that were actionable included knowing neglect of duty,<sup>170</sup> peculation,<sup>171</sup> exercising official discretion with a “corrupt”<sup>172</sup> or “partial motive”<sup>173</sup> rather than pursuing the public interest, and a breach of “trust,” such as taking a bribe to recommend a candidate for a Crown office.<sup>174</sup> Extortion was also a crime, “which consist[ed] in any officer’s unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due.”<sup>175</sup> Punishments included forfeiture of the office.<sup>176</sup>

The criminal law was rarely or perhaps never brought to bear for abuses of office by the most senior officeholders in the realm.<sup>177</sup> The holders of these offices were typically members of the nobility, and parliamentary impeachment was the more frequently employed tool of enforcement in these cases.<sup>178</sup> As discussed above, impeachments

3d ed. 1783).

169. WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 167 (Cornhill, Nutt printer 1716).

170. *See, e.g.*, *Crouther’s Case* (1599) 78 Eng. Rep. 893, 893-94 (involving a constable who refused “to make hue and cry”).

171. *R v. Buck* (1705) 87 Eng. Rep. 1046, 1046 (involving defendant tax assessors and collectors who imposed an “inequality of rates for the private advantage of some” and “put the money in their own pockets”).

172. *R v. Hann* (1765) 97 Eng. Rep. 1062, 1062.

173. *R v. Justices of the Peace of the Corp. of Rye* (1752) 96 Eng. Rep. 791, 791.

174. *R v. Vaughan* (1769) 98 Eng. Rep. 308, 310. On the crime of misbehavior in public office, see *RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 62-66 (1973).

175. 4 BLACKSTONE, *supra* note 34, at \*141.

176. *See* 2 CUNNINGHAM, *supra* note 168, § Office; *see also* 4 JOHN COMYNS, *A DIGEST OF THE LAWS OF ENGLAND* 152-54 (4th ed., Dublin, White 1793).

177. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 15 (1963).

178. *See, e.g.*, 4 BLACKSTONE, *supra* note 34, at \*121 (“Misprisons, which are merely positive, are generally denominated contempts or high misdemeanors; of which 1. The first and principal is the mal-administration of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability.” (emphasis omitted)); SAMUEL HALLIFAX, *AN ANALYSIS OF THE ROMAN CIVIL LAW, COMPARED WITH THE LAWS OF ENGLAND* 126 (Cambridge, J. Archdeacon printer 1774) (“The Mal-Administration of High Officers in Public Trusts is usually punished, in England, by the

of high-ranking public officers occurred, and in some of these a “public trust” view of the duties of public office is patent.<sup>179</sup>

Parliament also continued the use of trust language in describing offices and faithful execution duties of office, both immediately after the Restoration<sup>180</sup> and for the rest of the time period we consider here.<sup>181</sup> Some of these statutes were significant ones,<sup>182</sup> which

method of Parliamentary Impeachment, with Fine, Banishment, and perpetual Disability.”); *see also* Jaffe, *supra* note 177, at 13, 15-16.

179. *See supra* notes 118-21 and accompanying text.

180. *See, e.g.*, Corporation Act 1661, 13 Car. 2 c. 1, § 3, *reprinted in* 5 STATUTES OF THE REALM, *supra* note 32, at 321, 321-22 (providing, among other things, that “persons then bearing any Office or Offices of Magistracy or Places or Trusts or other Employment relating to or concerning the Government of the said respective Cities Corporations and Burroughs and Cinque Ports and their Members and other Port Towns” had to take certain oaths); 1662, 14 Car. 2 c. 11, § 31, *reprinted in* 5 STATUTES OF THE REALM, *supra* note 32, at 393, 400 (providing that all officers must take oaths “for the true and faithfull execution and discharge to the best of their knowledge and power of their several Trusts,” and “that no person or persons shall hereafter be employed or put in trust in the busines of the Customes untill he shall first have taken his Oath”); 1663, 15 Car. 2 c. 7, § 6, *reprinted in* 5 STATUTES OF THE REALM, *supra* note 32, at 449, 450 (referring to colonial governors as holding a “trust or charge” and requiring they take an oath to fully implement this Navigation Act).

181. *See, e.g.*, 1698-99, 11 Will. 3 c. 8, § 3, *reprinted in* 7 STATUTES OF THE REALM, *supra* note 32, at 594, 595 (requiring commissioners to take the oath “I A.B. doe swears that I will according to the best of my Skill and Knowledge faithfully impartially and truly demean my selfe in the Discharge of the Trust committed unto me by [this] Act of Parliament”); 1709, 8 Ann. c. 5, § 52, *reprinted in* 9 STATUTES OF THE REALM, *supra* note 32, at 186, 194-95 (“[E]very Commissioner and Officer who shall act in or about the managing or collecting the Duties [under this Act] ... shall before he shall act in or about the same take the Oath following .... That I will faithfully execute the Trust reposed in me pursuant to th[is] Act of Parliament ... without Fraud or Concealment and shall from time to time true Account make of my doings therein and deliver the same to such Person or Persons as Her Majesty.”); 1747, 20 Geo. 2 c. 41, § 5, *reprinted in* 7 STATUTES AT LARGE 52, 54 (London, 1764) (providing that officers appointed by the Barons of Exchequer to execute this act shall take an oath “for his true and faithful Demeanor in all Things relating to the Trust reposed in him by the said Barons ... and that he will not, directly nor indirectly, receive or take any Fee or Reward, or expect or accept the Promise of any Fee or Reward, for any Thing whatsoever to be done by him in the Execution of the said Trust (except what shall be settled or allowed by the said Barons)”).

182. *See, e.g.*, Test Act 1672, 25 Car. 2 c. 2, §§ 1-2, *reprinted in* 5 STATUTES OF THE REALM, *supra* note 32, at 782, 782-83 (requiring both peers and commoners who hold “any ... Offices Civill or Military,” or receive salary from grant or patent of the king, or “shall have Command or Place of Trust from” the king or predecessors, shall “take the several Oathes of Supremacy and Allegiance,” shall “receive the Sacrament of the Lords Supper according to the Usage of the Church of England,” and shall also make a declaration against the Catholic doctrine of transubstantiation); *id.* § 3, at 783 (providing that failure to comply voids appointment to office); *id.* § 4, at 783 (providing that any person who is convicted of entering or continuing in office without following the statute is disabled from suing, being an executor, administrator, or guardian, receiving any legacy or gift, or holding any office in the Realm); *id.* § 15, at 785

brought the statutory language of trust in relation to public offices into newspapers and political debate.<sup>183</sup> Parliament sometimes used the language of “Trust and Confidence” to describe its relationship to the king, perhaps thereby figuring the king as a trustee in whom trust and confidence was reposed.<sup>184</sup>

Charles II issued documents using trust language to describe public office. For instance, his patent and charter for the colony that became Rhode Island provided for a General Assembly to make laws and “apoynt such formes of oaths ... as are conveniente and requisite, with respect to the due administration of justice, and due execution and discharge of all offices and places of trust.”<sup>185</sup> The standard form of royal commissions issued to governors of North American colonies by the monarchs following Charles II—James II, William and Mary, Anne, and the Hanoverian Georges through the early 1770s—used the language of trust. First recounting that the monarch was “reposeing especiall Trust and Confidence in your Prudence Courage and loyalty,” the commissions went on to direct that the monarch “require[d] [the governor] to doe and Execute all things in due manner that shall belong unto the Trust Wee have reposed in you according to the severall Powers and Authorities mentioned in” this commission and later instructions.<sup>186</sup>

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(providing that the Act does not apply “to the Office of any High Constable, Petty Constable, Tythingman, Headburrough, Overseere of the Poore, Churchwardens, Surveyour of the Highwayes or any like inferiour Civill Office, or to any Office of Forester or Keeper of any Parke, Chace, Warren or Game, or of Bayliffe of any Mannour or Lands, or to any like private Offices, or to any person or persons having onely any of the before mentioned, or any the like Offices”).

183. See, e.g., *The King’s Dispensing Power Explicated & Asserted, 1687*, in 2 THE STRUGGLE FOR SOVEREIGNTY, *supra* note 107, at 817, 829, 830, 834 (defending James II’s purported dispensing with the Test Act’s anti-Catholic rules when he placed Catholics in public offices covered by the statute, in other words, offices of trust or profit).

184. See, e.g., 1660, 12 Car. 2 c. 4, § 1, *reprinted in* 5 STATUTES OF THE REALM, *supra* note 32, at 181, 181; 1689, 2 W. & M. c. 4, § 1, *reprinted in* 6 STATUTES OF THE REALM, *supra* note 32, at 166, 166-67.

185. Charter of Rhode Island and Providence Plantations—1663, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3211, 3215 (Francis Newton Thorpe ed., 1909).

186. *Sir William Phips’s Commission as Governor of the Province of the Massachusetts Bay*, COLONIAL SOC’Y OF MASS., <https://www.colonialsociety.org/node/12#rch13> [<https://perma.cc/2A5V-5EU7>].

English political thought after the Restoration continued to use fiduciary language to describe public officeholding, including the conservative defenders of a fairly traditional monarchy, radical writers in the republican tradition, and moderate critics of the post-Restoration status quo.

Traditional monarchists used the language of trust and trusteeship to discuss public office, though typically not in relation to the king. For instance, Robert Filmer—probably the preeminent defender of divine right royal absolutism in seventeenth-century England—wrote of members of Parliament using the language of trust and trustee.<sup>187</sup> An anonymous pamphleteer writing in favor of the return of monarchy in 1659 argued that a king is a better “Trustee[ ]” than governments by Parliament or the army: because a king knows “that the weighty business of the Commonwealth depends only upon him, [he] will probably be more careful to perform his trust.”<sup>188</sup> Edward Hyde, Earl of Clarendon—a principal advisor to Charles I during the civil wars and then Lord Chancellor to Charles II—used the language of trust in relation to public offices in his history on the rebellion.<sup>189</sup> Sir Matthew Hale, who served as Chief Baron of the Exchequer and then Chief Justice of the Court of King’s Bench under Charles II, described the English king as above and untouchable by “the coercive power of the law,” but “[b]y his office” and “[b]y his oath,” he was required under the “directive power of the law” to govern well and lawfully, and remained

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187. See ROBERT FILMER, *Patriarcha: The Naturall Power of Kinges Defended Against the Unnatural Liberty of the People*, in PATRIARCHA AND OTHER WRITINGS 1, 57 (Johann P Sommerville ed., Cambridge Univ. Press 1991) (1680); ROBERT FILMER, *The Free-Holders Grand Inquest Touching Our Sovereigne Lord the King and His Parliament*, in PATRIARCHA AND OTHER WRITINGS, *supra*, at 69, 72, 87, 90; ROBERT FILMER, *Observations upon Aristotles Politiques Touching Forms of Government, Together with Directions for Obedience to Governours in Dangerous and Doubtfull Times*, in PATRIARCHA AND OTHER WRITINGS, *supra*, at 235, 266.

188. THREE PROPOSITIONS FROM THE CASE OF OUR THREE NATIONS 2-3 (London, 1659).

189. See, e.g., 1 EDWARD EARL OF CLARENDON, *THE HISTORY OF THE REBELLION AND CIVIL WARS IN ENGLAND* 7 (Oxford, The Theater 1707) (discussing “Servants” to princes as acting “in the Execution of their Trusts”); *id.* at 85-86 (discussing the King promoting Anglican “Church-men” to “Offices of the highest Trust”); *id.* at 157 (quoting advisers to the King on placing reliable people “in all Places of Trust”); *id.* at 188 (describing “the Office of the Treasurer of the Navy (a [p]lace of great trust and profit)”; *id.* at 258 (discussing bishops acting contrary to “their Calling or their Trust”).

“accountable for his misgovernment and breach of that trust and oath” to God.<sup>190</sup>

It was the republicans, however, who largely used the trust language in the way it comes down to us today. Algernon Sidney, one of the most important writers in this tradition, was executed in 1683 by Charles II for alleged treason, based in part on his writings.<sup>191</sup>

According to Sidney,

[G]overnments are not set up for the advantage, profit, pleasure or glory of one or a few men, but for the good of the society.... And we may from hence collect, that in all controversies concerning the power of magistrates, we are not to examine what conduces to their profit or glory, but what is good for the publick.<sup>192</sup>

The core purpose of government is “for the defence of every private man’s life, liberty, lands and goods.”<sup>193</sup> The “right” of magistrates to rule must “essentially depend upon the consent of those they govern.”<sup>194</sup> The king’s power to rule being not “an inherent, but a delegated power ... whoever receives it, is accountable to those that gave it.”<sup>195</sup> And the people’s consent may be revoked—the people may “if need be, correct or depose their own magistrates.”<sup>196</sup> In drawing out these themes, Sidney’s work frequently used trust language.<sup>197</sup>

John Locke, whose most famous political writings in his *Two Treatises of Government* were published just after the Glorious Revolution, sounded many of the same themes as Sidney. His *First Treatise* largely aimed at Filmer’s defense of the divine right of

190. HALE, *supra* note 108, at 14-15.

191. *The Trial of Colonel Algernon Sidney, at the King’s Bench, for High Treason: 35 Charles II A.D. 1683*, in 8 STATE TRIALS AND PROCEEDINGS, *supra* note 118, at 901-02.

192. ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 91 (Thomas G. West ed., Liberty Fund 1996) (1698); *see also id.* at 74 (“[P]rinces as well as other magistrates were set up by the people for the publick good.”).

193. *Id.* at 444.

194. *Id.* at 108.

195. *Id.* at 529.

196. *Id.* at 309.

197. *See, e.g., id.* at 223, 287, 292-93, 399-400.

kings (Sidney's target also),<sup>198</sup> and the *Second Treatise* promoted a view of legitimate government that remains with us to this day: a government that flows from the consent of the governed, which must preserve life, liberty, and property; and holds that political rulers must pursue the public good.<sup>199</sup> The state must also prosecute and punish citizens who violate others' rights—and to do this adequately, it must establish impartial judges to mete out proportionate punishments.<sup>200</sup>

By the end of the *Second Treatise*, some of Locke's most famous and controversial propositions come to light: rebellion and regicide can be justified when political authority fails to be legitimate because it does not provide its subjects "freedom from Absolute, Arbitrary Power."<sup>201</sup> The right of revolution seems essential to Locke's political philosophy and forms the core of an enforcement mechanism that presumably keeps the state in check.<sup>202</sup>

Although it is probably the social contract account of political legitimacy that was his most enduring legacy,<sup>203</sup> Locke also relied on the "aspect of a trust that the rulers were required to discharge on behalf of the people."<sup>204</sup> Indeed, Locke twice in the *Second Treatise* appealed to the "fiduciary power"<sup>205</sup> and "fiduciary trust"<sup>206</sup> a legislature gets through authorization by the people. As John Dunn has written,

198. See generally JOHN LOCKE, *The First Treatise of Government*, in TWO TREATISES OF GOVERNMENT 5 (Thomas L. Cook ed., Hafner Publ'g Co. 1947) (1690).

199. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 131, 135 (Richard H. Cox ed., Henry Regnery Co. 1955) (1690).

200. See *id.* § 131.

201. *Id.* § 23. On the right to "remove or alter" government, see *id.* § 149.

202. See *id.* §§ 223-26. Irrespective of whether the ultimate picture—requiring the consent of the governed and permitting revolutions for when the state comes shy of legitimacy—is really one of "philosophical anarchism," an interpretation offered most famously by A. John Simmons, see generally A. JOHN SIMMONS, ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY (1993), Locke's political philosophy has played a role in supporting constitutional republics and democracies for hundreds of years.

203. E.g., LOCKE, *supra* note 199, § 122.

204. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 202 (1997).

205. LOCKE, *supra* note 199, § 149.

206. *Id.* § 156; see also *id.* § 111 (discussing the people's "entrust[ing]" rulers with power only if it is exercised "for their own good"); *id.* § 136 (reinforcing the vision of the legislative power being granted as a "trust" to be governed by "declared laws" and "standing rules"); *id.* §§ 221, 222, 240 (utilizing the language of "trust").

The legal concept of trust captures nicely three features on which Locke is anxious to insist: the clarity of a ruler's responsibility to serve the public good, the existence of a structure of rights external to the practical relation of ruling on which a sovereign's claim to authority must depend, and the inescapable asymmetry of power between ruler and ruled which precludes the latter from exercising direct and continuing control over the former.<sup>207</sup>

Notice here that Locke's use of the idea of the public trust need not be seen as mere metaphor: constitutional rules for a legitimate state actually follow from seeing state authority this way.<sup>208</sup> The legislators who Locke imagined to be legitimate had to serve the public good rather than their own good (or be altered or removed), and rights needed to be in place and respected in courts that could dole out impartial justice.<sup>209</sup> The public trust model for Locke may not have had enforcement mechanisms as clear as the right of rebellion,<sup>210</sup> but neither would it be very difficult to imagine that eventually courts would need to provide for legal equality and nondomination in a Lockean society; courts would find ways to hold governors to account with mechanisms shy of revolution. This form of "republicanism," Philip Pettit argues, "always had a juridical cast

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207. See John Dunn, *The Concept of "Trust" in the Politics of John Locke*, in PHILOSOPHY IN HISTORY 279, 296 (Richard Rorty et al. eds., 1984). Dunn ultimately sees "trust" to be a summary of Locke's ideas rather than generative of them. See *id.*

208. But see Bray & Miller, *supra* note 23, at 1492 (arguing that Locke cannot be taken to be invoking fiduciary power or trust in a "juridical" sense); Richard Primus, *The Elephant Problem*, 17 GEO. J.L. & PUB. POL'Y 373, 383 (2019) (arguing that "Locke was using the trust idea as an illustrative metaphor, not as a source of transposable rules").

209. E.g., LOCKE, *supra* note 199, § 142 (exploring the "bounds" of the "trust" to "govern by promulgated established laws, not to be varied in particular cases ... designed for no other end ultimately but the good of the people" (emphasis omitted)). To those who are too sure that Locke is only working in the loose language of metaphor, see, e.g., Bray & Miller, *supra* note 23, at 1492, we want to highlight what looks to us as the juridical cast of Locke's conception of fiduciary government. In the final analysis, a Lockean system promotes a system of rights and responsibilities reduced to law in statutes and constitutions. Those rights and responsibilities are often vindicated in courts or through impeachment, as a precondition for legitimate state authority.

210. Evan Fox-Decent emphasizes Locke's right of rebellion as his principal mechanism to enforce the public trust and the limits of fiduciary power. See FOX-DECENT, *supra* note 10, at 17 n.23. In part for this reason, Fox-Decent gravitates to Hobbes in his own work, where he sees "determinate legal principles" in which "the constitution of legal order within a relationship of mutual trust does the heavy lifting." *Id.* at 4.

in which a central place was given to the notion of rights—customary, legal, and constitutional rights—as bulwarks against absolute power.”<sup>211</sup> One could surely embrace the idea that a rather narrow republicanism based on Locke is not legal in any workaday way and only justifies radical politics at the margins for huge breaches of trust. Still, other more juridical models, such as the one Pettit offers, are also surely Lockean in spirit.

Turning from more radical writers who defended a right to revolution, trust or fiduciary language and conceptions seem also to have been common in the political speech of moderate opposition writers and politicians in the later seventeenth and early eighteenth centuries. A Whig pamphlet published during the exclusion crisis stated that by “the Oath and Office” of the king, a “great trust” is “lodged with him for the good and benefit, not hurt and mischief of the People.”<sup>212</sup> In *Cato’s Letters*, published in the early 1720s, John Trenchard and Thomas Gordon sounded many of the themes that we have been tracing: government is founded on consent of the people;<sup>213</sup> public office, including the monarchy, is a “trust”;<sup>214</sup> rulers and lesser magistrates must be accountable to the people;<sup>215</sup> if “corrupt ... Magistrates” are allowed to breach their trust with

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211. PETTIT, *supra* note 204, at 21. Even in the inchoate form that operates at the level of institutional design in the *Second Treatise*, seeing political authority as constrained by trust principles is not merely figurative language or political morality but actually a kind of constitutional law. Thus, although Bray and Miller are surely right that for Locke “public office is not premised on an undertaking pursuant to a deed or settlement transferring property to a trustee for administration on specified terms,” Bray & Miller, *supra* note 23, at 1492, constitutional governments of Lockean forms are routinely settled in governing documents called constitutions where the settlors’ intent matters a fair bit—and governors have offices of public trust with detailed authorizations and a wide body of public law constraining the exercise of discretionary power. This is law, not mere theory or metaphor.

212. *Vox Populi: Or the Peoples Claim to Their Parliaments Sitting*, in 2 THE STRUGGLE FOR SOVEREIGNTY, *supra* note 107, at 651, 664.

213. Letter No. 60 (Jan. 6, 1721), in 1 JOHN TRENCHARD & THOMAS GORDON, CATO’S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 413, 413-14 (Ronald Hamowy ed., 1995) [hereinafter Hamoway, CATO’S LETTERS]; Letter No. 20 (Mar. 11, 1720), in 1 Hamoway, CATO’S LETTERS, *supra*, at 138, 142.

214. Letter No. 75 (May 5, 1722), in 3 CATO’S LETTERS 75, 78-79 (4th ed., London, W. Wilkins et al. 1737) [hereinafter Wilkins, CATO’S LETTERS]; Letter No. 76 (May 12, 1722), in 3 Wilkins, CATO’S LETTERS, *supra*, at 84, 85.

215. Letter No. 75, in 3 Wilkins, CATO’S LETTERS, *supra* note 214, at 78; Letter No. 115 (Feb. 9, 1722), in 4 Wilkins, CATO’S LETTERS, *supra* note 214, at 81, 83; see also Letter No. 76, in 3 Wilkins, CATO’S LETTERS, *supra* note 214, at 84 (“Nations are then free, when their Magistrates are their Servants; and then Slaves, when their Magistrates are their Masters.”).

impunity, the office “in Time ... will be considered no longer as a Trust, but an Estate”;<sup>216</sup> and penalties for public officers’ breach of trust should include criminal sanctions.<sup>217</sup> Other English writers in the liberal opposition vein viewed the public good as being the measure of government policy and the aim of all government offices. These authors attacked corruption and abuses of public office, including the use of office for private profit, while stressing themes of fidelity to the public’s trust and the need for magistrates to be accountable.<sup>218</sup>

We now move from the law of public offices and political thought about public officeholding to the crucial period in which modern fiduciary duties take their shape.

#### *D. Modern Fiduciary Law’s Awakening—and Some of Its Public Law Roots*

This brings us, finally, to a most important period of development in what we think of today as private fiduciary law: the long eighteenth century—from the Restoration through the early 1800s<sup>219</sup>—when punctuated changes in private fiduciary law headed into an equilibrium that remains with us to this day.<sup>220</sup> Not all of the inputs into what we today would call private fiduciary law actually stem from cases that read as private law in a contemporary typology, but the influence of these cases in marking the history of fiduciary law reinforces our research agenda.

Take, for example, the 1701 case of *Lane v. Cotton*—a case at common law rather than equity—involving an action against a postal officer, in which the court made an effort to clarify how offices could lead their holders to be accountable.<sup>221</sup> The decision explored quite directly what it meant when the common law office of post-master

216. Letter No. 75, in 3 Wilkins, CATO’S LETTERS, *supra* note 214, at 82-83.

217. Letter No. 20 (Mar. 1720), in 1 Hamoway, CATO’S LETTERS, *supra* note 213, at 138, 142.

218. See generally CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN (1959).

219. For an example of this periodization by historians of England and Britain, see P.J. Marshall, *Introduction* to 2 THE OXFORD HISTORY OF THE BRITISH EMPIRE: THE EIGHTEENTH CENTURY 1 (P.J. Marshall ed., 2001).

220. See Helmholz, *supra* note 53, at 169.

221. (1701) 88 Eng. Rep. 1458, 1958.

was converted from what the case called a “private” office into a “public” office established by Parliament.<sup>222</sup> Although channeling this case through the common law courts hinted that public officer accountability was likely to follow a rather different trajectory than its private law corollaries,<sup>223</sup> it is hard not to see the language of “trust” and “entrustment” doing some of the work in fashioning the metes and bounds of the law of public office in the courts. Consider just some of the discussion: “[A] public office, intrusted ... by Parliament, for the profit and benefit of the subject ... in its nature requires care and diligence.”<sup>224</sup> Moreover,

where-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him.<sup>225</sup>

By at least 1701, then, the language of public trust functioned to produce law and hold officers accountable; it did not serve solely as a rhetorical flourish or mere analogy. Nor, as we can see in this moment of contact, were the private and public spheres developing in wholly autonomous and mutually exclusive ways.

In 1717, fiduciary language appeared in what likely falls on the private side of the public-private divide in an equity case, drawing on the language of trust, which we see on the public law side as well: “the tenant is a sort of fiduciary to the lord, and it is a breach of the trust which the law reposes in the tenants for him to take away the property of the lord.”<sup>226</sup> Yet the word “fiduciary” would not

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222. *See id.* at 1458-59.

223. Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations*, in *MAPPING THE LAW: ESSAYS IN MEMORY OF PETER BIRKS* 577, 596 (Andrew Burrows & Lord Rodger eds., 2006) [hereinafter Getzler, *Rumford Market*] (citing *Lane v. Cotton* and explaining that “[t]he law of public office was regulated by different writs such as quo warranto and trespassory actions until well into the mid-nineteenth century when fresh public-law techniques of judicial review based on King’s Bench writs of prohibition, certiorari, and mandamus were developed” (footnotes omitted)). Getzler tantalizingly suggests that “[t]he content of the modern rules for judicial review of administrative powers were lifted from Chancery doctrine concerning exercise of trust powers.” *Id.*

224. *Lane*, 88 Eng. Rep. at 1469.

225. *Id.* at 1464.

226. *Bishop of Winchester v. Knight* (1717) 24 Eng. Rep. 447, 448.

be concretized into a working legal concept for some time. Indeed, the next year in 1718, Thomas Parker, Earl of Macclesfield, the Lord High Chancellor of England, held that trustees are permitted to profit from their use of trust funds,<sup>227</sup> a result radically foreign to the modern law of fiduciaries.<sup>228</sup>

But in 1725, Macclesfield—apparently believing trustees, private or public, are permitted to take profits in their self-interest—found himself impeached for misappropriation of funds deposited by litigants into the Chancery court.<sup>229</sup> The court deemed Macclesfield to have failed in “the faithful vigorous Discharge of the great Trust reposed” in him, having breached his oath of “due and faithful discharge and execution of [his] Duty.”<sup>230</sup>

Lord Chancellor Peter King, John Locke’s cousin and literary executor, presided over the impeachment trial.<sup>231</sup> King was a Whig parliamentarian who served in the Court of Common Pleas, “removed from the lax culture of the Chancery” where it had become common to sell Chancery offices as investments.<sup>232</sup> He generally seemed committed to uprooting corruption and “particularly opposed the sale and pecuniary exploitation of public offices.”<sup>233</sup> After overseeing the conviction of his predecessor Macclesfield, King made perhaps the sharpest statement about private trustees’ fiduciary duties of loyalty the next year in 1726 in *Keech v. Sandford*, a case that commenced in earnest the modern history of private fiduciary law.<sup>234</sup> *Keech* established the baseline no profit and

227. See *Bromfield v. Wytherley* (1718) 24 Eng. Rep. 227, 227.

228. See *Ratliffe v. Graves* (1683) 23 Eng. Rep. 409, 410 (ordering trustee to pay to beneficiary the interest she received for lands held for beneficiary; trustees cannot “turn” trust property “to their own private advantage”).

229. Macclesfield’s scheme came to light when the money could not be repaid because it had been invested and lost in the 1720 South Sea bubble market crash. See generally JOHN CARSWELL, *THE SOUTH SEA BUBBLE* (1960).

230. *The Trial of Thomas, Earl of Macclesfield, Lord High Chancellor of Great Britain, for High Crimes and Misdemeanors the Execution of His Office*, in 6 A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS UPON HIGH TREASON, AND OTHER CRIMES AND MISDEMEANOURS; FROM THE REIGN OF KING RICHARD II TO THE END OF THE REIGN OF KING GEORGE I, at 140, 181 (2d ed., London 1730).

231. See Getzler, *Rumford Market*, *supra* note 223, at 583-84.

232. Getzler, “*As If*,” *supra* note 21, at 983; Getzler, *Rumford Market*, *supra* note 223, at 584-85.

233. Getzler, “*As If*,” *supra* note 21, at 983; see also Getzler, *Rumford Market*, *supra* note 223, at 584.

234. (1726) 25 Eng. Rep. 223, 223-24.

no self-interest rules that remain with us today.<sup>235</sup> It held that trustees cannot take profits from their offices, irrespective of whether fraud was involved and irrespective of whether the profit was at the actual expense of a loss to the beneficiary.<sup>236</sup>

Joshua Getzler has opined that the conception of loyalty in public office—one that pervaded the impeachment hearing, as it was well-entrenched in the law of public office by 1725—informed *Keech*'s specifications of private fiduciary obligation.<sup>237</sup> Thus, the core of private fiduciary law may well have emanated from a penumbra of concerns about misappropriation of profits and self-interest already prevalent in the law of public office and at the center of King's concerns in his other political positions.<sup>238</sup> This moment of contact between the law of public office and the private law of trusts is suggestive of our larger theme here: that it is probably a mistake to think private and public fiduciary law are easily severable. The important statutes, cases, and episodes that generated legal rules seem to feature a fair bit of mutual learning.

But we do not want to be fetishistic about 1725 and 1726, and Peter King is no hero: King ended up taking bribes himself and engaging in nepotism for his son.<sup>239</sup> We spotlight this case for its propinquity of public and private law concerns. This connection suggests that however much one wants to think that the role that trust concepts play in political theory is merely “figurative” or decorative,<sup>240</sup> something more constitutive may be going on. The very nature of what a trust is in the private law was not fully sealed off from the use of the trust conception in the law of public office. Even cases that came after *Keech* later in the century that were a little more forgiving of trustees<sup>241</sup>—allowing courts to “favour” trustees as

235. Getzler has a fascinating chapter on the development of ideas about self-interest in this critical period in Joshua Getzler, *Law, Self-Interest, and the Smithian Conscience*, in *LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE* 250, 252 (Maksymilian Del Mar & Michael Lobban eds., 2016) [hereinafter Getzler, *Smithian Conscience*].

236. See *Keech*, 25 Eng. Rep. at 223-24.

237. See Getzler, *Rumford Market*, *supra* note 223, at 589-90.

238. Getzler, *Fiduciary Principles*, *supra* note 51, at 478 (“[I]mpeachment ... was one of the streams feeding new equitable controls extended over fiduciaries in the late seventeenth and early eighteenth centuries.”).

239. See Getzler, *Rumford Market*, *supra* note 223, at 585.

240. See Bray & Miller, *supra* note 23, at 1483.

241. As Getzler writes, “Despite the ubiquity of the *Keech* rule today, at the time the decision may have been regarded as marginal.” Getzler, *Rumford Market*, *supra* note 223, at

long as there was nothing “wil[l]ful in the conduct,” “no *mala fides*”—still recognized that trusteeships were “offices” and that even when those trustees were “officer[s] of the Court,” they should be held to the obligations and given the perquisites that were prevalent in the private law of trusts.<sup>242</sup> Thus, even when *Keech* was not wholly embraced for its most restrictive duty of loyalty as it was making its way into the canon, linking private and public offices to the rules of trust survived King’s chancellorship.

The ensuing decades saw the *Keech* rule debated and only fitfully applied.<sup>243</sup> The House of Lords did not fully embrace the *Keech* principle until 1795 in *York Buildings Co. v. Mackenzie*, emphasizing what we today recognize as a prophylactic conflict of interest approach to fiduciary law.<sup>244</sup> *York* made clear that the “danger of temptation” was so great for people in the position of fiduciaries that they had to be controlled strictly.<sup>245</sup> Ultimately, Lord Eldon reinforced this strict approach in another series of Chancery cases in the early 1800s that remains resonant today.<sup>246</sup> Thus, it would be too simplistic to trace all private fiduciary law to one impeachment in 1725.

But a seed was planted that pushed the private law of trust close to the law of public office, just as some decades earlier the law of public office seemingly incorporated parts of the private law of

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242. *Knight v. Earl of Plymouth* (1747) 21 Eng. Rep. 214, 216.

243. See *Rakestraw v. Brewer* (1728) 24 Eng. Rep. 839, 840 (extending *Keech* to other fiduciary-like relationships, though not citing it); *Addis v. Clement* (1728) 24 Eng. Rep. 811, 813; *Ayliffe v. Murray* (1740) 26 Eng. Rep. 433, 434 (holding that trustees-executors cannot negotiate allowance for their work); *Whelpdale v. Cookson* (1747) 27 Eng. Rep. 856, 856 (holding that trustees should not personally acquire trust assets, reinforcing the rule against self-dealing for trustee-fiduciaries); *Bishop of Cloyne v. Young* (1750) 28 Eng. Rep. 527, 528 (eliminating any privilege of the trustee to take from the trust); *Adye v. Feuilliteau* (1783) 36 Eng. Rep. 784, 785 (enforcing a no profit rule with strict liability for losses); *Newton v. Bennet* (1784) 28 Eng. Rep. 1177, 1179.

244. (1795) 3 Eng. Rep. 432, 446.

245. *Id.*

246. See generally VINTER, *supra* note 53, at 151 (citing *Keech* and an Eldon opinion, *Ex parte James* (1803) 32 Eng. Rep. 385, as illustrations of the strictness of the equity rule that fiduciaries are accountable for the profits they make in their offices); *id.* at 48 (citing *Cooke v. Collingridge* (1823) Jac. 607, 621); *Crawshay v. Collins* (1808) 33 Eng. Rep. 736, 741. For a discussion of *Crawshay v. Collins*, see Getzler, *Rumford Market*, *supra* note 223, at 589. We will discuss *James infra* Part II.

trusts in *Lane v. Cotton*.<sup>247</sup> In the middle of the eighteenth century, another case also saw these mutually reinforcing bodies of law playing off each other: *Charitable Corp. v. Sutton*.<sup>248</sup> This was a foundational case in the development of private fiduciary trust law—and a central case in the development of business corporation law, from which much private fiduciary law gets its expression today.

In *Sutton*, by analyzing a strict law about breaches of trust that was to apply against directors of corporations,<sup>249</sup> Lord Harwicke recognized that the relevant directors were of a “mixed nature”: directorship “partakes of the nature of a publick office, as it arises from the charter of the crown.”<sup>250</sup> Even while recognizing that such directors are not “required to qualify themselves by taking the sacrament” commanded by Parliament for many public offices, “[b]y accepting of a trust” the directors were “obliged to execute it with fidelity and reasonable diligence.”<sup>251</sup> As Getzler argues, “The office of director was not governmental, but like the Bank of England or the great trading companies had sufficient impact on the public to require stern legal regulation through trust law.”<sup>252</sup> Lord Harwicke was also explicit that his ruling about trust law transcended the public-private divide: “Nor will I ever,” he wrote in *Sutton*, “determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private, or public capacity.”<sup>253</sup> *Sutton* seems to foreground the enforceable nature of legal duties from trust law against public officers. Thus, the public and private fiduciary regimes not only came together in *Keech* and *Cotton* but also in yet another case that sits in the jurisprudential firmament of what we too often take to be an autonomous sphere of private law.<sup>254</sup>

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247. (1701) 8 Eng. Rep. 1458.

248. (1742) 26 Eng. Rep. 642, 644.

249. *Id.* at 645 (“By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they had no benefit from it, but that it was merely *honorary*; and therefore they are within the case of common trustees.” (citation omitted)).

250. *Id.* at 644.

251. *Id.* at 644-45.

252. Getzler, *Rumford Market*, *supra* note 223, at 595.

253. 26 Eng. Rep. at 645.

254. Getzler recommends a look at *R v. Windham* (1776) 98 Eng. Rep. 1139, in which Lord Mansfield studies how common law writs and fiduciary remedies might work together against

## II. IMPLICATIONS

It might seem somewhat ill-mannered to submit a work of legal history in response to an invitation to write for a symposium about “The Future of Fiduciary Law.” Yet the topic is appropriate, we hope, because so much of contemporary fiduciary political theory and private law theory presents itself as aimed at recovering and using the past. In the case of fiduciary political theory, scholars drawing on Cicero’s conception of office, on republicanism, on Locke, on all the hints about fiduciary governance in the liberal political theory canon, use history to claim some kind of authority for their projects. Contemporary private law theory’s celebration of old common law categories and doctrines also draws on the authority of history—but often with the goal to protect, in some measure, the autonomy of the private law.<sup>255</sup> Our project here has marshalled history to highlight just how much cross-pollination seems to have occurred within fiduciary law itself, revealing it to be infused, perhaps surprisingly, with both private and public concerns.

Although we have emphasized certain moments of coalescence in the seventeenth and early eighteenth centuries between the law of public office and the law of trusts, future research could easily take a broader swath of history and a wider lens of subject areas to explore other domains within fiduciary law that might have a history

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officers of corporations with public functions. Getzler, *Rumford Market*, *supra* note 223, at 596 n.95.

255. This Article is not the place to review the extensive new literature in private law theory, but the dynamic is evident in diverse works in the field, from the Toronto School, which is more comfortable in legal philosophy, to the more functionalist and pragmatic New Private Law (NPL) thinkers, whose historical authority is more likely to come from canonical cases than canonical philosophical treatises. Compare ALAN BRUDNER & JENNIFER M. NADLER, *THE UNITY OF THE COMMON LAW* 351-52, 357 (2d ed. 2013) (rejecting Harvard’s NPL initiative for being too pragmatic and inclusive of public law goals, and doubling down on the autonomy of private law by drawing on Hegelian interpretations of the concepts of freedom and dignity), with John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1663 (2012) (introducing a symposium on NPL, explaining that a new concept in the NPL is “renewal of attention to problems and methods that for too long have been disparaged in orthodox legal-academic thinking,” and advocating for a revival of old concepts and doctrines distinctive to private law), and *Introduction to OXFORD HANDBOOK OF THE NEW PRIVATE LAW* (Andrew Gold et al. eds., 2020) (arguing that NPL generally aims to return domain-specific legal concepts and doctrinal categories to a status where they are not reduced to epiphenomena of external perspectives on law or public law concerns).

of sounding in both private and public law. Most simplistically, taking renewed stock of eight hundred years of the role of the lawyer—Janus-faced as a private agent of a client but also an officer of the court bound by public oath<sup>256</sup>—could be a profitable way to see how a hybrid fiduciary law can incorporate competing interests of public and private law in conceptualizing role and role fidelity.<sup>257</sup>

Alternatively, consider officers and directors of corporations: although early juristic corporations such as the Catholic Church did not look to sovereign grace for their existence under canon law,<sup>258</sup> English common law for hundreds of years—until the mid-nineteenth century, which saw the development of general incorporation by statute—conceived of corporations as instrumentalities of the state, staffed with “public official[s].”<sup>259</sup> Corporations without authorization from the Crown or Parliament were outlawed,<sup>260</sup> and there was little doubt about the public status of the corporation for a long while.<sup>261</sup> Although it is not controversial to acknowledge that corporate law is by and large private law now,<sup>262</sup> we should not easily forget that manager and director fiduciary duties developed side by

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256. On the centrality of the oath to the role of the lawyer in particular, see JOSIAH HENRY BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* 4 (1909).

257. For some work exploring the mixed public-private role of lawyers, see W. Bradley Wendel, *Lawyers as Quasi-Public Actors*, 45 ALBERTA L. REV. 83, 85 (2008); Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, in *FIDUCIARY GOVERNMENT*, *supra* note 16, at 67. For historical work on these themes, see, for example, Paul Brand, *Stewards, Bailiffs and the Emerging Legal Profession in Later Thirteenth-Century England*, in *LORDSHIP AND LEARNING* 139, 139-54 (Ralph Evans ed., 2004); Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 3 (1998); Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1385 (2004).

258. See, e.g., Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1500, 1503-04 (1973).

259. See KERSHAW, note 19, at 290-92. Additionally, the monarch in his or her political capacity was also considered a “Corporation.” MATTHEW HALE, *THE ANALYSIS OF THE LAW* 7, 29 (2d ed., London, E. Nutt printer, 1716) (describing the King, the “Supream Magistrate” in Great Britain, as “a sole Corporation” in his “Political Capacity”).

260. See Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 33-36 (2002) (explaining The Bubble Act of 1720, 1719, 6 Geo., c. 18).

261. See, e.g., HALE, *supra* note 259, at 34, 37-38 (classifying “Mayors of Corporations” as “Ministerial Officers,” part of the group of “Subordinate Civil Magistrates,” along with sheriffs and constables); see also PHILIP J. STERN, *THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA* 3 (2011) (noting that the English East India Company was itself “a form of government, state, and sovereign”).

262. KERSHAW, *supra* note 19, at 294; Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 1 (1945).

side with a conception of a trustee that had both private and public law valences.<sup>263</sup> Foundational trust law cases used to develop the duties of corporate officers also reveal mixed private and public law concerns.<sup>264</sup> Indeed, one might argue that the very effort to divvy up private and public law cleanly was itself a nineteenth-century phenomenon.<sup>265</sup>

Finally, and closer in time to the period we have focused upon here, consider a trio of equity cases decided by Lord Eldon in the early 1800s, which are considered canonical in the reinforcement of the strict obligations of fiduciary law against trustees: *Ex parte Lacey*,<sup>266</sup> *Ex parte James*,<sup>267</sup> and *Ex parte Bennett*.<sup>268</sup> Although leading commentators discuss these cases as important in the

263. In the famous *Dartmouth College* case, the highest court in New Hampshire was explicit that “[t]he office of trustee of *Dartmouth College* is, in fact, a public trust, as much so as the office of governor, or of judge of this court.” Trs. of *Dartmouth Coll. v. Woodward*, 1 N.H. 111, 119 (1817). The Supreme Court found *Dartmouth* had been founded by the initiative of private parties and diminished the state’s regulatory authority over this private corporation in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). For this history, see ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 85-87 (2018).

The colonies that eventually became the United States were themselves established by corporations. See generally Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1397 (2019). They often retained their self-identity as corporations too. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 447 (1793) (opinion of Iredell, J.); see also *Dixon v. United States*, 7 F. Cas. 761, 763 (C.C.D. Va. 1811); JAMES WILSON, *Considerations on the Bank of North America* (1785), in 1 COLLECTED WORKS OF JAMES WILSON 60, 67 (Kermit L. Hall & Mark David Hall eds., 2007) (“States are corporations ... of the most important and dignified kind.”). Municipal corporations had obviously public functions, leading Hendrik Hartog to remark that “the rules of municipal corporation law were formulated as ways of regulating the conduct of entities (like New York City) that judges already knew to be public.” HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870*, at 7 (1983).

264. See *Charitable Corp. v. Sutton* (1742) 26 Eng. Rep. 642, 644. In *Aberdeen Railway Co. v. Blaikie Bros.* (1854) 17 Sess. Cas. 20, 21, the duty of loyalty from *Keech* was more generally absorbed into the law of corporations. But “a director’s office would be vacated if he became directly or indirectly interested” in a transaction with the corporation, akin to an automatic impeachment, a remedy more familiar from what we today think of as public law. See KERSHAW, *supra* note 19, at 316. The English law’s reliance on public trust ideas to develop its private law of corporations also made its way to America. See *id.* at 341-43.

265. See Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 55 (1993) (“Categories familiar to us—above all, those that separate public from private corporations—are the inventions of nineteenth-century jurists.”).

266. (1802) 31 Eng. Rep. 1228.

267. (1803) 32 Eng. Rep. 385.

268. (1805) 32 Eng. Rep. 893.

development of private fiduciary law,<sup>269</sup> what routinely goes without mention is that all three develop trust law in connection with bankruptcy and insolvency law, a domain of mostly statutory and prerogative law that was some public-private hybrid, as it remains today.<sup>270</sup> If still more canonical cases for what we treat as private fiduciary law were also applied, expanded, or reinforced in hybrid cases where the trustee's activities implicate public law concerns, it further suggests that core private law may be suffused with public law considerations. At the least, this research agenda invites some problematizing of what we thought we knew about which direction export flows within the domains of fiduciary law.

The import of these recognitions about the instability of the public-private distinction in fiduciary law is that many efforts in fiduciary political theory should be less anxious about the use of fiduciary principles in thinking through the requirements of public office. Although many fiduciary political theorists are eager to cabin their accounts as merely analogical or translational, there may be justification to think of the officeholder-subject relationship as *just as* quintessentially fiduciary as the trustee-beneficiary relationship.<sup>271</sup> If further work could deepen the connections between these bodies of law—rather than just pointing to structural and linguistic similarities between some public law and some private law relationships—it would go some distance to respond to criticisms of fiduciary political theory that insist that fiduciary principles can only be used metaphorically in thinking about public office.<sup>272</sup>

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269. See Getzler, *Fiduciary Principles*, *supra* note 51, at 486-87; Licht, *supra* note 21, at 771-72, 794.

270. See, e.g., Louis E. Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 1 (1919); Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1717 (2018). Focus on the public-private hybrid that is modern bankruptcy law in the United States has increased with renewed attention to several municipal bankruptcies, such as those in Detroit and Puerto Rico, in which the debtor is a public entity. See, e.g., Edward J. Janger, *Towards a Jurisprudence of Public Law Bankruptcy Judging*, 12 BROOK. J. CORP. FIN. & COM. L. 39, 39 (2017). Even when the debtor is a private entity, a trustee with fiduciary duties supervised by the courts or the U.S. Trustee often ends up with Janus-faced responsibilities to private parties and the public.

271. Indeed, our research agenda may ultimately furnish some support for the literalists about public fiduciary obligations. See 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 Gold eds., 2018) (developing a typology of whether and how fiduciary political theorists draw upon literalist, analogical, or translational approaches).

272. See generally Bray & Miller, *supra* note 23, at 1482.

The benefits of understanding conceptual and historical connections between private and public fiduciary law will not only redound to the benefit of those seeking to understand public governance with a rich language that focuses on self-interest, corruption, and accounting. Opportunities also exist for private law scholars to see their subjects in new light.<sup>273</sup> If private officeholders with fiduciary obligations can be shown to be species of a genus that includes public officeholders with similar core duties, it would be easier to contemplate the use of some of the relevant norm internalization tactics we use routinely in public law domains. To give one example, just as we use oaths regularly to install people in public offices of trust to ensure they understand their undertakings and duties, one might think about whether it makes sense to require oaths for private officeholders in positions of trust too.

Obviously, enforcement mechanisms—how we challenge and remediate breaches of trust, and who has standing to complain about breaches in the courts or in the courts of public opinion or in the courts of impeachment—have developed separately in public and private law. Private causes of action for breaches of the duty of loyalty with a view to disgorgement look significantly different from political impeachments. Reminding ourselves of the long history of mutual contact between these bodies of law can provoke innovation in how we orient institutions to motivate officers to pursue only the interests of their beneficiaries and not to take undue profits from their offices.

## CONCLUSION

The interwoven histories we have offered here—of fiduciary law, the law of public office, and English political history and theory—may reveal a series of grand coincidences. The law of public trusts and the law of private trusts may both have developed their modern shapes and legal regimes in a homegrown way, sealed off from one another and from the political and intellectual upheavals going on simultaneously in the world outside legislatures and

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273. Some early efforts by private law theorists in this vein include Andrew Verstein, *Trustee or Delegate? Understanding Representation to Illuminate Shareholder Governance and Regulatory Change*, 9 EUR. CO. & FIN. L. REV. 74 (2012); and Harold Marsh, Jr., *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 35-36 (1966).

courts. Indeed, it would take much more work to show that the points of contact we have exposed here show conscious legal and theoretical codevelopment. But it seems that the evidence we have brought to bear at least shifts the burden upon those who insist on “juristic amnesia”<sup>274</sup> and leave no room for appreciating that a law of public office—real law on the books and decided in courts—seemed to draw from the legal concept of trust. It likewise seems evident that what we today call the private law of trusts often drew from a conception of office<sup>275</sup>—and sometimes public office and notions of proper officeholding—to underwrite its strict rules. These bodies of law look like they might be species of the same genus, and that genus likely was influenced by significant changes in political life in seventeenth- and early eighteenth-century England. We hope we have problematized the public-private distinction in fiduciary law and have shown the rich potential for still more historical and normative work built on this foundation.

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274. Getzler, *Fiduciary Principles*, *supra* note 51, at 490.

275. For a provocative argument that office was an organizing set of permissions and duties in early modern England, see generally CONDREN, *supra* note 101. Friendship itself might have been perceived as an office. See 1 EDWARD, EARL OF CLARENDON, *Of Friendship*, in *ESSAYS MORAL AND ENTERTAINING, ON THE VARIOUS FACULTIES AND PASSIONS OF THE HUMAN MIND* 111, 112-14, 116 (London, 1815).