ESCAPING STATE CONSTITUTIONAL DUTY

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INTRODUCTION

The constitutional relationship between the state and the citizen is a fiduciary relationship.[1] This is true regardless of whether we focus

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1. *See, e.g.*, GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010) [hereinafter LAWSON ET AL., ORIGINS]; Gary Lawson et al., *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 418 (2014) [hereinafter Lawson et al., *Fiduciary Foundations*]; Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government's Fiduciary Duty of Care*, 69 FLA. L. REV. 1385, 1387 (2017); David Jenkins, *The Lockean Constitution: Separation of Powers and the Limits of Prerogative*, 56 MCGILL L.J. 543 (2011); Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN'S L.J. 259 (2005); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004) [hereinafter Natelson, *Agency Law Origins*]; Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191 (2001) [hereinafter Natelson, *Practical Demonstration*]. The fiduciary theory of government has found its way into scholarship not only of legislatures, David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249 (2011); Robert G. Natelson,

on the Federal Constitution or the fifty state constitutions—all are pervasively fiduciary documents in both character and purpose.[2] All fiduciary relationships require accountability and communication.[3] Fiduciaries often operate outside the view of their beneficiaries, but ultimately, every fiduciary must account for her work through some sort of communication directed either at the beneficiary or at some responsible party or entity related to the beneficiary.[4]

State governmental officials—both elected and appointed—stand in a fiduciary capacity in relation to state citizens and residents. These officials account for the performance of their myriad and varying duties in different ways. Elections form part of the accountability structure, of course, but elections also sit within the fog of politics, and the information that emerges from electoral politics regarding a public official's performance of her fiduciary duties to the people can be obscured or rendered misleading due to this fog. Where this performance of duties is called into question, then, other accountability mechanisms must exist to improve the information that comes to the people through the electoral process. One of these accountability mechanisms is the state judiciary.

From the earliest days of the pre-Founding and Founding eras, state and federal judges were viewed as serving in the role of keeping the members of the other branches of government to the performance of their fiduciary duties to the public.[5] But, as public officials under a fiduciary constitution, judges are also fiduciaries themselves.[6] This status places on judges certain fiduciary duties, primarily the duties of loyalty, care, transparency, communication, and obedience to the purposes of the entrustment.[7]

Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders, 11 TEX. REV. L. & POL. 239 (2007) [hereinafter Natelson, *General Welfare Clause*], but also of administrative agencies, Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006), and as I will discuss at length in later sections of this Article, judges. Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013) [hereinafter Leib et al., *Fiduciary Theory of Judging*]. This view of representative government is now ascendant in the scholarship not only of constitutional law, but also of other areas of public law.

2. *See* Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 740-45 (2012) (establishing the fiduciary foundations of state constitutions).

3. *See, e.g.*, Bryan L. Clobes, *In the Wake of* Varity Corp. v. Howe*: An Affirmative Fiduciary Duty to Disclose Under ERISA*, 9 DEPAUL BUS. L.J. 221, 225-26 (1997) (examining the duty of communication in the ERISA fiduciary context).

4. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1, at 723-24.

5. Lawson et al., *Fiduciary Foundations*, *supra* note 1, at 434.

6. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018); Leib et al., *Fiduciary Theory of Judging*, *supra* note 1.

7. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1, at 731-38.

Other scholars have examined the fiduciary duties of the judiciary—mostly at the federal level, but also touching upon state courts.[8] Each of these treatments has attempted to establish the duties that a judge assumes when accepting the entrustment of the judicial role. Some focus on judicial care,[9] some on loyalty,[10] some on a general package of duties familiar to fiduciary law,[11] and one on developing a strong case for a novel fiduciary duty of deliberative engagement.[12] These efforts have also attempted to identify where judges and courts have taken actions that may be accepted features of judicial practice, but that conflict with one or more fiduciary norms that apply to judges.[13] My own prior work in this area has focused on the judicial enforcement of state constitutional duties, but neither the other commentators nor I have put our attention toward mechanisms judges and courts employ to circumvent their fiduciary duties. This Article addresses that gap, focusing on the judicial use of "escape devices" in cases presenting challenges under state constitutional affirmative duties.

The judicially derived escape device is a mechanism well-known to scholars and students of conflict of laws.[14] In that field, the identification of escape devices employed by courts to avoid the harsh results mandated by the categorical rules of the first *Restatement of Conflict of Laws* formed the principal case against those rules, and in favor of alternative approaches, such as interest analysis.[15] But as I will demonstrate, it turns out that judicial escape devices are everywhere—in contract law, tort law, statutory law, administrative law, and most importantly to the discussion that follows, in both federal and state constitutional law.

Focusing on state constitutional cases presenting challenges based on affirmative state constitutional duties, this Article examines the role of judicial escape devices, concluding that judicial escape

8. *See* Barnett & Bernick, *supra* note 6 (focusing on federal judges); Lawson et al., *Fiduciary Foundations*, *supra* note 1 (focusing on federal judges); Leib et al., *Fiduciary Theory of Judging*, *supra* note 1 (focusing mostly on federal judges, but also extending the analysis to state court judges to examine the impact of election, rather than appointment, on the fiduciary status of the judiciary).

9. Lawson et al., *Fiduciary Foundations*, *supra* note 1.

10. Barnett & Bernick, *supra* note 6.

11. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1.

12. *Id.* at 740-42 (discussing the duty of deliberative engagement).

13. Barnett & Bernick, *supra* note 6 (discussing what the authors deem "good faith" and "bad faith" constitutional construction); LAWSON ET AL., ORIGINS, *supra* note 1 (discussing the interpretation of the Necessary and Proper Clause); Leib et al., *Fiduciary Theory of Judging*, *supra* note 1 (discussing multiple conflicts between judicial duties and judicial performance).

14. *See, e.g.*, Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 175 (explaining the concept of an escape device and providing examples).

15. *See generally id.* (critiquing the First Restatement due to the inevitable use of escape devices).

significantly impacts the enforcement of such duties. Building upon this critique, the Article then moves to evaluate the use of escape devices under the fiduciary norms that undergird the judicial role, along with state government in general. The Article ultimately illustrates that the use of escape devices in state constitutional cases is broadly inconsistent with not only the fiduciary duties that apply to the judiciary, but also those that apply to the other branches.

Part I examines the nature of state constitutional duty, reviewing first, the differing approaches state constitutional drafters have taken in placing affirmative obligations on state governmental actors and then second, more comprehensive and theoretical approaches to conceptualizing state constitutional duty, ultimately framing the analysis in the remainder of the Article in the terms of fiduciary political theory. Part II then examines the ways in which judges in both state and federal courts have concocted escape devices to avoid difficult questions or results in cases to preserve their own political capital or to avoid conflicts with coordinate branches of government.

Part III then examines the use of escape devices in the context of state constitutional duties, tracking the ways in which judicial escapes have frustrated efforts to lend meaning to state constitutional provisions and doctrines through adjudication. Part IV then joins this critique with the theoretical foundation laid in Part I—the fiduciary theory of government. This Part demonstrates that the judicial use of escape devices in state constitutional cases not only stands in significant tension with the fiduciary obligations of the state court judge, but also impairs the performance of the fiduciary obligations of other state governmental actors.

I. THE NATURE OF STATE CONSTITUTIONAL DUTY

A. State Constitutional Duty Provisions

A reasonable place to begin a discussion of state constitutional duty is with currently dominant practices and conceptions. In early state constitutional history, the practice of the framers and drafters was much the same as that of the framers and drafters of the United States Constitution—indeed, in many cases, these framers and drafters were the same people.[16] Thus, early state constitutions, some of which survive in part to the present, mostly refrained from placing specific obligations on state governments, preferring instead to speak in

16. Robert F. Williams, *"Experience Must Be Our Only Guide": The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 405 (1988) ("The fifty-five delegates who attended the 1787 Constitutional Convention already had wide experience, either directly or indirectly, with constitutional theory and constitution-making. . . . By the time the Constitutional Convention met in the summer of 1787, the thirteen independent states had debated, framed, adopted, rejected, and modified at least twenty state constitutions.").

"admonitory" or "hortatory" terms.[17] These constitutions, consistent with their Lockean foundations, placed supreme power and discretion in legislative bodies, and their language reflects both that grant of authority and the Lockean assumption that the authority would be exercised in the best interest of the people, the popular sovereigns of each state.[18]

In the nineteenth century, it became clearer that legislative majorities could not always be trusted with this authority. Examples of self-dealing, corruption, and simple lack of transparency abounded.[19] So, reformers (and new constitutionalists in later-admitted states) resolved to rein in the power of legislatures in various ways, the most common of which were the imposition of both affirmative and negative duties on legislative action.[20] These duties took both substantive and procedural forms.[21] This change in approach has mostly held up to the present day, and has recently increased in intensity, especially in states that permit constitutional amendments through popular initiative.[22] The resulting landscape of state constitutional provisions illustrates multiple approaches to the placing of obligations on state actors.

Affirmative substantive duties instruct, or command, the state legislature to accomplish some policy goal. For example, every state constitution includes a provision in some way obligating the legislature to set up and maintain an education system.[23] Beyond this ubiquitous duty, state constitutions contain myriad varying duties, ranging from the duty to provide for human welfare and social services[24] to the duty to pursue environmental protection.[25] Some state

17. *See infra* notes 39-44 and accompanying text (drawing distinctions among "mandatory," "admonitory," and "hortatory" terms).

18. *See* Bauries, *supra* note 2, at 741-43 (discussing the influence of John Locke on the formation of state constitutions in the Founding era).

19. *See* Michael E. Libonati, *State Constitutions and Legislative Process: The Road Not Taken*, 89 B.U. L. REV. 863, 865-66 (2009) (discussing the shift from the Founding era through the nineteenth century).

20. *See id.*

21. *See infra* notes 27-31 and accompanying text.

22. *See, e.g.*, Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 915-18 (2003) (introducing the means by which state legislatures are commonly restricted from raising revenue).

23. Bauries, *supra* note 2, at 719.

24. *E.g.*, N.Y. CONST. art. XVII, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."); *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (conducting an in-depth study of state welfare provisions and focusing on the New York welfare clause).

25. *E.g.*, ALASKA CONST. art. VIII, § 2 ("The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."); *see also* Robert A. McLaren, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 127-28 (1990) (conducting an in-depth study of state constitutional environmental provisions, focusing on Hawaii).

constitutions provide for unique, state-specific duties,[26] while many others follow similar themes. For example, the duty to provide for the protection of health care exists in some form in seven state constitutions.[27] Several state constitutions mandate the establishment of a state university,[28] and some require tuition to that university to be free or nearly free.[29] Several others require provision of schools for the blind or those with other disabilities.[30] These affirmative substantive duties continue to take shape as the pace of constitutional change proceeds.

State constitutions also establish procedural duties, placing these duties mostly on state legislatures. These duties largely emerged from the environment of legislative distrust that developed in the nineteenth century as business and industry began to gain influence in legislative chambers, and populist resistance to that influence began to grow.[31] Today, most state constitutions impose procedural duties on state legislatures, often as conditions on legislating.[32]

Common examples of such procedural duties include the requirement that a bill be read aloud (sometimes multiple times) before passage;[33] the requirement that the title of a bill fairly represent the

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26. *See* Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1465 (2010) ("There are relatively unique provisions such as the Idaho Legislature's constitutional duty to act to prevent the spread of livestock diseases, the North Carolina General Assembly's duty to care for orphans, and the Wyoming Legislature's duty to encourage virtue and temperance." (footnotes omitted) (citing IDAHO CONST. art. XVI; N.C. CONST. art. XI, § 4; WYO. CONST. art. VII, § 20)).

27. *See* Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1347-67 (2010) (discussing health care provisions in the constitutions of Michigan, New York, North Carolina, Mississippi, South Carolina, Montana, and New Jersey).

28. *E.g.*, WIS. CONST. art. X, § 6 ("Provision shall be made by law for the establishment of a state university at or near the seat of state government, and for connecting with the same, from time to time, such colleges in different parts of the state as the interests of education may require."); WYO. CONST. art. VII, § 15 ("The establishment of the University of Wyoming is hereby confirmed, and said institution, with its several departments, is hereby declared to be the University of the State of Wyoming.").

29. *E.g.*, WYO. CONST. art. VII, § 16 ("The university shall be equally open to students of both sexes, irrespective of race or color; and, in order that the instruction furnished may be as nearly free as possible, any amount in addition to the income from its grants of lands and other sources above mentioned, necessary to its support and maintenance in a condition of full efficiency shall be raised by taxation or otherwise, under provisions of the legislature.").

30. *E.g.*, WASH. CONST. art. XIII, § 1 ("Educational, reformatory, and penal institutions; those for the benefit of youth who are blind or deaf or otherwise disabled; for persons who are mentally ill or developmentally disabled; and such other institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be provided by law.").

31. *See* Libonati, *supra* note 19, at 865-66 (discussing the shift from the Founding era through the nineteenth century).

32. *Id.* at 866; Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 201-02 (1983) [hereinafter Williams, *Processes*].

33. *E.g.*, IDAHO CONST. art. III, § 15 ("No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall

bill's contents;[34] and the command that the legislature limit its enactments to one subject.[35] Most state constitutions have these features, while some contain unique legislative procedural duties. For example, the Louisiana Constitution contains a provision requiring the state legislature to collaboratively develop an education budget with the state Board of Elementary and Secondary Education, with specific duties placed on each, and with a failsafe of maintenance of the prior year's budget if the two branches reach an impasse.[36] The Oklahoma Constitution, like most, bans conflicts of interest, but also places the duty on each legislator to identify any conflict related to pending legislation by reporting the conflict to the house of the legislature in which she serves, and forbids the legislator from voting on that measure.[37]

Each of these provisions shares a purpose deriving from the legislative distrust that initially drove the development of these provisions after the Founding era. Legislative restrictions of the procedural form serve to preserve transparency and accountability to the public. And certain categories of procedural duties, such as the rule that legislation may embrace only a single subject, operate to prevent logrolling and other factional activities that may operate to override the preferences of individual representatives or their constituents.[38]

B. Conceptualizing State Constitutional Duty

State constitutional provisions placing affirmative obligations on state actors may usefully be characterized as either mandatory, admonitory/hortatory, or declaratory.[39] A mandatory provision

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have been printed for the use of the members; nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon: provided, in case of urgency, two-thirds (2/3) of the house where such bill may be pending may, upon a vote of the yeas and nays, dispense with this provision. On the final passage of all bills, they shall be read at length, section by section, and the vote shall be by yeas and nays upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of the members present.").

34. *E.g.*, KAN. CONST. art. II, § 16 (providing in part, "The subject of each bill shall be expressed in its title").

35. *E.g.*, MD. CONST. art. III, § 29 (providing in part, "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title"); *see also* Williams, *Processes*, *supra* note 32, at 203-05 (discussing procedural limitations on legislating).

36. LA. CONST. art. VIII, § 13(B).

37. OKLA. CONST. art. V, § 24 ("A member of the Legislature, who has a personal or private interest in any measure or bill, proposed or pending before the Legislature, shall disclose the fact to the House of which he is a member, and shall not vote thereon.").

38. *See* Libonati, *supra* note 19, at 866 (discussing the purposes of procedural requirements placed on legislators).

39. The distinctions I draw in this Section are contestable, but defensible. Rhetoricians, in particular, may take exception to my taxonomy, as they draw a distinction (as to political rhetoric) between hortatory and admonitory rhetoric based on its positive or negative

imposes a duty through an explicit command, using terms such as "shall" or "must," or their negatives. An example is a portion of the Florida Constitution's education clause added by constitutional amendment in 2002:

> To assure that children attending public schools obtain a high quality education, the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that:
>
> (1) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for prekindergarten through grade 3 does not exceed 18 students;
>
> (2) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students; and
>
> (3) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students.[40]

As one can readily see, the provision begins with mandatory duty language, using the term "shall" to describe the obligation imposed, and then follows that language with specific content as to what the legislature "shall" do; namely, fund the education system sufficiently such that certain class sizes are maintained. It would be difficult to argue that this provision merely makes a suggestion as to how power should be exercised, or that it lodges discretionary authority with the legislature. The language is both clear and mandatory—the legislature does not have the option not to comply.

An admonitory or hortatory provision is one that instructs (i.e., admonishes or exhorts) the government to hold a particular interest

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approach. *See* ANDREW W. ROBERTSON, THE LANGUAGE OF DEMOCRACY: POLITICAL RHETORIC IN THE UNITED STATES AND BRITAIN, 1790-1900, at 16 (Univ. of Va. Press 2005) (1995) (describing the rhetoric of political editorials during and after the Civil War, stating, "Hortatory rhetoric was active, urging voters to mobilize; admonitory rhetoric was reactive, warning them of the consequences of political failure"). Rather than on rhetorical convention, I draw upon the general understanding of these terms as coextensive as expressed in the legal scholarship. *See, e.g.*, G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 78 (1998) (describing state declarations of rights in the Founding era to be largely "admonitory and hortatory"); Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 197 (2012) (describing what the author terms "The Stoic Constitution," stating, "This methodology calls to mind the position famously voiced by Learned Hand, that one should 'read [the Bill of Rights] as admonitory or hortatory, not definite enough to be [a] guide[ ] on concrete occasions, prescribing no more than that temper of detachment, impartiality, and an absence of self-directed bias that is the whole content of justice' " (alterations in original) (quoting LEARNED HAND, THE BILL OF RIGHTS 34 (1958)).

40. FLA. CONST. art. IX, § 1. This language was added following a constitutional revision in 1998 that strengthened the main duty language in response to a Florida Supreme Court decision, *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996), in which the court held the then-existing language to be unenforceable as a political question. *See infra* Part III (discussing the use of the political question doctrine in state courts).

as important in performing government functions, but does not necessarily impose a clear duty to pursue that interest. The Vermont Constitution's education clause is an example of this form: "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth."[41] The use of the term "ought," along with language indicating that the provision is suggestive of a course of action, yet one from which the legislature can choose to deviate if it wishes, illustrates that the clause works to admonish or exhort the legislature to work toward an ideal rather than commanding the legislature to pursue a particular policy.

Finally, a declaratory provision is one that proclaims the importance of an interest to the state, but does not impose any obligation, or even admonish or exhort governmental actors toward the pursuit of the interest. Article V of part the first of the Massachusetts Constitution exemplifies this type of provision: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."[42] This provision does no more than proclaim the fiduciary relationship between government and the people. It contains neither language of obligation nor language of encouragement or admonishment.

Considering these differing approaches, one might then begin a study of state constitutional duty by discerning, textually, whether a provision can or cannot be read as imposing an obligation. Mandatory provisions clearly authorize such reading, if not demand it. Declaratory provisions (in isolation) would seem to forbid it, at least without more evidence of meaning, such as structure, context, intent, and other such indicators. And admonitory or hortatory provisions would seem amenable to embracing obligations yet would also support an interpretation that stops just short of imposing duties. Thus, a purely textualist approach might limit the enforceable duties a governmental actor assumes to those in the "mandatory" category.[43] But augmenting these textual categories is the overall framework of state constitutionalism.

41. VT. CONST. ch. II, § 68.

42. MASS. CONST. pt. 1, art. V. For more on the fiduciary relationship between government and the people under state constitutions, see *infra* Section I.C.

43. The species of textualism commonly referred to as originalism may go farther than this, as most originalists recognize a distinction between constitutional interpretation, the derivation of the semantic meaning of constitutional text, and constitutional construction, the filling of gaps in underdetermined meaning and/or the application of meaning to facts to develop doctrinal rules of decision. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) (explaining this distinction).

That framework is broadly fiduciary in character, and this fiduciary orientation should inform our interpretation of provisions establishing obligations.[44]

C. Fiduciary Theory of State Government

Fiduciary political theory, of relatively recent vintage in public law scholarship,[45] animated the thinking of the Founding generation, along with most state constitutional founders who either followed or served along with that generation.[46] In recent years, many articles, essays, and commentaries have attempted to define and refine conceptions of government actors as fiduciaries of the people.[47] Below, I extend these analyses to state governmental actors, with particular attention to state court judges.

A fiduciary relationship arises when one party entrusts another party with her interests, either expressly or by operation of law, and the entrusting party is rendered vulnerable to the actions of the party to whom the interests are entrusted by virtue of the entrustment.[48] This vulnerability arises, according to Tamar Frankel's seminal work on fiduciary law, due to two features of fiduciary relationships. One is substitution of the fiduciary for the entrustor in carrying out duties in the interest of the entrustor.[49] In a republic, this is the function that governmental actors, especially the legislature, but in some respects

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44. *See* Bauries, *supra* note 2.

45. *See, e.g.*, LAWSON ET AL., ORIGINS, *supra* note 1; Lawson et al., *Fiduciary Foundations*, *supra* note 1, at 418; Lawson & Seidman, *supra* note 1, at 1387; Jenkins, *supra* note 1; Fox-Decent, *supra* note 1; Natelson, *Agency Law Origins*, *supra* note 1; Natelson, *Practical Demonstration*, *supra* note 1. The fiduciary theory of government has found its way into scholarship not only of legislatures, Ponet & Leib, *supra* note 1; Natelson, *General Welfare Clause*, *supra* note 1, but also of administrative agencies, Criddle, *supra* note 1, and as I will discuss at length in later sections of this Article, judges. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1. This view of representative government is now ascendant in the scholarship not only of constitutional law, but also of other areas of public law. *See, e.g.*, EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY 23-51 (2011); LAWSON ET AL., ORIGINS, *supra* note 1, at 56-57; Criddle, *supra* note 1, at 120; Fox-Decent, *supra* note 1, at 260-61; Jenkins, *supra* note 1, at 565-66; Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845 (2013); Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. 178, 179 (2012); Leib et al., *Fiduciary Theory of Judging*, *supra* note 1; Natelson, *Agency Law Origins*, *supra* note 1, at 247, 274, 284-87; Natelson, *Practical Demonstration*, *supra* note 1, at 192; Natelson, *General Welfare Clause*, *supra* note 1, at 245-46; Ponet & Leib, *supra* note 1, at 1249-50; D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013).

46. *See* Bauries, *supra* note 2, at 747 (outlining the fiduciary thinking of political philosophers who influenced the Framers).

47. *E.g.*, Rave, *supra* note 45.

48. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 800 (1983); *see also id.* at 800 n.17 (coining the term "entrustor," which I adopt in places for the purposes of this Article).

49. *Id.* at 808.

the members of the other branches as well, perform.[50] A republic's citizens do not act or vote directly on the business of government—their legislative representatives do. They also do not adjudicate disputes—their judicial representatives do. Similarly, they do not enforce the laws—their executive representatives do. As James Madison pointed out at the time of the Founding, the genius of republican government is that it removes the individual, along with his biases, from these decisions and places at least theoretically less biased representatives there instead.[51]

The other feature is delegation of the power to carry out those duties.[52] This, too, is a vital feature of republican governments—the delegation of power from the people to their representatives.[53] The very essence of representative democracy requires the people to delegate their sovereign authority to representatives who then exercise that authority for them.[54]

Each of these notions depends on the assumption that sovereign authority resides naturally in the people. Once delegated, then, that power must be exercised in the people's interests, or in other words, in a fiduciary capacity. Examining state constitutions adopted at differing times over the course of American history reveals a pervasive adoption of fiduciary ideals. To begin, almost every state constitution, regardless of when adopted, begins with either a preamble, a prefatory clause, or a provision in its declaration of rights affirming popular sovereignty as the foundation of state governmental power.[55] The

50. *See* THE FEDERALIST NO. 10, at 46-48 (James Madison) (George W. Carey & James McClellan eds., 2001) (distinguishing between republican, or representative, government and direct democracy); THOMAS PAINE, THE RIGHTS OF MAN Pt. II, Ch. III (1791) ("Republican government is no other than government established and conducted for the interest of the public, as well individually as collectively.").

51. *See* THE FEDERALIST NO. 10, *supra* note 50, at 44, 46-48.

52. Frankel, *supra* note 48, at 809.

53. *See* JOHN LOCKE, TWO TREATISES ON GOVERNMENT 311-12 (London: Printed for R. Butler, 1821) (Hathi Trust Digital ed., 2019) (1690) (describing government power as delegated from the people); *see also* Barnett & Bernick, *supra* note 6, at 21 ("Founding-era writings presented judges as representatives of the people no less than legislators.").

54. THE FEDERALIST NO. 10, *supra* note 50, at 46-48.

55. *See, e.g.*, DEL. CONST. pmbl. ("Through Divine goodness, all people have by nature the rights of worshipping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of obtaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may for this end, as circumstances require, from time to time, alter their Constitution of government."); ALA. CONST. art. I, § 2 ("That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient."); ALASKA CONST. art. I, § 2 ("All political power is inherent in the people. All government originates

Colorado Constitution is representative of the popular sovereignty claim: "All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."[56] This nearly universal approach to drafting evidences an understanding that a state constitution is an instrument of entrustment—that the people, exercising their popular sovereignty, entrust the operation of their government to representatives who are then empowered to act in the people's interests.

Republican political theory rests on the notion that government is a trust, and that elected or appointed governmental officials are, collectively and individually, the trustees of this entrustment.[57] In short, state governments are fiduciaries of the public. Several state constitutions make this conclusion explicit. For example, Georgia, the state with the most recently adopted constitution (its eleventh), textually defines the bridge between popular sovereignty and the fiduciary entrustment ideal: "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them."[58] Other state constitutions, while not stating the connection so explicitly, nevertheless make clear that fiduciary ideals and duties form the basis of public expectations of governmental actors.[59]

State constitutional documents further reveal a strong connection between the ideals of popular sovereignty and the people as a

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with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole."); ARIZ. CONST. art. II, § 2 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."); ARK. CONST. art. II, § 1 ("All political power is inherent in the people and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same, in such manner as they may think proper."); HAW. CONST. art. I, § 1 ("All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.").

56. COLO. CONST. art. II, § 1.

57. *See, e.g.*, LOCKE, *supra* note 53, at 316-17 ("Though in a constituted commonwealth, standing upon its own basis, and acting according to its own nature, that is, acting for the preservation of the community, there can be but *one supreme power*, which is *the legislative*, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still *in the people a supreme power to remove or alter the legislative*, when they find the *legislative* act contrary to the trust reposed in them . . . .").

58. GA. CONST. art. I, § 2, ¶ 1.

59. *See, e.g.*, W. VA. CONST. art. II, § 2 ("The powers of government reside in all the citizens of the state, and can be rightfully exercised only in accordance with their will and appointment."); R.I. CONST. art. I, § 2 ("All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole . . . .").

repository of inalienable rights.[60] Most state constitutions proclaim that the rights they enumerate are "excepted out of the . . . powers of government," as the retained rights of an entrustor are excepted out of the powers of a fiduciary.[61] The Arkansas Constitution exemplifies the reservations of rights found in many state documents, echoing the Declaration of Independence in stating: "All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness."[62]

Several state constitutions go further, explicitly denoting state power as a "public trust" or some variant of the phrase.[63] For example, the Florida Constitution states: "A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse."[64] In some cases, state constitutional documents reserve to the

60. *Cf.* Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 816 (1994) ("The core meaning of republican government, however, is clear. Most scholars would agree that a republican government is, at the very least, one in which the people control their rulers.").

61. *See* ALA. CONST. art. I, § 36 ("That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate."); ARK. CONST. art. II, § 29 ("[W]e declare that everything in this article is excepted out of the general powers of the government; and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void."); *see also* Donovan Waters, *Trusts: Settlor Reserved Powers*, 25 EST. TR. & PENSIONS J. 234, 247 (2006) ("*Scott* says that 'the trust is not incomplete merely because the settlor reserves power to revoke or to alter the trust. There is sufficient surrender of control over the property if the settlor transfers the title to it to the trustee, even though he reserves power to undo what he has done.' But it is not likely that any common law lawyer would take exception to that remark, because it is standard doctrine that a revocable trust is a valid trust. And a settlor power of amendment does not invalidate the trust." (quoting I.A. SCOTT ON TRUSTS ¶ 57.2 (4th ed. 1987)).

62. ARK. CONST. art. II, § 2.

63. *See* GA. CONST. art. I, § 2, ¶ 1 ("All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them."); COLO. CONST. art. XXIX, § 6 ("Any public officer, member of the general assembly, local government official or government employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state or local jurisdiction for double the amount of the financial equivalent of any benefits obtained by such actions."). Some state constitutions use the word "trust" to describe and limit the legislative duty. *See* ALA. CONST. art. IV, § 60 ("No person convicted of embezzlement of the public money, bribery, perjury, or other infamous crime, shall be eligible to the legislature, or capable of holding any office of trust or profit in this state."). Others contain provisions explicitly requiring that legislation, usually for appropriations and/or taxes, be passed only for public purposes. *See* ALASKA CONST. art. 9, § 6 ("No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.").

64. FLA. CONST. art. II, § 8.

people an explicit right to revolution,[65] illustrating that the entrustment of government power can be revoked if the fiduciary obligations it implies are not met. An example of such a provision is section 4 of the Kentucky Constitution, which states:

> All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper.[66]

In addition, reading their provisions more holistically reveals that state constitutions evince a distrust of legislative use of power that comports well with the residual fear of legislative tyranny that animated the Lockean conception of the legislature as a duty-limited fiduciary of the public trust and drove the move that began in the nineteenth century to limit legislative authority.[67] Thus, the core ideal of government power as an entrustment of fiduciary duties from the people to the state, limited by the instrument of entrustment, which in this case reserves significant spheres of authority for the people alone, forms the foundation of state constitutionalism.

Reaching beyond the Founding era, we see elements of public distrust of legislative fidelity to the public's entrustment. Although it is axiomatic that state legislative power is "plenary,"[68] at varying levels

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65. Some state constitutions claim this right expressly. *See* ARK. CONST. art. II, § 1 ("All political power is inherent in the people and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same, in such manner as they may think proper."); COLO. CONST. art. II, § 2 ("The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States."). Most do not, but many nevertheless imply the right to revolt by explicitly stating that the government's action outside its powers constitutes "usurpation" or "oppression." *See* ALA. CONST. art. I, § 35 ("That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression.").

66. KY. CONST. pmbl., § 4.

67. *See, e.g.*, FLA. CONST. art. IX, § 1; *id.* art. X, § 27(b) (directing the legislative power at specific objects); *id.* art. XI §§ 4, 6-7 (placing procedural restrictions on legislative action, including requirements for transparency, such as the public reading of each bill); *see also* Libonati, *supra* note 19, at 865-67 (outlining the increasing distrust of legislative power that led to the adoption or expansion of such provisions in the nineteenth century).

68. *See* TARR, *supra* note 39, at 7. This view has long been the conventional one in state constitutionalism. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 127-35 (Boston, Little, Brown, & Co. 1890) (collecting cases). "Plenary" should not be confused for "supreme" in the Lockean sense, as the former describes the scope of the legislative power—what objects it may address—while the latter describes the authority of the power—the extent to which it may be checked by the other branches of government, or by popular will. Constitutional drafters adopted most of Locke's prescriptions for representative

in state constitutions, we see the familiar, broad power granting language that we find in the Federal Constitution,[69] which, as G. Alan Tarr points out, functions as a limitation on legislative power rather than as a grant of authority.[70] With enumerations of power being unnecessary in a state constitution, they function most clearly as the people's assertion of control over their fiduciaries.

Most state constitutions adopted in the post-Revolutionary period also contain detailed procedural requirements for legislating, for instance that legislation address a single subject, that each house keep a journal, or that a bill be read a certain number of times out loud prior to passage.[71] These provisions mostly responded to legislative abuses, or were adopted to assuage fears of such abuses, in the nineteenth century.[72]

Many state constitutions also contain non-right-based provisions placing substantive limitations on legislation, some of which explicitly call for judicial involvement. For example, many state constitutions contain explicit bans on "special" legislation, or laws that benefit or burden only a single person or entity, or a small class thereof.[73] The obvious motivation behind such provisions is the prevention of self-dealing. Article V, section 24 of the Arkansas Constitution provides an example: "The General Assembly shall not pass any local or special law, changing the venue in criminal cases; changing the names of persons, or adopting or legitimating children; granting divorces; vacating roads, streets or alleys."[74] Most state constitutions contain

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government, but they left the legislative power checked by two co-equal branches, where Locke would have left it supreme and would have lodged the ultimate check in the people's power to alter, abolish, or reform their government. LOCKE, *supra* note 53, at 316-17.

69. *See, e.g.*, FLA. CONST. art. III, § 1 ("The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative district."); VT. CONST. ch. II, § 6 (speaking of the legislature: "They may prepare bills and enact them into laws, redress grievances, grant charters of incorporation, subject to the provisions of section 69, constitute towns, borroughs, cities and counties; and they shall have all other powers necessary for the Legislature of a free and sovereign State; but they shall have no power to add to, alter, abolish, or infringe any part of this constitution").

70. TARR, *supra* note 39, at 8-9. Tarr also points out that at least one state has acted by constitutional amendment to forestall such an interpretation. *See id.* (quoting ALASKA CONST. art. XII, § 8).

71. For a sampling of these sorts of provisions, see Scott R. Bauries, *State Constitutional Design and Education Reform: Process Specification in Louisiana*, 40 J.L. & EDUC. 1, 7-8 (2011).

72. Libonati, *supra* note 19, at 865-67; TARR, *supra* note 39, at 118-19.

73. *See generally* Lyman H. Cloe & Sumner Marcus, *Special and Local Legislation*, 24 KY. L.J. 351 (1936) (comprehensively reviewing special legislation provisions in state constitutions).

74. ARK. CONST. art. V, § 24.

this prohibition, though they each state it somewhat differently.[75] The Minnesota Constitution, for example, not only bars special legislation, but also explicitly calls for non-deferential judicial review in challenges related to such litigation.[76]

Although most fiduciary accounts of public law focus on legislative actors, some commentators have included the judiciary in their conceptions of fiduciary public law. In a recent article, Randy Barnett and Evan Bernick draw from the fiduciary conception of public law to develop a "unified theory of originalism."[77] Focusing on federal constitutional law, the authors demonstrate that the key to this unified theory is a conception of the judiciary as the fiduciary of the public. Their justification for this conception sounds in the entrustment, delegation, and vulnerability justifications of Professor Frankel outlined above: "Because we are all vulnerable to judicial decisions that bring the government's coercive power to bear upon us, or that prevent the government's power from being used to our benefit, federal judges ought to be understood as fiduciaries, with corresponding duties."[78] The authors utilize this conception to deal with a thorny problem in originalist theory—what a judge must do when the interpretive tools for determining the semantic meaning of constitutional text run out. Their solution is to hold to the entrustment and issue good-faith constructions of underdetermined text in light of the overall spirit of the Constitution.[79] To be clear, the authors do not argue that this is merely a sound way of judging, but instead that it is the fiduciary *duty* of the judge under the Constitution.[80]

Gary Lawson, Guy Seidman, and Robert Natelson trace the fiduciary conception of judging to the English practice prior to and during the Founding era, which required judges, as possessors of "delegated" power, to exercise that power consistent with fiduciary norms.[81] The

75. *E.g.*, OHIO CONST. art II, § 26 ("All laws, of a general nature, shall have a uniform operation throughout the State; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution.").

76. MINN. CONST. art. XII, § 1 ("In all cases when a general law can be made applicable, a special law shall not be enacted except as provided in section 2. Whether a general law could have been made applicable in any case shall be judicially determined without regard to any legislative assertion on that subject.").

77. Barnett & Bernick, *supra* note 6.

78. *Id.* at 21-22 (emphasis omitted).

79. *Id.* at 30-31.

80. William Thro builds on this theory to illuminate an approach to state constitutional adjudication of school funding suits. William E. Thro, *Barnett's & Bernick's Theory of Constitutional Construction and School Finance Litigation*, 357 EDUC. L. REP. 464 (2018).

81. Lawson et al., *Fiduciary Foundations*, *supra* note 1, at 434.

authors explain that this practice was carried over into the Founding era and expanded from the executive and the judiciary under English law to also include the legislature under the Constitution.[82]

The most comprehensive examination of the fiduciary theory of judging is that of Ethan Leib, David Ponet, and Michael Serota.[83] Leib et al. build the foundation of their fiduciary theory of judging on refinements of Frankel's general theory of fiduciary duty. Frankel's theory depends on two conditions, substitution and delegation, which lead to a third inevitable condition: vulnerability of the entrustor to the fiduciary.[84] Leib et al. refine this theory into three distinct considerations: discretion (of the fiduciary), vulnerability (of the entrustor to the fiduciary), and trust (reposed in the fiduciary by the entrustor).[85]

I agree with this formulation, but I dissent on one small point—one which, in my view, does not imperil the formulation itself. The authors develop this formulation in place of the ordinary democratic justification of the "consent of the governed," explaining that, in many cases, citizens in republics or other democratically-oriented systems rarely meaningfully "consent" to their leadership; in fact, large portions of the population, almost by definition, vote against any slate of leaders in every election, so it is difficult to consider them as having "consented" to their government.[86] But this discussion mistakes consent to the *system* for consent to the particular *leadership* of that system in a particular election cycle. In a republic, the people consent to be governed by those who prevail in the electoral and appointment processes; the status of a government as republican does not, or at least should not, depend on their consent to the leaders themselves specifically.

This notion of consent to the system, along with the distinction I am drawing here, has been placed into sharp relief in recent years, as large portions of the U.S. population, including many elected officials, have rejected the results of the 2020 presidential election and declared themselves (rhetorically, at least) unwilling to be governed by its results.[87] Like many before them who were disappointed with the results of an election, these individuals do not, and likely will never, consent to their governance by the officials they voted against. However, unlike in prior iterations of this conflict, there has been a broad movement in response to the 2020 election to reform the electoral machinery to guarantee that these individuals could see any electoral result they reject in the future overturned.

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82. *Id.*

83. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1.

84. *See supra* notes 49-52 and accompanying text (discussing Frankel's theory).

85. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1, at 706.

86. *Id.* at 712 (emphasis omitted).

87. *See, e.g.*, Domenico Montanaro, *Poll: Just a Quarter of Republicans Accept Election Outcome*, NPR (Dec. 9, 2020, 12:00 PM), https://www.npr.org/2020/12/09/944385798/poll-just-a-quarter-of-republicans-accept-election-outcome [https://perma.cc/ATU4-7SV8].

After the 2000 election, for example, many were disillusioned with the election of a candidate for president that many thought unqualified and in which such election was ultimately settled by a Supreme Court where the membership was dominated by justices nominated by the eventual winner's political party. There, the losing side did not engage state politics to secure modifications to the electoral process, or even the process of election contests, with the aim of overturning similar elections in the future, so the overall "consent" for the system was maintained.[88] In contrast, today, many efforts are afoot in the states to transfer sufficient authority to partisan state officials such that, if a Republican candidate for president loses the election, these state and local officials can act administratively to overturn that loss.[89]

These efforts arguably amount to acts of withdrawal of consent to the *system*. If they succeed, and a legitimate election is overturned, then it will be difficult for many to view the United States as a true republic going forward. Thus, the sort of general consent to republican government based on elections that I outline above, in contrast with specific consent to particular governing officials, is vital to the imposition of fiduciary duties on government officials as a necessary condition of republican government. Absent this general consent, which takes the form of continuing to live under electoral results that one both favors and does not favor, the assumption of a true delegation of authority is suspect because the substitution of the fiduciary for the entrustor runs against the will of at least some of the entrustors.

It matters greatly whether the democratic justification for republican government is the consent of the governed. To be a fiduciary, one must have assumed that role legitimately, and absent some theory of democratic legitimacy that is prior to the conclusion that a fiduciary relationship exists, it is impossible to determine whether that fiduciary relationship is legitimate ab initio. It is also difficult to determine what the scope of the duties attached to that relationship might be. State constitutions take great care to draw the connections—often explicitly—between popular sovereignty (from which the theory of the

88. The modifications to electoral processes following the 2000 election in fact were directly aimed at improving electoral fairness, expanding the vote, and developing more uniform standards for election administration. *See, e.g.*, Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125 (2009) (describing the aims of the Help America Vote Act, along with its primarily administrative shortcomings, and calling for further reforms focusing on institutions).

89. *See, e.g.*, *Voting Laws Roundup: December 2021*, BRENNEN CTR. FOR JUST. (Jan. 12, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021 [https://perma.cc/R3CC-YW5L] (outlining efforts in state legislatures to insert partisan decisionmakers into previously non-partisan roles, especially as to election contests).

"consent of the governed" emanates) and the fiduciary responsibilities of government officials because that connection is what renders the fiduciary relationship legitimate.[90]

In other words, I contend that, absent general consent, there can be no entrustment—no substitution or delegation, in Frankel's terms; and in Leib et al.'s terms, while discretion and vulnerability might exist, true "trust," which can only form volitionally, likely does not. Absent that general consent, a ruler (which is what would result, not a "leader" or "governor") *might* take up a fiduciary view of his responsibilities—Robert Natelson discusses both King James I and Emperor Trajan[91] in this context—but in such a case, the duties would be (1) contingent upon the will of the ruler and (2) different in scope and texture from those that would exist where the government fiduciaries are chosen through means consented to by those making the entrustment, and are therefore accountable to them. In short, in my view, the "consent" theory of popular sovereignty is not a competitor to the theory of fiduciary government but is instead an essential element.

Laying that quibble to the side, Leib et al. make a very convincing case that the conditions they derive from Frankel and others lead to a proper conception of the judge as a fiduciary. One challenge—and this challenge confronts any fiduciary theory of government—is that, if judges are fiduciaries, they would seem to have many individual beneficiaries, and if so, that would result in unwieldy analyses of whether fiduciary duties have been violated.[92] But Leib et al. deal with that potential objection convincingly, pointing out that multiple beneficiaries exist in many relationships, including those within corporations, probate, trusts, mutual funds, etc.[93]

I would add, drawing both from Leib et al. and others, that government fiduciary relationships are not likely to line up exactly with private fiduciary relationships. Perhaps a key difference is that, for a government fiduciary, the duties imposed on that relationship run to the undifferentiated whole of the "people" rather than to individual beneficiaries.[94] The people have set forth their priorities in their constitutions—the instruments that create these fiduciary relationships, and all such constitutions carve out individual interests that must be respected, sometimes at the expense of the collective whole. But ultimately, the duties of government fiduciaries run to the people collectively, and the people, conceived in this way, form a single entity

90. *See supra* notes 45-76 and accompanying text (discussing the fiduciary foundations of state constitutions).

91. Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1101-08 (2004) (discussing King James I); Natelson, *Practical Demonstration*, *supra* note 1, at 211-32 (discussing Emperor Trajan).

92. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1, at 713.

93. *Id.* at 714.

94. *See* Bauries, *supra* note 2.

that is both the entrustor (or "settlor") and the beneficiary. Thinking of government fiduciary duties in this way both simplifies the theory and allows for the resolution of some longstanding debates, some of which make up the discussion in the final two Parts of this Article.

But for now, the question remains whether judges—and here, I am concerned solely with state court judges—are fiduciaries. Leib et al.'s main focus is this question, and the case they make is compelling. Based both on sources from the Founding era and on the justifications employed in impeaching federal judges, the authors derive a general historical pedigree for viewing judges as fiduciaries.[95] In particular, they point out that judges are most often impeached explicitly for acting "contrary to [their] trust[s]," or another similar formulation that sounds in fiduciary duty.[96] The implication to be drawn, of course, is that the government views itself, in all of its branches, as a fiduciary. Other commentators support this conclusion.[97]

Then, applying their three-condition (discretion, vulnerability, and trust) model to the judicial role, Leib et al. conclude that judges are indeed best conceived of as fiduciaries.[98] In brief, judges are imbued with discretion to interpret the law, including constitutional law.[99] In addition, every judge, and especially every common law judge, exercises significant discretion in choosing how to decide, the *ratio decidendi* to pursue, and whether or to what extent to impose both equitable and legal remedies for wrongs.[100] This discretion, as Barnett and Bernick point out,[101] forms a power or authority structure to which the people are vulnerable—such power could be misused, after all. And importantly, the people have little means of assessing whether such power is being misused. Accordingly, we have no choice but to repose trust in the judiciary.[102]

Application of Frankel's two-condition (substitution and delegation) model supports this conclusion.[103] It is admittedly more difficult to think of judges as standing in the shoes of the people when compared with legislators. After all, under standard republican theory, the primary purpose of the legislature is to make rules for society in the place of the people who might otherwise engage in direct democracy, with

95. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1, at 715-16.

96. *Id.* at 716 (quoting 13 ANNALS OF CONGRESS 319-22 (1804)); 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, 1044 (1975).

97. *See* Barnett & Bernick, *supra* note 6; Lawson et al., *Fiduciary Foundations*, *supra* note 1.

98. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1, at 717.

99. *Id.* at 718.

100. *Id.*

101. Barnett & Bernick, *supra* note 6.

102. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1, at 718.

103. *See supra* notes 49-52 and accompanying text (discussing Frankel's model).

all of its dangers of mob rule and factional bias, or alternatively, in rule by might, rather than law. Thus, clearly, as others have established,[104] the legislator stands in a republic as a substitution of the citizen.

But this is also true of the judge. As is true for the rules governing society, the people require a set of representatives to resolve disputes for them. Absent a formalized process, the default is self-help, which can lead to violence, and potentially, societal breakdown.[105] In every republic, the people designate a judiciary to resolve disputes for them, and they implicitly consent to substitute the judiciary's resolution of their disputes for the resolution they might otherwise achieve (or have imposed on them by another's will) absent the existence of a formalized judiciary.[106] Naturally, if this substitution is to occur, the people must repose delegated authority in the judiciary to resolve disputes, such that these resolutions will be seen as legitimate. These twin conditions of substitution and delegation, once met, lead to a third condition as a result, and this third condition harmonizes the theories outlined here. That condition is vulnerability. As established by Leib et al.,[107] along with Barnett and Bernick,[108] once our trust is reposed in a powerful judiciary, we become vulnerable to it, and the acts of substitution and delegation effect a reposing of trust.

Now that it is established that judges are fiduciaries, it remains to inquire what the duties of these fiduciaries are. Leib at al. frame these duties as "the duties of loyalty, care, and a cluster of duties including candor, disclosure, and accounting."[109] They add to this group a novel duty specific to public office holders—that of "deliberative engagement."[110] This latter duty is described as an "affirmative duty to engage

104. Bauries, *supra* note 2; Rave, *supra* note 45.

105. *See* Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135, 137 (2009) ("For whenever society uses a non-violent judicial process to resolve a dispute, the involvement of the community is necessary so that disputes stay resolved and the disputants do not succumb to the temptation of self-help. Publicity is simply part of what it means for a society to resolve a dispute peacefully. The alternative is a system which relies on self-help and the threat of violence." (emphasis omitted)).

106. As Leib et al. establish, this substitution occurs regardless of whether a judiciary is elected or appointed, *Fiduciary Theory of Judging*, *supra* note 1, at 723-28. The people have consented to the system that establishes the substitution and delegation, so as long as that system is complied with, the substitution and its consequences follow.

107. *Id.* at 718.

108. Barnett & Bernick, *supra* note 6, at 21-22.

109. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1, at 730. Below, I group these duties under the label of the duty of transparency and communication. *See, e.g.*, CAL. PROB. CODE § 16060 (West 2018) ("The trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration.").

110. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1, at 730 (discussing this unique duty). Lawson et al. criticize the case for the duty of deliberative engagement, *see* Lawson & Seidman, *supra* note 1, at 1396, but whether it works as a post-hoc rationalization or a natural duty, it is clear that judges generally feel bound to engage with the public.

in dialogue" with the public, and that may take the form of open courts, hearings, written opinions, and openness to the participation of non-parties, such as amici curiae.[111] That is a fine list, but I would add to it the traditional duty of *obedience to the trust*.[112] This duty is distinct from the duties of loyalty and care, the former of which prohibits conflicts of interest and the latter of which requires reasonable diligence and competence.

Simply put, remaining obedient to the trust requires the judge to adjudicate. Recall that the fiduciary responsibility of the judge arises from the substitution of the judiciary for the people as the arbiter of disputes.[113] The trust imposed on the judge includes the faith that where disputes arise, they will be resolved judicially, if not settled privately and voluntarily. And the power to adjudicate disputes is a power reserved to the judiciary.[114] It is therefore not permissible, under a fiduciary view, for the judiciary to evade the trust the public has imposed on it by avoiding judicial review of cases over which the court has jurisdiction.

This view of judicial fiduciary duty has implications for many currently accepted features of adjudication, but where it is most salient is in the context of the judicially created "escape device." The next Part reviews the concept of the judicial escape device and lays the groundwork for evaluating judicial escape devices in the state constitutional law of affirmative duties.

II. THE JUDICIAL ESCAPE DEVICE

The concept of an escape device is familiar to scholars in the area of conflict of laws. Though the term is not unique to conflicts scholarship, it has been developed most fully in that body of work, so we will start by reviewing the concept as it has developed there. The term "escape device," made popular by Brainerd Currie, denotes the judicial use of various tools to avoid application of a categorical rule of construction that would result in what the court sees as an undesirable

111. Leib et al., *Fiduciary Theory of Judging*, *supra* note 1, at 740-41.

112. *See generally* Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43 (2008). Natelson also includes this duty in the landscape of public fiduciary duties. *See* Natelson, *Practical Demonstration*, *supra* note 1, at 211 ("A trustee has the duty to follow the directions of the settlor as expressed in the terms of the trust.").

113. *See supra* notes 77-85 and accompanying text (discussing the foundations of judicial fiduciary duty).

114. *See, e.g.*, IOWA CONST. art. III, § 1 ("The powers of the government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.").

or absurd outcome.[115] In conflicts jurisprudence, the outcomes in question most often are those mandated by precedent adopting the first *Restatement of Conflict of Laws*, which contains numerous categorical rules that adopting courts use to resolve familiar conflicts situations, such as *lex loci delicti*, the principle that the place of the injury provides the law to govern an interstate, or international, tort.[116]

A major part of the case for moving away from the First Restatement involved the claim that the rules never really functioned in accord with their purpose—to foster predictability and uniformity in determining what law will govern the issue of a dispute.[117] Rather, courts merely evaded the rules when they perceived a better outcome in doing so, but rather than doing so directly by overruling precedent adopting the First Restatement or its rules, the courts instead often used framing, categorization, and other techniques to escape the natural outcomes of those rules. Commentators critical of the First Restatement dubbed these techniques "escape devices."[118]

Some familiar escape devices used in avoiding the sometimes harsh results of the First Restatement's bright-line rules have included characterization, the substance-procedure distinction (a form of characterization with many permutations), localization or manipulation of the connecting factor, *renvoi*, and the public policy doctrine.[119] Characterization is essential in nearly all conflict of laws analyses predicated on the First or Second Restatements. Simply put, torts are generally treated differently from contracts, which are treated differently from domestic relations disputes, and so on.[120] Courts therefore must characterize a dispute before resolving a conflict relating to that dispute. And, in many states, the practice of dépeçage requires this

115. *See*, *e.g.*, Currie, *supra* note 14, at 175 (describing the escape devices that had accrued under the First Restatement); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 182-87 (1933) (same). Two of the devices earlier scholars such as Cavers saw as "escapes" then (applying the better law of a jurisdiction that would uphold a contract attacked as usurious, *id.* at 182-83, and enforcing the "intention of the parties," typically found in a choice-of-law provision in the parties' contract, *id.* at 184-85) would not be viewed by most as "escape devices" today.

116. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (AM. L. INST. 1934).

117. *See* Currie, *supra* note 14; Kermit Roosevelt III, *Legal Realism and the Conflict of Laws*, 163 U. PA. L. REV. ONLINE 325, 327 (2015).

118. William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1999 (1997).

119. *See* Currie, *supra* note 14, at 175; Cavers, *supra* note 115, at 184-85.

120. *See* Joseph M. Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws: A Study of Problems Involved in Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflict-of-Laws Principle*, 14 S. CAL. L. REV. 221, 223-24 (1941) (explaining the role of characterization in conflicts jurisprudence).

characterization to be made issue-by-issue, rather than as to the entire case, so potentially many characterization decisions must be made even for a single case.[121]

For judges who seek to avoid the application of harsh rules, this set of principles provides many degrees of freedom. To cite a familiar example, assume that *A* is severely injured by *B*, a driver, in Massachusetts while riding as a passenger in the car rented by *B* from a Connecticut car rental agent, but *A* and *B* live in Connecticut, where they began their trip, and where *A* ultimately files suit. Assume further that the tort law of Massachusetts does not recognize the liability of car rental companies for the negligence of drivers to whom they rent, but Connecticut law places the duty on the rental company to rent to safe drivers and makes the company liable vicariously for the negligence of the drivers to whom it rents.[122]

The plaintiff argues that the case is one for breach of contract, claiming that the Connecticut statute is made part of any rental contract formed in Connecticut. The defendant argues that the case is a tort case and should be governed by tort principles. Under traditional First Restatement principles, Connecticut would have applied the rule of *lex loci delicti*, or the place of the injury, choosing Massachusetts law, were it to characterize the injury as a tort.[123] But it would have applied the rule of *lex loci contractus*, and thus selected Connecticut as the place where the contract was initially formed, were it to characterize the injury as the breach of a contract for safe transport.[124]

Characterizing the case as one or the other becomes an escape device if the contrary characterization seems more sound and logical, but that characterization would choose the law of the state with the harsher rule (or simply would choose the law of a state other than the forum state).[125] Because a vehicle accident is a classic tort fact pattern, and because Massachusetts has a harsh damages cap in this hypothetical, it is likely that, in choosing its own law by characterizing the dispute as one for breach of contract, the Connecticut court used characterization as an escape device.

An important species of characterization is the familiar distinction between substance and procedure. The conflict of laws cases, along

121. *See generally* Willis L.M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973) (defining and analyzing the use of dépeçage in United States conflicts jurisprudence).

122. This example is drawn from the familiar case of *Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 163 (Conn. 1928).

123. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 378-380, 383, 385 (AM. L. INST. 1934) (stating that "the law of the place of wrong" governs in tort cases).

124. *See* Richman & Riley, *supra* note 118, at 1197-98 (explaining that the First Restatement held that the "law of the place of making" governed most contracts disputes).

125. *See id.* at 1199-1200 ("Although these evasive maneuvers produced better results in individual cases, they threatened to compromise the *First Restatement*'s vaunted virtues of simplicity, predictability, and forum neutrality.").

with the Restatements, are consistent in holding that a forum state must apply the substantive law of the jurisdiction its choice-of-law rules select but may apply its own procedural law.[126] Opportunistic characterization here will place matters that lie on one side of the substance-procedure divide on the other to avoid a harsh substantive rule of law in the chosen jurisdiction. Survival statutes are a classic example because they plausibly can be characterized either way.[127] Say a forum state has a statute that provides the cause of action, but a neighboring state, where the action occurred, does not provide for a survival action against a decedent. Hence, classifying the action as a procedural device, akin to a statute of limitation, rather than a substantive rule, akin to the recognition of a duty of care, will allow the forum state's court to avoid the harshness of the neighboring state's failure to recognize the action.[128]

One way in which this particular problem plays out is in the distinction between "rights" and "remedies," another distinction that is familiar to conflicts scholars. For example, let's say that a citizen of New York is killed in Massachusetts due to the negligence of a citizen of Massachusetts. Let's further say that Massachusetts recognizes the cause of action for wrongful death but places a damages cap on successful claims, while New York law both recognizes the cause of action and does not impose a damages cap. If the suit is filed in New York, and the court wishes to avoid the cap, then it may do so by characterizing the damages cap as an issue of "remedy," and therefore procedure, rather than "right," and therefore substance, thus resulting in the choice of New York law for that issue.[129]

Another common escape device is the invocation of the state's fundamental public policy as the basis for not applying a neighboring state's harsh rule of law.[130] For example, until 2010, Georgia's state constitution forbade all contracts made in restraint of trade, which effectively made employee non-competition agreements unenforceable

126. *See*, *e.g.*, Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526, 529 (N.Y. 1961) ("As to conflict of law rules it is of course settled that the law of the forum is usually in control as to procedures including remedies.").

127. *See* Grant v. McAuliffe, 264 P.2d 944, 947-48 (Cal. 1953) (applying a local survival statute to the survivors of an accident caused by a decedent in a state without a survival statute).

128. *See id.* at 948 (analogizing the survival statute to a statute of limitations on the basis that it merely extends the time during which an action can be filed, rather than creating a new right of action, and distinguishing survival actions from wrongful death actions on this basis).

129. *See Kilberg*, 172 N.E.2d at 529 (treating the damages cap as a "remedy," rather than the limitation of a "right," and declining to apply the Massachusetts limitation on wrongful death remedies in part on that basis). This case also employed another common escape device, the public policy exception, which is discussed below. *See infra* notes 130-36 and accompanying text.

130. *See* Cavers, *supra* note 115, at 183-84 (discussing the public policy doctrine: "The conflict of laws rule may be disregarded when the foreign law it selects dictates a result repugnant to the public policy of the forum").

in the state.[131] When an out-of-state contract not to compete was presented in a Georgia court, the court would refuse to enforce the agreement based on the clear public policy set forth in the state constitution.[132] That was an easy application of the public policy doctrine.

But many applications are less simple, and some invocations of the doctrine seem to have the purpose of avoiding a rule the forum state sees as overly harsh. In those cases, the doctrine operates as an escape device. For example, in *Kilberg*, discussed above,[133] the conflict was between the law of a neighboring state (Massachusetts), which capped damages in wrongful death suits, and forum law (New York law), which did not impose any such cap.[134] Although the New York court also relied on the substance-procedure distinction, in deciding to apply New York law, despite the situs of the injury that caused the wrongful death being Massachusetts, the court mainly based its reasoning on New York's "public policy" against imposing any statutory limitations on the right to recover for wrongful death.[135] The wrong giving rise to the lawsuit was a plane crash in Nantucket, Massachusetts, and the First Restatement rule would therefore have chosen to apply the damages cap, but the New York court was able to avoid this result based on the application of the public policy doctrine.[136]

Finally, as to conflict of laws, we have the *renvoi* problem. This problem stems from the discretion that courts have to determine whether a choice of law analysis that points to the law of a neighboring state requires the court to apply that state's "whole law," or just its "internal law."[137] In this formulation, whole law refers to the substantive law of the cause of action or issue and also the neighboring state's own choice-of-law rules. Internal law refers only to the substantive law of the cause of action or issue. The *renvoi* problem occurs when the

131. *See* GA. CONST. art. III, § 6, ¶ 5 (amended 2010) (prior version amended 2010 by ballot initiative Amendment 1 to permit the legislature to pass laws permitting certain restraints of trade, including, specifically, employment agreements not to compete); GA. CONST. art. III, § 6, ¶ 5 (amended version containing the new provisions authorizing legislation).

132. *See, e.g.*, Durham v. Stand-By Lab. of Ga., Inc., 198 S.E.2d 145, 149 (Ga. 1973) (holding a non-competition agreement unenforceable under section 5, paragraph 6, explaining, "such terms are overly broad and unreasonably in restraint of trade due to the chilling effect that may be had upon post-employment competitive activity because of the employee's inability to forecast with certainty the territorial extent of the duty owing the former employer").

133. *See supra* notes 126-29 and accompanying text (discussing the substance-procedure distinction).

134. Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526, 529 (N.Y. 1961).

135. *Id.* at 528 (drawing from N.Y. CONST. art. I, § 16, which states: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation").

136. *Id.* at 526, 528.

137. *See, e.g.*, Cormack, *supra* note 120, at 249 (explaining the *renvoi* problem, using the early terms "foreign conflicts-of-law rule" for "whole law" and "foreign domestic law" for "internal law").

forum state's analysis chooses the neighboring state's whole law, but the neighboring state's choice-of-law rules point back to the forum state.[138] If the whole law approach also obtains under the neighboring state's choice-of-law principles, then the matter will be placed in an infinite loop where the choice of law continuously *remits*, or passes back, from state to state.

This possibility presents several opportunities for escape. First, the forum state's court has degrees of freedom in choosing whether to adopt a whole law approach. Second, if it so chooses, and the neighboring state's choice of law rules cause a remission, then the forum state can choose either to accept the remission (effectively treating the neighboring state's choice-of-law rules as mandating an internal law approach), or it can acknowledge both the remission and the neighboring state's whole law approach and arbitrarily choose a place to stop the cycle of remission. If the choice at any of these stages results in the application of a rule that is less harsh than what would otherwise have been chosen, then it is possible that the court has used *renvoi* as an escape device.[139]

From the discussion above, we can derive a few general principles. First, a judge does not employ an escape device simply because the ruling she issues is narrow. It is well settled in common law that judges have discretion to rule as narrowly or as broadly as they determine suits the issues and facts truly before them.[140] Second, to place the label escape device on a particular judicial holding, one must be able to say that the holding in some way avoids a result that would obtain if the escape device were not employed. Third, and perhaps most importantly, the result that the escape device avoids would have to be undesirable from the perspective of the judge or the judiciary for some reason, whether that be a harsh burden placed on a sympathetic party; the continuation of a rule the court disfavors but does not wish to overrule; a perceived negative impact on the court's own authority; or some similar concern. These concerns, and others of the same kind, should cause us to wonder whether the judicial duty to adjudicate disputes is imperiled or whether the judge's personal, or even non-fiduciary professional, interests have invaded the judicial province.

We can test out these conditions in contexts outside the conflict of laws. In contract law, for example, commentators have advanced a view of equitable doctrines such as equitable estoppel and promissory

138. *Id.* at 249-50.

139. *See, e.g.*, Am. Motorists Ins. Co. v. ARTRA Grp., Inc., 659 A.2d 1295 (Md. 1995) (applying a whole law approach where Maryland choice-of-law principles chose the law of Illinois, and then "accepting" Illinois's remission of that choice back to Maryland, in a case involving an Illinois insurance policy).

140. *See, e.g.*, Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 169 (1930) (developing an approach to holding and dicta which attempts to give respect to the acknowledged power of a common law judge to rule narrowly or broadly).

estoppel, along with common law contract defenses such as fraud and misrepresentation, as escape devices in the context of the Statute of Frauds.[141] This view accords with the critical use of the term escape devices in the conflicts scholarship to a certain extent, but the uses identified can also be defended as consistent with the policy underlying the Statute of Frauds, namely that of preventing opportunistic enforcement of illusory bargains.[142]

Equitable estoppel prevents a party from claiming that a contract was formed to gain an advantage in a commercial transaction and then resisting enforcement after the counterparty detrimentally relies on that statement, for instance, to close a further sale of the same goods to a retail buyer.[143] Promissory estoppel in this context operates similarly, but focuses on a promise to sign or reduce to writing a promise not to invoke the Statute of Frauds in any potential litigation or a promise that the requirements of the Statute of Frauds had been met.[144] In each of these cases, the use of estoppel as an escape device comports with the trust that the Statute of Frauds was designed to ensure by disadvantaging parties engaging in dishonest and opportunistic behavior.

We see another version of this use of promissory estoppel as an escape device in employment contract law, as a way of evading the uniquely harsh American at-will doctrine where long-term or "lifetime" employment is promised to a worker without consideration for the bargain. For example, in *Shebar v. Sanyo Business Systems Corp.*,[145] the plaintiff planned to leave his employment due to dissatisfaction with management, but was convinced to stay based on assertions that "he had a job for the rest of his life, and that Sanyo had never fired, and never intended to fire, a corporate employee whose rank was manager or above."[146] The New Jersey Supreme Court wrestled with the state's longstanding doctrine that employment contracts for life were not enforceable absent a promise not to terminate without just cause.[147] Although the exchanges between the employee-plaintiff and the employer did not involve any discussions of just cause or

141. *See* Judith Mitchell Billings & Jeanne Henderson, Note, *Promissory Estoppel, Equitable Estoppel and Farmer as a Merchant: The 1973 Grain Cases and the UCC Statute of Frauds*, 1977 UTAH L. REV. 59, 61 (referring to these doctrines as "common law escape devices"). The authors also flesh out an argument viewing the classification of farmers as "merchants" to access a UCC exception to the Statute of Frauds, a technique that resembles the use of classification in conflicts jurisprudence. *See id.* at 59-67.

142. George N. Stepaniuk, Note, *The Statute of Frauds as a Bar to an Action in Tort for Fraud*, 53 FORDHAM L. REV. 1231, 1233 (1985).

143. *See, e.g.*, Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 680-81 n.18 (1984) (elucidating the distinctions between equitable and promissory estoppel in contract law).

144. *Id.* at 695.

145. 544 A.2d 377 (N.J. 1988).

146. *Id.* at 380.

147. *Id.* at 381-83 (discussing Savarese v. Pyrene Mfg. Co., 89 A.2d 237 (N.J. 1952)).

progressive discipline, the court held that these exchanges could constitute an oral promise "to discharge [plaintiff] only for cause," denying summary judgment for the employer based on the explicit promise of "life" employment.[148] By converting this promise to one for job security absent just cause, the court was able to avoid the harsh results of the rule against "lifetime" employment contracts, an especially desirable result in this case, where the evidence arguably showed that the employer had acted dishonestly.

Escape devices also make appearances in the long history of tort law—generally styled as exceptions, or in Prosser's words, "ameliorations," to the prevailing doctrine.[149] The most well-known of these concerned the common law doctrine of contributory negligence, which barred recovery for negligence in any case where the plaintiff's own negligence, in any part, led to the injury.[150] The most well-known escape device courts developed to avoid this harsh rule is the "last clear chance" doctrine, which sought to place liability on the defendant if the defendant was the last human who could have taken action to avoid the wrong and failed to do so.[151] Although this exception has been defended as a *sotto voce* doctrine of comparative fault (on the theory that the later negligent act of the defendant compounded the earlier negligence of the plaintiff), it contradicted the well-developed doctrine of proximate causation and thus is better understood as emanating from "a fundamental dislike for the harshness of the contributory negligence defense."[152] So, much like the escape devices that developed in the area of conflict of laws, this doctrinal development provided courts with degrees of freedom in avoiding harsh results without overruling the harsh doctrinal rule that led to those results.

Relatedly, during the early moves away from the harsh "fellow servant doctrine" of nineteenth-century common law, a doctrine which barred tort suits by employees against employers for workplace injuries caused by the negligence of co-workers, courts often employed escape devices to avoid that result.[153] Over time, the escape devices accumulated, such that the overall force of the doctrine held much less

148. *Id.* at 383.

149. *See* Clifton J. McFarland, *Recent Decisions Lay the Ground for "Escape Devices" to Ameliorate Joint and Several Liability Under CERCLA*, 7 NAT. RES. & ENV'T 61 (1993) (quoting WILLIAM L. PROSSER ET AL., TORTS: CASES AND MATERIALS 594-95 (7th ed. 1982) (suggesting several potential escape devices to environmental claims under CERCLA)).

150. *See* Gregory D. Smith, *Contributory Negligence as a Matter of the Law: The Last Vestiges*, 23 TORT & INS. L.J. 674, 674-75 (1987).

151. *See* Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy*, 39 VAND. L. REV. 851, 860 (1986).

152. Spahn v. Town of Port Royal, 486 S.E.2d 507, 511 n.3 (S.C. Ct. App. 1997) (quoting PROSSER ET AL., *supra* note 149, at 464).

153. *See* Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, 132 U. PA. L. REV. 579, 600-18 (1984) [hereinafter *The Fellow Servant Rule*] (outlining and critiquing the various escape devices developed by courts uncomfortable with the doctrine).

sway in employee tort cases, and it was eventually abolished, primarily by statute.[154] These escape devices took many forms, beginning with what many might consider to be an overly strict reading of precedent to bar liability only where the fellow servant was a co-worker in the same department.[155]

This initial exception inevitably led to others.[156] One held that the doctrine could not apply where the injury in question was caused not by a "fellow servant" (what we call a co-employee today), but by an "agent" of the employer (what we could call a supervisor today).[157] This supervisor-employee distinction allowed later courts to evade the fellow servant doctrine in any case in which a supervisor's negligence caused the employee's injury. Of course, this sort of escape device presented the further escape device of characterizing a tortfeasor as either a supervisor or non-supervisor, thus further imperiling the doctrine.[158]

Several others followed, including an exception for enslaved workers (who could not report careless co-workers who did not share their status, and therefore could not be expected to do what the doctrine assumed they would do—look out for themselves and their co-workers' negligence); an exception for cases in which the negligent co-worker should not have been hired in the first place (due to incompetence or lack of qualification); and an unsafe equipment exception.[159] Ultimately, the doctrine became cluttered with these escape devices and

154. *See, e.g.*, Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 240, 240 n.16 (1914) (explaining the development of "workmen's" compensation acts in England and examining the extension of such laws to the United States); H.D. Minor, *The Federal Employers' Liability Act*, 1 VA. L. REV. 169, 169 (1913) (describing the adoption of the Federal Act, which abrogated the fellow servant doctrine).

155. *See* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 453(d)-(f) (Charles C. Little & James Brown eds., 2d ed. 1844) (developing this distinction); *The Fellow Servant Rule*, *supra* note 153, at 602-03 (outlining the historical context and scholarly roots of this development). Indiana's Supreme Court was the first to adopt this escape device, but it soon spread to other jurisdictions. *See* Gillenwater v. Madison & Indianapolis R.R., 5 Ind. 339, 345 (Ind. 1854); *The Fellow Servant Rule*, *supra* note 153, at 612 n.200.

156. *See The Fellow Servant Rule*, *supra* note 153, at 613 (outlining further escape devices developed in the years following Story's Commentaries).

157. Little Mia. R.R. v. Stevens, 20 Ohio 415, 438 (Ohio 1851) (Hitchcock, J., concurring). Judge Hitchcock rejected the majority's opinion, which would have abrogated both the doctrine and its rationale, as developed both in prior cases and in Justice Story's Commentaries in favor of the narrow, but important, re-casting of the doctrine as being truly directed only at "fellow servants" at the same level of employment. *See The Fellow Servant Rule*, *supra* note 153, at 608. This concurrence became the rule in the next similar case before the Ohio Supreme Court. *See* Cleveland, Columbus & Cincinnati R.R. v. Keary, 3 Ohio St. 201, 217 (Ohio 1854).

158. We continue to wrestle with this distinction in employment law today. *See, e.g.*, Vance v. Ball State Univ., 570 U.S. 421 (2013) (analyzing whether a harasser of an employee was a supervisor or co-worker to determine liability of the employer under Title VII of the Civil Rights Act of 1964).

159. *The Fellow Servant Rule*, *supra* note 153, at 613-14.

was widely viewed as unworkable, but was never universally overruled in the courts. Rather, the universal adoption of workers' compensation statutes led to its abrogation.[160]

Through these examples, we can see the potential salutary nature of the judicially crafted escape device—it may be used to avoid the application of a needlessly inflexible or harsh rule, to avoid absurd results, or to undercut a rule that has lost its appeal over time. But at least in the context of the common law, the escape device also, at a minimum, prolongs the inevitable date when the court will have to do the hard work of evaluating the rule itself and potentially declaring that its initial adoption was a mistake. Sometimes, as in the case of the fellow servant doctrine, which was ultimately abrogated in every state through workers' compensation statutes and federally through the Federal Employers' Liability Act,[161] that day never comes judicially. One might reasonably question whether, if a rule leads to overly harsh, indefensible, or absurd results, it is more consistent with the judicial duty to abrogate that rule under ordinary common law processes or their public law equivalents, or to craft clever escapes from these unjust results.

Outside the common law tradition, commentators have outlined the use of the traditional escape devices familiar to conflicts of law under federal statutes, such as the Foreign Sovereign Immunities Act[162] and the Comprehensive Environmental Response, Compensation, and Liability Act.[163] In each of these contexts, species of categorization fitted to the statutory context can drive decisions in directions differing from those in which the statutes seem to point. Even in the area of federal-state conflict of laws, the Supreme Court has wrestled with the adoption of escape devices where the categorical doctrine of *Hanna v. Plumer*[164] has pointed to a preemption result that would arguably imperil federalism values. In *Gasperini v. Center for Humanities, Inc.*,[165]

160. *See generally* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982) (outlining these developments).

161. *See supra* note 154 and accompanying text (describing the abolishment of the fellow servant doctrine).

162. *See* Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations: Choice of Law Part II*, 86 COM. L.J. 346, 346-50 (1981) (outlining the escape devices, including the substance-procedure distinction and the constitutional supremacy of federal procedural rules and statutes that could be used to frustrate the mandated "place of injury" rule in the FSIA).

163. McFarland, *supra* note 149, at 61-62 (outlining three potential escape devices that might be used to frustrate CERCLA's goals, including a de minimis waste rule, a hazardous concentration rule, and a threshold harm rule, each of which is aimed at frustrating CERCLA's rigid requirement that any party responsible for "one molecule" of waste is liable for cleanup).

164. 380 U.S. 460, 464, 470-71 (1965) (holding that, in a conflict with state law, a Federal Rule of Civil Procedure governs as long as the rule, on its face, "really regulates procedure").

165. 518 U.S. 415 (1996).

Semtek International Inc. v. Lockheed Martin Corp.,[166] and *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[167] justices authored opinions (sometimes in the majority and other times in dissent) advocating for narrowed constructions of otherwise preemptive federal rules to take them out of conflict with state laws. This construe-away-the-conflict doctrine, where used to avoid the rigid application of the *Hanna* doctrine, can be seen as a form of escape device, as well.

In federal constitutional law, the notion of the escape device has been advanced to explain judicially crafted doctrines to avoid the application of the Eleventh Amendment to bar suits against states in some contexts.[168] The void-for-vagueness doctrine has been described as an indefensible escape device freeing the courts of their ordinary duties of statutory interpretation, which might instead include declaring the subject provision unconstitutional under a provision of the Bill of Rights or issuing a narrowing construction to eliminate the problem of undue executive discretion.[169] And it is a plausible critique of much of justiciability doctrine that it operates as an escape device used by courts, especially the United States Supreme Court, to avoid confronting "hard questions."[170]

Justiciability presents an interesting version of the judicial escape device, as there has been an undercurrent of criticism of justiciability doctrine over time that strongly resembles the critiques of First Restatement conflicts jurisprudence.[171] Michael Berch states this critique succinctly in the context of justiciability of social welfare rights:

> Against all these reasons, as justifying the use of escape devices, the most obvious countervailing consideration emerges. The courts have been ordained and established to decide cases. The judicial system loses some of its moral force attributable to decisions resulting from the

166. 531 U.S. 497 (2001).

167. 559 U.S. 393 (2010).

168. *See* Mark D. Freitag, *Avoiding the Eleventh Amendment: A Survey of Escape Devices*, 1977 ARIZ. ST. L.J. 625, 625 (outlining the three well-recognized doctrinal devices that escape the Eleventh Amendment's bar of suits against states). *But see* Ron S. Chun, *Avoiding a Jurassic Dinosaur Run Amok: Circumventing Eleventh Amendment Sovereign Immunity to Remedy Violations of the Automatic Stay*, 98 COM. L.J. 179 (1993) (describing the Eleventh Amendment itself as a device state creditors use to escape the automatic stay in bankruptcy proceedings).

169. *See* Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272 (1948) (developing the case for viewing the doctrine as an escape device and criticizing it on that basis).

170. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (dismissing for lack of standing a non-custodial parent's challenge to the use of the Pledge of Allegiance in a public school); Michael A. Berch, *Unchain the Courts—An Essay on the Role of the Federal Courts in the Vindication of Social Rights*, 1976 ARIZ. ST. L.J. 437, 443-47. *See generally* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). More discussion of this view, which I share, follows in the later sections of this Article. *See infra* Sections III.A-B.

171. *See, e.g.*, Berch, *supra* note 170.

> imperative to decide cases within its jurisdiction when it retains the license to decide or not to decide.[172]

In other words, where a court has been given power to resolve a dispute, yet abdicates that power, we might wonder whether the court deserves the power it has been granted.

Expanding this critique, why might we view escape devices with skepticism or derision? A few reasons come to mind. First, the use of a judicially crafted escape device provides a path for courts to avoid making difficult decisions. In most cases, we should expect the judiciary to engage the most difficult questions and have the fortitude to address even those questions that may impact the publics' or their elected representatives' approval of the judiciary. Absent that fortitude, it is difficult to justify the judiciary as a truly independent branch of government. In other words, if the judicial power must be restrained where extrinsic threats to the judiciary's authority are the strongest, or where the results of a judicial resolution are unpalatable, though legally correct, then the independence and legitimacy of the judiciary is rendered suspect. The short-term benefit derived from the judiciary's staying out of a contentious issue is far outweighed by the long-term damage such an action works on the true independence of the judicial branch as an agent of meaning and principle.[173]

Moreover, especially as to public law, where the availability of the judiciary to resolve difficult interpretive questions is most vital, if an escape device functions as a doctrine of abstention or exclusion of parties from the judicial process, as justiciability doctrines often do, it removes an important public law question from the scrutiny of the public, or at least greatly minimizes the ability of the public to engage in the scrutiny that is vital to popular sovereignty.

Although a number of commentators have tracked state supreme courts' convergence and divergence from federal doctrine on justiciability and sovereign immunity,[174] little attention as of yet has been paid to the use of these and other judicially crafted escape devices to avoid harsh or undesirable results in state constitutional law.[175] This

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172. *Id.* at 447.

173. *See generally* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (critically reviewing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS (1962)).

174. *See, e.g.*, Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (examining various doctrines of justiciability in state courts and arguing persuasively that these doctrines need not operate similarly to the way that they operate in federal courts, if they need operate at all).

175. *But see id.* (critiquing state court uses of justiciability-related escape devices, without using the specific term, on the grounds that they are unsuited to state courts). *See generally* Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797 (1987) (identifying and critiquing what this Article terms "procedural escape devices").

is the inquiry the remainder of the Article takes up. This inquiry makes the most sense in the context of unique state constitutional terms. Accordingly, building upon the discussion in Part I outlining the various substantive and procedural duties that state constitutions place on state actors distinct from those that might operate upon federal governmental officials, Part III attempts to arrive at an evaluation of the use of escape devices as a means to avoid difficult questions related to these duties.

III. STATE CONSTITUTIONAL ESCAPE DEVICES

The greater detail and clarity of state constitutions can sometimes leave state courts in positions they do not relish. Most commonly, this occurs where a clear state constitutional command places the state courts into conflict with the legislative branch of government. In such cases, the courts have devised a number of escape devices to avoid or mitigate the conflict. This Part examines the escape devices state courts employ in state constitutional cases.

State constitutional provisions are often written in ways that, if applied literally, would bring the judiciary into conflict with the legislative branch, and in some less frequent cases, the executive branch. Chief among these provisions are those establishing affirmative substantive legislative duties, such as the duty to establish, fund, and maintain an education system of a certain quality. The subsections below analyze the escape devices state courts employ to avoid these separation of powers concerns.

A. Merits Abstention from Political Questions

In some of the cases where separation of powers concerns are most salient, state courts abstain from addressing the merits entirely. In so doing, these state courts employ a version of what is known in federal courts as the political question doctrine. This doctrine mandates abstention where one of six traditional case patterns exists. According to the seminal *Baker v. Carr* decision, a case presents a political question when it involves:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of

> embarrassment from multifarious pronouncements by various departments on one question.[176]

Where one of these patterns is present, the case presents a political question that is not suitable for judicial resolution.[177]

In state court cases involving interpretation of state constitutional language calling for an education system that is "thorough," "adequate," "suitable," or even "high-quality," the pattern that seems to fit most aptly is the "lack of 'judicially manageable standard[s]' " pattern.[178] Some state court decisions explicitly adopt this federal framework, while others apply a version of it without naming it the political question doctrine, but this doctrine has prevented review of more than a trivial number of positive legislative duty claims in state courts.

An example of the application of this particular escape device is *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*.[179] In *Chiles*, the Florida Supreme Court rejected a statewide challenge to the state's education system under the then-current version of article IX, section 1 of the Florida Constitution, which provided, in pertinent part: "Adequate provision shall be made by law for a uniform . . . system of free public schools."[180] Applying the political question doctrine as elucidated in *Baker v. Carr*, the court abstained completely from reviewing the merits of the challenge.[181] In so doing, the court completely exempted the state constitution's education clause and its mandatory legislative duty from judicial review.

Many commentators have criticized this use of the political question doctrine,[182] and these critiques have much force. State constitutional provisions placing duties on the state legislature to provide

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176. 369 U.S. 186, 217 (1962). Although state courts have cited this portion of the *Baker* decision many times, it is not clear that all of its considerations would be relevant at the state level. Nevertheless, as I will discuss below, the "judicially manageable standards" prong has been very influential on state courts considering affirmative legislative duties to legislate.

177. *Id.* at 198.

178. *See* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701 (2010) (reviewing the use of the political question doctrine in state constitutional education funding cases).

179. 680 So. 2d 400 (Fla. 1996).

180. FLA. CONST. art. IX, § 1 (amended 2002).

181. *Chiles*, 680 So. 2d at 408.

182. *See, e.g.*, Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545, 563-64 (2009) (discussing *Chiles* as part of a broader critique of the doctrine); Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 594-97 (2004) (terming these sorts of pre-merits dismissals "judicial abdication"); *cf.* Bauries, *supra* note 2, at 735 (referring to these abstention decisions as "understandable" in light of the separation of powers concerns but going on to propose adjudicatory reforms that would allow for merits review while mitigating the separation of powers concerns).

basic services to the public should not be taken lightly. It is dangerous to the rule of law that state courts cannot wade into a dispute over whether such duty is fulfilled.

B. Remedial Abstention

A cousin of the political question doctrine is the practice among state courts addressing education duty claims of adjudicating the merits (i.e., rejecting the application of the political question doctrine, as described above), issuing a finding that the state constitution has been violated, but then staying their hand at the point of ordering remediation of the constitutional harm.[183] Most often, these courts send the case back to the state legislature—the body that has violated the state constitution by enacting a law that fails to meet the constitutional standard—where the legislature is expected to craft a remedy to its own constitutional violation.[184]

Many state school funding cases founded on the duty to provide an adequate education have resulted in remedial abstention. One familiar example will illustrate both the device and its consequences. In *DeRolph v. State*,[185] the Ohio Supreme Court, after finding that the school funding system passed into law by the state legislature violated the state constitutional command to set up and maintain a "thorough and efficient" education system,[186] declined to issue a detailed remedial order, such that one would have expected a court to issue in a statewide public law litigation in which the constitution has been found to be violated.[187] Rather, the court merely "admonish[ed]" the legislature to comply with its constitutional duty.[188]

The remedial abstention escape device removes the judiciary from the most worrisome stage of the case, from a separation of powers perspective. The remedial phase of a positive duty case in which the plaintiff has succeeded at proving a violation inevitably involves the court in fashioning an order to the legislature to, well, legislate—and to do so with a certain result in mind. It is not difficult to understand why such a prospect would cause state courts to worry about institutional conflict.

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183. Bauries, *supra* note 178.

184. *See id.* at 742.

185. 677 N.E.2d 733 (Ohio 1997).

186. *Id.* at 745; *see also* OHIO CONST. art. VI, § 2 ("The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state . . . .").

187. *DeRolph*, 677 N.E.2d at 747 ("Although we have found the school financing system to be unconstitutional, we do not instruct the General Assembly as to the specifics of the legislation it should enact.").

188. *Id.* ("However, we admonish the General Assembly that it must create an entirely new school financing system.").

But in employing remedial abstention as an escape from this conflict, the court leaves it to the legislature—the very party held to be in violation of the constitutional duty—to determine what remediation of that violation would require. In some cases, such as those in which the legislature and the courts generally agree that the system is out of compliance, and the lawsuit is essentially a vehicle for structuring that consensus, this form of abstention might be salutary.[189] This was true in the Kentucky case of *Rose v. Council for Better Education, Inc.*,[190] where the court stayed its remedial hand, but the General Assembly was prepared to immediately go to work on a remedy and shortly produced legislation that greatly improved the state's education system.[191] But in most cases, as in *DeRolph*, reticence leads to long-term sagas of reform, after which courts sometimes remove themselves from the entire enterprise of evaluating legislative efforts, as the Ohio court ultimately did in *DeRolph*,[192] or reinterpret state constitutional duties to uphold later legislative efforts on terms that likely would have upheld their original efforts, as the Texas Supreme Court did at the end of a multi-decade saga.[193] These distortions of constitutional meaning show that even a partial escape at the remedial phase, while helpful in avoiding inter-branch conflicts, prevents the courts from fully enforcing constitutional duties.

C. Lockstepping Federal Negative Rights Doctrines

A somewhat less obvious form of judicial escape is the practice of "lockstepping," or interpreting a state constitution using federal constitutional law as the primary source of meaning. Because state constitutions are unique documents, the natural impulse in reading them is to assume that they provide for unique powers and protections. But in many states, courts have reverted to interpreting the state constitution in "lockstep" with the Federal Constitution.[194] In some

189. *See generally* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (examining the effects of cooperative remedial approaches in public law litigation, including school funding litigation under state constitutions).

190. 790 S.W.2d 186 (Ky. 1989).

191. *See generally* William E. Thro, *Judicial Humility: The Enduring Legacy of* Rose v. Council for Better Education, 98 KY. L.J. 717 (2009) (outlining the salutary effects of the court's approach and defending that approach as desirable in school funding cases).

192. State *ex rel.* State v. Lewis, 789 N.E.2d 195, 202-03 (Ohio 2003) (releasing jurisdiction of the ongoing *DeRolph* litigation, without holding that state efforts to date had come to satisfy the constitutional duty).

193. Neeley v. W. Orange-Cove Consol. Ind. Sch. Dist., 176 S.W.3d 746, 789-90 (Tex. 2005) (after having held the state constitutional duty violated on a theory that provisions for the school system must be "adequate" to allow for the achievement of state content standards, holding the subsequent legislative effort constitutional because it was not "arbitrary").

194. *See generally* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005) (developing a taxonomy of state court adoption of federal constitutional doctrine, including lockstepping as one category).

cases, this alignment makes sense, but in others, it prevents the state's courts from forging a direction different from that of the federal courts, and it grants federalism and federal-state comity more influence than these concerns should command. What Robert Williams refers to as "kneejerk lockstepping" also serves as a judicial escape from the difficult work of deriving meaning from unique state constitutional text.[195]

D. Categorization

State courts deciding constitutional cases often employ the familiar escape device of categorization to avoid unpalatable results or conflicts with the other branches of government. The most common forms of categorization involve the distinction between "self-executing" and "non-self-executing" provisions; the distinction between "mandatory" and "directory" provisions; and the distinctions that must be drawn in determining whether to apply state constitutional governmental or official immunities to tort claims for damages. Below, I outline each of these areas in which characterizations allow for courts to sidestep difficult questions or avoid difficult conflicts.

1. Non-Self-Executing Provisions

One of the more durable tools in the state judge's toolbox has been the distinction between self-executing and non-self-executing provisions. The former do not require any enabling legislation to be effective, while the latter do require such legislation.[196] The upshot of the distinction can be that a constitutional provision—even one providing for individual rights protections—can remain dormant or even fall into desuetude if the court interprets it to be non-self-executing and the legislature of the state does not take action to implement it. If so, no direct action will lie to force such implementation.

For example, in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,[197] the Pennsylvania Supreme Court considered the effect of a new state constitutional amendment, providing:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common

195. *See id.* at 1505 (outlining the "unreflective" forms of adopting federal constitutional law as the meaning of similar state constitutional provisions).

196. *See, e.g.*, Harvey v. Ute Indian Tribe of Uintah & Ouray Rsrv., 416 P.3d 401, 426 (Utah 2017) ("A good indicator that the framers intended the provision to be self-executing is when the provision 'prohibits specific evils that may be defined and remedied without implementing legislation.' 'Conversely, constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect.' " (citations omitted) (quoting Bott v. DeLand, 922 P.2d 732 (Utah 1996); Spackman *ex rel.* Spackman v. Bd. of Educ. of the Box Elder Cnty. Sch. Dist., 16 P.3d 533 (Utah 2000)).

197. 311 A.2d 588 (Pa. 1973).

> property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[198]

The suit concerned the Governor's opposition to a tower proposed to be built by a private company at the site of the Battle of Gettysburg.[199] The site in question was within the National Park, and the builders had received permission from the National Parks Service to erect the tower, but the height of the tower would, in the view of the objectors, impair the aesthetic beauty of a sacred piece of natural Pennsylvania land.[200]

The Governor, standing in the shoes of the people, sought an injunction against the project, citing his duty under article I, section 27 to "conserve and maintain" the natural environment, and based on the text of that provision, his claim would seem to have stood on solid footing.[201] Nevertheless, the court rejected this claim, based on its characterization of section 27 as a non-self-executing provision.[202] In rejecting the Governor's argument that the provision should be considered self-executing because it was contained in the state constitution's declaration of rights, the court acknowledged that the provision established a right in the people to a clean environment, but then interpreted the language "shall conserve and maintain" as the grant of a discretionary power to the legislature, rather than the imposition of a duty.[203] Once that move was made, the court easily concluded that, as a discretionary power, the provision was not self-executing and would require legislative action prior to any action by the Governor to enforce its provisions.[204] As a result of this decision, section 27 was rendered a nullity unless and until the legislature were to pass legislation enabling the provision to operate. As Chief Justice Jones stated in dissent, the characterization rendered the provision "*an ineffectual constitutional platitude*."[205]

2. Mandatory and Directory Provisions

Another distinction, and one that shares some space with the distinctions I draw when discussing duties above, is the distinction between mandatory and directory provisions. Under this distinction,

198. *Id.* at 591 (quoting PA. CONST. art. I, § 27).

199. *Id.* at 589-90.

200. *Id.*

201. *Id.* at 590-91.

202. *Id.* at 594-95.

203. Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 594-95 (Pa. 1973).

204. *Id.*

205. *Id.* at 597 (Jones, C.J., dissenting) (emphasis added).

the former place enforceable duties on the legislature, while the latter merely suggest a legislative direction or purpose but allow for alternative ways of accomplishing the purpose, or allow for some discretion in pursuing it at all; in the latter cases, the provision is therefore unenforceable in court as a constitutional requirement.[206] Drawing this distinction, like drawing the self-executing distinctions above, allows the court to avoid the possibility of conflicts with the legislature. But similar to the above discussion, the characterization question involved allows for courts to sidestep difficult constitutional questions and potentially nullify constitutional duties.

An old and familiar case will serve as an example. In *Scopes v. State*,[207] the Tennessee Supreme Court considered the conviction of a schoolteacher for teaching the Darwinian theory of evolution by natural selection that was in conflict with a state law that had then-recently forbidden such teaching. The teacher challenged his prosecution based in part on article XI, section 12 of the Tennessee Constitution, which provides, "It shall be the duty of the General Assembly in all future periods of this government, to cherish literature and science."[208] The teacher argued that, to "cherish" science, the legislature was required to provide instruction in scientifically accepted facts, of which evolution was certainly one by the time of the trial.[209]

While this may have been one possible interpretation of the duty, others were certainly possible. But the court sidestepped its duty to interpret the meaning of the word "cherish" by declaring the provision merely "directory" and thus not enforceable in court.[210] So declaring the provision allowed the court to avoid, seemingly for all time, the more difficult question of what it means to "cherish" the sciences—the nature of the duty the provision actually places on the legislature.[211]

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206. *See, e.g.*, State *ex rel.* Billington v. Sinclair, 183 P.2d 813, 816-19 (Wash. 1947) (discussing the distinction and interpreting the challenged provision as directory, rather than mandatory, allowing the Commission of a city that met the constitutional definition of a "city of the first class" to refuse to petition for that status).

207. 289 S.W. 363 (Tenn. 1927) (often colloquially referred to as the "Scopes Monkey Trial").

208. *Id.* at 366 (quoting TENN. CONST. art. XI, § 12).

209. *Id.*

210. *Id.* ("While this clause of the Constitution has been mentioned in several of our cases, these references have been casual, and no act of the Legislature has ever been held inoperative by reason of such provision. In one of the opinions in *Green v. Allen*, 5 Humph. (24 Tenn.) 170, the provision was said to be directory. Although this court is loath to say that any language of the Constitution is merely directory, we are driven to the conclusion that this particular admonition must be so treated. It is too vague to be enforced by any court." (citation omitted)).

211. While the court did state its definition of the word "cherish," *see id.* ("To cherish science means to nourish, to encourage, to foster science."), it declined to interpret the word as it related to the duty of the legislature, essentially rendering the duty a nullity.

3. Categorizing Official Duties and Governmental Functions

Perhaps the most impactful form of categorization, at least in terms of impinging on individual rights, is that required by the many versions of state sovereign and governmental immunity doctrines. Here, rather than state constitutional duty, the state constitutional element takes the form of a defense to the performance of a tort duty of care.[212] In general, states enjoy the same immunity from suit that the federal government enjoys, both in federal courts under the Eleventh Amendment and in state courts under state constitutions.[213] But beyond this familiar territory lies a truly labyrinthine web of state court doctrines, all seemingly constructed to frustrate the claims of those harmed by state government actors' negligence.

In most states, the state itself (including its direct agencies, departments, or "arms") remains immune from suit for damages as the sovereign, but governmental entities below the state level, as well as individual government officials, may be subject to suits for damages.[214] To maintain such a suit, however, a plaintiff must run one of two categorization gauntlets.

If the suit is against a governmental entity, then the plaintiff will not be permitted to reach the merits of her claim unless she is able to establish that the entity at the time of the injury was conducting a "proprietary" rather than a "governmental" function.[215] In most courts, engaging in a proprietary function means engaging in ordinary business activities, such as sales of goods and property, or the provision of services for fees, rather than the making of government policy or the enforcement of laws.[216] On its face, this requirement seems easy to meet—where the government is engaged in providing services or selling goods in exchange for money, or where the government is engaged in managing or disposing of its own property, it would seem that the government is engaged in a "proprietary" function. But in some cases, courts twist the meaning of "governmental" to encompass more and more otherwise proprietary activity, leaving little to nothing of the distinction.

For example, in *Faulkner v. Greenwald*, the Kentucky Court of Appeals considered whether a volunteer worker at a school sporting event injured by a negligently secured overhead door on the concession

212. Joe R. Greenhill & Thomas V. Murto III, *Governmental Immunity*, 49 TEX. L. REV. 462 (1971).

213. *See* Yanero v. Davis, 65 S.W.3d 510, 517-21 (Ky. 2001) (discussing "sovereign immunity" in federal and state courts, along with "governmental immunity" from state tort suits).

214. *See, e.g.*, Matthew T. Lockaby & JoAnna Hortillosa, *Government Tort Liability: A Survey Examination of Liability for Public Employers and Employees in Kentucky*, 36 N. KY. L. REV. 377 (2009) (outlining these doctrines under Kentucky law).

215. *Id.* at 387.

216. Greenhill & Murto, *supra* note 212.

stand could recover against the school district.[217] In determining whether the selling of concession items was a governmental or proprietary function, the court quoted portions of an earlier case, *Schwindel v. Meade County*,[218] which involved a patron who had been injured while ascending the bleachers at a school baseball game.[219] The court in that case had held: "The fact that an admission fee was charged or that refreshments and event programs were sold at the softball tournament did not convert this event from a governmental function into a proprietary one."[220] Faced with a somewhat different case, the *Faulkner* court applied this holding, omitting any discussion of the potential differences between the cases.[221] The plaintiff in *Schwindel* had attempted to argue that because the school had charged admission to the game and because it had sold concessions there for profit, these features rendered the game itself a proprietary function.[222] But the *Schwindel* court rejected this conclusion, focusing on the fact that the plaintiff was a spectator, engaged in the ordinary activities of a spectator—navigating to and from seats—when injured.[223] The injury was a consequence of participating as a spectator to an interschool athletic competition, an ordinary feature of schooling and an unquestioned governmental function.[224]

In contrast, the injury in *Faulkner* was not to a spectator, but to a volunteer, and was incurred as a result of that volunteer working to earn money for the school through selling concessions to spectators of the sporting event. Still, the court employed a modified quotation from the *Schwindel* case to justify applying governmental immunity: "It has been held that interscholastic athletics is a governmental function and that '[t]he receipt of income from admission fees and sales of refreshments . . . [does] not convert [an] interscholastic athletic event into a proprietary function.' "[225] It is perhaps true that operating a concession stand is part of the governmental function of running a school, but if that is so, what would be the necessary showing for a school function to be considered proprietary and therefore not subject to governmental immunity protections? It is difficult to imagine the possibility of such a showing. Because this showing becomes more difficult to establish by the day, it has become an escape device that allows courts to avoid confronting official and governmental negligence.

217. 358 S.W.3d 1, 2, 4 (Ky. Ct. App. 2011).
218. 113 S.W.3d 159, 168 (Ky. 2003).
219. *Faulkner*, 358 S.W.3d at 4.
220. *Schwindel*, 113 S.W.3d at 168.
221. *Faulkner*, 358 S.W.3d at 3-4.
222. *Schwindel*, 113 S.W.2d at 162-63.
223. Faulkner v. Greenwald, 358 S.W.3d 1, 2, 4 (Ky. Ct. App. 2011).
224. Schwindel v. Meade Cnty., 113 S.W.3d 159, 168 (Ky. 2003).
225. *Faulkner*, 358 S.W.3d at 3 (alterations in original).

Barring liability against the entity itself (directly or indirectly), the suit must be filed against an official of that entity in that official's individual capacity, meaning that the actions the official either took or failed to take amount to her own personal negligence, but negligence was ostensibly aided by the position.[226] Where that is the case, a plaintiff will be permitted to reach the merits only if the official acted in bad faith.[227] Because bad faith is exceedingly difficult to prove,[228] this standard operates as an escape device, allowing courts to avoid the difficult question of whether to order the employee of a coordinate branch of government to pay damages for her wrongful conduct.

E. Escaping Procedural Duties

Moving from substantive to procedural duties, state courts have developed a series of rules of review they employ when a party brings a challenge to the procedures that legislatures must follow in enacting legislation. Each state legislative house keeps a journal of its proceedings, and most of these journals contain information about the legislative process—vote tallies, amendments, subject changes, etc.[229] Where an aggrieved party brings a challenge to the procedures the legislature followed in enacting a challenged law, courts are split as to how strictly they will scrutinize these procedures, but the differences in strictness do not reveal themselves through ordinary doctrines of deference. Rather, the distinctions appear based on whether the state court in question adheres to the "enrolled bill rule," the "journal entry rule," or the "extrinsic evidence rule."[230]

The enrolled bill rule limits judicial review of legislative processes to the contents of the bill as passed and enrolled in the state's code.[231] Courts following this rule cannot inquire as to the number of votes counted for and against the bill, for example, because that information is ordinarily not part of the enrolled bill.[232] Texas is one state among several that strongly adheres to the enrolled bill rule. In the seminal

226. Greenhill & Murto, *supra* note 212.

227. Angela S. Fetcher, *Outdated, Confusing, and Unfair: A Glimpse at Sovereign Immunity in Kentucky*, 41 BRANDEIS L.J. 959 (2003).

228. *See, e.g.*, Long v. Celebrity Cruises, Inc., No. 12-22807-CIV, 2013 WL 12092088, at *6 (S.D. Fla. July 31, 2013) (stating, in the context of discovery sanctions that require bad faith, "Courts recognize that because a movant often faces a difficult burden in proving bad faith, and as direct evidence of bad faith is rarely available, circumstantial evidence can be used.").

229. *See, e.g.*, Amos v. Moseley, 77 So. 619, 620 (Fla. 1917) (discussing Florida's journal requirement).

230. *See generally* Williams, *supra* note 175 (outlining these approaches, along with some medial approaches sitting in their interstices).

231. *Id.* at 816-18.

232. *See Moseley*, 77 So. at 561 (discussing the alternatives of the journal entry rule and the enrolled bill rule).

case of *Williams v. Taylor*,[233] the Texas Supreme Court applied this rule to avoid review of a statute challenged under the then-recent provisions of the Texas Constitution requiring that a bill be reported out to the full House at least three days prior to final adjournment.[234] The journals of each House established that this duty had been violated, so if those were viewed as competent evidence, the case would have easily been decided in favor of the plaintiff.[235] But the court applied the enrolled bill rule to reject the evidence in the legislative journals.[236] In so doing, the court frustrated the implementation of duties that were placed not only on the Texas Legislature, but also many others, during an era in which legislative distrust was high.

The journal entry rule expands this scope of judicial review to the bill itself, along with the House journals of each House of the legislature.[237] This expansion allows for some scrutiny over vote totals, amendments, title changes, and other matters that do not appear on the face of the final bill as enrolled, but House journals may be misleading as to adherence or violation of other procedures, such as whether the bill was read aloud the correct number of times prior to final passage, or more worryingly, by declaring that a procedure was followed when it actually was not. Where this is the case, only the extrinsic evidence rule, which permits the court to inquire as to competent evidence contradicting the statements in the House journal,[238] can reveal whether the journal is misleading.

This latter concern—journals that mislead as to what actually occurred procedurally along the way to passage of a challenged bill—surfaced in a Florida case, *State v. Kaufman*.[239] The plaintiffs in *Kaufman* challenged a recently enacted statute as violating a state constitutional duty requiring that a bill be read aloud prior to passage.[240] The House journals both stated explicitly that the read-aloud-before-passage duty had been fulfilled, but the recordings of the legislative sessions showed that this had not occurred in either House.[241] Likely, the House recorders employed boilerplate stating that each procedural duty had been met in any case in which legislation was recorded in the journals, but like the duty imposed by the Florida Constitution to read the bill aloud three times, this duty to read the bill aloud was imposed by a skeptical public to counteract legislative logrolling and self-

233. 19 S.W. 156 (Tex. 1892).

234. *Id.* at 156-58; *see also* Williams, *supra* note 175, at 817 (discussing *Taylor*).

235. Williams, *supra* note 175, at 817.

236. *Id.*

237. *Id.* at 819-21.

238. *Id.* at 821.

239. 430 So. 2d 904 (Fla. 1983); *see also* Williams, *supra* note 175, at 821-22 (discussing *Kaufman*).

240. 430 So. 2d at 905.

241. Williams, *supra* note 175, at 821-22.

dealing.[242] The evidence of the mismatch between the recordings and the journals should at least establish a prima facie case that the legislature was attempting to evade these protections by ignoring its procedural duties. The Florida Supreme Court, however, applied the journal entry rule,[243] ignoring the extrinsic evidence of non-compliance and approving a law passed through unconstitutional procedures. In so doing, the court denied the people vital information about how their representatives respected their entrustment of power with conditions on that power.

F. Judicial Escape and Legislative Duty

In each of the cases outlined above, the courts have applied an escape device to avoid either a difficult interpretive question under the state constitution or a conflict with another branch of government, usually the state legislature. We might question whether this avoidance, while desirable to courts seeking to preserve their own political capital, might conflict directly with constitutional design in the states. The next Part examines the use of escape devices in light of the fiduciary theoretical framework this Article establishes and concludes that this conflict is both unavoidable and troubling from a rule-of-law perspective.

IV. ESCAPE DEVICES AND FIDUCIARY STATE GOVERNMENT

Constitutional systems of accountability exist to ensure that constitutional fiduciary duties are performed and are performed in the interest of the public. One of the checks placed on the legislative branch is the need to stand for elections periodically, but this check means little if the people have only the biased information the political and electoral campaigning system produces for evaluating incumbent candidates' performance. The judicial branch, therefore, performs an important accountability function in identifying, and clearly and transparently communicating, legislative and executive duty failures (along with judicial failures in some cases) to the public. Where this communication does not happen, or in some cases where it does happen but is not sufficient to cure failures of fiduciary duty because it is not accompanied by an effective remedy, the court falls short of its own fiduciary duties to the public. The various escape devices discussed above lead directly to this sort of failure of duty.

While it is true that each of the branches of government has its own sphere of operation, and each sphere allows for some shaping of what the state constitution means, it is also true that the people have their

242. *See* Libonati, *supra* note 19, at 866 (discussing logrolling as one of the purposes of procedural requirements placed on legislators).

243. *Kaufman*, 430 So. 2d at 907.

own sphere of authority, and that authority depends on having access to authoritative interpretation of state constitutional norms. Absent that information, the people lack the ability to evaluate their own constitutional system, and if necessary, to call for changes to it. Particularly under state constitutions, which often allow for much more accessible amendment and revision opportunities than the Federal Constitution does,[244] this transparency is vital to the people's role. The use of escape devices impairs this information exchange.

Unlike escape devices in other contexts, especially in conflict of laws, where judicial escape merely distorts the results that would otherwise obtain absent escape,[245] in the context of state constitutional law, judicial escape directly impacts the performance of government fiduciary duties to the people. And unlike in conflict of laws, where judicial escape affects the case, the parties, and at most, other private cases that would cite the case employing the escape device as precedent, the use of escape devices in state constitutional law affects not only the judiciary, but also the other two branches of government, and ultimately, the rights of the people.

The examples of escape devices in state constitutional law outlined above most directly involve the judiciary's escape from its own fiduciary responsibilities to decide cases as the state constitution's meaning would dictate or to candidly and forthrightly establish a change in interpretation which alters that meaning. This escape from the fiduciary duties of obedience, transparency, and communication presents sufficient cause for concern in and of themselves, but they do not present the primary concern. That concern is related to the other branches and *their* fiduciary duties.

Where a court employs one of the escape devices outlined above to avoid a difficult or unpalatable result, or to forestall complaints or criticisms from the coordinate branches of government, and where the subject of the decision is state constitutional law, the result is to allow the coordinate branches of government to escape *their own* constitutional duties. When a state court abstains from reviewing the merits of a state constitutional school funding suit, for example, this judicial choice leaves a potential violation of an affirmative duty to legislate on behalf of the people's educational needs completely unexamined.[246] Leaving an issue of such importance—one that, indeed, lies at the center of what state legislatures are obligated to do for their beneficiaries—unexamined judicially leaves the state of the performance of the

244. *See generally* Hershkoff, *supra* note 24 (examining the institutional features of state constitutions and state courts as part of a critique of judicial review doctrines in those courts in positive rights cases).

245. *See supra* notes 116-40 and accompanying text (discussing the use of escape devices in the conflict of laws jurisprudence).

246. *See supra* notes 176-93 and accompanying text (discussing merits abstention and remedial abstention).

duty behind the veil of politics and thus unavailable to the public's inspection. Similarly, where the court performs its adjudicatory obligation to review the merits in such a case, and it identifies a constitutional violation in the failure to fully perform the duty the constitution sets up, but the court then opts to abstain from directive remediation of the constitutional wrong, the court leaves the harm identified and described, thus partially fulfilling its constitutional duty, but leaves it unredressed, thus allowing the legislature to continue to evade its own duty.

These actions, at a minimum, violate the judicial fiduciary duties of transparency and communication, in that the court in these cases fails to explain to the people the performance of their representatives in pursuing the affirmative educational duties the people have imposed on these representatives. The merits abstention cases deny any information to the public, egregiously violating these duties, but even the remedial abstention cases, which do provide information to the public as to how the legislature has been performing its duties, fail to provide the public further information as to how those duties should be performed in the event they are not being performed consistent with the constitution. But of more concern, the failure to transparently communicate this information to the people also allows their representatives to evade accountability for their performance of their own fiduciary duties to the public, in this case to set up and maintain an adequate education system.[247]

The "mandatory and directory provisions" and "self-executing and non-self-executing provisions" escape devices present similar failures.[248] In both cases, as with the "merits abstention" escape device, the court is able to evade review of the merits and thus avoids its duty to communicate transparently with the public as to the legislature's or the executive's performance of their own duties. This failure inevitably allows these other branches to evade accountability for their own duties and enables continued violation or ignoring of these responsibilities.

Evasions of procedural review through the "enrolled bill" and "journal entry" escape devices present a similar set of problems, and one perhaps even more clearly connected with the people's entrustment.[249] As discussed above, many state constitutional procedural restrictions on legislative conduct resulted from popular distrust of legislative majorities, and this distrust emerged as a result of legislators'

247. *See* Bauries, *supra* note 2 (developing the concept of the fiduciary state legislative duty to set up and maintain an educational system).

248. *See supra* notes 207-11 and accompanying text (discussing mandatory and directory provisions); *supra* notes 197-205 and accompanying text (discussing self-executing and non-self-executing provisions).

249. *See supra* notes 230-43 and accompanying text (discussing escape devices used to evade review of procedural legislative duties).

violations of their own fiduciary duties—particularly the duty of loyalty.[250] Although duties such as the requirement to read a bill aloud prior to passage may seem quaint and unnecessary, they exist because the people saw a need to limit their fiduciaries. Escaping enforcement of these limitations through the enrolled bill or journal entry rules allows these limits on the entrustment to be ignored.

Finally, although involving state constitutional law only defensively, employing the escape device of categorization in the areas of governmental and official immunities also illustrates the point.[251] Where, as discussed above, a court deems a proprietary function a core governmental function, in the face of the facts, this action shields governmental actors and entities from accountability for their negligent acts. In effect, the very existence of governmental, and especially official, immunities stand in stark contrast with the notion that government officials bear duties of care toward the people. But even if these doctrines can be defended under a fiduciary political theory, employing the escape device of manipulative categorization to absolve government actors from liability where it would otherwise attach under a proper categorization nevertheless further impairs the trust that is necessary for representative government.

Constitutional commands and prohibitions are, by definition, important. They "constitute" the relationship between the people and their government. It is therefore important to know what these provisions mean, and because state courts can speak authoritatively only through adjudication, it is vital that adjudication of constitutional norms happens, even, or perhaps especially, when the judiciary must pass upon the other branches' performance of their own constitutional duties. Each of the escape devices outlined above provides courts with an avenue to avoid defining what the law means—to avoid interpretation, the paramount duty of the judge.

CONCLUSION

More and more, constitutional scholars are coming to view constitutional law in fiduciary terms, envisioning the three constitutional branches as fiduciaries of the people, each with its own sphere of duties attendant to that fiduciary relationship.[252] As I have pointed out before, this view is broadly consistent with popular sovereignty theory,

250. *See* Libonati, *supra* note 19, at 866 (discussing the purposes of procedural requirements placed on legislators).

251. *See supra* notes 212-27 and accompanying text (discussing governmental and official immunities, and categorization as an escape device in this context).

252. *See* LAWSON ET AL., ORIGINS, *supra* note 1; Lawson et al., *Fiduciary Foundations*, *supra* note 1; Lawson & Seidman, *supra* note 1; Jenkins, *supra* note 1; Fox-Decent, *supra* note 1; Natelson, *Agency Law Origins*, *supra* note 1; Natelson, *Practical Demonstration*, *supra* note 1; Ponet & Leib, *supra* note 1; Natelson, *General Welfare Clause*, *supra* note 1; Criddle, *supra* note 1; Barnett & Bernick, *supra* note 6; Leib et al., *Fiduciary Theory of Judging*, *supra* note 1.

and it is also broadly consistent with the explicit text of many state constitutional documents.[253] It also is consistent with the structure of these documents, each of which sets up what is, in effect, a trust maintained on behalf of the public.

The judiciary's primary fiduciary role within this trust is twofold. One portion of this role is to examine and adjudicate disputes that involve potential breaches of the social contract—where these disputes involve other constitutional actors, that duty is to evaluate whether the other branches have violated their own fiduciary duties to the public. This is the duty of obedience to the entrustment of the people.[254] The people have substituted the judiciary for themselves in resolving disputes, and they have delegated the authority to do so lawfully to the judiciary. Evading this duty by way of escape devices violates the trust.

But the other primary aspects of this role include transparency and communication,[255] and failing to engage these fiduciary duties also allows the other branches to violate theirs with impunity—a situation destructive to the body politic. Even where the judiciary fulfills the duty of adjudicating the breaches of fiduciary constitutional duty alleged against the other branches, it must also communicate with the public, via published decisions and opinions, as to these breaches or non-breaches. Allowing an alleged breach to go unaddressed on the merits despite the existence of jurisdiction, or allowing a proven breach to go unremedied, but accompanying that acquiescence with a written opinion that makes it seem that the judiciary was faithfully fulfilling its duty, works an injustice on the public, effectively misleading the people into believing that their state constitution permits the challenged conduct and denying them the understanding to which they are entitled of the state constitutional provision at issue.

The so-called "virtues of passivity"[256] do not rescue these judicial escapes from critique. These virtues all sound in the judiciary's protection of its own political capital, with the understanding that, where the judiciary wades into disputes that place it into avoidable conflicts with the coordinate branches, it is the branch least armed to impose its will. But this account asks little of the people, and republican government asks more of them. The inter-branch checks state constitutions are set up to operate for the benefit and protection of the people, not the branches themselves.[257] Thus, refusing to adjudicate constitutional

253. Bauries, *supra* note 2.

254. *See supra* notes 112-14 and accompanying text (discussing the fiduciary duty of obedience to the entrustment).

255. *See* Leib et al., *Fiduciary Theory of Judging*, *supra* note 1, at 730 (discussing judicial fiduciary duties and terming these concerns "candor" and "accounting").

256. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

257. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124 (1994).

controversies to avoid institutional conflicts places the institutional interests of the fiduciary—the court—above the interests of the entrustor—the people.

The use of escape devices to avoid adjudication the judiciary sees as problematic in some way allows courts to signal their acceptance of a legislative or executive status quo without taking responsibility for approving that status quo.[258] Where judges do not bear direct accountability for the constitutional infractions they permit, popular sovereignty suffers. The people's entrustments that take shape through state constitutions impose duties on the judiciary to adjudicate and to transparently communicate with the people regarding failures of the coordinate branches. Absent the performance of those judicial duties, the people are left at the mercy of politics.

258. *Cf.* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1263 (2006) (speaking analogously about dicta in the federal courts: "In my experience, when courts declare rules that have no consequence for the case, their cautionary mechanism is often not engaged. They are far more likely in these circumstances to fashion defective rules, and to assert misguided propositions, which have not been fully thought through"). This concern is also apt where courts "pay no price" for avoiding conflicts with coordinate branches, and thus may be bound to announce fewer and fewer grounded bases for doing so.