Introduction

Fiduciary Government: Provenance, Promise, and Pitfalls

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The idea of "fiduciary government" – that public officials enjoy a position of power and owe obligations comparable to those of agents, trustees, and other fiduciaries – has attracted unprecedented attention in recent years. As scholars have increasingly come to recognize the shortcomings of social contract theories of government, many have looked to fiduciary obligation as a new model for legitimating public authority and explaining the obligations of the state and public officials. In addition, concerns about possible bias and corruption at the highest levels of government have invited renewed attention to the idea that public officers and institutions bear fiduciary duties to eschew conflicts of interest and to use their entrusted power solely for the public good. The idea of fiduciary government is as timely as it is timeless.

This book contributes to the growing renaissance of public fiduciary theory in several respects. First, it deepens our awareness of the idea's distinctive conceptual and normative advantages for legal and political theory. Second, it enriches our appreciation of the intellectual history of fiduciary government by examining the idea's development in Europe and the United States. Third, it sharpens our understanding of the idea's potential applications to various areas of substantive law, including constitutional, administrative, and public international law. Finally, it engages with conceptual and normative challenges for the idea of fiduciary government that have yet to be adequately addressed.

THE PROVENANCE OF FIDUCIARY GOVERNMENT

The idea of fiduciary government is not new. Indeed, it is central to republican theories of government rooted in the writings, culture, legal frameworks, and political realities of the ancient Greeks and Romans. In *The Republic*, Plato conceived of public officials as guardians entrusted with power for the purpose of promoting

general welfare.[1] Cicero wrote of public governance as a form of trust which, "like the office of a trustee, must be conducted for the benefit of those entrusted to one's care, not of those to whom it is entrusted."[2] Hugo Grotius – the Dutch jurist and founding father of international law – suggested that the assertion of sovereignty by states in domestic and international affairs is premised on fiduciary principles.[3] Thomas Hobbes articulated a fiduciary conception of adjudication, insisting that one cannot .be judge and party of the same cause.[4] Shortly thereafter, John Locke argued that legislative power is "a fiduciary power to act for certain ends."[5]

The idea of fiduciary government has attracted more than academic interest. Indeed, it proved deeply influential amongst revolutionaries, politicians, and public intellectuals in Britain and the United States. Prominent republicans in Britain, including Milton and Burke, drew upon the idea of fiduciary government in criticizing the absolutism of monarchist conceptions of Crown sovereignty.[6] Leading American revolutionaries also appealed to a fiduciary conception of republican government in criticizing British rule and framing their views on representative democracy and constitutional design. The authors of the *Federalist Papers* endorsed a patently fiduciary conception of government resting upon popular sovereignty, whereby agents of the state receive and execute public offices on trust for the benefit of the people from whom they receive power and to whom they are accountable. For example, James Madison conceived of state and federal governments as enjoying power under distinct but complementary fiduciary mandates, suggesting that they are "but different agents and trustees of the people, constituted with different powers and designed for different purposes."[7] Similarly, John Adams invoked a fiduciary conception of government, stating that "rulers are no more than attorneys, agents, and trustees for the people."[8]

While the idea of fiduciary government has a distinguished history, it was largely neglected throughout the twentieth century. Things changed in the 1990s, however, as scholars began to draw parallels between the operation of fiduciary principles in private law and public law constraints on the exercise of power by public officials.

1 *See* Plato, The Republic (G.M.A. Grube trans., 1992).
2 *See* Cicero, *Moral Goodness*, *in* De Officiis I.XXV 85, 87 (Walter Miller trans., 1997).
3 *See* Hugo Grotius, De Mare Liberum ch. V (Ralph Deman Magoffin trans., 1916) (1609); Hugo Grotius, De Jure Belli ac Pacis bk. II, ch. 2 (Francis W. Kelsey trans., 1925) (1625).
4 *See* Thomas Hobbes, Leviathan 129 (C.B. Macpherson ed., Penguin Books Limited 1968).
5 *See* John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* (1690), *in* Social Contract (Sir Ernest Barker ed., Oxford University Press 1948).
6 John Milton, *The Tenure of Kings and Magistrates*, *in* Areopagitica and Other Political Writings (1999); Edmund Burke, *Discontents in the Kingdom*, *in* Burke's Politics: Selected Writings and Speeches of Edmund Burke on Reform, Revolution, and War (R.J.S. Hoffman & Paul Levack eds., 1949).
7 The Federalist No. 46 at 294 (James Madison).
8 John Adams, The Revolutionary Writings of John Adams 28 (C.B. Thompson ed., 2000).

For example, the Australian jurist Paul Finn, author of a seminal treatise on fiduciary principles in private law, argued at length that the authority of the state ought to be understood in fiduciary terms, and that much of public law can be understood as reflecting the operation of fiduciary constraints on the authority of the state.[9] The idea of fiduciary government has since found renewed interest, with a steady stream of work breaking new ground on the topic. Evan Fox-Decent has drawn on figures as diverse as Hobbes,[10] Kant,[11] Fuller,[12] and Raz[13] to develop a fiduciary model of the rule of law and public authority. Evan Criddle has deployed the idea of fiduciary government to reframe problems of authority, representation, delegation, and discretion in the administrative state[14] and global governance.[15] In a series of co-authored publications, Criddle and Fox-Decent have argued that the fiduciary character of state authority helps to explain, and may be used to strengthen, the juridical structure of international human rights law.[16] Ethan Leib, with several co-authors, has brought fiduciary political theory to bear on problems of democratic political representation,[17] the role of juries and judges in democracies,[18] and other topics.[19] Other significant work includes Eyal Benvenisti's re-imagining of international law

[9] Paul Finn, *The Forgotten 'Trust': The People and the State*, *in* Equity: Issues and Trends 131 (Malcolm Cope ed., 1995).

[10] Evan Fox-Decent, *Hobbes Relational Theory: Beneath Power and Consent*, *in* Hobbes and the Law (David Dyzenhaus & Tom Poole eds., 2012).

[11] Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 Queen's L.J. 259 (2005); Evan Fox-Decent, Sovereignty's Promise: The State as Fiduciary (2011).

[12] Evan Fox-Decent, *Is the Rule of Law Really Indifferent to Human Rights?*, 27 Law & Phil. 533 (2008).

[13] Evan Fox-Decent, *Fiduciary Authority and the Service Conception*, *in* Philosophical Foundations of Fiduciary Law 363 (Andrew S. Gold & Paul B. Miller eds., 2014).

[14] *See, e.g.*, Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 Nw. U. L. Rev. 1271 (2010); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 Texas L. Rev. 441 (2010); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 117 (2006).

[15] *See, e.g.*, Evan J. Criddle, *Standing for Human Rights Abroad*, 100 Cornell L. Rev. 269 (2015); Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 Notre Dame L. Rev. 1073 (2012).

[16] *See, e.g.*, Evan J. Criddle & Evan Fox-Decent, Fiduciaries of Humanity: How International Law Constitutes Authority (2016); Evan J. Criddle & Evan Fox-Decent, *Human Rights, Emergencies, and the Rule of Law*, 34 Hum. Rts. Q. 39 (2012); Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 Legal Theory 301 (2009); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 Yale J. Int'l L. 331 (2009).

[17] *See* Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. Pol. Phil. 178 (2012).

[18] *See* Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 Calif. L. Rev. 699 (2013); Ethan J. Leib, Michael Serota & David L. Ponet, *Fiduciary Principles and the Jury*, 55 Wm. & Mary L. Rev. 1109 (2014).

[19] *See* Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 Harv. L. Rev. F. 91 (2013); Ethan J. Leib, David L. Ponet & Michael Serota, *Mapping Public Fiduciary Relationships*, *in* Philosophical Foundations of Fiduciary Law 388 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter Leib et al., *Mapping*].

based on the model of sovereignty as a form of trusteeship for humanity,[20] Gary Lawson and Guy Seidman's analysis of the U.S. Constitution's fiduciary character,[21] Theodore Rave's analysis of the fiduciary character of elected office and its implications for redistricting,[22] Sung Hui Kim's work analyzing public corruption and insider trading in terms of fiduciary government,[23] and Donna Nagy's work on the fiduciary regulation of financial conflicts of interest in government.[24] Recent scholarship on fiduciary government also resonates with the growing literature on information fiduciaries[25] and the law's response to private and public corruption as forms of disloyalty or abuse of trust.[26]

THE PROMISE OF FIDUCIARY GOVERNMENT

That the idea of fiduciary government has been with us for centuries suggests that it has interpretive and normative appeal. As some of the chapters in this volume explain, fiduciary models can explain facts about social and legal practices of government that other models cannot. The idea of fiduciary government also provides resources with which to critique and justify laws, policies, and structural arrangements through which the authority of the state is given particularized expression. Of

[20] Eyal Benvenisti, *Sovereigns as Trustees of Humanity*, 107 Am. J. Int'l. L. 295 (2013).

[21] Gary Lawson & Guy Seidman, "A Great Power of Attorney": Understanding the Fiduciary Constitution (2017).

[22] D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671 (2013).

[23] Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 Cornell L. Rev. 845 (2013); *see also* Sung Hui Kim, *Insider Trading as Private Corruption*, 61 UCLA L. Rev. 928 (2014).

[24] Donna Nagy, *Owning Stock While Making Law: A Fiduciary Solution to an Agency Problem in Politics*, 47 Wake Forest L. Rev. 845 (2013); Donna Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. Rev. 1105 (2011).

[25] Jonathan Zittrain, *Engineering an Election*, 127 Harv. L. Rev. F 335 (2014); Jack Balkin, *Information Fiduciaries in the Digital Age*, Balkanization (Mar. 5, 2014), http://balkin.blogspot.com/2014/03/information-fiduciaries-in-digital-age.html.

[26] *See* Zephyr Teachout, Corruption in America (2014); Laura Underkuffler, Captured by Evil: The Idea of Corruption in Law (2013); Lawrence Lessig, Republic, Lost: How Money Corrupts Congress and a Plan To Stop It (2011); Zephyr Teachout, *Constitutional Purpose and the Anti-corruption Principle*, 108 Nw. U. L. Rev. Colloquy 30 (2014); Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. U. L. Rev. Colloquy 30 (2012); Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 Nw. U. L. Rev. Colloquy 1 (2012); Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Teachout*, 107 Nw. U. L. Rev. Colloquy 1 (2013); Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009); Lawrence Lessig, *What an Originalist Would Understand 'Corruption' to Mean*, 102 Calif. L. Rev. 1 (2014); Paul Gowder, *Institutional Corruption and the Rule of Law*, 9 Ethics F. 84 (2014); Dennis Thompson, *Two Concepts of Corruption*, 12 Geo. Wash. L. Rev. 1036 (2005); M.E. Newhouse, *Institutional Corruption: A Fiduciary Theory*, 23 Cornell J. L. & Pub. Pol'y 553 (2014).

course, the promise of fiduciary government depends on how the idea is expressed. Contemporary scholars differ significantly on this point.

Some develop the fiduciary model in metaphorical terms, in a manner akin to the use made of the idea of contract in political philosophy and democratic theory. Put simply, public offices, like private fiduciary mandates, involve the exercise of other-regarding powers and as such are susceptible of corruption, abuse of trust, and disloyalty. These and other features of the idea of fiduciary government suggest that it might provide an evocative counterpoint to social contract theories of the state, offering new conceptual, interpretive, and normative vistas. Like the debate between contractarians and non-contractarians in private fiduciary law scholarship, a focus in public fiduciary theory on power and status promises to reorient political theory away from questions about consent and agreement to questions about power, vulnerability, trust, and the status of public entities.

While metaphorical use of the idea of fiduciary government is common, legal interpretivists have argued that public offices are actually (not merely metaphorically) fiduciary. Some, like Evan Criddle and Evan Fox-Decent, argue that the authority of the state is fiduciary insofar as it mirrors constitutive properties of fiduciary relationships in general. Others, like Ethan Leib, argue that the relationship between the state and its subjects is analogous to private law fiduciary relationships on the basis of shared characteristics. Notably, both types of relationships depend on trust, implicate power, engender dependence and vulnerability, and are open to abuse. Accordingly, public fiduciary relationships entail similar, albeit translated, duties and responsibilities.

Regardless of methodology, there is wide agreement that important normative implications follow from the recognition that governmental powers are held on a fiduciary basis. Public officials, like private fiduciaries, are said to be subject to legal norms designed to prevent, deter, or punish corruption and to ensure that legal powers are exercised properly and carefully for the purposes for which they were conferred. These norms include general duties of loyalty, impartiality, fairness, candor, confidence, and care. These general duties, in turn, support a series of more particular rules (e.g., conflict of interest requirements, abstention and recusal rules, disclosure and consent requirements) with important implications for our understanding of familiar notions, such as integrity in the occupation of a public office. Some argue further that fiduciary principles support commitments to legality, the rule of law, respect for human rights, and the laws of war.[27] The idea of fiduciary government thus may be capable of bridging recognition of state and popular sovereignty with acknowledgment of the essential role for international law as a bulwark of humanitarianism.[28]

[27] *See, e.g.*, Criddle & Fox-Decent, *supra* note 16.
[28] *See id.*; Benvenisti, *supra* note 20.

In summary, according to its proponents, the idea of fiduciary government can provide an account of state sovereignty and political obligation; help to articulate relationships between different branches of government; offer guidance as to the responsibilities of both states and public officeholders to citizens and noncitizens amenable to their jurisdiction; and situate governments within a system of international law.

THE PITFALLS OF FIDUCIARY GOVERNMENT

Theories of fiduciary government also face challenges. Some concern indeterminacy.[29] For example, if a public officeholder is a fiduciary, who are her beneficiaries? A state legislator could plausibly be seen as a fiduciary to the citizens who voted for her; to all citizens in her state; to all citizens of her nation; and to the public at large, including noncitizens and future citizens.[30] Likewise, it is often vital to determine whether a theorist is viewing officeholders, branches of government, or states in general as fiduciaries.

Another area of uncertainty concerns the construction of public fiduciary relationships. Different private law models of fiduciary relationships have different implications. An agency model, for example, suggests that the present instructions or preferences of the agent's principal should be decisive for the fiduciary in the exercise of her discretion.[31] A trustee model, by contrast, contemplates greater deference to fiduciaries' own judgments about what may advance the best interests of the beneficiaries. Other models, each with their own distinctive implications, have been invoked from time to time, as well. For example, some scholars have drawn on models of fiduciary administration in partnerships and corporations.[32]

A further challenge is to differentiate fiduciary theories of government from the alternatives without producing counterintuitive results. Some have argued that a thin account of fiduciary relations leaves us with a theory that is largely redundant – one that simply restates puzzles already recognized as puzzling under other theories of government.[33] Alternatively, it has been argued that fiduciary theories of government are overly stringent in the constraints they would place on the conduct of public officials.[34]

[29] *See* Leib et al., *Mapping*, *supra* note 19; Andrew S. Gold, *Reflections on the State as Fiduciary*, 63 U. Toronto L.J. 655 (2013).
[30] *See* Leib et al., *Mapping*, *supra* note 19, at 398–99.
[31] Deborah A. DeMott, *The Fiduciary Character of Agency*, *in* Philosophical Foundations of Fiduciary Law 321 (Andrew S. Gold & Paul B. Miller eds., 2014).
[32] Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 Cornell L. Rev. 845 (2013).
[33] Seth Davis, *The False Promise of Fiduciary Government*, 89 Notre Dame L. Rev. 1145, 1151, 1205 (2014).
[34] *See id.* at 1151, 1203–04.

A different set of challenges concerns questions of application where multiple beneficiaries are involved. A duty of loyalty is often understood as a duty to act in what the fiduciary believes to be in the beneficiary's best interests. If, however, this duty of loyalty is owed to several million constituents, it will be impossible to act in the best interests of each individual constituent. Moreover, it is very hard to pin down what it means to act in the best interests of citizens in the aggregate. The question of whether and, if so, how conventional fiduciary duties can be extended from bilateral relationships to public administration for diverse constituencies remains controversial.

Some theorists have argued that fiduciary government supports obligations *to* the state as well as obligations owed *by* the state.[35] On this view, fiduciary principles can help resolve problems of political obligation. Here, problems of analogy resurface. There are certain contexts in which fiduciaries possess authority over beneficiaries, even in the absence of beneficiary consent. Some have suggested that these relationships are a useful analogue to the relationship between a state and its citizens. However, these analogies have been challenged on their own terms[36] and on the basis that they imply an objectionable, paternalistic view of public governance.[37]

Lastly, to the extent that theorists ground fiduciary theory in accounts of government in particular states, there are significant questions of fit. For example, it has been questioned whether fiduciary principles are consistent with the intentions of the Founders of the U.S. Constitution or of the U.S. Congress, and it has been argued that fiduciary principles have not worked well where applied.[38]

These and other criticisms do not diminish the importance of the idea of fiduciary government. They do suggest, however, a need for further refinement, clarification, and elaboration of the idea. The contributors to this book take up this challenge, advancing debate over the authority of the state by improving our understanding of the history, advantages, and limitations of the idea of fiduciary government.

MODES OF GOVERNANCE

The chapters in this book are grouped into five parts. The contributions in Part I explain how the idea of fiduciary government points toward distinctive modes of governance.

[35] Fox-Decent, *supra* note 13.
[36] *See* Gold, *supra* note 29.
[37] *See* Evan Criddle, *A Sacred Trust of Civilization: Fiduciary Foundations of International Law in* Philosophical Foundations of Fiduciary Law 404 (Andrew S. Gold & Paul B. Miller eds., 2014); Davis, *supra* note 33, at 1187.
[38] *See* Davis, *supra* note 33, at 1171–95.

In *Fiduciary Representation*, Paul Miller responds to an especially powerful objection to the idea of fiduciary government. According to this objection, echoed in Timothy Endicott's contribution to this volume, private fiduciary administration is categorically distinct from ordinary public administration (i.e., administration in which the public official or entity is not charged with a private-law-like mandate demanding special regard for the interests of a limited class of beneficiaries). On this view, private and (ordinary) public administration both exhibit relations between power-holders and others who are subject to the relevant power, but those relations do not share the same constitutive features. There is, as Miller puts the objection, a lack of relational correspondence.

Miller tackles the objection head-on by arguing that there is a deep relational correspondence between private and public administration that goes to the core of fiduciary relationships. According to Miller, a central and defining feature of both private and public administration is that it is *representative* in character; i.e., one or more persons stand in a relation to others such that they can be said to represent or "personate" those others in the exercise of other-regarding legal powers. Drawing on the work of Thomas Hobbes and Hanna Pitkin, Miller argues that public and private administration equally entail legal representation, and argues that representation, in turn, is an inherently fiduciary mode of relating to others. Miller concludes by drawing out various implications of his argument; for example, that representation makes it possible for a people to exist as a collectivity that is also a single legal person (the state). Public representation within the state, Miller says, can be achieved both vertically and horizontally through myriad institutional arrangements. In these and other ways, Miller's idea of representation serves as a unifying thread that binds together various aspects of public administration, all the while showing that public and private administration are part of a wider genus: fiduciary administration.

Building on the insight that public and private fiduciary law have much to learn from each other, Theodore Rave calls for greater conceptual clarity in an area that has heretofore been characterized by doctrinal confusion. In *Two Problems of Fiduciary Governance*, Rave observes that public and private fiduciary law often conflate two distinct governance problems: the principal-agent problem and the tyranny-of-the-majority problem. The principal-agent problem describes the situation in which an agent engages in disloyal, self-regarding behavior at the expense of her principal. The tyranny-of-the-majority problem describes the separate situation in which a majority attempts to exploit or oppress a minority – that is, when principals treat each other unfairly.

As Rave explains, private and public fiduciary law often conceive of the duties that a majority owes a minority in the same terms as those that agents owe their

principals. Corporate law, for example, has imposed "fiduciary duties" on majority shareholders relative to minority shareholders under terms that recall the fiduciary duties that corporate managers owe to the corporation and its shareholders. Meanwhile, in public law, some scholars have argued that voters are fiduciaries in much the same way that elected officials can be characterized as fiduciaries for those whom they represent.

This conflation is troublesome, Rave says, because the two governance problems arise for different reasons and require different legal and structural responses. For example, standard entailments of the duty of loyalty – the fiduciary's obligation to eschew self-interest and act for the exclusive benefit of the beneficiary – are designed to address the principal-agent problem. But they have far less traction on the tyranny-of-the-majority problem because, as a general matter, principals are entitled to act in self-interest, as long as minorities are not exploited. Moreover, the principal-to-principal duties that have developed in private law have different equitable foundations than fiduciary duties. Understanding the differences between these problems is critical to any attempt to translate ideas from private law into a fiduciary conception of government.

In *Guardians of Legal Order: The Dual Commission of Public Fiduciaries*, Evan Criddle and Evan Fox-Decent reply to a prominent criticism of the idea of fiduciary government. The criticism suggests that fiduciary characterization of government is inapt on the basis that, while private fiduciaries can be (and are) obligated to show exclusive partiality to their beneficiaries, public officials cannot. Public officials must routinely balance and choose between the interests of multiple constituencies. Interest balancing and undivided loyalty couldn't be further apart as forms of other-regarding behavior. Norms of fiduciary loyalty, it is said, are simply not translatable to the public realm.

Criddle and Fox-Decent argue that this criticism is misconceived. It is founded on the mistaken assumption that fiduciary relationships are always premised on a single mandate to serve the interests of an individual or group with common interests. In fact, a significant subset of fiduciary relationships feature dual mandates. For these relationships, the ideal of undivided loyalty is displaced by one of fair and reasonable regard.

According to Criddle and Fox-Decent, dual mandates arise in relationships between licensed professionals and their clients (notably, doctor-patient and lawyer-client relationships). These relationships are constituted by a "first-order commission" to a particular client, and a separate "second-order commission" to serve certain public interests or purposes. Second-order commissions constrain the first-order ones, and accordingly fiduciaries face the pull of multiple loyalties. Living up to the demands of these loyalties requires careful balancing of different, and

potentially competing, considerations. This structure also typifies fiduciary government. For example: legislators owe a first-order duty to their constituents, subject to a second-order duty to the nation and citizenry at large. According to Criddle and Fox-Decent, this framing shows how the relational structure of fiduciary government is continuous with that of more familiar fiduciary mandates. It also suggests that the multiple loyalties "problem" for fiduciary government is not a problem at all. It is, rather, a familiar feature of relationships in which fiduciaries have dual commissions. Recognizing how second-order fiduciary duties operate also explains why states, as fiduciaries of humanity, are legally obligated under international law to cooperate with one another to protect human rights for the benefit of international society as a whole.

One of the great challenges for public fiduciary theory is to determine what kinds of fiduciary duties the state owes to its citizens. Laura Underkuffler's *Fiduciary Theory: The Missing Piece for Positive Rights* considers this question from a new angle: in her view, the state's fiduciary duties provide much-needed grounding for positive rights. Many think that citizens have positive rights to various benefits, from welfare entitlements, to education, to health care – and that government is subject to correlative duties to provide these benefits. While sympathetic to this view, Underkuffler argues that it is problematic to ground positive rights in interpretations of constitutional text (which can be interpreted in other ways); in broader constitutional principles (which are likewise contingent in their implications); or in such values as liberty or human flourishing (which may support positive rights, but without tying them to a governmental obligation).

Underkuffler contends that the missing ground of positive rights is found in the idea of fiduciary government. She notes that government-citizen relationships involve discretionary power, structural vulnerability, and incapacity, and thus qualify as fiduciary. Underkuffler recognizes that fiduciary theorists have been reluctant to recognize positive public fiduciary duties. However, emphasizing the "other-regarding posture" that fiduciaries maintain, she argues that the idea of fiduciary government can and does provide support for them.

Underkuffler also draws attention to a related concern: citizens benefit from a variety of negative rights, including government-supported property rights. There may thus be a worry that recognizing positive rights will require coerced reallocation of private property. She emphasizes, however, that government "*has created and enforced the very situation* that has generated the positive-rights claimants' desperate need." While some negative rights are understood apart from government recognition, she suggests that property rights are defined and enforced by government alone. Because government is responsible for conditions of scarcity and inequality in access to resources, its fiduciary responsibility to assess and respond constructively to those conditions is unavoidable.