# Mere Metaphor Is Not the Big Game

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Samuel L. Bray & Paul B. Miller, Against Fiduciary Constitutionalism, 106 **Virginia L. Rev.** 1479 (2020).

In their irrepressibly interesting essay, Samuel Bray and Paul Miller argue hard against the idea that notions of fiduciary duty writ large ought to be welcomed within the analytical apparatus of United States constitutional law. They worry about ensuing anachronism – indeed, repeatedly underscore this concern.

The 1787 constitution may be roughly contemporary with the law of trusts, for example. In the fiduciary notions we now try to group abstractly, however, much that is important dates from nineteenth and twentieth century developments – plainly coming too late to the party to figure as constitutional contemporaries. Bray and Miller concede that there is a very old practice of treating classical notions of loyalty and disinterest and the like as adding emphasis – maybe even urgency – to constitutional discussion. They do not deny the existence of Plato and Cicero, Locke and Hume, or their gangs of adherents. "But this language offers moral guidance and political wisdom," they write, "not enforceable duties with remedies that can be awarded by courts." (P. 1483.) Surely we can all agree with this. Plato and Benjamin Kaplan were and are in no way pursuing the same project. Bray and Miller lower their boom.

> Against this long history of a figurative and legally thin understanding of public office as a trust, it becomes easier to recognize the fiduciary constitutionalist project for what it is: an earnest and literalistic misreading of the tradition and an insistence on taking figurative language that works across thousands of years of political theory and treating it as if it were an invocation of an inevitably more particular body of legal or equitable claims and remedies. (Pp. 1483-84.)

The individual explorations leading to this conclusion are carefully developed. The overall argument looks to be straightforward.

Notably, Bray and Miller do not deny the possibility that "figurative language" and "more particular" terms might *coexist* within legal writings, *both* concerned with what ought to be emphasized or marginalized or proscribed. Why such doubling? Signaling efforts are evident – either openly or implicitly – in installations of operative legal text, whether primary or secondary. This push and pull, we might think, both assembles legal statements and puts them in relief, working as a choreography of sorts. Normative backdrops emerge, underscore commitments and reveal rejections (steps toward or away). Bray and Miller are concerned that we not confuse "figurative" and "particular" modes. But they are provocatively silent regarding the *affirmative* possibilities presented by this doubling.

The past half-century has witnessed extraordinary explosions of close creative thinking as to the implications of fiduciary duties in prominent fields of law. ERISA has provided one such context, regularly explored by the Supreme Court and other federal adjudicators, building up a considerable distinctive technicality. The American Law Institute, after two not-too-happy earlier tries, relatively recently (in this century) adopted a third Restatement of the Law of Agency. Much of the credit, it appears, rightly rests with reporter Deborah DeMott, cited by Bray and Miller as an early theorist of

fiduciary duty considered abstractly. The Restatement, though, is deeply immersed in concrete agency circumstances. Fiduciary duty vocabularies are at points strikingly recast, treated as not yet fully set and thus still amenable to recasting. Ideas about agency (not necessarily trusts concerns, for example) re-animate fiduciary ideas, now changed accordingly. The new Restatement is blockbuster legal artistry.

The monster jam remains, however, the two-decade sequence of temblors rattling and re-rattling corporate finance law, beginning in the mid-1970s. Whether tender-offer-forced, negotiated, or essentially unilateral, mergers and other acquisitions multiplied dramatically, shocks and aftershocks accumulating. The monetary costs, the commercial and employment disruptions felt sometimes over and over, the huge sums redistributed – all contributed to waves of aggressive and defensive litigation, mostly in Delaware courts. Longstanding corporate law fiduciary principles, or at least their decisive corollaries, changed repeatedly, within surprisingly short periods of time, as judges sought to manage the turmoil. In American legal history, there are very few common law exercises quite so closely, dramatically recurringly.

Professors Bray and Miller likely know all this too. They don't want to discuss it. No one, it is easy to think, believes that any or all of the great piles of Delaware chancery court decisions, Supreme Court ERISA interpretations, or Agency (Third) provisions, however wondrous, are part of the immediate corpus of United States constitutional law. But there is surely much we can learn from the particularities of all this work. Legally purpose-built organizations are sometimes beset and go awry. Lawyers, judges, or legislators respond, often adjusting or indeed retooling parameters of modern American fiduciary duty enforcement or nonenforcement. What we learn from these substantial efforts may not, in the end, strike us as relevant to American constitutional law. But maybe it would seem so sometimes, and the fact that it is once-removed would not undercut this usefulness if we were persuaded of its aptness.

Learning of this sort would be unabashedly "metaphorical." Or we might call it a legal version of "wisdom." Bray and Miller's fundamental distinction would still hold up. Indeed, they might note, robust procedural and remedial regimes more immediately coincide (or coexist) with constitutional law as such. Familiar distinctions between rights and remedies and substance and procedure, accompanied often by careful segregations of immediately pertinent legal materials, set boundaries. We all know, though, that these boundaries are not walls. We recall William Rehnquist's extraordinary triptych in *Rizzo v. Goode*, indirectly invisibly regulating the reach of important constitutional norms. We remember from the same era Abram Chayes and Owen Fiss arguing fiercely about the implications and relative priorities of remedies and rights; and too, the persisting debates about how closely (or not) the Rules Enabling Act distinction between substance and procedure confined Benjamin Kaplan's 1966 rules rewrites. Again, the significance for constitutional law at the time was obvious even if one step removed. These were and are still important illustrations of separated but interacting bodies of law. No appeals to abstraction of the sort that Bray and Miller criticize are involved. (Henry Smith's recent reworking of the relationships of law and equity is perhaps another example.)

A final note: Bray and Miller do not commit themselves to the proposition that constitutional law as we understand it should ordinarily overlap 1787 understandings, but they do note that the proponents of fiduciary incorporation seem to suppose so. There is more to explore here. Perhaps originalists would prefer a strong presumption against "metaphor" or "wisdom" counseling strongly specified interpretive choices when enough, or important enough, 1787 terms look to be relatively open textured. Would later constitutional amendment terms properly control if interpretations of seemingly open 1787 terms are not inconsistent with later inclinations? The same questions multiply as we consider once-removed modern statutes and common law – in particular, newer detailed reworkings of fiduciary ideas (not abstract formulas). Maybe original understanding matters "enough" practically only if there are a sufficient number of well-defined important 1787 terms. Maybe we need a theory of 1787 fundamentals therefore.

But where would that come from? It may help to borrow a reverse "metaphor" from John Rawls. There needs to be a set of 1787 "constitutional basics" somehow primary. But this set itself requires justification – its own corollary "thin theory" of the good to be treated as itself constitutionally basic. All of this would have to be taken up first, before later "metaphors" come on stage. What if we are not entirely satisfied with the derived thin theory? Would we then turn to the work of reconciling the initially "original" thin theory with later ostensible glosses – circumspect updated amalgams in the end, as it were?

Bray and Miller write provocatively. They push their readers further.

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