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ARTICLES

THE GOVERNMENT AS FIDUCIARY: A PRACTICAL DEMONSTRATION FROM THE REIGN OF TRAJAN

Robert G. Natelson*

Abstract: The Roman Emperor Trajan is justly celebrated as an author of several modern civil rights, such as the right to confront one's accusers. But he is most aptly remembered as the ruler who proved that fiduciary government was possible. Following the example of Trajan's reign could improve greatly the standards of American public law.¹

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1. Unless otherwise noted, translations from the Latin are those of the author.

Classical sources and citation forms are not familiar to most legally trained readers. This article relies on a number of such works; those cited on multiple occasions include those listed below. Like the Bible, most classical works are cited by book, chapter, and verse, for example, DIG. 1.4.13.

(1) SEXTUS AURELIUS VICTOR, *LIBER DE CAESARIBUS: PRAEEDUNT ORIGO GENTIS ROMANAE ET LIBER DE VIRIS ILLUSTRIBUS URBIS ROMAE SUBSEQUITUR EPITOME DE CAESARIBUS* (R. Gruendel ed., 1970) (1901) [hereinafter VICTOR] (a fourth century book of short imperial biographies, in Latin).

(2) ANONYMOUS, *EPITOME*, in VICTOR, *supra* [hereinafter EPIT.] (another fourth century book of short biographies of Roman emperors, in Latin).

(3) GAIUS, *INSTITUTES* (Francis de Zulueta trans., 1969) (1947) [hereinafter G. INST.] (a second century A.D. elementary law textbook that served as the basis of Justinian's *Institutes*, in Latin).

(4) C. PLINIUS SECUNDUS, *EPISTLES*, in *LETTERS AND PANEGYRICUS* (E.H. Warmington ed., Betty Radice trans., The Loeb Classical Library 1969) [hereinafter PL.EP.] (a book of Latin letters written by a Roman senator who served Trajan in various capacities).

(5) C. PLINIUS SECUNDUS, *PANEGYRICUS*, in *LETTERS AND PANEGYRICUS*, *supra* [hereinafter PL.PAN.] (a Latin speech in praise of Trajan by the same senator).

(6) FLAVIUS JUSTINIANUS, *CORPUS JURIS*. The massive compilation of Roman law col-

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“We are the trustees and agents of our fellow citizens.”
—Grover Cleveland, President of the United States

“A public office is a public trust.”
—The rewrite by W.C. Hudson, Cleveland’s Public Relations man²

I. INTRODUCTION

In the United States, both politicians and reformers frequently declare that a public office is a public trust.³ Grover Cleveland’s actual remark, “We are the trustees and agents of our fellow citizens,” better conveys the implications of the ideal. The primary purposes of the trust are said to be those set forth in the Declaration of Independence (the protection of natural human rights)⁴ and in the Preamble to the United States Constitution and various state constitutions.⁵

lected by order of the Emperor Justinian (reigned A.D. 527–65). It includes the *Codex* (COD.), the *Digest* (DIG.), and the *Institutes* (J. INST.). It is written mostly in Latin with an occasional Greek passage.

(7) 8 DIO CASSIUS COCCELIANUS, *DIO’S ROMAN HISTORY* (G.P. Goold ed., E. Cary trans., The Loeb Classical Library 1982) [hereinafter DIO] (a history of Rome composed in Greek by a Roman senator of the late second and early third centuries).

(8) EUTROPIUS, *BREVIARIUM* (Franciscus Rühl ed., 1901) [hereinafter EUT.] (a fourth century book of short biographies of Roman emperors, in Latin).

(9) 1 ANONYMOUS, *HISTORIA AUGUSTA* (G.P. Goold ed., David Magie trans., The Loeb Classical Library 1979) [hereinafter H.A.] (a book of longer Latin biographies of Roman Emperors, beginning with Hadrian, Trajan’s successor; the biography of Hadrian is largely factual; much later biographies are mostly fictional).

(10) SUTONIUS TRANQUILLUS, *DE VITA CAESARUM*, (E.H. Warmington ed., J.C. Rolfe trans., The Loeb Classical Library 1951) [hereinafter SUT.] (the first and best of the Latin imperial biographers).

2. After Grover Cleveland said, “We are the trustees and agents of our fellow citizens,” W.C. Hudson, a newspaper reporter then working for Cleveland, changed it to “a public office is a public trust” with Cleveland’s permission. To his credit, Cleveland always admitted that the snappier line was not his. William Safire, *How to Write a Memoir*, N.Y. TIMES, Apr. 18, 1988, at A23.

3. On March 25, 2001, there were 621 references to or paraphrases of the adage in the Lexis database of news stories.

4. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

5. See, e.g., U.S. CONST. pmb. (listing purposes that include domestic tranquillity and the general welfare); MONT. CONST. pmb. (“to improve the quality of life, equality of opportunity and to secure the blessings of liberty”). Some of the writings of the American Founding Generation reflect the ideal of government as fiduciary. For example, the *Feder-*

However, the maxim "The king can do no wrong"⁶ may be a better description of the *legal* reality. There is no general fiduciary obligation imposed on elected or higher appointed officials.⁷ Instead, the law provides only a series of ad hoc protections against arbitrary action set forth in state and federal constitutions, bills of rights, ethics laws, court rules, and various statutes, such as those that waive sovereign immunity. I do not wish to imply that such provisions are unimportant or insubstantial. But in our political and legal system, they are exceptions—concessions, really—from the plenary authority wielded by the sovereign.⁸

If the law took seriously the notion that public service is a public trust, it would hold government officials and employees, including policymakers, to standards analogous to those imposed on private fiduciaries. A legal regime that does not do so is an invitation to political abuse.⁹ New York State Senator George Washington Plunkitt lived many years ago, but most Americans might well agree that he reflected a common attitude among modern politicians when he reported as his own *modus operandi*: "I seen my opportunities and I took 'em."¹⁰ Certainly, the overwhelming majority of Americans do not trust government, see it as inefficient, and attribute the inefficiency to the moral turpitude of government functionaries¹¹—even if those functionaries

alist Papers are replete with references to this notion. Indeed, Grover Cleveland's original quotation is but a close paraphrase of Madison in Federalist No. 46: "The Federal and State governments are in fact but different agents and trustees of the people . . ." THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961). For additional references, see, for example, THE FEDERALIST NO. 49, at 316 (James Madison) (Clinton Rossiter ed., 1961) (describing legislators as public trustees and confidential guardians of the people); THE FEDERALIST NO. 55, at 344 (James Madison) (Clinton Rossiter ed., 1961) ("solemn trust"); THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961) ("public trust"); and THE FEDERALIST NO. 59, at 366 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("guardianship" and "trust").

6. 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.02.05 (3d ed. 1993); see *id.* §§ 53.02.05 to .02.10 (discussing sovereign immunity).

7. For two comparatively recent and thoughtful articles discussing the application of fiduciary standards to government, see generally Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57 (1996), and David M. Lawrence, *Local Government Officials As Fiduciaries: The Appropriate Standard*, 71 U. DET. MERCY L. REV. 1 (1993).

8. See, e.g., Clark, *supra* note 7, at 61–63, 68, 100–01 (noting the lack of, and need for, a common standard behind increasingly complex government ethics legislation).

9. *Id.* at 73.

10. Corey Kilgannon, *When Clubs Were Trumps, They Cut Deals While They Stacked the Deck*, N.Y. TIMES, Oct. 17, 1999, § 14, at 14.

11. See Karlyn Bowman, *Trust in Government*, ROLL CALL, Dec. 17, 1998, at 2 (citing results of a recent poll).

are not bold enough to admit their attitudes as openly as did Senator Plunkitt.

There are several potential objections to applying fiduciary standards to higher government functionaries.¹² One of the most important is the claim that it simply is not feasible. This paper addresses that objection by exploring a case that proved it feasible: the government of the Roman Emperor Trajan (A.D. 98–117). Indeed, Trajan's example induces us to ask the following question: If fiduciary government was practicable in a narrowly based regime governing a multicultural empire—where communication was slow and information expensive—why is it not achievable in America today?¹³

II. PRIVATE AND CIVIL GOVERNMENTAL STANDARDS IN THE UNITED STATES TODAY

A. *The Standards Regulating Private Governments*

Civil government is not, of course, the only institution by which some citizens manage the property and regulate the conduct of others. The private sector contains other such arrangements. Most of us have several such entities in our own lives or in those of our families: an informal recreational or service club, a guardianship, the entity for which we work, the businesses in which we invest, the homeowners' association that administers our neighborhood, the church or synagogue we attend, and, for the fortunate among us, the trust that sends us our monthly check. These institutions differ in their goals and organizational forms. They also differ in the degree of practical power the managers have over the managed—or, looking at it from the opposite perspective, the degree to which the managed depend on, or are vulnerable to, the managers.

For example, I am a member of a community service club. The officers of the club have relatively little power over me, and my practical dependency on them is relatively slight. I have almost

12. See *infra* text accompanying note 43.

13. It should be made clear at this point that arguments for fiduciary standards in government do not address the issues of how government decision makers should be selected or what should be the substantive scope of their powers.

no financial resources invested in the club, I have an important say in the election of the managing board, and I—or any member—only have to write a letter in order to quit.

Until recently, I was a stockholder in Merck & Company, a leading pharmaceutical firm. The officers of that firm had somewhat more power over me because I had invested several thousand dollars in the company. However, that stock was readily salable and was not a major portion of my assets, so the officers' practical influence was not much greater than that of the officers of the service club.

When I owned a condominium apartment, the board of directors had a good deal more practical power over me than did the board of Merck. At the time, my condominium was my principal economic asset, and because I lived there, the board also controlled much of my noneconomic life. Selling the unit, a decision I ultimately made, consumed much time and effort. I could vote, or not, for candidates for each seat on the board every three years, but that right was of little practical value day-to-day.

My children are the beneficiaries of trusts established by their grandparents. My children are underage, concomitantly unsophisticated, have no way of exiting the trust, and have no role in selecting the trustees, who currently control much of their potential inheritance. The practical dependence of my children on the trustees is greater than the power that the officials of my club or of Merck could exercise over me.

Dependence invites abuse. The courts respond by protecting the managed with judicial review of decisions made by the managers. As a general rule, the standards imposed on managers rise with the degree of likely dependence and vulnerability.¹⁴ This is only a general rule because locating any particular entity on a spectrum of dependence is chancy; there are too many variables among organizations and people. Although the officials of my service club have little hold over me, in some communities similar officials wield a great deal of practical economic and social power

14. There are factors other than dependence and vulnerability at play as well, such as the complexity of the organization, the number of principals, and the risks the organization undergoes. See Lawrence, *supra* note 7, at 8–11 (describing the general nature and purpose of a corporate enterprise). Inherent in the text, of course, is the well-recognized conclusion that “fiduciaries” are not all of one stripe. For a summary of the points of distinction, see Clark, *supra* note 7, at 69–73.

over their members. Depending on the person and the community, the practical power of church officials might be very great or very slight. Setting aside the special cases of church governance,¹⁵ the spectrum from nondependence to dependence—with concomitantly rising standards—runs through the following classes:

Least dependent: The classic arms-length transaction.

Slightly dependent: The relationship between the promoter and the customer considering entering into a more lasting arrangement with the promoter. Examples include the relationship between corporate promoter and prospective shareholder and the relationship between land developer and prospective lot buyer.

Somewhat dependent: The relationship between officials of a large, publicly traded for-profit corporation and the shareholders.

Moderately dependent: Various common enterprises in which the manager and the managed each have interests in the success of the enterprise. Examples include (1) the general partnership or joint venture, (2) the relationship between the subdivision developer who retains the power to alter real estate covenants and those who already have purchased lots, (3) the relationship between the holder of the executive right to lease for oil and gas and the landowner,¹⁶ (4) the relationship between oil and gas lessee and landowner,¹⁷ and (5) the relationship between mortgage participation lead lender and participants.¹⁸

Very dependent: In this category are various associations involved in the long-term management of important assets for their members. Examples include property owners' associations created by land covenants and housing, fishing, and agricultural cooperatives.

15. The courts avoid the "excessive entanglement" with religion by generally abstaining from certain intrachurch issues. *See, e.g.,* *United States v. Lee*, 455 U.S. 252, 263 n.2 (Stevens, J., concurring) ("It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims."); *cf. Lemon v. Kurtzman*, 403 U.S. 602, 614–15 (1971) (holding that some form of religious entanglement is necessary but should not be excessive).

16. *See, e.g.,* 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 15.7, at 448–49 (1987 & Cum. Supp. 2001) (discussing the nature and duty owed by each of these parties).

17. The latter relationship is governed by various "implied covenants." *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS 410–13 (2d ed. 1983).

18. *E.g.,* *First Citizens Fed. Sav. & Loan Ass'n v. Worthen Bank & Trust Co.*, 919 F.2d 510, 514 (9th Cir. 1990) (declining to impose fiduciary duty on lead lender in absence of contractual requirement); *see also* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 389–99 (3d ed. 1994).

Extremely dependent: The private family trust and certain analogous relationships, such as guardianships and management of controlling interests in close family corporations.¹⁹

Illustrative of the differences in the standards applied as one moves up the spectrum is the courts' application of the fiduciary duty of loyalty. There is, of course, no such duty in the arms-length relationship and little, if any, from a promoter to a customer, even if the promoter sometimes is misleadingly called a fiduciary.²⁰ Within the intermediate categories, the duty is stronger, but because the manager is also one of the managed, he legitimately may consider his own interests as part of the whole.²¹

19. For a discussion of the differences in the levels of vulnerability/dependence between a trust and a corporation, see Lawrence, *supra* note 7, at 11–12, 23–24, 30.

20. The courts sometimes have labeled this a “fiduciary” relationship, but the promoter’s duties actually are quite limited. See ROBERT G. NATELSON, *THE LAW OF PROPERTY OWNERS ASSOCIATIONS* 454–60 (1989) (discussing the law of promoter liability).

21. *Oil and gas ventures:* See generally 5 KUNTZ, *supra* note 16, § 54.1–2, at 1–7; *id.* § 59.1, at 105–118 (discussing intermediate standard of care, and noting that complete fiduciary subordination is not realistic in this setting); see also 1 KUNTZ, *supra* note 16, § 15.7, at 449 (noting the occasional use of the term “fiduciary” to describe the duty of care toward landowners imposed on the holder of the executive right to lease, and proposing other terms, such as “utmost fair dealing”); HEMINGWAY, *supra* note 17, at 27–32 (discussing standards concerning the exercise of power between landowners and those with the power to lease).

Mortgage participations: See GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT* 512 (5th ed. 1998) (citing First Citizens Fed. Sav. & Loan Ass’n v. Worthen Bank & Trust Co., 919 F.2d 510, 514 (9th Cir. 1990)) (declining to impose a fiduciary duty on lead lender in absence of contractual requirement).

Right of subdivider to alter covenants: The duty is significant, but falls short of fiduciary. See, e.g., *Nelle v. Loch Haven Homeowners’ Ass’n*, 413 So. 2d 28, 29 (Fla. 1982) (using a reasonableness standard); *Berger v. Van Sweringen Co.*, 216 N.E.2d 54, 58 (Ohio 1966) (“The company has discretion to act, but it must not abuse that discretion and must exercise its sound judgment in determining that restrictions should be waived, changed or cancelled.”); *Lakemore Cmty. Club, Inc. v. Swanson*, 600 P.2d 1022, 1026 (Wash. Ct. App. 1979) (applying a reasonableness standard).

Corporations: *Johnson v. Trueblood*, 629 F.2d 287 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981). In *Johnson*, the court stated:

It is frequently said that directors are fiduciaries. Although this statement is true in some senses, it is also obvious that if directors were held to the same standard as ordinary fiduciaries the corporation could not conduct business. For example, an ordinary fiduciary may not have the slightest conflict of interest in any transaction he undertakes on behalf of the trust. Yet by the very nature of corporate life a director has a certain amount of self-interest in everything he does. The very fact that the director wants to enhance corporate profits is in part attributable to his desire to keep shareholders satisfied so that they will not oust him.

The business judgment rule seeks to alleviate this problem by validating certain situations that otherwise would involve a conflict of interest for the ordinary fiduciary.

Id. at 292; *cf.* Lawrence, *supra* note 7, at 5 (stating that self-interested dealing is

In private trusts, however, the duty of loyalty is one of strict subordination to the interests of the beneficiary.²²

The courts apply a similar sliding scale to obligations of care. In the context of publicly traded for-profit corporations, where practical dependence is relatively low, courts use a version of the Business Judgment Rule that protects officials' discretionary decisions from the threat of personal liability, even when the officials are negligent.²³ In property owners' associations, where dependence often is much higher, the version of the Business Judgment Rule applied (when it is applied) gives managers a narrower immunity than that enjoyed by the officers of publicly traded corporations.²⁴ One may argue that the same is true for partnerships and close corporations.²⁵ Trustees may not take advantage of the Business Judgment Rule at all.

permitted in a business corporation if it is fair to the corporation).

Partnerships: See, e.g., UNIF. P'SHIP ACT § 404 (b), (e) (amended 1994), 6 U.L.A. 58 (1995) (limiting the duty of loyalty); *id.* § 404 cmt. 5 (amended 1994), 6 U.L.A. 58, 61 (1995) ("A partner as such is not a trustee and is not held to the same standards as a trustee. Subsection (e) makes clear that a partner's conduct is not deemed to be improper merely because it serves the partner's own individual interest.").

22. See GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 541, at 166 (2d ed. 1993) (discussing generally the duties of a trustee); *cf. Johnson*, 629 F.2d at 292 (stating that a corporate director is not required to subordinate completely his own personal interests).

23. See NATELSON, *supra* note 20, at 441-42 (analyzing the standard of care with regard to officials of for-profit corporations).

24. See *id.* at 441. For example, in *Levandusky v. One Fifth Avenue Apartment Corp.*, 553 N.E.2d 1317 (N.Y. 1990), the court rejected a reasonableness standard in favor of a Business Judgment Rule that would seem to insulate cooperative and condominium directors from ordinary negligence. *Id.* at 1321-22. However, the court also acknowledged that in practice the cooperative/condominium rule would evolve differently from the business corporation context. See *id.* at 1322. Moreover, the court's standard is still significantly higher than that used in reviewing legislative decisions. *Id.* Not only must actions be within the scope of authority and have a legitimate relationship to the welfare of the cooperative, but they may not discriminate against individuals (for example, may not be redistributive) or be taken without notice or consideration of all relevant facts. *Id.* at 1322-23.

25. Application of the rule itself and the version to be applied are controversial issues in partnership law. See J. WILLIAM CALLISON, *PARTNERSHIP LAW AND PRACTICE* § 12.02 (1992 & Cum. Supp. 2000) (discussing the duty of care in partnership management); Norwood P. Beveridge, Jr., *Duty of Care: The Partnership Cases*, 15 OKLA. CITY U. L. REV. 753, 757-58 (1990) (arguing that partners may be subject to a version of the Business Judgment Rule that requires the exercise of ordinary care). *But see* UNIF. P'SHIP ACT § 404(c) (amended 1994), 6 U.L.A. 58 (1995) (stating that a partner's duty in the conduct of a business wind-up is "limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law").

B. *The Standards Regulating Civil Governments*

“The King Can Do No Wrong.”

— Maxim of Anglo-American public law.²⁶

The power of the most powerful trustee pales in comparison to the authority wielded by the officials of civil government, especially those with significant discretionary authority.²⁷ While the responsibility of particular government officials vary, even local legislators and board members routinely engage in regulatory, tax, and redistributive activity with immense implications for the lives, livelihoods, and property of citizens. The adoption and implementation of zoning laws represent just one example. Moreover, both federal and state officials may imprison, seize property, fine, and inflict capital punishment. Federal officials may make war and conscript soldiers for war.²⁸

In the face of such power, the citizen generally has fewer alternatives than when dealing with private actors. Exit (emigration) from even the smallest political jurisdictions ranges from the inconvenient to the nearly impossible. The average citizen’s voice in selecting government officials is limited to the very top tier: the legislature, the chief executive(s), and in some states, the judges. Organization costs of securing the removal of unsatisfactory officials are high. As both federal and state governments expand their responsibilities, choosing among candidates becomes less meaningful because issues increasingly are bundled together. Of course, the U.S. Constitution’s grant of only enumerated powers to the federal government was designed in part to minimize bundling, but that limit has broken down since New Deal days.²⁹ So today Presidential candidates have important things to say about, even intensely local issues, such as the class size at your neighborhood public school.³⁰ Thus, the voter often is faced with choices

26. 18 MCQUILLIN, *supra* note 6, § 53.02.05 to .02.10.

27. Fiduciary-like standards often are applied to non-policy-making public employees. See Clark, *supra* note 7, at 74.

28. For recognition of the general point in a local government context, see Lawrence, *supra* note 7, at 23–24.

29. See, e.g., Wickard v. Filburn, 317 U.S. 111, 128 (1942) (finding that commerce clause power includes Congress’s power to regulate the price of commodities within that commerce); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.9, at 179–84 (6th ed. 2000) (discussing expansion of the commerce clause).

30. See, e.g., Jim Bebbington, *Gore to Visit Valley*, DAYTON DAILY NEWS, Sept. 9, 2000, at 1B (commenting on presidential candidate Al Gore’s discussion of “how to create a

such as: "Let's see. Do I want Candidate A for President, who has more foreign policy experience and will increase my farm subsidy, but take away my son's tax credit and tighten up on my mother's Medicare—or Candidate B, who will cut my farm subsidy, but increase my son's opportunity to log on local lands, raise my mother's social security check, and fund smaller classes for my children?" Obviously, this sort of bundling renders voter choice much less meaningful than at a time when government, especially the federal government, dealt only with a handful of issues.

The reality of power and dependence suggests that the standards of conduct for public officials should at least equal, if not exceed, those applied to private sector managers.³¹ But, especially as concerns policymaking officials, this is not the case. The correlation between dependence and the strictness of oversight ends at the Capitol steps.

Despite ad hoc concessions to individual rights, our public law's motivating theory is the pre-Independence notion that the sovereign can do no wrong. The sovereign is no longer the King but, theoretically at least, the people. Yet the force of administration on individual citizens is much the same. Hence, in the usual case of *Government v. Citizen*, unless Citizen finds protection in some enumerated right, ethics rule, or waiver of sovereign power, he is lost. He has no recourse at law for stupid or negligent acts by public officials because those officials are immune as agents of the sovereign;³² and even if sovereign immunity has been waived,

quality classroom environment, how teachers are trained, creating smaller class sizes and school modernization"); Jeff Leeds, *Campaign 2000: Ad Watch: Democrats' Commercial Touts Smaller Classes, College Tax Breaks*, L.A. TIMES, Sept. 19, 2000, at A12 (discussing the Democratic Party's then planned release of a thirty second commercial in which then-candidate Al Gore would discuss how the hiring of 100,000 additional teachers nationally could reduce class size).

Although this sort of talk comes from politicians of all stripes, the available evidence is that, within the range generally applicable in public schools, class size seems to have relatively little impact on educational quality. See, e.g., ERIC A. HANUSHEK, *THE EVIDENCE ON CLASS SIZE* (1998). Imposing fiduciary standards on public officials would encourage a higher level of discourse on public policy.

31. See Lawrence, *supra* note 7, at 24 (stating that local government should be held to stricter standards applicable to trustees rather than to corporate standards).

32. See 18 MCQUILLIN, *supra* note 6, § 53.02.05 to .02.10 (discussing that sovereign immunity is based on the maxim, "The king can do no wrong."); see also *Collins v. Tabet*, 806 P.2d 40, 44 (N.M. 1991) (holding that a court-appointed guardian ad litem is absolutely immune from liability for work done on behalf of a court, but is liable if operating as a private fiduciary).

recovery may be limited.³³ The government may adversely possess the citizen's land, but the citizen cannot, in turn, adversely possess against the government.³⁴ He may be subject to estoppel, but the government often cannot be.³⁵ If he grants land to a private party, the deed is construed against him, but if government grants land to him, the deed is construed in favor of the government.³⁶ Courts tightly regulate the citizen's power to seize assets *ex parte*, but the government has more latitude.³⁷ If the government regulates the citizen's land so as to diminish its value, he has no recourse unless all economically viable use has been wiped out.³⁸ The citizen's private association cannot engage in redistributive activity, but the government does so incessantly. Unlike private sector employees, public sector employees may be denied the right to strike.³⁹ The federal government is said to be a "trustee" for the American Indians, but ultimately, those trust duties are unenforceable against the federal government.⁴⁰ The private fiduciary must be prepared to justify his decisions by showing reasonable investigation and disinterested analysis; if he cannot, he may see his decisions invalidated and be subject to liability. Yet outside a few instances in which the courts apply

33. See, e.g., FLA. STAT. ANN. § 768.28(5) (West 1997 & Cum. Supp. 2000) (imposing limits of \$100,000 and \$200,000 respectively and no punitive damages or prejudgment interest). For a discussion of the problems of sovereign immunity, including damage limitations, in a currently contentious setting, see generally Tracy B. Harding, *Chalk Talk: Fatal School Shootings, Liability, and Sovereign Immunity: Where Should the Line Be Drawn?*, 30 J.L. & EDUC. 162 (2001).

34. Because *nullum tempus occurit regi* (no time runs against the king). 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.11[1] (Patrick J. Rohan ed., 1999) (citing *Devins v. Borough of Bogata*, 592 A.2d 199, 201 (N.J. 1991)); 4 HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 1170 (3d ed. 1975).

35. See 6 MCQUILLIN, *supra* note 6, § 20.13 ("Generally, estoppel will not be applied to prevent or to hinder the exercise of governmental functions.").

36. ROBERT G. NATELSON, MODERN LAW OF DEEDS TO REAL PROPERTY 97 (1992).

37. See, e.g., 21 U.S.C. § 853(e)(2) (1994) (pertaining to *ex parte* forfeitures); Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 985(d)(1)(B)(ii), 114 Stat. 202, 215 (2000) (considering *ex parte* forfeitures under the title for crimes and criminal procedure).

38. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); 11 POWELL, *supra* note 34, § 79.03[2] (discussing riparian rights and land use regulation); see also *City of Monterrey v. Del Monte Dunes at Monterrey, Ltd.*, 526 U.S. 687, 720 (1999) (holding that the issue of whether a landowner has been deprived of all economic value is a question of fact).

39. See, e.g., N.Y. CIV. SERV. LAW § 210 (McKinney 2000).

40. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 222 (1982 ed.) (stating that Congress can abrogate treaties with Indians unilaterally even to the point of ending the trust relationship); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564 (1903).

“strict scrutiny” or “intermediate scrutiny,”⁴¹ government officials may proceed on slender or no empirical basis and in circumstances of clear conflict of interest, and the courts will sustain the decisions and protect from liability those who made them.⁴²

The extraordinary latitude granted government officials is defended on various grounds. A few of these are reviewed later in this article. Our principal focus here is the argument that stricter public norms are not feasible—that the nature of public responsibility is such that public employees cannot reasonably be held to the sort of standards applied to everyone else. For example, it is said that governments should be exempt from adverse possession because (1) the government has a lot of land, which often is vacant and hard to police, (2) government employees are often negligent, (3) other citizens should not be deprived of land because of that negligence, and (4) public policy is served by government ownership of land.⁴³ Of course, none of this explains why government should be permitted to hold tracts of land so large it cannot manage them, why negligence is so casually accepted among public employees, or why the negligent actors or their insurers should not be responsible for loss rather than the taxpayer or the good faith adverse possessor.

The best answer to the unfeasibility claim, however, is to show by historical example that fiduciary government *is* feasible—and not merely among the bureaucrats, who are subject to daily review from above, but among policymakers themselves. The government conducted by the Roman Emperor Trajan is one historical example.

41. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (explaining that strict scrutiny, applied to race-based classifications, requires a narrowly tailored measure furthering a compelling state interest; and that intermediate scrutiny, applied to gender-based classification, means substantially related to an important governmental objective). Protection of economic expectancies or freedom of contract, however, is deemed to be neither “compelling” nor “important.”

42. See, for example, NOWAK & ROTUNDA, *supra* note 29, § 14.3 on the rational relationship test:

The Court will not grant any significant review of legislative decisions to classify persons in terms of general economic . . . legislation. . . . Thus, if a classification is of this type the court will ask only whether *it is conceivable* that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution. So long as it is arguable that the other branch of government had such a basis for creating the classification a court should not invalidate the law.

Id. § 14.3, at 639; see also *Kimel*, 528 U.S. at 83–84 (describing the various levels of judicial review applied to statutes that allegedly discriminate).

43. 16 POWELL, *supra* note 34, § 91.11[1].

III. THE EMPEROR TRAJAN

A. *Biography*

Trajan—Marcus Ulpius Trajanus—was one of the most admired Roman emperors. He was born in the Spanish-Roman town of Italica, near modern Seville, then part of the Province of Baetica: the first emperor born outside Italy.

The year of his birth is usually given as A.D. 53, but there is good evidence for the year 56.⁴⁴ Nothing is known of his mother; however, some speculate that she was a member of the Celtiberian aristocracy.⁴⁵ His father, also named Marcus Ulpius Trajanus, was later to become governor of Baetica. Trajan's father also served as commander of the Legion X Fretensis in Judaea (A.D. 68–70) under the general supervision of the future emperors Vespasian and Titus, as consul (A.D. 70; the first of his family to attain that office), as proconsul of the province of Asia, and as imperial governor of Syria.⁴⁶

Trajan, the son, pursued a military career from the start.⁴⁷ He spent an unusually long time as a young military tribune—some evidence suggests as long as ten years, but this is improbable. During part of this period, he worked with his father, when the latter was governor of Syria, on the frontier fortifications. Trajan also passed through the normal civilian offices, serving as praetor in 85 and consul in 91. Between those two dates he commanded a legion stationed in Spain. While specific combat experience cannot be identified, we know that Trajan was a well-regarded and broadly experienced military officer.

In 96, following the assassination of the Emperor Domitian, the senate elected Marcus Cocceius Nerva as *princeps*⁴⁸ or emperor.

44. JULIAN BENNETT, *TRAJAN: OPTIMUS PRINCEPS* 13 (1997); DIO, *supra* note 1, at 68.15.6.

45. BENNETT, *supra* note 44, at 11.

46. On Trajanus the Elder, see *id.* at 11–19. Trajanus was a *consul suffectus*, which means he was a replacement consul who took office later in the year rather than the more honored *consul ordinarius*, two of whom took office on January 1 and for whom the year was thereafter designated.

47. The following discussion of Trajan's life is taken from BENNETT, *supra* note 44, at 11–26; R.P. Longden, *Nerva and Trajan*, in 11 *CAMBRIDGE ANCIENT HISTORY* 188, 199–222 (1995); ALBINO GARZETTI, *FROM TIBERIUS TO THE ANTONINES 308–73* (1974); and BERNARD HENDERSON, *FIVE ROMAN EMPERORS 174–207* (1927).

48. *Princeps* was an old civilian title originally given to the chairman of the Roman

To quell unrest in the legions, in 97 Nerva adopted Trajan as his heir, probably because Trajan recently had won some military or diplomatic distinction as governor of Pannonia (near modern Slovenia).⁴⁹ Shortly thereafter, Trajan was transferred to the command of the armies in Lower (northern) Germany. When Nerva died in January 98, Trajan succeeded him.

By temperament and background, Trajan would have been expected to be primarily a military figure rather than a jurist. He is, in fact, celebrated for his military achievements. Much of his life was spent on shoring up the empire's frontiers, especially, but not exclusively,⁵⁰ in the Northeast.⁵¹ In addition to Trajan's labor

senate. It sometimes is translated "first citizen" and is, of course, the basis of our English word "prince." From the beginning, emperors were always known as *principes*.

Imperial nomenclature also included *Imperator*, meaning "commander," a military title. Each emperor further took as family names *Caesar* and *Augustus*—the latter meaning, approximately, "revered" or "honored one."

Trajan's full name on accession was *Imperator Caesar Divi Nervae Filius Nerva Traianus Augustus* (Commander Caesar, son of the deified Nerva, Nerva Trajan Augustus). Emperors tended to accumulate additional titles as their reigns progressed, and Trajan was no exception. Later in his reign, the senate awarded him several additional names, including *Dacicus* (conqueror of the Dacians), *Parthicus* (conqueror of the Parthians), and, most famously, *Optimus* (best).

49. BENNETT, *supra* note 44, at 45–46. Although it has long been assumed that Trajan was in Germany when Nerva adopted him, Julian Bennett makes a strong case that he was the source of certain military laurels sent from Pannonia. *See id.*

50. On Trajan's little-known frontier work in Africa, where he was, however, not present, see Longden, *supra* note 47, at 223. His most important border adjustment outside the Northeast occurred when one of his lieutenants peacefully annexed the Nabataean Arab kingdom, which extended from modern Jordan southeast well into Saudi Arabia. *See EUT.*, *supra* note 1, at 8.3.2; *see also* G.W. BOWERSOCK, *ROMAN ARABIA* 81–85 (1983); G.W. Bowersock, *A Report on Arabia Provincia*, 61 *J. ROMAN STUD.* 219 (1971).

He also did work in Germany, but this seems to have been largely preparatory of future northeastern campaigns. Longden, *supra* note 47, at 225.

51. Trajan's focus on the northeast quadrant of the empire was civil as well as military and is a feature of his reign worth further examination. In addition to the military work mentioned in the text, he made major changes in the administration of the northeast quadrant after the Second Dacian War: Pannonia was divided into upper and lower provinces; the procurator in Thrace was replaced by an imperial governor; the border between the provinces of Asia and Bithynia was adjusted; and the administration of Galatia and Cappadocia was separated. GARZETTI, *supra* note 47, at 345.

The northeastern focus shows up in Trajan's surviving juristic work. Of the eight known recipients of Trajan's rescripts (replies to provincial governors), two are otherwise unknown but five have been identified as imperial governors of northeast provinces. The first was Statilius Severus, Thrace, in A.D. 111–12. DIG. 29.1.24; J. INST. 2.11.1. The second was L. Minicius Natalis, Pannonia, in 116–17. *See* FERGUS MILLAR, *THE EMPEROR IN THE ROMAN WORLD* (1977); SIR RONALD SYME, *TACITUS* 243 (1958); Sir Ronald Syme, *The Jurist Neratius Priscus*, 85 *HERMES* 480, 493 (1957). The third was "Iulius Fronto"—likely P. Calvisius Ruso Iulius Frontinus, Cappadocia, in 105–07. *See* SYME, *supra*, at 793; *cf.* MILLAR, *supra*, at 324. The fourth was Minicius Natalis, Pannonia. *See* MILLAR, *supra*, at 324. The fifth was Gaius Plinius, Bithynia-Pontus, c. 109–11, *see infra*. For an article ex-

in Syria for his father, he worked on boundaries all along the Danube and conquered the trans-Danubian country of Dacia—modern Romania.⁵² As a result of a dispute regarding Armenia, also in the Northeast, he fought an initially successful, but ultimately futile, war with Parthia. He died in 117 with that task unfinished.

Despite Trajan's military accomplishments, the ancients considered his domestic contributions to be at least as significant.⁵³ In general, Trajan tried to be a ruler in the relatively mild tradition of Augustus and Nerva rather than a despot like Nero or Domitian.⁵⁴ As we shall see, he cultivated the image of the *pater patriae*, the Father of His Country, who labored unceasingly for his people and thought only of their welfare: the ruler as fiduciary.

B. Trajan Arrives in American Legal Writing

Despite America's common law tradition, both our culture and our legal system owe much to Rome, whose gifts have been transmitted to us through the office of the intervening years. The image of Trajan as the selfless, ideal ruler arose during his own

plaining Trajan's interest in Bithynia-Pontus, but advancing reasons applicable to most of the northeast quadrant, see Barbara Levick, *Pliny in Bithynia—And What Followed*, 26 GREECE & ROME 119 (1979).

52. Trajan's conquest is why Romania is today an island of Latinate speech in a Slavic sea.

53. See, e.g., EUT., *supra* note 1, at 8.2.1 ("*Rem publicam ita administravit, ut omnibus principibus merito praeferatur*"—"He so governed the state as to exceed all [other] emperors in merit."); *id.* at 8.4.1 ("*Gloriam tamen militarem civilitate et moderatione superavit*"—"He exceeded however his military glory by the quality of his civil government and his self-restraint."); see also EPIT., *supra* note 1, at 13.9 (describing Trajan as author and preserver of "justice and human and divine law").

54. In this century, in counterreaction to the excessive panegyric that always has surrounded Trajan, some scholars have sought a sinister side in his reign. A very great English Roman historian, Sir Ronald Syme, certainly participated in this effort. See, e.g., SYME, *supra* note 51 (which is his monumental work on the subject). Predictably, others even looked harder and purported to find more. See, e.g., K.H. Waters, *Traianus Domitiani Continuator*, 90 AM. J. PHIL. 385 (1969); *Trajan's Character in the Literary Tradition*, in POLIS AND IMPERIUM: STUDIES IN HONOR OF EDWARD TOGO SALMON (1974).

This revisionism clearly went too far. As R.P. Longden observed in his article in the *Cambridge Ancient History*, "Trajan was popular in his lifetime and his memory remained green, and that in an age which, like Tacitus' own, is *infensa virtutibus* [hostile to personal excellence] is hard to forgive . . ." Longden, *supra* note 47, at 201.

To his credit, Professor Bennett steered a moderate course in his recent biography. See generally BENNETT, *supra* note 44.

reign but gained force during those intervening years. In the third century after Trajan's death, the senate acclaimed new emperors with the hope that they would be "more fortunate than Augustus, better than Trajan."⁵⁵ Later the story arose—reported in Dante's *Divine Comedy*—that after hearing of one of Trajan's acts of kindness the Pope successfully prayed for the emperor's salvation. Thus, papal petition and divine grace bestowed upon Trajan alone, of all pagans born after Christ, a place among the blessed.⁵⁶

Then the luster of reputation shone into the modern era. Trajan is celebrated as a founder of two modern civil rights: the right not to be convicted in absentia in a criminal case,⁵⁷ and a criminal defendant's right to confront the witnesses against him, with its concomitant ban on anonymous accusations.⁵⁸ Courts and legal

55. See, e.g., EUT., *supra* note 1, at 8.1.5.3 ("*Felicio Augusto, melior Traino*").

Trajan was a model for fourth-century emperors in a number of ways, including his effort to annex territory in the East. See, e.g., C.S. Lightfoot, *Trajan's Parthian War and the Fourth-Century Perspective*, 80 J. ROMAN STUD. 114, 212 (1990).

56. See DANTE ALIGHIERI, *THE PURGATORIO*, *Canto* 10:70–90 (John Chiardi trans., 1957); see also DANTE ALIGHIERI, *THE PARADISO*, *Canto* 20:43–48, 103–17 (John Chiardi trans., 1961). For references in legal literature, see Michael E. Smith, *Punishment in the Divine Comedy*, 25 CUMB. L. REV. 533, 537 (1994); Carl Landauer, *Mosaic Imaginings: French Art and Its Revolutions*, 7 YALE J.L. & HUMAN. 433, 444 (1995) (book review).

57. See *Coffin v. United States*, 156 U.S. 432, 454 (1895) (citing Trajan's rescript that one should not be convicted of crime in his absence); Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 547 (1994) (discussing Trajan's ruling on not convicting persons in absentia as part of the history of the confrontation doctrine).

58. *Jay v. Boyd*, 351 U.S. 345, 367 (1956) (Black, J., dissenting) (citing ban on anonymous accusations); *Misurelli v. City of Racine*, 346 F. Supp. 43, 49 (E.D. Wis. 1972) (citing Trajan's ban on anonymous accusations), *vacated by City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *State v. Dennison*, 406 S.E.2d 383, 385 (S.C. 1991) (citing Trajan's prohibition of anonymous accusations against suspected Christians as part of a review of the history of the right to confront witnesses against one), *overruled by German v. State*, 478 S.E.2d 687 (S.C. 1996).

Among law review articles mentioning the subject are the following: Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1176 (1993) (commenting on Trajan's rejection of anonymous accusations, correspondence, and the history of the confrontation clause); Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 280 (1956) (quoting Justice Black's dissenting opinion in *Jay v. Boyd* on confrontation and the Pliny-Trajan correspondence); Lawrence E. Harkenrider, *Due Process or "Summary" Justice? The Alien Terrorist Removal Provisions Under the Antiterrorism and Effective Death Penalty Act of 1996*, 4 TULSA J. COMP. & INT'L L. 143, 143 (1996) (quoting Trajan's rescript against anonymous accusations); Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 918 (1988); Alexander M. Sanders, Jr., *Newgarth Revisited: Mrs. Robinson's Case*, 49 S.C. L. REV. 407, 438 (1998) (discussing the right of confrontation and Trajan's proscription against anonymous accusations); Jacqueline Miller Beckett, Note, *The True Value of the Confrontation Clause: A Study of Child*

scholars also cite Trajan for his statement that in a criminal case, "*satius enim esse, impunitum relinqui facinus nocentis, quam innocentem damnari*"—"for it is better that one guilty of crime be unpunished than that an innocent person be condemned."⁵⁹

Thus, in the 1930s, Trajan was enshrined in a bas-relief in the U.S. Supreme Court as a veritable symbol of equal justice under law.⁶⁰

Besides this recognition, American legal writers occasionally refer to Trajan in discussions of law and religion because the prohibition on anonymous accusations appeared in a famous rescript on prosecution of Christians.⁶¹ However, American legal sources

Sex Abuse Trials, 82 GEO. L.J. 1605, 1609 (1994) (commenting on Trajan's rejection of anonymous accusations, correspondence, and the history of confrontation clause); Cathleen J. Cinella, Note, *Compromising the Sixth Amendment Right to Confrontation—United States v. Gigante*, 32 SUFFOLK U. L. REV. 135, 139 (1998) (discussing the right of confrontation and Trajan's proscription against anonymous accusations); John A. Mayers, Note, *Coy v. Iowa: A Constitutional Right of Intimidation*, 16 PEPP. L. REV. 709, 713 (1989) (commenting on Trajan's rejection of anonymous accusations, correspondence, and the history of the confrontation clause); Karen L. Tomlinson, Note, *Maryland v. Craig: Televised Testimony and an Evolving Concept of Confrontation*, 36 VILL. L. REV. 1569, 1610 (1991) (commenting on Trajan's rejection of anonymous accusations, correspondence, and the history of the confrontation clause).

59. The quotation is from Justinian's *Digest*:

Absentem in criminibus damnari non debere, divus Traianus Iulio Frontoni rescripsit. Sed nec de suspicionibus debere aliquem damnari, divus Traianus Adsiduo Severo rescripsit; satius enim esse, impunitum relinqui facinus nocentis, quam innocentem damnari.

This may be translated:

An absent person should not be condemned in a criminal proceeding, the deified Trajan wrote in a rescript to Julius Fronto. But neither should one be condemned on mere suspicion, the deified Trajan wrote to Adsiduus Severus in a rescript; for it is better that one guilty of crime be unpunished than that an innocent person be condemned.

DIG. 48.19.5pr; see *Coffin*, 156 U.S. at 454; Alexander Volokh, *Aside: n Guilty Men*, 146 U. PA. L. REV. 173, 178 (1997).

60. For this and other incidents, see BENNETT, *supra* note 44, at xvi–xvii.

61. *Horace Mann League v. Bd. of Pub. Works*, 220 A.2d 51, 56 (Md. 1966); *Ecker v. First Nat'l Bank*, 1 A. 849, 851 (Md. 1885) (citing Pliny's letter on the Christians regarding the effects of Sunday laws); *Wright v. Dressell*, 3 N.E. 6, 8 (Mass. 1885); *St. Nicholas Cathedral v. Kedroff*, 94 N.Y.S.2d 453, 480 (App. Div. 1950) (Van Voorhis, J., dissenting) (noting that Trajan persecuted Christians), *rev'd*, 96 N.E.2d 56 (N.Y. 1950), *motion granted*, 98 N.E.2d 485 (N.Y. 1951), *rev'd*, 344 U.S. 94 (1952); *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. 401, 429, 438 (1867) (citing Pliny's letter on the Christians regarding the effects of Sunday laws); *Bolling v. Superior Court*, 133 P.2d 803, 809 (Wash. 1943) (showing the importance of religious gestures from Pliny's letter on the Christians); *Raines v. Watson*, 2 W.Va. 371, 388 (1868) (citing Pliny's letter on the Christians regarding the effects of Sunday laws); see also Ralph D. Mawdsley & Charles J. Russo, *Commentary: Religious Expression and Teacher Control of the Classroom: A New Battleground for Free Speech*, 107 EDUC. LAW REP. 1, 14 (1996) (citing the correspondence between Pliny

generally have neglected other aspects of Trajan's juristic record,⁶² especially its most important theme: the ruler as fiduciary.

C. Sources for Trajan's Reign

Before examining the substance of Trajan's record, it is appropriate to say something of the nature of Roman sources, with which the general reader may be unfamiliar.⁶³

The dry sands of Egypt and the diligence of Medieval copyists have left to us a considerable body of literature from the time of the Roman Empire. Unfortunately, the sources on Trajan are less plentiful than for most other emperors of the first and second centuries. For example, the famous compilation of imperial biographies by Suetonius Tranquillus ends two years before Trajan's accession. The less reliable imperial biographies in the pseudonymous *Historia Augusta* do not begin until Trajan's death. The greatest of Roman historians, Tacitus, wrote during Trajan's reign, but he did not write, overtly at least, about Trajan. Dio Cassius (c. A.D. 200), a Roman senator who wrote in Greek, examined Trajan's times in his Roman History, but the relevant chapter survives only in the form of a Byzantine abridgment or "epitome."

In addition to this epitome, the available literary sources on Trajan include the *Panegyricus*, a speech in praise of the emperor

and Trajan as a secondary source verifying existence of Jesus).

62. *But see* Bloom v. Georgia, 20 Ga. 443, 449 (1856) (citing Trajan's letter on fire brigades as part of the history of corporations); John Borrows, *Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia*, 37 OSGOODE HALL L.J. 537, 595-96 (1999) (using the same correspondence to show how a power can control other nations through law); Barbara A. Hauser, *Death Duties and Immortality: Why Civilization Needs Inheritances*, 34 REAL PROP. PROB. & TR. J. 363, 367 (1999) (reciting Trajan's reduction of inheritance taxes in a larger history of death taxes); Joyce Ann Mercer, *Legal and Theological Justice for Abused Adolescent Girls*, 9 J.L. & RELIGION 451, 469 (1992) (discussion of Pliny-Trajan correspondence as part of history of abandoned children); Ronald D. Rotunda, *Essay on the Bill of Rights: Exporting the American Bill of Rights: Lessons from Romania*, 1991 U. ILL. L. REV. 1065, 1067 (observing that the Romans colonized Romania under Trajan).

Sometimes Trajan gets credit for doctrines for which he was not responsible. *See, e.g.*, Adams v. Stephens & Cagger, 26 Wend. 451, 454 (N.Y. 1851) (discussing putative Trajanic law on attorneys' fees); Attorney General v. Barstow, 4 Wis. 567, 597 (1855) (inaccurately crediting Trajan with origin of division of powers).

63. The discussion which follows refers generally to each of the sources cited, *supra* note 1.

published by the consul, Pliny the Younger, in A.D. 100;⁶⁴ Pliny's personal correspondence with and about Trajan;⁶⁵ some short fourth century biographies of the emperor; and bits and pieces of other writings, including the *Historia Augusta's* biography of Hadrian (Trajan's cousin and successor) and comments by the late second century philosopher/rhetorician Fronto.

Most of these sources include useful information about Trajan's legal product, especially Pliny's *Panegyricus* and Pliny's correspondence with and about Trajan. Pliny did, after all, serve Trajan in several legal capacities, including *assessor* (advisor at trial) and imperial governor. Just as important are Trajan's surviving decisions set forth in the *Corpus Juris*, the great sixth century compilation of Roman law assembled by order of the Emperor Justinian.

By far the largest part of the *Corpus Juris* is the *Digest*, which looks rather like an American case digest, except that it contains fragments of juristic writings rather than the holdings of cases. About two dozen of these fragments describe rulings by Trajan. Another part of the *Corpus Juris* is an elementary law textbook—perhaps the most influential law book ever written—Justinian's *Institutes*, which contains three of Trajan's rulings. Also in the *Corpus* is the *Codex*, a collection of later imperial decrees that refer to two decrees issued earlier by Trajan.

To the foregoing, we must add stray fragments of Trajanic law contained in the *Institutes* of Gaius, a second century jurist on which Justinian's *Institutes* is based, and in occasional inscriptions and legends on coins.

Trajan's decisions, wherever found, come in several forms: (1) court decrees in which the emperor was serving as judge, (2) imperial *mandata*—that is, initial instructions to provincial governors, (3) rescripts, such as Trajan's replies to Pliny—imperial letters in reply to official inquiries, usually from provincial

64. Although some have dismissed the *Panegyric* as merely windy adulation, its structure and purpose enhance its credibility as a factual source. See generally BENNETT, *supra* note 44, at 63–66; Mark P.O. Morford, *Iubes Esse Liberos: Pliny's Panegyricus and Liberty*, 113 AM. J. PHIL. 113 (1992); Betty Radice, *Pliny and the Panegyricus*, 15 GREECE AND ROME 166, 168 (1968) ("This, then, is no idle flattery in conventional form; it is rather a sort of manifesto of the senate's ideal of a constitutional ruler . . .").

65. See A.N. Sherwin-White, *Trajan's Replies to Pliny: Authorship and Necessity*, 52 J. ROMAN STUD. 114 (1962).

governors, (4) other official letters, (5) edicts issued under the *ex ante* praetorian (judicial) power, (6) decrees of the senate, which were either initiated by the emperor or otherwise had imperial sanction, and (7) other *constitutiones* ("decisions") the exact nature of which is uncertain, but which may have been issued in rescripts.⁶⁶

Over the last few decades we have been able to glean more information from archeological finds and inscriptions (such as outposts in Trajan's province of Arabia),⁶⁷ legends on coins, and the fruits of detective work of the kind done by the late Oxford scholar Sir Ronald Syme and his disciples.

Because of the lack of traditional sources, modern scholars have written less on Trajan than on emperors such as Augustus or Nero, for whom more information is available. Indeed, until recently, the only full, modern biographical treatment of Trajan available in any language was Roberto Paribeni's *Optimus Princeps*,⁶⁸ published in Italy in 1926. As the time and place of publication might suggest, Paribeni wrote his book from a Fascist viewpoint. Thus, readers interested in more dispassionate treatments had to rely on chapters in larger works.⁶⁹

In 1997, however, Julian Bennett, an English scholar, published the biography *Trajan: Optimus Princeps*.⁷⁰ The same year another English scholar, Anthony Birley, issued his biography of Trajan's kinsman and successor, Hadrian.⁷¹ Professor Bennett's book especially is an important step toward understanding our subject, and his work has helped make this article possible.

66. See generally Hans W. Baade, *The Casus Omissus: A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INT'L L. & COM. 45, 51 (1994) (discussing the role of imperial *constitutiones*, and giving the Trajan-Pliny correspondence as an example).

67. For example, as a result of new finds, we know that the Province of Arabia, annexed by Trajan, was more extensive than formerly believed. Bowersock, *supra* note 50, at 230.

68. ROBERTO PARIBENI, *OPTIMUS PRINCEPS: SAGGIO SULLA STORIA E SUI TEMPI DELL'IMPERATORE TRAIANO* (Arno Press 1975) (1926).

69. Sections on Trajan appear in Longden, *supra* note 47, at 188-252; GARZETTI, *supra* note 47 at 308-73; HENDERSON, *supra* note 47 *passim*.

70. BENNETT, *supra* note 44.

71. ANTHONY R. BIRLEY, *HADRIAN: THE RESTLESS EMPEROR* (1997).

IV. TRAJAN'S APPLICATION OF FIDUCIARY PRINCIPLES

A. *Introduction*

The theme of Part IV is that Trajan implemented what we would today think of as a fiduciary concept of government. I am using the term fiduciary in the sense applied to trusts, cooperative associations, and other entities found near the dependence end of the spectrum.⁷²

I've structured this Part around four central trust obligations: (1) the duty to follow instructions, (2) the duty of loyalty, (3) the duty of impartiality, and (4) the duty of reasonable care. The discussion of loyalty and care include certain subsidiary obligations, such as the duty to avoid conflict of interest, the duty to prevent commingling of accounts, and the duty to exercise care in selecting and supervising agents.

B. *The Duty to Follow Instructions*

"Non est princeps super leges sed leges super principem . . ."

("The emperor is not above the laws, but the laws are above the emperor.")

—Pliny the Younger, on Trajan's ruling philosophy.⁷³

A trustee has the duty to follow the directions of the settlor as expressed in the terms of the trust.⁷⁴ The most important analogue in public service is that officials follow preexisting law until the law is changed in accordance with preexisting procedures.

Today, we tend to think of observing preexisting law as a minimal requirement for public service, although as noted below, significant lapses do occur.⁷⁵ The Romans had come to expect less from their rulers, especially as the principate became more openly absolutist. There was little of the rule of law throughout much of the personal autocracy of Caligula, Nero, and Domitian.⁷⁶

72. *Supra* notes 14–25 and accompanying text.

73. PL.PAN., *supra* note 1, at 65.1.

74. BOGERT & BOGERT, *supra* note 22, § 541, at 161.

75. *See infra* notes 95–96 and accompanying text.

76. SUET., *supra* note 1, *Gaius Caligula* 22.1–42, *Nero* 26.1–30.3, 32.1–38.3, *Domitian*

Because Trajan's power was very nearly absolute, his exacting adherence to law and legal norms is significant. Soon after his accession, he indicated that his would be a law-abiding reign by taking several oaths to that effect. He swore not to inflict capital punishment or disenfranchisement on any member of the senatorial order.⁷⁷ When he took the oath as consul in A.D. 100, he surprised all his listeners⁷⁸ by stating that the law was above the princeps rather than the princeps above the law.⁷⁹

Although some have tried to explain away the significance of the latter statement,⁸⁰ I have been unable to find any reported case in which Trajan simply disregarded established rules or precedents.⁸¹ For one thing, throughout the nearly twenty years of his reign he never violated his promise not to disenfranchise or kill senators.⁸² In summarizing this aspect of Trajan's rule, Professor Bennett states:

Trajan's personal attitude to legal matters [was] that the letter of the law was supreme, but the spirit of humane justice should prevail. . . . [He] was . . . blunt and uncompromising concerning the matter of the law, but emphasized magnanimity where possible.⁸³

There certainly are instances that showed Trajan to be blunt and uncompromising.⁸⁴ Occasionally he softened the full force of the law—his abstaining from vigorous prosecution of Christians is a good example—but always in cases when policy or humanity suggested that course.⁸⁵

10.1–14.1, 15.1.

77. DIO, *supra* note 1, at 68.5.2; *see also id.* at 68.15.

78. PL.PAN., *supra* note 1, at 64.

79. *Id.* at 65.1.

80. *See, e.g.,* Morford, *supra* note 64. The ideal of the emperor voluntarily following the law continued into more oppressive reigns as well. Thus, the military despot Septimius Severus (reigned A.D. 193–211) averred for himself and his savage son Caracalla: "For although we are not bound by the laws nevertheless we live in accordance with the laws." J. INST. 2.17 ("*Licet enim legibus soluti sumus, attamen legibus vivimus.*").

81. On Trajan's attitude towards the law, *see* PL.PAN., *supra* note 1, at 34.2, 36.2, 77.

82. There is no record of Trajan imposing the death penalty on a member of that order. His most severe penalty was exile to an island. *See, e.g.,* PL.EP., *supra* note 1, at 6.31.

83. BENNETT, *supra* note 44, at 123.

84. *E.g.,* PL.EP., *supra* note 1, at 6.31 (discussing the case of the adulterous wife and the centurion).

85. *Id.* at 10.97 (stating that the imperial governor was not to hunt out Christians and to release all who renounced the faith, no matter how suspect previously); *see also* GARZETTI, *supra* note 47, at 355; B.H. Streeter, *The Rise of Christianity*, in 11 CAMBRIDGE ANCIENT HISTORY, *supra* note 47, at 253, 256 ("[T]he point of Trajan's rescript is that,

The emperor's dedication to following established legal rules shines through his official correspondence with Pliny the Younger, then imperial governor of the Province of Bithynia-Pontus in Asia Minor. In his rescripts to Pliny, we find Trajan following established rules of sanctification,⁸⁶ interpreting and following the terms of an earlier decree of the senate,⁸⁷ and deferring to the local law of the province on the respective priorities of municipal creditors⁸⁸ and on whether benefit societies are permitted.⁸⁹

Trajan, or at least his advisors, were technical, but by no means mechanical, in applying established legal rules. A sample of the discernment applied is Trajan's response to a question about the punishment of slaves found trying to enter the military (which was by law to be composed exclusively of freemen), and whether it made any difference whether a slave had been actually enrolled in a particular unit.⁹⁰ Trajan answered by distinguishing among three sets of situations. First, if recruiting officers had pulled the slaves into the army, those officers were the guilty parties.⁹¹ Second, if people seeking to avoid military service had presented the slaves as proxies, then the fault was with the presenters.⁹² Third, if the slaves were truly volunteers (and this required that they know of their disability), then they had to be punished.⁹³ Trajan did not believe that it was important whether a slave had yet been enrolled.⁹⁴

One topic that recently attracted public interest is the extent to which officials can alter established election rules after the election or preliminary event (such as qualification of an initiative petition) already has occurred. There is authority for the proposition that this kind of retroactive rule rewriting violates the Four-

though in the last resort the authority of law must be upheld, its nonobservance in this case is to be connived at so far as is decently possible."). *But see* T.D. Barnes, *Legislation Against the Christians*, 58 J. ROMAN STUD. 32, 48 (1968) (opining that Trajan actually initiated the first specific legislation against the Christians).

86. PL.EP., *supra* note 1, at 10.71.

87. *Id.* at 10.73.

88. *Id.* at 10.109.

89. *Id.* at 10.93.

90. *Id.* at 10.29.

91. *Id.* at 10.30.

92. *Id.*

93. *Id.*

94. *Id.*; *see also id.* at 10.119 (another example of close legal reasoning).

teenth Amendment to the Constitution.⁹⁵ However, one can point to a number of cases in which it has happened. Thus, in 1999, in the author's home state of Montana, the supreme court overturned a successful citizens' initiative by altering *after the election* certain long-standing qualification/election rules relied on by the initiative's sponsors, by state officials, and by the electorate that approved the measure.⁹⁶ Trajan would not approve. In Bithynia-Pontus, the law required municipal senators to be citizens of the cities in whose senates they served. Nevertheless, the law had been widely ignored as municipalities sought to honor outstanding men from other places. Trajan's solution was to preserve the customary rules under which existing senators had been elected—they were allowed to retain their positions—while commanding compliance with the written law in the future.⁹⁷

C. *The Duty of Loyalty*

1. The Ideology of Service

The duty of loyalty in modern trust law is undergirded by the principle that the trustee must serve only the beneficiary: "Perhaps the most fundamental duty of a trustee is that he must display . . . complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons."⁹⁸ This ideal has become an ideology, expressed in the famous words of Justice Cardozo:

95. See e.g., *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), cert. denied sub nom. *Davis v. Alabama*, 516 U.S. 908 (1995); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978); *Kean v. Clark*, 56 F. Supp. 2d 719 (S.D. Miss. 1999).

96. *Marshall v. State*, 975 P.2d 325 (Mont. 1999), retroactively overruling explicitly, *State v. Cooney*, 225 P. 1007 (Mont. 1924); *State v. Alderson*, 142 P. 210 (Mont. 1914); *State v. Bd. of Comm'r*, 87 P. 450 (Mont. 1906), and implicitly, *State ex rel. Montana Citizens for Pres. of Citizens' Rights v. Waltermire*, 729 P.2d 1283 (Mont. 1986) (holding that multifariousness of an initiative does not make it facially invalid); *Sawyer Stores v. Mitchell*, 62 P.2d 342 (Mont. 1936) (insofar as it rejected requiring a separate law for every provision of existing law changed)).

As of this writing, *Marshall* has not been challenged, but an analogous action by the State of Mississippi was invalidated by a federal court the same year. *Kean v. Clark*, 56 F. Supp. 2d 719 (S.D. Miss. 1999) (holding that retroactive state alteration of petition rules to invalidate already validated petition constitutes content-based discrimination in violation of the U.S. Constitution).

97. PL.EP., *supra* note 1, at 10.115 (discussing rules regarding senators). For another example of Trajan's protection of reliance interests, see *id.* at 10.111 (allowing people who received public donations illegally to keep them after twenty years).

98. BOGERT & BOGERT, *supra* note 22, § 543, at 217.

A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.⁹⁹

As Professor Bennett points out, Trajan's reign was permeated by an ideology of service.¹⁰⁰ The imperial propaganda was that Trajan's reign began, or perhaps continued, from Nerva, a new age of government guided by this ideology. The *felicitas temporum*, the happiness of the times, or the *felicitas saeculi*, the happiness of the age, were both descriptions and goals to be served.¹⁰¹

The emperor was unlike a trustee in that he was appointed by the gods, not by a settlor or a court. But like a trustee, the emperor was to care for his charges as God cares for mankind,¹⁰² or as a parent cares for his or her children.¹⁰³ The welfare of his subjects was the ideal ruler's guidestar,¹⁰⁴ as the welfare of the beneficiary is the purpose of the trust. The ideal ruler's fate, like that of the trustee, was to toil unselfishly for those it was his duty to serve.¹⁰⁵ Like the trustee's duties, the ruler's obligations were ties of strict loyalty. "If he failed to honour his obligations in this way . . . he was no better than a traitor to himself and his polity"¹⁰⁶

The reign of the ideal ruler was not oppressive or overly paternal. The well-governed empire was a land where people were free.¹⁰⁷ Like the private trust, it was governed by justice and by the rule of law, and not by the tyrant's whim.¹⁰⁸ Just as a trustee

99. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1929). Interestingly enough, the case involved not a trustee but a joint venturer, for whom the applicable standard normally is somewhat lower. See *id.* at 462; *supra* note 18 and accompanying text (discussing enterprises in which the manager and the managed each have an interest in the enterprise's success).

100. BENNETT, *supra* note 44, at 65.

101. *Id.* The spirit or happiness of the age or of the times are recurrent themes in the Trajanic written product. See PL.EP., *supra* note 1, at 10.55, 10.97; DIG. 48.22.1; *cf.* PL.PAN., *supra* note 1, at 36.4, 40.4, 42, 44.1.

102. BENNETT, *supra* note 44, at 64, 68–70.

103. *Id.* at 66.

104. *Id.* at 68–70.

105. *Id.* at 67–69; see also GARZETTI, *supra* note 47, at 318.

106. BENNETT, *supra* note 44, at 70.

107. *Id.* at 65.

108. *Id.* at 69.

must choose good agents,¹⁰⁹ the perfect emperor selected agents from the most nearly perfect of his subjects,¹¹⁰ and among the imperial armies, he maintained perfect military discipline.¹¹¹

Dio Cassius, often sparing in his praise of emperors, is fulsome in describing Trajan:

Trajan was most conspicuous for his justice, for his bravery, and for the simplicity of his habits. He was strong in body, being in his forty-second year when he began to rule, so that in every enterprise he toiled almost as much as the others; and his mental powers were at their highest, so that he had neither the recklessness of youth nor the sluggishness of old age. He did not envy or slay any one, but honoured and exalted all good men without exception, and hence he neither feared nor hated any one of them. To slanders he paid very little heed and he was no slave of anger. He refrained equally from the money of others and from unjust murders. He expended vast sums on wars and vast sums on works of peace; and while making very many urgently needed repairs to roads and harbours and public buildings, he drained no one's blood for any of these undertakings. . . . His association with the people was marked by affability and his intercourse with the senate with dignity. . . . And even if he did delight in war, nevertheless he was satisfied when success had been achieved, a most bitter foe overthrown and his countrymen exalted. Nor did the result which usually occurs in such circumstances—conceit and arrogance on the part of the soldiers—ever manifest itself during his reign; with such a firm hand did he rule them.¹¹²

In partial fulfillment of the imperial obligation to protect the weak was Trajan's extension of Nerva's *alimenta* program, whereby the state loaned agricultural land to private individuals who paid the interest to cities, who in turn used the money to support poor children.¹¹³ Other enactments reflect the same value of care: measures suppressing crime,¹¹⁴ founding of colonies for

109. See *infra* note 206 and accompanying text.

110. BENNETT, *supra* note 44, at 66.

111. *Id.* at 66, 70. In this sentence, I am playing off the fact that Trajan's most treasured title, *Optimus*, can mean something akin to the way modern Americans use the word "perfect."

112. DIO, *supra* note 1, at 68.7.

113. *Id.* at 68.5.4; see also PL.PAN., *supra* note 1, at 51; Peter Garmsley, *Trajan's Alimenta: Some Problems*, 17 HIST. 367 (1968); Longden, *supra* note 47, at 210–12. The *alimenta* also aided middling farmers who otherwise might have had trouble obtaining financing. See BENNETT, *supra* note 44, at 81–84.

114. See DIG. 47.14.3.3 (suppressing rustlers); PL.EP., *supra* note 1, at 6.19 (suppressing bribery); *id.* at 10.32 (advocating the punishment of criminals); *id.* at 10.78 (preventing breaches of public order); see also DIG. 47.11.6.1 (protection of the grain supply from false balances); *id.* 48.13.5(4).4(7) (suppressing embezzlement). Trajan's famous hostility to pri-

military veterans,¹¹⁵ and that chief duty of all who would rule at Rome, protecting the city's grain supply.¹¹⁶ Trajan's greatest and most lasting show of care for the empire was his stupendous building program, the remains of which are found not only in Rome, but also across the Mediterranean world.¹¹⁷

2. The Duty of Loyalty: The Trustee Must Subordinate His Interest to the Beneficiary's Interest

Indeed, when [the newly-installed Emperor Trajan] first handed to the man who was to be prefect of the Praetorians the sword which this official was required to wear at his side, he bared the blade and holding it up said: "Take this sword, in order that, if I rule well, you may use it for me, but if ill, against me."¹¹⁸

The above statement illustrates the most important rule of the fiduciary duty of loyalty: the trustee's obligation is to subordinate entirely his interests to those of the beneficiaries.¹¹⁹

It is not bold to state that, despite occasional references to "the public trust" and "outstanding public servants," American political practice falls well short of this standard. Politicians are, with good reason, seen as seeking their own interests. This, in turn, fuels public cynicism toward government. Over the last few decades, an entire field of economics, "Public Choice," has grown up

vate associations was partly a crime-prevention measure. See PL.EP., *supra* note 1, at 10.34; *cf. id.* at 10.93.

115. See, e.g., DIG. 50.15.8; VICTOR, *supra* note 1, at 13.4; GARZETTI, *supra* note 47, at 344.

116. The fourth-century biographer Sextus Aurelius Victor reports, "*et annonae perpetuae mire consultum reperto firmatoque pistorum collegio*," that is, "Trajan strengthened the miller's guild to aid the grain supply." VICTOR, *supra* note 1, at 13.5. Some of the emperor's enactments in this regard have survived. See G. INST. 1.34 (giving the citizenship to millers with Latin rights who grind more than 100 *modii* of grain per day); GIOVANNI GUALANDI, LEGISLAZIONE IMPERIALE E GIURISPRUDENZA, *Vat. Frag.* 233, at 17 (Milano, Università di Roma 1963) (Ulpian, *liber de officio praetoris tutelaris*: recording that Trajan also excused those millers from guardianship duty); see also DIG. 47.11.6.1 (protection of the grain supply from false balances). *But see id.* 27.1.17.6 (the exemption from guardianship duties did not extend to shipowners).

117. See BENNETT, *supra* note 44, at 138–60; GARZETTI, *supra* note 47, at 329–39; PL.PAN., *supra* note 1, at 51. Constantine the Great, who ruled 200 years after Trajan, supposedly called Trajan a wall-climbing plant because his name was on so many buildings. See EPIT., *supra* note 1, at 41.13.

118. DIO, *supra* note 1, at 68.16.1; *cf.* VICTOR, *supra* note 1, at 13.9 ("*Tibi istum ad munimentum mei committo, si recte agam; sin aliter in me magis.*"); BIRLEY, *supra* note 71, at 38.

119. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

correlating political outcomes with the personal interests of politicians.¹²⁰

Of course one can never banish private interest entirely from any field of endeavor. However, modern trust law contains rules designed to buttress the subordination principle by tying the interests of trustees to those of their charges,¹²¹ eliminating conflicts of interest,¹²² and imposing clear and strict rules of conduct.¹²³

The principle of subordination to the interests of the beneficiaries runs like a motif throughout Trajan's administration. As the quotation extracted above shows, the emperor began his reign by, in effect, ordering his Praetorian Prefect to kill him, as Domitian's functionaries had killed him,¹²⁴ if he ever violated his trust. At another time, Trajan encapsulated his philosophy of government in his own variation on the Golden Rule. He said that he wanted to be the same kind of emperor toward private citizens as he would have wished an emperor to be if he had been a private citizen.¹²⁵

Allegations of self-denial were not unusual among Roman rulers,¹²⁶ but in this case, the conduct honored the words.¹²⁷ On his accession in A.D. 98, Trajan surprised many by lingering on the Rhine and Danube borders to complete the defenses there rather than hastening to Rome to enjoy the fruits of power.¹²⁸ Because of

120. Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988).

121. See, e.g., BOGERT & BOGERT, *supra* note 22, § 975, at 13, 15 (explaining that the compensation of a trustee is tied to the value of principal or income in the trust); RESTATEMENT (SECOND) OF TRUSTS § 242 cmt. b (1959) (explaining that the compensation of a trustee is tied to the value of the principal or income in the trust); cf. *id.* § 243 (explaining that a breach of trust may result in reduced compensation or no compensation to the trustee).

122. BOGERT & BOGERT, *supra* note 22, § 543, at 218.

123. E.g., *id.* § 543(A), at 271 (stating that a trustee is not permitted to buy at his own sale).

124. SUET., *supra* note 1, *Domitian* 17.1 to .2.

125. EUT., *supra* note 1, at 8.5.1 ("*respondit talem se imperatorem esse privatis, quales esse sibi imperatores privatus optasset*").

126. Andrew Wallace-Hadrill, *Civilis Princeps: Between Citizen and King*, 72 J. ROMAN STUD. 32, 36-37 (1982) (stating that self-denial, or *recusatio*, was a basis of the prince's ritual); see also *supra* note 80 and accompanying text.

127. Ancient historians frequently mention Trajan's spirit of self-denial. Thus, Sextus Aurelius Victor describes him as "[f]air, forgiving, very patient and very faithful to his friends." VICTOR, *supra* note 1, at 13.9. He adds that "[i]ndeed also the love of wine, with which vice Nerva was afflicted, [Trajan] had moderated with prudence, prohibiting his orders after long repasts from being carried out." *Id.* at 13.10.

128. BIRLEY, *supra* note 71, at 38-40.

his absence from Rome, Trajan declined election as *consul ordinarius* (one of the year's initial consuls) for A.D. 99.¹²⁹ Refusing this honor was particularly remarkable given the recent imperial practice of monopolizing it.¹³⁰ When Trajan finally did return, his procession through the provinces was marked by unusually moderate expenditure and respect for lives and property.¹³¹ His entry into the capital, on foot, was similarly unassuming.¹³² This emphasis on moderation continued throughout his reign.¹³³

When other emperors needed help, they had conscripted it. When Trajan sought to add a useful person to his staff, he allowed the man to decline for reasons of personal preference.¹³⁴ The emperor's own inclinations were military, but as Dio notes, he subordinated his preferences by conscientiously performing his civilian duties:

He did not, however, as might have been expected of a warlike man, pay any less attention to the civil administration nor did he dispense justice any the less; on the contrary, he conducted trials, now in the Forum of Augustus, now in the Portico of Livia, as it was called, and often elsewhere on a tribunal.¹³⁵

Pliny has left us several eyewitness descriptions of Trajan's diligence in conducting judicial trials.¹³⁶

During the previous century, suspicious emperors had relied heavily on paid informers to ferret out possible opposition. Evidence from informers was supplemented by torturing slaves to induce them to testify against their masters. Emperors recurrently terrorized Rome's upper classes with trials for treason, executions, seizures of estates, and forced disinheritance. There was little freedom of speech, even in the senate. Wealthy Romans protected themselves by keeping their mouths shut and bribing

129. PL.PAN., *supra* note 1, at 56.3.

130. This was especially true under the Flavian Emperors: Vespasian, Titus, and Domitian. *See, e.g.*, BENNETT, *supra* note 44, at 44 (stating that Trajan and a colleague were only the second pair of nonimperial *ordinarii* in Domitian's reign); SUET., *supra* note 1, *Vespasian* 24.1 (showing that Vespasian held consulate nine times in a ten-year reign), *Domitian* 13.3 (showing that Domitian held the consulate 17 times).

131. PL.PAN., *supra* note 1, at 20.2-3, 22.1-2.

132. BIRLEY, *supra* note 71, at 40.

133. *See, e.g.*, PL.EP., *supra* note 1, at 10.43 (stating that there was a reduction of expenditure on delegations to salute the emperor).

134. BENNETT, *supra* note 44, at 66; PL.PAN., *supra* note 1, at 86.

135. DIO, *supra* note 1, at 68.10.2.

136. *See* PL.EP., *supra* note 1, at 6.22, 6.31.

the emperor, either with inter vivos gifts or with a portion of their inheritances; thus, they sought to preserve the balance of their estates.

During his short reign, Trajan's predecessor, Nerva, largely ended imperial abuses,¹³⁷ and during his long reign, Trajan avoided them almost entirely. Specifically, he suppressed and exiled many informers,¹³⁸ stopped using slaves for political purposes,¹³⁹ ended the treason trials,¹⁴⁰ ceased property forfeitures,¹⁴¹ enforced wills regardless of whether they bequeathed anything to the emperor,¹⁴² declined various gifts,¹⁴³ and restored freedom of speech in the senate.¹⁴⁴ Pliny said, "You order us to be free, and so we are free."¹⁴⁵

The end of forfeitures was particularly impressive since under Domitian's reign the forfeiture of estates had been a significant revenue source.¹⁴⁶ Trajan went even further by restoring unneeded imperial estates to the private sector, either by gift or by sale.¹⁴⁷

Under previous rulers, another source of revenue had been to

137. For a summary of Nerva's policies, see Longden, *supra* note 47, at 188–99.

138. BENNETT, *supra* note 44, at 118; PL.PAN., *supra* note 1, at 34–36. Some informers were around years later. Pliny served as assessor (judicial assistant) to the emperor in a trial in which the side that used an informer lost. See PL.EP., *supra* note 1, at 6.31.

139. PL.PAN., *supra* note 1, at 42. Along the same line, imperial grants of freedom to slaves manumitted without notice to their masters would not prejudice the estates of those masters. G. INST. 3.32.

140. PL.EP., *supra* note 1, at 10.82; PL.PAN., *supra* note 1, at 42; see also EUT., *supra* note 1, at 8.4 ("[O]mni eius aetate unus senator damnatus sit atque is tamen per senatum ignorante Traian[o]."—"[T]hroughout his reign one senator was condemned and that was by the senate with Trajan not knowing about it.")

141. PL.PAN., *supra* note 1, at 50 (no seizures of property); DIG. 48.22.1 (no seizure of goods of exiles).

142. PL.PAN., *supra* note 1, at 43; see also DIG. 49.14.13 (discussing the "Benefit of Trajan"); see *infra* at notes 214–15 and accompanying text (discussing the "Benefit of Trajan" in greater detail).

143. PL.PAN., *supra* note 1, at 41.1.

144. BENNETT, *supra* note 44, at 66 (freedom of speech); PL.PAN., *supra* note 1, at 36.2–3. On Trajan's administration generally, historian Dio Cassius wrote: "When he came to Rome he did much to reform the administration of affairs and much to please the better element . . ." DIO, *supra* note 1, at 68.5.4. Pliny pointed out that Trajan's mildness improved the military, too: "[N]o one in command need fear to be unpopular—or popular with his men." PL.PAN., *supra* note 1, at 18.2.

145. BENNETT, *supra* note 44, at 65; PL.PAN., *supra* note 1, at 66. One is reminded of the conduct of the democratization of the Japanese people after World War II, made possible by imperial order.

146. Longden, *supra* note 47, at 194; see also SUET., *supra* note 1, *Domitian* 12.1 to .2.

147. PL.PAN., *supra* note 1, at 50.

conscript wealthy people to borrow government funds not currently being used, and to pay to the government hefty rates of interest on those unwanted loans. Trajan stopped this practice, telling his officials that if they wanted to place government loans they needed to find voluntary borrowers, even if it meant lowering the interest rate.¹⁴⁸

Time and again Trajan told his agents to, in effect, read his lips: No new taxes. At his accession, he forgave the *aurum coronarium* ("coronation gold"), the tribute generally collected from the provinces when a new emperor came into office,¹⁴⁹ as well as several other exactions imposed on provincials.¹⁵⁰ In his correspondence with Pliny when the latter was a provincial governor, Trajan refused to authorize new spending unless it came from existing revenue sources.¹⁵¹ Trajan rewarded Hadrian with a consulate partly because Hadrian had restrained tax collectors during his tenure as praetorian legate to the province of Lower Pannonia.¹⁵² Even Trajan's major social spending initiative, the expansion of the *alimenta*,¹⁵³ was funded without a tax increase.¹⁵⁴

Trajan's government was frugal enough that he was able to reduce taxes even before bringing home a massive amount of booty from the Dacian Wars. During his first two years in office, he greatly extended Nerva's cuts in the inheritance tax. As Nerva had exempted estates inherited from father to son, Trajan exempted estates passed from a son to a father—"for [he] would not suffer taxes to be levied on a father's tears!"¹⁵⁵ This was only one of a number of inheritance tax exemptions adopted, including a complete exemption for smaller estates.¹⁵⁶

All told, Trajan's self-denying attitude toward revenue¹⁵⁷ is a

148. PL.EP., *supra* note 1, at 10.55.

149. GARZETTI, *supra* note 47, at 315.

150. Longden, *supra* note 47, at 213 (discussing remission of *aurum coronarium* and of several other exactions).

151. PL.EP., *supra* note 1, at 10.24; *see also id.* at 10.91.

152. H.A., *supra* note 1, *Hadrian* 3.9 to .10.

153. *See supra* note 113 and accompanying text.

154. PL.PAN., *supra* note 1, at 27.4, 29.4.

155. "[*Quod lacrimas parentum vectigales esse non pateris.*" *Id.* at 38.3.

156. *E.g., id.* at 39 (exempting from taxation estates passing between grandchildren and grandparents, among brothers and sisters, and among those who had attained citizenship through Latin rights); *id.* at 39–40 (exempting small estates from taxation).

157. *Cf. EUT., supra* note 1, at 8.4 ("*[N]ihil iniustum ad augendum fiscum agens.*"—

refreshing contrast to modern practices—when government agencies engage in ceaseless public relations efforts to convince policymakers and the public to increase the size of their budgets.

D. *The Duty of Impartiality*

Interest group politics, resulting in redistribution of resources and privileges from one group to another, long has been a feature of American public life. However, private sector managers generally are not permitted to engage in redistribution among those they serve, absent specific authorization in the operative documents.¹⁵⁸ The *duty of impartiality* is the fiduciary obligation that prohibits trustees from favorably treating some beneficiaries at the expense of others, whether those beneficiaries are concurrent or successive.¹⁵⁹ A trustee must act with “due regard” to each beneficiary’s “respective interests.”¹⁶⁰

Trajan was a product of this time, so his solicitude for treating people impartially did not extend to slaves¹⁶¹ or to prisoners of

“Doing nothing unjust to increase the imperial treasury.”)

158. Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1547–54 (1982). Perhaps the most common exception is the power of a trustee to invade the corpus, if necessary, for the maintenance of a life tenant, who is often a widow or widower. See *Alexander v. Alexander*, 561 S.W.2d 59, 65–68 (Ark. 1978).

159. RESTATEMENT (SECOND) OF TRUSTS § 183 (1959). The text of section 183 (Duty to Deal Impartially with Beneficiaries) states: “When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.” *Id.* Comment a to section 183 clarifies the rule, stating: “The rule stated in this Section is applicable whether the beneficiaries are entitled to interests in the trust property simultaneously or successively.” *Id.* § 183 cmt. a; see also BOGERT & BOGERT, *supra* note 22, § 541, at 163–66.

160. RESTATEMENT (SECOND) OF TRUSTS § 232 (1959). Section 232 (Impartiality between Successive Beneficiaries) states: “If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.” *Id.* Comment a, which states when section 232 is applicable, provides:

The rule stated in this Section is an application of the broader rule stated in § 183 that where there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them. That rule is applicable whether the beneficiaries are entitled to interests in the trust property simultaneously or successively.

Id. § 232 cmt. a.

Comment d refers to what duties the section is applicable. “The rule stated in this Section is applicable to the duty of the trustee in making or continuing investments, to the general management of the trust estate, the making of repairs and replacements, and to the allocation or receipts and expenditures to principal and income.” *Id.* § 232 cmt. d.

161. Although even slaves received additional legal protection. DIG. 40.5.26.7 (granting

war, many of whom died in the arena or lost their homes.¹⁶² However, he did extend the principle of impartiality more widely than had been done previously, and in some ways, more widely than we extend it in public law today.

Trajan's benevolence toward children is, to be sure, consistent with the spirit of our public law. Indeed, it is one of the most attractive aspects of his reign. One reason for his policies was doubtless military: the need for future soldiers and the mothers of future soldiers—for some aspects of these policies are clearly tied to military needs.¹⁶³ But military needs do not fully explain programs such as the *alimenta*,¹⁶⁴ the manumission of foundlings,¹⁶⁵ and the protection of children both from parental abuse¹⁶⁶ and from theft by faithless guardians.¹⁶⁷

Trajan's evenhanded care for the provinces and for noncitizen provincials also is consistent with our law.¹⁶⁸ As noted earlier, Trajan relieved provincials from the "coronation gold" and from several other impositions.¹⁶⁹ He sent wheat to Egypt when that country's usually reliable crop failed,¹⁷⁰ rewarded agents who governed the provinces well,¹⁷¹ punished those who had acted inappropriately,¹⁷² and avoided imposing new taxes on the provincials.¹⁷³ Under his administration, a growing number of provincials entered the senate and other high offices.¹⁷⁴ His corre-

freedom despite the noncooperation of a master who was bound to grant it).

162. BENNETT, *supra* note 44, at 101. On the lavishness of Trajan's arena "spectaculars," see also Longden, *supra* note 47, at 215.

163. DIG. 49.16.4.12 (protecting children for military service); see also BENNETT, *supra* note 44, at 119 (validating military wills).

164. PL.PAN., *supra* note 1, at 27–28. See generally BENNETT, *supra* note 44, at 81–84 (pointing out that the program served agricultural and humanitarian, as well as military purposes).

165. PL.EP., *supra* note 1, at 10.66

166. DIG. 37.12.5 (requiring abusive father to manumit son).

167. COD. 5.75.5.

168. On Trajan's general care for the provinces, see HENDERSON, *supra* note 47, at 200–11. Henderson makes the point that while Trajan's attentions were well meant, his practice of appointing *curatores* in Italy and the provinces was so extended by his successors that it led to a breakdown in local government. *Id.* at 202.

169. See *supra* text accompanying notes 149–50.

170. PL.PAN., *supra* note 1, at 30–32.

171. *Id.* at 70.8; see also H.A., *supra* note 1, *Hadrian* 3.9 to .10. The empress Plotina is said to have encouraged good provincial government. EPIT., *supra* note 1, at 42.21.

172. BENNETT, *supra* note 44, at 76–77.

173. PL.EP., *supra* note 1, at 10.24 (no new taxes); PL.PAN., *supra* note 1, at 29.4.

174. HENDERSON, *supra* note 47, at 170; Longden, *supra* note 47, at 221–22 (referenc-

spondence with Pliny highlights his concern for provincial interests.¹⁷⁵ We see him deferring to local laws, customs, and institutions;¹⁷⁶ authorizing public works such as canals,¹⁷⁷ aqueducts,¹⁷⁸ and sewers;¹⁷⁹ and studiously avoiding practices for the sole reason that they would inconvenience the provincials.¹⁸⁰

It is in his treatment of individuals whose interests clashed with the state, however, that Trajan's policy of impartiality went beyond our own public law. Early in his reign, he reorganized the courts that adjudicated disputes between taxpayers and the imperial treasury so that the taxpayers more often won.¹⁸¹ That does not seem remarkable to Americans only a few years after reforms in the Internal Revenue Service,¹⁸² but that was not all. Trajan made it clear that he considered his duty toward individuals as important as his duty toward governments.¹⁸³ He rejected the preferential mechanisms, so common in our system, that give governments the upper hand in disputes with private citizens.

For example, in our law, creditors who are governmental entities routinely enjoy priority over private creditors.¹⁸⁴ Insofar as he could do so without ignoring local institutions, Trajan rejected such priorities.¹⁸⁵ Similarly, our law protects the negligent judge, and most other negligent officials, from direct liability for the

ing, inter alia, "Trajan's readiness to favour a competent man whatever his origins").

175. See PL.EP., *supra* note 1, at 10.18, 10.22.

176. *Id.* at 10.80, 10.91 (following local rules regarding citizenship).

177. *Id.* at 10.38, 10.42.

178. *Id.* at 10.62.

179. *Id.* at 10.99.

180. *Id.* at 10.69 (avoiding hardship for provincials); *id.* at 10.44 (relieving provincials of unnecessary expense); *id.* at 10.55 (discussing coerced loans); see also PL.PAN., *supra* note 1, at 29.3-5 (paying allies who supply wheat).

181. PL.PAN., *supra* note 1, at 36.3-4. This may have been a continuation of a reform begun under Nerva. Longden, *supra* note 47, at 193.

182. *E.g.*, Treasury and General Government Appropriations Act of 2000, Pub. L. No. 106-58, §§ 102-03, 113 Stat. 430, 437 (1999) (discussing the education of Internal Revenue Service employers in taxpayer rights and maintaining taxpayer confidentiality).

183. PL.EP., *supra* note 1, at 10.111 (explaining that cities may not use old claims to disturb long-held private fortunes, for "*Non minus enim hominibus cuiusque loci, quam pecuniae publicae consultum volo*," that is, "For I want to take no less account of individuals in each place than I do of government funds.>").

184. See, *e.g.*, NELSON & WHITMAN, *supra* note 18, at 353-54 (discussing the Federal Deposit Insurance Corporation being treated as a holder in due course of commercial paper owned by failed bank even though a private party taking paper in similar circumstances would be disqualified); 5 POWELL, *supra* note 34, § 39.04[3] (discussing the priority of real property tax liens over preexisting private interests).

185. PL.EP., *supra* note 1, at 10.109.

harm they do.¹⁸⁶ Trajan ruled that city magistrates responsible for appointing a faithless guardian, who left the ward's estate bankrupt, could be liable for the loss.¹⁸⁷ Our law sharply limits the right to compensation for government takings,¹⁸⁸ Trajan's government protected individuals against preventable losses and compensated for others.¹⁸⁹

E. *The Trustee Must Exercise Reasonable Care*

1. Public Law in the United States

Outside of discrete areas, American law does not impose fiduciary-style obligations of due care on public officials. Legislators may vote with impunity for legislation based on slender, or no, empirical grounds; at most, they may be defeated for reelection or see their handiwork invalidated by the courts, although rarely even then. They do not suffer personal liability for the damage they do. Judicial immunity is absolute, except for ungainly removal remedies, such as impeachment. The doctrine of sovereign immunity, except where waived, protects administrators from responsibility for actions that may impose great loss on private citizens, on the general public, or on the government itself. Waivers of immunity may be limited to fairly small amounts.¹⁹⁰

Even in the financial area, where the standards are higher, government financial practice often is less rigorous than that in the private sector.¹⁹¹

186. *Cf.* *Collins v. Tabet*, 806 P.2d 40, 44 (N.M. 1991) (holding that a court-appointed guardian ad litem is absolutely immune from liability for work on behalf of court, but liable if operating as a private fiduciary).

187. COD. 5.75.5; *cf.* RESTATEMENT (SECOND) OF TRUSTS § 174 (1959) (explaining the duty to use reasonable care in selection of agents).

188. *See supra* note 38 and accompanying text.

189. *See* G. INST. 3.72; J. INST. 3.7.4; COD. 7.6.1, 7.6.12 (preventing an imperial grant of citizenship to a patron's client from prejudicing the patron's inheritance rights); PL.PAN., *supra* note 1, at 29.3–5 (paying for goods requisitioned, even from noncitizens); PL.EP., *supra* note 1, at 10.55 (rejecting standard practice of forcing wealthy citizens to borrow excess government funds).

190. *See supra* note 33 and accompanying text.

191. One example of legislative problems arising from reliance on misleading official financial statements from government agencies is discussed in Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 MONT. L. REV. 495, 516 (1997). In this case, erroneous official figures induced the Montana state legislature to adopt tax

By contrast, private fiduciaries, even though they enjoy a good deal less power than agents of the sovereign, are bound by strict standards of care. For example, in the management of a trust, "the trustee is required to manifest the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question."¹⁹² Moreover, in contradistinction to the political arena, where there is a tendency to justify harmful acts by pleading good intentions, in the trust context, "[t]he duty to use the care and skill of an ordinarily prudent man is absolute. The fact that the trustee was honest and well intentioned will not excuse him from the manifestation of the required amount of diligence and prudence."¹⁹³ How much closer Trajan's standards approached our fiduciary norms than our governmental norms appears partly from the discussion regarding his care for the provinces.¹⁹⁴ Additional light is cast by an examination of other financial, judicial, and administrative enactments.

2. The Duty of Care: Financial Measures

Early in his reign, Trajan took several steps to ensure greater fiscal accountability in government. The state treasury (*aerarium*) had become greatly entangled with the imperial estate (*fiscus*), and Trajan separated them to the extent possible.¹⁹⁵ In doing so, he anticipated the modern trustee's obligation to segregate the trust assets and not mingle them with his own assets or with those of other trusts.¹⁹⁶ Furthermore, he ordered publication of imperial travel expenses and took other steps to maintain the integrity of government financial accounting.¹⁹⁷

measures that provoked a popular revolt of which your author was the principal leader.

192. BOGERT & BOGERT, *supra* note 22, § 541, at 167; *see also* RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

193. BOGERT & BOGERT, *supra* note 22, § 541, at 177.

194. *See supra* notes 168–80 and accompanying text.

195. BENNETT, *supra* note 44, at 124–26. On the *fiscus*, *see* Fergus Millar, *The Fiscus in the First Two Centuries*, 53 J. ROMAN STUD. 29 (1963).

196. BOGERT & BOGERT, *supra* note 22, § 541, at 161; *see also* RESTATEMENT (SECOND) OF TRUSTS § 179 (1959) (explaining the duty to keep funds separate).

197. BENNETT, *supra* note 44, at 126; PL.PAN., *supra* note 1, at 20.5–6 (describing the publication of travel expenses); *see also* PL.PAN., *supra* note 1, at 48.22.1 (maintaining integrity of accounts cited as a reason for not seizing goods of exiles); *cf.* RESTATEMENT (SECOND) OF TRUSTS § 173 (1959) (explaining the trustee's duty to furnish information to

Under fiduciary law, a trustee must collect and preserve the trust principal.¹⁹⁸ Parallels in Trajan's administration include legislation on embezzlement,¹⁹⁹ an order for the investigation of a waste of public funds,²⁰⁰ and an order for investigation of private accounts with public implications.²⁰¹ He enforced financial promises made by private citizens to cities,²⁰² and refined procedures for interaction between provincials and fiscal officers.²⁰³ The Benefit of Trajan²⁰⁴ offered rewards for those voluntarily relinquishing to the state treasury improperly retained inheritances.

The worldwide phenomenon of privatization of unproductive state assets reflects an understanding that sometimes a government can further the public interest by disposing of assets rather than merely by amassing more. Trajan conducted his own privatization plan by selling and giving away underutilized imperial property.²⁰⁵

3. The Duty of Care: Selection and Supervision of Agents

The princes could not rule the empire alone. He needed loyal and competent agents. Modern fiduciary law requires a trustee to exercise reasonable care in selecting, supervising, and investigating agents.²⁰⁶ This section discusses some of the methods by which Trajan complied with modern fiduciary standards in that regard.

The first thing was to choose excellent subordinates. There is every indication that Trajan did this. The student of the era gains

beneficiary).

198. BOGERT & BOGERT, *supra* note 22, § 541, at 160–61.

199. DIG. 48.13.4.7.

200. PL.EP., *supra* note 1, at 10.38.

201. *Id.* at 10.82.

202. DIG. 50.12.14 (promise to construct a work for the city); *cf.* RESTATEMENT (SECOND) OF TRUSTS § 177 (1959) (discussing the duty to enforce claims).

203. GUALANDI, *supra* note 116, *Frag. de Iure Fisci* 6, at 17 (*Edicto divi Traiani cavetur, ne qui provincialium cum servis fiscalibus contrahunt nisi absignante procuratore: quod factum dupli damno vel reliquorum exsolutione pensatur.*).

204. *See infra* notes 214–15 and accompanying text.

205. PL.PAN., *supra* note 1, at 50.5 (describing the sale of such property); *id.* at 50.7 (describing the donation of such property); *see also* PL.EP., *supra* note 1, at 10.70 to .71 (describing the donation of imperial property to the City of Prusa). This apparently continued a program begun under Nerva. Longden, *supra* note 47, at 195.

206. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, HANDBOOK OF THE LAW OF TRUSTS 335 (5th ed. 1973). This is a hornbook edition of the work cited *supra* note 22.

confidence in the ability and dedication of counselors and agents such as Neratius Priscus, Hadrian,²⁰⁷ Juventius Celsus, Pliny, and Trajan's special friend, Lucius Licinius Sura.²⁰⁸ In this category also, one must include Trajan's wife, the Empress Plotina. She is said to have had an active interest in assuring honest government for the provinces²⁰⁹ and in improving the resolution of financial disputes between the treasury and the general public.²¹⁰ Her comportment is captured by historian Dio Cassius:

When Plotina, his wife, first entered the palace, she turned round so as to face the stairway and the populace and said: "I enter here such a woman as I would fain be when I depart." And she conducted herself during the entire reign in such manner as to incur no censure.²¹¹

Trajan applied rigorous selection procedures to less exalted offices as well. Pliny tells how the emperor, by selecting judges more impartial than previous ones, ensured that in cases between taxpayers and imperial treasury, the taxpayers often won.²¹²

Key to good administration is a proper arrangement of incentives and disincentives. We know of three relevant actions in Trajan's administration. The first was a law curbing conflicts of interest in the senate by requiring all candidates for office to invest at least a third of their resources in Italian land. At a time when land comprised much of society's wealth, this helped ensure that senators would feel directly the impact of their domestic policies, for good or ill.²¹³ The second was an edict called the *beneficium Traiani*, or Benefit of Trajan.²¹⁴ Designed, perhaps, as a substitute for the disgraced system of informers, it offered cash rewards to putative heirs (many, if not most of whom, would have been in the higher orders and thus in Trajan's service) who voluntarily came forward to report that they might receive an inheri-

207. For Hadrian's record in maintaining military discipline and restraining overreaching tax collectors, partly for which he was rewarded with a consulate, see BIRLEY, *supra* note 71, at 53; H.A., *supra* note 1, *Hadrian* 3.9 to .10.

208. For a more complete list of Trajan's counselors or *amici*, see GARZETTI, *supra* note 47, at 340-41 and Longden, *supra* note 47, at 221-22.

209. EPIT., *supra* note 1, at 42.21.

210. BENNETT, *supra* note 44, at 77.

211. DIO, *supra* note 1, at 68.5.5.

212. PL.PAN., *supra* note 1, at 36.3-4.

213. PL.EP., *supra* note 1, at 6.19.

214. DIG. 49.14.13pr; see also *id.* 34.9.5.20 (making a later reference to the Benefit of Trajan).

tance that legally should go to the state treasury (*aerarium*). Each award amounted to one-half of the sum collected that was due the treasury.²¹⁵

Third, the emperor let it be known that agents in his service would be held accountable if they failed to adhere to high ethical standards,²¹⁶ and that, like everyone else, they were subject to the law. In one case, the heirs of a testator commenced a lawsuit charging two defendants with forging part of a will. One of the defendants was Eurythmus, a freedman and procurator (administrative officer) of the emperor. When some of the heirs, perhaps concluding that discretion was the better part of valor, offered to drop the suit against Eurythmus, Trajan reassured them with the remark, "*Nec ille Polyclitus est nec ego Nero*"—"Neither is he Polyclitus nor am I Nero"—thereby letting the heirs know that unlike Nero's freedman Polyclitus, Trajan's agents were not above the law. The suit went forward.²¹⁷

Trajan's insistence on compliance with law and morality did not mean that he micromanaged his agents. On the contrary, so long as they served him well, he let them fulfill their duties with relatively little interference.²¹⁸

However, among those most dangerous of the emperor's subordinates, the troops, the emperor insisted upon strict discipline. Unrest among the soldiers had unseated several emperors, and might have unseated Nerva had he not adopted Trajan.²¹⁹ Hence,

215. There is a mystery surrounding the Benefit: Why, under this edict, were the facts justifying forfeiture reported to the state treasury or *aerarium* while the forfeitures themselves were to the emperor's estate or *fiscus*? While there are other possible answers, I believe that the text of the edict was altered, either before, during, or after the compilation of Justinian's *Digest*. The change might have resulted from a desire to set forth more closely the substantive law as it existed during the life of the copyist: for even by the time of Paulus, the writer who is our source for the fragment (early third century), the *aerarium* had ceased to be of much importance. The Benefit of Trajan is reported in the *Digest* under the heading "*De Iure Fiscii*;" there is no section entitled "*De Iure Aerarii*." The change could not have been an accident. It is repeated in the *Digest* at 49.14.13.1, 49.14.13.3, and 49.14.13.5.

216. PL.EP., *supra* note 1, at 6.31 (discharging and exiling a centurian for having an affair with another's wife).

217. *Id.* at 6.31. The final result is not known, because the letter ends by reporting a procedural adjournment. *Id.*

218. PL.PAN., *supra* note 1, at 93 (speaking of the consuls). *But see* PL.EP., *supra* note 1, at 10.46 (describing how provincial governors were required to obey the rules in using the *cursus publicus*, the imperial postal system).

219. Trajan was adopted when army discipline was breaking down. PL.PAN., *supra* note 1, at 6.2.

Trajan gave discipline much of his attention,²²⁰ and there were no major incidents of military unrest during his two decades in office.²²¹

In addition to the foregoing, the emperor prescribed various procedural devices to improve the quality of his agents' administration and to protect citizens from abuse. These are discussed in the following section.

4. The Duty of Care: Judicial and Administrative Procedures

A trustee has a duty to follow procedures appropriate to sound decision making. "The element of skill or judgment . . . would appear to include the use of proper safeguards and internal procedures as well as consideration of the advice of specialists or experts when necessary to make informed decisions."²²² Trajan acted extensively and competently as a judge in important cases,²²³ and he was quite concerned with process. Many specific enactments reflect his belief that for his government to be worthy of the *felicitas temporum*, judges needed to follow judicial procedures that were efficient,²²⁴ promoted the discovery of truth,²²⁵ did not foment social division,²²⁶ and were perceived as fair.²²⁷

220. DIG. 2.12.9 (stating that normal holidays do not relieve soldiers from matters pertaining to military discipline); *id.* 49.16.4.5 (stating that those guilty of capital offenses found trying to enlist shall be put to death); *id.* 49.16.4.6 (stating that enlistees dodging court summons are to be dismissed and sent to court, even if innocent); PL.EP., *supra* note 1, at 6.31 (showing that Trajan emphasizes discipline in adultery trial of centurion); *id.* at 10.20 (explaining that soldiers are to remain with their units as much as possible, and not to share duties with public slaves, where discipline might be weakened).

221. DIO, *supra* note 1, at 68.7.5 (reporting Trajan's maintenance of military discipline).

222. BOGERT & BOGERT, *supra* note 22, § 541, at 171.

223. See BENNETT, *supra* note 44, at 122-24; see also PL.EP., *supra* note 1, at 6.22, 6.31.

224. See, e.g., DIG. 5.3.7pr (establishing priority of determining validity of a will before determining validity of a grant of freedom under it); *id.* 48.16.10.2 (creating a thirty day statute of limitations for successor of deceased accuser to renew charges against accused).

225. E.g., PL.EP., *supra* note 1, at 10.96 (stating that anonymous accusations were not to be entertained); DIG. 29.5.10.1 (providing for questioning of father's freedmen in case involving death of son); *id.* 48.18.1.11 to .18.1.12 (providing for questioning under torture of slaves in homicide cases; note that slaves always were questioned under torture—Trajan's contribution was not the torture, but the leave to question); *id.* 48.18.1.19 (using evidence obtained from slaves); *id.* 48.18.1.21 (explaining how a questioner should use "general," not leading questions because the former are better suited to finding the truth); see also *id.* 48.19.5pr (ordering that there was to be no criminal condemnation in absentia).

226. PL.EP., *supra* note 1, at 10.97 (barring anonymous accusations); cf. *id.* at 10.34

At least three of those four goals are present in Trajan's judicial rulings on questions of inheritance, an area that comprises a conspicuous part of his surviving work. Thus, his concern with fairness caused him to respect the intent of the testator, even if expressed imperfectly,²²⁸ and even if the testator failed to bequeath the customary bribe to the emperor.²²⁹ His concern with truth and judicial efficiency led him to insist on some formality in will-making, even if minimal.²³⁰

All four of these goals are present in Trajan's celebrated proscription against hunting down Christians and in his ban on anonymous accusations.²³¹ Anonymity encouraged mass accusations: Pliny's letter to the emperor mentions that a great number were being accused,²³² and one can imagine easily that those numbers were threatening to overwhelm the slender judicial resources available.²³³ Second, anonymous accusations were not reliable sources of evidence. For similar reasons Trajan elsewhere proscribed leading questions from judges.²³⁴ Third, Trajan was trying to avoid the social divisions that had arisen under Domitian through the practice of political posturing leading to mutual

(barring most private societies because of divisions they had caused); 10.93 (deferring to local law, but stating that such societies sometimes are established to engage in riot and lawlessness).

227. See, e.g., DIG. 26.7.12.1 (protecting buyers from having to return property to ward sold by guardian in good faith; Trajan notes that this rule also protects wards by assuring the marketability of guardianship property); *id.* 41.4.2.8 (holding that prescription allowed in an item that guardian purchased at auction from estate in good faith); *id.* 48.17.5.2 (providing that fruit belonging to a missing person should be preserved and, if threatened with spoilage, sold and the proceeds preserved for the owner); *id.* 48.19.5pr (ordering that there will be no criminal condemnation in absentia); *id.* 40.5.26.7 (ordering that when a master bound to manumit a slave fails to appear in court, the court grants liberty with the same effect as if the master had done so); *cf.* G. INST. 3.72; J. INST. 3.7.4; COD. 7.6.1, 7.6.12 (ruling that the right of a patron to inherit from his client is not prejudiced by an imperial grant of citizenship to the client where the patron either does not know of the grant or otherwise does not consent).

228. E.g., DIG. 28.5.1pr (allowing change of normal order of clauses in a will); *id.* 29.1.1pr (allowing latitude in creation of military wills; but the pompous wording of this *mandatum* sounds more like Nerva than Trajan).

229. *Id.* 36.1.31(30).5; *cf.* *id.* 48.22.1 (no imperial seizure of goods of exiles).

230. J. INST. 2.6.1 (stating that mere loose talk about leaving someone as an heir does not create a will); DIG. 29.1.24 (same).

231. PL.EP., *supra* note 1, at 10.97.

232. *Id.* at 10.96.

233. A provincial governor judged cases himself, and his staff was quite small. See G.P. Burton, *Proconsuls, Assizes and the Administration of Justice Under the Empire*, 65 J. ROMAN STUD. 92, 95, 105 (1975).

234. DIG. 48.18.1.21.

denunciations.²³⁵ Finally, Trajan's directions would be accepted by most as more than fair: not only would the accused be given an opportunity to face his accusers, but also if the accused renounced Christianity and made the ritual gestures of loyalty to Rome, he or she was automatically acquitted.²³⁶

V. CAN TRAJAN'S PRINCIPLES BE APPLIED TODAY?

The record of Trajan's government, at least to the extent that record has survived, strongly suggests that governments can more closely approximate the fiduciary pattern than does American government today. One can raise legitimate questions, however, about the closeness of the comparison. After all, it may be said, Trajan ruled a less diverse people with simpler tools. Moreover, he was not a democratically elected ruler, but largely an autocrat, and autocrats should be bound by tighter standards.

First, regarding the challenges that diversity poses to governing, it is we, not Trajan, who have the advantage. The Roman Empire was far more culturally diverse and polyglot than the United States today. In addition to the two official tongues—Latin and Greek—Roman subjects spoke several Celtic and Germanic languages and other languages entirely outside the Indo-European group (such as Hebrew, Arabic, Syraic, and Aramaic) as well as Coptic and other African tongues. There was no common school system to meld together the radically different cultures encompassed by the empire. It is true that Trajan reduced his burden by respecting the laws and institutions of smaller, more homogeneous levels of government—a crude kind of federalism.²³⁷ But by laying down general principles for carefully selected agents to adapt to local circumstances, Trajan was able to maximize the use of the fiduciary principle, at least in decision-making by the central government.

235. Pliny reports that "for a great many individuals of every age, both men and women, are [by these charges] being brought to trial, and this is likely to continue. It is not only the towns, but villages and rural districts too." PL. EP., *supra* note 1, at 10.96.

236. *Id.* at 10.96 to .97.

237. For recent expositions of the advantages of federalism, see Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995) and James O'Toole & Warren Bennis, *Our Federalist Future: The Leadership Imperative*, CAL. MGMT. REV., June 22, 1992, at 73.

As for comparative tools—it is again we who have the advantage over Trajan. Even the fastest methods of communication across the Roman Empire consumed days, sometimes weeks. Transportation was limited to the speed of horses. The emperor’s “database” consisted of personal recollections, scrolls in the imperial archives, letters from officials, petitions from citizens, and any other materials he could obtain from distant libraries. The communication, transportation, and information technology our policymakers take for granted was utterly nonexistent.

As to the objection that Trajan’s position was largely autocratic, the fact of autocracy must be conceded—but how dispositive is it? One can argue plausibly that, because in an elective system the ballot box offers citizens an alternative unavailable in an autocracy, periodic election renders fiduciary government less necessary. Perhaps it is so. On the other hand, it is noteworthy that our law concedes very limited force to this argument in *private sector* relationships, such as incorporated and unincorporated associations, where managers usually are elected by those they regulate. In the private sector, all officials—however chosen—who culpably cause loss may be liable to the organization or its members. Even sole selection does not bar recovery; the fact that an employer hired a faithless agent does not immunize the agent from the legal duty of indemnifying his employer.²³⁸ Only in the public sector is it seriously contended that the ballot box is an adequate remedy for official malice, self-seeking, or incompetence.

But the ballot box alone is inadequate for protecting the public from official misconduct. One reason is the small voice any one person, or any one interest group, has in the election of the leaders who target that person or group for unfair treatment. Another is that the programs of today’s welfare state create a trust-like dependence on whomever is in office. The average retiree in the United States today is almost certainly more dependent on sitting federal lawmakers and their continued commitment to Social Security than the average civilian provincial retiree was dependent on Trajan.

238. RESTATEMENT (SECOND) OF AGENCY § 15 (1958) (stating that agency requires consent of the principal); *id.* § 399 (stating that an agent is liable to a principal for breach of duty to such principal).

Earlier in this article,²³⁹ I set forth the spectrum of private sector relationships, ranging from one extreme: the arms-length deal, where one party has little or no sway over the other, to the other extreme: the private trust for children, where the manager's power and the managed person's dependence are very great. Because of the overwhelming power of government and the difficulty people face in escaping any particular jurisdiction, one can argue that the law should confine political discretion even more tightly than it confines a trustee's discretion.

At this point, however, two more serious objections arise. Both stem from a concern for the preservation of freedom. At the power/dependence end of the fiduciary spectrum, the manager disregards even the will of the beneficiaries and, instead, does what the manager deems in their best interest, subject to exacting judicial review. This model is inconsistent with our notions of individual autonomy.²⁴⁰ Even Trajan, autocrat as he was, accommodated a considerable amount of citizen freedom.²⁴¹ Our model should accommodate more.

A related objection is that application of overly exacting fiduciary standards might replace rule by elected representatives with rule by judiciary. Few of us would want to see judges as the central arbiters of tax or regulatory policy. However, we need not adopt a fiduciary model that requires this. Our model can allow a certain deference to political judgment without affording politicians "open seasons" on the liberties and fortunes of groups that are out of favor.

It may be, therefore, that the most nearly appropriate fiduciary model for government is the one now applied to private, non-profit, democratic cooperative associations engaged in the long-term management and conservation of important assets for their members: housing and agricultural cooperatives, homeowners' associations, and the like. These are the organizations that are near, but not at, the trust end of spectrum—a score of "five out of a possible six," so to speak.²⁴² Officials of such associations enjoy

239. *Supra* notes 15–19 and accompanying text.

240. Compare, however, the government's "trust" relationship with Indian tribes, in which Congress may disregard the will of the beneficiaries without the limitation of exacting review. *E.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

241. *Supra* notes 181–89 and accompanying text.

242. The scheme set forth above classifies relationships according to level of power and

fairly broad discretion, but still are required to conduct themselves as nearly all of us would wish our government decision-makers conducted themselves: in a fashion that is (1) disinterested, (2) nondiscriminatory,²⁴³ (3) in good faith, (4) procedurally reasonable, and (5) based on good information as to options and empirically demonstrated consequences.²⁴⁴ In some areas, public decisionmaking already meets those standards—the U.S. Senate’s deliberations over foreign policy come to mind. In other areas, they are the standards that most politicians already pretend to meet.

In public law terms, such a standard suggests that courts review exercises of political discretion with an “intermediate scrutiny” standard even if such regulations are now subject only to a “rational relationship” test. A number of commentators have suggested this approach in any event.²⁴⁵ However, even a looser standard of review, for example, one comparable to the large corporation version of the Business Judgment Rule, would be a step toward more responsible government, even if it might leave politicians with more leeway than they either need or deserve.²⁴⁶

Some may argue that fiduciary government is not a worthy goal at all. Certainly the goal will not appeal to those who still, after all we experienced in the twentieth century, think that unbridled political power can create a better society. But there is evidence that, given unweighted choices, most people, even most people in civil government, would think fiduciary standards are a

dependence into six categories. *Supra* notes 15–19 and accompanying text.

243. Application of this principle would require increased use of compensation to people suffering disproportionately from regulations purportedly adopted to further the general welfare.

244. Although much policy decisionmaking still is guesswork, one merely observing the *political* process might be surprised to learn that much of it no longer is, due to a plethora of reasonably unbiased empirical studies on the real-world effects of public policy choices. On education, see, for example, Eric A. Hanusek, *Assessing the Effects of School Resources on Student Performance: An Update*, 19 EDUC. EVALUATION & POLICY ANALYSIS 141 (1997). On government size, see, for example, James Gwartney, Robert Lawson & Randall Holcombe, THE SIZE AND FUNCTIONS OF GOVERNMENT AND ECONOMIC GROWTH, U.S. Congress, Joint Economic Committee, at <http://www.house.gov/jec/growth/function/function.htm> (last visited Mar. 8, 2001).

245. Professors Bernard H. Siegan and Richard Epstein both have proposed this approach. See Bernard H. Siegan & Richard Epstein, *Recent Publications*, 67 GEO. WASH. L. REV. 791, 794 (1999) (reviewing Bernard H. Siegan, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS AND LAND USE REGULATION (1997)); Symposium, *Richard Epstein’s Takings: Private Property and the Power of Eminent Domain*, *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 74 (1986).

246. *Supra* notes 23–25 and accompanying text.

good idea. Fiduciary and quasi-fiduciary standards are, after all, what the decisionmakers in civil government themselves opt for when judging people other than themselves. Such standards, under many different names,²⁴⁷ hold sway over all kinds of managers—except those employed in civil government.

Not only the adoption of such norms, but also the market itself reveals such preferences. The almost universal absence of redistributive devices in arrangements marketed to the general public testifies to their *ex ante* unpopularity.²⁴⁸ The almost uniform insistence by politicians on their own good intentions and best efforts, and their frequent repetition of the adage of President Cleveland—that inestimable politician who really believed it—that a public office is indeed a public trust, reflects their perception that, even when they are not acting like fiduciaries, the electorate wishes they were.

VI. CONCLUSION

The principles by which Trajan governed are a rebuke to our own, less exacting, standards of public law. It is Trajan's application of those principles, and not merely his adoption of a few modern-sounding judicial procedural safeguards, that makes his reign juristically important. This eminently practical soldier-turned-emperor showed us that holding government to fiduciary standards, even in a huge multicultural empire, is not merely a noble ideal—but an attainable one.

247. For example, fiduciary duties, duties of utmost good faith, implied covenants of fair dealing, etc. discussed *supra* notes 98–99, 118–123, 158–60, 192–93, 198, 206, 222 and accompanying text.

248. Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1547–54 (1982).