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The Elephant Problem

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**THOMAS M. COOLEY BOOK PRIZE &
SYMPOSIUM**
“A GREAT POWER OF ATTORNEY”:
UNDERSTANDING THE FIDUCIARY CONSTITUTION
BY GARY LAWSON AND GUY SEIDMAN

The Elephant Problem

RICHARD PRIMUS*

ABSTRACT

In their new book, “A Great Power of Attorney”: Understanding the Fiduciary Constitution, Gary Lawson and Guy Seidman argue that, as a matter of original meaning, the Constitution should be understood as analogous to a power of attorney, that interpretive devices applicable to powers of attorney should therefore be used in constitutional interpretation, and that interpreting the Constitution that way would produce results congenial to modern libertarian preferences, such as the unconstitutionality of the Affordable Care Act and the invalidity, on nondelegation grounds, of much of the federal administrative state. But the book fails to carry any of its central arguments. As a historical matter, there is virtually no evidence that the Founders thought of the Constitution on the model of a power of attorney. The book’s claim is about original meaning, so that ought to be the end of the matter. But to go on: the metaphor of the Constitution as a power of attorney nicely highlights the principle that governmental officials should act in the public interest rather than for their own personal benefit. But it’s only a metaphor. The idea that the Constitution should be interpreted with the tools that would be used to interpret a power of attorney does not follow, and without that interpretive consequence the metaphor has no resolving power in contested cases.

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INTRODUCTION

In the summer of 1787, representatives of twelve American states gathered in Philadelphia to create a more powerful central government. The old system of concentrating power in the separate states had proven inadequate. Interstate protectionism brought economic trouble up and down the Atlantic Seaboard. The British and Spanish were eating America's lunch. The new Constitution was intended to put matters right by creating a national government with real power—power sufficient to superintend the public welfare on a continental scale. The adoption of that Constitution by the people of the United States was a major victory, and a fortunate one, for the empowerment of national government.

The same Constitution also limits the national government, and appropriately so. A powerful government without mechanisms of limitation, like a powerful automobile without good brakes, is a dangerous thing. Some of the best things about American constitutional law—notably its protection of certain individual rights—involve limiting government. But, just as an automobile is first and foremost a technology for getting from here to there, the Constitution is first and foremost a mechanism for operating a government rather than limiting one. The safety features might save your life, but they are conceptually secondary to the empowering ones. Indeed, in American constitutional law, even the glorious rights-protecting safety features have done their work mostly by empowering the national government—that is, by empowering national institutions to protect individual rights against the abuses of states and localities rather than by checking the federal government itself.¹

1. See, e.g., Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6–18 (1996) (describing the normal pattern of judicial review in individual rights cases as the federal judiciary's imposition of national norms on outlier local jurisdictions).

The book *A Great Power of Attorney*² by Gary Lawson and Guy Seidman is mostly interested in the Constitution as a device for limiting the national government. Lawson and Seidman build on the work of Robert Natelson, who has argued that the Founders conceived of the Constitution as a fiduciary instrument whose interpretation should be governed by principles of agency law.³ Lawson and Seidman particularize that argument, saying that the Constitution should be interpreted as if it were an eighteenth-century power of attorney.⁴ They emphasize certain consequences that might flow from thinking of the Constitution in that way. In their telling, the powers conveyed in eighteenth-century powers of attorney were strictly construed, such that understanding the Constitution as a power of attorney would mean systematically resolving questions about the scope of federal power against the federal government.

The book's central claim—that the Constitution is like a power of attorney—has some intuitive appeal. Like a power of attorney, the Constitution is a document that vests legal authority formally or initially belonging to X (a private client, or the people of the United States) in Y (an attorney, or the federal government) on the understanding that Y is to exercise the power for X's benefit.⁵ To be sure, there are limits to the analogy, because the Constitution is also *unlike* a power of attorney. Private clients are different from the people of the United States as a whole, the government is a more complex beast than any private attorney, and the relationship between the people and the government is different from that between an individual and his or her attorney in any number of ways.⁶ But all analogies have limits, and discovering what is illuminating about a good

2. GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017).

3. See *id.* at 7 (crediting Natelson). In all, the book cites seven different published works by Natelson, one of which is co-written with Lawson and Seidman. They are: Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014) [hereinafter Lawson, Seidman & Natelson, *Fiduciary Foundations*]; Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010); Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in LAWSON ET AL., *supra*; Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239 (2007) [hereinafter Natelson, *Judicial Review of Special Interest Spending*]; Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE WESTERN L. REV. 243, 247–76 (2004); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004); and Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICHMOND L. REV. 191 (2001).

4. See, e.g., LAWSON & SEIDMAN, *supra* note 2, at 11.

5. Thirty years ago, Attorney General Edwin Meese invoked something like this idea in his Guidelines on Constitutional Interpretation, directing government litigators to see the people as their client and the Constitution as that client's instructions. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988). Note that in that application the analogy may have served to empower government officials at least as much as to restrain them: We The People are a client that furnishes its lawyers with maximum autonomy, because the client never shows up to tell the lawyers how to do their jobs.

6. Lawson and Seidman acknowledge as much. See, e.g., LAWSON & SEIDMAN, *supra* note 2, at 56.

analogy requires the willingness to focus on instructive similarities rather than trashing the analysis simply because the two compared objects are not the same in every respect. So, to glide past some complications for the moment, the Constitution formally delegates powers belonging initially to one entity (the People) to another entity (the government), and the government is supposed to exercise its delegated powers not for its own benefit but for the benefit of the People it serves. The government is, in that respect, the legal agent of the people, and the Constitution is its warrant for acting in their name. So there is something to the metaphor of the Constitution as a power of attorney.

Something—but how much? Recall here the South Asian fable of the blind men and the elephant.⁷ In the fable, several blind men set out to discover by direct observation what an elephant is. One feels the elephant's trunk and determines that the elephant is like a snake. Another bumps against the elephant's side and concludes that the elephant is like a wall. A third feels the elephant's leg and announces that the elephant is like a tree. And so on. The blind men then fall to fighting about their disagreement, a disagreement in which "each was partly in the right, and all were in the wrong."⁸ The point of the fable, of course, is that a thing can resemble some other thing in one of its aspects while still being so different from the resembled thing that nothing much flows from the comparison. Yes, the elephant is a little like a tree. But it is not a good idea to try to climb the elephant, or prune it, or picnic in its shade.

I. THE CLAIM

The question to ask about Lawson and Seidman's book, therefore, is whether analogizing the Constitution to a power of attorney helps us think cogently about the Constitution. Is the Constitution *enough* like a power of attorney to generate consequences for constitutional meaning and constitutional law?⁹ To be clear, and as I will discuss in more depth later on, Lawson and Seidman do not assert that their argument settles any twenty-first-century legal questions. But they do propose to carry us some distance in that direction.

To understand the significance of the book, it is helpful to locate its argument within a complete chain of reasoning that would move from a set of initial premises to a set of judicially actionable conclusions. Such a chain of reasoning could be rendered in five parts. This rendering is my reconstruction rather than the authors' explicit organization of their ideas. I break the chain of reasoning into these five parts in order to distinguish carefully between propositions that A

7. My favorite version is a doggerel retelling by John Godfrey Saxe. *The Blind Men and the Elephant*, in THE POEMS OF JOHN GODFREY SAXE 259 (1872).

8. *Id.* at 260.

9. Lawson and Seidman seem to agree that the question should be posed this way, and they answer it in those terms: "The Constitution is sufficiently like a power of attorney in enough important respects to make the interpretative rules for that kind of instrument prime candidates for interpretative rules for understanding the Constitution. That is the only substantive proposition to which all of the machinery in our book thus far is addressed." LAWSON & SEIDMAN, *supra* note 2, at 54–55.

Great Power of Attorney claims to establish and propositions that it officially acknowledges it does not establish. As organized for that purpose, the five propositions are as follows:

- (1) Americans of the Founding generation understood the Constitution as a fiduciary instrument.
- (2) More specifically, the Constitution strongly resembles an eighteenth-century power of attorney.
- (3) The original meaning of the Constitution is, to a considerable extent, a function of what the Constitution's text would mean if interpreted with the interpretive principles that eighteenth-century Americans would have used when interpreting powers of attorney. Those principles prominently include the idea that powers conveyed are to be construed strictly.
- (4) The meaning of the Constitution when it was adopted is also its meaning today.
- (5) Courts deciding constitutional cases should construe the powers of the federal government strictly.

The authors repeatedly disclaim having demonstrated proposition (5).¹⁰ Constitutional law as enforced by courts, they explain, is not a pure function of constitutional meaning. It is a more complex function of constitutional meaning and considerations related to the practicalities of the social world and the institutional role of courts. According to Lawson and Seidman, their book is only about what the Constitution *means*, not what anyone is obligated to do in light of that meaning.¹¹

The authors fully endorse the first four propositions. But, as they explain, the book only argues propositions (2) and (3). For proposition (1), they rely on prior work by Natelson.¹² Proposition (4) sounds in originalism, and a great deal has been written on the question elsewhere, and the authors do not reargue the case in this book. Instead, the ambition of *A Great Power of Attorney* is to build on Natelson by arguing the second and third propositions. To execute that ambition successfully would be to establish something important about the original meaning of the Constitution—and therefore, in the authors' view, something important about the meaning of the Constitution, period.

I am not persuaded by all of the book's claims about what the Constitution would mean if it were interpreted with the principles that eighteenth-century Americans would have used to interpret powers of attorney.¹³ But my focus is on

10. See, e.g., *id.* at 5, 61, 172.

11. See, e.g., *id.* at 5.

12. See, e.g., *id.* at 7 (crediting Natelson).

13. My reservations on this score operate on two levels. First, I am not confident that the rules of interpretation for powers of attorney were sufficiently settled, uniform, and discriminating to generate any reliable set of meanings when applied to the Constitution, whether through a rule of strict

a prior part of the thought process. Fundamentally, I do not think the book succeeds in showing that the Constitution's original meaning was substantially shaped by the power-of-attorney idea. The evidence proffered is too weak to support the claim that Americans of the Founding generation—whether real ones or hypothesized reasonable ones—recognized the Constitution as a legal instrument to be interpreted like a power of attorney. If the evidence cannot support that claim, the rest of the project never gets off the ground.

My contention is not merely that the Constitution *is not* a power of attorney. If I were saying only that, I would not be grappling with the best version of Lawson's and Seidman's argument. They recognize that a claim that the Constitution should be interpreted like a power of attorney because it *is* a power of attorney could be picked apart. As they say themselves, the Constitution differs from a power of attorney in several important respects.¹⁴ So instead, Lawson and Seidman defend the more moderate claim that “the comparison between the Constitution and a power of attorney works at some level.”¹⁵ Their arguments about constitutional meaning are, officially, conditional and partial: *if* or *to the extent that* the Constitution should be interpreted as a power of attorney, the Constitution means such-and-such.¹⁶

For the exercise to be valuable, though, the relevant extent must be pretty considerable. If the Constitution is like a power of attorney only to the extent that an elephant is like a tree, then the comparison cannot generate useful conclusions about what the Constitution means. After all, the elephant *is* a little like a tree. But it does not follow that in figuring out how to interact with elephants, it is sensible to proceed by thinking about how one interacts with trees. Not even a little.¹⁷

construction or otherwise. I do not know enough about eighteenth-century American agency law to be certain that the claim is wrong, but I also do not think its correctness has been sufficiently demonstrated. Second, some of the particular ways that the authors apply the idea that powers conveyed are to be construed strictly may be too quick. For example, the authors contend that Congress does not exercise a regulatory power given to it by telling executive agents to regulate in the relevant area, “just as a steward given authority to manage a farm would not exercise that management power by turning the job over to a subordinate.” LAWSON & SEIDMAN, *supra* note 2, at 126. I am not so sure. I would guess that many stewards given authority to manage farms routinely direct subordinates to conduct parts of the job, or maybe even the entire job while the steward is on vacation, without offending the farm owner's sense of his or her arrangement with the steward. It would probably depend on the particulars of the arrangement and the expectations of the specific parties. I similarly think that whether Congress can be said to exercise its regulatory power when it delegates some regulatory powers to executive agencies is a complicated question that depends on more variables than can be captured by a general conceptual claim about what it means to exercise a power.

14. See LAWSON & SEIDMAN, *supra* note 2, at 54, 56.

15. *Id.* at 8.

16. *Id.* at 6.

17. To be sure, some of the ways in which one would sensibly behave toward elephants converge with the ways in which one would sensibly behave toward trees. For example, I would not try to lift either thing with my bodily strength alone. Nor would I expect either an elephant or a tree to help me wash the dishes after dinner. But in neither case is analogizing the elephant to the tree a useful step in my process of reasoning about the elephant. I know what I need to know about the elephant by direct observation, without the need for the analogy.

It is accordingly necessary to ask about the strength of the historical claim that underlies the book's project. To what extent, at the time of the Founding, did the drafters or the ratifying public see the Constitution as analogous to a power of attorney? To what extent did the drafters or the ratifying public think that a known set of interpretive tools reliably used in the interpretation of powers of attorney would also be used to interpret the Constitution? How broadly did members of the ratifying public hold such views, and how much weight did they think that view of the Constitution had relative to other possible ideas about how the Constitution should be interpreted? Or, if one prefers to ask the question in a more abstract way,¹⁸ what would the view of a hypothetical reasonable American in the 1780s have been on these matters?

In my own view, as distinct from Lawson's and Seidman's, nothing about modern constitutional meaning—let alone modern constitutional law—necessarily follows from the answers to those questions. That is because I have significant disagreements with Lawson and Seidman about, among other things, the nature of meaning. In my view, when one discovers something about the Constitution's meaning in 1787, one discovers something about its meaning *then*, not its meaning *now*. And for reasons that I have explained elsewhere, I am pretty certain that the Constitution's meaning (like that of many other long-lived documents) changes over time.¹⁹ All meaning is meaning to some audience and under particular circumstances, so meanings often change when audiences and circumstances do. What the Constitution meant to the ratifying public in 1787 is, accordingly, not what the Constitution means *in se* but rather what the Constitution meant to one particular (constructively imagined) audience.

But just as Lawson and Seidman do not purport to vindicate their theory of meaning or their version of originalism in this book, I do not come to criticize their project by contesting their claim that the Constitution means now what it meant in the eighteenth century. Instead, I mean to bracket those disagreements to the greatest extent possible and then, trying to take the book on its own terms, to investigate its claims about constitutional meaning at the Founding. If the Founders thought that the Constitution should be interpreted like a power of attorney in the way that Lawson and Seidman describe, then the significance of that

18. As Lawson and Seidman would. *A Great Power of Attorney* does not spend much time articulating its approach to identifying original meanings, but I assume the authors' approach to be largely consonant with the one they articulated in Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006) (describing We the People as a hypothesized entity from whose perspective the Constitution is written).

19. See, e.g., Richard Primus, *The Constitutional Constant*, 102 CORNELL L. REV. 1691 (2017) (describing the dynamic by which the meaning that the Constitution holds for Americans changes over time as American ideals and values change, such that the Constitution always reflects Americans' values and ideals); Richard Primus, *Constitutional Expectations*, 109 MICH. L. REV. 91, 98–108 (2010) (describing the process of change). For one leading statement of a contrary position, see Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Constitutional Meaning*, 91 NOTRE DAME L. REV. 1 (2015) (arguing that the meaning of constitutional text is fixed at the moment of enactment and does not subsequently change).

fact for modern law depends on the quality of the next steps in the thought process, prominently including whether and how original meanings are binding later on. If the Founders thought about the Constitution in the way the book describes, that fact might be worth communicating even if original meanings are not binding in later constitutional law. Historical knowledge can be valuable even when it does not generate modern law. But if the Founders did not think of the Constitution as a document to be interpreted as if it were a power of attorney—or, if you prefer, if the hypothetical reasonable Founder would not have thought that way—then there is no need to take the argument any further.

One additional thought about the book's orientation toward historical evidence is perhaps necessary here. Much of the time, *A Great Power of Attorney* seems to treat original constitutional meaning as something that one could identify by understanding (and where necessary abstracting from) the ideas that reasonable Americans had about constitutional meaning during the 1780s. That is a mainstream view and, I think, a sensible one. On that view, whether the Constitution's original meaning was shaped by an interpretive prism calling for the document to be read like a power of attorney is a question about whether and to what extent reasonable people at the Founding would have interpreted the Constitution in that way. Answering that question would call for (but perhaps not be limited to) an investigation into whether and to what extent Founding-Era Americans in fact entertained that set of views about interpreting the Constitution. Sometimes, however, Lawson and Seidman write as if their claim about original constitutional meaning is independent of the ideas that Americans held about the Constitution during the 1780s. When they write in this second way, Lawson and Seidman seem to be saying that the best way to understand the Constitution's nature in its original context is as a power of attorney, *whether or not* any actual members of the Founding generation had that conception.²⁰

I understand how the first of these two approaches can generate conclusions about the Constitution's original meaning. To the extent that reasonable Americans in the 1780s thought that the Constitution should be interpreted like a

20. For example, in explaining their claim that the original meaning of the Constitution is its meaning if understood as a power of attorney rather than as if understood as a trust, Lawson and Seidman concede that many more eighteenth-century Americans described the Constitution as a trust than as a power of attorney but then say this: "[W]e think the power of attorney better captures the actual form, structure, and operation of the Constitution than does the trust, and we accordingly are persuaded that reasonable eighteenth-century observers who considered both analogies carefully and systematically (of which we do not have any good evidence of concrete eighteenth-century observers actually doing) would agree that the power of attorney better captures the ideas sought to be conveyed by the Constitution than does the trust analogy." LAWSON & SEIDMAN, *supra* note 2, at 62. This seems to say that (1) by and large, eighteenth-century Americans did not consciously think about the Constitution in the way that Lawson and Seidman think best, but (2) if they had focused on the question and considered it in a careful and reasonable way, they would have concluded that Lawson and Seidman are right. This is a remarkably ahistorical approach to the investigation of original constitutional meanings, because it sees ideas actually held at the moment of origin as judgments that later observers can dismiss as incorrect understandings of the Constitution rather than as parts of the data from which original meanings must be constructed.

power of attorney, identifying the Constitution's meaning in the 1780s calls for reading it in that way. (Much as the prevailing view among Americans in the 1780s that the Constitution should be interpreted as if it were written in English is a good reason for thinking that determining its original meaning calls for reading it as if it were written in English.) The second approach, however, does not seem conceptually capable of identifying original constitutional meanings. After all, the meaning of a text to a given audience at a given time must be a meaning discernable with an interpretive method known to that audience at that time. It is one thing to argue, as many originalists do, that the original meaning of "equal protection" or "free speech" can *apply* today in ways that most Americans would not have foreseen in 1868 or 1791;²¹ it is quite another to argue that discerning the original meaning of a text can require an approach to interpretation not in use at the time the text was written. If members of the Founding generation did not interpret the Constitution as if it were a power of attorney, then it makes little sense to say that the Constitution's original meaning is the meaning it would have if the document were read as if it were a power of attorney. A text cannot have communicative content that would be decodable only with a technology not available to anyone in its audience. Or, more prosaically: If it *was* not read that way, it did not mean what it would mean if it *were* read that way. And if no actual Founders read it that way, a hypothesized reasonable Founder would not read it that way either.

To me, that second approach seems less like identifying the Constitution's original meaning than like substituting one's own views for those of the Founders. Instead of asking "What did people think then?" or "What would a hypothesized reasonable person of that time have thought?", the second approach asks something like "Regardless of what interpretive conclusions people in 1787–1788 actually reached, what conclusions do *I* reach about the meaning of the Constitution, if I work from the materials that were known in 1787–1788?" But nobody owns the term "original meaning," and Lawson and Seidman are free to answer whatever question they wish. Moreover, even given the significant differences between these two conceptions of original meaning, an argument about original meanings on either conception would have to take account of facts about the world from which the Constitution emerged. So I now turn to evidence about those facts.

II. THE EVIDENCE

Not to hide the ball: I do not think the book succeeds in showing that the Founders believed the Constitution would or should be interpreted like a private-law power of attorney in any way sufficient to generate conclusions about

21. See, e.g., Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 432–36 (2007) (articulating the distinction between original meanings and original expected applications); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2005).

constitutional meaning in 1788, let alone today. The basic reason is that little evidence for the proposition is presented. The general background evidence requires generous inferential leaps, and the direct evidence from writings and speeches of Americans at the Founding rests heavily on a single speech. Worse, that single speech might suggest the opposite of what the book uses it to show. And the historical record is strikingly bereft of supporting evidence in places where such evidence should be thick on the ground. For example, there is no indication that opponents of extensive federal power used the power-of-attorney frame to make their arguments in the first years after the Constitution was adopted. If the idea that the Constitution should be interpreted with the restrictive tools applicable to powers of attorney was mainstream in 1788, it is hard to explain why nobody arguing for restrictive interpretation of federal power in the years immediately following spoke up to remind people of that point.

A. Of Natelson, and Beyond

It is easy to find examples of Founding-Era Americans describing government with words or ideas that crop up in the law of agency. Then as now, people might describe government officials as executing a public trust, or as the agents of their constituents, and so forth. Nothing about this phenomenon is particular to the American Founding. It is just as easy to find people speaking this way about government on other continents and in other centuries. And whether in 1780s America or elsewhere, the people who use this language might not be saying that government should proceed on the basis of the technical specifics of agency law, just as a person who says “All men are brothers” is probably not saying that all dealings among men are to be governed by the law of family relationships. Locke, for example, used the language of “trust” when describing the basis of government, and the leading modern scholars of Locke’s political thought have taken the view (rightly, I think) that Locke was using the idea metaphorically, to make some general points at a high level of abstraction.²² Those general points included the ideas that government officials have an obligation to serve the public rather than simply themselves, that the claim of legitimate governmental authority rests on a moral framework rather than on the mere fact of power, and that government officials must as a practical matter have some discretion in their exercise of power rather than being minutely regulated and supervised by the people they govern.²³ But it did not follow, for Locke, that any technical interpretive

22. See, e.g., John Dunn, *The Concept of “Trust” in the Politics of John Locke*, in *PHILOSOPHY IN HISTORY* 296 (Richard Rorty, J.B. Schneewind & Quentin Skinner eds., 1984); *JOHN LOCKE: TWO TREATISES OF GOVERNMENT* 114–15 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

23. John Dunn put the point this way: “The legal concept of trust captures nicely three features on which Locke is anxious to insist: the clarity of a ruler’s responsibility to serve the public good, the existence of a structure of rights external to the practical relation of ruling on which a sovereign’s claim to authority must depend, and the inescapable asymmetry of power between ruler and ruled which precludes the latter from exercising direct and continuing control over the former.” Dunn, *supra* note 21, at 296. At the same time, Dunn unhesitatingly concludes that “The metaphor of a legal trust . . . carries little or no distinctive weight in [Locke’s] argument.” *Id.* In other words, Locke did not argue that the

rules applicable to legal²⁴ things called “trusts” were therefore also applicable to government. That is, Locke was using the trust idea as an illustrative metaphor, not as a source of transposable rules.²⁵ It is perfectly plausible to think that Americans who used fiduciary language were speaking in the same sorts of general or metaphorical ways.²⁶ So supporting the claim that Americans understood the Constitution as a legal instrument that should be interpreted like a power of attorney, or any other instrument of agency law, requires more than pointing to examples of Americans speaking of trusts, agents, or powers of attorney when talking about the Constitution. It requires evidence that the agency language used was meant to carry a specific set of technical implications for how the Constitution should be interpreted.

Indeed, it would require lots of such evidence—enough to displace a fair amount of existing work on the subject. Many respected scholars—some of them originalists, some of them not—have concluded that there was no generally shared view at the time of the Founding about the appropriate rules for interpreting the Constitution.²⁷ That lack of agreement about interpretive rules, this prior scholarship explains, stemmed partly from the fact that the Constitution was a

three important features of government named above should be understood to be features of government because government is a trust; he simply used the idea of a trust as a way of communicating those ideas about government.

24. “Legal” is here used in an imprecise (or anachronistic) sense. Technically, trusts were creatures of Chancery and therefore equitable rather than legal entities.

25. See Dunn, *supra* note 21; see also Laslett, *supra* note 21, at 115 (“Locke did not intend to go further in his references to trust than to make suggestive use of legal language. . . . The concept is obviously intended to make it clear that all actions of governors are limited to the end of government, which is the good of the governed. . . .”).

26. As Lawson and Seidman acknowledge. See, e.g., LAWSON & SEIDMAN, *supra* note 2, at 3 (raising the possibility that James Iredell spoke metaphorically when describing the Constitution as a power of attorney).

27. See, e.g., JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 116–23 (2018) (showing that at and near the time of ratification, there was no consensus on the appropriate methods for interpreting the Constitution or otherwise putting it into practice); Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149, 154 (2015) (reviewing JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013)) (noting Founding-Era dissensus on the question of how the Constitution should be interpreted); Lash, *supra*, at 161 (arguing that the Constitution was a new kind of document, to which pre-existing methods of interpretation were inapplicable); JACK M. BALKIN, *LIVING ORIGINALISM* 353–56 (2011) (canvassing the topic of Founding-Era disagreement over what sort of document the Constitution was and how it was to be interpreted); Saul Cornell, *The People’s Constitution vs. The Lawyers’ Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 296 (2011) (“Americans were just as deeply divided over questions of constitutional methodology then as they are now.”); Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL’Y 907, 912 (2008) (“[T]here was no more agreement about what the ‘correct’ way to interpret the Constitution was or should be in the early years of the Republic than there is today.”); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 555–56 (2003) (noting a variety of views among the Founders about whether the Constitution should be interpreted using the rules applicable to other legal instruments and, if so, which ones); H. Jefferson Powell, *The Original Understanding of Original Intent*, 91 HARV. L. REV. 885, 912–13 (1985) (noting that at the time of ratification there were “sharp disagreements over which interpretive approach was acceptable” and even over whether recourse to traditional methods of legal interpretation was acceptable at all).

new sort of legal instrument, one for which analogies to older sorts of legal instruments were at best partial and controversial.²⁸ Just as the elephant is neither tree nor snake nor wall, the Constitution was not reducible to any particular thing that American lawyers had worked with before.

That many prior scholars from differing ideological perspectives have come to this conclusion does not mean that new scholarship cannot prove things otherwise. But it would take persuasive evidence to get the job done. For their part, Lawson and Seidman do not claim to have marshaled the evidence necessary to show that Americans generally understood the Constitution as a fiduciary instrument that should be interpreted accordingly. Instead, they rest on Natelson, who has argued that claim at length. The present book is in part a hymn in praise of Natelson's efforts, which Lawson and Seidman take to be transformative.

The Natelson account, as drawn upon by Lawson and Seidman, goes like this: In the eighteenth century, American courts had specific, reliable, and well-settled rules for interpreting fiduciary instruments.²⁹ Trusts were interpreted in a certain way, and corporate charters were interpreted in a certain way, and powers of attorney were interpreted in a certain way, and so on. The Constitution was drafted by people well-versed in the standardized interpretive principles of fiduciary law,³⁰ and they knowingly drafted a document that conformed to the specifications of a fiduciary instrument. What's more, the Constitution's nature as a fiduciary instrument was well-understood not just by its drafters, and not just by judges and lawyers, but by the public broadly. In the eighteenth century, the argument runs, American laypeople had a great deal of personal experience with fiduciary law, and they were well-versed in its rules of interpretation.³¹ So when the people ratified the Constitution, they understood themselves to be adopting an instrument that would be interpreted using well-settled rules from the law of agency.

Taking Natelson's argument as a given, Lawson and Seidman take the further step of arguing that there is a certain kind of fiduciary instrument that the Constitution most resembles: a power of attorney. But they do not make that claim by arguing that people at the Founding spoke about the Constitution as a power of attorney more than they spoke about it using other sorts of terms known to agency law.³² Instead, they proceed mostly by means of a substantive comparison. All things considered, they argue, the Constitution has more in common

28. See, e.g., GIENAPP, *supra* note 26; LASH, *supra* note 26, at 161; BALKIN, *supra* note 26, at 353–56; NELSON, *supra* note 26, at 555–56.

29. LAWSON & SEIDMAN, *supra* note 2, at 17.

30. *Id.* at 30.

31. *Id.* at 29.

32. Natelson, for his part, argues that the most common agency language that the Founders used when discussing the Constitution was not that of powers of attorney but that of public trust. See Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1086–87. It may be worth noting here that the trust metaphor differs from Lawson's and Seidman's power-of-attorney metaphor—among other ways—by suggesting that government is vested with considerable discretion. See Dunn, *supra* note 21, at 296–97 (noting this feature of the trust metaphor and its importance in Locke's theory of government).

with an eighteenth-century power of attorney than with other sorts of legal instruments.

One key payoff to this argument, for Lawson and Seidman, is that according to the assertedly standard interpretive rules in effect in the eighteenth century, powers of attorney were to be construed strictly. A constituted attorney, the argument runs, would under eighteenth-century agency law be entitled to exercise only the powers specifically granted in the fiduciary instrument. So if the Constitution should be interpreted like an eighteenth-century power of attorney, it authorizes the federal government to do considerably less than would be the case if the Constitution were interpreted in some other way—even if that other way still regarded the Constitution as a fiduciary instrument but not as a power of attorney in particular. After all, not all fiduciary instruments are equally restrictive. Corporate charters are fiduciary instruments, but they are interpreted as creating inherent or implicit powers as well as expressly conveyed ones.³³ Trusts are fiduciary instruments, but one of their essential aspects is the vesting of discretion in the trustee. So if the Constitution should be interpreted as an eighteenth-century fiduciary instrument, it matters whether the instrument as which it is interpreted is a power of attorney, a corporate charter, a trust, or something else.

B. Background Inferences

There are parts of Natelson's account that I am not qualified to assess. For example, I do not know enough about eighteenth-century agency law practice to be able to evaluate with confidence the claim that the interpretive conventions applicable to trusts, to corporate charters, and to powers of attorney were well-settled throughout British North America. Was it indeed the case, in a world without institutional legal training or a system for collecting and distributing the decisions of courts, that a geographically dispersed population shared a single set of technical understandings on these matters?³⁴ Even if so, was it really the case that laypeople and not just experts knew those rules? One might worry that the account reflects a Tower of Babel fantasy,³⁵ in which we imagine that at some earlier and purer time we were all of one speech. But that worry is merely a reason for skepticism. It does not disprove Natelson's claim, nor does it exempt anyone from confronting Natelson's evidence with an open mind.

The trouble is that the evidence is, in important places, thin. Here, for example, is the most developed version³⁶ of Natelson's argument that American laypeople knew the rules of interpretation in fiduciary law:

33. See LAWSON & SEIDMAN, *supra* note 2, at 68 (acknowledging this distinction).

34. Natelson does not produce any ground-level studies of agency-law practice.

35. I owe this phrase to Don Herzog.

36. It is, at any rate, the most developed version offered in any of the seven works by Natelson cited in *A Great Power of Attorney*. Having not read all of Natelson's work, I might be missing a more developed account elsewhere. In the seven works I consulted, Natelson does not refer to such a more developed account in some other piece of writing.

Members of the founding generation who were neither lawyers nor businessmen often gained personal knowledge of the relevant standards by serving as fiduciaries themselves. The shorter life expectancy of the time left far more decedents' and orphans' estates to administer per capita, creating a need for guardians, executors, administrators, and trustees. Affective relationships among family members were much stronger in the eighteenth century than in periods immediately prior, and such obligations were honored accordingly. And general knowledge of the law was more widely spread among the public than it is today, as one can perceive when one reads the public debates, so often carried on in explicitly legal terms.³⁷

Those propositions are rather general, and it is not clear that they can support the conclusion they are supposed to establish. To begin at the beginning: Natelson produces no actual statistics about, or even estimates of, the number or proportion of Americans who served as fiduciaries. And there are reasons visible even on the same page of Natelson's writing for suspecting that the practice could not have been terribly widespread. For example, Natelson reports that in Virginia, "All fiduciaries seem to have posted hefty bonds (commonly between 100 and 1000 pounds)."³⁸ Wouldn't a requirement to post that kind of bond sharply limit the proportion of Virginians who could have the experience of serving as fiduciaries? Not every eighteenth-century Virginian had that kind of money lying around.

The next step in the argument—that shorter life expectancy would mean more decedents per capita—seems right. But it requires a further inference to think that there would have been a substantially higher per capita number of decedents' and orphans' *estates*. (Was it not common for people—especially people who died early in life—to die without property, or to die intestate, or both? Much of the shorter life expectancy of that time was due to high rates of infant mortality, and dying infants rarely leave behind property in need of administration.³⁹) The proposition that "relationships among family members were much stronger in the eighteenth century than in periods immediately prior" seems a bit broad,⁴⁰ and even if true in the aggregate, it might have no bearing on whether large numbers of Americans served as fiduciaries. Many types of family affection have little to do with the implementation of technical legal duties. And supposing even that

37. Natelson, *Judicial Review of Special Interest Spending*, *supra* note 3, at 247–48.

38. *Id.* at 248 n.33.

39. Natelson's statistics about life expectancy are about life expectancy *at birth*. See *id.* at 247 n.32.

40. *Id.* at 248. Natelson's citation for this sentence is of Lawrence Stone's magnum opus LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500–1800* (1977). To prevent readers from judging Natelson with unjustified harshness, it bears mention that Stone's treatise does, here and there, discuss America as well as England. But (and with the due caveat that I have not read Stone's entire tome), I am not aware that Stone at any point says that the family's movement toward being more of an affective institution in the eighteenth century had any particular impact on individuals' tendencies to serve as fiduciaries for their family members. Stone is cited simply as "noting that a general theme of his extensive study was the great warming of intra-family sentiment from the sixteenth to eighteenth centuries." Natelson, *Judicial Review of Special Interest Spending*, *supra* note 3, at 248 n.34.

many ordinary Americans served as fiduciaries and did so conscientiously, it would still not follow that those Americans knew the technical rules by which fiduciary instruments were interpreted by courts. If most fiduciaries did their jobs in good faith and competently, there would be little need to get courts involved or otherwise to worry about the technical rules of interpretation.⁴¹

Finally, Natelson's example of a source that shows that legal knowledge was widespread among the public—a 1787 essay about the proposed Constitution by an author using the pseudonym Timoleon⁴²—does not seem like good support for that claim. Timoleon's essay does suggest legal sophistication. But why is that sophistication evidence of widespread legal knowledge? Timoleon was probably James Tilton, a graduate of the University of Pennsylvania who served in both the Delaware Legislature and the Continental Congress.⁴³ Needless to say, pointing to a sophisticated analysis by such a person does nothing to advance the claim that ordinary Americans had similar levels of legal sophistication.⁴⁴

None of these gaps in Natelson's argument proves that his claim is false. Maybe eighteenth-century Americans, laypeople and lawyers alike, really did share a set of technical understandings about the interpretation of fiduciary instruments. Maybe better evidence could be produced. But maybe not. And although the shortcomings of the evidence offered does not falsify the claim, they do suggest that the historical record is being read in a light rather favorable to the case being prosecuted. So to the extent that *A Great Power of Attorney* rests on Natelson's historical claims—and that extent is considerable—the project rests on uncertain foundations.

The book's refinement of Natelson's thesis, by which the Constitution is said to resemble not just any fiduciary instrument but a power of attorney in particular, relies on some uncertain inferences of its own. For example, the book contends that the Constitution looks like an eighteenth-century power of attorney because a typical power of attorney would have "a preamble setting forth the reasons for

41. Modern Americans have experience in relationships and transactions governed by contracts. But not many non-lawyers know the principle of *contra preferentem* or the parol evidence rule. And the idea that an employer who has contracted to employ a person at forty thousand dollars a year for five years commits no breach when firing the employee after three years is—in my limited experience—one that laypeople tend to dismiss as obviously wrong, even when articulated by a law professor.

42. Natelson, *Judicial Review of Special Interest Spending*, *supra* note 3, at 248 n.36 (citing TIMOLEON (1787), reprinted in 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 534, 535 (John P. Kaminsky & Gaspare J. Saladino eds., 1981) [hereinafter DHRC]).

43. Tilton used the Timoleon pseudonym when publishing other work the following year. See JAMES BARNWELL, READING NOTES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA, at xi (1887); 7 CHARLES EVANS, AMERICAN BIBLIOGRAPHY (1912); Book Note, 46 MISS. VALLEY HIST. REV. 167 (1959) (reviewing TIMOLEON'S BIOGRAPHICAL HISTORY OF DIONYSIUS, TYRANT OF DELAWARE (John A. Munroe ed., 1958)); William Henry Williams, *Delaware and Ratification a Paradox Examined*, 6 DEL. LAW. 8 (1987). For that reason, and because the November 1787 essay Natelson cites articulates antifederalist views consistent with Tilton's own, he seems the likely author.

44. Natelson says that the Timoleon source is merely one of many that could be adduced for the purpose. But the fact that the one source adduced does not support the argument raises questions about how persuasive the other promised sources would be. In the end, of course, the claim that other sources could demonstrate the point cannot be evaluated until those other sources are adduced.

and purposes of the document, a clause constituting and ordering the agent, a description of the agent's principal powers, and (where appropriate) an incidental powers clause."⁴⁵ But to their credit, the authors acknowledge that they did not examine a large enough sample of American powers of attorney to know how widely powers of attorney conformed to that particular template.⁴⁶ Moreover, as the authors also acknowledge, those particular features of the Constitution were common in other sorts of eighteenth-century legal instruments besides powers of attorney. Indeed, they were common in corporate charters—and as Lawson and Seidman recognize, treating the Constitution as a corporate charter would bring into play a more generous approach to construing the government's powers.⁴⁷ What's more, those three features—a preamble, a description of principal powers, and an incidental powers clause—do not come close to a full description of the Constitution. If one focused on other aspects of the Constitution at least as important as those three—say, its division of the power-exercising entity into three branches, or its specification of a unique process for changing its own content—the analogy with a power of attorney would not come to mind.

Lawson and Seidman recognize that the analogy between the Constitution and powers of attorney is imperfect. They contend, however, that the Constitution is in substance more analogous to a power of attorney than to any other sort of legal instrument.⁴⁸ I am not sure that is right.⁴⁹ But even if it were, it would be a fallacy to insist that the Constitution should be interpreted as if it were some other sort of legal instrument to which it is analogous, rather than admitting the possibility that Constitution should be interpreted in the specific and distinctive way appropriate for the specific and distinctive kind of law that it is. As Bishop Butler taught, every thing is what it is, and not some other thing.

C. *Lonely James Iredell*

These reservations would matter a lot less if Natelson or Lawson and Seidman produced direct evidence that many Americans in 1787–1788 believed that the Constitution should be interpreted with restrictive rules of interpretation appropriate for interpreting powers of attorney. And they do have an example of a prominent Founder speaking about the Constitution that way. In a speech given in July 1788, James Iredell described the Constitution as “a great power of attorney,” conferring specific powers on the government

45. LAWSON & SEIDMAN, *supra* note 2, at 23.

46. *Id.* at 21

47. *Id.* at 68. For an important development of the corporate-charter alternative, see John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter?*, 17 *Geo. J.L. & Pub. Pol'y* 407 (2019)

48. Well, they almost argue that. They seem to concede that the analogy to a corporate charter works about as well. See LAWSON & SEIDMAN, *supra* note 2, at 64–68. And the authors recognize that different implications for federal power would follow from approaching the Constitution in one of those two ways rather than the other. *Id.* at 68. But for whatever reason, this concession does not deflect the authors from their central argument.

49. As noted just above, Lawson and Seidman concede that a corporate charter analogy works about as well. A reasonable argument could be made that the analogy with a trust is also comparably good.

as the agent of the people.⁵⁰ Natelson produces this line from Iredell frequently,⁵¹ and Lawson and Seidman use the image as the title of their book.

There is no question that Iredell, in this 1788 speech, offered a picture of the Constitution as just the thing that Lawson and Seidman say it should be compared to: a power of attorney. What's more, Iredell in this passage characterized the Constitution as a power of attorney precisely in order to make the point that Lawson and Seidman identify as the most important implication of recognizing the Constitution as a power of attorney: that the powers it confers are to be strictly construed. In the relevant speech, Iredell was arguing that the Constitution did not need a Bill of Rights because the enumeration of Congress's powers, strictly construed, would provide all the protection necessary for individual rights. To support the claim that the enumerated powers would be strictly construed, Iredell analogized the Constitution to a power of attorney. Given how well the example fits the thesis, it is no wonder that Iredell's speech is, for Lawson and Seidman as well as for Natelson, Exhibit A.

The problem is that there is no Exhibit B. Unless I have missed something, this Iredell speech is the only source that Natelson points to in which anyone in 1787–1788 expressly analogized the Constitution to a power of attorney, whether for interpretive purposes or otherwise. If I missed another example in Natelson's work, Lawson and Seidman missed it also: they forthrightly acknowledge that as far as they know, "Iredell is the only person from the founding era and before to use the terminology of a power of attorney" in connection with the Constitution.⁵²

This is not a small problem. During the ratification process, Americans produced enormous amounts of text about the Constitution, pro and con. Even many ideas about the Constitution that were squarely rejected were articulated dozens of times. To be sure, the quantum of evidence required to make a plausible case that people at a certain time and place thought about something in a certain way is partly a matter of judgment, and as such it is one about which informed analysts can reasonably disagree. I know no rule by which a historian would need to produce a hundred rather than fifty or twenty instances of an idea's being articulated during the 1780s in order to sustain a claim about constitutional interpretation at that time. But establishing such a claim must require considerably more than a single example.

To be clear, the fact that neither Natelson nor Lawson and Seidman have any other examples does not prove that Americans did *not* think of the Constitution as a power of attorney in 1788. Maybe the ratifying public did think that way and simply left no evidence of the fact. Or perhaps the evidence exists and this book

50. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

51. See, e.g., Natelson, *The Legal Origins of the Necessary and Proper Clause*, *supra* note 3, at 55; Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, *supra* note 3, at 103; Natelson, *supra* note 36, at 247; Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, *supra* note 3, at 305.

52. LAWSON & SEIDMAN, *supra* note 2, at 62.

for whatever reason does not happen to produce it. But the former possibility is sheer speculation that cannot be enough to make a persuasive case about the Constitution's original meaning, and the latter possibility is, I think, not borne out by the facts. I do not mean that there are *zero* examples of anyone other than Iredell's using that frame during the ratification debates. But the number might not be much higher than zero, either. My own searches of the America's Historical Newspapers database and the electronic version of the Documentary History of the Ratification of the Constitution (DHRC) discovered one occasion on which a delegate to the Massachusetts convention offered the analogy.⁵³ But that is all. Given the vast output of writing and speaking about the Constitution in America during 1787–1788, it is just plain hard to think that an idea that may have been argued publicly just two times anywhere on the continent was in fact a widely shared view.⁵⁴

On the contrary, the Iredell speech considered in context works at least as well for a counter-hypothesis: that Americans widely *rejected* the idea that the Constitution was a power of attorney in the way Iredell claimed. Iredell made the speech in question at a North Carolina convention called to consider ratifying the Constitution. His power-of-attorney argument was meant to help the delegates see that ratification was the right decision to make. But the North Carolina convention at which Iredell was speaking voted *against* ratifying the Constitution.⁵⁵ That refusal to ratify was a repudiation of Iredell, who was the leader of North Carolina's pro-ratification faction.

Moreover, the convention delegates overtly contradicted the specific argument that Iredell had been making when he spoke of the Constitution as a power of attorney. Iredell was responding to the common complaint that the Constitution contained no Bill of Rights and more specifically to the contention that North Carolina should not ratify unless the Constitution were amended to provide one. Arguing that North Carolina should ratify and not demand a Bill of Rights, Iredell contended that amendments in the nature of a Bill of Rights "would not only be incongruous, but dangerous."⁵⁶ It would be incongruous because the Constitution was a great power of attorney, so the powers of Congress would be strictly construed, and affirmative limitations would be out of place. And it would be dangerous because specifying rights that Congress could not abridge would imply that Congress was not limited to the powers expressly described.⁵⁷ In other

53. Statement of Mr. Choate at the Massachusetts convention, Jan. 25, 1788, 6 DHRC, *supra* note 41, at 1351.

54. The DHRC does also record one instance in which someone considered using the analogy and thought better of it. About ten days after the analogy was offered in the Massachusetts convention, the prominent Massachusetts lawyer William Cushing—later a Justice of the United States Supreme Court—included the analogy between the Constitution and a power of attorney in a draft of notes for a speech. But Cushing deleted the analogy in a subsequent draft, and the speech itself was never given. See 6 DHRC, *supra* note 41, 1433 n.11.

55. 4 ELLIOT'S DEBATES, *supra* note 49, at 251.

56. *Id.* at 149.

57. *Id.*

words, amendments in the nature of a Bill of Rights would have the deleterious effect, in Iredell's view, of undermining the claim that the Constitution should be understood as a power of attorney.

This argument that a Bill of Rights would be unnecessary and maybe even dangerous—that the enumeration of congressional powers would suffice to protect individual liberties, and that the specification of affirmative limits on Congress would imply that Congress could do anything not specifically prohibited—is familiar to constitutional lawyers. In its fullest form, it is associated with a speech by James Wilson at the Pennsylvania Statehouse in September of 1787,⁵⁸ and its most canonical home is Hamilton's Federalist 84. Many modern commentators, Lawson and Seidman among them, have embraced the idea as authentic Founding-Era constitutional theory.⁵⁹ But it was not. It was a post-hoc rationalization that some of the Constitution's supporters developed after the Convention adjourned in an attempt to mollify members of the public who thought the Constitution deficient for not including a Bill of Rights.⁶⁰

As sometimes happens with post-hoc rationalizations, the audience saw right through it. Any number of Americans during the ratification process denounced the idea as specious⁶¹ and perhaps even an attempt to bamboozle the people.⁶² After all, the substance of the theory gives way on even a small amount of skeptical inspection. It did not take much perspicuity for Americans in 1788 to understand that a legislature with the power to tax, to raise armies, and to do various other things could act rather oppressively if it had a mind to, even if it were limited to exercising the powers the Constitution affirmatively granted to it.⁶³ What's more, the Philadelphia Convention's proposed document plainly included affirmative limits on Congress, so the idea that specifying such limits would be out of place was transparently false.⁶⁴ Indeed, the argument Iredell offered was so thoroughly implausible that at many stages of the ratification process Antifederalists practically goaded Federalists to make the argument publicly so that the Antifederalists could denounce the Federalists as willing to say any crazy thing to

58. See 13 DHRC, *supra* note 41, at 337.

59. See LAWSON & SEIDMAN, *supra* note 2, at 46 (taking this view).

60. For one good demonstration of this point, see Mark Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/91*, 9 U. PA. J. CONST. L. 357 (2007). See also LAWSON & SEIDMAN, *supra* note 2, at 80 (identifying Graber as "one of the academy's most acute legal historians").

61. See, e.g., Letter from Richard Henry Lee to Sam Adams (Oct. 27, 1787), in 13 DHRC, *supra* note 41, at 484–85; Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 14 DHRC, *supra* note 41, at 482–83.

62. Jefferson to Madison, *supra* note 60, at 482–83 (describing Wilson's argument as one that "might do for the audience to which it was addressed; but it is surely a gratis dictum").

63. See, e.g., BRUTUS I (1787), reprinted in 13 DHRC, *supra* note 41, at 411, 414–16; George Mason, Speech at the Virginia Ratifying Convention (June 14, 1788), in 3 DHRC, *supra* note 41, at 415–16.

64. See Lee to Adams, *supra* note 60; CINCINNATUS II (1787), reprinted in 14 DHRC, *supra* note 41, at 11, 12; BRUTUS II (1787), reprinted in 13 DHRC, *supra* note 41, at 524, 528.

get their Constitution adopted.⁶⁵ The public refused to be fooled, and the demand for a Bill of Rights continued unabated. In short, the central fact about the Founding generation's relationship to the idea that a Bill of Rights was unnecessary (or counterproductive) because the Constitution's enumeration of congressional powers would keep federal power in check is this one: they didn't buy it.⁶⁶

The North Carolina convention at which Iredell compared the Constitution to a power of attorney seems to have shared the general public's disdain for Iredell's argument. Despite Iredell's urging that the Constitution was a great power of attorney and that a Bill of Rights would therefore be incongruous and even dangerous, the convention delegates not only refused to ratify but by well more than a two-thirds majority approved a long list of rights that they wished to see written into the Constitution by way of amendment before they would again consider ratification.⁶⁷ Only in November 1789, after Congress approved rights-protecting amendments and sent them to the states for ratification, did North Carolina relent. In light of this repudiation of Iredell and his argument that further checks on federal power would be superfluous or ill-advised, it seems odd to treat a power-of-attorney analogy that Iredell offered in support of that argument as evidence of a widely-held Founding view (or, in a more abstract formulation, as a reason to think that a hypothesized reasonable Founder would have agreed).⁶⁸

To be sure, we do not know exactly what the delegates who rejected Iredell's pleas thought about his power-of-attorney claim, and in what proportion. Maybe they thought it was preposterous to read the Constitution as Iredell was suggesting. Maybe they thought that his suggested reading was attractive but also were pretty confident that the Constitution would not in fact be read that way if ratified. Maybe they thought that the Constitution might be read that way but it also might not, and "not" was sufficiently likely that it was not worth taking a chance. More plausibly, maybe some of the delegates thought the first of those three things, and others the second, and others the last. But regardless of how those delegates were distributed along this spectrum, there does not seem to be any reason to read the evidence as suggesting that the North Carolina delegates believed Iredell's

65. Consider the example of John Smilie, a leader of the anti-ratification forces in Pennsylvania, who at the Pennsylvania convention basically dared Wilson to repeat his argument. See 2 DHRC, *supra* note 41, at 386.

66. For further treatment of this point, see Graber, *supra* note 59; see also Richard Primus, *The Limits of Enumeration*, 124 Yale L.J. 576, 615–18 (2014).

67. 4 ELLIOT'S DEBATES, *supra* note 49, at 242–47 (committee report); *id.* at 250–51 (recording vote of 184–84 in favor of approving the committee's report, with Iredell's name listed first among the losing side).

68. One might argue that Iredell's power-of-attorney idea was actually much better accepted outside North Carolina, such that its rejection in Iredell's own convention was a geographic accident that says nothing about American opinion more broadly. After all, the argument could run, most of the states ratified without demanding amendments first, so maybe North Carolina was an outlier on the point. But in the absence of examples of the analogy's being articulated by other people, there is little basis for assuming that people in other states accepted this particular idea.

power-of-attorney prism would prevail in constitutional interpretation. Or even that they thought it worth taking seriously.

If Iredell's speech were merely one of many Founding-Era sources analogizing the Constitution to a power of attorney, the fact that Iredell's version of the argument flopped might not matter very much. But Natelson has no other examples of anyone in 1787–1788 offering the power-of-attorney idea, and neither do Lawson and Seidman. As noted above, I do not think there are many other examples to be found. For anyone who would argue that the original meaning of the Constitution is its meaning if interpreted as a power of attorney, this is a serious problem.

Lawson, Seidman, and Natelson do specify a few other occasions on which they say Americans in 1787–1788 made the more general argument that the Constitution should be interpreted with the rules applicable to *some sort* of fiduciary instruments (other than powers of attorney). But it is not clear that this more general version of the thesis is adequately supported by evidence either. To be sure, the Founding generation often used words that are at home in fiduciary settings when discussing the Constitution or government more generally. On inspection, however, the sources that are cited to show that the Founders regarded the Constitution as a fiduciary instrument may not reveal anything about the Founders' views about constitutional interpretation.

Consider the claim, in an article co-written by all three authors, that John Marshall at the Virginia ratifying convention regarded the Constitution as “an agency instrument that incorporates background presumptions familiar from other fiduciary contexts”—presumptions that drive specific principles of textual interpretation.⁶⁹ In support of this proposition, they cite two pages from Elliot's Debates. Lawson, Seidman, and Natelson do not explain why the statements attributed to Marshall on the cited pages demonstrate a view about interpreting the Constitution in accordance with rules appropriate to fiduciary instruments: the point is simply asserted. And it is not obvious that the statements are sufficient for that purpose. On the contrary, it seems a stretch to read Marshall as having taken that position in any meaningful way.

The first of the two pages cited records Marshall's response to a delegate who worried that Congress and the President would make bad laws and bad treaties. Marshall's argument is given as follows:

I shall ask the worthy member only, if the people at large, and they alone, ought to make laws and treaties? Has any man this in contemplation? You cannot exercise the powers of government personally yourselves. *You must trust to agents.* If so, will you dispute giving them the power of acting for you, from an existing possibility that they may abuse it? As long as it is impossible for you to transact your business in person, if you repose no confidence in delegates, because there is a possibility of their abusing it, you can have no government[.]⁷⁰

69. Lawson, Seidman & Natelson, *Fiduciary Foundations*, *supra* note 3, at 431.

70. 3 ELLIOT'S DEBATES, *supra* note 49, at 225 (emphasis added).

Marshall's argument here is pretty simple. In a polity too large to be governed by a general meeting of all the members, the only possible government involves delegating responsibility to a smaller number of people. And in the sentence I have italicized, Marshall does use two words that figure prominently in agency law. Those words are "trust" and "agents." But do Lawson, Seidman, and Natelson really mean to say that Marshall's using those words tells us that he believed the apparatus of agency law interpretation was applicable to the Constitution? The interpretation of legal instruments is not even Marshall's topic here. Does every use of the words "trust" or "agents" invoke the technical rules of agency law?

Note too that Marshall in this passage is not talking about a feature of the United States Government in particular. He is describing a fact about government in general. Except in the smallest of all polities, all government involves the need to do something Marshall here calls "trusting," and it involves doing that thing toward a group of people who are sensibly described as "agents." So if Lawson, Seidman and Natelson are right, Marshall here would be asserting that except in polities where all members can meet face-to-face, power-conferring documents in *every possible government* must be interpreted as instruments of agency law. It simply is not possible to have government on any other terms. That would be an exceedingly strange view, and these passages are no reason to attribute it to Marshall. The statement "you must trust to agents" need not entail any consequences about the relationship between government and the private law of agency, any more than the statement "all of us are brothers" would mean that the relationship among Americans should be governed by family law.

The other cited passage recording Marshall's remarks is also about the impossibility of the people's exercising the powers of government directly. It reads as follows:

"Shall the people at large hold the sword and the purse without the interposition of their representatives? Can the whole aggregate community act personally? I apprehend that every gentleman will see the impossibility of this. Must they, then, not *trust* them to others? To whom are they to *trust* them but to their representatives, who are accountable for their conduct? . . . [And if the power is abused the People can assert themselves.] It is the people that give power, and can take it back. What shall restrain them? *They are the masters who give it, and of whom their servants hold it.*"⁷¹

Once again, the word "trust" appears. Indeed, it appears twice. And the last sentence asks the audience to think in terms of master and servant, which is an agency-law relationship. But again, it seems a stretch to think that Marshall here is asserting that the Constitution must be interpreted with a legal apparatus taken from the law of trusts, or that of master and servant. The word "trust" does not

71. *Id.* at 233 (emphasis added).

always (or even usually) refer to something in agency law, and insisting that the master-servant passage carries a commitment about the rules of legal interpretation would seem to require some lack of perspective about human speech. Just as the single example of Iredell's speech is too thin to support the claim that Americans at the Founding recognized the Constitution as a power of attorney, sources like these are too thin to support the claim that Americans at the Founding believed the Constitution should be interpreted with the specific devices of other kinds of agency law.

To their credit, Lawson and Seidman acknowledge that not every use of language used in agency law, or every statement that analogizes government to some sort of fiduciary arrangement, is a signal that the speaker believes that technical rules of fiduciary interpretation should apply in the affairs of government.⁷² They conclude, however, that the totality of the evidence—"the sheer volume of these references"—overcomes the problem.⁷³ Their sense, as I understand it, is that even if many Founding-Era uses of fiduciary language do not reflect the interpretive stance for which they argue, there are many examples that *do* reflect that interpretive stance. As the leading repository of such vindicating references, they cite Natelson's article *The Constitution and the Public Trust*.⁷⁴ But in that article, which cites a tremendous number of historical sources ranging across many centuries, Natelson produces no examples of Americans who, in the 1780s, clearly took the position that the Constitution should be interpreted with technical rules drawn from the law of agency. And if no examples (or almost no examples) clearly support the thesis, it does not matter how many examples there are.

Natelson does produce some sources that *might* reflect the idea that the Constitution should be interpreted like a fiduciary instrument, and he produces many sources indicating that people at the Founding thought of government as having fiduciary-like responsibilities as a matter of general principle—that government should govern in the interests of the people rather than in the interests of the officeholders, and so forth. Natelson concludes that article by arguing that if the Founders had that general attitude toward government, it makes sense to interpret the Constitution in a way that vindicates the relevant vision—for example, with an eye to requiring that governmental power be exercised for the public welfare rather than for private gain.⁷⁵ I suspect that many well-socialized constitutional lawyers would find that argument plausible. But an argument at that level of generality need not mean that any technical interpretive doctrines associated with specific strains of agency law are transposable to the Constitution. So, given the striking lack of evidence that people at the Founding thought that the Constitution should be interpreted as if it were subject to the interpretive rules of agency law, it seems possible, or indeed likely, that the Founding generation

72. LAWSON & SEIDMAN, *supra* note 2, at 31.

73. *Id.*

74. *Id.*

75. Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1168.

simply did not have that view—even if lots of people used fiduciary metaphors when discussing the subject of government.

D. Post-Ratification Silence

As a further indicator that Americans at the Founding may not have understood the Constitution to be sufficiently like a power of attorney so as to be interpreted with the rules used for interpreting powers of attorney in agency law, consider the use—or lack thereof—of that idea in congressional debates about constitutional interpretation in the first years after the Constitution was adopted. If the power-of-attorney prism were an available heuristic for constitutional interpretation at that time, Members of Congress who found themselves opposing proposed laws on the grounds that the proposals exceeded the powers of the new government would have had a strong incentive to remind their colleagues of a generally shared or at least a generally accessible proposition: that the powers granted in the Constitution must be construed strictly, because the Constitution should be interpreted with the rules applicable to powers of attorney.

Natelson says that as a general matter he does not put much stock in post-ratification history when trying to identify the original meaning of the Constitution. Once the Constitution was ratified, he points out, people had incentives to make bad-faith arguments, or at least to engage in motivated reasoning, when doing constitutional interpretation.⁷⁶ This concern is reasonable. For example, someone who wanted to argue for an ambitious public works program in 1795 might advance a more expansive view of the Constitution’s “provide for the general welfare” language than might have occurred to reasonable readers in 1787–1788. But the same suspicion that people after ratification would have powerful motives to characterize the Constitution in particular ways indicates that people arguing for a *narrow* construction of congressional powers in the 1790s would have jumped at the chance to make an available argument on their side of the question. If the power-of-attorney idea was a common understanding among Americans at ratification, or even just an available one, then people arguing for narrow constructions of congressional power shortly after ratification would probably have put the idea to use.

It is therefore instructive that there is no record of anyone’s invoking the power-of-attorney idea in the First Congress’s debates about the extent of federal power. Consider the 1791 debate over creating the first Bank of the United States. For more than a week, the House of Representatives argued about the scope of Congress’s legislative powers. James Madison himself spoke at great length, and more than once, about the (ostensible) importance of narrowly construing the powers given to Congress. So did several of his colleagues. But so far as it appears from the Annals of Congress, not once did anyone remind the House that the Constitution was supposed to be interpreted with the restrictive rules for

76. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, *supra* note 3, at 248.

interpreting powers of attorney.⁷⁷ Nor (with one possible exception⁷⁸) do the Annals record opponents of the Jay Treaty—another bitterly contested bit of law-making—invoking the power-of-attorney rubric. Nor opponents of the Alien and Sedition Acts. These absences make it hard to be confident that any significant number of Americans, at the time of the Founding, believed that a well-settled set

77. To my knowledge, the only occasion on which anyone in the Bank debate clearly drew on any aspect of agency law, even at the level of metaphor, occurred near the very end of the debate, and it had nothing to do with questions of how to interpret a legal text. According to the Annals of Congress, Madison in his last intervention in the Bank debate argued, among other things, that the Bank as proposed would give too much economic benefit to a set of wealthy stockholders and not enough to the general public. In contending that Congress had a responsibility to cut a better deal on the public's behalf, Madison said "that the Government ought to consider itself as the trustee of the public on this occasion, and therefore should avail itself of the best disposition of the public property." 2 ANNALS OF CONG. 1959 (1791). Because the Annals are not a verbatim transcript, one should not make too much of the wording of this passage. But it is still worth noting that the only appearance of agency-law thinking in the Bank debate occurred as a form of policy criticism, not by way of explaining the principles that should underlie the interpretation of Congress's powers.

Natelson, for his part, claims that during the Bank debate three Members of Congress—Fisher Ames, James Madison, and Michael Jenifer Stone—treated the Necessary and Proper Clause "as an expression of the incidental agency powers doctrine." Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, *supra* note 3, at 315 & n.363. But it is not clear why the passages cited from those Members' remarks indicate that those Members thought they were drawing specifically on the private law of agency. Ames described the Necessary and Proper Clause as establishing "the doctrine that powers may be implied," which might or might not be a reference to agency law. 2 ANNALS OF CONG. 1904 (1791). Ames also analogized the government to a corporation, *id.* at 1905, and, to the extent that he meant legal implications to follow, the result would be to vest the government with powers beyond those enumerated—as was indeed Ames's view. See Richard Primus, "The Essential Characteristic": *Enumerated Powers and the Bank of the United States* 117 MICH. L. REV. 415 (2018). The Stone passage Natelson cites opposes the idea that the Constitution grants powers by implication, and again nothing is said about agency law in particular. And the Madison passage Natelson cites does not seem to say anything about agency law at all. It records Madison saying that the Constitution "is the great law of the people, who are themselves the sovereign Legislature," and then quoting the preamble to ascertain the purposes of the Constitution, and then arguing that the Constitution should be interpreted in light of its purposes. 2 ANNALS OF CONG. 1947 (1791). Again, to read that argument as clear invocation of any doctrine particular to agency law seems a stretch.

78. The Jay Treaty debates included the only two occasions of which I am aware on which Members of Congress in the first decade after ratification adverted to powers of attorney in the course of constitutional debates, and on neither occasion did the Member assert that the Constitution should be interpreted with the rules applicable to powers of attorney. On the first of those two occasions, Daniel Buck of Vermont—a Jay Treaty supporter—described the Constitution as "a sufficient letter of attorney to the President and the Senate" to make the Treaty. 4 HISTORY OF CONG. at 711 (March 23, 1796) (Statement of Rep. Buck). Buck also described the elected branches of the federal government as "agents of the people." *Id.* But he did not develop either of these ideas in any way sufficient to support his conclusion that interpretive rules applicable in the private law of agency were also applicable to the Constitution. He might just have been speaking metaphorically, and in any event the crux of his argument was to enable, rather than constrain, federal action. A short time later, South Carolina's Robert Harper used the idea of a power of attorney conveying limited authority from principal to agent to argue that the President and the Senate could make a treaty but needed the House's participation in legislation to put that treaty into effect. *Id.* at 751. This second use of the power-of-attorney idea does emphasize the idea of a limited grant of power, but it might not be a claim that the Constitution, as such, should be interpreted with the rules applicable to powers of attorney. It might merely be using the power of attorney idea as a way of illustrating the more general idea that certain grants of power are limited.

of interpretive rules used for powers of attorney was also the set of rules to be used for interpreting the Constitution.⁷⁹ If that understanding had indeed been widespread, why would the pitched battles over construing the powers of Congress in the decade following have been fought without anyone's mentioning that idea?

Perhaps there were uses of the power-of-attorney framing that were not captured by the inexact record that is the Annals of Congress. Or perhaps I missed some invocations that really are there. But having looked, I have been able to find at most one invocation of the idea that the Constitution should be interpreted as a power of attorney, or more generically as a fiduciary instrument, in any congressional debate occurring in or before 1798.⁸⁰ (I stopped looking after that point.) Again, I may have missed something. But even if a handful of comments escaped my notice or were not properly recorded, it does not seem that the power-of-attorney frame was part of the customary apparatus of constitutional interpretation in the first decade after ratification—not even among well-informed people who had every incentive to argue for narrow constructions of congressional power.

E. The Elephant and the Tree

So here's where we are: Many scholars, with varying perspectives, have examined Founding-Era sources and concluded that there was no settled understanding at that time about how to interpret the Constitution. Natelson argues that the Constitution was a fiduciary instrument and that people generally understood it that way. Lawson and Seidman emphasize one sort of fiduciary instrument—the power of attorney—and argue that the Constitution should be interpreted in that light. But the whole idea that the Founders believed that the Constitution should be interpreted according to the particular rules of agency law rests on ambitious inferences. Natelson produces many examples of Founding-Era Americans using words that are used in agency law when discussing the government or the Constitution, but not much reason is given to conclude that those Founding-Era Americans meant that the technical interpretive devices of agency law should carry over to constitutional interpretation. And there is precious little evidence that anyone at the Founding—let alone most people at the Founding—thought that the Constitution should be interpreted as if it were a power of attorney.

That's not to say that the Constitution bears no resemblance whatsoever to a power of attorney. Both the Constitution and a typical power of attorney are legal documents by which some authoritative actor empowers some other actor to exercise power, and in both scenarios the power is supposed to be exercised for the benefit of the power-conferring actor rather than that of the power-exercising actor. But that does not mean that we can understand what to do with the Constitution by understanding what to do with a power of attorney any more than

79. If no significant number of actual Americans thought this way, it seems unlikely that a hypothetical reasonable one abstracted from the whole would have done so.

80. The one possible exception is Harper's comment about the Jay Treaty, discussed *supra* note 77.

we can understand how to interact with an elephant on the basis of understanding how to interact with a wall, a snake, or a tree. The Constitution is, to put it simply, *not* a private-law power of attorney, nor is it a private-law instrument of any other kind. “The people” are not the same as a private client, and the project of structuring and regulating a successful government differs wildly from the project of empowering and directing an agent to sell one’s house. As I suspect the Founders understood.

Lawson and Seidman might demur. Several times in *A Great Power of Attorney*, they explain that it is not their view that the Constitution is *actually* a power of attorney.⁸¹ They describe their argument as partial and conditional: *to the extent* that the Constitution is like a power of attorney, certain consequences follow for constitutional meaning.⁸² So in response to any argument that the Constitution is not a power of attorney, or that neither Natelson nor Lawson and Seidman have produced much evidence that the Founders believed the Constitution would be interpreted as a power of attorney, Lawson and Seidman can always say that they are not claiming otherwise. Not that they doubt the force of the analogy; on the contrary, their own belief is that the Constitution is enough like a power of attorney to drive a lot of constitutional interpretation.⁸³ But if readers are not prepared to go that far with them, readers should at least appreciate that the Constitution should be treated like a power of attorney to whatever extent the power-of-attorney analogy is apt.⁸⁴

But what if that extent is terribly small? If the historical record showed that the power-of-attorney frame was one of a few major ways in which the Founders envisioned constitutional interpretation, Lawson and Seidman could say that the Constitution should be interpreted like a power of attorney to the extent that the Founders thought about it that way, and their argument could have meaningful interpretive consequences. Given the thoroughgoing weakness of the historical evidence, however, the project is left with little purchase. One failed speech and a bunch of questionable inferences cannot validly create anything like a sound interpretive frame. It is no doubt true that to the extent that the Constitution means what it would mean if interpreted like a power of attorney, the Constitution means what it would mean if the Constitution were a power of attorney. But it is also true that to the extent that an elephant is like a tree, an elephant is like a tree. The analogy does not improve our understanding of the elephant.⁸⁵

81. See, e.g., LAWSON & SEIDMAN, *supra* note 2, at 4

82. See, e.g., *id.* at 11.

83. “If we cannot draw a straight line from the interpretation of powers of attorney to the interpretation of the U.S. Constitution, we at least can construct a vector, of perhaps uncertain magnitude, pointing in that direction. That is not a small matter. We actually believe that such a vector covers most, if not all, of the relevant interpretative distance in many cases . . .” *Id.* at 56.

84. *Id.* (“We actually believe that such a vector covers most, if not all, of the relevant interpretative distance in many cases, but we can live with a lesser claim if we must.”).

85. Again, there are things worth knowing about the elephant that are also true of the tree. For example, it can important to understand that the elephant is large. But we grasp everything we need to know about the elephant’s size by direct observation of the elephant, without any need for the analogy. See *supra* note 17.

Lawson and Seidman surely appreciate this point. They know that their book has persuasive value only to the extent that readers are willing to think of the Constitution as a power of attorney. Indeed, the book is written as if it has trouble holding to its official position that its claims are merely conditional. Over and over, the text reads as if it is making actual claims about the Constitution—that the Constitution *is* a power of attorney and should be interpreted as such—rather than conditional claims about what would follow to the extent that those things are true. Chapter One is called “What the Constitution Is—and Why it Matters.”⁸⁶ That question is restated on the book’s first page as “what actually *is* [the Constitution]?”⁸⁷ Lawson’s and Seidman’s text italicizes the word “*is*” to stress that the question goes to the Constitution’s actual nature; they describe that question on that same first page as “existential.”⁸⁸ The next two pages assert that “correct characterization of the object of interpretation [*i.e.*, the Constitution] is critical”⁸⁹ and indicate that such a correct characterization must “accurately situate[] the Constitution within the universe of documents known to eighteenth-century makers of legal instruments.”⁹⁰ The book credits Iredell, on the basis of his power-of-attorney speech, with being “[t]he person who most aptly identified the Constitution’s character.”⁹¹ This all sounds like an argument that it is *correct* to think of the Constitution as a power of attorney. And if the goal of *A Great Power of Attorney* is to generate ideas about constitutional meaning, then this stronger argument is just what the authors need. An argument about what the Constitution really *is*, if only it were accurate, would support claims about how the Constitution should be interpreted.

Lawson and Seidman disclaim that stronger argument. They acknowledge differences between the Constitution and powers of attorney and, with a reasonableness that everyone should appreciate, insist only that the idea “works at least at some level of analogy.”⁹² Which it does. In my own view, it works a little better than several of the blind men’s analogies about the elephant. But to know whether it works well enough to play any important role in answering questions about what the Constitution meant at the time of its adoption, one needs to know whether Iredell’s speech expressed an idea that many Americans would have found persuasive at the time of the Founding. Neither this book nor the Natelson work upon which it rests come close to establishing that proposition.

86. LAWSON & SEIDMAN, *supra* note 2, at 1.

87. *Id.*

88. *Id.*

89. *Id.* at 2.

90. *Id.*

91. *Id.* at 3; *see also id.* at 11 (“The Constitution is a fiduciary instrument best categorized as a power of attorney . . .”).

92. *Id.* at 4.

III. THE IMPLICATIONS

In the nature of constitutional argument, however, the central idea of *A Great Power of Attorney* might have power even if its ostensible historical underpinnings are unsound. To the extent that constitutional law is shaped by original meanings, it is shaped not by *actual* original meanings but by *operative* original meanings—that is, by original meanings as understood and imagined by the real people who exercise decisionmaking power.⁹³ Those people’s conceptions of original constitutional meanings are not totally unrelated to actual original meanings, but they are also not a direct function of actual original meanings. They are combined products of history, myth, socialization, and what we might call “historical preferences,” meaning not preferences held in the past, but rather preferences *about* the past—preferences about who the Founders were, what they stand for, and how their story will be told.⁹⁴

In the complex shaping of operative original meanings, a pithy phrase or a well-drawn image can do persuasive work, even if the history that the phrase or image invites us to imagine differs from what a historian’s careful and dispassionate reading of the historical record would show. Lin-Manuel Miranda took liberties with history, and his work product is surely changing intuitions about the Founders and the Constitution.⁹⁵ For a more specialized audience, *A Great Power of Attorney* can do something similar. It offers a sharp and memorable idea about how to understand the Constitution, one with enough intuitive plausibility that people who are attracted to the conclusions it generates will likely make it part of their good-faith apparatus for understanding the Constitution, regardless of the accuracy of the historical claim.

I assume, of course, that Lawson and Seidman do not intend *A Great Power of Attorney* to have persuasive effect to any degree beyond what the historical record would support. They are professors who wrote a book published by a university press, not artists staging a Broadway musical. As noted earlier, their text repeatedly cautions that it reaches *no* conclusions about what judges or other constitutional decisionmakers should do, let alone historically unsupported ones.⁹⁶ They distinguish (as some other scholars also do⁹⁷) between constitutional *meaning* and constitutional *law*. Constitutional meaning, as they use the term, is the communicative content of the document—by which Lawson and Seidman mean

93. Cf. CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 150 (1890) (“No people are ruled by dead men, or by the utterances of dead men. Those utterances are only law so far as they are voiced by some living power.”).

94. See Richard Primus, *The Functions of Ethical Originalism*, 88 *TEX. L. REV.* 79, 83–84 (2010) (describing this kind of “historical preferences” and their role in constitutional interpretation).

95. See Richard Primus, *Will Lin-Manuel Miranda Transform the Supreme Court?*, *ATLANTIC* (June 4, 2016), <https://www.theatlantic.com/politics/archive/2016/06/lin-manuel-miranda-and-the-future-of-originalism/485651/> [<https://perma.cc/HJ5B-6N8S>].

96. See LAWSON & SEIDMAN, *supra* note 2, at 172 (“We say nothing—literally nothing—about the possible normative project.”).

97. For a good discussion of this distinction, see Mitchell M. Berman, *The Tragedy of Justice Scalia*, 115 *MICH. L. REV.* 783, 786–96 (2017).

the *original* communicative content of the document.⁹⁸ Constitutional law, which governs the action of public officials, is some product of constitutional meaning as filtered through practical and institutional concerns—and, Lawson and Seidman say, moral concerns⁹⁹—that lie outside the ratified text. Because constitutional meaning does not directly supply constitutional law, the authors say, nothing that the book claims about constitutional *meaning* directly prescribes any particular course of action for government officials implementing constitutional law.¹⁰⁰

Lawson and Seidman are correct, I think, that nothing in this book establishes what constitutional decisionmakers should do. But I reach that conclusion for different reasons. For me, the first reason why nothing in *A Great Power of Attorney* furnishes a reason for action is that I do not share the book's assumptions about the authority of original meanings. As I have argued elsewhere, arguments about the Constitution's eighteenth-century meaning rarely provide good reasons for action in twenty-first century constitutional decisionmaking.¹⁰¹ Second, even if eighteenth-century meanings were good bases for twentieth-century decisionmaking, this book would still not give reasons for action, because it does not supply persuasive evidence for its claim about eighteenth-century constitutional meaning. The evidence that Natelson, Lawson, and Seidman offer is too thin to establish that reasonable eighteenth-century Americans would have understood the Constitution as a legal instrument that should be interpreted like a power of attorney to any consequential extent. So, because the historical claim is not adequately supported and because that claim should not drive constitutional decisionmaking even if it were historically correct, I agree with the book's official view that its argument has no normative consequences.

To stop there, however, would be to understate the book's probable impact. In spite of its self-described limitations, *A Great Power of Attorney* strikes me as likely to influence normative ideas about modern constitutional law. Note that the applications Lawson and Seidman use to illustrate their (conditional) ideas about constitutional meaning tend to involve current legal controversies. Much of the book is devoted to exploring how the constitutional meaning that the authors claim to establish would bear on modern legal questions, from the existence of a federal eminent domain power¹⁰² to the administrative state's tolerance for rule-making delegation¹⁰³ to the constitutionality of the Affordable Care Act.¹⁰⁴ Even

98. See, e.g., LAWSON & SEIDMAN, *supra* note 2, at 169, 172.

99. See Lawson & Seidman, *Originalism as a Legal Enterprise*, *supra* note 18, at 53–54.

100. See, e.g., LAWSON & SEIDMAN, *supra* note 2, at 169, 172.

101. See, e.g., Richard Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165 (2008).

102. LAWSON & SEIDMAN, *supra* note 2, at 95.

103. *Id.* at 104–29.

104. *Id.* at 91–99. In this context, Lawson and Seidman have in fact recommended that government officials implementing constitutional law do pretty much what one would imagine if the arguments of this book were straightforwardly translatable into legal doctrine. See, e.g., Brief of the Authors of *The Origins of the Necessary and Proper Clause* (Gary Lawson, Robert G. Natelson & Guy Seidman) and

as the book disclaims direct normative applicability, it is persistently interested in using its view of constitutional meaning to shape the reader's understanding of issues with normative legal stakes. And as it happens, the proffered constitutional meanings all align pretty well with a certain kind of libertarian values.¹⁰⁵ The individual mandate, the exercise of eminent domain by the federal government, and the fishy prosecution of poor Captain Yates are all shown to be inconsistent with the meaning of the Constitution.

In this light, the idea that the book says nothing normative seems naïve. Regardless of its official modesty, *A Great Power of Attorney* does something to alter the landscape of normative constitutional argument. It injects an image—the image of the Constitution as a power of attorney, to be construed restrictively—into the discourse of constitutional lawyers. It tells readers that the Constitution means certain things and does not mean other things. To be sure, it describes those ideas as conditional, as warranted only so far as warranted, and as not determining constitutional law. But in the dynamics of constitutional persuasion, an argument about constitutional meaning cannot help but drive normative legal conclusions. The particular arguments that Lawson and Seidman develop about what the Constitution means—or would mean, if the power-of-attorney frame prevailed—are too tempting to be left lying around unused. As a meme of thought, the quickly intuitive idea of the Constitution as a power of attorney will do its own work, regardless of whether its historical foundations are sound.

Lawson and Seidman might respond that they are just doing their jobs as scholars. They call things as they see them, and they describe constitutional meaning as they best understand it, and if other people misread their book as proving things it does not prove, well, Lawson and Seidman cannot be held responsible for other people's carelessness. On its own terms, that's a cogent position. As a general rule, it seems right to say that scholars should not abstain from writing things they think to be correct when carefully stated just because other people might adopt the ideas in less careful ways.

Nonetheless, it is hard to escape the conclusion that the book will be read as an argument of the very kind that the authors disclaim. On this score, one of the most instructive texts one reads when reading this book is not a text written by Lawson and Seidman at all. It is a blurb on the back cover by Steven G. Calabresi. The blurb begins as follows: “‘*A Great Power of Attorney*’ is the best book written about judicial interpretation of the Constitution in my lifetime!”

the Independence Institute as Amici Curiae in Support of Respondents, *Dep't of Health & Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398) (arguing, based on the premise that the Constitution should be interpreted like an eighteenth-century fiduciary instrument, that the individual mandate of the Affordable Care Act was unconstitutional).

105. Lawson and Seidman say that their analysis produces “a wide, and quite eclectic, set of interpretative implications, some of which surprised even us.” LAWSON & SEIDMAN, *supra* note 2, at 11. But it is not clear that any of those implications points to a constitutional meaning unfriendly to normative libertarianism. Instead, all of the implications seem like good news, from a libertarian point of view.

For someone who has absorbed Lawson and Seidman's explanation that their book is not about the behavior of government officials, that sentence must be puzzling. In what is surely intended as a statement getting to the crux of why people should read the book, Calabresi describes *A Great Power of Attorney* as being about something that the authors insist they do not address: *judicial* interpretation. Judicial interpretation of the Constitution, as opposed to interpretation *simpliciter*, is an activity of government officials. It is shaped by the distinctive institutional role that courts play as wielders of coercive power. The book repeatedly insists that questions about how government officials do or should execute their offices are beyond the book's strictly delimited investigation of constitutional meaning. In Lawson and Seidman's words, "We are interested in constitutional meaning, not constitutional authority or justification. . . . We make no claims about the extent to which that meaning either does or should drive decisions about read-world conduct."¹⁰⁶ But the back cover advertises the book as essential reading on the subject of *what judges do*.

We all know the injunction against judging books by their covers. In this case, perhaps the blurb on the back is not one that Lawson and Seidman wanted. Perhaps it was chosen carelessly by an intellectually imprecise publisher—or deliberately by a goal-oriented one who reasoned that "This is an important book about judges and the Constitution" would sell more copies than "This is a book with no normative argument."¹⁰⁷ But regardless of how it got there, the blurb says something accurate about how the book will be received. *A Great Power of Attorney* raises the profile and the status of a provocative but inadequately supported idea about how to read the Constitution. Despite its authors' disclaimers, the book will function as a conduit through which Natelson's tendentious rendering of history is delivered in ready-to-use form to the community of constitutional law advocates. To the extent that the book executes that function, it will inspire constitutional arguments—normative arguments, arguments about what courts should do—that traffic in original meanings but which misperceive the Founders. In particular, it will inspire arguments that obscure the fact that the Founders' major project was the creation of a bigger, stronger, and more centralized national government.

CONCLUSION

At a time when the President of the United States shows astonishingly little compunction about wielding political power for his own personal enrichment, it seems wise to take advantage of any opportunity to assert that government officials must use their authority for the public welfare and never for private gain. One shorthand way to make that point is by saying that government under our Constitution is a public trust. Similarly, analogizing the Constitution to a power

106. See, e.g., *id.* at 5.

107. See LAWSON & SEIDMAN, *supra* note 2, at 172 ("We say nothing—literally nothing—about the possible normative political project.").

of attorney can be salutary if it reminds people who exercise governmental power that they are required to act for the sake of something other than their own benefit. It does not follow, however, that anything else from the agency-law apparatus of trusts or powers of attorney must inform constitutional interpretation. Such analogies are useful only as accessible illustrations of a general idea, not as proposals to transpose rules from the context in which they were developed to some other context that might require a different approach.

Fundamentally, the idea that the Constitution should be interpreted on the model of a power of attorney—or indeed that of any private-law instrument—risks a mistake that political theory identified long ago. That mistake is the attempt to model public politics too closely on private or family affairs.¹⁰⁸ What works in one realm frequently does not work in the other. To impose the rules appropriate in either sphere on activities conducted in the other is often a recipe for the failure of the relevant project.

The possibility that government cannot succeed if it is treated as just one more entity subject to the rules of private law would, for me, be a sufficient reason not to impose such rules in the realm of government. But Lawson and Seidman may think differently. One of the most important passages in *A Great Power of Attorney* comes in the form of a disclaimer even greater than the disclaimer of normative consequences for constitutional law. As if to stress how far they mean to stay from actual legal arguments, Lawson and Seidman adopt a position of agnosticism on something like the very possibility of government. “We also emphasize,” they write, “that we are making no claims about actual political authority, about the normatively binding quality of the Constitution, or indeed about whether there is any such thing as binding political authority.”¹⁰⁹ That statement is both an expression of intellectual modesty and a doubling down on the book’s animating skepticism toward governmental power. Agnosticism toward the binding quality of the Constitution or even about the possibility of binding political authority more generally is skepticism about the moral acceptability of government itself. In other recent writing, one of the book’s authors has eloquently communicated the view that, indeed, government is a nasty thing, one whose projects should be described with terms of opprobrium.¹¹⁰ That deep skepticism toward the moral acceptability of government is not developed in *A Great Power of Attorney*. But it is, perhaps, the elephant in the room.

108. See, e.g., ARISTOTLE, *THE POLITICS*, bk. 1, § 1. Among modern treatments of this theme, I am partial to JUDITH SHKLAR, *ORDINARY VICES* (1984) (arguing that many traits or practices that are morally blameworthy in private life are not morally blameworthy in politics and government).

109. LAWSON & SEIDMAN, *supra* note 2, at 61.

110. See Gary Lawson, *Reflections of an Empirical Reader (Or: Could Fleming Be Right This Time?)*, 96 B.U. L. Rev. 1457, 1477 (2016) (“[T]o tell judges and other officials how to decide cases . . . means telling judges and other officials who to shoot, whose lives to control, and whose wealth to seize. That is, of course, what pretty much everybody in the world of constitutional interpretation except me is trying to do, and the conflicts among the contending theorists reduce to who gets shot, whose lives get controlled, and whose wealth gets seized.”).

If one is uncertain whether government can be morally acceptable, then perhaps one will not be bothered by the idea that government should be treated as if it were something that is not government at all. But if one thinks that any sound conception of morality must have room for authoritative government—as I do—and if one is confident that the constitutional government of the United States legitimately commands our obedience—as I am—then one must read the Constitution in ways that let that government accomplish what it needs to do, as a government, rather than treating it as something else that cannot accomplish what a government must accomplish. It is the latter perspective that centrally animated the project, more than two hundred years ago, of adopting a Constitution that would create a more powerful and more effective national government.