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Authors' Response: An Enquiry Concerning Constitutional Understanding

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Authors' Response: An Enquiry Concerning Constitutional Understanding

GARY LAWSON* AND GUY SEIDMAN**

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One of Professor Lawson’s first students, alluding to a 1985 article with the provocative title “Why Professor [Marty] Redish Is Wrong about Abstention,”¹ declared that his ambition was to inspire someone to write an article entitled “Why [the student] Is Wrong about XXX.” The student claimed that, regardless of what filled in the “XXX,” this event would be the pinnacle of academic accomplishment.

If that view is even close to the mark, then having an entire conference devoted to explaining why Professors Lawson and Seidman are wrong about the

* Co-author of *A Great Power of Attorney: Understanding the Fiduciary Constitution* (2017); Philip S. Beck Professor, Boston University School of Law. We are grateful to the participants at a faculty workshop at Boston University School of Law for their insightful comments. © 2019, Gary Lawson & Guy Seidman.

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1. Michael Wells, *Why Professor Redish Is Wrong about Abstention*, 19 GA. L. REV. 1097 (1985).

Constitution is an extraordinary honor. In all seriousness, we are genuinely flattered by the remarkable gathering convened at Georgetown University Law Center on April 20, 2018 to discuss our book, *“A Great Power of Attorney” : Understanding the Fiduciary Constitution*.² We are profoundly grateful to the many participants at the conference, to the editors at the *Georgetown Journal of Law and Public Policy*, to Randy Barnett and the staff at the Georgetown Center for the Constitution, and, most of all, to Suzanna Sherry, Richard Primus, Ethan Leib, Jed Shugerman, and John Mikhail for taking the time and energy to engage with our work. We truly wish we could have accessed their comments before sending our book to print, and we are delighted and honored to respond in this forum to their comments and to those of some of the other conference discussants.

So, are Professors Lawson and Seidman really wrong about the Constitution? We think that the multiple answers to that question are “mostly not,” “quite possibly partly yes,” and “it depends,” with much turning on exactly how one frames and understands the relevant question(s). Rather than go through each article and comment from this conference point by point, we organize our response thematically. We first address some important methodological aspects of our project (and of our larger collaborative agenda) and then deal with some substantive critiques that emerged from the conference and resulting papers. As we explain, our position was evolving a bit even as we wrote the book, and this conference clarified some of that evolution and pointed the way to further research.

I. DISCOURSE ON THE METHOD

A. *Author! Author! . . . Author!*³

Richard Primus⁴ right away remarks on perhaps the most important methodological feature of our book when he notes that we “build on the work of Robert Natelson.”⁵ That simple observation is even more correct—and more significant—than Primus realizes. One cannot understand the nature of this project without knowing how it came to be.

Our book originally had three authors (and the two of us were going to be the junior partners in the enterprise). Robert Natelson had been thinking, researching, and writing about the fiduciary character of the United States Constitution long before we latched onto the idea. Indeed, we discovered the fiduciary idea through Natelson⁶ while developing some related ideas about the venerable principle

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

3. With apologies to Arthur Hiller and Israel Horowitz.

4. Richard Primus, *The Elephant Problem*, 17 *GEO. J.L. & PUB. POL’Y* 373 (2018).

5. *Id.* at 375. See also *id.* at 377 (“they rely on prior work by Natelson”); *id.* (“the ambition of *A Great Power of Attorney* is to build on Natelson”); *id.* at 373 (“The present book is in part a hymn in praise of Natelson’s efforts, which Lawson and Seidman take to be transformative.”).

6. Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 *CASE W. RES. L. REV.* 243 (2004).

of reasonableness in administrative law and that principle's relevance for understanding the Necessary and Proper Clause.⁷ After we collaborated with Natelson and Geoffrey Miller on a book devoted specifically to the intellectual underpinnings of the Necessary and Proper Clause,⁸ the two of us and Natelson wrote an article as a quasi-sequel about the broader implications of a fiduciary account of the Constitution.⁹ In the course of that project, we realized that an adequate treatment of those broader implications required a book, which we then began planning. Since Natelson had already written several thorough and lengthy articles on fiduciary constitutionalism,¹⁰ we planned for those articles, in revised form, to be the bulk of the book. Even the applications of fiduciary constitutionalism on which we initially planned to focus were primarily subjects that Natelson had already explored, such as the federal spending power¹¹ and election law.¹² The two of us were going to contribute an overall theoretical structure for the project, relate the fiduciary principle to the principle of reasonableness, and add our own modest findings on Founding-Era meaning to Natelson's voluminous research. The proposal for the book we sent out, which the University Press of Kansas accepted, outlined precisely this structure. It was, in substance if not in form, going to be a work by "Natelson, Lawson & Seidman"—or really even "Natelson (with Lawson & Seidman)."

Unfortunately, Natelson had to withdraw from the project shortly after its acceptance for publication. With his departure went a lifetime of learning about Founding-Era fiduciary law, theory, and history. Natelson had spent years studying documents, visiting archives, and poring through treatises. He had acquired an encyclopedic knowledge of fiduciary instruments that we would never be able to reconstruct on our own. Because we could no longer simply adapt existing articles into our intended structure or draw on Natelson's brain, the two of us substantially re-tooled the book. Accordingly, we took Natelson's extensive work as our jumping-off point, added some embellishments, and reoriented the applications of fiduciary constitutionalism around the basic fiduciary duties rather than around specific topics in constitutional law and theory. The result is something very different from the original design for the book. Nonetheless, Natelson's lifetime of work undergirds all that we have done. He has read and processed an

7. We first discussed the principle of reasonableness in GARY LAWSON & GUY I. SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 52–57 (2004).

8. GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010).

9. See Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014).

10. See, e.g., Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004); Natelson, *supra* note 6; Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICHMOND L. REV. 191 (2001).

11. See 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'Y 239 (2007).

12. See Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (2010).

absurd amount of material on Founding-Era agency law—far more than either of us can even imagine studying. We are profoundly grateful to him for helping frame the project, for helping draft the proposal, and for generously reading and commenting on the manuscript for the book as we prepared it. We generally refer to him (without his knowledge or permission) as our unindicted co-author, and we fervently hope to collaborate with him again in the future.

Thus, Primus is absolutely right that, methodologically, much of our argument rests on Natelson's work. We are quite content with that. We will let Natelson, if he so wishes, defend his own work against Primus's thoughtful and detailed critique.¹³ For our purposes, it is sufficient to say that Primus lodges his critique against the claim that, "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."¹⁴ As we explain below, that is not our claim.¹⁵ We instead rely on Natelson's work for a different and somewhat weaker claim for which we think it more than adequate. We identify that precise claim shortly.

*B. Not Getting Normative: The Non-Role of Lawson & Seidman in Constitutional Adjudication*¹⁶

For as long as he can remember, Lawson has maintained that propositions about textual meaning and propositions about appropriate human action are in separate domains.¹⁷ The techniques and evidence that are likely to provide objectively good indicators of textual meaning will not necessarily be likely to do the same for appropriate human action (and the people who are likely to be good at ascertaining textual meaning are not necessarily likely to be good at discerning morally correct behavior, and vice versa). Claims about textual meaning do not, on their own, have any implications other than as claims about textual meaning. Merely ascertaining the meaning of a document, such as the United States Constitution, provides nothing relevant about how any person—whether a judge, a president, a citizen, or a scholar—ought to behave. In order to link textual meaning and human action, one needs an argument involving a large and complex set of subsidiary premises relating a specific text to morally justified conduct, and that argument must be grounded in moral and political theory rather than in legal theory. Lawson has loudly trumpeted this position (some might say to tedium) for decades,¹⁸ and he has inflicted it on Seidman in our joint work as part of the price for the collaboration. It accordingly features

13. See Primus, *supra* note 4.

14. *Id.* at 11.

15. It might, however, be Natelson's claim. He and we disagree on some basic issues of interpretative methodology. Primus's critique is thus potentially very relevant in many important contexts.

16. With apologies to Randy Barnett.

17. See, e.g., Gary Lawson, *In Praise of Woodenness*, 11 GEO. MASON L. REV. 21, 22–23 (1988). Lawson believes that this was the first law review article that he ever wrote.

18. See, e.g., Gary Lawson, *Originalism without Obligation*, 93 B.U. L. REV. 1309 (2013); see also Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

prominently in our book, as it has (at Lawson's intransigent insistence) featured prominently in all of our joint projects.

Some have a hard time believing, or perhaps understanding, the sharp conceptual line between propositions of textual meaning and propositions of appropriate human action. For example, Suzanna Sherry criticizes this distinction because "either the 'communicative signals' of the author are dispositive (when discernable) or they are not."¹⁹ Yes, but dispositive of *what*? Of textual meaning, yes. But of personal or political morality as well? Not without a very substantial moral and political argument that neither of us has seen presented rigorously. Perhaps Sherry thinks it follows, as night follows day, that the Constitution's meaning is normatively dispositive: "[I]f Lawson and Seidman are correct, we *must* undo much of the jurisprudence (and invalidate most of the federal laws and virtually all of the administrative regulations) of the past seventy-five years or so."²⁰ We do not see that connection. And if one writes down the various propositions necessary to make such a connection on a piece of paper and checks what does and does not logically follow, one will discover that we are right not to see it. There's many a slip 'twixt textual meaning and moral prescription—whether the text in question is the Constitution, the pages of the United States Reports, the current platform of a political party, the Bible, *Atlas Shrugged*, *A Theory of Justice*, or the menu at the local IHOP. Our project is all about textual meaning. In our professional guise as "Lawson & Seidman," we leave moral prescription to moral theorists.

So, are we saying that constitutional adjudicators should not give dispositive weight to constitutional meaning? No, we are not saying anything of the kind. Nor are we saying that they should do so. Nor are we saying that they should give X or Y weight to constitutional meaning—or give X or Y weight to anything other than constitutional meaning. Those are all propositions in the domain of moral and political theory, and we have nothing intellectually interesting to say about them. "We say nothing—literally nothing—about the possible normative project" that someone might try to construct using (or not using) material from our book.²¹ Nothing means nothing. That's just not our thing.²²

Our thing is to provide information that will help ascertain the communicative meaning of the Constitution of 1788. Nothing more, nothing less. We address whether we have provided anything useful along those lines in Part II. In section I.E below, we address why we think it worthwhile to pursue such a project.

19. Suzanna Sherry, *The Imaginary Constitution*, 17 GEO. J.L. & PUB. POL'Y 441, 448 (2018).

20. *Id.* at 447 (emphasis added).

21. LAWSON & SEIDMAN, *supra* note 2, at 172.

22. The suggestion that we are actually doing prescriptive theory because of our choice of verbs, see Sherry, *supra* note 19, at 447–48, is tin-foil-hat craziness.

*C. Assume a Can Opener . . .*²³

If we are interested only in descriptive claims about constitutional meaning—and not in prescriptive claims about constitutional adjudication or governance²⁴—why do we occasionally speak as though some real-world cases were rightly or wrongly decided?²⁵

We answered that question in the book, and we stand by that answer here. We do have a vision of how one ascertains communicative meaning, and in the book “we on occasion describe certain decisions or doctrines as correct in light of that vision.”²⁶ In other words, all of the claims about court decisions in this book are hypothetical imperatives: *If* one regards a certain conception of communicative meaning as the basis for decision, *then* certain conclusions follow. It was not our goal to try to convince people that they should adopt that conception of communicative meaning as the basis for decisions. It just seemed a sensible and natural way to write the book. People who don’t accept the antecedent need not accept the consequent.

We used exactly the same technique when determining whether we could use our interpretative findings, some of which were highly tentative, to draw conclusions about communicative meaning. Again, we couched all of our claims about the relevance of fiduciary theory to communicative meaning in “if . . . then” terms. “[W]e aim here to construct a hypothetical imperative: *if* one views the Constitution in certain terms, *then* certain interpretative consequences follow.”²⁷ That is what we said, and that is what we meant. One hundred percent elephantine.

23. With acknowledgment to whoever invented the joke about the economist on a desert island.

24. LAWSON & SEIDMAN, *supra* note 2, at 5 (“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 real-world conduct.”).

25. *See, e.g.*, Primus, *supra* note 4, at 402–03; Ethan J. Leib & Jed Shugerman, *Fiduciary Constitutionalism and “Faithful Execution”: Two Legal Conclusions*, 17 GEO. J. L. & PUB. POL’Y 463, 487–88. A related question is why, if we are not interested in prescription or constitutional adjudication, we use examples drawn from current controversies, such as the Obamacare case and *Yates v. United States*, 135 S. Ct. 1074 (2015), to illustrate the interpretative consequences of our analysis. *See* Primus, *supra* note 4, at 402–03. One suggested answer is that we are subtly trying to “shape the reader’s understanding of issues with normative legal stakes.” *Id.* at 403. We are, alas, not that clever. The real answers are much less interesting. We discussed *NFIB v. Sebelius*, 567 U.S. 519 (2012), as the chief case in our chapter on principal and incidental powers because we had helped David Kopel and Rob Natelson at the Independence Institute write briefs in that case, so we had already done most of the work needed for a book chapter. We illustrated the principle against sub-delegation through *Yates* because a few years ago, Lawson was editing the case for inclusion in his Administrative Law casebook as an example of the use of canons of construction in statutory interpretation and thought to himself, “gee, that would make a really cool sub-delegation case if you spun it that way.” It thus took its place in the book alongside our discussion of eighteenth-century debates over post roads and collection districts. We illustrate the principle of fairness in federal action by using *Bolling v. Sharpe*, 347 U.S. 497 (1954), because . . . come on, realistically, what else is one going to use?

26. LAWSON & SEIDMAN, *supra* note 2, at 7.

27. *Id.* at 78.

A theme running through many of the comments in this conference is that there just *has* to be a political agenda lurking in here somewhere. To be sure, “law professor” and “political agenda” generally go together like “Brady” and “Belichick,” so it is a plausible first assumption. But Brady did once play for the University of Michigan while Belichick was a defensive coordinator for the Jets—these connections are not always airtight. A fairly modest inquiry will show that, whatever is true of the general run of legal academics, we in particular really, truly do not have a political agenda lurking in our scholarly project. That is a very fortunate thing. One of us is a libertarian anarchist; the other is an Israeli who leans left. If we had an agenda, it would be a distressingly weird one.

D. “*Don’t Know Much About History*”²⁸

Our goal in writing the book was to aid in ascertaining the communicative meaning of the United States Constitution. How does one go about ascertaining the communicative meaning of such a document? The answer would require a lengthy book (or possibly several volumes) that neither of us, singly or together, is presently prepared to write. We are not, here or elsewhere, setting out a comprehensive theory of constitutional interpretation.²⁹ But we obviously have something in mind that drives the process. Otherwise, we would have no way of sorting between relevant and irrelevant material. In particular, we must have some sense of what counts for or against claims of communicative meaning. Because communicative meaning must ultimately be grounded in mental states in order to be communicative, an originalist methodology for understanding the Constitution must look for evidence of some kind of communicative intentions as of 1788, when the document was ratified. Does that interpretative time frame mean that good originalist work must be primarily historical?

Many of the comments, both in the papers and in the discussion at the conference, seem to think so, and they worry that our analysis is historically inadequate. Our response is to move to dismiss the indictment because it does not state an offense. In a civil case, we would move for dismissal under FRCP 12(b)(6). We are not historians by training or trade. We do not see ourselves as doing history. We are doing legal interpretation, by which we mean interpreting a legal instrument.³⁰ History has a role to play in that process, as do countless other disciplines, but, in ascertaining constitutional meaning, history is the handmaiden of law, not the other way around.

28. With acknowledgement to Sam Cooke.

29. One of us has outlined what such a theory would require. See Gary Lawson, *Reflections of an Empirical Reader (or: Could Fleming Be Right This Time?)*, 96 B.U. L. REV. 1457 (2016). Spoiler alert: It requires a *lot*.

30. On the Constitution as a legal instrument (in case anyone has any doubts), see John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018).

We have written previously on this precise point and the substance of our views has not changed much in the interim.³¹ The Constitution announces that its author is “We the People,”³² which is a hypothetical, legally constructed entity rather than a concrete, historical person with real mental states. The author is trying to communicate to a wide public, which operationally suggests an intention to appeal to a hypothetical reasonable reader. Any attempt to “ascertain” the intentions, or mental states, of a hypothetical entity, whether author or reader, is by nature something other than a strictly historical enterprise. If the word did not already apply to a very different idea, we might call that enterprise “construction.”³³ Of course, a construction of a hypothetical entity’s hypothetical mental state that is uninformed by history will almost surely be a bad construction,³⁴ just as with a construction uninformed by economics, political science, philosophy, religion, psychology, linguistics, geography, botany, classical studies, and a host of other subjects. But the process of constructing the intentions of a hypothetical actor involves something different from strict historical (or economic, political, philosophical, religious, psychological, linguistic, geographical, botanical, or classicist) investigation. That is especially true when the hypothetical actor is authoring a legal instrument that is best understood by reference to legal concepts.

Reinforcing all of this is the fact that the actual, concrete authors of the Constitution—however one wants to define historically real authorship in this context—were plural. Jointly authored works, by metaphysical necessity, must be understood as the product of a hypothetical single author. Gary Lawson and/or Guy Seidman, for example, did not author this work. “Lawson & Seidman”—a hypothetical author whose “intentions” may not match up precisely with the concrete, historically real intentions of either of us—authored it.³⁵ And, given that this is a work of legal scholarship, legal scholars are at least as well situated as are historians to interpret what “Lawson & Seidman” is³⁶ saying.

Because we are engaging in the legal construction of a hypothetical entity’s intentions, the kind of evidence that would be decisive for a historical account of a concrete person’s real mental states is not decisive, or necessarily even very persuasive, for our purposes. We are thus less worried than some commentators

31. See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006).

32. U.S. CONST. pmb1.

33. In modern constitutional theory, “construction” refers to the process of filling in gaps in interpretative meaning with normative considerations that can yield adjudicative results. See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013). We are here using “construction” in a non-normative, non-adjudicative sense to describe the process of ascertaining a hypothetical state of mind rather than a historically real state of mind.

34. See Jonathan Gienapp, *Knowing How vs. Knowing That: Navigating the Past*, PROCESSHISTORY.ORG (Apr. 4, 2017), <http://www.processhistory.org/gienapp-knowing-how/> [<https://perma.cc/Y8A5J6L6>].

35. See Lawson & Seidman, *supra* note 32, at 61–67.

36. Technically, we should refer to ourselves in the singular, but we henceforth follow convention by using the plural.

about the dearth of specific statements from real-world, concrete people expressing the views that we attribute to We the People.³⁷ We the People speaks from a distinctive position and from a distinctive conceptual framework. Moreover, intentions at the level of generality that is important to us can sometimes embody implicit assumptions that only come to full light in a post hoc analysis. What a hypothetical entity “intends” can be a function of how well a particular set of propositions coheres with and explains concepts that may not have been specifically on the mind of any concrete person. If the term had not already been taken for a quite different use, “fit and justification” would not be a totally inapt way to describe this constructive enterprise.

Might historians have something interesting to contribute to uncovering those conceptual frameworks and their referents? Yes, of course³⁸—as might economists, political scientists, philosophers, religious experts, psychologists, linguists, geographers, botanists, classicists, and numerous other experts whose inputs can contribute to an understanding of the conceptual framework of We the People. How much of the process of legal interpretation is historical rather than legal may depend on the extent to which the legal English in which the Constitution was written in 1788 differs from today’s legal English. That question, in turn, is partly historical, partly philosophical, partly semiotic, and partly legal, among many other partlies. This is why we do not purport to set forth a comprehensive theory of interpretation.

To be sure, a hypothetical entity, especially a hypothetical entity that is trying to communicate to concrete people, is not likely to “intend” something that would be totally alien to the people, real or hypothetical, with whom the entity is trying to communicate. Primus is right that one cannot plausibly attribute to We the People an intention to employ “an approach to interpretation not in use at the time the text was written . . . [or] that would be decodable only with a technology not available to anyone in its audience.”³⁹ That is why it is important that at least some Founding-Era real actors, even if not all or most real actors, actually discussed legal instruments such as the Constitution in fiduciary terms. We are not advancing an approach to interpretation that would have been incomprehensible to a hypothetical reasonable reader to whom it was posed as an option. This is the precise claim for which we largely rely on Rob Natelson’s exhaustive research.⁴⁰ But, by the same token one cannot ascertain the intentions of a hypothetical entity purely by reference to the views of real persons with real mental states. The hypothetical mental states of We the People must be constructed from the available evidence of those “mental states,” which in this case is the Constitution itself and its surrounding context. That evidence tells us a number of things—that We the People is writing a legal instrument at a specific moment in time, that We the

37. See, e.g., Primus, *supra* note 4, at 375–76.

38. See Gienapp, *supra* note 34.

39. Primus, *supra* note 4, at 381.

40. See *supra* section I.A.

People has some substantial measure of legal sophistication, that We the People is trying to communicate with a spatially and temporally diverse audience that can understand a legal document, and so forth. Obviously, what real people said and thought, or did not say or think, is admissible evidence of what a hypothetical entity would or would not think, which is why we say quite a bit in the book about what various real people said and thought. But the object of inquiry of interpretation of a (metaphysically jointly authored) legal instrument authored by We the People is not the sort of object that a distinctively historical method is likely to yield.

Does this view of meaning imply that the original meaning of the Constitution might be something that very few real people in the eighteenth century actually understood the Constitution to mean? Does it “see[] 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?”⁴¹ Yes, that is pretty much what it implies and sees (though those actually held ideas can certainly be “part” of the data set from which original meaning is constructed, even if they are not constitutive of original meaning). We have discussed this specific interpretative issue at length in a prior work, where we defended a view of the Treaty Clause that was advanced in the Founding Era by Thomas Jefferson and just about no one else:

Disputes about documentary meaning have never been thought to be fully resolvable by reference to nose counts, as would be true if actual mental states were the ultimate touchstone of reasoning. Today, as in the eighteenth century,

[p]eople give *reasons* for their views of meaning, and those reasons do not inevitably reduce to some calculation involving actual mental states. Those reasons can involve pointing out some feature of the document that one’s opponents have not yet seen, or have undervalued, or have refused to acknowledge for political or other reasons. In other words, they refer to mental states that *would* or *might* exist under counterfactual circumstances. Those reasons can also, of course, include reference to actual mental states; one can certainly invoke the numbers, the eminence, or both of the proponents of a particular viewpoint. But those actual mental states are *evidence* of meaning; they are not *constitutive* of meaning.

An approach such as ours that privileges an objective, hypothetical meaning does *not* consider materials such as “the records of the constitutional convention, the ratification debates, *The Federalist*, and early governmental practice” to be “the canonical originalist sources.” Instead, “one must always be prepared to ask whether an expressed understanding would have been different if the utterer had known or thought about X, Y, and Z.” A view that received only minimal expression during the founding era could nonetheless represent the original meaning of the Constitution *if* one concludes that a reasonable

41. Primus, *supra* note 4, at 380 n.20.

person, after considering all of the relevant arguments, including arguments that may not have occurred to anyone at the time, would have accepted that view as correct.

Put as simply as possible, our approach downplays, though it does not eliminate, the relevance of actual expressions of mental states and emphasizes the relevance of arguments from the text, organization, and context of the Constitution considered as a whole. To a reasonable-person originalist, arguments from structure and first principles can easily outweigh even very impressive evidence about concrete historical understandings. "Original *understandings* were not necessarily original *meanings*."⁴²

Nose counts, to be sure, are not wholly irrelevant. Of course we care that, for example, very few people in the Founding Era directly spoke of the Constitution as a power of attorney. It is one of the reasons why we were, and are, equivocal about that specific characterization of the Constitution and why we are less equivocal about the characterization of the Constitution as some kind of fiduciary instrument. We will get to all of that in Part II. For now, we just want to clarify the methodological nature of our project. It is not "history-lite" or "law office history." It is not history at all. It is legal interpretation of a document authored by a legal construct called We the People.

We suspect that the incredulity of some people that this might actually be the project of original meaning stems from insufficient attention to the distinction between positive and normative inquiries. Certainly, if one is looking for reasons to follow the Constitution today that are grounded in the putative authority of some historically real people, the historically real intentions of those people will be very important. But we are not looking for that. We are trying to ascertain what things and relations in the world the Constitution takes as its referents. Actual readers of the document in the eighteenth century could get that wrong—just as can actual readers in the twenty-first century.

*E. "When I Don't Know What to Say, Don't Know What to Do, Don't Know If it Really Even Matters to You, How Can I Make You See It Matters to Me?"*⁴³

Why does the Constitution's communicative meaning, as we have narrowly defined that term, matter?

For some people, it probably does not matter at all. For other people, it might matter a great deal. For others, it might matter somewhat. We are not prescribing whether or how much our findings should matter to anyone in particular. That will depend on the intellectual interests, subsidiary premises, and other knowledge of every reader, and those are things that we neither can nor want to control.

42. Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 8–9 (2006) (footnotes omitted); see also LAWSON & SEIDMAN, *supra* note 2, at 9–12 (setting forth the same account of meaning).

43. With acknowledgments to Ed Hill, Mark D. Sanders, and Faith Hill.

The term that we like to use to describe our project is “modular.” The results can fit into a great many other projects in a wide range of ways.

If one holds some strong subsidiary premises about the normative implications of original constitutional meaning, the normatively appropriate role of judges, and the relative strength of the fiduciary analogy in an interpretative hierarchy, one might well conclude, as did Steve Calabresi on the book’s dust jacket, that the book “is must reading for anyone interested in American constitutional law or judicial review.” Nothing that we say in our book compels any such conclusions about the application of our work to constitutional law or judicial review, but neither does anything that we say foreclose other people from plugging our analysis into a larger framework and reaching such conclusions.

If one holds different, and perhaps weaker, premises about the normative significance of original meaning and/or about the relative strength of the fiduciary analogy, one might find our analysis moderately supportive of conclusions reached in some measure through other means. Perhaps the work of Ethan Leib and Jed Shugerman in this symposium meets that description.⁴⁴ They argue, very persuasively, that the seemingly unlimited presidential pardon power might have constitutional limits grounded in background fiduciary norms.⁴⁵ Our work for them is “laying further groundwork to the project of fiduciary constitutionalism.”⁴⁶ It is one piece of evidence in a larger mosaic. Our book is very far from the sole source on which they rely; and they attempt, as we do not, to use fiduciary insights to construct a real-world model of adjudication. Again, nothing that we say compels that use of our modular project, but nothing that we say forecloses it either. Indeed, their analysis is exactly the kind of development that we anticipated (and hoped) might result from our work; and given the increasing prominence of fiduciary theory in legal scholarship we will not be at all surprised if other projects, from a wide range of perspectives, emerge in the near future that try to use our findings in a similar fashion.

On the other hand, if one holds a very different set of subsidiary premises, in which original meaning has no normative significance (or perhaps even negative normative significance), then one might see our work as nothing more than marginally relevant to those few persons who “happen to have an interest in quirky questions of American legal history.”⁴⁷ If that is true for some readers, so be it. We do not ever expect our work to receive universal acclaim. We do not insist that everyone on the planet, or even in the academy, must take an interest in what we do.

44. See Leib & Shugerman, *supra* note 25.

45. If the Constitution is seen as a fiduciary instrument, then all of the granted powers, including the pardon power, come with implicit limits. Perhaps one could argue that the pardon power by its nature is somehow exempt from the Constitution’s background fiduciary norms, but that is an uphill climb for anyone who wants to argue that Leib and Shugerman are wrong in their claim about the meaning of the pardon power. We, of course, express no view on their adjudicative and remedial claims.

46. Leib & Shugerman, *supra* note 25, at 464.

47. Sherry, *supra* note 19, at 449.

Perhaps some people will find our hypothetical understanding of original meaning so alien, or so divorced from an underlying normative project that depends on the actual mental states of historical figures, that they will dismiss our work entirely. It would not surprise us if some self-described “originalists” take this view, if those originalists are trying to build a theory of real-world adjudication in which the real-world views of certain real-world persons play a central role. For those persons, the hypothetical account of meaning that we offer may not be useful for what they are trying to accomplish—just as interpretative accounts driven by an underlying normative theory of adjudication may not be useful for what we are trying to accomplish.

Or perhaps our work will end up being cited by Supreme Court Justices and other people in power, not so much as an intellectually grounded interpretation of constitutional language but rather as an image that will “alter the landscape of normative constitutional argument.”⁴⁸ Could be. All of that depends on what the various readers bring to the process. We do not presume to dictate to those readers what they should bring.

We decline the suggestion of several commentators that we should warn off uses of our work by people whose political views do not match those of the commentators. If commentators are worried that people might use our work for ends that the commentators do not like, those commentators should write books or articles rigorously demonstrating, building up from true first principles, that their political views must be accepted by all rational people, so that no one should do anything that might ever be taken as support for contrary views. When that rigorous demonstration appears, we will consider issuing appropriate warning labels with our work product.

To be sure, there are people who think that legal theory is pointless unless it makes normative claims—or at least that legal theorists strengthen their works by advancing normative claims.⁴⁹ There are also people who think that legal theory is pointless when it tries to make normative claims (one of us comes very close to holding that view⁵⁰). There are a lot of people in between those two positions. Our modular analysis is available for any of these people to use or ignore, as they see fit. That was always our original intention.

II. AN ESSAY CONCERNING CONSTITUTIONAL UNDERSTANDING

Enough about methodology. Is our book right or wrong about the Constitution?

48. Primus, *supra* note 4, at 403.

49. Kimberley Wehle urged us in this direction in the discussion.

50. See Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL'Y 727, 775–83 (1988).

A. “Your Lips Move, but I Can’t Hear What You’re Saying”⁵¹

To judge whether we are right or wrong about the content of the Constitution, one must know, among other things, what we are claiming that content to be. Our book makes several distinct claims—and it advances those claims with very distinct levels of confidence.

One claim is that the Constitution is best understood as some kind of fiduciary instrument. A second claim is that, within the family of fiduciary instruments, the Constitution most resembles a power of attorney. A third claim is that the characterization of the Constitution, in either the broad sense as a fiduciary instrument or the narrow sense as a power of attorney, is relevant for ascertaining the Constitution’s communicative meaning. We will very briefly take up the third claim in section II.B below. For now, we want to focus on the first two.

In the course of this conference, discussants began referring to the power-of-attorney claim as the “strong thesis” and the fiduciary-instrument-of-some-kind claim as the “weak thesis.”⁵² We have three observations about this distinction.

First, we think that about 95% of what we hoped to accomplish in this book is encapsulated by the “weak thesis.” This book is really about *Understanding the Fiduciary Constitution*—and perhaps we would have been better served to make that phrase the entire title and leave out the catchy quotation from James Iredell. Most of the first half of the book concentrates on demonstrating the Constitution is *some kind* of fiduciary instrument. Virtually every interpretative consequence that we discuss in the second half of the book follows, with whatever strength it has, without regard to what specific kind of fiduciary instrument best describes the Constitution. Doctrines regarding personal exercise of delegated power, incidental powers, duties of care, and duties of fairness in the treatment of multiple principals all apply, as far as we can tell, largely uniformly across the entire family of eighteenth-century fiduciary instruments. Even if the Constitution is a completely novel kind of fiduciary instrument, as some have claimed,⁵³ there are principles that apply to fiduciary instruments of all forms, and understanding the Constitution as a fiduciary instrument of any kind accordingly brings those principles into play.⁵⁴ Thus, we do not really regard our “book’s central claim . . . [as] that the Constitution is like a power of attorney.”⁵⁵ To be sure, that is one of our

51. With acknowledgment to Roger Waters, David Gilmour, Nick Mason, and Rick Wright.

52. Lawson’s notes suggest that Jed Shugerman first proposed this terminology, but that may just be the first time that Lawson wrote down its use.

53. See Primus, *supra* note 4, at 383–85. Victoria Nourse also forcefully made this point in the discussion.

54. We do not see those principles, as does Primus, *see* Primus, *supra* note 4, at 387, as technical rules of law beyond the capacity of ordinary eighteenth-century people. We are not talking about the rule against perpetuities or the doctrine of the last antecedent. We are talking about the basic ideas that fiduciaries given power are presumptively supposed to exercise it rather than pawn it off on someone else, to do what they are supposed to do and not what they are not supposed to do, and to do whatever they do carefully and fairly. This is not especially technical stuff. A normal person serving as or employing a guardian, steward, or factor could grasp this much.

55. Primus, *supra* note 4, at 375.

claims, and it even worked its way into the title of the book, but it is not our “central” claim. The “central” claim is more general: that the Constitution is best seen, for interpretative purposes, as some kind of fiduciary instrument.

That leads to our second observation: We do not really see the “weak” thesis as being especially weak. We think it is strong (though that is because we can plug the module into a broader framework in which such a conclusion is interesting). Even if one thinks that the interpretative consequences of that characterization are much smaller than we think they are, it is still important to see the Constitution as, at least in part, a fiduciary instrument. Maybe that characterization has local if not global implications; it might, for example, help one understand the Necessary and Proper Clause, the Take Care Clause, or the Pardons Clause even if does not ground a universal theory of the document.⁵⁶ If a reader comes away from our book convinced that the Constitution is usefully analogized to some sort of fiduciary instrument in at least some contexts, we will declare victory, leave the field, and enjoy some fine lap time with our cats.

Third, the one major consequence⁵⁷ that turns on the precise kind of fiduciary instrument involved is not really that major to us. Under powers of attorney, grants of (principal) power are strictly construed, while under corporate charters, grants of (principal) power get construed more broadly in light of the purposes of incorporation. We noted that difference in the book and then passed it over fairly quickly.⁵⁸ That is because, as we repeatedly have said and will explain further in a moment, we were much more confident that the Constitution was some kind of fiduciary instrument than we were that it was best analogized specifically to a power of attorney. If the corporate charter analogy ends up working best, so that the interpretative consequence of viewing the Constitution in those terms is to push towards a broad construction of federal powers, we will not view that as any kind of defeat for our project. We were never out to reach any particular conclusions.⁵⁹ We were out to explore the implications of a framework.

56. We are grateful to Kevin Walsh for providing a clear formulation of this idea in the discussion. Thomas Colby and Tara Grove also helped clarify our thoughts on this point about the possibility of local versus global applications of fiduciary theory.

57. Leib and Shugerman suggest another possible—and fascinating—consequence. *If* the Constitution contemplates use of contemporary evolving, rather than fixed eighteenth-century background rules for fiduciary instruments, and *if* the contemporary background rules on subdelegation are different for trusts and powers of attorney, *then* the characterization of the Constitution as a trust rather than a power of attorney—a distinction that we dismiss in the book as unimportant, *see* LAWSON & SEIDMAN, *supra* note 2, at 62—might matter for interpretative purposes. *See* Leib & Shugerman, *supra* note 25, at 474–75, 483–84.

58. As Suzanna Sherry notes, *see supra* note 19, at 444–46, we spent twenty-six pages on incidental powers, twenty-three pages on subdelegation, twenty-one pages on duties of care and loyalty, twenty-one pages on impartiality, and a total of about two pages on broad or narrow constructions of principal powers.

59. It is a bit of a sad commentary on academia that this claim will be viewed suspiciously by some—not sad because the suspicions are held but sad because they are held as a result of long experience and therefore held with some reason. But the claim is true nonetheless.

Where does that leave the “strong” thesis that analogizes the Constitution specifically to a power of attorney? It leaves it more or less where we left it in 2017, with one minor modification.

When we sent the book to press, we were (and still are) very confident the Constitution is usefully viewed as a kind of fiduciary instrument. The evidence for the claim is plentiful.⁶⁰ Within the family of fiduciary instruments, we thought the two leading contenders were a power of attorney and a corporate charter, with a trust running a fairly distant third. The trust idea has a great deal of support in specific statements by historically concrete individuals, but the form of the Constitution has a lot of trouble mapping onto a trust. By contrast, many of the features of both a power of attorney and a corporate charter can be seen in the Constitution, and those features become clearer the more one looks at the instruments.

To be sure, how clear the picture becomes depends to some extent on which features one regards as essential. John Mikhail, for example, looks at Founding-Era powers of attorney and sees nothing about “popular sovereignty, separation of powers, bicameralism, federalism, bylaws, elections, qualifications, compensation, emoluments, armies, navies, offenses, pardons, treaties, ambassadors, vacancies, recesses, courts, crimes, treason, jurisdiction, privileges, immunities, amendments, ratification, rights, or other familiar features of written constitutions.”⁶¹ All true. These are rather significant features of constitutions, and they are never going to appear in a power of attorney, if only because powers of attorney cannot authorize agents to bind non-parties to the agreement. There is a big difference between authorizing a government and authorizing someone to collect a debt or manage a farm. The Constitution is not and cannot be, metaphysically, a power of attorney. However, the features of a power of attorney that appear in some form in the Constitution are also significant: the Constitution designates agents to act on behalf of We the People and its posterity. This includes managing a large portion of the principal’s financial and business affairs. The Constitution makes such a designation within a structure and organization that bears some resemblance to a complex power of attorney. Which is more important: the absence in real powers of attorney of the language and structure of governance, or the presence in the Constitution of power-of-attorney-like substantive features? Is the Constitution half-empty or half-full of power-of-attorney features? We think it is half-full, though that may be as much an aesthetic as an intellectual judgment.

In any event, there are some obvious differences between the Constitution and a private-law power of attorney which reduce any possible relationship to an analogy. Taking into account all of the elements we could identify, and searching for

60. Whether it is sufficient to support any particular conclusion depends, at least in part, on the standard of proof for claims about legal meaning—which is another one of Lawson’s long-time obsessions. See GARY LAWSON, *EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS* (2017).

61. John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter? A Commentary on “A Great Power of Attorney”*: Understanding the Fiduciary Constitution by Gary Lawson and Guy Seidman, 17 *Geo. J.L. & Pub. Pol’y* 407, 419 (2019); see also Primus, *supra* note 4, at 387.

nothing more scientific than what “felt” like the best “fit,” we came down on the side of a power of attorney over a corporate charter. But it was a very close call, as evidenced by the six arguments spanning twelve pages which we devoted to the affirmative case for the corporate charter analogy.⁶² In terms of subjective odds, when we finished the book we had the power of attorney over the corporate charter by something in the neighborhood of 60/40.

Frankly, if we wrote the book today, we would probably say the odds are closer to 50/50. The book likely would have a different title and cover. That is partly the result of many arguments presented in the course of this conference, but it is largely a result of the continuing momentum in favor of the corporate charter analogy that was building even as we were finishing the book. To be sure, as we explain below, we are not switching here to the view that the Constitution is best seen as a corporate charter (though we can imagine switching to that view as time goes on). We are just moving the ball a bit closer to the fifty-yard line.

John Mikhail presents a strong case for seeing the Constitution as a re-chartering of the United States government.⁶³ There is not the slightest question that the United States was a corporation at some point before 1788, for reasons that we gave in detail in the book,⁶⁴ and that it therefore had the powers of a corporation at that point. On that much we fully agree with Mikhail. We were reluctant in the book, however, to see the Constitution as a re-chartering of that corporate entity because the Constitution did not have the form of a re-chartering and, in particular, did not make clear reference to the prior displaced “charter” in the fashion that one would expect from a re-chartering. We continue to think that this is a big strike against viewing adoption of the Constitution as a re-chartering.⁶⁵ For example, the New Hampshire Constitution of 1784, which replaced the sparse (and expected to be temporary) New Hampshire Constitution of 1776,⁶⁶ specifically acknowledged the change in governmental form and contained an entire paragraph relating to continuity between the old and new charters:

To the end that there may be no failure of justice, or danger arise to this State from a change of the form of government, all civil and military officers, holding commissions under the government and people of New-Hampshire, and other officers of the said government and people, at the time this constitution shall take effect, shall hold, exercise and enjoy all the powers and authorities to them granted and committed, until other persons shall be appointed in their

62. See LAWSON & SEIDMAN, *supra* note 2, at 63–74.

63. See Mikhail, *supra* note 61.

64. See LAWSON & SEIDMAN, *supra* note 2, at 64–66.

65. Another strike is that it was commonplace in Founding-Era corporate charters, especially for political bodies, specifically to identify the basic powers and attributes of corporations that were being conferred on the entity. Even if those powers followed as incidents to corporate status, the normal practice was to name them in the instrument. The absence of that specification in the Constitution makes it less likely that the Constitution can be viewed as a corporate charter rather than as an authorizing instrument, such as a power of attorney, for an already-existing corporation.

66. See N.H. CONST. of 1776.

stead. All courts of law in the business of their respective departments, and the executive, and legislative bodies and persons, shall continue in full force, enjoyment and exercise of all their trusts and employments, until the general-court, and the supreme and other executive officers under this constitution, are designated and invested with their respective trusts, powers and authority.⁶⁷

The Pennsylvania Constitution of 1790, also replacing a 1776 document,⁶⁸ contained a lengthy nine-section Schedule preserving past authorities so “[t]hat no inconvenience may arise from the Alterations and Amendments in the Constitution of this Commonwealth.”⁶⁹ The United States Constitution, by contrast, contains only limited references to the pre-existing order, with no explicit reference to a change, alteration, or amendment to the form of government. The Preamble alludes to a prior union.⁷⁰ Article IV’s Property Clause notes “nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State,”⁷¹ which indicates that the United States had claims prior to the Constitution. The Engagements Clause, in the most explicit reference to the Confederation government, stipulates “[a]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.”⁷² The Supremacy Clause refers to “all Treaties made, or which shall be made, under the Authority of the United States.”⁷³ This all confirms the United States was a corporate entity prior to the Constitution, but there is no explicit, detailed provision for continuity from a displaced charter, as one would expect from an eighteenth-century re-chartering of a political corporation.

But the most telling evidence against seeing the Constitution as a re-chartering of the United States is something that we wrote about many years ago: The Articles of Confederation, or at least part of them, *remained in force* even after ratification of the Constitution. The Articles did not cease to function until all of the governmental machinery specified in the Constitution was up and running, which was almost a year after ratification.⁷⁴ During that time, some provisions of the Constitution, such as the Contracts Clause and the prohibition on states entering into treaties, were in full effect from ratification forward (at least for the ratifying states), but other provisions, such as the federal Treaty Clause and the Declare War Clause, were not effective until a President, Senate, and House were

67. *Id.*

68. PA. CONST. of 1776.

69. PA. CONST. of 1790 sched.

70. U.S. CONST. pmb. (“to form a *more perfect union*”) (emphasis added).

71. *Id.* art. IV, § 3, cl. 2.

72. *Id.* art. VI, cl. 1.

73. *Id.* art. VI, cl. 2.

74. We discuss these claims at some length elsewhere. See Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1 (2001); Gary Lawson & Guy Seidman, *The First “Establishment” Clause: Article VII and the Post-Constitutional Confederation*, 78 NOTRE DAME L. REV. 83 (2002).

selected and sworn in. The best inference from this piecemeal effectiveness of the Constitution is that the relevant provisions of the Articles of Confederation regarding matters such as treaties and declarations of war remained in effect. (Otherwise, there would be some huge gaps in the ability of ratifying states to perform some very basic functions.) If the Constitution really was a re-chartering, it would displace the old charter entirely unless provisions or arrangements were specifically preserved. This is why the new constitutions in the states during the Founding period paid such close attention to succession and continuity of governmental institutions. They needed to preserve elements of the old order each time there was a change in the charter.⁷⁵ The Constitution did not make such provisions. Instead, a new instrument operated alongside whatever the old arrangements were. In whatever way one wants to describe that setup, it was not a classic re-chartering of a corporation. It looks more like a power-of-attorney-like grant of powers to a corporate entity that already existed and continued to exist.

On the other hand, there is a potentially strong textual argument in favor of seeing the Constitution as a corporate charter that we did not address in our book but will do so now.

As Mikhail correctly points out, the Necessary and Proper Clause gives Congress power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁷⁶ The Constitution does not seem expressly to grant any powers to “the Government of the United States” as an entity but parses out all enumerated powers to specific departments (most notably the legislative department) and officers. This portion of the clause referring to the “Government of the United States” is subject to several possible interpretations, the last of which gives rise to Mikhail’s argument.

One is it describes an empty set because there are no powers vested by the Constitution in “the Government of the United States.” That is not an impossible interpretation; the notion that every clause in the Constitution must have independent meaning is oft repeated but seldom defended.⁷⁷ Plenty of legal documents contain verbiage that ends up meaning nothing,⁷⁸ and there is reason to think the Constitution contains a non-trivial amount of such verbiage.⁷⁹ The author of the Constitution, We the People, was, as we have said, “one smart

75. For a much more detailed discussion of continuity principles in Founding-Era state constitutions, see Lawson & Seidman, *When Did the Constitution Become Law?*, *supra* note 75, at 15–21.

76. U.S. CONST. art. I, § 8, cl. 18.

77. One prominent defense of the canon against surplusage defends the canon entirely with normative and consequentialist arguments rather than with arguments grounded in accurate assessment of communicative meaning. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 179 (2012).

78. See *Moskal v. United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting); LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 133 (2d ed. 2013).

79. See Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 250 (2005).

cookie,”⁸⁰ but it is hard to see why one should assume that We the People was infallible. Few real authors meet that standard, so it is hard to see why a hypothetical one would have to meet it. Nonetheless, the Constitution appears to exhibit a high degree of care in its composition,⁸¹ so there is some reason to consider alternative accounts of this provision before writing it off as empty.

A second possible interpretation is this provision is a somewhat awkward reference to institutions of the United States that are neither “Department[s]” nor “Officer[s]” but which receive powers under the Constitution. That would be the individual houses of Congress, which are neither departments⁸² nor officers but which receive various powers in Sections 2–5 of Article I that could benefit from statutory implementation.⁸³ We have previously, with some hesitation, endorsed that construction as the least unlikely interpretation of this portion of the Necessary and Proper Clause.⁸⁴

A third possibility is the powers vested “in the Government of the United States” to which the Necessary and Proper Clause refers are precisely the powers that come incidentally from corporate status. Blackstone summarized these powers as the power of perpetual existence, the power to sue and be sued, the power to hold property, the power to have a seal, and the power to make by-laws.⁸⁵ This interpretation, as Mikhail points out, has much to commend it. There really are unenumerated powers of the United States that do not need to stem from a specific grant of power in the Constitution but which follow as incidents from corporate status. Those powers, such as the “sue and be sued” power and the power to have a seal (there are no “sue and be sued” or “seal” clauses in the Constitution), are amenable to statutory implementation, so it is quite possible to read the Necessary and Proper Clause as authorizing Congress to implement these corporate powers belonging to the “the

80. Lawson & Seidman, *supra* note 32, at 72.

81. *See id.* (“It is impossible to read the Constitution without coming away with a profound admiration for its intricacy, interconnectedness, sophistication, and solid grounding in articulable and plausible assumptions about human behavior.”).

82. Each house of Congress is a branch, not a department. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1156 n.6 (1992).

83. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.”); *id.* art. I, § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore . . .”); *id.* (“The Senate shall have the sole Power to try all Impeachments.”); *id.* art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .”); *id.* art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

84. *See* Lawson & Seidman, *Necessity, Propriety, and Reasonableness, in THE INTELLECTUAL ORIGINS OF THE NECESSARY AND PROPER CLAUSE*, *supra* note 8, at 120, 128 n.30.

85. 1 WILLIAM BLACKSTONE, COMMENTARIES *463. One might add to this list the power to appoint and remove officers. *See* STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 50 (London, J. Butterworth, Fleet-Street 1794) (“Every corporation aggregate has a power necessarily incident to it, of admitting members and appointing officers, and removing them for reasonable cause, without any express grant conferring on them such a power.”).

Government of the United States.”⁸⁶ The pay-off for Mikhail’s position is that for this corporate-powers-implementing interpretation of the Necessary and Proper Clause to hold, the Constitution must be seen as some kind of chartering event. The clause refers to powers “vested by *this Constitution* in the Government of the United States.” The Necessary and Proper Clause thus does not authorize Congress to pass laws to implement powers that *pre-existed* the Constitution by reference to corporate status, unless those powers were *conferred* or somehow *confirmed* by the Constitution in a fashion that meets the definition of “vested.” If those powers exist in a form that can be implemented by Congress, the Constitution must be seen as somehow recreating the United States as a corporate entity. Put another way, if the Constitution was not a chartering event of some kind, then Congress would seem to have no power to implement the corporate powers of the United States that are not specifically enumerated in the Constitution, because those powers would not be “vested” by the Constitution itself. The absence of such congressional implementing power is not an impossible conclusion, but it is an odd one.

Notwithstanding the allure of this argument, we still think the best account of the “Government of the United States” portion of the Necessary and Proper Clause may well be the one that we previously identified, in which it refers, albeit infelicitously, to powers vested in the houses of Congress. Even with this construction of the Necessary and Proper Clause, we think the Constitution can still accommodate a congressional power to implement incidental corporate powers. After all, one of the traditional incidental powers of corporations is to pass by-laws. The specific enumeration of powers in the Constitution surely limits the ability of federal institutions to claim inherent authority to enact by-laws on subjects relating to those enumerations,⁸⁷ but the incidental authority to implement basic incidental corporate powers through by-laws is a pretty good candidate for an unenumerated power that flows (at the risk of repetition) incidentally from corporate status. Accordingly, the narrower interpretation of the Necessary and Proper Clause does not necessarily leave Congress powerless to address the United States’ capacity to sue and be sued or to have a seal.

For the above reasons, we continue to think it is very difficult to see the Constitution as a re-chartering of the United States as a corporate entity.⁸⁸ But, by

86. Does it count against this interpretation, as a textual matter, that the relevant corporate entity seems to be “the United States” rather than “the Government of the United States?” We are not sure.

87. See KYD, *supra* note 85, at 100, 102.

88. Could the Constitution be the initial corporate charter, thereby avoiding the problems involved in thinking about it as a re-chartering? That is not impossible. The King and Parliament, for example, were understood to be corporate entities but had no charters. Perhaps the United States circa 1783 was a corporate entity with no charter, which then gained its charter in 1788. A full discussion of this possibility would require a separate article, but at least two considerations point very strongly against this idea. First, if the Constitution can be seen as a kind of charter for a corporation called the United States, it is hard to see why the Articles of Confederation could not also be seen in that fashion. The corporation “chartered” by the Articles obviously was less impressive than the corporation “chartered”

the same token, we still think it is very difficult to see the Constitution as a power of attorney as well. We never thought that it was a power of attorney. We thought, and think, that the Constitution is very much *like* a power of attorney in certain ways. The Constitution is also very much *like* a corporate charter in certain ways, even if it is not a corporate charter. All of these comparisons are analogies. If we were to write the book today, we would probably emphasize the analogies to powers of attorney and to corporations more or less equally. Structurally, we still think that the power of attorney model is a better fit. In terms of the actual perceptions of real-world individuals, for whatever those are worth, the corporate model was more pervasive. There is evidence to support, and to detract from, both analogies. We are profoundly grateful to Mikhail for sparking our additional consideration of these matters.

B. "And Where Do We Go From Here?"⁸⁹

We think that there is something to be gained from seeing the Constitution as similar in some fashion to either a power of attorney or a corporate charter. Both analogies work to some degree and fail to work to some degree. How does this affect the interpretative enterprise?

There is no way to answer that fundamental question without setting forth a comprehensive account of constitutional interpretation. That is why we employ the metaphor, which some people⁹⁰ intensely dislike, of a vector.⁹¹ Vectors have both direction and magnitude. We think that analogies between the Constitution and powers of attorney and corporate charters need to be addressed in the same way. They point in ascertainable interpretative directions. How far they point in those directions—their magnitude—is a function not only of the strength of the analogies but also of the relative strengths of those analogies compared to other contributors to the interpretative enterprise, which cannot be determined without fully specifying a grand interpretative theory. This is why all of the conclusions in our book are hypothetical imperatives. We are identifying the direction of these interpretative vectors without trying to assign a magnitude. Each person will have to decide for himself or herself how far these vectors push. This is also why we focus in the book on those conclusions that we think follow independently of the precise kind of fiduciary instrument that best characterizes the Constitution. For those general principles applicable to all fiduciary instruments, we think that the directions are fairly clear and that the magnitude of the interpretative effects

by the Constitution, but it was still a corporation. If documents were chartering the United States, is hard to see how the Constitution could be the first move rather than, at the very least, the second move. Second, the Constitution simply does not contain the kind of language, including the specification of the incidental powers of corporations, that was characteristic of governmental charters up to that point. If the point of the Constitution was to serve as the initial charter for a governmental corporation, it expressed that point in a very obtuse way.

89. With acknowledgement to David Essex.

90. *E.g.*, Ethan Leib.

91. LAWSON & SEIDMAN, *supra* note 2, at 77.

is substantial, but we cannot say more than that without filling in the details of a comprehensive interpretative theory.

*C. What Difference, at This Point, Does It Make?*⁹²

Suppose that one thinks, with Mikhail, that the Constitution is most usefully seen as a corporate charter. In that case, the vast bulk of the (if . . . then) conclusions that we draw in the book follow more or less as we describe them, because the basic principles of fiduciary law applied to eighteenth-century corporations just as they applied to eighteenth-century powers of attorney. The differences between Mikhail's account and ours are actually quite small—much smaller than Mikhail wants to claim.

The principal powers of corporations are construed broadly to achieve the purposes of the corporation. That is basic Blackstonian corporate law.⁹³ Mikhail, however, goes further to contend that “the Constitution vests the Government of the United States with the implied power to fulfill every purpose for which that government was established, including the six great objects of the Preamble.”⁹⁴ More specifically, he maintains that “[t]he Government of the United States is vested by the Constitution with the power to provide for the common defense and promote the general welfare.”⁹⁵ If that interpretative consequence indeed follows from viewing the Constitution as analogous to a corporate charter, it would be a significant conclusion. We do not think that it follows.

Principal corporate powers are to be construed broadly, but one must still be construing the principal corporate powers. Mikhail assumes that if the Constitution is (akin to) a corporate charter, it must authorize the national government to do whatever it takes to carry out the purposes identified in the Preamble. It is possible to draft corporate charters that effectively make the purposes of the corporation its powers, just as it is possible to draft powers of attorney that effectively give the agents the power to do whatever the agents think is best for the principals.⁹⁶ The question is whether any particular instrument, whatever its characterization, actually does any such thing. The characterization of the instrument does not answer that question.

Consider the 1781 federal charter for the Bank of North America.⁹⁷ The document is very sparse. It grants (or confirms) to the corporation all of the basic powers of perpetuity and legal personhood, appoints initial directors, and

92. With acknowledgment to Hillary Clinton.

93. See BLACKSTONE, *supra* note 86, at *467 (“The general duties of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one; that of acting up to the end or design, whatever it be, for which they were created by their founder.”).

94. Mikhail, *supra* note 61, at 429; see also John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015).

95. Mikhail, *supra* note 61, at 440 (“All the rest is commentary.”).

96. Lawson currently holds a power of attorney for someone that essentially says this.

97. See 21 J. CONTINENTAL CONG. 1187–89 (1781). For the Pennsylvania version, which is substantively very similar, see An Act to Incorporate the Subscribers to the Bank of North America, 10 PA. STAT. AT LARGE 406–08 (1887).

provides for the appointment of officers and future directors. The powers of the corporation are defined starkly as follows:

And be it further ordained, that the said corporation are hereby declared and made able and capable in law, to have, purchase, receive, possess, enjoy, and retain lands, rents, tenements, hereditaments, goods, chattels and effects, of what kind, nature or quality soever, to the amount of thirty ten millions of Spanish silver milled dollars and no more; and also to sell, grant, demise, alien, or dispose of the same lands, rents, tenements, hereditaments, goods, chattels and effects

And be it further ordained, that the said corporation may make, ordain, establish, and put in execution such laws, ordinances and regulations as shall seem necessary and convenient the government of the said corporation.

[Provided always that nothing herein before contained, shall be construed to authorize the said corporation to exercise any powers in any of the United States, repugnant to the laws or constitution of such State.] . . .

And be it further ordained, that this ordinance shall be construed, and taken most favorably and beneficially for the said corporation.⁹⁸

In essence, the statute says to the bank, “go forth and be a bank to the extent of ten million Spanish silver milled dollars.”⁹⁹ The purpose of the corporation—“the support which the finances of the United States would receive from the establishment of a national bank”¹⁰⁰—effectively constitutes and defines the bank’s powers. The statute establishing the first Bank of the United States was to similar effect.¹⁰¹ Although the statute provided a much wider set of constraints on the bank’s actions than did the 1781 Act,¹⁰² the powers granted to the bank were not much different from the powers granted to the Bank of North America; indeed, the language describing powers is almost identical in the two enactments. In 1791, as in 1781, the purposes behind the corporation—promoting “the successful conducting of the national finances,” “the obtaining of loans, for the use of the government, in sudden emergencies,” and producing “advantages to trade and industry in general”¹⁰³—do much of the work in defining the corporation’s powers.

The United States Constitution is a very different instrument. The Preamble sets forth purposes for the instrument as a whole, and some individual clauses set out the purposes for which some specific powers are granted—patents and

98. 21 J. CONTINENTAL CONG. at 1188–89 (striketrough and brackets in original).

99. This statute supports Larry Solum’s recent observation that the term “twenty dollars” in the Seventh Amendment surely refers to a quantity of a certain kind of silver rather than to a quantity of federal reserve notes. See Lawrence B. Solum, *Surprising Originalism*, CONLAWNOW (May 8, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3175412 [<https://perma.cc/LL7T-3K34>].

100. 21 J. CONTINENTAL CONG. at 1187–88.

101. See Act of March 2, 1791, ch. 10, 1 Stat. 191 (1845).

102. See *id.* § 7, rules VIII–XI, 1 Stat. at 194–95.

103. *Id.* at 191.

copyrights may be granted “[t]o promote the Progress of Science and useful Arts”¹⁰⁴ and taxes may be imposed “to pay the Debts and provide for the common Defense and general Welfare of the United States.”¹⁰⁵ But the document does not broadly define the powers of the government by means of the purposes. Rather, the powers define and cabin the means by which, and the extent to which, the purposes are to be pursued. The Constitution, whether understood as a power of attorney or a corporate charter, is not a document that says “go forth and be a government.”¹⁰⁶ It is a document that says, “go forth and be a government as defined in this instrument, using the means specified in this instrument.” The Constitution could have been written along the lines of the charter for the Bank of North America. There likely were people who wanted the Constitution to be written along the lines of the charter for the Bank of North America.¹⁰⁷ It was not written that way. Even if it is understood as a corporate charter, it is not that kind of corporate charter.

Accordingly, we do not think that very much turns on whether the Constitution is more like a corporate charter than it is like a power of attorney. In either case, it's fiduciary duties all the way down.

*D. Looking for Law in All the Wrong Places*¹⁰⁸

The standard fiduciary instrument is a private-law document. That is true of powers of attorney, appointments of stewards and factors, and so forth. It was less true in the eighteenth century of corporate charters, in an era before general incorporation laws, and perhaps less true as well of guardianships (especially when the state directly intervened through a guardianship *ad litem*), but the law of agency on which we base our analysis is largely a law governing relations among private parties. Are we making a fundamental mistake by looking to private law for guidance on the meaning of the Constitution?¹⁰⁹

This seemingly simple question lies at the heart of much of our collaborative research agenda over the past two decades (and of much of the agenda that remains to be fulfilled). When “We the People” assembled the highly complex apparatus that is the United States Constitution, a clockwork mechanism of

104. U.S. CONST. art. I, § 8, cl. 9.

105. *Id.* art. I, § 8, cl. 1. The “general Welfare” language is a clarification of the scope of the taxing power, not an independent grant of power to promote something called the “general Welfare.” See LAWSON & SEIDMAN, *supra* note 2, at 165; Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81 (1999).

106. The idea that the national government might possess powers incidental to being a nation-state (as opposed to powers incidental to being a corporation or to its principal powers), see Mikhail, *supra* note 61, is hard to square with the structure of the document, see LAWSON & SEIDMAN, *supra* note 7, at 23, and is impossible to square with the Tenth Amendment.

107. James Wilson was likely such a person. See John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L. J. 1045, 1074–78 (2014).

108. With apologies to Wanda Mallette, Patti Ryan, Bob Morrison, and Johnny Lee.

109. Victoria Nourse, in particular, posed such a question with characteristic thoughtfulness in the discussion at the colloquium.

interlocking moving parts,¹¹⁰ what were the legal sources from which “We the People” drew? What was the specific legal-doctrinal knowledge that “We the People” possessed, and what portions of that knowledge inform the nature of the Constitution as a *legal* document?

Many authors have opined on aspects of such issues. One offered answer, which is clearly correct and to which we have little to add, is that the Constitution drew on earlier state constitutions.¹¹¹ Those state constitutions, as we noted,¹¹² contain considerable support for a fiduciary understanding of the late eighteenth-century enterprise of constitution-making.

A second answer is that “We the People” learned from the specific and troubled experience of more than a decade of interactions among thirteen suddenly independent former colonies. Indeed, going further back in time, it is easy to see how much of the Constitution draws on both the specific experience of the colonists under England and, perhaps more significantly, their belief about what legal rights they had, as individuals and as a community, *as Englishmen*. Where did the colonists look for such ideas? Clearly, they were aware of many ideas and theories that informed the incendiary times of the late eighteenth century.¹¹³ Thinkers such as Hobbes, Locke, and Rousseau were surely great influences, but when Americans moved from the ideas of natural law that permeate the Declaration of Independence¹¹⁴ to the concrete mechanisms of positive law, they turned their gaze to English law, which they clearly saw as *their law*,¹¹⁵ and often to the most reliable encapsulation of that law available in North America: Blackstone’s

110. Mechanical clocks are an apt metaphor, as they were some of the most complex human artifacts known to the Founding generation, a generation that mostly preceded the Industrial Revolution that started ca. 1800. See TONY BUICK, ORRERY: A STORY OF MECHANICAL SOLAR SYSTEMS, CLOCKS, AND ENGLISH NOBILITY, at xii–xiii (2013) (“During the eighteenth century many scientists and astronomers recognized the attraction of producing orreries, not just as an educational tool, but to show off their talents and increase their business profile. Many instruments were produced with extraordinary complexity and precision . . .”).

111. See, e.g., Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L. J. 911, 911 (1993) (“The era of the American Revolution was the most creative and significant period of constitutionalism in modern Western history, but this time was creative and significant not because of the Constitution that looms so large in our lives today. Rather, the American Revolution was creative and significant because of the revolutionary state constitutions that preceded the Constitution by more than a decade. Not only did the formation of the new state constitutions in 1776 establish the basic structures of our political institution. Their creation also brought forth the primary conceptions of America’s political and constitutional culture that have persisted to the present.”).

112. See LAWSON & SEIDMAN, *supra* note 2, at 43–45.

113. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1968).

114. “When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them . . .” THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

115. The American Revolution was a revolt against English political rule, not against English common law. Founding-Era state constitutions uniformly adopted English law as the presumptive law of the states.

Commentaries on the Laws of England.¹¹⁶

It is clear that, in framing the Constitution, “We the People” (hypothetically) sifted carefully through English legal sources, no doubt including a (hypothetical?) copy of Blackstone’s *Commentaries*,¹¹⁷ often adopting institutions and protections of rights and liberties when these were already established in English law and often creating their own where they found the English rules unacceptable. Clearly, the right to petition, habeas corpus, and legislation through the cooperation of two separate branches of the legislature and the head of the executive all had their origins in English constitutional law. The constitutional provisions protecting the right to bear arms, securing the office of federal judges, and rejecting titles of nobility were reactions against English practices and traditions; and many provisions entrusting the federal authorities with powers, such as the power “[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States”¹¹⁸ and “[t]o coin Money . . . and fix the Standard of Weights and Measures,”¹¹⁹ were the result of the recent experience post-independence.

Of particular interest to us, as administrative lawyers, is the role of administrative law in this constitution-making process. By the mid-eighteenth century, England already possessed a more highly developed public law than any major Western power—more so, certainly, than its contemporaneous counterparts such as France, Spain, and Russia. But from a twenty-first century perspective, English public law looks very thin. While the seeds of modern constitutional and administrative law can often be traced to English law many centuries back, those antecedents provide only a rudimentary framework compared to what we now expect public law to do, which is to detail recognized human and civil rights and the methods for their protection, the structure of government, the interactions among the departments of government, and the ways to curb official wrongdoing and make officials accountable. Much of what is involved in those tasks was long handled though what today we would call private law. To hold government officials accountable, for example, one would sue the offending official in a private-law tort suit and let the ordinary judicial process sort out the extent to which the official action was legally authorized. This was public law—judicial control of

116. On the significance of Blackstone’s *Commentaries* for the Founding generation, see Guy I. Seidman, *The Origins of Accountability: Everything I Know about the Sovereign’s Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 479 (2005). But see Martin Jordan Minot, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 VA. L. REV. 1359 (2018) (questioning the extent to which a study of Blackstone was part of legal education during the Founding period).

117. It is worth noting that, while the *Commentaries* have remained continuously in print from the 1760s to date and have been cited more than 10,000 times in American judicial opinions, there are nearly 200 recorded English, Irish and American editions, plus many other works based on the *Commentaries*. These editions often differ significantly from the original text published 1765–1769.

118. U.S. CONST. art. I, § 8, cl. 4.

119. *Id.*

administrative action, to borrow a phrase¹²⁰—but it was accomplished at least in part through private-law mechanisms. There were, of course, other mechanisms of accountability that have more of a contemporary public-law flavor, from impeachment¹²¹ to petitioning for a redress of grievances¹²² to the development of prerogative writs.¹²³ Our point is only that a full exposition of this feature of law cannot be given without considerable reference to private law ideas.

The same principle holds for protecting and defining rights. Consider, for example, the question whether a private business must provide service to any (well behaving and paying) client or whether it has the discretion to refuse service for personal reasons. In many countries, including the United States, we find numerous statutes banning private enterprises from discriminatory behavior, which seems to place the subject in the realm of public law. But if we look back a few centuries, we find some intriguing private-law norms regarding inns and pubs (a.k.a. public houses). Consider the weary traveler, riding all day along the disheveled roads of medieval England,¹²⁴ who arrives at a country inn. It is the only established inn available in the area where he can find food and drink and rest himself and his horses. This is an important service, and it is one that the state did not provide. The common law rule that applied here was, apparently, that the innkeeper was required to accept all guests. Some authorities suggest that in fifteenth- and sixteenth-century England, “[i]f any ale-keeper or innkeeper refused to lodge a traveler, a justice of the Peace may compel him to it; or the Constable might present it as an offence at the next sessions; or the party refused might have an action on the case.”¹²⁵ In the mid-eighteenth century, Blackstone clearly states that “if an inn-keeper . . . hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he, without good reason, refuses to admit a traveller.”¹²⁶ Indeed, the definition of the term “inn” provided by the *American Bouvier Legal-Dictionary* in 1856 was “1. A house where a traveler is furnished with everything he has occasion for while on his way,”¹²⁷ and the dictionary added:

120. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

121. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2d ed. 2000).

122. See Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739 (1999).

123. See S. A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40 (1951); William J. Hughes & Eugene Brown, “Writ” of Prohibition, 26 GEO. L.J. 831 (1937–38); Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523 (1923).

124. Those roads were possibly even more unkempt and hazardous than is the Kingsroad.

125. FREDERICK W. HACKOOD, *INNS, ALES AND DRINKING CUSTOMS OF OLD ENGLAND* 67 (1909).

126. 3 BLACKSTONE, *supra* note 86, at *164.

127. A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES BY JOHN BOUVIER 637–38 (1857).

2. All travellers have a lawful right to enter an inn for the purpose of being accommodated. It has been held that an innkeeper in a town through which lines of stages pass, has no right to, exclude the drive of one of these lines from his yard and the common public rooms, where traveler are usually placed, who comes there at proper hours, and in a proper manner, to solicit passengers for his coach, and without doing any injury to the innkeeper.¹²⁸

Yet another example foreshadows some future projects that we have been contemplating for some time. Much of America's territorial expansion—in Florida, Texas, California, and elsewhere—resulted from officially unsanctioned private action. The actions of private parties, which effectively turned foreign territory into American territory without overt governmental involvement, was leveraged into official territorial acquisition that amounted to a *fait accompli*. Formal lines could still be drawn between “governmental” and private action, but the functional lines were so blurred that it is often hard, even for arch-formalists, to see the value in the formal distinctions. For a Founding generation that watched individuals pledge to each other their lives, fortunes, and sacred honors, not merely as representatives of states but also as private citizens, a blurring of lines between public and private could not be surprising.

The simple but powerful lesson in all of these stories is that lines between public law and private law that today are often taken for granted are not necessarily good guides to understanding the legal thought of 1788.¹²⁹ If one wants to know what someone with legal acumen such as “We the People” was thinking about government in 1788, one needs to think, at least in large measure, like a private lawyer.

Whether or not one likes Blackstone's scholarship,¹³⁰ Blackstone had some huge advantages over any modern academic, however learned. Blackstone was the first person to hold a Chair for common law studies at an English university; for much of history, those institutions functioned as civil law universities, teaching Roman and ecclesiastical law but not the practical common law. In serving as the “big bang” for common-law academics in England, Blackstone had the advantage of teaching all of the law—all subjects, all topics, all fields. Such an endeavor today, with the huge amount of law and scholarship accumulated in each sub-discipline, is plainly inconceivable.¹³¹ Reflecting on this pedagogical development made us realize that there are some topics where private law and public law scholars seem to be teaching and addressing similar topics in a manner quite divorced from each other. For example, we, and others, have long had the

128. *Id.* at 638 (citation omitted).

129. This illustrates why constructions uninformed by history are likely to be bad constructions. See *supra* note 34 and accompanying text.

130. And many have criticized Blackstone. For a useful overview of the publication and reception of the *Commentaries*, see Wilfrid Prest, *General Editor's Introduction*, in WILLIAM BLACKSTONE, THE OXFORD EDITION OF BLACKSTONE: COMMENTARIES ON THE LAWS OF ENGLAND, at xii–xiv (Wilfrid Prest, ed. 2016).

131. Although Richard Epstein has made something of a go at it.

intuition that there must be useful similarities between *corporate* governance and *political* governance of a nation: a small number of people entrusted with advancing the interests of a large number of people clearly pose similarities, even in an era in which corporations are private rather than public entities. But until very recently, few scholars have addressed themselves systematically to those connections; the rare example is our colleague/friend/role-mode Tamar Frankel, and even she has made only limited inroads in expanding corporate theory into constitutional law. The wider connections between constitutional law and agency law, however, escaped our intuitions for quite a while. That is how one of us could spend many years studying the Necessary and Proper Clause, and writing extensively on the subject,¹³² without seeing the agency-law foundations of the clause. It took Rob Natelson to bridge that gap.

Once one stops trying to divide law into public and private domains, and especially stops imposing that sharp structure where it may not belong, the natural question is what background knowledge, legal and otherwise, a reasonable person would draw upon in crafting and reading the Constitution. Much of that background legal knowledge is going to be what today one would call private law. One of the most important features of that “private” law is the law of agency, and particularly the fiduciary aspects of agency law. “We the People,” we think, understood at least the broad outlines of this body of law, and the work product of “We the People” is best understood with this body of law in mind. That is all that we mean, but we definitely mean that much, by *Understanding the Fiduciary Constitution*.

132. See Gary Lawson, *Discretion and Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267 (1993).