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Are People in Federal Territories Part of “We the People of the United States”?

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ARE PEOPLE IN FEDERAL TERRITORIES
PART OF “WE THE PEOPLE OF THE
UNITED STATES”?

by: Gary Lawson* & Guy Seidman**

ABSTRACT

In 1820, a unanimous Supreme Court proclaimed: “The United States is the name given to our great republic, which is composed of states and territories.” While that key point is simple, and perhaps even obvious, the constitutional implications of interpreting “the United States” to include federal territories are potentially far reaching. In particular, the Constitution’s Preamble announces that the Constitution is authored by “We the People of the United States” and that the document is designed to “secure the Blessings of Liberty” to the author and its “Posterity.” If inhabitants of federal territory are among “We the People of the United States,” then federal actors owe them (and their “Posterity”) the same fiduciary duties owed to people in the States. There is no definitive answer regarding the original meaning of “We the People of the United States,” but the presumptive meaning of “the United States” in 1788 included federal territory, so the presumptive meaning of “the People of the United States” would similarly include people in federal territory. While there are strong textual and contextual arguments for excluding territorial inhabitants from “We the People,” there are also countervailing textual and contextual arguments for their inclusion. In the end, the answer may depend on something beyond the reach of interpretative theory: How strong is the presumption in favor of inclusion that can be drawn from pre-1788 understandings and practices? If territorial inhabitants are indeed among “We the People of the United States,” then federal action toward the territories must conform to fiduciary norms, including the key norm of impartiality with respect to multiple beneficiaries, which would require very strong reasons for disfavoring territorial inhabitants in comparison to state inhabitants.

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INTRODUCTION

In *Loughborough v. Blake*,¹ decided in 1820, a unanimous Supreme Court proclaimed: “[T]he United States . . . is the name given to our great republic, which is composed of States and territories. The district

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1. 18 U.S. (5 Wheat.) 317 (1820).

of Columbia, or the territory west of the Missouri [River], is not less within the United States, than Maryland or Pennsylvania."² At the time of this statement, the Court could not realistically look beyond the continental United States or even beyond the Rocky Mountains; the "territory west of the Missouri" ended with the boundaries of the Louisiana Purchase.³ Turning southward, the United States was well on its way to acquiring Florida from Spain,⁴ but in 1820, that was the extent of the nation's expansion from the original boundaries confirmed by the Treaty of Paris in 1783.⁵ The United States had not yet become an overseas empire with island possessions in two oceans.

On its face, however, the Supreme Court's unqualified statement in *Loughborough* would seem to apply equally to federally acquired territory southeast of the Caloosahatchee River, such as Puerto Rico or the Virgin Islands, or far southwest of the Colorado River, such as American Samoa. The Constitution speaks only of "Territory . . . belonging to the United States,"⁶ without distinctions based on geography, culture, or time. If the Supreme Court's broad language was right in 1820, the term "the United States" includes not only States but also federally controlled territories, whatever their location.

While that key point is simple, and perhaps even obvious, the constitutional implications of such an interpretation of "the United States" are potentially far reaching. Just to name a few implications: If "the United States" to which the Supreme Court was referring in 1820 was the same "United States" that appears as a term 53 times in the Constitution of 1788 (and again in the Fourteenth Amendment of 1868), all federal duties, imposts, and excises would need to be uniform across both States and territories⁷—meaning that there could

2. *Id.* at 318–19. The Court anticipated these remarks 15 years earlier. While holding that residents of the District of Columbia were not, as a matter of statutory interpretation, state citizens for diversity purposes, the Court thought it clear that D.C. residents were "citizens of the United States." *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 453 (1805). The same would presumably be true of residents of other federal territory at the time.

3. See Treaty Between the United States of America and the French Republic, Fr.-U.S., Apr. 30, 1803, art. I, 8 Stat. 200, 202. The precise extent of the Louisiana Purchase was not entirely clear in 1803. See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 87–89 (2004). At a minimum, it included all or part of the present States of Arkansas, Colorado, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, and Wyoming.

4. See Treaty of Amity, Settlement and Limits, Spain-U.S., Feb. 22, 1819, art. II, 8 Stat. 252. Spain did not ratify the treaty until October 5, 1820, and the treaty was not effectuated until early 1821. See WILLIAM EARL WEEKS, JOHN QUINCY ADAMS AND AMERICAN GLOBAL EMPIRE 169 (1992). But as a practical matter at least parts of Florida had been part of the United States even before the treaty formalized the acquisition. See LAWSON & SEIDMAN, *supra* note 3, at 89–90.

5. Definitive Treaty of Peace, Gr. Brit.-U.S., Sept. 3, 1783, 8 Stat. 80.

6. See U.S. CONST. art. IV, § 3, cl. 2.

7. See *id.* art. I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . .").

never be an export tax on territorial goods because there can be no export taxes on state goods⁸ and that the only permissible “uniform” rate on national exports would be, therefore, zero. More fundamentally, persons born in territories would appear to be United States citizens, entitled to all the rights and subject to all of the duties thereof, at least as of 1868 by virtue of the Fourteenth Amendment⁹ if not by virtue of the Constitution of 1788 itself. And most importantly, if “the United States” includes territories as well as States, then people in territories would be among the “People of the United States” who ordained and established the Constitution.¹⁰ Arguably, then, subsequent territorial inhabitants would be among the “Posterity”¹¹ of the Constitution’s author and would thus be among those for whom the “Blessings of Liberty” are to be secured.

Present-day doctrine reflects none of these understandings. Eighty years after *Loughborough*, a divided Supreme Court held that duties on exports from Puerto Rico were constitutionally permissible,¹² meaning that Puerto Rico is not considered part of “the United States” for purposes of the uniformity provision of the Taxing Clause. Citizenship for territorial inhabitants has long been handled by treaty and statute rather than constitutional command, though the question whether territorially born inhabitants are automatically citizens under the Fourteenth Amendment is currently being litigated—the issue was resolved in favor of constitutionally based citizenship by one district court only to have that decision overturned by a divided vote in the Tenth Circuit Court of Appeals.¹³ For more than a century, the extension to territorial inhabitants of certain basic rights of citizens, such as rights to trial by jury and indictment by grand jury, has been held to be a matter of congressional choice rather than constitutional requirement for at least some territorial inhabitants.¹⁴ With respect to fiduci-

8. *See id.* art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”).

9. *See id.* amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States . . .”).

10. *See* U.S. CONST. pmbl. (“We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”).

11. *Id.* (“[I]n Order to . . . secure the Blessings of Liberty to ourselves and our Posterity . . .”).

12. *See* *Downes v. Bidwell*, 182 U.S. 244, 249 (1901).

13. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1197 (D. Utah 2019), *rev’d*, 1 F.4th 862 (10th Cir. 2021).

14. *See* *Hawaii v. Mankichi*, 190 U.S. 197, 217–18 (1903) (holding that there is no right to indictment by grand jury or trial by petit jury in Hawaii); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (holding that there is no right to jury trial in the Philippines); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (holding that there is no right to indictment by grand jury in the Philippines); *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (holding that there is no right to jury trial in Puerto Rico). If the territory is deemed “incorporated” into the United States—meaning roughly that the territory is a serious candidate for statehood, *Boumediene v. Bush*, 553 U.S. 723, 757 (2008)—then all rights-bearing provisions of the Constitution apply to it without re-

ary duties, there is presently no general recognition of those duties for federal actors, in or out of the territories, though we have written extensively on why that omission seriously misreads the Constitution, which imposes fiduciary duties on *all* actors empowered by it.¹⁵ But even if one accepts our conclusion that federal officials are fiduciaries, the idea that territorial inhabitants are part of “the People of the United States,” to whom those fiduciary duties run, flies in the face of virtually all of U.S. history.

This Article focuses on a portion of the last—and we think most basic—of the foregoing potential implications from treating territories as part of “the United States” for purposes of the Constitution. We explore whether, as a matter of original constitutional meaning, territorial inhabitants are part of “We the People of the United States” as that term is used in the Preamble.

This is not an easy interpretative question to resolve—or even to analyze. It is well known that the concept of United States citizenship was not sharply defined at the time of the founding.¹⁶ The Constitution did not contain even a partial definition of national citizenship until 1868, and the only specific references to the concept in the original Constitution are a grant of power to Congress to “establish an uniform Rule of Naturalization”¹⁷ as well as cryptic provisos that the President must be “a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution,”¹⁸ that members of the House of Representatives be “seven Years a Citizen of the

gard to congressional action. See *Rasmussen v. United States*, 197 U.S. 516, 520–22 (1905). For unincorporated territories, only “fundamental” rights apply of their own force. Those “fundamental” rights, under current doctrine, do not include all the provisions of the Bill of Rights regarding criminal procedure or all of the Constitution’s structural or separation of powers provisions. For a brief (but we think telling) critique of this distinction between incorporated and unincorporated territories, see LAWSON & SEIDMAN, *supra* note 3, at 196–97. For a slightly longer (and we think equally telling) critique, see Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1176–78 (2009).

15. See GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017) [hereinafter *POWER OF ATTORNEY*]; Gary Lawson & Guy Seidman, *Authors’ Response: An Enquiry Concerning Constitutional Understanding*, 17 GEO. J.L. & PUB. POL’Y 491 (2019) [hereinafter *Authors’ Response*]; Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government’s Fiduciary Duty of Care*, 69 FLA. L. REV. 1385 (2017); Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014). Our position is not idiosyncratic. See, e.g., Ethan J. Leib & Andrew Kent, *Fiduciary Law and the Law of Public Office*, 62 WM. & MARY L. REV. 1297 (2021); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J.L. & PUB. POL’Y 463 (2019).

16. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 10, 209 (1978); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 410–11 (2020).

17. U.S. CONST. art. I, § 8, cl. 4.

18. *Id.* art. II, § 1, cl. 5.

United States,"¹⁹ and that senators be "nine Years a Citizen of the United States."²⁰ It is not obvious what was meant by "a Citizen of the United States" in these clauses. Even three quarters of a century after the Constitution was ratified, Attorney General Edward Bates, in refusing to extend the reasoning of the Supreme Court in *Dred Scott*²¹ that even free Blacks could not be citizens of a State for purposes of federal diversity jurisdiction, could write:

Who is a citizen? What constitutes a citizen of the United States? I have often been pained by the fruitless search in our law books and the records of our courts, for a clear and satisfactory definition of the phrase *citizen of the United States*. I find no such definition, no authoritative establishment of the meaning of the phrase, neither by a course of judicial decisions in our courts, nor by the continued and consentaneous action of the different branches of our political government. For aught I see to the contrary, the subject is now as little understood in its details and elements, and the question as open to argument and to speculative criticism, as it was at the beginning of the Government.²²

The arguably broader concept of "We the People of the United States" was even more shadowy.

In prior work, we deliberately avoided trying to ascertain the identity of "We the People of the United States" who "ordained and established" the Constitution:

Who composed the entity "We the People" (never mind its posterity) in 1788? Was it just the people who actually ratified the document? Who actually participated in the ratification process? Who were eligible to participate in the ratification process? Who chose to honor the ratification process by failing to engage in armed rebellion? Who were subject to the jurisdiction of the institutions created by the document whether or not he or she had any role in the document's ratification? . . . Even to begin to sort through these complexities involving eighteenth-century understandings of citizenship, allegiance, obligation, and claims of right would require at least a book²³

To give away the ending of this Article: We are no more confident now than we were five years ago that we have definitive answers to these questions. But if we are right that the Constitution is best understood as some form of fiduciary instrument, designed by and for the

19. *Id.* art. I, § 2, cl. 2.

20. *Id.* art. I, § 3, cl. 3.

21. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

22. *Citizenship*, 10 Op. Att'y Gen. 382, 383 (1862) [hereinafter Attorney General Opinion].

23. See POWER OF ATTORNEY, *supra* note 15, at 145–46; see also Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1162 (2014) (posing similar questions about the character of federal fiduciary obligations).

benefit of "We the People of the United States," those questions are key to understanding some crucial features of the Constitution, including the status of the territories and territorial inhabitants and the responsibilities of federal actors toward them. Thus, we are at least going to give those questions a look.

Part I frames the issue of authorship of the Constitution, which is crucial to understanding the role of territorial inhabitants in the constitutional scheme. Authorship matters because the Preamble declares that the Constitution is designed to benefit "ourselves [meaning 'We the People of the United States'] and our Posterity."²⁴ Whoever counts among "We the People of the United States" thus determines who the Constitution regards as its beneficiaries. The Constitution's *legal* author was "We the People of the United States," regardless of who *literally* wrote or ratified the words contained in that document. Thus, one cannot ascertain whether territorial inhabitants are part of "We the People" simply by noting that they had no role in the ratification process and no constitutional representation in Congress. The content of "We the People of the United States" *could* be co-extensive with the "the ratifiers of the Constitution" or any other sub-group of the continental population in 1788, but nothing in the Constitution *mandates* that conclusion.

Part II discusses the status of federal territory and its inhabitants before ratification of the Constitution in 1788 to help ascertain the original meaning of the term "We the People of the United States" at that time. The key proposition is that the presumptive meaning of "the United States" in 1788 was precisely the meaning attributed to that phrase by Chief Justice John Marshall in *Loughborough*. And if "the United States" presumptively includes federal territory, "the People of the United States" presumptively includes people in federal territory.

In light of that pre-constitutional territorial status, Part III examines the strongest arguments for and against considering territorial inhabitants to be part of "We the People of the United States" at the time of the founding. Suffice it to say that there are good arguments for both positions. The answer may depend on something beyond the capacity of interpretative theory to determine: Who bears the burden of proof regarding the inclusion of territorial inhabitants in "We the People of the United States," and how strong is that burden?

Part IV briefly sketches some of the consequences of considering territorial inhabitants to be part of the "We the People," on the assumption (which we defend at great length elsewhere) that the Constitution takes the form of some kind of fiduciary instrument. A full treatment of those consequences is the stuff of a separate article or book, but we think it can be established that the basic fiduciary duties

24. U.S. CONST. pmbl.

of federal actors extend to people in the territories as well as people in the States.

This Article is an exploration of original meaning, which requires at least three up-front clarifications about the nature of the project. First, we are focused only on defining “We the People of the United States” as of 1788 when the Constitution first took effect. There have been other periods when the meaning of “We the People” took center stage in U.S. legal and political history. The meaning of “We the People” was the key issue on the eve of the Civil War in *Dred Scott*, in which the plurality opinion maintained that no American Blacks—even free Blacks with full state citizenship—could ever be citizens of any State in the United States for purposes of federal diversity jurisdiction. Half a century later, as we have also already noted, the Court, in the face of national expansion across the Atlantic and Pacific Oceans, abandoned the dictum of *Loughborough v. Blake* regarding the inclusive character of “the United States”; the meaning of “the United States” and its “People” was the dominant constitutional question of that moment. This Article addresses neither of those episodes (though we have briefly addressed them elsewhere²⁵) but concentrates solely on ascertaining the original meaning of “We the People of the United States” in the Preamble to the Constitution of 1788.

Second, we emphasize that our understanding of “original meaning” is different, and in important respects narrower, than is commonplace in inquiries that generally proceed under the label “originalism.” We mean *only* to ascertain the original communicative content of the Constitution. We *do not* mean to prescribe that content as the basis for judicial or other decisions. Indeed, we do not argue here (or elsewhere) that the Constitution’s communicative meaning should (or should not) contribute in any fashion to the content of constitutional decision-making.²⁶ Those are important prescriptions and arguments,

25. On *Dred Scott*, see STEVEN GOW CALABRESI & GARY LAWSON, *TEACHER’S MANUAL TO THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA* 188 (2020). On the debates at the turn of the nineteenth century, culminating in the *Insular Tariff Cases*, see LAWSON & SEIDMAN, *supra* note 3, at 194–97. For trenchant analyses of competing conceptions of “the United States” in the late nineteenth and early twentieth centuries, see Christina Duffy Burnett, “*They Say I Am Not an American . . .*”: *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT’L L. 659 (2008); Christina Duffy Burnett, *The Constitution and Deconstitution of the United States*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898* 181 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

26. We thus disagree with Larry Solum that contribution to legal meaning—what Professor Solum calls the “constraint principle”—is one of the “core ideas of originalist constitutional theory.” Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (“[T]he original meaning of the constitutional text should constrain constitutional practice.”). To be sure, Professor Solum’s claim about the core ideas of originalism is generally descriptively accurate across the broad range of originalist theory, most of which is prescriptive as well as descriptive, but it does not describe our concededly idiosyncratic

to be sure, and others are free to offer, defend, or critique them, but we do not offer, defend, or critique them here. Our project is purely descriptive.

Third, with respect to that descriptive focus: By “original communicative content of the Constitution,” we mean the things and relations in the world to which the concepts in the Constitution refer. The criteria for inclusion of things and relations in those concepts are determined by the hypothetical conceptual framework of a hypothetical author of the document in 1788 (hence the “originalist” part of this project) rather than by the real-world thoughts or frameworks of concrete historical individuals, whether past or present.²⁷ In practice, this search for hypothetical authorial intention in the context of an externally directed legal document, such as the Constitution, requires reference to the conceptual framework of a hypothetical reasonable reader. Accordingly, we are less interested than some other theorists might be in what actual historical figures thought or said about the Constitution. Those real-world thoughts and words are potentially *relevant* for ascertaining the meaning ascribed to the Constitution by a hypothetical actor, but they are not *determinative* or *constitutive* of that meaning. We will not here get into the weeds of this methodology.²⁸ We say as much as we have only because our approach differs enough from what generally goes by the name of “originalism” so that our use of the term “originalism” without explanation might lead to misunderstanding. Indeed, it is not clear that the term “originalism” is even the best description of our methodology. As one of us has written:

[W]hen I am supposedly standing shoulder to shoulder as an “originalist” with, *inter alia*, Bruce Ackerman, Larry Alexander, Sam Alito, Akhil Amar, Jack Balkin, Randy Barnett, Will Baude, Raoul Berger, and Robert Bork—and those are just the “As” and

approach or this particular project. For more on the crucial, and too often overlooked, distinction between originalism as a tool for ascertaining textual meaning and as a prescriptive norm for governance see *Authors' Response*, *supra* note 15, at 494–95; see also Gary Lawson, *Originalism without Obligation*, 93 B.U. L. REV. 1309, 1313 (2013) (discussing originalism as a theory of interpretation versus a theory of adjudication).

27. See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) [hereinafter *Originalism as a Legal Enterprise*]. As it happens, reference to real-world thoughts and beliefs yields the same uncertainties that we wrestle with using our hypothetical-author methods. The founding generation was no more settled on what constitutes “the United States” than were the imperial and anti-imperial theorists a century after the founding. See Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1652 (2019) (describing “multiple meanings of ‘United States’ in the late eighteenth century”—“[s]ometimes, the term referred specifically and only to the thirteen states collectively; in other instances, it described the entire territory of the nation of the United States”).

28. For an outline of it, see POWER OF ATTORNEY, *supra* note 15, at 8–11; Gary Lawson, *Reflections of an Empirical Reader (Or: Could Fleming Be Right This Time?)*, 96 B.U. L. REV. 1457, 1461–63 (2016).

“Bs” that leap immediately to mind who are swept in by some currently circulating broad definitions of originalism—it is not clear that the label “originalist” is doing a lot of useful epistemological work.²⁹

Perhaps we should just say that we are engaged in the empirical project of ascertaining the communicative meaning of the phrase “We the People of the United States” in the Constitution of 1788 and leave it at that.

I. POWER TO THE PEOPLE³⁰

For whose benefit are federal actors—Congress, the President, and the federal courts³¹—supposed to govern? The Constitution answers that question, albeit in ambiguous fashion, in its very first sentence. The Constitution’s Preamble reads in full:

We the People of the United States, in Order to form a more perfect Union, establish Justice, ensur[e] domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.³²

The Preamble does not play much of a role in modern constitutional discourse or law.³³ Nor did it play much of a role in the founding era; James Wilson “is the only one of the Founders to treat the Preamble as a statement of the principles underlying the Constitution.”³⁴ We do not here enter into debates concerning whether or how the Preamble does or should affect the scope of other constitutional provisions.³⁵ Our focus on the Preamble has a more specific purpose: It tells us the

29. *Id.* at 1458.

30. With acknowledgments to John Lennon.

31. Technically, members of the electoral college are also federal actors. One could say the same of state officials performing functions created by the federal Constitution, such as setting state rules for federal elections, and grand and petit jurors in federal proceedings. One might even say it of voters in federal elections. But we focus in this Article on Congress since it is the primary actor with regard to governance of federal territory.

32. U.S. CONST. pmbl.

33. See John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 SO. CAL. L. REV. 1021, 1024 (2018) (“The Preamble is rarely mentioned in federal court opinions, in constitutional law treatises, or in leading law school constitutional textbooks.”). For a notable exception to the extended discussion of the Preamble from casebooks, see STEVEN GOW CALABRESI & GARY LAWSON, *THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA* 115–42 (2020).

34. William Ewald, *James Wilson and the American Founding*, 17 GEO. J.L. & PUB. POL’Y 1, 21 (2019). But see Welch & Heilpern, *supra* note 33, at 1050 (taking a more optimistic view of the Preamble’s significance at the founding).

35. See, e.g., JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* 62 (2015) (“[W]e should aspire to fidelity to our scheme as an ongoing frame of government pursuing the ends of the Preamble . . .”).

legal author of the Constitution, which in turn tells us who the Constitution was designed to benefit. The legal author of the Constitution is "We the People of the United States," and the document is designed to benefit that author and its "Posterity."

Of course, the Constitution was not in fact written by anything or anyone that can plausibly be characterized as "We the People of the United States." If taken literally, the Preamble's assertion of authorship is factually false, an absurd pretension, or both. For interpretative purposes, however, two points must be kept in mind.

First, as far as *meaning* rather than *legitimacy* is concerned, it does not matter how false or absurd a pretension the document's announcement of authorship might be. To the extent that authorship is relevant to the ascertainment of *meaning*, the document's claim of authorship is conclusive.³⁶

Second, legal documents often have *literal* authors and *legal* authors, and the two can be very different. Wills are almost never literally written by the decedents whose affairs they settle; they are written by lawyers. But legally speaking, the will is considered to be the instrument of the decedent. If one is looking for the "intention" behind the instrument, it is the intention of the decedent, not of the lawyer who actually wrote the words, that matters. This is true even if the decedent never read the will but just signed on the dotted line where the lawyer pointed. Similarly, if one downloads a form document, such as a lease, and then signs it, the unknown person or persons who literally wrote the form document are legally irrelevant; the document is legally considered to be the product of the person who adopts and uses it regardless of whether that person actually composed (or even read) the words.³⁷

The literal authors of the Constitution, including the Preamble, were some combination of persons at the Constitutional Convention. Probably the best candidates for literal authors of most of the words of the document are the five members of the Committee of Detail, consisting of Oliver Ellsworth, Nathaniel Gorham, Edmund Randolph, John Rutledge, and James Wilson.³⁸ The Preamble in its final

36. Similarly, the 1975 science-fiction novel *Venus on the Half-Shell* must be interpreted by reference to the imagined intentions of the wholly fictional Kilgore Trout (a character invented by Kurt Vonnegut) rather than by Philip José Farmer, the book's literal author. KILGORE TROUT, *VENUS ON THE HALF-SHELL* (1974). If Farmer wanted his real intentions rather than Trout's fictional ones to control, he could have identified himself rather than Trout as the author.

37. Cf. RAYMOND W. GIBBS, JR., *INTENTIONS IN THE EXPERIENCE OF MEANING* 220 (1999) ("I might even purchase a birthday card from a local store, present this to a friend, and claim authorship of the sentiments expressed in the card simply because I signed and sent the card to a particular person, even if as 'author' I am not historically connected to the person who wrote the text.").

38. On the crucial role of the Committee of Detail in the drafting of the Constitution, see William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 202 (2012).

form is perhaps best attributed to the Committee of Style, consisting of Alexander Hamilton, William Johnson, Rufus King, James Madison, and Gouverneur Morris.³⁹ Perhaps one could more specifically link individual provisions, or even phrases, with particular persons, such as attributing the Territory or Other Property Clause or the Preamble to Gouverneur Morris.⁴⁰ But just as with a will or a form lease, the legal author of the Constitution is none of those people who actually composed the words. The legal author is identified in the Preamble as “We the People of the United States” who ordained and established the document. That is the author in whose name the document was issued. As we noted above, for interpretative purposes, it makes no difference whether that claim of authorship is a preposterous pretension, a profound insight about political theory, or neither. For interpretative purposes—for purposes of understanding to what things and relations in the world the words of the Constitution refer—the claim is a brute fact. The document says that its author is “We the People of the United States.” If you want to ascertain the communicative meaning of the document, you must take that claimed authorship as a starting point without regard to its merit as a matter of political or moral theory. Otherwise, you are inventing meaning rather than ascertaining it.

Importantly, “We the People of the United States” is not necessarily just the historically real and concrete people in the ratifying States who gave the Constitution full legal effect in those States. Article VII provides: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”⁴¹ The legal effect of the Constitution thus depended on the actions of a specific group of historically real people who participated in state ratifying conventions. That group necessarily excluded inhabitants of federal territories who were not citizens of some specific State that was part of the Constitution’s ratification process, because the territories, as territories, played no role in constitutional ratification. Does that end this Article’s inquiry into the constitutional status of territorial inhabitants before it even begins?

Not at all. Take a step back from the Article VII ratification scheme and ask this more basic question: *What gave Article VII any relevance?* The answer is that Article VII is only legally relevant, as far as the Constitution is concerned, because the ordained and established Constitution authored by “We the People of the United States” made it

39. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 553 (Max Farrand ed. 1911).

40. On Morris as the likely literal author of the Territory or Other Property Clause, see LAWSON & SEIDMAN, *supra* note 3, at 73. On Morris as the likely literal author of the Preamble, see PETER CHARLES HOFFER, FOR OURSELVES AND OUR POSTERITY: THE PREAMBLE TO THE FEDERAL CONSTITUTION IN AMERICAN HISTORY 14 (2013).

41. U.S. CONST. art. VII.

so. Here again it is important to distinguish the task of *interpreting* the Constitution from the task of *justifying* it or any form of government emerging in its name. As a matter of political theory, we express no view on whether the action of state ratifying conventions in 1787–1788 could, either with or without a draft of a constitution in front of them, legitimately create a government. That is a question separate and apart from ascertaining the legal authorship, and therefore the meaning, of the Constitution of 1788, and our only concern is with meaning. For interpretative purposes, the ratifiers are relevant only because the instrument that they are ratifying makes them relevant by its terms. Those terms, in turn, were authored by “We the People of the United States.” Ratifying conventions within certain States gave the Constitution formal legal effect, but the Constitution was “ordained and established” as a legal instrument by “We the People.” The exclusion of territorial inhabitants from Article VII does not tell us the content of “We the People of the United States.”

Moreover, note that the Preamble speaks in the present tense: We the People “do ordain and establish this Constitution.” The act of ordaining and establishing is complete by the end of the Preamble’s one sentence. Nothing more than the Preamble itself is necessary for that act of ordaining and establishing. Article VII prescribes a separate act: the “Establishment” of the Constitution among the ratifying States. The ratifiers gave full legal effect within their own States to the Constitution, but the document itself existed prior to the ratification and had communicative meaning prior to the ratification. “In 1788, the Constitution had the same meaning in Rhode Island and North Carolina as it had in New Hampshire and Connecticut, and it would have had the same meaning had it been defeated at five ratifying conventions.”⁴² Indeed, the ratifiers were ratifying “this Constitution,” which had identity and meaning apart from the ratification process. Similarly, a will does not become fully effective until it goes through probate, but the probate judge is not the legal author of the instrument, and one does not consult the judge’s intentions when ascertaining the will’s meaning. Indeed, the judge strives to give effect to the intentions of the decedent—the will’s legal author. For the same reasons, for purposes of ascertaining communicative meaning, the author of the Constitution is “We the People of the United States.” The document says so.⁴³

Another feature of “We the People of the United States,” which has special relevance for the role of territorial inhabitants, is that the document in question was a constitution “for the United States of America.” The Constitution did not bring the United States of

42. Gary Lawson, *Classical Liberal Constitution or Classical Liberal Construction?*, 8 N.Y.U. J.L. & LIBERTY 808, 821 n.50 (2014).

43. For a more detailed account of why and how “We the People” is the Constitution’s author, see *Originalism as a Legal Enterprise*, *supra* note 27, at 58–70.

America into existence. The United States of America existed before the Constitution was ratified, and the “People of the United States,” as an entity capable of having legally constructed intentions, similarly pre-dated the Constitution. The identity of “the People of the United States” thus depends on pre-constitutional understandings.

The pre-constitutional existence of the United States is textually clear from the Constitution itself. Article IV gives Congress “Power to dispose of and make all needful Rules and Regulation respecting the Territory or other Property belonging to the United States,”⁴⁴ and then adds that “nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States.”⁴⁵ This means that the Constitution assumes that “the United States” as an entity had claims to territory or other property that pre-date the Constitution. Similarly, the Article VI Engagements Clause provides that “[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.”⁴⁶ The “United States” that existed under the Articles of Confederation is thus the same entity—the same “United States”—for whom the Constitution provides new powers and responsibilities. The Supremacy Clause similarly emphasizes continuity between the pre-ratification and post-ratification “United States” by referencing “all Treaties made, or which shall be made, under the Authority of the United States.”⁴⁷

These cross-temporal references are not surprising, as the Constitution did not immediately and fully displace the Articles of Confederation. The Constitution took effect in stages, with some provisions, such as the Contracts Clause,⁴⁸ taking effect immediately upon ratification on June 21, 1788. Other provisions, such as the Treaty Clause,⁴⁹ could not become effective until the machinery of the federal government, such as a President and Senate, was in place, which did not fully happen until spring 1789.⁵⁰ The Constitution, unlike many of the state constitutions of the time, did not contain an express provision regarding the transition from the previous regime to the new one.⁵¹ The best inference from this silence is that certain institutions from the Articles of Confederation, such as the treaty-making authority of the national

44. U.S. CONST. art. IV, § 3, cl. 2.

45. *Id.*

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

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

48. *See id.* art. I, § 10, cl. 1 (“No State shall . . . pass any Law impairing the Obligation of Contracts . . .”).

49. *See id.* art. II, § 2, cl. 2 (the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties”).

50. On the stages of constitutional effectiveness, see Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 4 (2001).

51. *See* Gary Lawson & Guy Seidman, *The First “Establishment” Clause: Article VII and the Post-Constitutional Confederation*, 78 NOTRE DAME L. REV. 83, 85–86 (2002).

government, remained in force until the constitutional machinery to replace those institutions was formed.⁵² Thus, “[t]he United States of America” proclaimed in the Articles of Confederation⁵³ was in existence before the Constitution was ratified, and it maintained its identity through ratification.

It is unclear at what moment in time “the United States” as an entity—and thus something called “the People of the United States”—came into existence. At the very latest, the United States as a corporate entity⁵⁴—and therefore “the People of the United States” as a meaningful concept—existed as of March 1, 1781, when the Articles of Confederation were ratified.⁵⁵ The Articles on multiple occasions refer to the United States as an entity distinct from the constituent States.⁵⁶ It is also possible that “the United States,” and therefore its “People,” existed before that time, though the evidence is equivocal.

Counting against a pre-Articles of Confederation existence of the United States and its “People” is the fact that if “the United States” was a distinct entity before March 1, 1781, it would be fully capable of holding property, which is one of the inherent powers of corporations under founding-era corporate law.⁵⁷ It would therefore have made sense for land cessions from individual States to be made to that entity. New York ceded its western land claims more than a year before ratification of the Articles of Confederation,⁵⁸ but the cession very pointedly was not made to “the United States” as an entity. Rather, the cession was made “for the use and benefit of such of the United States, as shall become members of the federal alliance of the said states.”⁵⁹ New York’s cession was a grant to States as parties to a confederation rather than to a distinctive entity called “the United States.” The Virginia cession of January 2, 1781, similarly read as a grant to “United States,” understood as a group of States rather than a distinct corporate entity.⁶⁰

52. We make this argument at some length in *id.* at 84.

53. ARTICLES OF CONFEDERATION OF 1781, art. I.

54. In the founding era, all governmental bodies were considered corporations. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 447 (1793) (opinion of Iredell, J.) (“The word ‘corporations,’ in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendant, is in this sense ‘a corporation.’”).

55. *Primary Documents in American History*, LIB. CONG. (Oct. 31, 2021, 8:04 PM), www.loc.gov/rr/program/bib/ourdocs/articles.html [<https://perma.cc/EK2A-DUEF>].

56. See ARTICLES OF CONFEDERATION OF 1781, arts. I, VI, IX.

57. See 1 WILLIAM BLACKSTONE, COMMENTARIES *463; see also John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1082–83 (2015).

58. See Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27, 43 (1936) (noting that New York ceded its lands on February 19, 1780).

59. 19 JOURNALS OF THE CONTINENTAL CONGRESS 211 (1781).

60. See *Letter from Thomas Jefferson to Samuel Huntington*, ARCHIVES.GOV (Jan. 17, 1781), <https://founders.archives.gov/documents/Jefferson/01-04-02-0481> [<https://perma.cc/HJV5-ALM8>].

The senses of foreign actors, and of diplomats negotiating with foreign actors over treaty language, does not necessarily say much about the issues that concern us, but for whatever it is worth: The 1778 Treaty of Amity and Commerce with France was styled as an agreement among "[the] Most Christian King, and the thirteen United States of North America, to wit: New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South Carolina and Georgia."⁶¹ That is an agreement among 14 distinct nation-states rather than an agreement between France and a unitary corporate entity. Similarly, the contemporaneous Treaty of Alliance with France was formed between France and individual States acting jointly rather than between France and a distinct entity called "the United States."⁶² This at least suggests that there was no "United States" before 1781.

On the other hand, even after 1781, treaties did not typically refer to "the United States" as a distinct entity. The same formulation from the 1778 treaties with France was used in 1782 for the Treaty of Amity and Commerce with the Dutch Republic⁶³ and the 1783 Treaty of Amity and Commerce with Sweden.⁶⁴ The 1785 treaty with Prussia did not specifically list each of the States as parties, but it did refer to "the United States of America, and *their* citizens,"⁶⁵ not to "the United States of America, and *its* citizens." None of these treaty provisions reads as though the United States was a distinct entity, even after 1781, though it obviously was such an entity by that point. Perhaps more tellingly, from an early date it was standard practice in those pre-Articles treaties to refer to "two parties"⁶⁶ to the treaties, which understands the collective States to be a single entity. Other formulations referred to "either party"⁶⁷ or, as in the post-Articles of Confederation Moroccan-American Treaty of Peace and Friendship, "both parties."⁶⁸ If the relevant entities were the 13 States acting as discrete nations, that reference would be inappropriate. But we do not want to make too much of these formulations; it is obviously convenient for treaties to refer to the assemblage of the collective States as a single entity without intending to make any profound statements about the independent corporate status of something called "the United States."

61. Treaty of Amity and Commerce, Fr.-U.S., Feb. 6, 1778, 8 Stat. 12.

62. See Treaty of Alliance, Fr.-U.S., Feb. 6, 1778, 8 Stat. 6.

63. Treaty of Amity and Commerce, Neth.-U.S., Oct. 8, 1782, 8 Stat. 32.

64. Treaty of Amity and Commerce, Swed.-U.S., Apr. 3, 1783, 8 Stat. 60.

65. Treaty of Amity and Commerce, Prussia-U.S., art. I, July-Sept. 1785, 8 Stat. 84 (emphasis added).

66. Treaty of Alliance, *supra* note 62, at 10, art. XI; Treaty of Amity and Commerce, *supra* note 61, at 22, art. XV.

67. Treaty of Amity and Commerce, *supra* note 61, at 20, 22, arts. XIV, XVII, XIX, XX, XXIII.

68. Treaty of Peace and Friendship, Morocco-U.S., Jan. 1787, art. I, 8 Stat. 100.

More relevantly, in *Respublica v. Sweers*,⁶⁹ the Pennsylvania Supreme Court in 1779 clearly understood “the United States” to be a distinct entity at least two years before the Articles of Confederation took effect. Cornelius Sweers, a commissary clerk in the United States Army during the Revolutionary War, was indicted, prosecuted, and convicted in Pennsylvania “for altering a bill of parcels and receipt given by Margaret Duncan, for goods bought from her, with intent to defraud the United States”⁷⁰ and “for forging a receipt, purporting to be a receipt from one Adam Foulke, with intent to defraud the United States.”⁷¹ Sweers’s defense was that there could be no such offense of defrauding “the United States” because “‘at the time of the offence charged, the United States were not a body corporate known in law.’”⁷² There was, claimed Sweers, simply no “United States” for him to defraud. The Pennsylvania Supreme Court tersely held otherwise:

From the moment of their association, the United States necessarily became a body corporate; for, there was no superior from whom that character could otherwise be derived. In England, the king, lords, and commons, are certainly a body corporate; and yet there never was any charter or statute, by which they were expressly so created.⁷³

It is not entirely clear what the court had in mind as “the moment of their association.” Was that November 15, 1777, when the Articles of Confederation were sent to the States for ratification? July 1776 when the States jointly declared independence? Or was it even earlier, with the meeting of the first Continental Congress in 1774, or even with the meeting of the Stamp Act Congress of 1765? The court did not say, and for our purposes it does not matter very much which precise date the court had in mind. The United States certainly existed as an entity once the Articles of Confederation took effect, which is why post-Articles treaties could refer to “the two nations”⁷⁴ or, as in the Treaty of Paris, “the two countries.”⁷⁵ By early 1781, “the People of the United States” thus existed as a legal entity capable of authoring documents and having legally constructed intentions, just as any juridical entity, such as a private corporation, is capable of issuing documents in its own name and having legally constructed intentions.

69. 1 U.S. (1 Dall.) 41 (Pa. 1779).

70. *Id.* at 41 (emphasis omitted).

71. *Id.* at 43 (emphasis omitted).

72. *Id.* at 44.

73. *Id.*

74. Convention Between the Lords the States General of the United Netherlands, and the United States of America, Concerning Vessels Re-captured, Oct. 8, 1782, art. I, 8 Stat. 50.

75. Definitive Treaty of Peace, *supra* note 5, at 80.

II. ON THE OTHER HAND⁷⁶

If before 1788 there was a "United States," and thus a "People of the United States," there were also "Citizen[s]" of the United States during that time. Are those categories of "People" and "Citizen[s]" co-extensive for purposes of understanding the Preamble?

It is possible, but we do not think so. To ascertain the meaning of "We the People of the United States," we do not think that we need to solve the riddle of the meaning of a "Citizen of the United States" as of 1788. That is good news, because it is quite a nasty riddle.

The Constitution of 1788 uses the term "Citizen of the United States" solely in the context of qualifications for the presidency or Congress. The Senate Qualifications Clause requires that senators be United States citizens for at least nine years.⁷⁷ Thus, in 1789 when a Senate first convened, there seemingly *had* to be something called "the United States" for people to be citizens of at least since 1780, a year before the Articles of Confederation, or else no one would be qualified to serve in the first Senate. Alternatively, of course, the term could mean a citizen of any one of the United States, with such citizenship defined at the state level, rather than (or perhaps in addition to) referring to United States citizenship as a distinct concept. The Article II Qualifications Clause avoids this temporal problem by saying that the President must be a citizen "at the time of the Adoption of this Constitution."⁷⁸ The Constitution says nothing about any of these questions—leading to Attorney General Bates' previously quoted 1862 lament about the uncertain character of United States citizenship⁷⁹ and a great deal of subsequent and inconclusive scholarship.

The difficulties of sorting out the meaning and consequences of citizenship run deep. It is not surprising that the founders chose to leave the matter unaddressed. Societies wrestled with the multiple meanings and consequences of citizenship at least since classical times⁸⁰—and the founding generation was well versed in classical studies,⁸¹ and there is the basic fact that "there are still many aspects of ancient citi-

76. With acknowledgements to Paul Overstreet, Don Schlitz, and Randy Travis.

77. U.S. CONST. art. I, § 3, cl. 3.

78. *Id.* art. II, § 1, cl. 5.

79. See Attorney General Opinion, *supra* note 22, at 383.

80. See JOSINE BLOK, *CITIZENSHIP IN CLASSICAL ATHENS* (2017); see also PHILIP BROOK MANVILLE, *THE ORIGINS OF CITIZENSHIP IN ANCIENT ATHENS* (1990) (exploring the interplay between citizenship and social behavior in ancient Athens); A.N. SHERMAN-WHITE, *THE ROMAN CITIZENSHIP* (2d ed. 1973); J.G.A. Pocock, *The Ideal of Citizenship Since Classical Times*, 99 *QUEEN'S Q.* 33 (1992).

81. See DAVID J. BEDERMAN, *THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION* (2008); CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* (1994).

zenship that lay in the shadows.”⁸² Part of the problem is linguistic. The term “citizen” can mean many things. Some of those meanings are technical and legal, while others are more colloquial or cultural. As a professor of English has aptly said: “In the early United States, citizenship was less a legal category than an emergent extralegal concept that accumulated its meaning flexibly in rhetorical experiments that traversed several genres.”⁸³ Part of the problem is substantive. How one defines a citizen depends largely on the consequences of that definition. What does one get—and what does one owe—by virtue of being a citizen rather than an alien? And part of the problem is political and structural. In the United States, there are two distinct citizenships: state and national. Often they go together, but sometimes they do not. The concept of dual citizenship is at least as old as Roman times, but it introduces complications that a careful study of citizenship must address. All these concerns sharply pose risks of equivocation: Uses of the term “citizen” in one context may mean something quite different in other contexts or even in different premises of a single argument.

We hope to avoid all these problems with defining citizenship. The brute fact is that the Preamble that we are seeking to interpret does not ever use the word “Citizen.” It uses the word “People”—in sharp distinction to the specific uses of the word “Citizen” in the various qualification clauses. It is certainly possible to have a conception of “the People” that includes only citizens, but that is hardly inevitable, especially if “citizen” takes on a technical legal meaning rather than a broad colloquial one. Thus, we confine our efforts to trying to define “We the People of the United States” without presupposing that this category is or is not equivalent to some conception of “Citizens of the United States.”

There was clearly something called “the United States” before the Constitution. And if there was a United States, there was a “People of the United States.” The real question is thus not whether “We the People of the United States” was a kind of juridical entity akin to a corporation in 1788. Of course it was. The real question is: Who were the equivalents of its shareholders? More specifically, what precisely was the extent of this “United States” whose “People” were purporting to speak in the Preamble about ordaining and establishing a new constitution?

As we have noted, one of the legal characteristics of a corporation is the capacity to hold land in its own name. “By March, 1781, Congress

82. Lucia Cecchet, *Greek and Roman Citizenship: State of Research and Open Questions*, in *CITIZENS IN THE GRAECO-ROMAN WORLD: ASPECTS OF CITIZENSHIP FROM THE ARCHAIC PERIOD TO AD 212*, at 1 (Lucia Cecchet & Anna Busetto eds., 2017).

83. CARRIE HYDE, *CIVIC LONGING: THE SPECULATIVE ORIGINS OF U.S. CITIZENSHIP* 9 (2018).

was in possession of the New York, Connecticut, and Virginia cessions,"⁸⁴ making the United States prior to the Constitution a substantial landowner. The terms of the cessions effectuated before the Articles of Confederation, we have noted, did not purport to grant land to the United States as an entity,⁸⁵ but by 1781 it was clear that the United States was a distinct entity holding territory.⁸⁶ What was the status of that federally owned and governed territory—and more specifically, what was the status of the inhabitants of that federally owned and governed territory between 1781 and 1788?

We get some clues—though characteristically equivocal ones for this topic—from the manner of federal governance of territory under the Articles of Confederation. To be sure, it was not at all clear where the Confederation Congress even got the power to govern territory and its inhabitants. Article XIX of John Dickinson's early draft of proposed articles of confederation contained a grant to Congress of power to govern federal territory,⁸⁷ but no such provision appears in the actual Articles of Confederation. This absence has not gone unnoticed over the years,⁸⁸ but no serious objections to lack of power were raised in the founding era.⁸⁹ Consequently, from an early date following the state cessions of territory, the Congress under the Article of Confederation exercised power to govern the Northwest Territory, as the ceded land is typically called.⁹⁰

The first such statute in 1784 gave broad powers to territorial inhabitants to govern themselves:

[T]he settlers on any territory so purchased, and offered for sale, shall, either on their own petition or on the order of Congress, receive authority . . . to meet together, for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of the original States; so that such laws nevertheless shall be subject to alteration by their ordinary legislature; and to erect, subject to a like alteration, counties, townships, or other divisions, for the election of members for their legislature. . . . [Once such State acquires 20,000 free inhabitants, its settlers] shall receive . . . authority . . . to call a convention of representatives to establish a permanent constitution and government for themselves.⁹¹

84. Merrill Jensen, *The Creation of the National Domain, 1781-1784*, 26 *MISS. VALLEY HIST. REV.* 323, 323 (1939).

85. See *supra* notes 53–56 and accompanying text.

86. See *supra* notes 53–56 and accompanying text.

87. See Josiah Bartlett's and John Dickinson's Draft Articles of Confederation, in *Letters of Delegates to Congress, 1774–1789*, at 243 (Paul H. Smith ed. 1979).

88. See Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 *COLUM. L. REV.* 929, 940 n.77 (1995).

89. See JAMES G. WILSON, *THE IMPERIAL REPUBLIC: A STRUCTURAL HISTORY OF AMERICAN CONSTITUTIONALISM FROM THE COLONIAL ERA TO THE BEGINNING OF THE TWENTIETH CENTURY* 73 (2002).

90. See *id.*

91. 26 *JOURNALS OF THE CONTINENTAL CONGRESS* 276 (1784).

There were provisos involving the kinds of governments that could be created in the territory, including a proviso forbidding taxes on federal land,⁹² but on the whole, the thrust of this statute was to treat the inhabitants of territories as a self-governing body. The federal presence was limited to a vague provision declaring "[t]hat measures not inconsistent with the principles of the Confederation, and necessary for the preservation of peace and good order among the settlers in any of the said new states, until they shall assume a temporary government as aforesaid, may, from time to time, be taken by the United States in Congress assembled."⁹³ The statute assumed that these self-governing "State[s]," as the statute called them, would in time be admitted to the Confederation "on an equal footing with the said original states."⁹⁴

For reasons detailed by Peter Onuf in his indispensable study of the Northwest Ordinance,⁹⁵ this Jeffersonian/Republican vision of territorial self-governance ran into the reality of the need for law, order, and clear property titles to attract adequate numbers of high-quality settlers to the region. Accordingly, the Confederation Congress in 1787 replaced this thin scheme with an "[o]rdinance for the government of the territory of the United States, North West of the river Ohio,"⁹⁶ popularly known as the Northwest Ordinance. This statute provided for more robust federal supervision of the territory, but it still left considerable room for internal self-governance. Unsurprisingly, it sends mixed messages about the status of territorial inhabitants.

On the one hand, the residents of the territory were referred to as "inhabitants"⁹⁷ rather than citizens, either of the United States (whatever that would have meant at the time) or of any State. Indeed, the assumption was that at least some residents would have no state citizenship; qualification for service in the territorial legislature required that one "shall have been a citizen of one of the United States three years and be a resident in the district or . . . shall have resided in the district three years."⁹⁸

On the other hand, the provisions for internal territorial governance through local legislatures, though more limited than the provisions in 1784, say much about how the territories and their inhabitants were viewed in the pre-constitutional period. Even though many influential state and national figures viewed the territorial settlers as less civilized than their state counterparts and of dubious character for self-govern-

92. *See id.* at 277.

93. *Id.* at 278.

94. *Id.* at 277-78.

95. *See* PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE*, at xv (1992).

96. 32 JOURNALS OF THE CONTINENTAL CONGRESS 334 (1787).

97. *See id.* at 337, 340-43.

98. *Id.* at 337. There was also a modest property qualification. *See id.* at 337-38.

ance,⁹⁹ the Northwest Ordinance continued to provide for local legislatures elected by local inhabitants and retained the promise of statehood as soon as specific population levels were reached.¹⁰⁰ The Ordinance stated that “[t]here shall be formed, in the said territory, not less than three nor more than five States”¹⁰¹ and guaranteed those States admission to the Union when their population reached 60,000.¹⁰² Indeed, that commitment to turning territorial inhabitants into state inhabitants was put in place even before the land cessions took place:

Before there was a Northwest Territory, its political future had been prescribed. In the Public Lands Resolution of 10 October 1780, the Congress had resolved (1) that the lands ceded to the United States “shall be settled and formed into distinct . . . States, which shall become members of the Federal Union, and shall have the same rights of sovereignty, freedom and independence as the other States,” and (2) that they shall be “republican States.”¹⁰³

Even though the path to statehood looked longer and more complicated in 1788 than it did in 1780 or 1784,¹⁰⁴ territorial status was always, in the founding era, considered a way station on the path to statehood. As Peter Onuf put it: “[S]tatehood was immanent in the American concept of territory.”¹⁰⁵ If territorial inhabitants were not yet fully citizens of the United States (again putting aside what that might have meant in the 1780s), they were national citizens in the making. They were guaranteed basic rights of citizens, such as trial by jury,¹⁰⁶ just compensation for takings of property,¹⁰⁷ and the sanctity of private contracts,¹⁰⁸ and they were expected to fulfill basic duties of citizens, such as “to pay a part of the federal debts contracted or to be contracted, and a proportional part of the expenses of Government.”¹⁰⁹ With rights came duties for territorial inhabitants, just as with citizenship within a State.

On the other, other hand (and the reader may have noticed that there are almost always several hands regarding these matters), the

99. See Duffey, *supra* note 88, at 936; Robert S. Hill, *Federalism, Republicanism, and the Northwest Ordinance*, 18 *PUBLIUS* 41, 45 (1988). Those doubts were not entirely unjustified. See ONUF, *supra* note 95, at xiii (“Speculators, squatters, and other adventurers infested the new settlements, promoting their private interests, defying state and national authority, and entertaining overtures from foreign powers . . .”).

100. See Robert Knowles, *The Balance of Forces and the Empire of Liberty: States’ Rights and the Louisiana Purchase*, 88 *IOWA L. REV.* 343, 371 (2003).

101. 32 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 96, at 343.

102. See *id.* at 342–43.

103. Hill, *supra* note 99, at 43.

104. See ONUF, *supra* note 95, at 54–55, 59–60, 72.

105. *Id.*

106. 32 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 96, at 340.

107. See *id.*

108. See *id.*

109. *Id.* at 341. There was a similar proviso in the 1784 ordinance. See 26 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 91, at 277.

Northwest Territory was not wholly self-governing. It had a federally appointed governor, secretary, and judges.¹¹⁰ As Gregory Ablavsky has pointed out, the governance of the Northwest Territory had many features of a federal administrative agency.¹¹¹ Inhabitants of the territory were not nearly on a par with inhabitants in the States.

Depending on whether one sees the glass as half-empty or half-full, one could plausibly say either that territorial inhabitants were very close to or very far from being full members of the political community of the United States known as "We the People." But in the end, here are the simplest of questions that we think bear most directly on the narrow interpretative question before us: When the 1782 treaty with the Netherlands said that there would be

a firm, inviolable and universal peace and sincere friendship . . . between the subjects and inhabitants of the said parties, and between the countries, islands, cities and places, situated under the jurisdiction of the said United Netherlands, and the said United States of America, their subjects and inhabitants, of every degree, without exception of persons or places,¹¹²

could that possibly have meant only persons within the jurisdiction of some specific State? Of course not. If the United States went to war, would the opponent regard the people in the territories as enemy combatants? Of course. When the United States acted as a corporate entity, it acted on behalf of all the people subject to its jurisdiction, including those in the territories without state citizenship.

It was certainly possible in 1788 to use the term "the United States" to refer solely to an assemblage of the 13 States. But the most basic, default understanding of that term would include the territory that was not under the jurisdiction of any specific State but belonged to the United States as a corporate entity. That was true in 1820, and it was true in 1788. Thus, the people of "the United States," presumptively understood in this fashion, would at least presumptively include people in federal territory.

Presumptions, of course, are generally rebuttable. Does anything in or about the Constitution rebut this one?

III. BOTH SIDES, NOW¹¹³

We can now begin to address our central question: Were territorial inhabitants among the "We the People of the United States" who legally authored the Constitution?

110. See 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 96, at 335-36.

111. See Ablavsky, *supra* note 26, at 1633.

112. Treaty of Amity and Commerce, *supra* note 63, at 32.

113. With acknowledgments to Joni Mitchell (and to Judy Collins for the definitive cover).

The strongest argument against including them as part of “We the People of the United States” comes from the Constitution itself. While the Articles of Confederation neglected to give Congress explicit power to govern territories, the Constitution contained two clauses specifically addressed to that topic. The Territories Clause—or, as we would call it, the Territory or Other Property Clause—provides: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”¹¹⁴ A similar clause gives Congress power “[t]o exercise exclusive Legislation in all Cases whatsoever”¹¹⁵ over the District of Columbia.¹¹⁶ Several features of the Territory or Other Property Clause suggest that territories are constitutionally distinct from the United States.

First, and most obviously, the clause describes federal territory as “belonging to the United States.” It seems clear that “belonging” in this context describes an ownership relationship rather than an inclusive one. The clause is not saying that federal territories “belong[]” to the United States in the *Loughborough v. Blake* sense of being part of the political unit but instead is saying that they “belong[]” to the United States as property belongs to its owner. They are therefore, in a constitutional sense, something different and apart from “the United States” that owns them. That meaning is confirmed by the fact that territory is conjoined in the clause with “other Property.” As far as the Constitution is concerned, federal territory is equivalent to staplers or paper clips owned by the federal government; the clause does not distinguish Congress’s power over the former from its power over the latter. This is not a formulation designed to communicate clearly that territorial inhabitants are on a par with state inhabitants or are fully included within the political compass of “the United States.”

Second, for those who care about such things (and we generally do not), the principal drafter of the Territory or other Property Clause, Gouverneur Morris, deliberately crafted the clause to put federal territory into a dependent status. As Morris forthrightly admitted in an 1803 letter:

I always thought that, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it

114. U.S. CONST. art. IV, § 3, cl. 2.

115. *Id.* art. I, § 8, cl. 17.

116. We do not explore here how similar or dissimilar these two provisions might be. For a discussion of possible differences between the Territory and Other Property Clause and the District Clause, see James Durling, *The District of Columbia and Article III*, 107 GEO. L.J. 1205 (2019).

been more pointedly expressed, a strong opposition would have been made.¹¹⁷

The textual equation of territory with paper clips was not an accidental drafting error.

Third, the Territory or Other Property Clause includes a seemingly unlimited right on the part of Congress to “dispose of” federal territory. This is a natural and expected aspect of the provision, as a principal purpose of ceding land to the national government was to allow it to sell (“dispose of”) that land in order to pay national debts incurred during the Revolutionary War. But the breadth of the clause would seem to allow Congress to transfer that land, whether or not it is occupied, wholesale to a foreign power with or without consideration. Such a transfer would impose on inhabitants of that transferred territory allegiance to the formerly foreign power that would now own the territory. If any such power exists to effect that kind of transfer of allegiance for inhabitants of a State, it can only come from the treaty power, and any such treaty would require the consent of two-thirds of the Senate.¹¹⁸ Moreover, if our view of the federal treaty power—set out at length in other work¹¹⁹—is correct, state territory could only be transferred to a foreign power as part of a treaty of peace, not for ordinary commercial purposes.¹²⁰ None of that is true with regard to disposal of non-state territory; the Constitution seems to permit a reverse-Louisiana Purchase—a Louisiana Sale—if Congress deems it appropriate. The relative freedom afforded Congress in the disposal of territory—and the inhabitants thereof—suggests that federal territorial inhabitants are simply not part of “the People of the United States” in the same sense as state inhabitants.

Finally, the Guarantee Clause requires every State to have “a Republican Form of Government.”¹²¹ There is no express constitutional requirement that Congress establish republican institutions in territories.¹²²

117. Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), in 3 *THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS* 192 (Jared Sparks ed., 1832).

118. See U.S. CONST. art. II, § 2, cl. 2. Of course, it would not require consent from the House. Whether it is easier to get agreement from majorities of both houses of Congress or from a two-thirds majority of the Senate is an empirical question that changes from time to time and from issue to issue. Precisely that question drove much of the debate over the annexation of Texas. See LAWSON & SEIDMAN, *supra* note 3, at 92.

119. See Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1 (2006).

120. See *id.* at 62–64.

121. U.S. CONST. art. IV, § 4.

122. There is also no express definition in the Constitution of what constitutes a “Republican Form of Government.” Extra-constitutional sources are not materially more helpful. See CALABRESI & LAWSON, *supra* note 33, at 77–78.

The Preamble itself also contains suggestions that territorial inhabitants are not part of “We the People.” One of the purposes of the Constitution was “to form a more perfect Union.”¹²³ As Akhil Amar points out, this language was “openly patterned on the indissoluble 1707 union of Scotland and England, as Federalists emphasized at every turn, in many states, in both speech and print, from the beginning to the end of the ratification process.”¹²⁴ Scotland and England were independent nations that chose to merge into a single political unit. The States could have made that same choice in 1788, but an owned territory that was not at the time an independent nation-state could not—which explains why States but not the Northwest Territory were part of the Article VII ratification process. It makes sense to speak of a “Union” of formerly independent nation-states; it is hard to see how this language applies to territory that is owned rather than independent.

These are powerful arguments. Now we consider the other side.

The countervailing case in favor of including territorial inhabitants in “We the People of the United States” also begins with the constitutional text—in this case the text of the Preamble. The Constitution does not say that it was ordained and established by “We the Citizens of the United States.” It does not describe its author as “We the Citizens of the various States.” It does not say “We the Ratifiers of the Constitution.” It does not even use the phrase “We the People of the States,” which is precisely the language that was used in the first draft of the provision. The preamble that emerged from the Committee of Detail, and that at one point received the approval of the Constitutional Convention, read: “We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.”¹²⁵ This version clearly excludes territorial inhabitants from the “People” authoring the Constitution; only people in the States counted. The final version of the Preamble produced by the Committee of Style uses the broader term—indeed, perhaps the broadest term that one could use—“We the People of the United States.” If the presumptive meaning of “the United States” includes territories, the presumptive meaning of this provision would also include territorial inhabitants. If the document meant to refer to a narrower, specific sub-group of people, it would have been very easy to do so.

123. U.S. CONST. pmbl.

124. AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840* 263 (2021).

125. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 39, at 177.

There is really no way to tell whether this substitution of language by the Committee of Style was deliberately attempting to broaden the specification of the Constitution's authorship. Even if we cared what the drafters of this language subjectively thought (and we mostly do not), we have little information about how the precise wording of the Preamble came about. No one on the Committee of Style took notes. Accordingly, "historians have very little evidence of what went on in the meetings of the Committee of Style."¹²⁶ Nor was there relevant discussion of the meaning of "We the People of the United States" at the Constitutional Convention or during ratification. All we have is the text, and the text seems to sweep quite broadly.

The next argument for including territorial inhabitants in "We the People" is a bit subtler but perhaps even more powerful. The author "We the People of the United States" purports to be ordaining and establishing a constitution. Again, it does not matter for interpretative purposes whether this makes even the slightest bit of sense as a matter of normative political theory. It is what the document says it is about, so for purposes of understanding the document, one must take that as a given. The natural inference is that this author "We the People of the United States" thinks itself subject to the jurisdiction of the entity that it is creating. More to the point, "We the People of the United States" is the entity empowering the institutions of government mentioned in the instrument, with the goal of having those institutions manage some portion of the affairs of "We the People of the United States." The scope of power exercised by those institutions extends over the *entire geographic and political range of the United States in its broadest sense*, including federally owned territory. Congress is given power to make rules and regulations respecting territory.¹²⁷ The President's "executive Power"¹²⁸ includes the power to execute federal law within territories. The power of federal courts to decide cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"¹²⁹ includes cases involving territories. "We the People of the United States" could not possibly think that it was empowering institutions to govern, let us say, French or Spanish inhabitants, because there would be a spectacular mismatch between the empowering and empowered entities. To match up the powers with the empowering requires including territorial inhabitants among the empowering.

This understanding of "We the People of the United States" connects the wording of the Preamble to the wording of the Declaration of Independence a decade earlier. One of the most famous self-evident truths announced by the Declaration is that to secure rights,

126. HOFFER, *supra* note 38, at 66.

127. U.S. CONST. art. IV, § 3, cl. 2.

128. *Id.* art. II, § 1, cl. 1.

129. *Id.* art. III, § 2, cl. 1.

"Governments are instituted among Men, deriving their just powers from the consent of the governed."¹³⁰ Since territorial inhabitants are among the people governed by the Constitution, their consent is essential to the structure. Since consent in this context is figurative rather than literal, a reasonable accommodation of the need for the consent of the governed with the realities of formation of a government is to include territorial inhabitants among the beneficiaries of the instrument by reading the term "People" to encompass them.

To be sure, one must not make more of this argument than it will bear. A strong form of this argument makes assumptions about the eighteenth-century perception of representation and its relationship to political authority that are the stuff of felled forests. We are not historians, political scientists, or political or moral theorists, and we have no desire to inject ourselves into those debates. We simply offer, as a matter of legal interpretation, the observation that the Constitution makes the most sense as a fiduciary instrument if the empowering principal is a good fit with the powers granted to the various agents. Since those powers include authority over territorial affairs, the Constitution makes more sense as a fiduciary instrument if one has a broader rather than narrower conception of "We the People of the United States" that includes all the people subject to the jurisdiction of the government even if they are not subject to a specific State's jurisdiction.

If all we had to go on were the arguments just canvassed, the weight of argument would probably lean, however slightly, against including territorial inhabitants among "We the People." The textual arguments against inclusion are straightforward, and the counterarguments are more equivocal. It seems unlikely that the Committee of Style was making fundamental changes to the draft of the Preamble that expressly excluded territorial inhabitants, and the argument from a structural matching of the Constitution's author with the Constitution's governed has a question-begging quality to it. The arguments for including territorial inhabitants, to be sure, are not meritless. Far from it—they are very substantial. But if the interpretative enterprise consists solely of weighing the strengths of the combined arguments on each side, the case against inclusion seems somewhat stronger than the case for it.

The interpretative question, however, is a bit subtler than this simple comparison of arguments suggests. It might make a big difference *how much* the weight of argument leans in one or the other direction.

We began this Section with a presumption in favor of treating "the United States" as including territories, which readily leads to a presumption in favor of treating "People of the United States" as including people in the territories. We think that presumption is warranted

130. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

given the circumstances leading up to 1788 and the likely default understanding of a term such as “the United States.” How strong is that presumption, and are the arguments presented in this section strong enough to overcome it?

Our definitive answer is that we do not know—and we doubt whether anyone else does either. There is no objective metric for measuring the strength of a presumption or the weight of evidence used to rebut it. Perhaps all that a presumption does in this context is provide a default result in the absence of any evidence in either direction. If the *prima facie* case for inclusion of territorial inhabitants in “We the People of the United States” takes this Thayerian form¹³¹ of “[a] presumption that allows the party against whom the presumption operates to come forward with evidence to rebut the presumption, but that does not shift the burden of proof to that party,”¹³² the textual and structural case against inclusion surely counts as non-zero evidence sufficient to remove that presumption from play. On the other hand, there is another kind of Thayerian presumption that leads to very different results. If we are talking about a presumption akin to Thayer’s rule of clear mistake for constitutional review of federal action, in which courts “disregard the [federal] Act [only] when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question,”¹³³ the case against inclusion of territorial inhabitants would need to establish its claim beyond a reasonable doubt. Whatever that familiar but elusive term “beyond a reasonable doubt” might mean, the case for excluding territorial inhabitants from “We the People of the United States” does not remotely approach it. If that is the relevant presumption, it has not been, and probably cannot be, overcome. In between these two Thayerian poles, of course, is an infinite variety of gradations of the strength of a presumption. Where one locates the relevant presumption and how one ascertains the strength of the evidence against it are matters that do not lend themselves to clear answers.

A full exploration of these matters would take us down several rabbit holes involving epistemology, cognitive theory, and evidence law and theory, among other rabbit holes, and that is far afield from

131. This account of presumptions as a decision tool in the absence of evidence received its classic expression in JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE* 355–58 (1898), and has been largely codified in the Federal Rules of Evidence. See FED. R. EVID. 301 (“In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.”). State law practice is much more varied.

132. *Thayer Presumption*, BLACK’S LAW DICTIONARY (11th ed. 2019).

133. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

this project.¹³⁴ The best we can do at this point is to say that there are good-faith arguments to be made on both sides for including or excluding territorial inhabitants from among “We the People of the United States.” Reasonable people of good will could take and defend either position as a matter of interpretative theory.

As a matter of ascertaining communicative meaning, we do not think that the answer depends much on the consequences of choosing one or the other interpretation. But the consequences of viewing territorial inhabitants among “We the People of the United States” are worth noting. Accordingly, we conclude with two questions: (1) If, hypothetically, territorial inhabitants are among the “People of the United States,” what does that mean for agents of federal governance?; (2) If, hypothetically, “the People of the United States” in 1788 included territorial inhabitants, would that include people in after-acquired territories such as Puerto Rico or American Samoa?

IV. (EVERYTHING I DO) I DO IT FOR YOU¹³⁵

Building on the pioneering work of Robert G. Natelson, we have argued at great length elsewhere that the Constitution is a kind of fiduciary instrument, in which a principal—“We the People of the United States”—grants to various agents—Congress, the President, and the federal courts, among others—some measure of authority over and responsibility for We the People’s affairs.¹³⁶ We will not repeat here the book-length case for this characterization of the Constitution. Suffice it to say that preambles that explain the purposes of power-granting instruments were not uncommon in fiduciary instruments of the founding era. Those preambles give guidance on how the agents are supposed to perform their discretionary functions. Those functions are cabined always by, first and foremost, the express terms of the fiduciary instrument and, secondly and crucially, the background norms of fiduciary law¹³⁷ that constitute the default rules that

134. For those who find the rabbit holes tempting, see GARY LAWSON, *EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS* (2017).

135. With acknowledgments to Bryan Adams, Michael Kamen, and Mutt Lange.

136. See *POWER OF ATTORNEY*, *supra* note 15; *Authors’ response*, *supra* note 15. For the seminal works by Rob Natelson (who we only half-jokingly call our “unindicted co-author”), see Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004); Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191 (2001).

137. A recent article by Professors Sam Bray and Paul Miller questions whether there was anything that can be called “fiduciary law” in the founding era. See Samuel L. Bray and Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1482 (2020). They are right in this respect: The general category of fiduciary law, or fiduciary instruments, did not really exist until substantially after the founding. In the founding era, there was a law of factors, a law of guardians, a law of powers of appointment, a law of stewards, and so forth, but there was no overarching frame-

govern the actions of agents in the absence of express directives to the contrary in the fiduciary instruments.

The specific preamble at issue here contains many goals or purposes for the agents to pursue, including most notably “secur[ing] the Blessings of Liberty to ourselves and our Posterity.” The “ourselves” is a direct reference to the author who ordained and established the Constitution: “We the People of the United States.” Faithful agents who receive power under this instrument would understand that their tasks include providing the blessings of liberty to “the People of the United States” and its “Posterity.”

The trick is how to operationalize that fiduciary obligation in the real world given the fictitious character of “We the People” (not to mention its “Posterity”). That is a task for another life, but fortunately two simple points suffice to settle the broad question of federal obligations towards territories and their inhabitants.

First, *all* provisions in the Constitution, including the provisions giving Congress power over federal territory and the District of Columbia, giving the President “executive Power” in those territories, and giving federal courts the power and duty to decide cases involving those territories that arise under federal law, come packaged with fiduciary duties. Those duties do not need to be expressly set out in the instrument, just as they would not need to be set out expressly in any instrument engaging a steward, a factor, a guardian, or any other fiduciary agent. To be sure, the instrument would need to identify and define those fiduciary duties if it wanted to deviate from the common-law baseline of duties that functions as the default rules for any fiduciary instrument, but silence brings the default rules into play. Those default rules, as they stood in the late eighteenth century, were aptly summarized by the indispensable Rob Natelson:

A. The Duty to Follow Instructions and Remain Within Authority

Fiduciaries were required to honor the rules creating their power and, therefore, had an absolute obligation to remain within their authority. If a fiduciary did not act within his power, it was irrelevant whether or not he acted reasonably.

work that eighteenth-century lawyers would have seen as uniting all of these topics. But Professors Bray and Miller are wrong, we think, in another important respect. There was no *vocabulary* of general fiduciary law in the late eighteenth century, but there was a *substance* of such law. The category of fiduciary law emerged later because there was law for the category to describe; the commonalities were there even if they were not always expressly recognized. Robert Natelson has exhaustively catalogued the core features of eighteenth-century fiduciary law in this retrospective sense. See Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 57–59 (2010) [hereinafter Natelson, *Necessary and Property Clause*]; and Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 239–40 (2007).

....

B. The Duties of Loyalty and Good Faith

Fiduciaries were to represent their beneficiaries honestly and with undivided loyalty and not act in a way prejudicial to them. Self-dealing was a breach of trust.

C. The Duty of Care

Fiduciaries were not insurers of everything that might go wrong under their administration, that is, for “meer [sic] accident” or for cases in which the beneficiary was at fault. There was, nonetheless, a basic duty of care or diligence

D. The Duty to Exercise Personal Discretion

When not authorized in the instrument creating the relationship, fiduciary duties were nondelegable

E. The Duty to Account

Fiduciaries, then and now, were expected to account to those for whom they worked

F. The Duty of Impartiality

In absence of a specific rule to the contrary (such as the rule permitting a creditor-executor to pay himself before he paid other creditors), the common law courts favored impartiality among members of the same class. The bias of the High Court of Chancery – the source of most fiduciary law – toward impartiality was even stronger.¹³⁸

There is nothing in the Constitution that fundamentally alters these basic fiduciary duties for federal actors. Indeed, these duties are confirmed, clarified, and strengthened by many constitutional provisions, including specific provisions detailing the duty to account,¹³⁹ the duty of loyalty,¹⁴⁰ and the duty to stay within the limits of granted authority.¹⁴¹

The duty that is perhaps most pertinent to territorial affairs is the duty of impartiality. Where an agent represents multiple principals, the baseline eighteenth-century common-law rule was that the agent must consider the interests of *all* the principals. We have elsewhere explored and developed that baseline rule at considerable length.¹⁴² It does not require all principals to be treated *equally* (which would be impossible in many contexts), but it does require them to be treated *fairly*. As a noted fiduciary expert aptly put it: “[W]here a fiduciary serves classes of beneficiaries . . . as a whole, the fiduciary is nonethe-

138. Natelson, *Necessary and Property Clause*, *supra* note 137, at 57–59 (footnotes omitted).

139. U.S. CONST. art. I, § 9, cl. 7 (“[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

140. *Id.* art. I, § 6, cl. 2; *id.* art. I, § 9, cl. 8; *id.* art. II, § 1, cl. 8.

141. *Id.* art. II, § 1, cl. 7; *id.* art. VI, cl. 3.

142. See POWER OF ATTORNEY, *supra* note 15, at 151–71. That chapter, as with most of our work on fiduciary constitutionalism, could not have existed without Rob Natelson. See Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 415 (2014).

less required to act *fairly* as between different classes of beneficiary in taking decisions which affect the rights and interests of the classes *inter se*.¹⁴³ Pre-founding and founding-era caselaw amply reflects this understanding.¹⁴⁴ Those cases treated equality among principals as a baseline norm,¹⁴⁵ but allowed deviations from that norm when there were good reasons to treat different members of the beneficiary class differently—as, for example, when one beneficiary of an estate had received substantial sums from the testator before death.¹⁴⁶

In the context of territorial governance, this means that territorial inhabitants must be treated *fairly*, though not necessarily *identically*, with non-territorial inhabitants. It would require a separate article (which we are contemplating) to try to sort through the various contexts in which this principle might arise and be resolved in practice. In particular, one would need an account of what constitutes good reasons for different treatment of territorial and non-territorial inhabitants—just as one needs an account of what constitutes good reasons for differential treatment of beneficiaries of an estate when the holder of a power of appointment has discretionary, but not limitless, power to dispose of assets. As with many questions of public constitutional law, the answer may lie in a careful study of pre-constitutional private law,¹⁴⁷ which had much experience dealing with similar problems of agency in a world of multiple principals with competing interests.

Second, the best understanding of “Posterity,” as that term is used in the Preamble, extends into the future to include inhabitants of territories not yet acquired in 1788. Of course, the literal definition of “posterity” would be “succeeding generations; descendants.”¹⁴⁸ But a literal definition in the context of the Preamble makes no sense and is pragmatically unwarranted. The term “posterity,” and its connection to constitutional preambles, did not spring full blown from the Committee of Style. The Constitution’s Preamble draws on a multiplicity of similar provisions in earlier state constitutions and other documents that also mention “posterity”:

That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest *their posterity*; namely, the enjoyment of life and liberty, with the means of

143. Paul Finn, *The Forgotten “Trust”: The People and the State*, in EQUITY: ISSUES AND TRENDS 131, 138 (Malcolm Cope ed., 1995) (emphasis added).

144. See POWER OF ATTORNEY, *supra* note 15, at 157–63.

145. See, e.g., Gibson v. Kinven (1682) 23 Eng. Rep. 315, 316 (Ch.).

146. See Burrell v. Burrell (1768) 27 Eng. Rep. 428, 428–29 (Ch.).

147. See *Authors’ Response*, *supra* note 15, at 515–20. For an example of how this application of private-law fiduciary principles can apply to specific constitutional problems, see Gary Lawson, *A Private-Law Framework for Subdelegation*, in THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE (Peter J. Wallison & John Yoo, eds., 2022).

148. 2 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1755).

acquiring and possessing property, and pursuing and obtaining happiness and safety.¹⁴⁹

[I]t is our indispensable duty to establish such original principles of government, as will best promote the general happiness of the people of this State, *and their posterity*, and provide for future improvements, without partiality for, or prejudice against any particular class, sect, or denomination of men whatever¹⁵⁰

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves *and posterity*; and devoutly imploring His direction in so interesting a design, do agree upon, ordain and establish the following *Declaration of Rights, and Frame of Government*, as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS.¹⁵¹

These provisions obviously do not limit their scope to then-existing inhabitants and their biological progeny. These States all expected and welcomed new immigrants who were not literally the “posterity” of the inhabitants at a specific instant in time. “Posterity” in these contexts thus refers to all people who will come within the jurisdiction of the State in a condition legally equivalent to those who are already present; “posterity” has a broad and metaphorical meaning rather than a hereditarily literal one.

The Preamble’s reference to “Posterity” also obviously includes future persons biologically unrelated to existing inhabitants. The Constitution provides for “Naturalization,”¹⁵² and it was widely understood in 1788 that the United States was going to expand. The Articles of Confederation provided for automatic admission of Canada if it wanted to join the Union.¹⁵³ The Constitution allows Congress to admit new States,¹⁵⁴ and there is no plausible case for limiting that ad-

149. VA. CONST. art. 1, § 1 (West, Westlaw through End of the 2021 Reg. Sess.) (emphasis added).

150. *Pa. Const. of 1776 Preamble*, AVALON PROJECT, https://avalon.law.yale.edu/18th_century/pa08.asp [<https://perma.cc/VNY8-LHZI>] (emphasis added); see also *Vt. Const. of 1786 Preamble*, VT. ST. ARCHIVES & RECORDS ADMIN., <https://sos.vermont.gov/vsara/learn/constitution/1786-constitution/> [<https://perma.cc/6VLG-6P82>] (employing identical language).

151. MA. CONST. OF 1780 pmbl. (West, Westlaw through amendments approved Feb. 1, 2021) (first emphasis added).

152. U.S. CONST. art. I, § 8, cl. 4.

153. See ARTICLES OF CONFEDERATION OF 1781, art. XI (“Canada, acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.”).

154. See U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union”).

mission power only to territory then held by the United States.¹⁵⁵ Nor was it universally understood that all expansion would occur on continental North America; Thomas Jefferson, at least, regarded "Cuba as the most interesting addition which could ever be made to our system of States."¹⁵⁶ If one looks only at the Constitution of 1788, and not at the politics and ideology of 1898, it is hard to see how future territories stand in any different position from territories that existed in 1788.

If territorial inhabitants in 1788 were among "We the People of the United States," territorial inhabitants in 2022—wherever on the globe those territories are located—are pretty clearly among the "Posterity" to whom the Preamble refers. Whatever fiduciary obligations federal actors owed to territorial inhabitants in 1788 also apply in 2022.

155. See LAWSON & SEIDMAN, *supra* note 3, at 73–78 (providing further analysis on the Admissions Clause).

156. Letter from Thomas Jefferson to James Madison (Oct. 24, 1823), in 12 THE WORKS OF THOMAS JEFFERSON 320 (Paul Leicester Ford ed., 1905).