

# The Imaginary Constitution

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## ABSTRACT

*How many ways can conservatives spin an originalist tale to support their deregulatory, small-government vision? The answer is apparently infinite. In a new book, Gary Lawson and Guy Seidman are the latest in a long line of scholars who insist that the real original meaning of the Constitution demands unwinding the regulatory state and substantially limiting the power of the federal government. They argue that the Constitution is a fiduciary instrument, specifically a power of attorney. After summarizing the book, this essay turns to three of its most important failings, each of which serves to make the book a work of politics, not history. In the end, their account is imaginative but their Constitution is imaginary.*

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## INTRODUCTION

How many ways can conservatives spin an originalist tale to support their deregulatory, small-government vision? The answer is apparently infinite. Gary Lawson and Guy Seidman are the latest in a long line of scholars who insist that the *real* meaning of the Constitution demands unwinding the regulatory state, limiting the power of the federal government, and, oh yes, invalidating the dreaded individual mandate of the ACA (thus saving a handful of Americans about \$700 each).<sup>1</sup>

You have to give them credit for imagination, though. Eschewing more traditional views of the Constitution as, alternatively, a plan of government, a pact among states, or a charter of liberty, they argue that the Constitution is a fiduciary instrument. Specifically, it is a grant of a power of attorney. In it, the principal—“We the People”—grants particular and limited powers to act on the principal’s behalf to three agents: the Congress, the President, and the federal courts. It is, in the words of the book’s subtitle, a fiduciary Constitution.

In Part I of this essay, I provide a brief summary of the book. In the remaining parts, I turn to three of its most important failings, each of which serves to make the book a work of politics, not history. In the end, their account is imaginative but their Constitution is imaginary.

### I. OUR FIDUCIARY CONSTITUTION

Lawson and Seidman build their case in a logical fashion. They first examine the general structure and wording of contemporaneous powers (or letters) of attorney, which bear some similarity to the structure and wording of the Constitution. They suggest that most Americans of the time were probably familiar with fiduciary instruments and fiduciary law, “either by serving as fiduciaries, having someone serve as their fiduciary, or knowing or being related to someone in one or the other of these categories.”<sup>2</sup> To make the leap from private fiduciary relationships to “fiduciary government,” Lawson and Seidman focus on some of the Founding generation’s sources of political theory (“Fiduciary Government in

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1. See GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017). Their predecessors include RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014) (arguing that the Founders *meant* to write a “classical liberal,” rather than “progressive,” Constitution); MICHAEL GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012) (arguing that the Founders wrote a Constitution embodying “competitive federalism”); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004) (arguing that the Founders wrote a libertarian Constitution).

2. LAWSON & SEIDMAN, *supra* note 1, at 29.

Theory”) and on state constitutions written before 1787 (“Fiduciary Government in Action”).

They conclude that “[t]he case for viewing the Constitution as some kind of agency instrument is . . . overwhelming, even if the case for treating it specifically as an eighteenth-century person would have treated a power of attorney proves more equivocal.”<sup>3</sup> They concede that the arguments for instead treating the Constitution as a species of corporate charter, rather than as a power of attorney, are “powerful.”<sup>4</sup> Nonetheless, “because corporations, as public entities exercising delegated power, would be subject to fiduciary principles,” Lawson and Seidman contend that most of the general principles of fiduciary relationships are relevant regardless of whether the Constitution is specifically a power of attorney rather than a corporate charter.<sup>5</sup>

If the Constitution is a power of attorney, Lawson and Seidman argue, then ascertaining its original meaning requires applying the background rules for interpreting powers of attorney and other fiduciary instruments—in short, eighteenth-century agency law. The three rules of agency law most significant to modern constitutionalists are the strict construction of the agent’s powers, the doctrine of principals and incidents, and the duty of personal exercise of delegated power.<sup>6</sup> According to the authors, the latter two applied to all fiduciary relationships, including corporations. However, again according to the authors, the requirement of strict construction applies only to powers of attorney; corporate charters are to be interpreted liberally.<sup>7</sup>

And where do those background rules take us? Together, they result in an interpretation of the Constitution that makes most of the past century or so of federal law unconstitutional. Lawson and Seidman do not talk much about the consequences of narrowly construing federal power—especially the enumerated powers of Congress. But they do not have to. “Strict constructionism” has been a watchword of conservatives advocating small government for decades.<sup>8</sup> Lawson

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3. *Id.* at 11; *see also id.* at 172 (“We claim the Constitution has enough resemblance to a fiduciary instrument, and specifically to a power of attorney, to make the eighteenth-century background rules for interpretation of such documents relevant at some level to ascertaining the meaning . . . of the Constitution.”).

4. *Id.* at 68.

5. *Id.*

6. Lawson and Seidman discuss strict construction at 68–69 and 105–06, principals and incidents at 79–103, and personal exercise (or non-delegation) at 104–129. They also discuss two other rules of agency law, the duties of care and loyalty (130–50) and the duty of impartiality (151–71). With one exception that I will mention later, none of these additional duties is of much relevance to today’s constitutional questions.

7. LAWSON & SEIDMAN, *supra* note 1, at 68; *see also id.* at 106–07. I disclaim any independent knowledge of eighteenth-century agency or corporate law, and am relying entirely on their account whenever I describe such law.

8. *See, e.g.*, DAVID MERVIN, RONALD REAGAN AND THE AMERICAN PRESIDENCY 146 (1990) (“To be appointed to the federal judiciary during the Reagan years it was not enough to be a Republican, it was also necessary to be a ‘strict constructionist’”); Edward Lazarus, *Bush and the Court*, WASH. POST (Oct. 24, 2000), [https://www.washingtonpost.com/archive/opinions/2000/10/24/bush-and-the-court/d72f38fd-d80a-4377-86eb-42ee4ca941e0/?utm\\_term=.22e217b04f43](https://www.washingtonpost.com/archive/opinions/2000/10/24/bush-and-the-court/d72f38fd-d80a-4377-86eb-42ee4ca941e0/?utm_term=.22e217b04f43) [<https://perma.cc/2L3E-N9V3>] (reporting on

and Seidman may also be circumspect here because of their earlier concession that the Constitution might be fairly viewed as a corporate charter (to be liberally construed) rather than as a power of attorney. They do, however, have a great deal to say about the consequences of the other two doctrines.

The doctrine of principals and incidents means that an agent can exercise only expressly granted powers (principal powers) and those implied powers (incidental powers) that are “‘incident and directly necessary’ to execution of the principal powers.”<sup>9</sup> An incidental power must thus be both *subordinate* or *inferior* to a principal power, and *necessary* to its execution. One of the most common ways that eighteenth-century fiduciary documents described incidental powers was to grant the agent the power to do all things “necessary and proper” to carry out the principal powers.<sup>10</sup> (You can see where this is leading.)

And so Lawson and Seidman create a list of things that cannot be incidental powers—and thus are not authorized by the Necessary and Proper Clause—because such things are not subordinate or inferior. It is, according to them, “a close question” whether establishing a national bank is a principal or incidental power.<sup>11</sup> They leave as an exercise for the reader whether regulating intrastate commerce is a principal or incidental power,<sup>12</sup> thus implying that it is at least a close question. On other issues, they have no doubts. Compelling a person “to purchase a commercial product,” as they describe the ACA’s individual

presidential nominee George W. Bush’s promise that Supreme Court “nominees be ‘strict constructionists’ who would not ‘legislate’ from the bench”); Tom Wicker, *In The Nation: What’s a Strict Constructionist?*, N.Y. TIMES (Apr. 16, 1970), <https://www.nytimes.com/1970/04/16/archives/in-the-nation-whats-a-strict-constructionist.html> [<https://perma.cc/EM3D-NHZS>] (“In Judge Blackmun, it is said, President Nixon has found the ‘strict constructionist’ of the Constitution for which he had been searching.”); see also Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (arguing for a narrow interpretation of the Commerce Clause); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) (“The judge must stick close to the text and the history, and their fair implications, and not construct new rights”). Lawson and Seidman do suggest—although they do not insist—that strict construction might make federal exercise of the power of eminent domain unconstitutional. LAWSON & SEIDMAN, *supra* note 1, at 94–96.

9. LAWSON & SEIDMAN, *supra* note 1, at 82 (quoting Lord Darcy v. Askwith, 80 Eng. Rep. 380, 380 (1618)).

10. Both strict construction and a narrow interpretation of incidental powers were, as Lawson and Seidman recognize, a solution to the problem of agency costs. LAWSON AND SEIDMAN, *supra* note 1, at 23–26. Ironically, the law’s strategy for dealing with agency costs has—like the Constitution itself—evolved since the eighteenth century, in ways that make strict construction and the doctrine of incidents especially inapt in the context of describing the powers of governmental institutions. As a leading scholar of fiduciary law has written, the early approach, “which predictably has failed, was to minimize the agent’s discretionary powers.” Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1042 (2011). It failed because “the very purpose of retaining an agent with expertise is undermined if the agent is not given room to apply that expertise on behalf of the principal in changing conditions.” *Id.* at 1040–41. Similarly, to the extent that many in the Founding generation believed that legislators should rely on their own expertise or experience rather than simply mirroring the views of their constituents, see *infra* text accompanying notes 67–85, construing legislators’ powers narrowly defeats their ability to fulfill their obligations.

11. LAWSON & SEIDMAN, *supra* note 1, at 89.

12. *Id.* at 103.

mandate,<sup>13</sup> is “an extraordinary power of independent significance.”<sup>14</sup> They also describe the individual mandate as “forc[ing] people to deal with other private parties,” a description that could apply to much of federal antidiscrimination law, and which therefore suggests that such laws are outside the purview of the Necessary and Proper Clause.<sup>15</sup> The federal police power is also a principal power not granted by the Necessary and Proper Clause, as is federal commanding of state legislatures or executives.<sup>16</sup>

Lawson and Seidman turn next to the principle that agents must exercise their discretionary duties personally. Applying this agency principle to the Constitution yields a robust non-delegation doctrine: “the Constitution forbids delegation of discretionary powers unless such delegation is explicitly or implicitly, but in either case affirmatively, authorized by the Constitution.”<sup>17</sup> To illustrate, they focus on the particular example of Congress’s delegation to the National Marine Fisheries Service the determination of legal size limits for caught fish,<sup>18</sup> finding it to be an unconstitutional delegation of discretionary legislative power by the fiduciary Congress. But the principle applies to almost all delegations to administrative agencies, as Lawson and Seidman recognize. They note that “the grant of authority to the National Marine Fisheries Service is not even remotely unique or unusual in the scope or breadth of discretion granted to the agency to define lawful and unlawful conduct.”<sup>19</sup> The administrative state, in other words, is largely unconstitutional.

The non-delegation principle derived from fiduciary law goes even further than most versions of the non-delegation doctrine, which concentrate on

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13. Some of us might describe it as regulating *how* individuals participate in the interstate market for health insurance: Do they self-insure or do they outsource? See, e.g., Michael J. Graetz & Jerry L. Mashaw, *Constitutional Uncertainty and the Design of Social Insurance: Reflections on the Obamacare Case*, 7 HARV. L. & POL’Y REV. 343, 346–48 (2013) (characterizing “the failure to buy health insurance as a decision to self-insure”); Ronald Kahn, *The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in National Federation of Independent Business v. Sebelius*, 73 MD. L. REV. 133, 181 (2013) (“[I]t remains true that the decision whether to self-insure has an impact on interstate commerce.”); Abigail R. Moncrieff, *The Individual Mandate as Healthcare Regulation: What the Obama Administration Should Have Said in NFIB v. Sebelius*, 39 AM. J.L. & MED. 539, 556–62 (2013) (arguing that “the mandate is a means of eliminating inefficiencies that arise from self-insured healthcare transactions”).

14. LAWSON & SEIDMAN, *supra* note 1, at 93.

15. *Id.* at 94. Perhaps they would consider federal prohibitions on race discrimination to be within Congress’s enumerated powers under § 5 of the Fourteenth Amendment, but it’s hard to see how, on their reading of the Constitution, that argument could extend to federal civil rights laws that prohibit discrimination on the basis of gender, religion, or national origin.

16. LAWSON & SEIDMAN, *supra* note 1, at 100.

17. *Id.* at 112.

18. *Id.* at 107–09. The example is drawn from *Yates v. United States*, 135 S. Ct. 1074 (2015). The actual case turned on the meaning of “tangible object” in the Sarbanes-Oxley Act, 18 U.S.C. § 1519, and is well worth reading in its own right, both for the unusual alignment of Justices and for the clarity of the various opinions’ views on statutory interpretation. Lawson and Seidman would not even reach the statutory question, because they would find the delegation of authority to the agency unconstitutional in the first place.

19. LAWSON & SEIDMAN, *supra* note 1, at 109.

delegations to administrative agencies. Because the fiduciary principle of non-delegation applies to *all* exercises of federal power, “there is no warrant for limiting [its] reach.”<sup>20</sup> Congress is not even permitted to delegate the governance of federal territories, federal property, federal enclaves, or the District of Columbia. It must manage and prescribe rules for all of those matters itself. And if that become too much to handle? Congress “can always turn land over to states or private parties.”<sup>21</sup> Talk about a blueprint for small government.

In short, interpreting the Constitution as incorporating the background principles of eighteenth-century fiduciary law produces results that conservative politicians and academics have been advocating—and mostly failing to persuade legislatures or courts to adopt—since the New Deal. As the blurb on the jacket notes, the book is fundamentally a “picture of the original design for limited government.”

And there’s more! One of the problems with originalism (and, as I will suggest in the next section, the book depends on originalist premises) is that it cannot explain some iconic cases that Americans believe to be unequivocally correct.<sup>22</sup> The originalist response is often a strained attempt to fit the cases within the originalist paradigm. Michael McConnell, for example, has made a valiant effort to defend *Brown v. Board of Education*<sup>23</sup> on originalist grounds.<sup>24</sup> Lawson and Seidman’s fiduciary Constitution provides an originalist justification for *Bolling v. Sharp*,<sup>25</sup> *Brown*’s companion case invalidating segregated schools in the District of Columbia. Here they rely on the duty of impartiality to conclude that Congress, as a fiduciary, is “required to act *fairly* as between different classes of beneficiary.”<sup>26</sup> Because Congress had no reasonable grounds to distinguish between black and white schoolchildren, it did not act fairly when it established racially segregated schools in the District of Columbia.<sup>27</sup> Thus the fiduciary Constitution not only accomplishes the goals of conservatives, it also legitimizes one of the most iconic and most doctrinally difficult Supreme Court cases.

*Bolling* aside, if Lawson and Seidman are correct, we must undo much of the jurisprudence (and invalidate most of the federal laws and virtually all of the

20. *Id.* at 125.

21. *Id.* at 126.

22. See, e.g., William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 6 (2011).

23. 347 U.S. 483 (1954).

24. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). The effort is generally viewed as unsuccessful by historians. See, e.g., Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995). Lawson and Seidman explicitly make no claims about either state powers or the limitations imposed by the Fourteenth Amendment. LAWSON & SEIDMAN, *supra* note 1, at 12, 147, 175 n.26.

25. 347 U.S. 497 (1954). As Lawson and Seidman note, the constitutional basis for *Bolling* is somewhat problematic. LAWSON & SEIDMAN, *supra* note 1, at 151–56.

26. LAWSON & SEIDMAN, *supra* note 1, at 157 (quoting 1 SAMUEL LIVERMORE, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT 85–86 (1818)).

27. *Id.* at 170–71.

administrative regulations) of the past seventy-five years or so. Luckily for those of us who live in the modern era, they are not correct.

First, their underlying premise—that the meaning of the Constitution depends on what the Founding generation thought it meant—is tired and unpersuasive. In the next Part, I will not rehearse the familiar arguments against originalism, but will instead explain why, despite their own disclaimers about the scope of their project, the book depends on an originalist perspective. Second, their historical account is, at best, incomplete and misleading, and in some instances wrong, as I will describe in Part III. Finally, their account of the fiduciary Constitution has limited usefulness in today’s circumstances, in which one of the primary problems facing government is that both the “principals” and the “beneficiaries” of the fiduciary relationship have conflicts among themselves that the “agent” must resolve. I describe this flaw, which is related to the most important lapse in their historical analysis, in Part IV.

## II. ORIGINALIST ALL THE WAY

As a work of pure history, the book has its charms. Who knew that eighteenth-century legal forms could be so interesting,<sup>28</sup> or that Latin scholars disagree on the best translation of Cicero’s *De Officiis*?<sup>29</sup> Lawson and Seidman write breezily, especially when they are being descriptive rather than prescriptive, and one can learn quite a bit from them.

The problem is that what one learns is irrelevant to constitutional law unless one is an originalist. Unless we agree that the Constitution should be interpreted according to its original public meaning—which, as the authors suggest, includes background assumptions about how to interpret documents of the character of the Constitution—then neither the original public meaning nor the background assumptions make much difference in interpreting today’s Constitution. Even if we accept the original meaning as merely a starting point for interpretation (a method that most originalists would not consider sufficiently originalist), that meaning ends up doing so little work in any controversial constitutional context that layering in a few background assumptions will not change anything. Sure, it might be interesting to know that the Founding generation thought the “take care” clause of Article II, or the constitutionally mandated presidential oath of office, embodied or reflected fiduciary duties of care and loyalty.<sup>30</sup> But that information likely will not have any influence on a non-originalist’s view of exactly what the President is or is not permitted to do.

Lawson and Seidman try to finesse this problem by disclaiming any prescriptive intent.<sup>31</sup> They say that they “make no claims about the extent to which the

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28. *See id.* at 14–23.

29. *See id.* at 33–35.

30. *See id.* at 131–32.

31. *See id.* at 2 (“Our focus in this book is purely interpretative rather than prescriptive”); *id.* at 5 (“all of the claims in this book are positive, or empirical, claims”).

meaning [they] discover should or must contribute to legal decision making.”<sup>32</sup> They contend that although their project is “a species of originalism,” it is unlike most originalist methodologies because those others are “really theories of judicial role or practical governance,” not “theories of pragmatic meaning.” In that case, however, it is unclear why the book has value to anyone outside a handful of legal historians and, in particular, why it should be read by lawyers or judges or discussed at a law school symposium.

Moreover, these disclaimers ring hollow in the context of other statements. For example, in the same introductory section in which they make the disclaimers quoted in the previous paragraph, they state that “understanding the fiduciary character of the Constitution is important not simply as a historical matter but also for its contribution to constitutional interpretation.”<sup>33</sup> Come again? Their findings are relevant to “constitutional interpretation” but not to “legal decision making”? They explain this apparent contradiction by insisting on a very specialized meaning of “constitutional interpretation”: “the process of discerning the communicative signals sought to be conveyed by the Constitution’s author.”<sup>34</sup> They claim to “present . . . no theory about the appropriate way to translate constitutional meaning into constitutional adjudication.”<sup>35</sup> This distinction between constitutional meaning or constitutional interpretation on the one hand, and legal decision-making or constitutional adjudication on the other, appears to be similar to the distinction that many originalists try to draw between interpretation and construction.<sup>36</sup>

But neither distinction is successful in its attempt to split the atom. Either the “communicative signals” of the author are dispositive (when discernable) or they are not. For originalists, they are dispositive. For non-originalists, they are not—and, as I noted earlier, when these signals are composed of persnickety background assumptions about fiduciary law they are likely not even to be relevant. So we are back to the question of *why* we might want to, in their words, “seek only to ascertain the meaning of a particular historical document,”<sup>37</sup> unless we think that meaning is binding today.

Lawson and Seidman, at some level, recognize the originalist underpinnings of their arguments. The book is peppered with loose language suggesting that they think judges and others should *use* their insights in contemporary constitutional adjudication. They talk about the case for “viewing” the Constitution as a fiduciary instrument in the same sentence as the case for “treating” it as specifically a

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32. *Id.* at 6.

33. *Id.* at 7.

34. *Id.* at 8.

35. *Id.* at 170.

36. See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013); Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL’Y* 65 (2011). According to Barnett, “interpretation” is “discovering the semantic meaning” of a document (which is “fixed at the time of its enactment”), while “construction” is “applying that meaning to particular factual circumstances.” Barnett, *supra*, at 66–67.

37. LAWSON & SEIDMAN, *supra* note 1, at 8.

power of attorney. The parallelism between the passive “viewing” and the active “treating” betrays an unconscious recognition that they are not merely looking for constitutional meaning but seeking to implement it. They close the book by suggesting that omitting the law of agency from “U.S. law school curricula . . . might be a mistake of constitutional magnitude.”<sup>38</sup> Why would it be imperative, rather than, say, intellectually broadening, for law students to learn agency law unless it is somehow relevant to constitutional decision-making today? And, of course, if they are not interested in constitutional adjudication, why do they bother to apply their fiduciary principles to modern questions such as the constitutionality of the ACA, the regulation of intrastate commerce, or the delegation of authority to administrative agencies?

In short, the book has nothing to say to non-originalists unless they happen to have an interest in quirky questions of American legal history. A nice article for the Green Bag, perhaps, but not a 200-page, heavily footnoted book. It is disingenuous for the authors to claim that they are shocked (shocked!) that some might read them as pushing their conservative views about interpretive strategies, and the results of those strategies, on judges and lawyers.

### III. LAW-OFFICE HISTORY

The book also fails on its own terms as a work of history. Although it purports to be an accurate, apolitical, historical account, it is riddled with errors large and small, revealing it as a work of advocacy rather than history. I will start with some examples of small—but telling—mistakes or omissions, and then show how the overall tenor of the book misleads the reader into a false portrait of the Founding generation’s<sup>39</sup> views on government, representation, and the dangers that the Constitution was designed to avoid.

#### A. *Errors and Omissions*

Lawson and Seidman rely on three broad categories of evidence for their conclusion that the Constitution is a fiduciary document. The first is a long quotation from James Iredell, in which he actually calls the Constitution “a great power of attorney.”<sup>40</sup> The second is an analysis of the Founding generation’s theories and practice of government, to show that eighteenth-century Americans “would have regarded the creation of a government as something requiring resort to fiduciary concepts . . . .”<sup>41</sup> Finally, they draw a comparison between the language and structure of powers of attorney and the language and structure of the Constitution.

I will focus here on their first two evidentiary points. The last depends on a judgment about the relative similarities and differences, and is ultimately

38. *Id.* at 172.

39. The authors explicitly ignore amendments beyond the Bill of Rights. *Id.* at 175 n.32. This creates a further problem: To the extent that later amendments have an interactive effect on interpretation, singling out one era distorts the meaning of the Constitution as a whole.

40. *Id.* at 3.

41. *Id.* at 31.

unpersuasive because the differences are as great as the similarities. Thus, much depends on whether the authors are correctly portraying the views of Iredell and the Founding generation on fiduciary government. After demonstrating that they are not, I will turn to a few other omissions that undercut their historical claims.

### 1. Iredell's Speech

Let's start with Iredell. (Bear with me: this is going to be quite detailed, because the authors' painstaking detail is what makes the book so superficially persuasive . . . and so misleading.) The book quotes one of Iredell's speeches in the North Carolina ratifying convention, in which he argued against the need for a bill of rights.<sup>42</sup> Iredell began by arguing that there is no need for such protections in a document that expressly enumerates the powers of the government, because by definition the people retain all power not given. This is where he drew the analogy to a power of attorney, and he continued by giving an example of what someone who has a power of attorney can and cannot do. So far, so good.

But Lawson and Seidman include one more (partial) sentence of Iredell's speech: "A bill of rights, as I conceive, would not only be incongruous, but dangerous."<sup>43</sup> From this, they conclude that Iredell was making a second point: "the Constitution's character as a document has implications for the interpretative presumptions that apply to it."<sup>44</sup> However, they have cut Iredell off mid-speech. He continued: It would be dangerous

because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.<sup>45</sup>

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42. *Id.* at 3.

43. *Id.* This is their version of Iredell's speech, which ends with a period because it is the end of the sentence. Another version would use ellipses instead, because the sentence continues. That is also why I include "partial" in parentheses. *See infra* text accompanying notes 45–46.

44. LAWSON & SEIDMAN, *supra* note 1, at 4. They do not flesh this point out, but I presume that Lawson and Seidman are arguing that the "danger" of including a bill of rights is that, interpreting the Constitution as a power of attorney, the inclusion of a bill of rights would change the meaning of the document by expanding the powers granted to the attorney.

45. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 174 (Jonathan Elliot ed., 1st ed. 1836). Elliot's second edition, which is the one cited by Lawson and Seidman, contains a different version of Iredell's statement. Immediately following the portion quoted by Lawson and Seidman, Iredell goes on to say: "No man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by this Constitution." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 149 (Jonathan Elliot ed., 2d rev. ed. 1891). He then suggests that a future interpreter of the Constitution would assume that Congress could violate any rights not listed. Both editions of Elliot are available at *HeinOnline*, making it easy to consult both. In this case, the difference between the editions does not detract from my point in the text, because it is clear in both versions of the speech that Iredell is worried about protecting rights, not limiting powers.

Why does this matter? It matters because Lawson's and Seidman's truncated version of the speech makes it seem as if Iredell's last sentence was about *powers*, but the full speech reveals that it was really about *rights*.<sup>46</sup>

So they are left with merely pointing out that Iredell called the Constitution a power of attorney. And, as they concede, he appears to be the only person to do so until Lawson and Seidman themselves.<sup>47</sup> Contrast that silence with the evidence supporting characterizing the Constitution as a truly novel instrument, analogous to nothing else—a characterization Lawson and Seidman explicitly reject.<sup>48</sup> As Caleb Nelson has documented, many people in and around the Founding Era characterized the Constitution in just that way.<sup>49</sup> The fact that no one other than Iredell expressed the view that it was a power of attorney is therefore quite telling against the book's historical thesis.

## 2. Fiduciary Government

Lawson and Seidman also ignore an important eighteenth-century debate that cuts against their conclusions. They bolster their claim that the Founding generation adhered to a fiduciary theory of government by pointing to “strong movements in favor of an obligation on the part of representatives to follow specific instructions of the electorate.”<sup>50</sup> But they neglect to mention that during congressional debates on the Bill of Rights, Thomas Tudor Tucker of South Carolina, an Anti-Federalist, moved to insert a right of the people to “instruct their representatives,” which was soundly defeated.<sup>51</sup> Relatedly, Lawson and Seidman dismiss the absence of any specific language in the Constitution (or the Bill of Rights, as Tucker wanted) reflecting a fiduciary relationship by arguing that the “fiduciary character of government in 1788 was as obvious, and possibly even more so, as the absence of federal power to abridge the freedom of the press.”<sup>52</sup> Maybe so,

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46. Yes, I know those might be considered two sides of the same coin. But when we are talking about analogizing governmental powers to powers of attorney (the latter of which do not have or need a concept of “rights”), the semantic difference is important. Daryl Levinson's work illuminates the importance of the difference between powers and rights. For example, he has explained that constitutional structure—in other words, government powers—is more likely to become entrenched (and thus immune from ordinary politics) than are constitutional rights, in part because the constitutional structure allows compromises and trade-offs over time, thus discouraging defection by those disappointed by particular outcomes. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 717–33 (2011); see also Daryl J. Levinson, *Foreword to Looking for Power in Public Law*, 130 HARV. L. REV. 31, 33–34 (2016) (making clear that the powers of Congress are part of the structural constitution).

47. LAWSON & SEIDMAN, *supra* note 1, at 62. They credit Robert Natelson, in a 2004 article, with first recognizing the fiduciary or agency-law underpinnings of at least some clauses of the Constitution, *id.* at 7, but Lawson and Seidman appear to be the first to point specifically to powers of attorney. That matters, as I pointed out earlier, because not all fiduciary obligations require strict construction of the powers granted to the fiduciary.

48. *Id.* at 55–57.

49. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

50. LAWSON & SEIDMAN, *supra* note 1, at 40.

51. 1 ANNALS OF CONGRESS 733, 747 (1789).

52. LAWSON & SEIDMAN, *supra* note 1, at 46.

but Congress (to say nothing of the states) was convinced of the need to make freedom of the press explicit, and nevertheless rejected every attempt to insert language into the Constitution that would strengthen its fiduciary character.<sup>53</sup>

### 3. Actions Speak Louder than Words

Additionally, Lawson and Seidman omit any mention of the history of what the Founding generation *did* once the Constitution was ratified and the federal government began operations. First, contrary to their argument that the fiduciary Constitution prohibits the delegation of discretionary power, Congress immediately established and delegated discretionary power to a host of administrative agencies, including the Customs Service, the post office, and commissions to oversee military pensions, patents, fishing rights, and trade with Indian tribes, among other things.<sup>54</sup> Second, within a little more than a decade, Congress and the President had exercised powers that were neither enumerated in the Constitution nor easily described as subordinate or inferior—and therefore incidental—to those enumerated powers. While some of these actions were constitutionally controversial, the fact remains that the same generation (and many of the same individuals) who drafted and ratified the Constitution ultimately found them constitutionally acceptable. Consider the Louisiana Purchase,<sup>55</sup> the creation of federal criminal laws,<sup>56</sup> and the Alien Acts.<sup>57</sup> These examples and the broad

53. In addition to rejecting a right to instruct representatives, Congress also rejected a proposal to insert “expressly” in what became the Tenth Amendment, between “not” and “delegated.” See *infra* text accompanying notes 66, 82–84.

54. See generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012). For an account of the tremendous discretion accorded to customs officials in particular, see GAUTHAM RAO, *NATIONAL DUTIES: CUSTOMS HOUSES AND THE MAKING OF THE AMERICAN STATE* 81–97 (2016).

55. Lawson and Seidman argue that the power to acquire new territory is incident to the power to admit new states, but it is unclear when and how the Louisiana territories (unlike the western territory ceded by existing states, on which they base their argument) were “destined for statehood.” LAWSON & SEIDMAN, *supra* note 1, at 102. The massive controversy over the Purchase’s constitutionality does not help the authors, because, ultimately, Jefferson acted despite his scruples and the Congress acquiesced. See, e.g., DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM 1801–1805*, at 313–25 (1970) (documenting Jefferson’s doubts about constitutionality); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1829*, at 98, 99–104 (2001) (noting that the treaty with Napoleon was approved by Senate in four days, but the implementing legislation was more controversial); see also generally EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803–1812* (1920).

56. See generally Adam H. Kurland, *First Principles of Federalism and the Nature of Federal Criminal Jurisdiction*, 48 EMORY L.J. 1, 55–60 (1996). Kurland notes that “[a]t the outset, the First Congress recognized that federal criminal law authority was not limited to the few explicit constitutional grants of authority to define punishments.” *Id.* at 56. It is arguable whether all of the early criminal laws can be characterized as an exercise of incidental powers; Lawson and Seidman do not discuss these laws and note only that a “federal police power” is “easily a principal power.” LAWSON & SEIDMAN, *supra* note 1, at 100.

57. In 1798, Congress enacted the Alien Acts (along with the more famous Sedition Act). 1 Stat. 570 (1798). The Alien Friends Act allowed the President to deport aliens whom he deemed “dangerous to the peace and safety of the United States”; it was harshly criticized and expired in 1801. For a description of the controversy over the Alien Friends Act, see GEOFFREY R. STONE, *PERILOUS TIMES: FREE*

delegation of discretionary power cast doubt on the book's conclusions that the Founding generation thought they were creating a document that incorporated the principles of fiduciary law.

#### 4. Other Historical Problems

Other omissions similarly undermine their historical account. For example, Lawson and Seidman provide essentially no support for their (crucial) statement that “many members” of the general public were familiar with fiduciary law. The only support they offer is to quote an article (in a 2010 book they edited) that says “there is reason to believe” people in that era had more exposure to fiduciaries because shorter life expectancies meant more executors of estates and the executors worked in teams.<sup>58</sup> They also assume that their evidence supporting the Founding generation's “infatuation with fiduciary government”<sup>59</sup> necessarily translates into a need to consider the background rules of fiduciary relationships in interpreting the Constitution. But, as one scholar of fiduciary law has noted, the *rules* governing fiduciary relationships developed in the context of tightly circumscribed numbers of beneficiaries, “and did not contemplate the rise of less personal and direct relationships between institutional fiduciaries and large numbers of beneficiaries that exist today.”<sup>60</sup> Lawson and Seidman thus fail to support their assertion that general theories of fiduciary government translated—for eighteenth-century Americans—into an expectation that the Constitution was creating a government bound by the formal rules of fiduciary law.

These representative errors and omissions raise the suspicion that Lawson and Seidman are engaged in “law-office history.”<sup>61</sup> But the more serious problem with their historical account is that in describing the Constitution as a power of attorney (or as a fiduciary instrument more generally), they mischaracterize the views of the constitution-makers as consonant with today's political conservatives. In particular, they mistakenly portray the Founding generation as in favor of small and limited government, as envisioning the legislature as faithful agents of the people rather than as a deliberative body, and as concerned only (or primarily) with potential governmental perfidy. As I show in the next section, none of those characterizations accurately describes the Founding era.<sup>62</sup>

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SPEECH IN WARTIME 31–33 (2004). The Alien Enemies Act, however, is still in force as 50 U.S.C. § 21, and allows the President to restrain and deport citizens of a hostile nation. Again, it is arguable whether the power to enact such a law is incidental to the power to declare war, but Lawson and Seidman do not even mention it.

58. LAWSON & SEIDMAN, *supra* note 1, at 29–30.

59. *Id.* at 31.

60. Lauren R. Roth, *The Collective Fiduciary*, 94 NEB. L. REV. 511, 523–24 (2011). Roth suggests that we should “distinguish[] the responsibilities of fiduciaries based on the number of beneficiaries they serve.” *Id.* at 528.

61. “Law-office history” is “the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data offered.” Alfred Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 & n.13 (1965).

62. The members of the Founding generation, like the members of any generation, were not monolithic. Even beyond the general distinctions I draw below between Federalist and Anti-Federalist

*B. Mischaracterizing the Founders as Modern Conservatives*

## 1. Small Government

Lawson and Seidman perpetuate the myth that the Founding generation intended to create a small national government of limited powers. As numerous recent historical analyses have shown, that is simply not true.<sup>63</sup> Indeed, the Constitution owes its existence to the *failed* experiment with a weak national government under the Articles of Confederation.<sup>64</sup> It would therefore be surprising if the Constitution were designed to replicate the federal government of the Articles rather than creating a new and powerful national government. As many historians have shown, it was primarily the Anti-Federalists—following in the footsteps of the English “Country” party—who opposed a strong national government.<sup>65</sup> They were the ones who favored a restrictive view of the powers granted by the Constitution, both by urging a strict and narrow textualism and by trying to insert the word “expressly” into the Tenth Amendment’s reservation of powers not delegated.<sup>66</sup> The fiduciary Constitution described by Lawson and Seidman is thus more reflective of the dissenting voices of the Founding generation than of the prevailing views.

## 2. The Nature of Representation

Lawson and Seidman also present only one side of another schism, this one about the nature of representation. In arguing that the government has fiduciary obligations, they come very close to presenting John Adams’s position that the legislature “should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them.”<sup>67</sup> For example, they quote one of

views, different members of each faction held varied beliefs—which also sometimes changed over time. Because Lawson and Seidman paint with a broad brush, I will here do the same. But readers should recognize that my descriptions are generalizations and are subject to multiple exceptions and variations.

63. See, e.g., MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996); cf. Calvin H. Johnson, *Madison’s Denial*, 34 CONST. COMM. 193, 203 (2019) (“The best evidence is that neither the text nor the drafting history of the Constitution supports the enumerated power limitation.”).

64. See, e.g., MICHAEL J. KLARMAN, *THE FRAMERS’ COUP* 73–125 (2016). For a briefer overview, see DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 32–35 (3d ed. 2013).

65. See, e.g., SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828* (1999); James H. Hutson, *Country, Court, and Constitution: Antifederalism and the Historians*, 38 WM. & M. Q. 337 (1981).

66. See CORNELL, *supra* note 65, at 11, 59, 160, 187.

67. JOHN ADAMS, *THOUGHTS ON GOVERNMENT* (1776), *reprinted in* 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805*, at 403 (Charles S. Hyneman & Donald S. Lutz eds. 1983). Highlighting the close kinship between this view of representation as requiring that the legislature be a mirror of the public and the view of the legislature as the public’s fiduciary is that, a decade earlier, Adams had espoused a view of representation very similar to that of Lawson and Seidman: “It is nothing more than this, the people choose attorneys to vote for them in the great councils of the nation, reserving always the fundamentals of government, reserving also a right to give their attorneys instructions how to vote.” *The Earl of Clarendon to William Pym*, BOSTON GAZETTE, Jan. 27,

*Cato's Letters* that representatives “shall . . . never have any interest detached from the Persons entrusting and represented,” and note that the same theme is prevalent in other essays.<sup>68</sup> During the Revolutionary Era—as opposed to the Founding Era—Adams (and thus Lawson and Seidman) probably accurately reflected the views of most Americans. Having suffered under Burke’s theory of “virtual representation,” they were determined to create legislatures that were mere agents of their constituents.<sup>69</sup>

But by the late 1780s, experience with state legislatures acting as pure agents of popular will had chastened and sobered the views of many. Views of the meaning of representation also changed as legislatures themselves took on additional roles; freed from the need to control a monarch, state legislatures could diverge from Parliament’s traditional passive role as protector of the people and become more active in “adopting policies that would contribute to the prosperity of society and the happiness of citizens.”<sup>70</sup> Finally, the demands of the Revolutionary War required state legislatures (and the Confederation Congress, to the extent it could) to be more active.<sup>71</sup> All of these factors “subverted the republican belief that a representative assembly could both mirror society *and* pursue the general good.”<sup>72</sup> A new vision of representation—which required knowledgeable, experienced legislators to *deliberate* for the good of the nation rather than simply *mirror* the views of the constituents—began to take hold.

We can see evidence of both the older and newer views of government in the debates in the Constitutional Convention and the debates in Congress over the Bill of Rights.<sup>73</sup> James Wilson, for example, thought the legislature “ought to be the most exact transcript of the whole society.”<sup>74</sup> George Mason echoed that older view, arguing that representatives “should sympathize with their constituents [and] should think as they think and feel as they feel.”<sup>75</sup> Roger Sherman, on the other hand, said that the people “should have as little to do as may be about the Government.”<sup>76</sup> Gouverneur Morris viewed the Senate, at least, as a check on “the precipitation, changeableness, and excesses” of the popularly elected

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1766, reprinted in 3 WORKS OF JOHN ADAMS 481 (Charles Adams ed., 1850–1856). As noted *infra*, at text accompanying notes 82–84, by the late 1780s the idea of a right to instruct representatives had become controversial and ultimately lost out.

68. LAWSON & SEIDMAN, *supra* note 1, at 40.

69. As Lawson & Seidman recognize, see *id.*, one of the best accounts of these Revolutionary-Era views is found in GORDON WOOD, REPRESENTATION IN THE AMERICAN REVOLUTION (rev. ed. 2008). But as Wood also points out, the Constitutional era saw new voices raised against the Revolutionary passion for “actual” representation. *Id.* at 55.

70. RAKOVE, *supra* note 63, at 205.

71. *Id.* at 216–17. Rakove’s account here also helps dispel the myth that the Founding generation thought they were creating a small and inactive government with limited powers.

72. *Id.* at 217.

73. Both views were probably also expressed in the state ratifying conventions and other ratification debates. My purpose here is to provide representative examples rather than an exhaustive account.

74. JAMES MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 74 (June 6) (Adrienne Koch ed. 1966) (hereinafter “Madison’s Notes”).

75. *Id.* at 75.

76. *Id.* at 39 (May 31).

House.<sup>77</sup> James Madison similarly appealed to what “[a] people deliberating in a temperate moment” might do, concluding that at least one of the branches ought to consist of those with “a competent knowledge of the public interests.”<sup>78</sup> Even the nature of representation in the Convention itself was disputed. Gouverneur Morris contended that “he came here as a Representative of America,” not to “truck and bargain for our particular states.”<sup>79</sup>

Finally, Madison in *Federalist No. 10* recognized the need for an independent, “disinterested” legislature rather than one that mirrored the views of the populace. The virtues of the legislature of a large republic are twofold, he suggested, and both virtues contemplate a deliberative, rather than mirror-like, body. Such a legislature will “refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country.” And this filtering could make it likely “that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.”<sup>80</sup> *Federalist No. 10* represents the hope that legislators will in fact be better than their constituents, “that interest groups will neutralize each other, thereby creating space for virtuous individuals to rise to positions of leadership.”<sup>81</sup>

The dispute over the validity of the agency (or mirror) theory of representation was again on full display when the House of Representatives debated Tucker’s motion to include a right to instruct representatives. Beginning again with the older view, John Page of Virginia took the agency view, arguing that “[i]nstruction and representation in a Republic appear to me to be inseparably connected.”<sup>82</sup> George Clymer of Pennsylvania took the opposite position, calling a right to instruct “utterly destructive of all ideas of an independent and deliberative body, which are essential requisites in the Legislatures of free Governments.”<sup>83</sup> Fellow Pennsylvanian Thomas Hartley was even more clear in rejecting the older view: “It appears to my mind that the principle of representation is distinct from any agency that may require written instructions. The great end of meeting is to consult for the common good.”<sup>84</sup>

77. *Id.* at 233 (July 2).

78. *Id.* at 193 (June 26).

79. *Id.* at 240 (July 5). The Convention reached no definitive resolution of the nature of representation. They were more concerned with the practical problem of how to constitute a national legislature in a way that satisfied large states, small states, slave states, free states, federalists, and nationalists. The underlying philosophical disagreements merely surfaced during some of these more pressing debates.

80. THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed. 1961).

81. Ganesh Sitaraman, *The Relevance and Irrelevance of the Founders*, 110 HARV. L. REV. 619, 624–25 (2006).

82. 1 ANNALS OF CONG. 734 (1789).

83. *Id.* at 735.

84. *Id.* at 734. As noted earlier, Tucker’s motion was defeated, although that does not necessarily mean that the deliberative view of representation prevailed. Many members opposed the motion for more practical reasons.

This divergence of views about the nature of representation was unlike the debate about the appropriate size and power of the national government. The latter, as I have already suggested, mostly broke down along established ideological lines and was decisively resolved in favor of the Federalists. The debate about the nature of representation, however, sometimes crossed those lines, with some Federalists clinging to the older notions about legislatures as mirrors of their constituents and some Anti-Federalists favoring the newer view of deliberative legislatures.<sup>85</sup> And the disputes about the nature of representation were not definitively resolved during the Founding era. So the problem with Lawson's and Seidman's historical account here is not that they present a view that was rejected, but rather that they present as a consensus only one side of a very active debate. Like their other omissions, it suggests that the book is advocacy rather than historical scholarship.

### 3. The Founding Generation's Other Great Fear: Majority Tyranny

Finally, Lawson and Seidman focus on only one of the Founding generation's two major concerns. They are undoubtedly correct that one great worry of the era was that government, as agents of the people, might be unfaithful to their trust. Protections against governmental perfidy—or what Zephyr Teachout calls the “anti-corruption principle”<sup>86</sup>—are found throughout the Constitution and figured prominently in contemporaneous debates. I have already suggested that agency law is not the most apt analogy to describe how the Founding Era responded to those fears. The more significant problem with the book's historical analysis, however, is that it leaves out entirely a second major concern: majority tyranny.

G. Edward White has summarized the Founders' concerns:

[A]longside the evils of monarchic tyranny and corruption that American republicans identified were another set of evils, and . . . the form of government created by the Constitution was designed to respond to those as well as to the former set. The other evils were *democratic* tyranny and corruption, the expected results of interactions between demagogues and the untutored masses . . . . [T]he proponents of the Constitution, while understanding the importance of a theoretical relocation of sovereignty in “the people,” held, in the main, a skeptical view of the capacity of the people as a whole to govern themselves . . . .<sup>87</sup>

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85. Both Gordon Wood and Saul Cornell argue that dispute about the nature of representation did break largely along Federalist/Anti-Federalist lines. See CORNELL, *supra* note 65, at 147–53; WOOD, *supra* note 69, at 54. Looking only at the debates in the Convention, this does not seem to me to be as clear as it is to Cornell and Wood. If, however, Cornell and Wood are correct, then Lawson and Seidman are even more misleading: rather than simply limiting themselves to one side of an ongoing debate, they have attributed to the Constitution the views of the *losing* side.

86. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

87. G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 794–95 (1994).

As Gordon Wood put it, describing reactions to the popular state governments established after independence: “An excess of power in the people was leading . . . to a new kind of tyranny, not by traditional rules, but by the people themselves.”<sup>88</sup> Forrest McDonald has described one of the Founders’ goals as “preventing self-government from degenerating into majoritarian tyranny.”<sup>89</sup>

We can see evidence of this fear before, during, and after the Constitutional Convention. In 1787, Benjamin Rush epitomized the twin concerns of faithless government agents and tyrannical majorities: “In our opposition to monarchy, we forgot that the temple of tyranny has two doors. We bolted one of them by proper restraints, but we left the other open, by neglecting to guard against the effects of our own ignorance and licentiousness.”<sup>90</sup> James Madison, writing to Thomas Jefferson, emphasized that majority tyranny was the greater danger: “the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of constituents.”<sup>91</sup>

This skeptical view of democracy—and the fear of a tyranny of the majority—was shared by Federalists and Anti-Federalists alike. “The Anti-Federalists were not latter-day democrats . . . . The last thing in the world they wanted was a national democracy which would permit Congressional majorities to operate freely and without restraint.”<sup>92</sup> In the Constitutional Convention, Elbridge Gerry, who became a leading Anti-Federalist, lamented the “excess of democracy.”<sup>93</sup> During the ratification debates, Anti-Federalist Maryland “Farmer” contended that in democracies, “the tyranny of the legislative is most to be dreaded,”<sup>94</sup> and Anti-Federalist “Agrippa” wrote that it is “as necessary to defend an individual against the majority in a republic as against the king in a monarchy.”<sup>95</sup>

These illustrative quotations from both primary and secondary sources barely skim the surface, but they are sufficient to demonstrate that the Founders were as worried about government agents who *obeyed* their principals’ instructions as they were about those who might not.<sup>96</sup> Lawson’s and Seidman’s characterization

88. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 404 (1969).

89. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 291 (1985).

90. Benjamin Rush, *Address to the People of the United States* (Jan. 1787), at <http://teachingamericanhistory.org/library/document/address-to-the-people-of-the-united-states/> [<https://perma.cc/F6KJ-YP4C>] (quoted in McDONALD, *supra* note 89, at 3).

91. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 *THE PAPERS OF JAMES MADISON* 299 (Robert A. Rutland and Charles F. Hobson eds. 1977).

92. Cecilia Kenyon, *Men of Little Faith*, 12 *WM & M. Q.* 3, 42–43 (1955).

93. MADISON’S NOTES, *supra* note 74, at 39 (May 31).

94. *Essays by a Farmer No. 1*, reprinted in 5 *THE COMPLETE ANTI-FEDERALIST* 15 (Herbert J. Storing ed. 1981) (hereinafter *STORING, COMPLETE ANTI-FEDERALIST*).

95. Letter from Agrippa to the Massachusetts Convention (Feb. 5, 1788), in 4 *STORING, COMPLETE ANTI-FEDERALIST*, *supra* note 94, at 111.

96. Daryl Levinson makes a similar point: The Founders, in his words, were concerned about agency problems but also “worried that the principal-agent relationship between constituents and their representative would be all to tight, allowing . . . the oppression of minorities.” Levinson, *Parchment*

of the Constitution as a power of attorney focuses solely on the latter problem, thus missing half the historical debate.

Ironically, illuminating the Founding generation's fear of majority tyranny might bolster the authors' conservative political agenda, insofar as the broad federal legislation they decry is the product of popular majorities. But, of course, not all popularly enacted legislation is tyrannical, and separating valid from invalid legislation thus requires a political theory about the nature of *rights*.<sup>97</sup> Eschewing such a theory, Lawson and Seidman instead rely on an argument that limits the *powers* of government—but in the process, they distort history.

Even aside from the Founders' views, recognizing the potential for a tyranny of the majority reveals a final problem with characterizing the Constitution as a power of attorney. The next Part addresses that problem.

#### IV. CONFLICTING PRINCIPALS

The recognition that some factions of “We the People” might oppress others (in other words, the possibility of tyranny of the majority) creates a further complication. It is a recognition that there are conflicts of interest among the principals who are, according to Lawson and Seidman, delegating a power of attorney to the government. If we include “our posterity” as other beneficiaries of the power of attorney—as Lawson and Seidman do<sup>98</sup>—the conflicts multiply even more.

And, in fact, it is resolving these conflicts of interest among the citizenry (and future citizens) that is the primary activity of government today, and the driving force behind most of the legislation Lawson and Seidman criticize. What costs may be imposed on the many in order to safeguard healthcare for the few who cannot afford it? When does intrastate commerce have a sufficient relationship to interstate commerce so that the former must be regulated in order to protect the latter? How do we balance the rights of property owners and corporations today against the harms of climate change in the future? How do we allocate rights between private citizens who want to discriminate and the victims of that discrimination? These are the sorts of questions that underlie government decisions to

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*and Politics*, *supra* note 46, at 666. Michael Klarman takes a somewhat different approach, suggesting that only the elite Federalists favored the “undemocratic” provisions of the Constitution; “most Americans would have expected or wanted” a “vastly different Constitution.” KLARMAN, *supra* note 64, at 540. The Federalists nevertheless managed to secure ratification through “built-in advantages and miscalculations by their opponents” as well as by “ma[king] some of their own luck” and by “presenting the country with a stark choice between the admittedly flawed Articles . . . and the vastly different Constitution,” disallowing any intermediate options. *Id.* at 610–11. If Klarman is right, it weakens Lawson’s and Seidman’s argument still further by undermining the legitimacy of relying on the original meaning of a Constitution that essentially put one over on the American people. We should neither venerate nor slavishly adhere to a document that was the result of a coup—which, of course, is part of Klarman’s point.

97. For a preliminary sketch of just such a theory against the conservative, deregulatory agenda, see Suzanna Sherry, *Selective Judicial Activism: Defending Carolene Products*, 14 *Geo. J.L. & Pub. Pol’y* 559 (2016).

98. LAWSON & SEIDMAN, *supra* note 1, at 50.

enact many of the laws that Lawson and Seidman seek to invalidate as an unconstitutional exercise of power beyond that granted by the power of attorney.

Viewing government's role as adjusting relationships among We the People rather than as solely the people's agent is not a recent invention. Madison himself wrote that "the regulation of these various and interfering interests forms the principal task of modern legislation."<sup>99</sup> As Gordon Wood notes, by the 1790s most Americans recognized that "[p]olitics . . . could no longer be described as a contest between rulers and people" because the "political struggles would in fact be among the people themselves."<sup>100</sup>

What does this recognition of competing interests among the principals mean for the thesis that the Constitution is—or should be interpreted as if it were—a power of attorney? It makes a hash of it, because fiduciary law prohibits agents from representing multiple parties whose interests conflict. As the Restatement of the Law of Agency (Third) puts it: "[A]n agent who acts on behalf of more than one principal in a transaction between or among the principals has breached the agent's duty of loyalty to each principal through undertaking service to multiple principals that divides the agent's loyalty."<sup>101</sup> In particular, an agent with multiple principals may not act as an agent for more than one of them with regard to any particular matter or transaction,<sup>102</sup> unless there is no substantial conflict among them.<sup>103</sup> The Supreme Court has held that "[a] fiduciary cannot contend 'that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.'"<sup>104</sup>

Thus, it is contrary to the law of agency—that is, the law governing fiduciary relationships—to allow the government to represent, through a power of attorney, the conflicting interests of *all* the principals who make up We the People.

Lawson and Seidman might respond that in ratifying the Constitution, We the People have consented to allow the branches of government to represent us all. This argument is insufficient. First, it seems inconsistent with the underlying purpose of a power of attorney for multiple principals to authorize an agent (or several agents) to represent all of them in their dealings with one another. The purpose of a power of attorney is to allow an agent to act in lieu of the principal

99. THE FEDERALIST NO. 10 (James Madison), *supra* note 80, at 79.

100. WOOD, *supra* note 69, at 80.

101. 2 RESTATEMENT OF THE LAW OF AGENCY 3D § 8.03 cmt. b (AM. LAW INST. 2006); *see also* DANIEL S. KLEINBERGER, AGENCY, PARTNERSHIPS, AND LLCs 120 (2d ed. 2002) ("The mere existence of dual agency violates the duty of undivided loyalty.")

102. 1 RESTATEMENT OF THE LAW OF AGENCY 3D § 3.14; *see also* [2005] UKHL 8, 1 W.L.R. 567, 567 (Eng.) (noting that a lawyer's duty of loyalty "very frequently makes it professionally improper and a breach of his duty to act for two clients with conflicting interests in the transaction at hand"); *cf.* UNIF. TRUSTS ACT § 6 (1937) (forbidding the trustee of one trust from selling property to itself as the trustee of another trust).

103. 1 RESTATEMENT OF THE LAW OF AGENCY 3D § 3.16.

104. NLRB v. Amax Coal Co., 453 U.S. 322, 330 (1981) (quoting *Woods v. City National Bank & Trust Co.*, 312 U.S. 262, 269 (1941)).

to accomplish the principal's wishes; where the wishes of multiple principals conflict, the agent cannot fulfill his duties.

Further, if an agent (after appropriate disclosures) obtains multiple principals' consent to represent them all, the agent "owes duties of good faith, disclosure, and fair dealing to all of the principals."<sup>105</sup> But good faith and fair dealing are a far cry from—and might well be inconsistent with—the strict limitations on delegated power that Lawson and Seidman advocate. Indeed, the representation of multiple principals in the same transaction, to the extent that it is permitted at all, seems much closer to what Lawson and Seidman describe as the business judgment rule, which contains "a presumption that in making a business decision the directors of a corporation acted . . . in good faith."<sup>106</sup> As they note, this is a "highly deferential" standard.<sup>107</sup>

Finally, even if representation of multiple principals is permitted and subjects the agent to the standard fiduciary duties of loyalty and care, those duties are owed to *each* of the principals. And that brings us right back to the problem that most modern governmental decisions pose the dilemma of how to adjust the rights, duties, and relationships among different citizens. Acting as an appropriate fiduciary for one set of principals will often entail violating fiduciary duties to another set.<sup>108</sup>

This last point yields an observation about the appropriate characterization of the Constitution. Adjusting the rights, duties, and relationships among different segments of the public—which is a large part of what government does—makes the government more of an arbitrator than a fiduciary. Fiduciaries represent the interests of their principals; arbitrators decide disputes among principals. Perhaps in ratifying the Constitution, We the People consented to having government entities arbitrate our differences. Characterizing the Constitution as making the federal government a species of arbitrator is much more consistent with both the general views of the Founding generation and the role of government in modern America than is characterizing the Constitution as a power of attorney. But doing so does not lead where Lawson and Seidman want to go: toward deregulation and small government. So we are back to my original point: "A Great Power of Attorney" is not so much a historical work as a political one.

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105. 2 RESTATEMENT OF THE LAW OF AGENCY 3D § 8.06. Lawson and Seidman don't talk about the duty of fair dealing, but they do talk about the duty of impartiality, which seems similar. See LAWSON & SEIDMAN, *supra* note 1, at 151.

106. LAWSON & SEIDMAN, *supra* note 1, at 137. The rule also presumes that the directors acted "on an informed basis" and "in the honest belief" that they were acting in the best interests of the corporation. *Id.*

107. *Id.*

108. One scholar suggests that conflicting duties to multiple principals may be resolved by privileging the duty of loyalty over the duty of care. Arthur R. Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U. L. REV. 75 (2004). That does not help in this context, because the options that the government chooses among do not neatly divide into violations of the duty of care and violations of the duty of loyalty.

## CONCLUSION

The Founders could not imagine that they were creating a Constitution that would last for more than two centuries. The pessimists among them thought it might not last a generation.<sup>109</sup> The reason they were wrong is that the Constitution grew and changed—with and without formal amendments—as the country did. Lawson and Seidman wish to undo much of that historical development. In support of their project, they purport to describe our fiduciary Constitution. Ultimately, however, they are merely describing an imaginary Constitution of their own creation.

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109. See, e.g., Herbert Mitgang, *New Light on 1787 and Washington's Doubts*, N.Y. TIMES (July 4, 1987), <https://www.nytimes.com/1987/07/04/arts/new-light-on-1787-and-washington-s-doubts.html> [<https://perma.cc/G8GW-WPW8>].