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“A Great Power of Attorney”
Chapter One

What the Constitution Is—and Why It Matters

The U.S. Constitution, ratified in 1788, is the oldest governing document of its kind still in force for a nation-state. The Massachusetts Constitution of 1780 is older by a hair, but Massachusetts is no longer a nation-state (though it was at the time its constitution was adopted). The Magna Carta and other documents that are part of Great Britain’s inaptly named “unwritten” constitution are more venerable, some countries that base their governments on various religious writings have foundational materials that far predate the eighteenth century, and San Marino will put in a claim to having the world’s oldest functioning written constitution. But no existing secular document for a major country, self-consciously designed as a frame of government, has endured for as long as has the U.S. Constitution, and perhaps no such document has been as influential. In modern times, it has served as a model for waves of constitution making in other countries. Indeed, “it is the gold standard in constitutional governance, much as the Roman Constitution was during the 400 years of the Roman Republic.” Moreover, few written works have been plumbed as thoroughly. The U.S. Constitution is the subject of reams of scholarly commentary, volumes of judicial opinions, and countless decisions and conversations both in and out of the halls of government, in the United States and elsewhere. Religious texts aside, the U.S. Constitution is quite possibly the most important document in the modern world and is certainly one of the most carefully studied.

One might think all major questions concerning the character, if not necessarily the meaning, of the Constitution would by now have been fully argued and perhaps even fully settled. Not so. A basic, and even existential, question still shadows the Constitution and all of the myriad treatments of it. As Douglas Adams so eloquently asked of the ultimate question of life, the universe, and everything: “Yes . . . but what actually is it?” After more
than two centuries, the very nature of this remarkable instrument is a matter of profound controversy.

The U.S. Constitution has been characterized at various times as many different kinds of documents, including a “superstatute,” a “compact,” a “treaty,” a “corporate charter,” an “instruction manual... for a particular form of government,” “a principal symbol of... the aspirations of the tradition,” “a charter of aspirations to which we owe fidelity,” “a reflection of the tension between our understanding of our present state and our understanding of social ideals toward which progress is possible,” and “that set of beliefs, or whatever, that has some hold on our behavior, our beliefs, and our collective and individual identity.” Some of these descriptions are meant literally, and some are meant metaphorically. Some are intended simply to be descriptions, whereas others are intended to be guides, goals, or ideals.

The characterization of the Constitution as one or another kind of document can matter for any number of purposes, ranging from interpretative to normative to rhetorical to historical. For at least some of those purposes, the effort to understand the legal nature of the Constitution is more than an academic pursuit; it has significant real-life implications as pertinent today as they were in 1788.

Our focus in this book is purely interpretative rather than prescriptive, and for that purpose, correct characterization of the object of interpretation is critical. How one interprets a document depends in large measure on what kind of document one is—or thinks one is—interpreting. (It depends as well, of course, on what one means by “interpretation”—more on that shortly.) How one understands the Constitution is largely determined by what one understands the Constitution to be. One is quite likely to read the document differently if one views it as an instruction manual, a chain novel, or “that set of beliefs, or whatever, that has some hold on our behavior.” Getting the characterization of the Constitution right is essential to sound interpretation.

In recent years, we have become convinced that none of the aforementioned characterizations of the Constitution, including the description of the Constitution as an “instruction manual” that the two of us previously put forward, is quite right. Some of those descriptions are closer to the mark than are others, but none accurately situates the Constitution within the universe of documents known to eighteenth-century makers of legal instruments. Perhaps so many different characterizations have been offered over time because others share our uneasiness with the available menu.
Accordingly, this book sets forth a characterization of the Constitution that we feel comes closer than the others do to providing a satisfactory understanding of the nature of the document—and therefore comes closer than the others do to providing the foundation for ascertaining the appropriate background rules for constitutional interpretation.

The person who most aptly identified the Constitution’s character as a document was James Iredell. Iredell was the North Carolina jurist and state attorney general, and later U.S. Supreme Court justice, who served as the chief spokesperson for the Constitution at his state’s ratifying convention in 1788. In the course of arguing that the Constitution did not need to include a bill of rights (or at least a bill of rights more extensive than the one appearing in Article I, section 9), Iredell said:

Of what use, therefore, can a bill of rights be in this Constitution, where the people expressly declare how much power they do give, and consequently retain all they do not? It is a declaration of particular powers by the people to their representatives, for particular purposes. It may be considered as a great power of attorney, under which no power can be exercised but what is expressly given. Did any man ever hear, before, that at the end of a power of attorney it was said that the attorney should not exercise more power than was there given him? Suppose, for instance, a man had lands in the counties of Anson and Caswell, and he should give another a power of attorney to sell his lands in Anson, would the other have any authority to sell the lands in Caswell?—or could he, without absurdity, say, “Tis true you have not expressly authorized me to sell the lands in Caswell; but as you had lands there, and did not say I should not, I thought I might as well sell those lands as the other.” A bill of rights, as I conceive, would not only be incongruous, but dangerous.14

In this passage, Iredell made two points directly relevant to our discussion.15 First, and most obviously, Iredell identified the Constitution as “a great power of attorney.” Although Iredell quite possibly meant this metaphorically, it is essentially and profoundly correct as a factual description of the Constitution’s character, and that description holds the key to understanding much about the document. The Constitution presents itself as a grant of powers from a principal, identified in the Preamble as “We the People of the United States,”16 to various designees or agents. It has the form, function, and feel of an agency instrument. Powers of certain
kinds—some defined more precisely than others—are vested by the principal in different actors whose attributes, duties, and limitations are laid out with obvious and considerable care in order to accomplish the principal’s goals. To be sure, the Constitution—which at the time of its making was a paradigmatic, if somewhat novel, instrument of public law—does not fit precisely the mold of traditional private-law-agency instruments. The recipients of power, such as Congress, the president, and the federal courts, are not literally private-sector executors, factors, stewards, or guardians. More importantly, the Constitution purports to create responsibilities and obligations for persons and entities other than the principal, We the People, which a literal power of attorney could never do. Nonetheless, the comparison between the Constitution and a power of attorney works at least at some level of analogy. Founding-era advocates of the Constitution routinely described federal legislators and officials as “guardians,” “trustees,” and “agents”; the overall operation of the Constitution, as a grant of power from the principal to manage some measure of the principal’s affairs, is starkly indicative of the agency character of the document. Combined with the impressive background and contextual evidence we will present indicating that constitutive governmental instruments were seen in agency-law terms in the eighteenth century, the most natural, and even obvious, reading of the Constitution treats it as entrustment of identified powers to identified agents, precisely as Iredell described it.

Iredell’s second point is that the Constitution’s character as a document has implications for the interpretative presumptions that apply to it. If the Constitution is a kind of power of attorney, it should be read as though it were a power of attorney and not, for example, a poem, a chain novel, or an inspirational speech, or even as if it were another kind of distinctively legal instrument such as a treaty, contract, or will. In particular, powers of attorney are a species of the wider category of fiduciary instruments. Those persons given power under fiduciary instruments exercise that power under legal constraints—not just the constraints specified in the instrument but also (absent express exclusion) those constraints that are part of the general law governing fiduciary relationships. Similarly, those who grant power over their affairs to others do so in a legal context that assumes fiduciary relationships by their very nature carry certain obligations in their wakes. If the Constitution is a fiduciary instrument in this family, then its grants of power, and the accompanying express limitations on that power, must be understood in light of background principles of fiduciary obligation. In syllogistic form: (1) agency instruments should be construed using a standard
set of interpretative conventions for that class of documents; (2) the Constitution is an agency instrument, so therefore (3) the Constitution should be construed using a standard set of interpretative conventions for that class of documents.

The purpose of this book is to explain why and how Iredell was right on both counts. He was right that the Constitution is best characterized as an agency instrument, and even more specifically as a “great power of attorney,” and he was right that that characterization has interpretative implications (at least as we employ the term “interpretative”). We aim in this book to flesh out both of Iredell’s observations and to show how they help guide ascertainment of the Constitution’s meaning.

At least four things worth mentioning at the outset are not among the purposes of this book, and one thing worth mentioning at the outset most assuredly is among those purposes. We start with the disclaimers.

First, we emphatically and unequivocally are making no claims that the Constitution actually, as a matter of political and moral theory, worked as an effective, normatively binding transfer of authority from some mass of We the People to some set of governmental actors. In other words, we are not arguing that the Constitution is an agency instrument in any sense relevant to moral theory or political science. There is a burgeoning literature on the extent to which fiduciary theory can ground actual moral and political obligation either in general or in the specific context of the U.S. Constitution. Various scholars have tried to use fiduciary theory to ground, inter alia, broad theories of constitutionalism or narrower theories concerning more limited subjects such as election law, administrative law, or international law. We do not engage that literature at all because our project has nothing to do with moral or political theory. We are interested in constitutional meaning, not constitutional authority or justification. One of us has written at great length on the oft-elided distinction between the meaning of a document such as the Constitution and the implications of that meaning for action by official agents (or others). The connection between those ideas is complex, and its resolution lies in the domain of moral theory rather than interpretative theory or legal theory. We are not moral theorists. Near the end of this book, we offer some brief thoughts on a few of the problems raised by the uncertain connection between constitutional meaning and constitutional adjudication, but that is as far as we go. Accordingly, all of the claims in this book are positive, or empirical, claims about the meaning of constitutional language. We make no claims about the extent to which that meaning either does or should drive decisions about real-world conduct.
Second, and relatedly, we are not setting out a scheme of judicial review under which fiduciary principles should guide real-world decisions. We do not, as Seth Davis put it in the course of trenchantly criticizing the idea, “see in fiduciary law a political morality from which to derive judicial constraints on political discretion,”23 nor are we using fiduciary principles to ground a theory of judicial role in a constitutional context or otherwise.24 To be sure, we think we have interesting (and true) things to say about the Constitution’s meaning, and for those who think the Constitution’s meaning contributes content to the law,25 that information might prove valuable. But we are making no claims about the extent to which the meaning we uncover should or must contribute to legal decision making.

Third, as we will explain in more detail in subsequent chapters, we are not arguing here that background principles of fiduciary law are the only background principles of interpretation that operate in the context of the Constitution. As far as the present argument is concerned, the ascertain-ment of constitutional meaning might well be a complex task involving a range of considerations that do not have any obvious rank ordering within an interpretative hierarchy. We claim here only that the background norms of fiduciary law are part of that hierarchy. Thus, it does not follow from our argument, even if one accepts it entirely, that the meaning of the Constitution is strictly determined by fiduciary law. Rather, the argument of this book is a hypothetical imperative in “if-then” form: if the Constitution is interpreted strictly as a fiduciary instrument, then certain interpretative consequences follow. Those interpretative conclusions can always be subject to modification by other interpretative principles one thinks are equally or more powerfully grounded in the document. Although we believe that the fiduciary model is enormously powerful, and perhaps powerful enough to carry much stronger arguments about constitutional meaning than we elect to make in this book, our present aim is simply to describe the contribution a fiduciary understanding of the Constitution can make to constitutional meaning, not to set out a self-contained and comprehensive interpretative theory.

Of course, we approach this book with a particular interpretative theory in our minds, and it is difficult (and unnecessary) to conceal that theory. We have elsewhere described at length how we approach the task of interpretation through a vision of original meaning that operationalizes the intentions of the Constitution’s (hypothetical, legally constructed) author as the understandings that would have been held by a (hypothetical, legally constructed) reasonable observer in the eighteenth century.26 In this book,
we modify that vision somewhat to take full account of the Constitution’s fiduciary character. But we are not asking the reader to accept our vision of interpretation—much less to accept that such a vision is a normatively appropriate way in which to ground modern-day decisions. We think the vision is correct (and indeed close to self-evident after one limits one’s inquiry, as we do, to ascertaining the communicative signals conveyed by the document), and we on occasion describe certain decisions or doctrines as correct or incorrect in light of that vision, but it is not our goal here to defend, or even describe, any particular theory of constitutional interpretation, much less any particular theory of constitutional decision making. As we explain below, to the extent that original meaning, as we have defined it, makes any contribution to constitutional interpretation, we think we have relevant observations to make about that meaning, but we go no further than that.

Fourth, we make no claim to originality. We did not invent the idea that the Constitution is a fiduciary instrument—obviously, Iredell got there first, and, as we shall later see, Chief Justice John Marshall was not far behind him. Nor did we rediscover Iredell’s (and Marshall’s) ideas for a modern audience. That honor belongs to Robert G. Natelson, who has worked tirelessly for many years to bring to light the agency-law character of the Constitution, which was so obvious to the founding generation that it scarcely bore mention. Chronologically, Gordon Wood pointed to Iredell’s comments at an earlier date, and others have made reference to the “great power of attorney” idea from time to time, but Natelson was, as far as we can tell, the first modern scholar to appreciate the full significance of Iredell’s characterization of the Constitution as an agency instrument. We are grateful to Natelson, with whom we have been privileged to work as coauthors on a number of projects (most notably including one adapted herein as Chapter 8), for opening our eyes to this insight. Although Natelson will surely disagree with much of what we write in this book, we see ourselves as fleshing out the implications of his discoveries, and his shadow lurks on almost every page. Indeed, there are portions of this book Natelson not only could have written better but also has effectively already done so. Our intellectual debt to him cannot be measured.

Now to our affirmative project: understanding the fiduciary character of the Constitution is important not simply as a historical matter but also for its contribution to constitutional interpretation. Subject to the crucial qualifications outlined above, we aim to identify the implications of the Constitution’s character for the Constitution’s meaning. Because the
focus of this project is constitutional interpretation, we want to be clear about what we mean by that enterprise because our conception of what is involved in the process of “interpretation” is not universally shared and is therefore subject to misunderstanding.

We use the word *interpretation*, and more specifically the phrase *constitutional interpretation*, to mean the process of discerning the communicative signals sought to be conveyed by the Constitution’s author. That is a purely positive and descriptive process that turns on a quite specific and narrow account of textual meaning. The word *interpretation* certainly can be, and often is, put to many other and much broader uses, both descriptive and normative. We do not claim any special entitlement to the word. We are simply declaring how we are using the term in this book. If the reader is so accustomed to seeing or using the word *interpretation* in other senses that miscommunication from our usage is likely, just substitute the phrase *ascertainment of communicative meaning* for the word *interpretation* throughout this book, and one will not go wrong.

Because communicative meaning is located in the first instance in authorial intention, our project of ascertainment of meaning is necessarily a species of what is usually called *originalism* because it looks to the meaning that certain terms held as of the late eighteenth century, when the Constitution (or at least the original text and the Bill of Rights, the part of the Constitution with which we are here concerned) was authored. Many methodologies that go by the label *originalism*, however, are really theories of judicial role or practical governance rather than (or in addition to) theories of pragmatic meaning, and we neither embrace nor reject such aspects of those methodologies here. We seek only to ascertain the meaning of a particular historical document, much as we might seek to ascertain the meaning of the Code of Hammurabi or the Rhode Island Charter of 1663. What, if anything, one does with that meaning after one has it is not our concern here.

After focus is directed to the ascertainment of the meaning of the communicative signals in—or what one of us has elsewhere called an “empirical reading” of—the Constitution, it becomes clear how characterization of the document drives that interpretative process. No document can contain the full set of rules for its own interpretation. Even if the document contains explicit instructions concerning its own interpretation, those instructions must themselves be interpreted, if only to determine whether the instructions are meant to be construed literally rather than ironically or sarcastically. There will always be operative a set of background principles
of interpretation that must be brought to bear on any interpretative enterprise. Some of those background principles come from the general structure of the relevant language (though discerning the relevant language is itself an act of interpretation), whereas others are particular, and possibly even unique, to the specific document being interpreted. One approaches interpretation of a poem differently from interpretation of a spouse’s shopping list, an instruction manual for the assembly of a computer table, or a power of attorney granting another person authority over one’s health care or financial decisions.

If one is interpreting a poem, for example, one will presumably not be hyperfocused on the literal, semantic meaning of the sentences (or sentence fragments) in the poem. One will likely be on the lookout for metaphors, similes, exaggerations, sarcasm, irony, and a host of other literary devices that typically are employed in poems. Of course, in any particular instance, one might fail to find any such devices. Perhaps a straightforward semantic interpretation is precisely what the author of a poem had in mind. The point is only that if one knows that one is reading a poem, that knowledge triggers certain expectations about the way in which language is likely to be used. Those expectations may or may not be met in any given instance, but one will not know that until one has tried them out on the document. The character of the document generates, at the very least, presumptions about how the document’s meaning is best ascertained.

If the document is a shopping list from one’s spouse, interpretation guided by metaphor or irony is likely to lead to trouble. “Yes, the list said ‘four apples,’ but since apples are associated with sin, I bought four boxes of double-stuffed Oreos instead.” Again, perhaps there are individual cases in which those background assumptions will accurately discern communicative meaning; maybe the spouse intends that the shopping list be the occasion for a culinary adventure and just wants to see what you will bring back. But over a wide range of cases, the background assumptions one might bring to interpretation of a poem will not suit the interpretation of a shopping list. It is not clear, however, that the shopping list is necessarily best understood by reference to semantic, or standard, sentence or word meanings instead. It is quite possible that you and your spouse have certain understandings that will not be shared by a wider linguistic community. If the list says, “Bring home three peaches,” you may grasp, from context and long experience, that the list means, “Bring home three cartons of peach-flavored ice cream.” A random stranger who found your list would probably read it quite differently (and, on these assumptions, wrongly).
When reading an instruction manual for assembling a computer table, one is likely to resort, as a presumptive matter, to semantic meanings, on the assumption that the author of the manual was trying to communicate clearly and directly to a broad range of potential readers. The attempt to discern communicative meaning through that set of background assumptions might fail, either because the author did a poor job of communicating, you do a poor job of reading, the subject matter of the communication is difficult to convey despite everyone’s best efforts, or the manual’s author was actually composing a blank-verse poem out of boredom or malice. Background assumptions, as with all other kinds of assumptions, can be wrong. Nonetheless, they are presumptive devices calculated, within the limits of human ability, to discern communicative meaning, and it would be beyond foolish to approach the instruction manual in the first instance as a poem without some strong context-specific evidence that that is the right approach.

If one is reading a power of attorney, one would likely approach the process through semantically inclined eyes, much as with the instruction manual for assembling the computer table, but with attention directed to the possibility of encountering technical terms of art keyed to the subject matter. One does not expect instructions on end-of-life decisions or investments of life savings to be written using metaphor or irony or to contain private codes, but one does expect to encounter a fair amount of “legalese,” including terms that might be accessible only to someone with advanced training in the law. As always, your attempt to discern communicative meaning can fail for any number of reasons. Indeed, what looks to you like a power of attorney might actually be intended by the author as a poem, a code, or a joke. But, as always, the attempt to discern meaning calls for background assumptions tailored to the kind of document at hand. Those assumptions do not guarantee interpretative success, but they are the tools that a capable and honest interpreter is likely to bring to the job.

All of this assumes, as we have noted, that one is trying to ascertain the communicative intentions behind a document. If one is instead reading the document for aesthetic pleasure, completely without regard to its communicative content, all bets are off. There might also be other activities in which communicative intentions play a role but are not the only objects of inquiry; one might want to know, for example, not just what a document says but also what it would say if it were a morally good document. But for any activity in which the document’s communicative content is at all relevant, one can only discern that content accurately if one starts with
the right set of background assumptions about how to approach the document’s language. The correct choice of assumptions is influenced, if not strictly dictated, by the kind of document one is interpreting.

The Constitution is a fiduciary instrument best categorized as a power of attorney, and that characterization carries interpretative consequences in its wake. Chapters 2–4 of this book lay the foundation for our analysis by exploring the contents of eighteenth-century fiduciary law (with particular attention to powers of attorney), the eighteenth-century conception of fiduciary government, and the extent to which the Constitution can be viewed as, or at least as akin to, a power of attorney rather than other legal fiduciary and nonfiduciary instruments such as treaties or corporate charters. The case for viewing the Constitution as some kind of agency instrument is, we believe, overwhelming, even if the case for treating it specifically as an eighteenth-century person would have treated a power of attorney proves more equivocal. Chapters 5–8 then examine how various features of fiduciary law, such as the doctrine of principals and incidents and the duties of personal execution, care, loyalty, and impartiality, generate interpretative conclusions in the context of the Constitution. Again, we frame these interpretative conclusions in hypothetical form: to the extent that the Constitution can be seen as a fiduciary instrument, or in some cases as a fiduciary instrument of a particular kind, certain conclusions about the document’s meaning follow from that identification.

In the course of our discussion, we touch on a wide range of topics, including, to name a few, eighteenth-century corporate law, pre-founding-era English administrative law, several millennia of thought on the nature of government, and the ability of Congress to allow a federal agency to fix the minimum length for red grouper caught in the Gulf of Mexico. We also reach a wide, and quite eclectic, set of interpretative conclusions, some of which surprised even us. Interpreting the Constitution as a fiduciary instrument, for example, leads one to think that the necessary and proper clause authorizes Congress to employ only incidental rather than principal powers when implementing federal authority, which arguably forecloses use of the clause to enact the so-called individual mandate under Obamacare, under which most U.S. citizens must purchase government-approved health insurance, and which might even rule out any federal power of eminent domain. We uncover strong arguments, rooted in the Constitution’s original meaning, in favor of doctrines applying something strongly resembling both substantive due process and equal protection to actions by the federal government, although those arguments neither support nor
negate a substantive-due-process-like doctrine applicable to the states via the Fourteenth Amendment. (None of the arguments in this book speak to the meaning of the Fourteenth Amendment.) The case for the interpretation embodied in the Supreme Court’s decision in *Bolling v. Sharpe*, which forbade Congress from operating segregated schools in the District of Columbia, is also quite strong, but the case for a strict rule of color-blindness in all federal action is far weaker. The nondelegation doctrine has a firm constitutional foundation, whereas the case for a presumption of constitutionality of federal action is equivocal and might depend on exactly what kind of fiduciary instrument best describes the Constitution.

In the end, we raise as many questions as we answer. It is not at all clear how to identify with any precision the beneficiaries of the Constitution after one views the document in fiduciary terms. There are grave difficulties in giving content to at least some of the fiduciary duties that were part of the eighteenth-century legal and interpretative background. There are even greater problems, which we do not address in this book, in determining whether and how to translate the interpretative insights gained from understanding the Constitution’s fiduciary character into judicial doctrine. We do not pretend to have done more than scratch the surface of the implications of a fiduciary understanding of the Constitution. Nonetheless, we hope that the reader finds the modest journey herein as enlightening as we have found it.