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## Framer's Intent: Gouverneur Morris, the Committee of Style, and the Creation of the Federalist Constitution

William M. Treanor


*Georgetown University Law Center*, [wtreanor@law.georgetown.edu](mailto:wtreanor@law.georgetown.edu)

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William Michael Treanor<sup>1</sup>

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Abstract

At the end of the proceedings of the federal constitutional convention, the delegates appointed the Committee on Style and Arrangement to bring together the textual provisions that the convention had previously agreed to and to prepare a final constitution. Pennsylvania delegate Gouverneur Morris was assigned to draft the document for the committee, and, with few revisions and little debate, the convention subsequently adopted the Committee's proposed constitution. For more than two hundred years, questions have been raised as to whether Morris as drafter covertly made changes in the text in order to advance his constitutional vision, but the legal scholars and historians studying the convention have concluded that Morris was an honest scrivener. No prior article, however, has systematically compared the Committee's draft to the previously adopted resolutions or discussed the implications of those changes for constitutional law. This article reveals how many changes Morris made to the text delegates had previously agreed to and how important those changes were (and are). It shows that many of the central elements of the Constitution (including the Preamble; the basic Article I, Article II, and Article III structure; and the contract clause) were wholly or largely the product of the Committee's work. In total, Morris made twelve significant changes to the Constitution, and these textual changes advanced his constitutional goals, including strengthening the national government, the executive, and the judiciary; protecting private property; and fighting the spread of slavery. Finally, it shows that, in central debates in the early republic, Federalists, and, notably, fellow committee member Alexander Hamilton repeatedly drew on language crafted by the Committee as they fought for their expansive vision of the Constitution. In revising the constitutional text, Morris created the basis for what was to become the Hamiltonian reading of the Constitution.

This history has significant implications for modern constitutional law. While the Supreme Court has never been presented with a case that reveals the extent of the Committee's changes, in four cases it has confronted situations in which the Committee's text arguably had a different meaning than the provision previously adopted by the convention, and the Court has consistently treated the Committee's work as substantively meaningless and concluded that the prior resolutions were controlling. That approach should be rejected because it is at odds with the majoritarian premise of constitutional ratification by "the people." The text that was ratified is controlling. At the same time, in most circumstances, Morris's language was ambiguous. A modern public meaning originalist approach leads to the conclusion that Morris's revisions made possible alternate readings of the Constitution: it supported what was to become the Federalist approach, but did not prevent Republican textualist readings. On important contemporary issues, focus on Morris's text makes us aware of originalist understandings of the text that have been

frequently dismissed or wholly forgotten; although it does not eliminate the originalist basis for narrower readings, that focus provides new originalist support for broad understandings of congressional, judicial, and presidential power and for protection of private property.

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Constitution

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Introduction

*That document [the Constitution] was written by the fingers, which write this letter.*  
Gouverneur Morris to Timothy Pickering, December 22, 1814<sup>3</sup>

*The **finish** given to the style and arrangement of the Constitution fairly belongs to the pen of Mr. Morris; the task having probably been handed over to him by the Chair of the Committee, himself a highly respected member and with the ready concurrence of others. A better choice could not have been made, as the performance of the task proved.*

James Madison to Jared Sparks, April 8, 1831<sup>4</sup>

“Gouverneur Morris was probably the most brilliant member of the Pennsylvania delegation and of the convention as well. Sharp-witted, clever, startling in his audacity, and with a wonderful command of language, he was admired more than he was trusted. . . .”

Max Farrand, *Framing of the Constitution* (1913).<sup>5</sup>

“Gouv. Morris. . . . Celebrated attorney, one of the great minds of the continent, but without morals and, if one believes his enemies, without principles. . . .”

French Embassy, “List of Members of Congress, with notes of the most interesting people in different states” (1788)<sup>6</sup>

There is a voluminous body of scholarly literature that grapples with *framers’* intent in drafting the Constitution and what that intent should mean for modern constitutional

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<sup>3</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787 420 (Max Farrand ed., Yale Univ. Press rev. ed. 1986).

<sup>4</sup> FARRAND 499.

<sup>5</sup> Max Farrand, *Framing of the Constitution* 21 (1913).

<sup>6</sup> Farrand 236 (my translation from the French).

interpretation. But there has been no serious study of *framer's* intent and what that intent means for constitutional adjudication today. Although largely forgotten today, *the* framer was Gouverneur Morris, a brilliant, commanding, and linguistically gifted member of the Pennsylvania delegation. Morris was the delegate who spoke most often at the convention, and, at a convention marked by compromises on critical issues, he, more than any other delegate (including Alexander Hamilton), championed positions that were to become the Federalist constitutional position in the early republic: he fought for a national government with expansive powers, he wanted a strong executive and a strong federal judiciary, he pressed for strong protection for private property, and, among the delegates, he stood alone in his fierce denunciation of slavery.

Morris became *the* framer through his work on the Committee of Style. At the end of the proceedings of the federal constitutional convention, following more than a month of debate on the previous draft of the Constitution, the delegates elected "a Committee of five to revise the style of and arrange the articles agreed to by the House."<sup>7</sup> With Morris working as the draftsmen, the Committee over the course of three days produced a new draft Constitution, and, with minor changes, that draft was adopted and became the Constitution submitted to the states and ratified.

In 1798, in the course of a House debate, Congressman Albert Gallatin charged that Morris in drafting the Constitution had deceptively (and subtly) changed the text of the general welfare clause, converting a comma into a semicolon in order to convert a limitation on the taxing authority into a broad positive grant of power, but that Roger Sherman had caught the "trick" and restored the original punctuation.

Morris's enemies had long before the convention viewed him as lacking integrity, and Gallatin's charge has been noted by a range of scholars. It has been analyzed in the context of academic work on individual clauses.<sup>8</sup> Although some scholars have contended in interpreting particular clauses that Morris altered language to achieve some substantive end, the prevalent opinion is that Gallatin was mistaken and that Morris was an honest scrivener.<sup>9</sup> But, remarkably, no scholarly work has systematically compared the provisions referred to the Committee of Style with the draft the Committee produced in order to assess the importance of the Committee's changes. More broadly, despite the fact that the Committee of Style had the "pen" as the final draft of the Constitution to be considered by the convention was prepared, there has been no serious academic study of the Committee's work as a whole, including how its members were selected, what the relationships between them were, and their visions of the Constitution. This article offers that analysis.

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<sup>7</sup>2 Farrand 547.

<sup>8</sup>See, e.g., Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 286 n.25 (1987) (noting charge); David Engdahl, *The Basis of the Spending Power* 18 SEATTLE U. L. REV. 215, 252-4 (1995) (general welfare clause); Phillip Hamburger, *The New Censorship*, 2004 S. CT. REV. 271, 354 n.111 (same); Vasani Kesavan and Michael Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291 (2002) (new states clause); James Pfander, *History and State Suability*, 83 CORNELL L. REV. 1269, 1292 (engagements clause). For further discussion, see *infra* part V.

<sup>9</sup>Clinton Rossiter, RICHARD BROOKHISER, *GENTLEMAN REVOLUTIONARY: GOUVERNEUR MORRIS, THE RAKE WHO WROTE THE CONSTITUTION* 92 (2003); WILLIAM ADAMS, *GOUVERNEUR MORRIS* (2003)

The Committee of Style was unlike any other committee at the constitutional convention: while other committees had been divided among delegates with different perspectives, the Committee of Style was dominated by strong nationalists. Comparison of the document the Committee produced with the text previously approved by the Convention reveals a series of crucial (if largely subtle) changes. “We, the People of the United States” – the opening words of the Preamble and undoubtedly the most famous phrase in the document – were the creation of the Committee, as were the Preamble’s substantive ends – “in order to form a more perfect union, to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty. . . .” The Committee re-inserted the contracts clause into the Constitution – it had been rejected on the floor – and altered the clause’s scope, providing a textual basis for it reach public contracts. It created the familiar structure of the Constitution – Article I (Congress), Article II (Executive), and Article III (the Judiciary). It revised the vesting clauses of Article I so it was different from the vesting clause of Article II different. It altered, in important (although not obvious) ways, the language of the law of the land clause, the engagement clauses, the qualifications clause, and the new states clause. The Committee removed the word “justly” from the fugitive slaves clause.

Each of those changes were consequential. As drafter, Morris placed into the Constitution text that could be used to advance ends that he had unsuccessfully supported on the convention floor – strengthening the executive, the judiciary, and Congress, establishing judicial review, protecting private property, expanding the types of “offenses” for which the President could be impeached, allowing Congress to add eligibility requirements for service in Congress, expanding the power of the national government to assume state debts, limiting the creation of new states and fighting slavery.

Significantly, in the great constitutional debates in the Washington and Adams administration, Federalists repeatedly invoked language that Morris had placed in the Constitution. Morris in 1787 created the playbook that Federalists were to turn to again and again in the critical constitutional controversies of the 1790’s.

Recognition of the extent of Morris’s changes leads to the question what impact that text should have on constitutional adjudication today, and this article analyzes that problem from the perspective of public meaning originalism, the dominant originalist approach.

Since no previous work has analyzed the Committee of Style’s work, the Supreme Court has, obviously, never had occasion to examine this question in its full context. But on four occasions it has adjudicated cases in which text crafted by the Committee of Style arguably had a different meaning than the text previously adopted by the convention. In each case, it simply disregarded the Committee’s text, holding, in the language of *Powell v. McCormack*, that the “Committee [of Style] . . . had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so.”<sup>10</sup> Only Justice

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<sup>10</sup>395 U.S. at 538-39 (quoting Charles Warren, *supra*, at 422 n.1). See also *Utah v Evans*, 536 U.S. 452 (2002) (Census Clause); *United States Term Limits v. Thornton*, 514 U.S. 779 (1995) (Qualifications Clause); *United States v. Nixon*, 506, U.S. 224 (1993) (Impeachment Clause).

Thomas has disagreed with this approach, observing in dissent in *Utah v. Evans* that he considered the Committee of Style's language binding because it was the language that was ratified and "I focus on the words of the adopted Constitution."<sup>11</sup>

As Justice Thomas's dissent suggests, the Court's approach is at odds with democratic theory. "We, the People" ratified the constitutional text that the Convention ultimately adopted; the ratifiers not only did not adopt, they never saw the provisions referred to the Committee of Style, which were not made public until generations after ratification. At the same time, Justice Thomas's approach misses the fact that, in general, Morris's text did not have one clear meaning (and that is why it largely escaped controversy when the Committee completed its work – the newly created Federalist readings were not obvious as the convention hurriedly reviewed the entire document). Morris devised text that Federalists could rely on, but that text was sufficiently ambiguous so that Jeffersonian Republicans could draw on it, as well. Morris's text had multiple meanings.

The Jeffersonian Republican readings of the text have become originalist orthodoxy. It is the conventional wisdom that, from an originalist perspective, the Preamble is not a grant of authority, that the text of the Constitution does not authorize judicial review, that Congress is not constitutionally obligated to create lower federal courts, and that the contracts clause does not cover contracts with state governments. Similarly, the argument that the difference between the vesting clauses of Article I and II means that presidential powers should be read broadly is widely attacked as at odds with the original understanding.

But, in the most important constitutional controversies of the early republic, Federalists relied on text created in the Committee of Style to advance a dramatically different conception of the Constitution. Under the Federalist approach, the Preamble is a grant of almost plenary authority, judicial review is grounded in the Constitution's text, Congress has an obligation to create lower federal courts, the difference between the two vesting clauses evidences a broad grant of "executive power" to the President, and the contracts clause applied to contracts with states.

Recognition of those readings means that broad understandings of executive, congressional and judicial power, although contested at the time of the founding, are all grounded in the document's original public meaning. Equally important, countervailing narrow readings are also grounded in the document's original public meaning. Similarly, some in the founding generation read the text of the contracts clause to extend to state contracts - and others rejected this view.

Much of contemporary originalist debate reflects the assumption that there is one reading of constitutional text. Because of Morris, however, critical textual elements of the Constitution are ambiguous. They supported both High Federalist and Republican readings. With respect to the clauses Morris changed, a public meaning originalist should therefore find multiple textualist readings. Resolution of questions in contemporary adjudication requires examination of non-originalist sources. To use the terminology of Professor Larry Solum, these clauses are in the "construction zone," where originalists have to rely on non-originalist tools, such as precedent or

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<sup>11</sup>536 U.S. at 496.



constitutional structure, to choose between two originalist meanings to resolve modern constitutional law questions.<sup>12</sup>

This article begins, in Section I, with an overview of the Committee of Style's work, Morris's career, and Gallatin's charge. Section II examines the treatment by historians of the Committee (they have portrayed Morris as an honest scrivener), Section III looks at the Supreme Court case law, and Section IV discusses the treatment in the law review literature (where scholars have focused, almost completely, on individual clauses and, with the exception of a brief discussion by Professor Paulsen, Vasav Kesavan, and Dean Manning, ignored the larger theoretical question of what weight should be given textual changes made by Morris). As noted, although there are brief treatments of the topic, no work of scholarship has focused on the changes made by the Committee. Section V discusses Morris's constitutional positions at the convention prior to the work of the Committee and the ways in which the constitutional text that had been adopted before the Committee of Style began its work was at odds with Morris's vision. Section V then shows how Morris changed the Constitution's text in ways that advanced the central elements of his constitutional vision, and it also shows that Federalists – in particular, Alexander Hamilton and James Wilson, who had participated in the Committee's preparation of the Constitution – relied on Morris's text in virtually all of the great constitutional debates of the Early Republic. Finally, Section VI discusses the significance the Committee's text should have for modern originalists. It argues that attention to the Committee's work and the subsequent reliance on it by Federalists reveals a Federalist vision of the Constitution that modern originalists have largely missed. Although there was a competing Republican vision of the text, Morris created the basis for a Federalist understanding of the Constitution that modern originalists should recognize and that means that originalism does not provide clear answers to central constitutional questions that have been treated as having, from the perspective of originalists, clear answers.

## I. The Committee of Style and Morris's Constitution

With Morris serving as penman, the Committee of Style crafted the final draft of the Constitution considered by the Convention. This section discusses the Committee's mandate, the selection of its members, Morris's career, the questions about his integrity, and his role as draftsmen. This section concludes with an analysis of the convention's consideration of the Committee of Style's draft Constitution, with a focus on its review of the "general welfare clause" and the "offenses against the law of nations" clause, the only two clauses whose meaning Morris had changed that were discussed at the convention. The discussion of the "general welfare" clause highlights Congressman Gallatin's charge about Morris's revision of the clause.

### a. The Mandate and Selection of the Committee

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<sup>12</sup>See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *Fordham L. Rev.* 453, 458 (2013) (construction zone applies when "the constitutional text does not provide determinate answers to constitutional questions"). See also Randy Barnett & Evan D. Bernick, *The Letter and Spirit: A Unified Theory of Originalism*, 107 *Geo. L.J.* 1, 6 (2018) ("We argue that, in what Lawrence Solum has termed the "construction zone," judges should identify the original functions of individual clauses and structural design elements to formulate rules that are consistent with the Constitution's letter and calculated to implement its spirit.").

On September 8, 1787, as the work of the constitutional convention drew to a close after almost four months of often bitter debate, there was still no Constitution. The draft constitution produced by the Committee of Detail on August 6 had been subject to more than a month of debate. A host of significant additions and deletions had been voted in floor discussion. Moreover, in that month, five committees had been formed to resolve a series of issues. Not only was there no working draft Constitution, but, while the Journal of the Convention had recorded the relevant resolutions and votes, there had not even been an effort to bring together a compilation of what the delegates had in fact agreed to.

Seeking to bring their deliberations to a conclusion and coherence to the provisions that had been approved, the members of the constitutional convention created a committee “to revise the style of and arrange the articles which had been agreed to by the House,”<sup>13</sup> to quote Madison’s notes, and, following Madison, the committee has come to be known as the Committee of Style and Arrangement. But, as will be discussed below, much of the Committee’s work manifested a vision of the Constitution very different from the vision Madison was to embrace in the years after ratification, and Madison therefore had an incentive to minimize the legitimacy of any substantive changes the committee made, both in his notes and in the letter to Sparks that appears at the head of this article (where he credits Morris with the document’s “finish”). The only other notes from a delegate to discuss the creation of the committee – the notes of Dr. McHenry’s - stated that the panel was “to revise and place the several parts under their proper heads.”<sup>14</sup> Similarly, the committee’s formal name was the committee “to revise the style of and arrange the articles,”<sup>15</sup> and the Secretary called it the “Committee of revision.”<sup>16</sup> Arguably, the reference to “revision” suggest that the Committee had a mandate that ran beyond mere style.<sup>17</sup>

The delegates elected to the committee Alexander Hamilton, William Johnson, Rufus King, James Madison, and Gouverneur Morris.<sup>18</sup> It appears that James Wilson, although not a committee member, worked informally with the Committee as it prepared its draft.<sup>19</sup>

Narrative accounts about the constitutional convention center on the floor debates and particularly on the fierce debates about whether representation would be based on population and about the protection the Constitution would provide for slavery. But much of the actual work of the convention took place, not on the floor, but in the committees which were delegated a series of

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<sup>13</sup>2 FARRAND 553.

<sup>14</sup>Cite to Farrand

<sup>15</sup>1 DHC 191.

<sup>16</sup>1 DHC 193-96.

<sup>17</sup>See Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 G.W. L.J. 1620, 1648 (2012) (suggesting that Madison’s constitutional vision gave him an incentive to frame the committee’s work as limited to style and that McHenry and the official records reference to it as a committee of revision more accurately captured its mandate). Madison’s reframing of the committee’s mandate would have been consistent with his revision of his notes in light of later controversies, revisions convincingly detailed in Bilder’s *Madison’s Hand: Revising the Constitutional Convention* (2015).

<sup>18</sup>2 Farrand 553

<sup>19</sup>3 Farrand 170

major responsibilities, including, in order, the Committee to “devise and report some compromise” (which fashioned the compromise on representation), the Committee of Eleven (which framed the Constitution’s sections on the slave trade and navigation laws), the Committee of Detail (which wrote a draft Constitution), the Committee on Postponed Matters (which fashioned the method for electing the President and expanded his powers), and, finally, the Committee of Style and Arrangement.<sup>20</sup>

The composition of the Committee of Style and Arrangement was unlike the composition of any of the committees that went before.

Historian John Vile has observed, “[T]he method of committee selection was formulated with a view of facilitating . . . compromise.”<sup>21</sup> Prior committees had reflected a balance between advocates of nationalism and champions of states and between delegates from the various regions (deep South, the upper South, the mid-Atlantic states, and New England). For example, the Committee of Detail – the committee that had drafted the previous draft of the Constitution – had one strong nationalist (Pennsylvania’s Wilson), two moderate nationalists (Connecticut’s Oliver Ellsworth and Massachusetts’ Nathaniel Gorham), a champion of the states (South Carolina’s John Rutledge, who served as chair) and one delegate who ultimately refused to sign the Constitution (Virginia’s Edmund Randolph), and it had geographic balance, with one representative from the deep South, one from the upper South, one from the mid-Atlantic region, and two from New England. The draft produced by the Committee of Detail reflects this orientation – it limited the powers of the national government (substituting the Virginia plans open-ended grant of powers to the national government with an enumeration of limited powers) and a series of protections for slavery.

In contrast, the Committee of Style was, to an astonishing degree, nationalist in orientation. For example, in historian Forrest McDonald’s analysis of the delegates, 14 of the 55 delegates are categorized as strong nationalists.<sup>22</sup> Of this group, four were on the Committee of Style: Hamilton, King, Madison, and Morris. Wilson, the committee’s informal advisor, also numbers among the 14. Only William Johnson of Connecticut, the Committee’s chair, was not a strong nationalist, and he falls in the category of moderate nationalist.

Even more important, not only was the Committee composed of nationalist voices, it was –

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<sup>20</sup>While scholarship has traditionally focused on the floor debates, recent articles by two scholars illuminatingly examine the work of the Committee of Detail. See William Ewald, *The Committee of Detail*, 28 *Constitutional Commentary* 197 (2012); John Mikhail, *The Necessary and Proper Clauses*, 102 *Georgetown Law Journal* (2014) (forthcoming). Because of this focus on the importance of committee drafting, Professors Ewald’s and Mikhail’s project parallels this one in moving from floor debates in studying constitutional construction, although they examine the work of a different committee. Similarly, while modern scholarship has focused on Farrand’s record of floor debates, Mary Sarah Bilder has recently defended the historical value of the official records (which Farrand disparaged). See Mary Sarah Bilder, *How Bad Were the Official Records of the Constitutional Convention?*, 80 *George Washington L.Rev.* 1220 (2012). Thus, like this essay, Bilder is seeking to expand the focus of modern scholarship on the drafting of the Constitution beyond Farrand’s record of the floor debates.

<sup>21</sup>Vile at 151.

<sup>22</sup>FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 186-187 (1985). McDonald 186-87.

very precisely – composed of *the leading* nationalist voices at the convention. Thus, historian William Gienapp has recently written of the federal constitutional convention:

The current system [the Articles of Confederation] appeared to have reached a breaking point and many national leaders favored dramatic reform. Accordingly, when the delegates assembled, Madison and his fellow nationalists – especially George Washington, Alexander Hamilton, James Wilson, Gouverneur Morris, and Rufus King – expanded the scope of the project. Rather than merely revising the Articles – as some believed they had been instructed to do – they opted to construct a brand new constitutional order.<sup>23</sup>

In light of Gienapp’s observation, the committee’s membership merits highlighting. Washington, as President of the Convention, did not serve on any committee and thus presumably was not considered for the committee.<sup>24</sup> Remarkably, the other five leading nationalists at the convention – Morris, Madison, Hamilton, King, and Wilson – *all* participated in the work of the Committee of Style. Since committees at the convention generally had only one delegate from the same state,<sup>25</sup> the convention could only have placed Morris or Wilson on the committee, since both were Pennsylvanians. The delegates picked Morris, but Wilson nonetheless served as a de facto committee member. The only counterweight to the strong nationalists was a moderate nationalist (Johnson).

At the convention, the committee members (with the exception of Johnson) had served as a united block fighting for a strong national government. On the first day of the convention, Governor Randolph of Virginia introduced what has come to be known as the Virginia Plan, which envisioned a strong national government. That proposal had been prepared in a week of informal meetings before the convention’s start that had involved, not only the members of the Virginia delegation (with Madison apparently playing the dominant role), but Wilson and Gouverneur Morris.<sup>26</sup> After Randolph presented the plan on the floor of the convention, Morris successfully moved for the adoption of its core principles. Morris, Wilson, and Madison then went on to become, in a literal sense, the dominant voices at the convention – with Morris speaking more than any delegate (173), Wilson the second most (168) and Madison the third most (161).<sup>27</sup> In addition to speaking frequently, Morris proposed more resolutions than any other delegate (39) and had more adopted than any other delegate (22); Wilson was second in motions passed (18 – tied with Randolph) and third in terms of motions made (31, following Morris and Madison). Madison made more motions than anyone but Morris (35), although he had a lower pass rate than his fellow nationalist leaders (13, placing him after Gouverneur Morris, Wilson, and Randolph, and tied with Gerry).<sup>28</sup> King spoke less often than the first three, but was consistently

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<sup>23</sup>Gienapp at 1200 to 1201.

<sup>24</sup>Vile at 151.

<sup>25</sup>The sole exception to this rule was the Committee on Original Apportionment of Congress, which had two members from Massachusetts, King and Gorham. There is no evidence as to why Congress, in selecting that committee, departed from its otherwise uniform practice.

<sup>26</sup>Ellis

<sup>27</sup>Rossiter at 252.

<sup>28</sup>Keith L. Dougherty and Jac Heckelman, A Pivotal Voter from a Pivotal State: Roger Sherman at the

an advocate of a strong national government. Hamilton was, surprisingly, the least significant floor presence of the five, perhaps because he was stymied by the fact that the other two New York delegates were opposed to revision of the Articles of Confederation. But his most significant speech – his six hour long oration on August 16 – was the most nationalist speech at the convention, more nationalist than even the Virginia Plan.

Thus, as the final draft of the Constitution was being prepared, strong nationalists held the pen.

There was also a tilt in the regional representation on the Committee, though this was less dramatic and less consequential than the shift on nationalism. Where other committees had representation from New England, the mid-Atlantic region, the Upper South and the Deep South, the Committee had four members from the North (two from mid-Atlantic states – Morris and Hamilton – and three if one counts Wilson – and two from New England (King and Johnson), only one from the Upper South (Madison), and no one from the Deep South. In a convention that had fought bitterly over slavery, the drafting committee had the two members of the convention who had most strongly attacked the Constitution’s protections for slavery (Morris and King, with Morris being by far the strongest voice) and the chair of the New York anti-slavery society (Hamilton). Nonetheless, the Committee membership promised substantial protection for slavery. Madison had defended slavery during the debates, although he had recognized slavery’s immorality. Not only did Connecticut’s Johnson own slaves, but he had, when a member of Congress, sold one of his slaves who disobeyed him to a South Carolina congressman, and, at the convention, endorsed South Carolina’s and Georgia’s proposal to allow the importation of slaves for twenty years.<sup>29</sup>

The make-up of the committee reflected the selection process for committee members. Until recently, in all the academic studies of the convention, there has been little analysis of how the committees were selected. The convention records simply note that committee election was “by ballot” but provide no other information on the method for choosing committee members.<sup>30</sup> In 2018, however, historian and legal scholar David Stewart provided the first detailed analysis of the subject. He has convincingly argued that the convention had two different types of committee, and there were different selection processes for the different types.<sup>31</sup> The committees of eleven handled specific issues that the convention as a whole could not resolve – such as the structure of the presidency or the balance between large states and small states. Each state had a representative, and each states’ delegation chose its own representative.<sup>32</sup> In contrast, the two

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Constitutional Convention, 100 Am. Poli. Sci. Rev. 297, 301 (2006) (chart of motions made and passed at the convention).

<sup>29</sup>King’s, the Revolution and Slavery Chapter Five (columbiaandslavery.columbia.edu)

<sup>30</sup>1 Farrand 12 (“ Committees shall be appointed by ballot; and the members who have the greatest number of ballots, altho’ not a majority of the votes present, shall be the Committee. . .” (resolution of the Rules Committee).

<sup>31</sup>David O. Stewart, Who Picked the Committees at the Constitutional Convention?, *Journal of the American Revolution* (September 13, 2018). For a competing view, see Rakove at 379 n.38 (each delegate voted as individuals for all committees). Both the Rakove and the Stewart view lead to the same conclusion for the Committee of Style: delegates voted individually to select that committee members.

<sup>32</sup>Id. Rhode Island did not send delegates, and two of New York’s three delegates departed early (leaving Hamilton as the sole delegate and two delegates were necessary for a state to vote). Thus, the committees of eleven

drafting committees – the Committee of Detail and the Committee of Style – each had five (as opposed to eleven) members, which meant that not all states were represented, and the members were chosen by the votes of individual delegates (rather than having a state’s delegate chosen by the state’s representatives).

As the convention drew towards the close and the adoption of a Constitution of some type came to seem inevitable, delegates who were ambivalent or hostile to the Constitution began to head home. 13 of the 55 delegates were no longer attending in the last month, and the delegates who had returned home were primarily proponents of the view that the national government should be weak. Only one delegate who had been absent returned at the end of the proceedings, and that delegate was the strong nationalist, Alexander Hamilton. The percentage of voters who were nationalists was higher than at any previous point in the proceedings, so it is not surprising that the Committee of Style was dramatically more nationalist than any of the prior convention committees.

Moreover, adoption of the Connecticut compromise – which gave each state a seat in the Senate – had decisively altered the perspective on nationalism of the small states of the mid-Atlantic region: Maryland, Delaware, and New Jersey. For most of the convention’s proceedings, representatives of these states had largely opposed a strong national government. But once these states secured a strong voice in the national government through the Connecticut Compromise, they embraced a government with expansive power. And these states had a comparatively large number of delegates. The convention allowed each state to send as many delegates as it chose (although delegations had to consist of at least three members). Because Philadelphia was close to home for the mid-Atlantic states, which made service at the convention easier and transportation costs less, the mid-Atlantic states had the most sizeable delegations, other than Virginia’s. Thus, at the time the vote was taken for the Committee of Style, of the 42 delegates, 15 came from the now-pro-nationalist small states of the mid-Atlantic.<sup>33</sup> When these voters were combined with the seven Pennsylvania delegates – who had been pro-nationalist throughout the proceedings – a near majority of the voters when the Committee of Style was selected were from the nationalist, mid-Atlantic block. When these mid-Atlantic votes were combined with pro-nationalist votes of delegates in the other regions, the fact that the final committee, the Committee of Style, was more nationalist than any that had gone before was inevitable.

In addition to their shared constitutional philosophy, there were strong ties between the members of the committee.

One of the great divisions at the convention was between delegates who spent the revolutionary period in state government and those who had served in the national government (in the military, the Continental Congress, the departments of the national government or some combination of these roles). Not surprisingly, the former group tended to favor strong state governments, and the latter tended to favor a strong national government.<sup>34</sup> All the members of

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represented each of the delegations that could vote.

<sup>33</sup>Cite to Mikhail and show break-down of states.

<sup>34</sup>Ellis

the committee fell into the latter category. Indeed, they had all served together. In the years immediately preceding the convention, Johnson, Madison, King, Wilson, and Hamilton were in the Continental Congress, and Morris (who had earlier served in the Congress) was Assistant Superintendent of the Treasury. Thus, the group had working relationships that predated the convention.

There were also strong personal connections between the nationalists on the committee. Hamilton and Madison had worked together closely as members of the Continental Congress. In the years before the constitutional convention, they were a familiar sight on the streets of Philadelphia, walking together and developing strategies to strengthen the national government. They had been two of the twelve delegates at the 1786 Annapolis Convention, which had issued the call for what was to become the federal constitutional convention, and their close working relationship was to continue during the ratification debates as they became the two principal authors of the *Federalist*.

Hamilton and King were close friends. Their ties were so close that, after ratification, Hamilton convinced King to move to New York, where King re-launched his political career and, because of Hamilton's backing, was elected to the United States Senate.<sup>35</sup> Hamilton was tied to Johnson through Columbia College. Hamilton was a member of the Board, and Johnson the recently named President.

Morris and King were close friends. Morris and Wilson had an important professional relationship. They had been co-counsel on what was, other than the early judicial review cases, the most important legal matter in the revolutionary era: the argument before the Pennsylvania legislature's against the proposed termination of the corporate charter of the Bank of the United States.

The closest tie on the committee, however, was between Morris and Hamilton. There was a natural bond between the two, outgoing, witty New Yorkers, both lawyers, both educated at Columbia, with similar politics and a common interest in finance (although, as will be discussed, very different personal backgrounds). The two had first worked together during the Revolutionary War when Hamilton was aide de camp to Washington and Morris a member of the Continental Congress inspecting the military. Hamilton revered the slightly older Morris for his intelligence and presence, and the two established a strong friendship. They worked closely together when Hamilton was in Congress and Morris the Assistant Superintendent of Finance.

They both had deep ties to Washington, and the relationship of each with the future President has been compared to a father-son relationship, although father-son relationships of very different types. Hamilton's career was in large part based on his work for Washington, during the war on the General's staff, as Secretary of Treasury, and as Major General under Washington during the Whiskey Rebellion.

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<sup>35</sup>Chernow. Hamilton support for King ultimately had disastrous consequences, since the angered rival candidate, Robert Livingstone, ultimately came to support the Jeffersonian Republicans, and that support was critical to the election of President Jefferson and Vice President Burr in 1800.

Morris's relationship with Washington had begun at the start of the Revolutionary War, when the 25 year old Morris had been the New York Provincial Congress' liaison with the General, and their relationship evolved into a strong social one. Washington and Morris were in many ways polar opposites. Morris was irreverent, irrepressible, talkative, given to bombast, obviously brilliant, and frequently sarcastic. Washington, dignified, self-controlled, insecure about his education, and careful in speech, enjoyed his company. During the course of the convention, Washington traveled around Philadelphia and to Valley Forge with Morris on two weekends when delegates were meeting, and, when the convention concluded, Washington departed Philadelphia with Robert Morris (with whom Washington had been staying) and Gouverneur Morris.

The Washington-Morris relationship did, however, have limits. In the most famous (if probably apochryphal) story involving Morris at the convention, Hamilton dared Morris to clap Washington on the back, offering to host a large dinner if Morris took the dare. Morris did (or so the story goes). He reported to Hamilton that Washington had responded to the clap on the back with a withering stare. "I would give anything in my power to undo that act," Morris said, "Never has a dinner proved so costly."

As the Washington clap-on-the- back story suggests, there was a playful side to the Morris-Hamilton relationship. There were, however, suspicions that the relationship between the two had a darker side. As will be discussed subsequently, there is strong evidence that both encouraged the Newburgh Conspiracy, a planned mutiny of Revolutionary Army officers in 1783, in the hopes that the mutiny would force the Continental Congress to expand its authority.

The close relationship between Morris and Hamilton was to be life-long. After the convention concluded, Hamilton beseeched Morris to join with him and Madison and Jay in writing *The Federalist*. (Morris, for reasons that are unclear but that are probably because he wanted to focus on business concerns, declined.) Later, Hamilton asked Morris join him in writing a history of the world. (Again, Morris declined, and the project never came to fruition.)

When Burr shot Hamilton and Hamilton lay dying, Eliza Hamilton called for Morris. "You are his dearest friend in the world," she said. And when Hamilton was buried, Morris gave the eulogy at his widow's request. "I fear," his moving extemporaneous address at the funeral began, "that instead of the language of a public speaker, you will hear only the lamentations of a bewailing friend."

The four strong nationalists on the committee were also bound together by age. They were in the same cohort – all in their thirties.

And the Federalist Papers is one final indication of the ties among them. When Morris turned down the offer to join Hamilton and Jay as Publius, Hamilton turned to Madison. Madison accepted, and suggested King as "a proper auxiliary."<sup>36</sup> While Hamilton held King in

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<sup>36</sup>See Madison's Detached Memoranda, WMQ, 3d ser., III [1946], 564-65 (Elizabeth Fleet, ed.)



high regard, he advised Madison that King's talents were not "altogether of the sort required for the task in view."<sup>37</sup> And so the four members of the Committee of Style (other than Johnson) were the two primary authors of the Federalists and two near-authors.

Thus, when the convention selected Johnson, Hamilton, Madison, Morris and Hamilton for the Committee of Style and Arrangement, they placed a strongly nationalist group in charge of crafting the final document. When Wilson was informally added to group, its nationalist cast was strengthened even further. The men were linked not only by approach to the Constitution, but the strong nationalists had worked together during the proceedings. And there were important personal ties between the committee members, particularly between Morris and Hamilton.

When the Committee convened, Johnson, the chair, asked Morris ("with the ready consent of the others," Madison observes) to prepare a draft Constitution.<sup>38</sup> Given Morris' strength and experience as a wordsmith and a legislative drafter and the respect in which he was held, he was an obvious selection even among a very talented group, but his reputation was complicated.

#### **b. Gouverneur Morris**

There is a great irony to Morris's place in history: he is both largely forgotten and seemingly unforgettable. Even apart from his role at the constitutional convention, he led a life crowded with incident and work of profound consequence.

Morris was a descendant of one of the most politically prominent and wealthiest families in the colony of New York. His grandfather, Lewis Morris, had served as Governor of New Jersey, and was, to quote the eminent historian Bernard Bailyn, "the least egalitarian of men,"<sup>39</sup> a description that could also be applied to Gouverneur. Lewis Morris, Jr., Gouverneur's father, served for decades as a British Vice Admiralty Judge and owned Morrisania, 1920 acres of what is now the South Bronx, one of the largest manors in the New York City region. Sarah Morris, Gouverneur's mother, was Lewis, Jr.'s second wife and also came from a prominent and wealthy family. The couple had five children. Gouverneur was the last child and first boy. Gouverneur was his mother's maiden name.

Lewis's father died when Gouverneur was ten. He had already left home, having been enrolled at Benjamin Franklin's Academy in Philadelphia. He proved a prodigy. At 12, he began his studies at Columbia College, the youngest in his class by three years. He was a success in his studies, graduating second in his class (although, admittedly, there only seven graduates) and delivered the commencement address, in which he presciently spoke of "the glorious title of free born American[s]." <sup>40</sup>He read law and was admitted to the bar at 19. Despite his youth, he rapidly established himself as a successful lawyer commanding high fees, while also becoming a real estate speculator.

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<sup>37</sup>Id.

<sup>38</sup>3 Farrand 499.

<sup>39</sup>Bernard Bailyn, *Origins of American Politics*,

<sup>40</sup>Kiershce at 30.

As the Revolution approached, Morris became involved in politics. He initially supported seeking accommodation with the Crown, but by 1775 Morris had become a powerful voice in favor of Revolution. He also enlisted in the New York militia, serving as a Lieutenant Colonel.<sup>41</sup> In May 1776, as a 24 year-old member of New York's Provincial Congress, he delivered a memorable three hour calling for independence and introduced a motion for the election of a new body that would establish a new government for New York State. A week later, the Provincial Congress adopted his motion.<sup>42</sup>

In aligning himself with the Patriot cause, Morris decisively broke with most of his family. His elder step-brother Staats Long Morris served as a British General, married a Duchess, and eventually became a member of Parliament.<sup>43</sup> Even more notably, his mother Sarah Morris was an outspoken Tory, never abandoned her support of the crown, and remained on her estate in what was, for most of the war, Loyalist controlled New York.<sup>44</sup> Morris never saw his mother after the war began, and, with the exception of one letter that he wrote when his sister died, he severed all ties with her until her death in 1783.<sup>45</sup>

In 1777, at the age of 24, Morris was one of the three principal drafters of the New York State Constitution (along with John Jay (another close friend) and Robert Livingston). That year, he was elected as one of New York's representatives to the Continental Congress, where he signed the Articles of Confederation.<sup>46</sup> He served one term in Congress, but was not re-elected. Most historians think he was not reelected because he was not supportive of New York's interests in its territorial disputes with Vermont. From 1781 through 1784, he was the nation's Assistant Superintendent of Finance, serving under his close friend and eventual business partner Robert Morris, the Secretary of Finance (and no relation). The two Morrises administered the finances of the government and "carried out daring, outrageous strategies to keep the country afloat to the end of the war," ensuring the funding that the army needed despite the national government's lack of taxing authority and the states refusal to honor Congress's request for support.<sup>47</sup> From 1784 to 1787, with the conclusion of the war, he focused on his business activities, which were principally with Robert Morris.

Gouverneur Morris was surprised at the Pennsylvania legislature's decision to name him to its delegation at the constitutional convention. He was a New Yorker, so he was not an obvious candidate for selection to represent Pennsylvania. Moreover, he had announced that he did not want to be named to the Pennsylvania delegation and was in Trenton on business when the legislature voted. It appears that the politically powerful Robert Morris convinced the legislature to add Gouverneur to its delegation, although it was a close thing. Of the seven delegates named,

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<sup>41</sup>Kiersche at xi.

<sup>42</sup>Kiersche at 43, 52.

<sup>43</sup>Adams 143.

<sup>44</sup>See Kiersche at 38 for a complete listing of the family's allegiances.

<sup>45</sup>Kiersche.

<sup>46</sup>Kiersche at 107.

<sup>47</sup>Adams x-xi.

Gouverneur received the fewest votes. (James Wilson received the next fewest votes, so two of the three most prominent delegates at the convention were narrowly elected).

Morris was physically unforgettable and had a vivid personality. Like Washington, he stood almost 6 foot 4, and the two towered over most of their fellow delegates. (Indeed, the two men were of such similar size and build that the sculptor Houdin used Morris as his model when he created the statues of Washington that now stand outside Independence Hall and the state capitol in Richmond.) By comparison, Madison was 5 feet 4 inches, and Alexander Hamilton was 5 feet 7 inches. Morris had a peg leg, and his right arm had been badly scalded in a childhood accident. He was irreverent<sup>48</sup> and witty.<sup>49</sup> He was gregarious and had a gift for friendship. He was also arrogant with a tendency to be bombastic, and, to an extent unique at the convention, he spoke his mind. He seems never to have stopped talking. The fact that he was the most frequent speaker at the convention is particularly remarkable because he left Philadelphia for three weeks in the midst of the debates to attend to business matters (whereas Wilson and Madison, the second and third most frequent speakers, attended every session.) His nickname in New York political circles captured his combination of size, talkativeness, buoyancy and lack of self-restraint: he was the “Tall Boy.” He had many friends, and he had many critics.

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His great gifts were evident. In his private character sketches of his fellow delegates, Georgia’s William Pierce wrote:

Mr. Gouverneur Morris is one of those Genius’s in whom every species of talents combine to render him conspicuous and flourishing in public debate: He winds through all the mazes of rhetoric, and throws around him such a glare that he charms, captivates, and leads away the senses of all who hear him.<sup>50</sup>

Like Pierce, Madison and Hamilton both chose the same word to describe Morris: they called him a “genius.” Historians have repeatedly reached the same conclusion. Theodore Roosevelt, in an early biography of Morris, wrote, “There has never been an American statesmen of keener intellect or more brilliant genius,” adding that Morris had the capacity to “have stood among the two or three very foremost” statesmen in the history of the United States.<sup>51</sup> Max Farrand, the great historian of the conventional convention, described Morris as “probably the most brilliant member of the Pennsylvania delegation and of the convention as well.”<sup>52</sup> Morris was, William Gienapp has recently observed, “dazzlingly talented.”<sup>53</sup>

Morris had a gift with words and a background in drafting that made him the logical choice to serve as the committee’s drafter. Unlike any of the other committee members, he had

<sup>48</sup> Farrand (slapping Washington).

<sup>49</sup> See Rossiter at 248-49 (describing convention speeches). His fellow delegate William Pierce wrote, “No man has more wit.” 3 Farrand 92.

<sup>50</sup> 3 Farrand 92.

<sup>51</sup> Roosevelt at 3284.

<sup>52</sup> Farrand, *The Framing of the Constitution* at 21.

<sup>53</sup> Gienapp at 1519.

experience in writing a constitution (having served as one of the principal drafters of the New York Constitution of 1777) and that experience alone would have made him the obvious candidate to prepare the draft. Even apart from that experience, however, he had a strong background as a drafter of legal documents. During his career in the New York legislature, Continental Congress, and assistant superintendent of finance, he had been called upon to write literally hundreds of reports and statutes, including such major documents as Congress's 1778 response rejecting Lord North commissioner's entreaty to begin peace negotiations.<sup>54</sup> Indeed, Morris's most influential contribution to the English language is arguably not "We the People of the United States." As assistant superintendent of finance, in a report on the national monetary system, he invented the word "cent" – in connection with his plan that the nation's monetary system be based on the decimal system – and argued that the Spanish term "dollar" should be adopted as the basic unit of currency.<sup>55</sup> At the convention, he had already been enlisted to draft the Brearley Committee report, which introduced the electoral college.

Equally relevant to his selection as drafter, he was eloquent. His speeches at the convention read differently than those of his fellow delegates. Madison and Wilson are, for example, typically dry and careful, and they appealed to reason. Not surprisingly, their favorite readings were works of history, philosophy, and law. In contrast, Morris, to again quote fellow delegate Pierce, "winds through all the mazes of rhetoric, and throws around him such a glare that he charms, captivates, and leads away the senses of all who hear him."<sup>56</sup> He loved literature and wrote poetry throughout his life, and his speeches reflect great literary gifts. He could be funny,<sup>57</sup> and he could be threatening.<sup>58</sup> His speech rebuking delegates who thought of themselves as representatives of states and demanding that they think first of the nation – "I am an American," he proclaimed – and his powerful denunciation of slavery and the three-fifth clause are in my opinion the strongest speeches at the convention. The fact that Eliza Hamilton asked him to deliver Hamilton's eulogy at Trinity Church and that Martha Washington asked him to deliver the eulogy for Washington in the Senate reflected, not just the closeness of his ties to Hamilton and Washington, but acknowledgement of his gifts as an orator. Most strikingly, Hamilton's request that he join in the writing of *The Federalist* reflects recognition of his power with words.<sup>59</sup> His decision to not join in the effort was a loss. As biographer Richard Brookhiser has observed, "[T]he Federalist Papers [Hamilton, Madison, and Jay] wrote are clear, earnest, and intelligent, often ringing, but they made their way without Morris's sparkle."<sup>60</sup>

People in the revolutionary era and early republic repeatedly turned to Morris when words mattered. Equally significant, for Morris words mattered more than they did for most, and perhaps all, of his fellow delegates.

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<sup>54</sup>Kiersch at —.

<sup>55</sup>Roosevelt at 107.

<sup>56</sup>3 Farrand 92.

<sup>57</sup>Vice President speech and other speech cited by Rossiter.

<sup>58</sup>Early speech suggesting that we must part if small states insist on equal representation.

<sup>59</sup>3 Farrand 421 ("I was warmly pressed by Hamilton to assist in writing the Federalist, which I declined.")

<sup>60</sup>Brookhiser 92.

As Professor Gienapp has written, “Prior to 1787, American judges and lawyers tended to interpret constitutions according to their spirit, structure, and purpose. Rarely did they consider a constitution’s language to be constitutive of its meaning or its defining feature.”<sup>61</sup> This approach reflected colonial heritage. The British constitutional system lacked a written constitution, and the words of documents of constitutional stature, like the Magna Carta, the Petition of Right of 1628, and the Declaration of Rights of 1689, as well as the words of colonial charters, were only one source of constitutional meaning. The various bills of rights “possessed authority . . . because they articulated fundamental liberties or had been reinforced by custom.”<sup>62</sup> Professor Gienapp has observed. “The written compacts . . . blended seamlessly into a complex, dynamic whole defined as much by custom, history, and constitutional practice.”<sup>63</sup>

Even as Americans in the revolutionary era adopted state constitutions, the older approach to constitutional understanding, in which text did not fully determine legal meaning and words could be trumped by other concerns, continued to shape interpretation. Contrary to conventional wisdom, there was a substantial body of judicial review caselaw in the revolutionary era and early republic prior to *Marbury v. Madison*,<sup>64</sup> - more than thirty cases in which courts invalidated statutes – and it is striking how little attention courts in these cases paid to precise constitutional wording.<sup>65</sup> An illustrative example is *Commonwealth v. Caton*,<sup>66</sup> the 1782 Virginia case which was the first judicial review decision in the state, and a case in which a host of critical figures (including Madison, Randolph, and, probably, Marshall, who according to legend was in the courtroom when the decision was announced) .

The case involved three prisoners who had been granted a pardon by the lower house of the state legislature. While the Virginia Treason Act required that both houses had to approve a pardon, the state constitution seemed to make a pardon by one house sufficient. The defense maintained that “the act of the assembly was contrary to the plain declaration of the constitution; and therefore void.”<sup>67</sup> Edmund Randolph, then the state attorney general, countered that in interpreting the constitution, “the liberality necessary to capture its spirit, must be adopted.” The influential Chief Justice Pendleton concurred. In ruling against the prisoners, he proclaimed that the case “should be decided according to the spirit, and not by the words of the constitution.” Consistent with Pendleton’s approach, both early decisions upholding statutes and those striking them down are strikingly atextual. In particular, courts in a majority of the early judicial review decisions struck down statutes that they deemed inconsistent with the right to a jury trial or judicial independence even though there was no apparent inconsistency between the statutes and the constitutional text.<sup>68</sup>

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<sup>61</sup>Gienapp at 1106.

<sup>62</sup>Gienapp at 2131.

<sup>63</sup>Gienapp at 455.

<sup>64</sup>cite

<sup>65</sup>Cite to dissertation, Stanford, Against Textualism.

<sup>66</sup>cite

<sup>67</sup>cite

<sup>68</sup>Dissertation, Stanford

Consistent with this approach, convention delegates focused on structure and for the most part devoted surprisingly little attention to precise wording. The central debates at the convention – the debates about state representation in Congress and about the 3/5<sup>th</sup> clause – were about structure. In contrast, much of the text that subsequently became of central importance to constitutional law was ambiguous even to the drafters. The drafting history of the direct taxes clause, the declare war clause, and the commerce clause – perhaps the three most contested clauses in the Constitution – is illustrative. Immediately after the direct taxes clause was adopted, Rufus King asked his fellow delegates, “What is a direct tax?” Madison’s notes indicate that no one responded, and the delegates simply moved onto the next topic. When the declare war clause was adopted, the drafters were primarily motivated by their unhappiness with the Committee of Detail’s proposal that Congress have the power to “make war.” There was little discussion about what “declare war” meant, and no discussion of the fact that the term “declare war” had a meaning in international law – formalizing a state of hostility between nations in ways that provided protections to the nation’s citizens – that was very different from what the drafters apparently wanted to do, which was to give Congress the power to decide to initiate conflict. Towards the end of the relatively short debate about the commerce clause, Madison observed that the word “commerce” was “vague.”

Textual imprecision was, in part, the product of a rapid drafting process, as well as a desire to paper over disagreement in order to achieve support for the Constitution. But, even more fundamentally, it reflected the fact that, as Gienapp has written, “delegates largely refused to imagine the writing of a constitution through a textual prism. For most, constitutionalism still meant balancing powers and interests – building a functioning system of constituent political relationships, not policing linguistic barriers.”<sup>69</sup>

Some delegates went farther than not focusing on text. To quote Gienapp again, they “openly disparaged the idea of reducing constitutions to text.”<sup>70</sup> Madison was the leading advocate of this view, stating that, [i]f a Constitutional discrimination of the departments on paper were a sufficient security to each [against] encroachments of the others . . . all further provisions would be superfluous.”<sup>71</sup> Madison’s concern was not simply with the efficacy of text to control action, but with its determinacy. As he was to write in Federalist 37, “When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful, by the cloudy medium through which it is communicated.”

Madison’s concerns about language were a major reason for his championing (unsuccessfully) the proposal that Congress could veto state legislation “in all cases whatsoever.”<sup>72</sup> Madison firmly believed that such an open-ended power was necessary because no written constitutional limits could check state abuses. He wrote Jefferson that, regardless of how “ample the federal powers may be made, or however Clearly their boundaries may be delineated

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<sup>69</sup>Gienapp at 1205.

<sup>70</sup>Gienapp at 1295.

<sup>71</sup>Gienapp at 1295.

<sup>72</sup>Virginia Plan.

on paper . . . they will be easily and continually baffled."<sup>73</sup> Madison's failure to secure this congressional veto over state legislations, a proposal for which he and Wilson had repeatedly fought, was the major reason why, at the end of the convention, he was deeply disappointed with the final document.

Morris was at the opposite end of the spectrum in terms of his approach to text. He treated wording as profoundly significant. Where Madison and Wilson fought for a congressional veto, he opposed it – one of the few subjects involving national power in which he disagreed with his fellow nationalists. Morris argued that the proposal was not only anathema to states, but it was unnecessary. He asserted that judicial review was "sufficient" to limit state authority. Unlike Madison and Wilson, he thought textual limits were adequate to check states.

Throughout the convention (even apart from his role as Committee of Style drafter), Morris was deeply attentive to word choice and to the ways in which text would be construed, and his consistent attention to wording and construction was unmatched among the delegates. For example, in framing the scope of congressional power, he proposed (unsuccessfully) that Congress have the "police" power, the only delegate to use this broad term in connection with congressional power. He again used a term that no one else used when, in connection with his work on the Committee of Style, he wrote the letter transmitting the Constitution to the Continental Congress – a letter which Professor Daniel Farber has referred to as the Constitution's "cover letter." The letter asserts that the Constitution is a "consolidation" of power – a word that was anathema to Anti-Federalists and that had, literally, not been uttered at the convention. Morris inserted the word in the Constitution's "cover letter" in a way that provided support for a nationalist construction of the Constitution.

His attentiveness to future construction is indicated as well by his understanding of the general welfare clause, as indicated by delegate James McHenry's notes. In his notes for September 4, McHenry observes: "Upon looking over the constitution it does not appear that the national legislature can erect light houses or clean out or preserve the navigation of harbours . . . This to be further considered. A motion to be made on the light house etc, to-morrow."

While McHenry did not make that motion, in his notes for September 6 he wrote: "Spoke to Gov Morris Fitzimmons and Mr Goram to insert a power in the confederation enabling the legislature to erect piers for protection of shipping in winter and to preserve the navigation of harbors - Mr Gohram [sic] against. The other two gentlemen for it ...." McHenry's notes continue: "Mr Gov: thinks it may be done under the words of the I clause I sect 7 art. amended - and provide for the common defence and general welfare." McHenry was aghast: "If this comprehends such a power, it goes to authorise the legisl. to grant exclusive privileges to trading companies etc."

A particularly powerful example of Morris's attentiveness to text and how it would be construed (as well as his capacity for deception) is the new states clause. As will be discussed later, Morris wanted to limit the number of new states and their political power, a position that no other delegate appears to have shared, and he covertly secured constitutional language to advance this end.

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<sup>73</sup>Gienapp at 1191.

Towards the end of the convention, as the delegates worked through the Committee of Detail's drafted and turned to its provision on new states, Morris rose to propose an alternate provision. Madison's notes report:

Mr Govr Morris moved to postpone this [discussion of the new states provision] in order to take up the following. "The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. States; and nothing in this constitution contained, shall be so construed as to prejudice any claims either of the U-- S-- or of any particular State."<sup>74</sup>

There was no substantive discussion of the meaning of the clause, except that Maryland's Luther Martin proposed the addition of a provision that any claims could be litigated in the Supreme Court, which Morris responded was "unnecessary, as all suits to which the U.S. -- are parties -- are already to be decided by the supreme Court of the U -- States."<sup>75</sup> Without further debate, Morris's addition of this clause on territorial governance was adopted, with Maryland alone dissenting.<sup>76</sup>

While the clause was thus adopted without discussion of its import, Morris saw it as profoundly consequential. Writing a letter to Henry Livingston 1803, at the time of the Louisiana Purchase, he boasted that he had crafted the territories clause in such a way that it barred newly acquired territories from becoming states, but that he had hidden the clause's meaning so that his fellow framers would fail to realize what the clause meant. Livingston has asked Morris "whether the. Congress can admit, as a new State, territory, which did not belong to the United States when the Constitution was made."<sup>77</sup> Morris answered, "In my opinion they cannot."<sup>78</sup>

Morris took credit for having proposed the relevant language: "I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article [of the Constitution], I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made."<sup>79</sup>

Morris was playing with extraordinary skill and foresight a high stakes interpretive game that his fellow delegates were largely unaware was afoot. Where they were often casual in framing text, he approached the task with seriousness and attention to the goals he sought to advance.

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<sup>74</sup>2 Farrand 466.

<sup>75</sup>2 Farrand 466.

<sup>76</sup>2 Farrand 466.

<sup>77</sup>3 Farrand 404.

<sup>78</sup>3 Farrand 404.

<sup>79</sup>3 Farrand 404.



So, when Johnson selected Morris, he picked a drafter of substantial political experience, a leading voice at the convention, someone whose great intelligence commanded respect, and someone who was both skilled with words and who took words seriously.

At the same time, he picked someone whose integrity was widely questioned. “The world in general allows greater credit for his abilities than his integrity,” Hamilton’s good friend John Laurens wrote in a 1779 letter.<sup>80</sup> Delegate William Pierce said he is “fickle and inconstant.”<sup>81</sup> According to a confidential report prepared by the French embassy, he was “without morals and, if one believes his enemies, without principles. . . .”<sup>82</sup> Morris’s deceptive crafting of the new states clauses suggests such challenges to his integrity were warranted. His reputation as lacking integrity had three different grounds.

One was his personal life. He was, to quote one recent historian, “a consummate philanderer.”<sup>83</sup> and one of his leading biographers gave his book about Morris the subtitle: “The Rake who Wrote the Constitution.”<sup>84</sup> His biographers disagree about whether he had a peg leg because his leg had been jumping out of a window to evade a husband or whether it was the product of a carriage accident, but the prevalence of the former story reflects his reputation. Fellow delegates and other political leaders were well aware of his numerous affairs. Even his allies were troubled by his promiscuity.<sup>85</sup> Others considered him immoral. John Adams and Samuel Adams “despised him”<sup>86</sup> Connecticut delegate Roger Sherman wrote a friend, “[W]ith regard to moral character I consider him [Morris] an irreligious and profane man. . . . I am against such characters.”<sup>87</sup>

Second, there was widespread belief that he and Robert Morris had used their posts as Assistant Superintendent of Finance and Superintendent of Finance to enrich themselves improperly. Modern scholarship indicates that these charges were unwarranted and that Robert Morris, in fact, spent a substantial amount of his personal funds in support of the war efforts. Nonetheless, the suspicions about both Morris’ were widespread.

Third, and most consequentially, it was widely believed that, acting with the goal of forcing Congress to assert greater authority over the states, in 1783, he had secretly encouraged federal army officers to mutiny.

The planned mutiny is known as the Newburgh Conspiracy. As the war drew to a close, army officers were generally owed years of salary, and there was widespread anger. A group of officers devised a plan to assemble troops, march on the Continental Congress in Philadelphia, and

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<sup>80</sup>Letter from John Laurens to Alexander Hamilton, Dec. 18, 1779 (available in *Founders on-line*) (apparently in reference to Morris).

<sup>81</sup>3 Farrand 92.

<sup>82</sup>3 Farrand 236.

<sup>83</sup>Beeman at —.

<sup>84</sup>Brookhiser

<sup>85</sup>Cite to John Jay; Washington letter when his ambassadorship was proposed.

<sup>86</sup>McDonald, GM at 3; see also “Faith and the Founders” at 218.

<sup>87</sup>McDonald, Political Philosophy at 3; Brookhiser at 127.

demand Congress provide them the compensation they were owed. Washington learned of the plot. He dramatically and unexpectedly appeared at a meeting of his officers where they were discussing the potential mutiny. Invoking his own personal sacrifices in the cause of the Revolution, he convinced them to abandon the plot.<sup>88</sup>

It is, at the very least, clear from surviving correspondence that, regardless of whether or not Gouverneur Morris was actively conspiring with the mutineers, he was aware of the possibility of a mutiny and welcomed it, believing a mutiny could be used to push a weak Congress to expand its powers. In a coded letter, he wrote John Jay: "The army have Swords in their hands. . . . I am glad to see Things in their present Train. Depend on it good will arise from the Situation to which we are hastening."<sup>89</sup>

Beyond such enthusiasm, there is strong circumstantial evidence from his correspondence that Gouverneur Morris not only welcomed the mutiny but that he worked with its leaders to plan it. While there is disagreement among scholars, the weight of historical authority is that Gouverneur was an active participant and that he drafted the letter secretly circulated among officers urging them to join the mutiny. There is, in addition, strong evidence that Hamilton was assisting the mutineers, as well.<sup>90</sup>

Washington believed that Morris was central to the mutiny. Morris, Washington wrote, was "at the bottom of this."<sup>91</sup> Washington's suspicions led to a break between the two men. Washington did not communicate with Morris for two years, although (for reasons that are unknown) they had re-established their ties before the constitutional convention.

Thus, Morris brought to his work as drafter not only great gifts, but a reputation that gives credibility to Gallatin's charge and that warrants a close examination of his work as drafter.

### **c. Morris's draft and the work of the Committee**

We have limited historical information about the committee's deliberations. Unlike with the Committee of Detail, the Committee of Style's drafts were not preserved, and, as Jared Sparks, Morris's first biographer wrote, Morris left "hardly a scrap of paper on the subject of the constitution."<sup>92</sup> We do know, however, from letters written by Morris and Madison that Morris was the Committee's drafter. Madison described Morris's work as stylistic, rather than substantive, and Morris asserted that he had only tried to change the Constitution's meaning in one area. Each, however, had reasons to state that Morris had not changed the meaning of the text.

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<sup>88</sup>See Richard Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* at 17-39 (1975); id., "The Inside History of the Newburgh Conspiracy: America and the Coup d'Etat", *The William and Mary Quarterly* (1970). Despite the title, Kohn is doubtful that a coup d'état against Congress was ever seriously attempted.

<sup>89</sup> 2 Letters of John Jay 485-86

<sup>90</sup>Brookhiser, Adams. Robert Morris is also suspected of supporting the mutiny, although there is more disagreement among historians on this point. Robert Morris biography

<sup>91</sup> Robert Morris biography.

<sup>92</sup>3 Farrand 514.

Morris addressed the work of the Committee in a December 22<sup>nd</sup>, 1814 letter to Timothy Pickering. He began with a slap at Madison and Madison's notes (which were not to be published until after Madison's death):

While I sat in the Convention, my mind was too much occupied by the interests of our country to keep notes of what we had done. Some gentlemen, I was told, passed their evenings in transcribing speeches from shorthand minutes of the day. They can speak positively on matters, of which I have little recollection. My faculties were on the stretch to further our business, remove impediments, obviate objections, and conciliate jarring opinions.<sup>93</sup>

Thus, Morris is implicitly contrasting his active engagement in the work of the convention with Madison's, suggesting the latter was more a passive transcriber than an engaged participant.

Morris next dismissed the relevance of drafting history for constitutional interpretation and championed, instead, a textualist approach: "[W]hat can a history of the Constitution avail towards interpreting its provisions. This must be done by comparing the plain import of the words, with the general tenor and object of the instrument."<sup>94</sup> Such an approach is not surprising for someone who, this article shows, selected words to advance his own constitutional goals, rather than the views of the delegates as a whole. He is elevating text, rather than drafting history, because the text he drafted departed from framers' intent.

Morris then proclaimed that he had written the Constitution and that he had been (largely) an honest scrivener:

That instrument [the Constitution] was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their selflove, and to the best of my recollection, this was the only part which passed without cavil.

Madison described Morris's role on the Committee of Style in an April 18, 1831 letter to Jared Sparks. Sparks, who was writing Morris's biography, had written to Madison to ask about what role Morris had played at the convention. Madison responded:

The finish given to the style and arrangement of the Constitution, fairly belongs to the pen of Mr. Morris; the task having, probably, been handed over to him by the Chairman of the Committee, himself a highly respectable member, and with the ready concurrence of the others. A better choice could not have been made, as the performance of the task proved. It is true that the state of the materials, consisting of a Reported draft in detail, and subsequent resolutions accurately penned, and falling easily into their proper places, was a good preparation for the

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<sup>93</sup> Farrand 420.

<sup>94</sup> Farrand 420.

symmetry and phraseology of the Instrument: but there was sufficient room for the talents and taste stamped by the author on the face of it. The alterations made by the Committee are not recollected. They were not such as to impair the merit of the Composition. Those, verbal & others, made in the Convention, may be gathered from the Journal, and will be found also to leave that merit altogether unimpaired.<sup>95</sup>

Madison is here both giving Morris credit for the drafting and treating his contributions as merely stylistic. He underscored the word “finish.” At the end of the letter, Madison portrayed Morris as someone willing to cede to the sentiment of the majority when he lost a debate:

It is but due to Mr. M. to remark that to the brilliancy & fertility of his genius, he added what is too rare, a candid surrender of his opinions when the lights of discussion satisfied him that they had been too hastily formed, and a readiness to aid in making the best of measures in which he had been overruled.<sup>96</sup>

This comment accords with the idea that Morris was an honest scrivener bowing to the decisions of the whole. Morris was “read[y] to aid in making the best of measures in which he had been overruled.”

A third primary source bearing on authorship comes from the diary of Ezra Stiles, the President of Yale College. Stiles reported that he had been visited by Connecticut delegate Abraham Baldwin, shortly after the convention had concluded. Baldwin gave Stiles a summary of the convention’s proceedings and concluded with a discussion of the work of the Committee of Style. Stiles records Baldwin as telling him:

Finally a Committee of 5 viz, Mess. Dr Johnson, Gouverneur Morris. Wilson, — These reduced it to the form in which it was published. Messrs Morris & Wilson had the chief hand in the last Arrangt & Composition. This was completed in September.<sup>97</sup>

Stiles’ diary is the historical evidence of Wilson’s participation, even though Wilson was not a member of the committee. It also indicates that delegates beyond the committee were aware of Morris’ leadership role.

Stiles’ account is the only one that equates Wilson’s role with Morris’s. It is, however, hearsay from a delegate who was not on the committee (Baldwin) (and who erred in listing the committee membership). Morris and Madison are both clear that Morris was the drafter. (Gallatin’s account, to be discussed later in this section,<sup>98</sup> also implicitly identifies Morris as the drafter.)

Both Madison and Morris minimized Morris’s substantive contributions. Madison

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<sup>95</sup>3 Farrand 499.

<sup>96</sup>3 Farrand 500.

<sup>97</sup>3 Farrand 170.

<sup>98</sup>See —

declared Morris gave the document its “finish,” and he underlined the term in the letter he wrote about the Committee’s work. Morris suggested that the only time he had shifted the meaning of the Constitution was with respect to the judiciary. (His comment about the judiciary is similar in nature to his comment about the new states clause. In both cases, he writes of revising text to change meaning, but not doing so so clearly as to be caught.)

Nonetheless, as will be discussed, Morris made a series of subtle textual changes of great import. So, why did Madison and Morris both minimize the Committee’s work?

They both had good reasons for doing so.

Breaking with his constitutional jurisprudence at the time of the convention, by the time Madison wrote his letter about the Committee (in 1831), he had adopted a constitutional vision that involved a national government of limited powers and a constrained role for the executive and the judiciary. Indeed, Madison largely came to embrace that vision in the 1790s. Morris’s changes were inconsistent with the vision that Madison’s championed in the 1790s and for the remainder of his career: Morris’s text provided support for a broad role for the national government and the power of the President and the federal courts and Madison’s ultimate constitutional vision was at odds with Morris’s at each point. As will be seen, in critical fights in the 1790s, Madison battled Hamilton and other Federalists about how to read the Constitution, and he had advanced readings of the text that treated Morris’s text as having no legal consequence. Thus, his assertion that Morris had only given the Constitution its “finish” was consistent with the way he had read that text. Equally significant, he was in a real sense boxed in. If Morris had written text that altered the Constitution’s meaning, Madison, as a committee member, was either complicit in the change or he had failed to pay attention with potentially dire consequences. Both as a champion of a particular constitutional vision and as a politician protecting his reputation and legacy, Madison had to treat Morris’s changes as merely stylistic.

Morris also had reason to minimize his contributions. If he had acknowledged that he had intentionally crafted text to change the constitution’s meaning, that assertion would have undermined the legitimacy of his work. It would have provided support for those who took a competing view of the constitution, indicating their view was the consensus view of the delegates and that Morris’s changes were illegitimate. The one area in which he acknowledged seeking to alter the constitution’s meaning was with respect to the judicial role, but this was also the one area in which he had a record to contend with. When he was a Senator, he argued in 1802 that the Preamble was a constitutional bar to the Jeffersonian attempt to eliminate federal courts of appeals. The Committee of Style’s Preamble was dramatically different than the Preamble that had been drafted by the Committee of Style, and Morris, in invoking the Preamble as supporting a strong federal judiciary, had clearly relied on language he had drafted. Similarly, in that speech, he relied on language from the judicial powers clause that he had also drafted. Thus, writing in 1814, Morris would have found it hard to deny that language he had crafted had provided support for a strong federal judicial role. But there was no other area in which he had relied on his text to defend a view of the constitution, and he was thus free to claim that, except with respect to the judicial role, his drafting had only had stylistic effect.

There is no direct evidence of the committee's deliberations. The one subject on which, according to a number of historians, Morris's fellow committee members had prevailed on Morris is with respect to the contract clause. In earlier debates at the convention, the contract clause had been voted down, and Morris had been the leading voice in opposition. King, in contrast, had proposed the inclusion of the clause, and Hamilton had endorsed it. Thus, historians Clinton Rossiter and Forrest McDonald have suggested that King or Hamilton must have prevailed on Morris and led him to resurrect the previously rejected clause. But, as will be discussed, Morris's early opposition to the contract clause had been based on his objection to King's formulation, not to the idea of a contract clause per se, and the contract clause as contained in the Committee of Style draft accorded with Morris's constitutional views about the importance of protecting private property and his earlier role on behalf of the Bank of the United States. Thus, the contract clause in the committee's draft reflected Morris's constitutional vision. Equally important, the contract clause is unlike any of the other changes made by the Committee: while every other change is not obviously legally consequential, the addition of the contract clause is. It is unlikely the delegates would have missed this addition when reviewing the Committee of Style draft. Thus, there is good reason to think there was an agreement among delegates not reflected in Madison's notes to add the contract clause to the Constitution. In other words, contrary to the prevailing view among historians, it is unlikely that the contract clause is in the Constitution because his fellow committee members convinced Morris to insert the clause.

There is no evidence of Morris having discussed with any of his fellow committee members the substantive import of his textual changes. Madison clearly did not engage in such discussions, or at least did not admit to have been part of them. Moreover, as will be discussed, with respect to the one substantive change in the draft document that, according to Madison's notes, the convention as a whole discussed, Madison flagged Morris's change as a printing error and Wilson opposed the change, which reinforces the view that Madison, and perhaps Wilson, was not aware of the substantive changes effected by the new draft. At the same time, in the years after the convention, Wilson and, more frequently, Hamilton made constitutional arguments that drew on Morris's texts. Wilson's uses of the text were fairly straightforward, and he may simply have been reading the text without any knowledge of Morris's goals. Hamilton's use of the text were less obvious. Given his closeness to Morris, Hamilton's uses may reflect an awareness of what Morris was doing. Moreover, the evidence that both were implicated in the Newburgh conspiracy suggests that the two were comfortable engaging in manipulation in order to advance goals of critical importance to them.

In any event, the Committee's work was rapid. The Committee was selected on September 8. On September 12, it delivered its report to the convention.

#### **d. The Convention's Consideration of the Committee of Style's draft**

The convention spent three days reviewing the Committee's draft and discussing other matters (primarily the possibility of a Bill of Rights) before voting in favor of the Constitution on September 15. The weary delegates were quickly going through the document in order to bring the proceedings to a close, and, for the most part, Morris's changes were not scrutinized. There was, however, focus on two clauses that had been revised by Morris: the delegates debated the

offences against the law of nations clause; there was also, apparently, scrutiny of the general welfare clause, although this is not reflected in Madison's notes. In both cases, Morris's changes were subtle: one punctuation mark was substituted for another in the general welfare clause; through editing, a new verb became applicable to the offences against the law of nations clause. Despite their subtlety, these changes had powerful legal significance: the punctuation change (which the convention reversed in favor of the earlier version) would arguably have converted a limited taxing power into a broad grant of power to the federal government; the verb change (which was left in place by a narrow vote) gave Congress the power to criminalize acts against the law of nations. In each case, Morris's language advanced his vision of the appropriate scope of powers of the federal government.

*i. Offences against the law of nations clause*

*Proceedings of the Convention Referred to the Committee of Style and Arrangement*

Article VII, Sect. I: The Legislature shall have power to . . . define and punish piracies and felonies committed on the high seas, to punish the counterfeiting of the securities, and current coin of the United States, and offences against the law of nations;

*Report of the Committee of Style*

Article I, Sect. 8: The Congress . . . shall have power. . . .

<<f>> To provide for the punishment of counterfeiting the securities and current coin of the United States. . . .

<<k>> To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

In drafting the Committee of Style's Constitution, Morris separated what had been in the Committee of Detail's draft a grant of congressional power concerning piracies and felonies on the high seas, counterfeiting, and offences against the law of nations into two separate clauses - one concerning counterfeiting and one concerning piracies and felonies on the high seas and offenses against the law of nations. The clause about counterfeiting is pulled out from between the clauses about "piracies and felonies" and about "offences against the law of nations" and given a separate home.

While the word shift appears stylistic and sensible - it puts into two different clauses two congressional powers of different kinds - it is consequential because the verb(s) linked with the phrase "offences against the law of nations" change when the middle clause is removed. In the Committee of Detail's version, Congress simply has the power "to punish . . . offences against the law of nations. . ." But, when the middle clause is removed, the verbs linked with "offences against the law of nations" become to "define and punish." As a result, Congress now has the power to "define . . . offences against the law of nations."

In reviewing the printed version of the Committee of Style's report, Madison spotted the change. He marked on his copy of the report that there had been "a typographical omission" of the word "punish."<sup>99</sup> Madison inserted "punish" into his copy of the printed version, and when

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<sup>99</sup>2 Farrand 595. In reprinting the Committee of Style report, Farrand used Madison's copy and noted

Congress turned to consider the grant of power on September 14, the text before it apparently adopted the Madisonian view of what the text should be: “To define and punish piracies and felonies committed on the high seas, and ‘punish’ offences against the law of nations.”<sup>100</sup> The second punish is in quotes in the minutes, which suggests that there was some recognition that the second punish was not in the broadside version of the draft constitution.

Immediately after the clause as “corrected” by Madison was read, Morris took the floor. Without commenting on the history of the verbiage, he made the argument that the word “punish” should be removed from the clause under consideration: “Mr. Govr. Morris moved to strike out ‘punish’ before the words ‘offences against the law of nations.’ so as to let these be *definable* as well as punishable, by virtue of the preceding member of the sentence.”<sup>101</sup> He is thus arguing on substantive grounds for a reversion to the text in the printed version.

Wilson rejected Morris’s view: “To pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance, that would make us ridiculous.”<sup>102</sup>

Morris then closed the debate (he and Wilson were the only speakers) by defending his position: “The word *define* is proper when applied to *offenses* in this case; the law of (nations) being often too vague and deficient to be a rule.”<sup>103</sup>

Morris’s motion was then put to a vote, and it narrowly carried - six states to five. Although individual votes were not recorded, in light of the record of the state vote and the report of the debates, we have some evidence of how the Committee of Style members voted. Virginia voted against the motion, which suggests that Madison probably voted against Morris (although not necessarily, since he was only one vote of what was at this point a five person delegation). Wilson had announced his opposition to the Committee’s text, and Pennsylvania’s five person delegation sided with Wilson, rather than Morris. Since Hamilton was the only New York delegate at this point and only states with two delegates present could vote, we do not know what Hamilton’s views were. Connecticut’s two person delegation voted in favor of the Committee of Style’s proposal, which means that Committee of Style Chair William Johnson voted in favor of his committee’s draft. Massachusetts’ three person delegation voted against the Committee of Style draft. It is unclear what King’s vote was, because he could have voted in favor of the Committee’s proposal and been outvoted by his fellow delegates or, alternately, he could have voted against the Committee’s proposal.

This September 14 debate was the only time “the offenses against the laws of nations” clause was discussed on the convention floor. The clause has not been discussed in the literature on whether the Committee of Style made substantive changes and the scholarly literature on it

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Madison’s handwritten notes on the printed report. Madison handwrote the word “punish” into the text of Article I, section 8, clause k, and added a note that “a typographical omission.”

<sup>100</sup>2 Farrand 614.

<sup>101</sup>2 Farrand 614 (italicization in the original).

<sup>102</sup>2 Farrand 615.

<sup>103</sup>2 Farrand 615.



overall is small,<sup>104</sup> but it is significant to a consideration of the work of the Committee of Style. First, it is an example of a very subtle textual shift in the committee's draft that caused the clause to have the normative meaning that Morris wanted (and a different meaning than the original text). Second, at least in this instance (the general welfare clause was a different story), in revising the text, Morris was probably not consciously defying what he saw as the majority sentiment. He was, instead, being risk averse - rather than risking loss, he tried to achieve his end through stealth. Third, it provides relevant evidence bearing on the question whether Morris acted with others. The fact that, in the only reported discussion we have of a change Morris had made, Wilson opposed the change and Madison believed it a typographic error (and probably opposed it) suggests that, even though Madison, Wilson, and Morris had worked together through the convention to push for a strong national government, Wilson and Madison were not privy to any plan Morris had to change the meaning of the text.

*ii. The General Welfare Clause*

*Proceedings of the Convention Referred to the Committee of Style and Arrangement*

Article VII, Sect. 1: The Legislature shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States.

*Report of the Committee of Style*

Article I, Sect. 8: The Congress . . . shall have power.

<<a>> To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and general welfare of the United States.

The difference between the two versions lies in punctuation, and it is this clause that Congressman Gallatin invoked in his attack on Morris and his integrity as drafter.

In the version of the clause sent to the Committee, Congress is granted the taxing power (and the power to impose duties, imposts, and excises) to provide money to pay for "the common defence and general welfare." Although there is room for disagreement,<sup>105</sup> the standard understanding is that reference to "the common defence and welfare" is a limitation on the taxing authority, not a separate grant of congressional authority. Thus, to the extent that Congress *otherwise* has power to legislate for the "common defence and general welfare," the clause provides Congress with a way to pay for relevant expenditures. At the same time, the provision

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<sup>104</sup>The leading article on the clause is Andrew Kent [Texas]. Kent's article does not address the claims that Morris in writing the Committee of Style draft was seeking to change the Constitution's meaning; he simply reports on the September 24 debate. See also Harrison, Georgetown.

<sup>105</sup>Bilder discussion of Anti-Federalist view of the clause in the final constitution. See also 11 Annals at 105 (speech of Senator Baldwin) (noting that "it had been contended in the early years of the Government, repeatedly and with much earnestness that [the general welfare clause] was a grant of powers . . . authorizing Congress to build manufacturing towns, a National University, and to carry on any pecuniary enterprises with the public money; deliberate practice seems for many years to have settled the construction that those words should be considered not as a grant of power, but a limitation of the power . . .").

<sup>1052</sup>Farrand 379.

limits the ends that can be pursued through the use of the congressional taxing power: money from taxes (and duties, imposts, and excises) can only be used to pay debts and to pay for “the common defence and welfare.”<sup>106</sup>

In the printed report of the Committee of Style, the comma that follows the word “excises” in the provisions referred to the Committee has become a semi-colon. While the Committee of Style’s version has some ambiguity, the semicolon at the very least makes possible the argument that the language about the “common defence and welfare” should be understood as a separate grant of power to Congress to legislate for “the common defence and welfare.” Thus, Article I, section 8 would provide for three separate grants of power to Congress: “[t]o lay and collect taxes, duties, imposts and excises”; “to pay the debts . . . of the United States”; to “provide for the common defence and general welfare of the United States.”<sup>107</sup>

Somehow - and the records of the convention provide no details - the punctuation changed back in the version of the Constitution that was finally adopted by the delegates. Madison’s notes reveal no discussion of the punctuation on the floor. When the Constitution was engrossed, however, the semicolon in the Committee of Style’s report had become a comma again.

While there is no record of debate on the topic in 1787, the punctuation shift became the subject of public notice in 1798 when Congressman Albert Gallatin gave a speech in the House about the meaning of the “defence and general welfare” clause and denounced what he declared an unsuccessful “trick” to make it into a grant of power; he accused Morris (by implication) of being the perpetrator. Gallatin, who had not attended the Philadelphia convention, stated that “he was well informed that those words had originally been inserted into the Constitution as a limitation on the power of laying taxes.” He added: “After the limitation had been agreed to, and the Constitution was completed, a member of the Convention (he was one of the members who represented the state of Pennsylvania) being one of a committee of revisal and arrangement, attempted to throw these words into a distinct paragraph, so as to create not a limitation, but a distinct power.” He is clearly referring here to Morris, the only Pennsylvanian on the Committee of Style. (Wilson was not a member, although he reviewed the document.) Gallatin concluded by observing that the ploy had proven unsuccessful and the original language restored: “The trick, however, was discovered by a member of Congress from Connecticut, now deceased, and the words restored as they now stand.”<sup>108</sup> The heroic proofreader of Gallatin’s account is Roger Sherman, the only member of the Connecticut delegation no longer living in 1798.

Madison discussed the punctuation issue at the end of his life, at a time in which the question whether the general welfare clause was a grant or a limitation was again a topic of great moment, in a memorandum that he wrote (although did not publish) about the general welfare clause. He declared, “[I]t was not the intention of the general or of the State Conventions to

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<sup>106</sup>See Madison Federalist 41.

<sup>107</sup>On this reading, see McDonald, *Novus Ordo Seclorum* at 264-65; Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 *Yale L.J.* 281, 286 n. 25 (1987).

<sup>108</sup>2 Farrand 379.

express, by the use of the terms common defence and general welfare, a substantive and indefinite power.”<sup>109</sup> He acknowledged that some published editions of the Constitution had a semicolon after the word “excises,” but he asserted that this was a mistake because the engrossed copy of the Constitution, the copy of the Constitution sent by the Philadelphia convention to the Continental Congress, the copies of the Constitution sent by Congress to the states, and the surviving copies of the official versions of the Constitution printed by the ratifying states all had a comma after “excises”.<sup>110</sup> He then turned to the punctuation in the Committee of Style’s Report: “The only instance of a division of the clause afforded by the journal of the Convention is in the draught of a Constitution reported by a committee of five members, and entered on the 12<sup>th</sup> of September.” He strikingly is distancing himself here from the Committee of Style; he gives no indication that he was one of the five. His analysis is purely textual, without any mention of his personal experience. He dismisses the significance of the “division of the clause” – i.e., the semicolon – in the Committee of Style’s report. He notes that, in the provision referred to the Committee of Style, “the parts of the clause are united, not separated.”<sup>111</sup> The punctuation in the Committee of Style’s draft “must have been an erratum of the pen or of the press.”<sup>112</sup> Thus, where Gallatin sees a “trick,” Madison sees a transcription error. As in his letter to Sparks about Morris contributions as drafter of the Committee of Style, Madison is taking the position that the Committee did not try to change the substantive meaning of the Constitution.

Morris never commented on the evolution of the general welfare clause, but he both wanted the general welfare clause to be a broad grant of power and understood it to be so. It should be noted that he may well be responsible for the fact that the provision that went to the Committee of Style had a clause giving Congress the power to “provide for the common Defence and general Welfare.” The language “common Defence and Welfare” had been devised by the Committee of Eleven, on which Morris had served, and it is plausible that he introduced the language while he served on that committee.<sup>113</sup> Regardless of whether he had crafted the initial version of the clause, however, it is clear that he wanted the national government to have broad power to legislate, and, throughout his time at the convention, he repeatedly pushed for capacious grants of power to the federal government. The relevant evidence with respect to the general welfare clause comes from the previously discussed notes of Delegate James McHenry of Maryland of his informal conversation with Morris, Nathaniel Gorham of Massachusetts, and Thomas Fitzsimons of Pennsylvania on September 6, a few days before the Committee of Style began its work. McHenry wanted the addition of a clause empowering Congress to erect piers. Morris told the others that “it may be done under the words of I clause I sect 7 art. amended - >and provide for the common defence and general welfare.”<sup>114</sup> But none of the other three

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<sup>109</sup> Farrand 491.

<sup>110</sup> Farrand 492.

<sup>111</sup> Farrand 492.

<sup>112</sup> Farrand 492.

<sup>113</sup> Hoffer at 73. The phrase was, however, used at the convention from the start. The Virginia Plan had called for a government that would accomplish the objectives of “common defense, security of liberty, and general welfare.” Moreover, the Articles of Confederation had enumerated the objectives of “general welfare”, “common defense” and protecting “liberties.”

<sup>114</sup> Farrand 529.

thought the general welfare clause conferred such substantive power.<sup>115</sup> Thus, the punctuation change would have advanced the reading Morris wanted the clause to have.

As will be discussed in the next section, the general view among historians of the convention is that Morris was an honest scrivener. The authors of the two principal accounts of the history of the general welfare clause have reached a similar conclusion with respect to that clause and rejected the charge that Morris tried to change its meaning. Professor David Engdahl describes McHenry as “a man of limited ability,”<sup>116</sup> who misunderstood Morris (who only meant that Congress had a broad power to spend under the general welfare clause, not that it had plenary power). He dismisses Gallatin’s charge as “hearsay.”<sup>117</sup> Engdahl concludes, “Gallatin’s aspersion on Morris was dubious at best and deserves no further credit among fair minded historians.”<sup>118</sup> For similar reasons, Robert Natelson has concluded that it is “unlikely”<sup>119</sup> that Morris was a “villain”<sup>120</sup> who attempted to covertly alter the meaning of the general welfare clause. “McHenry was likely confused”<sup>121</sup> about Morris’s meaning, Natelson concludes, and the idea that Morris would think he could slip the punctuation change by his fellow delegates is incredible: “The story assumes that Morris thought he was playing with fools, easily hoodwinked--at the Philadelphia convention, the ‘assembly of demigods!’”<sup>122</sup>

Nonetheless, two leading constitutional historians have taken a different view. Max Farrand was unsure whether Morris had tried to change the meaning of the general welfare clause. Farrand compiled the provisions sent to the Committee of Style and compared his compilation with the committee’s draft constitution. That comparison, he wrote, “would lead one to think that no undue liberties had been taken.” On the other hand, he noted Morris’s claim about his changing the meaning of the new states clause, the “stories that were whispered about in the years following the adoption of the new constitution,” Gallatin’s charge, and the punctuation in the Committee of Style’s proposed constitution. In light of this evidence, Farrand concluded, “just a little suspicion attaches to the work of Morris in preparing this last draft of the constitution.” Where Farrand was unclear whether Morris had tried to change the clause’s meaning, Forrest McDonald was certain: he believed that Morris secretly changed the punctuation when he found that McHenry and Gorham disagreed with his reading of the general welfare clause.<sup>123</sup> Morris was “audacious.”<sup>124</sup>

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<sup>115</sup>McHenry thought a specific grant of power to Congress (to allow it to authorize piers) was needed. Gorham has opposed to the grant of power. Fitzsimons seems to have been in agreement with McHenry.

<sup>116</sup>David Engdahl, *The Basis of the Spending Power*, 18 *Seattle U. L. Rev.* 215, 251 (1995) (quoting Farrand at 36).

<sup>117</sup>*Id.* at 252.

<sup>118</sup>Engdahl discusses the charge at length 253 n. 192. See *id.* at 251-56.

<sup>119</sup>Robert Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 *Kan. L. Rev.* 1, 28 (2003).

<sup>120</sup>*Id.*

<sup>121</sup>*Id.*

<sup>122</sup>*Id.*

<sup>123</sup>McDonald at 265.

<sup>124</sup>McDonald at 272.

In an assessment of whether Morris attempted to change the meaning of the general welfare clause it is significant that the separate data points merge seamlessly into a coherent and plausible account. McHenry's notes show that Morris's reading of the general welfare clause was different than the reading other delegates were giving it and that others would have opposed a revision that would have given the clause the scope that Morris wanted. The printed report of the Committee of Style's proposal then has a punctuation change that would have strengthened Morris's reading. In the engrossed version of the Constitution, the punctuation has been changed back. Gallatin's speech offers an explanation for the reversion – Sherman's catching the change – and Sherman was one of the delegates who viewed Morris as immoral, so he would have been a likely person to look closely at the Committee's proposal. And the fact that Gallatin does not mention McHenry is notable. There is evidence of which Gallatin was presumably unaware (McHenry's notes had not been published and if Gallatin had known of the McHenry episode he would have likely mentioned it as part of his attack) which is consistent with his charge. And, as McDonald, observes, Morris was "audacious."

The most important question, however, is not whether Morris was surreptitiously changing the meaning of the general welfare clause, but whether the change he made there and the change he made in the offences against the law of nations clause were part of a larger pattern of surreptitiously making small changes that profoundly altered the constitution's meaning to reflect his vision of what the constitution should provide. Examining Morris's constitutional philosophy and the Committee of Style's changes, this article argues that this is in fact what happened. But first it will look at what previous historians and legal scholars have written about the Committee of Style and it will examine the Supreme Court case law addressing the question whether changes made by the Committee of Style are legally significant.

## II. Historians' views of the Committee's work

Despite the fact that the first challenge to Morris's integrity as drafter came more than two hundred years ago and the fact that there is (to put it mildly) a substantial body of historical and legal scholarship closely probing the constitution's text, there has, remarkably, not been a single study systematically examining the changes that Morris made in order to determine whether he was an honest scrivener. There have been a small number of articles that have examined individual clauses and the Committee of Style's changes to them,<sup>125</sup> and these articles will be discussed in Section V, which discusses how particular clauses were changed to reflect Morris's constitutional vision. But the closest we have to larger discussions of Morris's role on the Committee are his biographies and the histories of the convention. That scholarship will be discussed in this Section. Analysis of this works shows a near-consensus that Morris was an honest<sup>126</sup> scrivener and that he and the Committee faithfully carried out the limited mandate of

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<sup>125</sup>Flaherty (vesting clause); Pfander (debt clause); Turley (impeachment clause).

<sup>126</sup>Robertson, *The Original Compromise* (2013) does not note the Gallatin charge or concerns about Morris's integrity. In a footnote, he mentions the Committee of Style's addition of a semicolon to the general welfare clause and erroneously suggests that Luther Martin "thought [the change] broadened national powers." *Id.* at 290 n.82 (citing Luther Martin, *Observations*, in 4 Farrand at 292. Robertson does not recognize that the Committee of Style's semicolon was removed and Martin's objection was to the clause as ultimately adopted by the Convention. See 4 Farrand at 492. Catherine Drinker's classic *Miracle at Philadelphia* (1966) does not note the

making stylistic changes and putting the document in a final form. Where scholars have departed from the consensus, they have focused on a single change of limited importance. No one has argued that there was a pattern of departures.

Recent years have seen a serious focus on the drafting history of the constitutional convention, with three important studies by David Stewart, Richard Beeman, and Michael Klarman. None of these studies, however, discusses the controversy about whether Morris, as drafter, attempted covertly to alter the Constitution's meaning. They simply see Morris and the Committee as successfully executing the important, but non-substantive and limited, task of producing a coherent constitution from the Committee of Detail's draft, the work of the five subsequent committees, and the various floor votes over the previous month. David Stewart observes, "This draft [the Committee of Style's draft] had to be faithful to the Convention's actions. Morris could be trusted to do that."<sup>127</sup> Morris had a "cooperative spirit," and he produced a "masterful final draft of the Constitution,"<sup>128</sup> The Committee "put the finishing touches of the Constitution," according to Michael Klarman.<sup>129</sup> The Committee "was working to provide the 'last polish' to the document," Richard Beeman reports.<sup>130</sup> Gallatin's charge has disappeared from recent accounts of the convention.

In contrast, earlier historians of the constitutional convention acknowledged Gallatin's charge and Morris's statements with respect to the new states clause and the Committee of Style's treatment of the judiciary and considered whether Morris was an honest scrivener. In his classic 1967 study, *1787: The Grand Convention*, Clinton Rossiter concluded that Morris had not departed from the intent of his fellow delegates. Rossiter writes: "Although Morris liked to think in his later years, as did some of his enemies in the Jeffersonian ranks, that he had taken certain 'liberties' in order to give the national government even more strength and tone, the fact is that he was a faithful servant of the committee and the committee of the Convention."<sup>131</sup> He concludes, "The report of the committee of style was an adroit and tasteful rendering of the will of the framers."<sup>132</sup>

However, as noted in the previous section, Max Farrand in his *Framing the Constitution* was skeptical of Morris. While he did not closely analyze the Committee of Style's draft and his treatment of the issue is brief, Farrand noted Gallatin's charge and Morris's admissions, and he suggested that "just a little suspicion attaches to the work of Morris in preparing this last draft of the constitution."

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charge that Morris was dishonest. She does, however, observe: "In one instance at least, Morris made a final attempt to twist a clause to his own thinking – and failed. It was the third section of Article IV, about excluding new territories, in wording which, Morris later confessed, he 'went as far as circumstances would permit to establish the exclusion.'" Morris's comment, however, pertained to an earlier motion on the convention floor, not his work on the Committee of Style. See *infra* at —.

<sup>127</sup>Stewart at 233.

<sup>128</sup>Stewart at 179.

<sup>129</sup>Klarman at 256.

<sup>130</sup>Beeman at 345.

<sup>131</sup>Rossiter at 228-29.

<sup>132</sup>Rossiter at 228.

As has also been noted, Forrest McDonald also challenged Morris's integrity. His *Novus Ordo Seclorum* is an analysis of political ideology at the time of the founding, rather than a history of the convention. He briefly notes the charge that Morris altered the meaning of the general welfare clause, observes that McDonald was "audacious," and accepts the charge as legitimate. But McDonald's focus in his account is simply on the one clause, rather than on Morris's overall integrity as a drafter. Although he never wrote a scholarly study on the topic, McDonald did, however, believe that Morris was not an honest scrivener. When testifying about Congress in 1999 about the impeachment clause and whether the Committee of Style had changed its meaning, McDonald said, "We have heard several people comment that the Committee of Style would not have taken liberties with the resolutions to the Convention. They don't understand Gouverneur Morris . . ."<sup>133</sup>

Morris has been the subject of three biographies in the past fifteen years. Only one biographer, Richard Brookhiser, looks at the question whether Morris tried to alter the Constitution's meaning as drafter of the Committee of Style proposal. "Did the careful scribe try to smuggle in an argument for nationalism?"<sup>134</sup> Brookhiser asks. After noting Gallatin's charge, Brookhiser dismisses it out of hand: "At the time the charge was made, Sherman was dead, and Morris was out of the country. Morris was not above sleight of hand, but he made his convictions explicit elsewhere."<sup>135</sup> Thus, Brookhiser concludes that Morris did not try to change the constitution's meaning, although such manipulation would not have been out of character.

In short, the Gallatin charge has often been ignored (including in the leading recent convention histories and most of the recent Morris biographies), and both historians who have considered the charge and those who have not have concluded that Morris tried to be true to the intent of his fellow delegates. The only dissenters are Farrand, who indicates that it is unresolved whether Morris tried to shift the constitution's meaning, and McDonald, who sees him as having tried to alter the scope of the general welfare clause (and who was generally suspicious of Morris, although he did not explore those suspicions, outside of the general welfare clause, in his scholarship).

In addition to the question whether Morris was generally an honest scrivener, there are two specific changes that the Committee made that have received attention from scholars, and some have seen these provisions as departing from the intent of the convention: the Committee revised the Preamble; it added the contracts clause, which had been criticized and passed over when it had been the subject of debate on the convention floor.

When the Committee of Style began its work, the Constitution's Preamble, which had been written by the Committee of Detail, read:

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<sup>133</sup>Turley at note 100. House Hearings at 23.

<sup>134</sup>Brookhiser at 90.

<sup>135</sup>Brookhiser at 90.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity. <sup>136</sup>

The Committee of Style dramatically re-wrote the Preamble to be:

We, the People of the United States, in order to form a more perfect union, to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish the Constitution for the United States of America.

The convention did not debate the Committee of Style's Preamble (or at least Madison's notes do not indicate that the Preamble was debated), and it was approved as drafted by the Committee (except that, presumably for reasons of parallelism, the word "to" was deleted from "to establish justice"). It was, however, subject to intense debate during the ratification process, with Patrick Henry memorably declaring, "Sir, give me leave to demand, what right had they to say, We the People. My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask who authorized them to speak the language of We the People instead of We the States?"<sup>137</sup>

While the two preambles are dramatically different, many historians have treated the alterations in the Preamble as the product of pragmatic concerns, rather than a substantive reconceptualization.<sup>138</sup> While they have recognized that "We the People of the United States" has a nationalist tone and appeal that the enumeration of states does not, they have concluded that, to quote Rossiter, "[w]e ought not attach too much significance to this change."<sup>139</sup> On August 31, shortly before the Committee of Style began its work, the Convention had decided that the new government would come into being if nine states ratified the Constitution. Rossiter writes, "Since no one could tell for certain which states would ratify and which would stall or even refuse flatly to join, the sensible course was to leave out any mention at all of New Hampshire and her twelve sisters."<sup>140</sup> Any "contribution to the cause of American nationalism"

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<sup>136</sup>2 Farrand 565.

<sup>137</sup>Cite. For discussion of the debate over the Preamble, see Hoffer, 83-91; Welch and Helpm [USC] at 1050-61.

<sup>138</sup>Rossiter at 221.

<sup>139</sup>CLINTON ROSSITER, 1787: THE GRAND CONVENTION 229 (1966); accord 1 JOHN VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING (2005); Stewart; FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); see also Madison (A constructive ingenuity and interpretation of Preamble).

<sup>140</sup>CLINTON ROSSITER, 1787: THE GRAND CONVENTION 229 (1966). Accord, Stewart at 234 ("A practical reason helps explain the change."); Farrand at 2200 (Committee "cleverly avoided" the problem created by the possibility that some states might not ratify; as a result, "the preamble loses something of the importance often ascribed to it.") McDonald argues that, despite that the Preamble invocation of "We the People" as opposed to listing states "does not prove anything" and he offers as evidence the fact that the Constitution consistently refers to United States in the plural. FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 281 N.37 (1985). As I have previously argued, however, the reference to United States in the plural does not prove anything: in the late eighteenth century, spelling rules dictated that nouns ending in "s" were paired



was “largely unintentional.”<sup>141</sup> And weight should not be accorded to the objectives of the Preamble, which was simply a “polished statement of the purposes of the Constitution, for which Morris had drawn on traditional sources,”<sup>142</sup> including the Articles of Confederation’s enumeration of the objectives of “general welfare”, “common defense” and protecting “liberties.” While the revised preamble.

Others take a different approach. Richard Beeman takes the position that, “though not definitive in its articulation,” Morris intentionally re-cast the Preamble in order to “suggest that the people of the *nation* possessed that sovereign power.”<sup>143</sup> Biographer Brookhiser sees “We the people of the United States” as Morris’s “statement of nationalism.”<sup>144</sup> Biographer Adams argues that “We the People of the United States” “set[] out the high command of a responsible national government.”<sup>145</sup>

But, if there is a disagreement about the weight that should be accorded to “We the People of the United States” as a symbolic matter, none of the leading historians of the convention or Morris biographers has argued that Morris hoped that the Preamble would, as a matter of law, expand the powers of the national government. They have not seen the Preamble as legally enforceable.

In addition to the revisions to the Preamble, the other obvious change made by the Committee of Style is its insertion of the contract clause.

On August 28, Rufus King had proposed adding “in the words used in the Ordinance of Congs establishing new States, a prohibition on the States to interfere in private contracts.”<sup>146</sup> The contract clause of the Northwest Ordinance, to which King was referring, provided:

And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.<sup>147</sup>

Morris responded, criticizing the proposal:

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with plural verbs. “United States” took a plural verb; so did “news.” William Michael Treanor, *Taking Text too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487 (2007).

Klarman does not discuss the Preamble.

<sup>141</sup>Rossiter at 229.

<sup>142</sup>Rossiter at 229. Accord, Stewart at 234 (“the balance of Morris’s preamble . . . Distillate the purposes of government. Many constitutions have been written since . . . Yet none surpasses – and few rival – Morris’s preamble.”)

<sup>143</sup>Beeman at 6511.

<sup>144</sup>Brookhiser at 91.

<sup>145</sup>Adams at 163.

<sup>146</sup>Farrand 439.

<sup>147</sup>Northwest Ordinance Article II.

This would be going too far. There are a thousand laws relating to bringing actions — limitations of actions & which affect contracts— The Judicial power of the U— S— will be a protection in cases within their jurisdiction; and within the State itself a majority must rule, whatever may be the mischief done among themselves.<sup>148</sup>

Mason voiced opposition, echoing Morris:

This is carrying the restraint too far. Cases will happen that can not be foreseen, where some kind of interference will be proper, & essential— He mentioned the case of limiting the period for bringing actions on open account — that of bonds after a certain (lapse of time,) — asking whether it was proper to tie the hands of the States from making provision in such cases?<sup>149</sup>

Madison records brief speeches by himself and Wilson and Rutledge’s proposal that a clause on bills of attainder and retrospective laws be substituted for King’s motion:

Mr. Wilson. The answer to these objections is that retrospective interferences only are to be prohibited.

Mr. Madison. Is not that already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void.

Mr. Rutledge moved instead of Mr. King’s Motion to insert — “nor pass bills of attainder nor retrospective\* laws” . . .<sup>150</sup>

Rutledge’s motion passed, seven states in favor and three opposed, and thus the prohibition on bills of attainder and retrospective laws was substituted for the proposed contract clause. The contract clause was not discussed on the floor of the convention again until the Committee of Style submitted its draft where the contract clause somehow reemerged. When the convention considered the Committee’s draft, its focus on the contracts clause was brief. There was (at least according to Madison’s notes) no recognition that the clause had been previously opposed and not adopted. The only comment was Gerry’s. He suggested that the prohibition on interference with contracts should be extended to the federal government, but no one seconded him. The Committee’s proposal was adopted with a modification (the words “altering, or” were dropped, although there is no indication why), and the convention adjourned for the day and did not revisit the clause in its following discussions.<sup>151</sup>

Of the recent histories of the convention, only Stewart’s account mentions the contracts clause at all. In a brief treatment, he notes that inclusion of the clause was the “single point [on

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<sup>148</sup>2 Farrand 439.

<sup>149</sup>2 Farrand 440.

<sup>150</sup>2 Farrand 440.

<sup>151</sup>2 Farrand 619. For further discussion, see *infra* at \_\_\_\_

which] the Committee of Style departed from the Convention's efforts."<sup>152</sup> He observes that, in "[r]eviving the issue in the committee room, King met greater success" than he had on the convention floor. He does not mention Morris's opposition to the clause during the floor debate nor how the convention wound up reversing itself on the contracts clause issue. Neither Beeman nor Klarman, the authors of the two other recent accounts of the convention, mentions the contracts clause at all.

The leading older accounts note the re-emergence of the clause in the Committee of Style's work, but their treatment is brief. Rossiter writes that the clause was an "intentional"<sup>153</sup> "contribution to the cause of American property."<sup>154</sup> He credits King with the re-emergence of the clause: "Rufus King, having failed to persuade his colleagues on the floor in late August of the usefulness of some restarting on the power of states to 'interfere in private contracts,' now persuaded his colleagues on the floor to add such a clause."<sup>155</sup> Farrand's treatment of the issue is similar, also concluding that King was responsible for the clause's reemergence.<sup>156</sup>

Strikingly, none of these accounts deals with why, according to Madison's notes, the convention did not recognize that they had previously considered the contracts clause and none notes that Morris had initially opposed the clause. McDonald, however, discusses both issues. He suggests that either King or Hamilton must have prevailed in the committee meetings and secured inclusion of the clause in the constitution. He also argues that, because records of the convention were poorly kept, the delegates, when they reviewed the Committee of Style's draft, may have failed to realize that they had previously considered the clause and had decided not to include it in the constitution. As a result, they did not closely scrutinize the clause then it emerged in the Committee of Style draft.

Similarly, the contracts clause receives little treatment in Morris's biographies. Brookhiser does not mention it. Without any comment on Morris's views on the clause, Adams simply notes that the Convention "accepted without discussion the committee's new language that no state could pass any 'law impairing the obligation of contracts.'"<sup>157</sup>

In short, where the scholarly literature discusses the drafting of the contracts clause, it acknowledges that the committee of style's draft represented a departure from what the convention had previously decided, but there is no suggestion that the clause represented Morris's view. It is seen as a victory for King or Hamilton.

Thus, the dominant position in the limited body of work on the Committee of Style is that Morris was an honest scrivener. With the exception of Farrand's broad assertion that Morris's

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<sup>152</sup>Stewart at 235.

<sup>153</sup>Rossiter at 230.

<sup>154</sup>Rossiter at 229-30.

<sup>155</sup>Rossiter at 230.

<sup>156</sup>Farrand at 2171 ("Prohibition of state laws impairing the obligation of contracts, formerly asked for unavailingly by Rufus King, had been inserted by the committee of style of which he was a member and was now accepted by the convention without question.")

<sup>157</sup>Adams at 164.

integrity as a drafter is open to question, those scholars who have suggested that Morris made changes to advance his own goals have made very specific claims – that he altered the Preamble to give it a more nationalist tone or that he altered the punctuation in the general welfare clause to confer broader powers on Congress. No study presents a systematic analysis of the changes the committee made, and no scholar has argued that Morris constructed a series of changes to advance his constitutional aims.

### III. The Significance of the Committee of Style’s Changes: The Supreme Court Caselaw

On four occasions within the last 45 years, the Supreme Court has decided cases involving constitutional language written by the Committee of Style which arguably had a meaning different than the language of the provision referred to the Committee and where the legal significance of the Committee’s work was at issue. In none of the cases is there an acknowledgement that Morris was the drafter and that his integrity as drafter has been questioned. In each case, the Court has held that the Committee of Style “‘had no authority from the convention to alter the meaning’” of the draft Constitution submitted for its review and revision.”<sup>158</sup> Only Justice Thomas has disagreed with this approach, observing in dissent in *Utah v. Evans* that he considered the Committee of Style’s language binding because it was the language that was ratified and “I focus on the words of the adopted Constitution.”<sup>159</sup> At the same time, in cases where the language at issue was created by the Committee of Style, but where the parties did not highlight the fact that the language was devised by the committee, the Court has given legal effect to language written by the Committee, and there is a tension between the Court’s approach in the Committee of Style cases (with its focus on drafters’ intent) and modern originalist jurisprudence.

The Court first considered the significance of changes made by the Committee of Style in *Ex parte Grossman*.<sup>160</sup> At issue in the case was the scope of the pardon clause and, specifically, the weight to be given the words “for offenses against the United States,” which the Committee of Style had added to the clause.<sup>161</sup> The Court stated, “We have given the history of the clause to show that the words ‘for offences against the United States’ were inserted by a Committee on Style, presumably to make clear that the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the States. It can not be supposed that the Committee on Revision by adding these words, or the Convention by accepting them, intended *sub silentio* to narrow the scope of a pardon from one at common law or to confer any different power in this regard on our Executive from that which the members of the Convention had seen exercised before the Revolution.”<sup>162</sup>

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<sup>158</sup>Utah v Evans, 536 U.S. 452, 474 (2002) (quoting Powell v. McCormack, 395 U.S. 486, 538-39 (1969).

<sup>159</sup>536 U.S. at 496.

<sup>160</sup>267 U.S. 87 (1925)

<sup>161</sup>The pardon clause referred to the Committee provided: "He shall have power to grant reprieves and pardons except in cases of impeachment." 2 Farrand 575. The Committee on Style reported this clause in the form adopted by the convention: "and he shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment."

<sup>162</sup>267 U.S. at 113.

Thus, the Court in *Ex Parte Grossman* concluded that the Committee of Style's changes did not alter the meaning of the constitutional text. The four modern cases adopt a similar approach. The lead case of the four is *Powell v. McCormack*,<sup>163</sup> Congressman Adam Clayton Powell's successful constitutional challenge to the House of Representatives' refusal to seat him. A central issue in the case was the meaning of the qualifications clause. The clause provides: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."<sup>164</sup> Writing for the Court, Chief Justice Warren observed that the House had argued that this text should be interpreted "in light of what they regard as a very significant change made in Art. I, § 2, cl. 2, by the Committee of Style. When the Committee of Detail reported the provision to the Convention, it read:

'Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of [in] the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen.' *Id.*, at 178.

However, as finally drafted by the Committee of Style, these qualifications were stated in their present negative form."<sup>165</sup>

The House argued that the Committee of Style's shift from the formulation of the qualifications in a positive form to a negative form reflected a decision that the House could add additional qualifications for membership in the House beyond age, citizenship, and residency. Warren rejected this argument, holding that the Committee of Style did not have authority to change the text's meaning:

Respondents' argument misrepresents the function of the Committee of Style. It was appointed only "to revise the style of and arrange the articles which had been agreed to." 2 Farrand 553. "The Committee . . . had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so; and certainly the Convention had no belief . . . that any important change was, in fact, made in the provisions as to qualifications adopted by it on August 10."<sup>166</sup>

Warren's underlying premise is that the Committee's work must be understood against the background of the Convention's procedural rules. The Committee, the Chief Justice writes, was created by the convention "to revise the style of and arrange the articles which had been agreed to." He adds, "The Committee . . . had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention . . ." This statement indicates that, had the Committee sought to change the Constitution's meaning, such an act would have been *ultra vires* and without legal effect. Warren then bolsters his position by

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<sup>163</sup>395 U.S. 486 (1969).

<sup>164</sup>Article I, § 2, cl. 2.

<sup>165</sup>395 U.S. at 537.

<sup>166</sup>395 U.S. at 538-39 (quoting Charles Warren, *supra*, at 422 n.1).

observing that the Committee had not informed the Convention that it was “purport[ing]” to change the meaning of the clause and “certainly the Convention had no belief . . . that any important change was, in fact, made.”

There is an irony to Warren’s treatment of the convention – and an underlying issue he fails to address. As the Chief Justice recounts the drafting history, he invokes Madison’s opposition to “the delegation to the Congress of the discretionary power to establish any qualifications”<sup>167</sup> and repeatedly refers to one delegate who disagreed with Madison and the majority view that the House should not have discretion over whom to seat: Gouverneur Morris. Warren quotes Morris’s statement that “[h]is intention was ‘to leave the Legislature entirely at large.’”<sup>168</sup> He notes that Morris made a motion to that effect and that the Convention rejected it.<sup>169</sup> The Chief Justice reports that, in order to limit the House’s discretion in expelling its members, Madison successfully made a motion that 2/3 of the House should be required to expel, rather than ½. Warren notes that Madison’s motion was passed unanimously, with only one state not voting because the delegation was divided. One delegate, however, “voiced his opposition”: Morris.<sup>170</sup>

Thus, the leading case that establishes the principle that the Committee of Style’s changes are without legal effect is one involving a clause where Morris seems not to have been an honest scrivener. He wanted the House to have the authority to add qualifications, he lost when the Convention made its decisions, but, by shifting the clause’s formulation from positive to negative, he provided textual support for those who wanted the House to have that authority. The opinion fails to see that the drafter of the text being interpreted is someone whose goals were inconsistent with the convention’s decisions. Perhaps if he had seen this the Chief Justice would have thought it irrelevant to the outcome, but there is no acknowledgement of the tension between the text – with words presumably chosen by Morris to permit House discretion or at least provide an argument for such discretion – and the framers’ intent not to give the House discretion. In other words, Warren treats framers’ intent as decisive without having to grapple with the tension between text and framers’ intent and the need to decide between them.

In 1995, the Supreme Court reaffirmed this interpretation of the Qualifications clause and the *Powell* approach to the Committee of Style in *United States Term Limits v. Thornton*.<sup>171</sup> *Thornton* presented the question whether Arkansas could impose term limits on members of the United States House of Representatives. As the House did in *Powell*, in *Thornton*, the state argued that the negative phrasing of the Qualifications clause “suggests that they were not meant to be exclusive.”<sup>172</sup> The *Thornton* Court reviewed the *Powell* Court’s examination of the drafting history, including the Convention’s rejection of Morris’s proposal that the House be

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<sup>167</sup>Id. at 534.

<sup>168</sup>Id. At 534 (quoting 2 Farrand at 249-50).

<sup>169</sup>Id. At 534.

<sup>170</sup>Id. at 536. For further discussion, see *infra* at —.

<sup>171</sup>514 U.S. 779, 792 n. 8 (1995).

<sup>172</sup>Id. at 815, n.27.

able to add qualifications.<sup>173</sup> It found that treatment of the history convincing: “We thus conclude now, as we did in *Powell*, that history shows that, with respect to Congress, the Framers intended the Constitution to establish fixed qualifications.<sup>174</sup> With respect to the negative phrasing issue, the Court cited the segment of the *Powell* opinion on the Committee of Style and stated, “This argument [the negative phrasing argument] was firmly rejected in *Powell*, see 395 U.S. at 537-539, and n. 73; see also Warren 422, n. 1, and we see no need to revisit it now.”<sup>175</sup>

While relying on *Powell*, *Nixon v. United States*<sup>176</sup> involved the most nuanced approach to the Committee of Style in this line of cases. Judge Walter Nixon contested the Senate’s conviction of him, which followed impeachment by the House. As part of his argument that convictions by the Senate were judicially reviewable, he contended that the word “sole” in the impeachment clause – which provides, “The Senate shall have the sole Power to try all Impeachment.”<sup>177</sup> - was without legal significance because it had been added by the Committee of Style. Rejecting this argument, Chief Justice Rehnquist, writing for the Court, stated:

Nixon asserts that the word "sole" has no substantive meaning. To support this contention, he argues that the word is nothing more than a mere "cosmetic edit" added by the Committee of Style after the delegates had approved the substance of the Impeachment Trial Clause. There are two difficulties with this argument. First, accepting as we must the proposition that the Committee of Style had no authority from the Convention to alter the meaning of the Clause, see 2 Records of the Federal Convention of 1787, p. 553 (M. Farrand ed. 1966) (hereinafter Farrand), we must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language. See *Powell v. McCormack*, 395 U.S. at 538-539. That is, we must presume that the Committee did its job. This presumption is buttressed by the fact that the Constitutional Convention voted on, and accepted, the Committee of Style's linguistic version. See 2 Farrand 663-667. We agree with the Government that "the word 'sole' is entitled to no less weight than any other word of the text, because the Committee revision perfected what 'had been agreed to.'" Brief for Respondents 25. Second, carrying Nixon's argument to its logical conclusion would constrain us to say that the second to last draft would govern in every instance where the Committee of Style added an arguably substantive word. Such a result is at odds with the fact that the Convention passed the Committee's version, and with the well-established rule that the plain language of the

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<sup>173</sup>Id. at 791.

<sup>174</sup>Id. at 792-93.

<sup>175</sup>Id. at 815, n.27.

<sup>176</sup>506 U.S. 244 (1993).

<sup>177</sup>The impeachment clause provides:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Art. I, § 3, cl. 6.

enacted text is the best indicator of intent.<sup>178</sup>

There is a significant shift in focus here from *Powell*. In *Powell*, the Court treated the language sent to the Committee of Style as dispositive. The Constitution's negative formulation is treated as irrelevant. In *Nixon*, in contrast, the Court parses the Committee of Style's text (which had been adopted by the convention) and rejects the idea "that the second to last draft would govern in every instance where the Committee of Style added an arguably substantive word." The Court embraces the presumption that the text sent to the committee and the committee's proposal have the same meaning.

Critically, the Court in *Nixon* (and in the other cases in the *Powell* line) did not confront the question of how to construe the constitution if the framer (Morris) was opting for language that did not reflect the Convention's conclusions – if, in other words, "the Committee did [not do] its job." The Court simply assumes that the Committee of Style was seeking to "accurately capture[] what the Framers meant in their unadorned language." The dishonest scrivener presents a situation in which the two goals animating the Court – construing the "plain meaning of the text" giving effect to the convention's intent – are at odds, and the opinion does not suggest how the Court would resolve that tension.

In *Utah v Evans*,<sup>179</sup> the Court's most recent confrontation with the Committee of Style, it returned to the approach in *Powell*. The question before the Court was whether the Census Bureau's use of sampling violated the Census Clause, which states in relevant part: "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." In holding that sampling was permissible, Justice Breyer made two arguments. One was a textual argument that the term "actual enumeration" was consistent with sampling.<sup>180</sup>

The second argument, the relevant argument for this article, focuses on the fact that the words "actual enumeration" were added by the Committee on Style:

In arguing that sampling was impermissible, Utah relies on the words "actual enumeration," which has been added by the Committee on Style. The history of the constitutional phrase supports our understanding of the text. The Convention sent to its Committee of Detail a draft stating that Congress was to "regulate the number of representatives by the number of inhabitants, . . . which number shall . . . be taken in such manner as . . . [Congress] shall direct." 2 M. Farrand, *Records of the Federal Convention of 1787*, pp. 178, 182-183 (rev. ed. 1966) (hereinafter *Farrand*). After making minor, here irrelevant, changes, the Committee of Detail sent the draft to the Committee of Style, which, in revising the language, added the words "actual Enumeration." *Id.*, at 590, 591. Although not dispositive, this strongly suggests a similar meaning, for the Committee of Style "had no authority from the Convention

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<sup>178</sup>*Id.* at 231-32.

<sup>179</sup>536 US 452 (2002).

<sup>180</sup>*Id.* at 474 ("The final part of the sentence says that the 'actual Enumeration' shall take place 'in such Manner as' Congress itself 'shall by Law direct,' thereby suggesting the breadth of congressional methodological authority, rather than its limitation.")



to alter the meaning" of the draft Constitution submitted for its review and revision. *Powell v. McCormack*, 395 U.S. 486, 538-539, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969); see 2 Farrand 553; see also *Nixon v. United States*, 506 U.S. 224, 231, 122 L. Ed. 2d 1, 113 S. Ct. 732 (1993). Hence, the Framers would have intended the current phrase, "the actual Enumeration shall be made . . . in such Manner as [Congress] . . . shall by Law direct," as the substantive equivalent of the draft phrase, "which number [of inhabitants] shall . . . be taken in such manner as [Congress] shall direct." 2 Farrand 183. And the Committee of Style's phrase offers no linguistic temptation to limit census methodology in the manner that Utah proposes.

Breyer is here all but reading the words "actual enumeration" out of the Constitution. Following *Powell*, he is holding that "the Committee of Style 'had no authority from the Convention to alter the meaning' of the draft Constitution submitted for its review and revision." He is then creating a strong presumption that the words used by the Committee of Style do not alter the meaning of the words used by the Committee of Detail ("this strongly suggests a similar meaning"). The result is that the Committee of Style's text, rather than being closely parsed by the Court, is understood as not changing the Committee of Detail's text. ("Hence, the Framers would have intended the current phrase, 'the actual Enumeration shall be made . . . in such Manner as [Congress] . . . shall by Law direct,' as the substantive equivalent of the draft phrase, 'which number [of inhabitants] shall . . . be taken in such manner as [Congress] shall direct.'") By invoking *Powell*, with its implication that any changes made by the Committee of Style were ultra vires, but then using a strong presumption as the basis of analysis, Breyer's analysis leaves open the question as to what the rule should be when the Committee of Style's text is simply inconsistent with the text referred to the Committee. But, in the absence of such clear inconsistency, Breyer's approach in *Evans* gives controlling effect to the words referred to the Committee of Style, rather than to the language proposed by the Committee and adopted by the convention.

Justice Thomas, in dissent, attacks the idea that Committee of Style should be treated as having a limited mandate:

The Court also places undue weight on the penultimate version of the Clause, the iteration that was given to the Committee of Detail and Committee of Style. See 153 L. Ed. 2d at 473. Whatever may be said of the earlier version, the Court rejected a similar reliance in *Nixon v. United States*, 506 U.S. 224, 231, 122 L. Ed. 2d 1, 113 S. Ct. 732 (1993), because "we must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language." [\*496] Carrying the majority's "argument to its logical conclusion would constrain us to say that the second to last draft would govern in every instance where the Committee of Style added an arguable substantive word. Such a result is at odds with the fact that the Convention passed the Committee's version, and with the well-established rule that the plain language of the enacted text is the best indicator of intent." *Id.*, at 231-232. Rather than rely on the draft, I focus on the words of the adopted Constitution.<sup>181</sup>

Criticizing the *Evans* majority, Thomas is invoking the more nuanced approach of

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<sup>181</sup>*Id.* at 495-96 (Thomas, J., dissenting).

*Nixon*. But the central thrust of his analysis implicitly rejects the entire *Powell* line (including *Nixon*). Regardless of the details of drafting history rules of the drafting process, the text that matters is the text the Convention adopted and that was ratified by the state conventions. “I focus on the words of the adopted Constitution,” he writes.

Justice Thomas, however, has not secured any other votes for his position. While *Nixon* has a different focus than the other three decisions in the line, the four cases share the core principle that the Committee of Style could not change constitutional meaning. “It was appointed only ‘to revise the stile of and arrange the articles which had been agreed to.’ 2 Farrand 553. “The Committee . . . had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so. . . .”<sup>182</sup>

While the Court has taken a consistent position in cases in which there has been a claim that the Committee of Style altered the Constitution’s meaning, those cases are at tension with other elements of the Court’s jurisprudence and with modern originalist jurisprudence in two ways.

First, there are important cases in which the Court has relied on the Committee of Style’s text, even though that text departed significantly (and in relevant ways) from the text referred to the Committee. For example, in *Free Enterprise Fund v. PCAOB*,<sup>183</sup> the Court invalidated Sarbanes Oxley’s PCAOB removal provisions because they were inconsistent with Article II’s vesting clause.<sup>184</sup> The clause’s language – which has been relied on since the first Congress to justify the President’s removal power and a broad understanding of executive power – was the product of the Committee of Style.<sup>185</sup> In the landmark case of *Myers v. United States*,<sup>186</sup> the Court invoked Hamilton’s distinction between the vesting clauses of Articles I and II to justify its understanding of the President’s removal power.<sup>187</sup> The Committee of Style created the distinction between the two vesting clauses.<sup>188</sup> In these cases, unlike the *Powell* line of cases, no one challenged the constitutional language on the grounds that the Committee of Style had departed from the convention’s prior decisions. Thus, in cases where the Court has not been presented with the argument that the Committee of Style only had a limited mandate, the Court has given effect to the Committee of Style’s language.<sup>189</sup>

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<sup>182</sup>*Powell*, 395 U.S. at 538-39.

<sup>183</sup>561 U.S. 477 (2010).

<sup>184</sup>*Id.* at 492 (citing vesting clause); *id.* at 496 (“That arrangement is contrary to Article II’s vesting of the executive power in the President.”) For discussion of *PCAOB*’s vesting clause analysis, see Patricia Bellia, *PCAOB and the Persistence of the Removal Puzzle*, 80 *Geo. Wash. L. Rev.* 1371, 1405-07 (2012)

<sup>185</sup>See *infra* at —.

<sup>186</sup>272 U.S. 52 (1926)

<sup>187</sup>See *id.* at 138.

<sup>188</sup>See *infra* at —.

<sup>189</sup>It is also worth noting that the Court has also repeatedly applied the contracts clause, even though it could be argued that the clause’s inclusion in the Committee of Style’s draft was at odds with the drafting history. That is, however, a different situation than that involved in the other cases discussed in this section, since it, unlike the others cases, involve a tension between drafting history and the plain meaning of the text. While some of the language in the decisions is broad enough to suggest that the text referred to the Committee of Style trumps the text

Second, the approach in *Powell* and the cases that follow it is at odds with modern originalist thought. When Warren wrote *Powell*, originalists focused on drafters' intent, and the decision reflects that approach. The decision looks, in particular, to the conventions' procedural rules to decide what the convention meant. Warren's analysis reflects intentionalism, the interpretive school that looks to drafters' intent or ratifiers' intent. While once the dominant originalist approach, intentionalism has been largely supplanted as a school of thought by a focus on original public meaning. To the extent that intentionalism retains influence, scholars focus on ratifiers' intent, rather than drafters' intent. The ratifiers were "We, the People" meeting in the state conventions. In contrast, the drafters were operating in secret so their discussions did not influence ratifiers' debate, their intent was not of legal consequence (since they were simply preparing a document for the consideration of the ratifying conventions, and the ratifying conventions were the legally empowered actors), and, it has been generally assumed since Jefferson Powell published his classic article, *The Original Understanding of Original Understanding*, that the founding generation considered drafters' intent irrelevant.<sup>190</sup>

Thus, *Powell* lines rejection of the work of the Committee of Style is very much inconsistent with other Supreme Court caselaw and with current originalist thought. Nonetheless, it is the approach that the Court has repeatedly taken, and it remains the settled approach of the Court.

#### IV. Law Review Scholarship

The law review scholarship on the work of the Committee of Style is limited. As is the case with the historical literature, there has been no systematic study of the changes Morris and the committee made. There have been a handful of studies, discussed in the sections of this article focusing on individual clauses, that look at a particular clause, such as the general welfare clause, the new states clause or the debt clause, and suggest that Morris may have changed the text of the clause to advance his goals, but no studies that look at the work of the Committee of Style as a whole. There has also been little theoretical discussion of the question, raised by the *Powell* line of cases, of how to interpret the Constitution when the text of the Committee written by the Committee of Style departs from the text referred to the Committee.

There is, however, a significant body of scholarship discussing the interpretation of two specific clauses where the text written by the Committee of Style departed from the text referred to the committee (although these articles rarely discuss the charges made against Morris): the impeachment clause and the presidential succession clause.

The version of the impeachment clause referred to the Committee of Style stated:

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proposed by the Committee, the *Powell* line does not involve cases in which the plain meaning of the text is at odds with drafting history.

<sup>190</sup>H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARVARD L. REV. 885 (1984). For a more complete discussion of the competing originalist schools, see Treanor, *Against Textualism*, 103 NORTHWESTERN L. REV. 983 (2009); Solum. On the evolution of originalism, see Vasani Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134-48 (2003).

“He [the President] shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason or bribery or other high crimes and misdemeanors against the United States. . . .”<sup>191</sup>

The Committee proposed the following clause: “The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”<sup>192</sup>

In addition to bringing the Vice President and all civil officers into the same clause with the President, the Committee of Style dropped “against the United States”: “other high crimes and misdemeanors against the United States. . . .” became “other high crimes and misdemeanors.

This change became of critical significance at the time of the impeachment of President Clinton.

430 law professors and 400 historians signed open letters to the House contending that only wrongs involving “an attack on the state” were impeachable offenses.<sup>193</sup> As Cass Sunstein put it, “[T]he clear trend of the discussion [at the convention] was towards allowing a narrow impeachment by which the President could be removed only for gross abuses of public authority.”<sup>194</sup> Their argument was that the types of crimes that were the potential basis for President Clinton’s impeachment were not the types of offenses that the Constitution provided could be grounds for impeachment because they were private in nature. This theory was known as the “executive function” theory of impeachment.<sup>195</sup> The same issues may become relevant if there were a move to impeach him for actions that were not connected with his work as President.<sup>196</sup>

A problem with the executive function theory is the text. If the Constitution had said “offenses against the United States” were grounds for impeachment, there would be a good argument that offenses that do not involve the president’s functions as president are not grounds for impeachment. But the Committee of Style had changed the language to “offenses.” Defenders of the executive function thesis have had to come up with a way to overcome the Committee of Style’s change.

Their solution has been to follow *Powell* and treat the language that the Convention had referred to the Committee of Style (rather than the language of the Constitution as ratified in state conventions) as the crucial language. Historian Jack Rakove, for example, concluded that the Committee of Style cut the phrase “against the United States” because it “deemed the qualifying words redundant.” The Committee of Style, Rakove argued, would not “have felt

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<sup>191</sup>Art. X, sec. 2.

<sup>192</sup>Art. I, sec. 4, cl. 3.

<sup>193</sup>Popp at 227.

<sup>194</sup>Sunstein, Penn

<sup>195</sup>Turley.

<sup>196</sup>See Ryan Goodman, Interview of Cass Sunstein, Newsweek, October 23, 2017.

empowered to make a substantive change in the meaning of the impeachment clause.”<sup>197</sup> “Offenses” was short-hand for “offenses against the United States.” Cass Sunstein took a similar approach. “Was the deletion [of “offenses against the United States”] designed to broaden the legitimate grounds of impeachment? This is extremely unlikely. As its name suggests, the Committee on Style and Arrangement lacked substantive authority (which is not to deny that it made some substantive changes), and it is far more likely that the particular change was made on the grounds of redundancy.”<sup>198</sup>

In contrast, advocates of a broad reading of the impeachment clause have followed an approach similar to that Justice Thomas was to employ in dissent in *Evans*: they rely on the Constitution’s text. Gary McDowall observed that the language of the impeachment clause as adopted “seems to have a broader, less restricted meaning than merely a narrow interpretation of crimes against the government. . . . [It] also seems to undermine the claim that impeachment is limited only to what one might call official duties and does not reach what Joseph Story would later call simply ‘personal misconduct.’”<sup>199</sup>

In general, Morris does not figure in either side’s account. There are a couple of exceptions, however. Most significant, Professor Rakove has labeled Gouverneur Morris a staunch opponent of impeachment and contended that Morris’s hostility to impeachment supports Rakove’s narrow view of the clause’s reach: Morris would not have wanted to expand the scope of the impeachment clause.<sup>200</sup> Professor Turley, an advocate of the broad reading, describes Morris as part of the “original extreme wing on impeachment, opposing any impeachment for the chief executive.”<sup>201</sup> Turley then offers a range of different possibilities on why the phrase “offenses against the United States” might have been excluded – Morris might have cut it to appeal to people like Sherman who mistrusted him or he might have cut it because he thought it redundant. As will be discussed, both approach miss a crucial fact: while he was initially opposed to impeachment, Morris had changed his mind before he served on the Committee of Style, and the text that the Committee of Style proposed reflects his views.

The second clause that has received significant attention in current legal debates is the presidential succession clause. As referred to the Committee of Style, the clause read:

“The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or disability of the President and Vice President; and such Officer shall act accordingly, until such disability be removed, or a President shall be elected.”<sup>202</sup>

The Committee’s proposal was:

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<sup>197</sup>Rakove, *GW* 1999, at 687 & n.25.

<sup>198</sup>Sunstein, *Penn* at 40.

<sup>199</sup>McDowall, *GW* at 634.

<sup>200</sup>Cite in *GW* article

<sup>201</sup>Turley at 1814.

<sup>202</sup>Article X, sect. I.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or the period for choosing another president arrive.<sup>203</sup>

The critical change here is that “officers” is substituted for “officers of the United States.” “Officers of the United States” is understood elsewhere in the Constitution to refer to officers of the judicial and executive branches.<sup>204</sup> “Officers” is understood to refer to officers of any branch. The question raised by the Committee of Style’s change is whether it adds legislative officers (such as the Speaker of the House and the President Pro Tempore of the Senate) to the people who may be placed in the line of presidential succession.

Again, the responses to this question are similar to the two approaches of the Justices to changes made by the Committee of Style and the two approaches scholars have taken in the context of the impeachment clause.

One approach is to follow the *Powell* approach and privilege the language referred to the Committee of Style. The leading article here is written by Professor Vic and Akhil Amar. They argue that the Committee of Style was only empowered “to revise the stile of and arrange the articles which had been agreed to.” The clause could not be altered by a committee that had no power to change meaning. As a result, the formulation that went to the committee- “officers of the United States”- is the governing text, and members of Congress cannot be placed in the line of presidential succession.

Again, the competing approach looks at the text. The leading proponent of this view is Dean John Manning. Dean Manning argues, “[E]ven if the Committee of Style acted ultra vires by making substantive changes to the text, the Ratifiers accepted them. The relevant fact is that the Ratifiers acted on the text submitted to the States, not on the sequence of ‘secret deliberations’ of the Constitutional Convention. . . . [T]he natural import of the text submitted to the States would be . . . that the unrestricted term ‘Officers’ is broader than the phrase ‘Officers of the United States.’ Thus, the drafting history does not provide a convincing textual argument for reading the Succession Clause to exclude members of Congress from the line of succession.”<sup>205</sup>

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<sup>203</sup>Article II, sec 1, clause e.

<sup>204</sup>See, e.g., Laurence Tribe, *American Constitutional Law* 4-17, at 290 (2d ed. 1988); Akhil Amar & Vikram Amar, *Is the Presidential Succession Law Constitutional?* 48 *Stan. L. Rev.* 113, 114-17 (1995). There is a separate debate about whether the President is an “officer of the United States,” compare, e.g., Seth Barrett Tillman, *Why Our President May Keep his or her Senate Seat*, 4 *Duke J. Const. Law & Pub. Pol’y* 107 (2009) (no) with Steven Calabresi, *The Great Divorce*, 157 *U. Pa. L. Rev.* 134 (2008) (yes) (debate with Professor Tillman), but it is not relevant for purposes of construing the presidential succession clause.

<sup>205</sup>Manning, *Stanford*, at 144-45.

Neither group of scholars has referenced Morris, but, as will be shown, he did have a view on whether members of Congress should be in the line of presidential succession.

Even as the question of how to treat text proposed by the Committee of Style has been central to four recent Supreme Court decisions and even though that text has been at issue in important debates about presidential succession and impeachment, there has been a dearth of critical thinking about the larger theoretical concerns that should govern a scholar or a court's view of the legal significance of the text drafted by the committee. Typically, scholars either follow the *Powell* approach or rely on text without reference to drafting history without explanation for why they are following a particular approach.

There are, however, two exceptions, although the treatments are brief.

Michael Paulsen and Vasan Kesavan, in their article “Secret Drafting History of the Constitution” have suggested a framework for using the proposals referred to the Committee on Style to interpret the Committee's proposals. They suggest “us[ing] the draft Constitution referred by the Framers to the Committee of Style and Arrangement as a sort of ‘committee report,’ which is recognized as the most authoritative source of legislative history in statutory interpretation.”<sup>206</sup> The proposal referred to the committee is a guide for understanding ambiguous constitutional text:

“[T]he draft of the Constitution referred by the Framers to the Committee of Style may have semantic value in clarifying the meaning of the text of the Constitution (unless, of course, the Committee of Style, acting *ultra vires*, altered the meaning of a clause).”<sup>207</sup>

Kesavan and Paulsen offer a specific illustration of their approach: interpretation of the word “Officer” in the presidential succession clause: “There is good reason to believe that ‘officer’ in the Committee of Style draft is shorthand for ‘officer of the United States’ in the draft referred by the Framers to the Committee of Style, especially in the absence of any additional recorded debate on the point.”<sup>208</sup>

Kesavan and Paulsen embrace *Nixon* as reflecting their approach:

“The Supreme Court has recently observed that because the Committee of Style ‘had no authority from the Convention to alter the meaning’ of a clause, the presumption is “that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language. . . . That is, we must presume that the Committee did its job.’ This presumption may be characterized as giving the draft of the Constitution referred by the Framers to the Committee of Style the status of a committee report--it is authoritative evidence of legal meaning, but not legal authority. Thus, when the text of the Constitution is unambiguous, it trumps the ‘second-to-last’ draft of the Constitution, as is the case in statutory interpretation; 443

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<sup>206</sup>Kesavan and Paulsen at 1206

<sup>207</sup>Kesavan and Paulsen at 1207

<sup>208</sup>Kesavan and Paulsen at 1208.

but when the text of the Constitution is ambiguous, its meaning may be informed by the Constitution's 'committee report.'"<sup>209</sup>

Although they do not use this example, under the Kesavan and Paulsen approach, a court would give legal effect to the contracts clause, regardless of the drafting history and regardless of how it came to be in the constitution, because it is in the constitution. The early draft comes into play only in cases of ambiguity: the text referred to the Committee of Style should cause a court to follow one approach to ambiguous text (e.g., that "officers" means "officers of the United States") rather than another plausible reading (e.g., that "officers" means officers in any of the three branches). But unambiguous text added by the Committee (e.g., the contract clause) should be given effect.

In "Secret Drafting History," Kesavan and Paulsen do not address the question raised by this article: How should the Constitution should be interpreted in cases where Morris surreptitiously departed from agreed on understanding? While Kesavan and Paulsen do not address this problem in "Secret Drafting History," however, they briefly treat it in "Is West Virginia Constitutional?"

"Is West Virginia Constitutional?" is one of the handful of a law review articles to discuss the possibility that Morris changed a particular constitutional provision to advance his goals. In this instance, the focus is on the new states clause. The Committee of Style made various changes to the clause - including the insertion of a semicolon (the technique used in the general welfare clause) - that arguably allowed the free state of Vermont to become the fourteenth state, but would have barred Kentucky (and Maine and West Virginia) from becoming states because they were part of other states at the time of ratification. Such a result - the admission of Vermont and exclusion of Kentucky - would have accorded with two of Morris's core convictions: it would have curtailed the power of slave states in the national government and it would have also curtailed the power of new western states.

After raising the issue of a surreptitious revision, Kesavan and Paulsen conclude that it is unlikely that Morris would have been able to slip language with a secret meaning into the Constitution since it would have meant "that the other members of the Committee of Style were sleeping at the constitutional switch."<sup>210</sup> Moreover, if the Committee's language was intended to bar the admission of break-away states like Kentucky, Kesavan and Paulsen conclude that intent is irrelevant:

"If somebody did pull a fast one, however, it was not fast enough. The Supreme Court has recently observed that because the Committee of Style "had no authority ... to alter the meaning" of a clause, the presumption is "that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language ... that the Committee did its job." Given that the effect of the semicolon is ambiguous, any intended ruse did not succeed. At most it created an interpretive ambiguity in the text of Article IV, Section 3, for

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<sup>209</sup>Kesavan and Paulsen at 1208-09.

<sup>210</sup>Kesavan and Paulsen [West Virginia] at 394.



which it is appropriate to repair to extratextual evidence of original public meaning, which in the end resolves the ambiguity. The better conclusion is that the admission into the Union of new breakaway States was contemplated in Article IV, Section 3 and permitted with the consent of parent States and of Congress.<sup>211</sup>

Kesavan and Paulsen again invoke *Nixon*'s "presumption" that the Committee "accurately captured what the Framers meant in their unadorned language." They further indicate that, if there was some bad intent it is irrelevant because the language used was ambiguous, and all the extratextual evidence points the same way – in favor of the admission of break-away states like Kentucky.

Indeed, they are right about the "new states" clause – all the evidence points the same way. The drafters (other than Morris) favored admission of new states that were splitting away from old states, and when Kentucky was considered for admission to the Union, no one suggested that admission would be unconstitutional.

But this leaves open the critical question of how to read the language when the extratextual evidence does not all point the same way. When the text is ambiguous, does the fact that the ambiguity was created by Morris – who was departing from prior understanding of the other drafters – matter? More broadly, how does one interpret ambiguous text fashioned by a dishonest scrivener? Kesavan and Paulsen do not grapple with this question.

The other theoretical discussion of how to treat text created comes from Dean Manning, and it has been previously quoted. Where Kesavan and Paulsen accord meaning to the drafting history, Manning's approach is textualist, and, like Justice Thomas, he dismisses the idea that the drafting history is relevant:

Relying on the limited mission of the Committee of Style "would constrain us to say that the second to last draft [of the Constitution] would govern in every instance where the Committee of Style added an arguably substantive word." We would be mistakenly discarding the ratified Constitution for a prior draft. The Constitution's legal force came from its ratification, not from its proposal by the Philadelphia Convention. Accordingly, even if the Committee of Style acted *ultra vires* by making substantive changes to the text, the ratifiers accepted them. The relevant fact is that the ratifiers acted on the text submitted to the States, not on the sequence of "secret deliberations" of the Constitutional Convention - deliberations that were not revealed until decades after ratification.<sup>212</sup>

Quoting Max Farrand's observation that "'just a little suspicion attaches to the work'" of Gouverneur Morris and the Committee of Style, Manning acknowledges that the meaning of the Committee of Style's text could be inconsistent with the text referred to the Committee: "Despite

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<sup>211</sup>Kesavan and Paulsen [West Virginia] at 394-95

<sup>212</sup>Manning, Stanford —. Manning's article predates Justice Thomas's dissent in —, and he obviously does not cite it. Like Kesavan and Paulsen, Manning relies on *Nixon*, but he focuses on a different aspect of the decision. He highlights *Nixon*'s language about not relying on "the second to last draft," but he does not discuss *Nixon*'s "presumption," which is central to Kesavan and Paulsen's analysis.

its limited mission, the Committee of Style, whether inadvertently or by design, did make substantive changes to the document.” He offer the example of the Uniformity Clause,<sup>213</sup> which the Committee eliminated but was reinserted by the Convention. “If the Convention had never rectified that decidedly substantive omission, and the ratifiers had then adopted the text without knowing the pertinent drafting history, we would not think that the Uniformity Clause was nevertheless part of the Constitution because the Committee of Style's omission had been unauthorized.”

Like Kesavan and Paulsen, Manning does not discuss the question of how to construe ambiguous text. His analysis assumes that focus on the ratified text reveals constitutional meaning.

To conclude: there is no work before this article that looks systematically at the changes Morris and the Committee made and their legal import. Moreover, while there has been some focus in the scholarship of changes made by the Committee of Style in the context of particular clauses, with respect to the topics that have received the great analysis – the impeachment clause and the presidential succession clause – there has been almost no recognition of the fact that the changes were Morris’s handiwork and his integrity has been challenged. Commentators have simply followed a textualist approach (looking at the wording in the Constitution as ratified) or relied on drafting history, without grappling with the dishonest scrivener question. The principal scholarly works discussing the dishonest drafter question – Kesavan and Paulsen; and Manning – have done so briefly, have taken competing positions, and have failed to discuss how to interpret the Committee’s text when it is ambiguous, which, as will be discussed, is the central problem.

#### V. Gouverneur Morris’s Constitutional Vision

In order to understand what Morris sought to achieve through his work the Committee of Style, it is important to understand his constitutional vision – a subject that has received little study – and the ways in which the draft Constitution, as it appeared before the Committee of Style began its work, was inconsistent with that vision.

Although Morris was not a scholar like Madison or Wilson, he had a distinctive and coherent constitutional vision. He was a strong nationalist. He championed both a strong executive and a strong judiciary. He stood apart from his fellow delegates in his devotion to the protection of private property, his opposition to slavery, and his belief that the addition of new western states posed serious problems. This section develops the basic elements of his constitutional philosophy and what the convention had decided on each of these points before the Committee of Style began its work.

##### **a. Nationalism**

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<sup>213</sup> “[A]ll Duties, Imposts and Excises shall be uniform throughout the United States,” U.S. Const. art. I, 8, cl. 1.

Along with James Wilson and Alexander Hamilton, Morris was one of the small group of strong and consistent nationalist voices at the convention.<sup>214</sup> Morris's belief in the need for a powerful national government had been evidenced in his statements early in the Revolutionary War.<sup>215</sup> His experience as a member of the Continental Congress and as Assistant Superintendent of Finance – and his frustration, in particular, with Congress's ability to raise funds needed to wage the war and pay the troops – had deepened that commitment.<sup>216</sup>

Where other delegates at the convention spoke of themselves as representatives of their states, Morris (a New Yorker elected to represent Pennsylvania) was unambiguous that he came "as a representative of America – a representative in some degree of the whole human race." He denounced those who "sought to truck and bargain for their respective states." "[S]tate attachments and state importance," he declared, "had been the bane of the country." "[I]f they [certain states] did not like the Union, no matter, --- they would have to come in, and that was all there was about it; for if persuasion did not unite the country, then the sword would." "It had been one of our great misfortunes [under the Confederation] that the great objects of the nation had been sacrificed constantly to local views. . . ."<sup>217</sup> Addressing the argument that representation in the Senate by states was necessary "to keep the majority of the people from injuring particular States," he responded "particular States ought to be injured for the sake of a majority of the people, in case their conduct should deserve it."<sup>218</sup>

From the beginning of the convention, Morris championed a supreme national government and opposed the idea that the constitution would be a compact among the states. When Randolph had proposed the Virginia Plan, he had framed it as a revision of the Articles of Confederation, with its first resolution being: "Resolved that the Articles of Confederation ought to be so corrected & enlarged, as to accomplish the objects proposed their institution.; namely common defence, security of liberty & general welfare."<sup>219</sup> In his first speech at the convention, Morris offered three amendments to the Virginia Plan as substitutes for Randolph's first resolution that would have profoundly reframed the document. His amendments – only the third of which was considered and adopted<sup>220</sup> - would have made clear that the Constitution was not an amendment to the Articles, that it was not the product of a confederation of states, and that it was creating a supreme national government:

1. That a Union of the States merely federal (will not accomplish the objects

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<sup>214</sup>Rakove at 76 (Morris and Hamilton). While Madison is often categorized as one of the strong nationalists, his view of national powers was linked to the role of Virginia the national government. When the Connecticut Compromise diminished Virginia's role, Madison became less assertive of national power. See Rakove at 76. <sup>2</sup> Farrand at --- (quoted in Farrand at &^ ("determination of powers of national government had to wait for determination of how seats were to be allocated in the houses.") (get cite in Rakove at 76)

<sup>215</sup>Adams

<sup>216</sup>Adams

<sup>217</sup>1 Farrand 552.

<sup>218</sup>1 Farrand 552.

<sup>219</sup>1 Farrand 33

<sup>220</sup>1 Farrand at 35

- proposed by the articles of Condeferation [sic], namely common defence, security of liberty, & genl. Welfare.)
2. that no treaty or treaties among the whole or part of the States, as individual sovereignties, would be sufficient
  3. that a *national* Government (ought to be established consisting of a *supreme* Legislative, Executive & Judiciary.<sup>221</sup>

Elaborating on his conception of the work of the convention, Morris was later to assert, “This Convention is unknown to the Confederation.”<sup>222</sup> By the terms of the Articles, that agreement could not be amended “without the unanimous consent of the legislatures.”<sup>223</sup> The convention’s eventual constitution would be subject to review and potential adoption by a different audience than the state legislatures: “[I]n case of an appeal to the people of the U.S., the federal compact [the Articles of Confederation] may be altered by a *majority of them*.”<sup>224</sup> His vision was that the Convention was not to amend the Articles, but to begin the work of creating a new national government to be adopted by “the people of the U.S.”

While Morris’s first two proposals were tabled, the third was adopted. Thus, because of Morris, at the start of the convention, the proposed Constitution proclaimed that each of the three branches of the “national” government (not the “federal” government) would be “supreme.” As previously noted, after offering his amendments to the Virginia Plan, Morris “explained the distinction between a federal and national, supreme, Govt.; the former being a mere compact resting on the good faith of the parties; the latter having a compleat and compulsive operation. He contended that in all communities there must be one supreme power, and one only.”<sup>225</sup> Morris’s speech made clear that his selection of the words “national” and “supreme” was considered and that he favored a national government that had “compulsive operation” and that was the “only” supreme power.

Randolph’s Virginia Plan had an expansive grant of power to Congress. It provided:

“that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.”

The combination of this grant of power with Morris’s amendment proclaiming the supremacy of the three branches of the national government was striking. At the start of the

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<sup>221</sup>1 Farrand 33 (emphasis added)

<sup>222</sup>2 Farrand 92.

<sup>223</sup>2 Farrand 92.

<sup>224</sup>2 Farrand 92 (emphasis in Madison’s notes).

<sup>225</sup>1 Farrand 35.

proceedings, the Virginia Plan, as modified by Morris, vested in the national government an authority that was close to plenary power. Scholars debate whether, for Virginians like Randolph and Madison, this grant should actually be read at face value or whether it was instead more in the nature of a placeholder.<sup>226</sup> But Morris was seeking plenary power, or something close.<sup>227</sup>

Reflecting this strongly nationalist approach, Morris also proposed the creation of a cabinet post of “Secretary of Domestic Affairs” who would “attend to matters of general police, the State of Agriculture and manufactures, the opening of roads and navigations, and the facilitating communications thro’ the U. States.”<sup>228</sup> This was a capacious conception of national power, particularly in its use of the word “police,” which meant, to quote Dr. Johnson’s Dictionary, “the regulation and government of a city or country, so far as regards the inhabitants.”<sup>229</sup> No one else at the federal constitutional convention argued that the national government should have the “police” power. Other delegates consistently spoke of the “police” power as a power of the states.

The Virginia Plan as modified by Morris was, however, the high point of nationalism at the convention. The critical moment in the move towards a more limited national government was the work of the Committee of Detail. The Committee proposed a draft constitution that framed the discussion for the last month of the Convention. The Committee abandoned the general grant of power featured in the Virginia Plan and proposed, instead, a list of enumerated that (with modifications) became the grant of powers in Article I, section 8 of our Constitution. Whereas the Virginia Plan with Morris’s revision envisioned the national government as “supreme,” the Committee of Detail’s Constitution was one of limited powers.<sup>230</sup>

Reinforcing this concept of a federal government of limited powers was the Committee of Detail’s proposed preamble. As the committee undertook its revisions, committee member Edmund Randolph drafted a “sketch of the constitution” to guide the committee in its work.<sup>231</sup> Randolph made clear that, while “[a] preamble seems proper”<sup>232</sup> it was not to be an assertion of authority. The preamble was “[n]ot for the purpose of designating the ends of government and

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<sup>226</sup>Rakove.

<sup>227</sup>See also Klarman at 241 (discussing views of Hamilton, Butler, and Read in favor of “abolishing the states if doing so had been politically feasible.”).

<sup>228</sup>2 Farrand 343.

<sup>229</sup>2 Samuel Johnson, Dictionary of the English Language (London, W. Strahan 1755). In a recent article, Professor Randy Barnett has surveyed the history of the convention and ratification and concluded that “examining the few instances where it [the term ‘police’] was discussed reveals that it referred originally to those powers not delegated to the national government.” Randy Barnett, The Proper Scope of the Police Power, 79 Notre Dame L. Rev. 429, 476 (2004). While I disagree with Professor Barnett because Morris’s usage was in reference to national power, but his basic point is worth noting because it highlights the way in which Morris’s commitment to nationalism exceeded those of his fellow delegates.

<sup>230</sup>For a superb discussion of the Committee of Detail, see William Ewald, The Committee of Detail, 28 Const. Comm. 197 (2012).

<sup>231</sup>4 Farrand 183-93. The preserved copy of Randolph’s “Draft Sketch of the Constitution” is in Randolph’s hand with revisions in John Rutledge’s hand. 4 Farrand 183 n. 1.

<sup>232</sup>4 Farrand 183.

human polities.”<sup>233</sup> It had to be consistent with “the rights of states.”<sup>234</sup> Reflecting this approach, the Committee of Detail’s Preamble was both minimalist and framed the Constitution as a document created by the people of the individual states:

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvani, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity. <sup>235</sup>

Thus, as the Committee of Style began its work, the draft Constitution was one that created a government of limited, enumerated national powers and that was framed, by its preamble, as a creation of the people of the thirteen states.

## **b. The Presidency**

With Wilson, Morris was the principal voice for a strong executive at the Convention.

Morris believed that “an active and vigorous executive” was essential to good government and that “the due Establishment of the executive Authority” was the “Key Stone in the great Arch of Empire.”<sup>236</sup> His commitment to a strong executive was long-standing. The New York Constitution of 1777, which he helped draft, vested more power in the governor than any other state constitution. His war experience had strengthened his conviction that a strong executive was of vital importance, and his belief that Washington would be the first President reinforced that belief that the Constitution should entrust great authority to the President. As he wrote in a letter shortly after the convention, “The Extent of our Country and the deliberative freedom of it’s legislative Authority require the Compensation of an active and vigorous Execution. Every subordinate Power should be tied to the Chief by those intermediate Links of Will and Pleasure which like the Elasticity of the arterial System under sensible the Pulsations of the Heart at the remotest Extremities.”<sup>237</sup>

At the convention, there were deep conflicts about the Presidency. There was a move to create a Presidency shared by multiple people, rather than an individual. There was wide support for vesting in Congress the power to select the President. With Wilson, Morris was the primary force arguing for the election of the President by the people; Morris contended that selection by Congress would make the President dependent on the legislative branch. Because of his concern about congressional power over the President, he proposed the electoral college as a compromise method of selection.<sup>238</sup> Morris wanted an absolute presidential veto and opposed impeachment of the President (though he ultimately changed his mind). He opposed

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<sup>233</sup>4 Farrand 183.

<sup>234</sup>4 Farrand 183.

<sup>235</sup>2 Farrand 565.

<sup>236</sup>McDonald at 12.

<sup>237</sup>Letter from Gouverneur Morris to William Carmichael (July 4, 1789).

<sup>238</sup>See Adams at 156; Stewart at 213.

presidential term limits and argued for either lifetime tenure or unlimited eligibility for reelection. He wanted the President alone to appoint judges and cabinet officials and argued for a broad executive power in military affairs.

Morris's principal speech on the presidency took place on July 19, and he outlined the case for a strong presidency.<sup>239</sup> He began with the observation that a properly constituted presidency was crucial to "the efficacy & utility of the Union among the present and future States." He then argued that a strong presidency was critical to the operations of a republic of the size of the United States:

"It is necessary to take into one view all that relates to the establishment of the Executive; on the due formation of which must depend the efficacy & utility of the Union among the present and future States. It has been a maxim in political Science that Republican Government is not adapted to a large extent of Country, because the energy of the Executive Magistracy can not reach the extreme parts of it. Our Country is an extensive one. We must either then renounce the blessings of the Union, or provide an Executive with sufficient vigor to pervade every part of it."

In addition to arguing that a strong president was necessary for successful administration of a large republic, Morris argued that a strong executive was necessary to check the Congress and to protect "the lower classes":

"One great object of the Executive is to controul the Legislature. The Legislature will continually seek to aggrandize & perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, agst. Legislative tyranny, against the Great & the wealthy who in the course of things will necessarily compose-- the Legislative body. . . The Executive therefore ought to be so constituted as to be the great protector of the Mass of the people."<sup>240</sup>

He argued that the President should have the power to appoint both executive and judicial officers and to control the military: "It is the duty of the Executive to appoint the officers & to command the forces of the Republic: to appoint 1. ministerial officers for the administration of public affairs. 2. Officers for the dispensation of Justice--." Morris linked giving the President these powers with his argument for popular election of the President: "Who will be the best

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<sup>239</sup>All the following quotes are from 2 Farrand 52.

<sup>240</sup>2 Farrand 52. See also 2 Farrand 33. Madison there argues that "experience had proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability & encroachments of the latter, a revolution of some kind or other would be inevitable." Morris agrees, observing that "[h]e concurred in the opinion that the way to keep out monarchical Govt. was to establish such a Repub. Govt. as wd. make the people happy and prevent a desire of change." 2 Farrand 33.

Judges whether these appointments be well made? The people at large, who will know, will see, will feel the effects of them--Again who can judge so well of the discharge of military duties for the protection & security of the people, as the people themselves who are to be protected & secured?"

Thus, Morris's vision embraced a broad grant of executive power to the President. The President was to command the military and unilaterally appoint judicial and executive branch officers. Morris's emphasis was not, however, on these specific grants, but on the overarching principle that the nation needed a strong executive for the effective administration of the government of an "extended republic" and for the protection of the people, including the "lower classes."

As with national powers, the crucial decisions about the scope of presidential power (prior to the Committee of Style) were made in the Committee of Detail, which drafted the enumeration of presidential powers.

At one level, the Committee's proposal did not depart dramatically from Morris's vision (although they did not go as far as he would have wanted). As Morris envisioned, the President was to be Commander-in-Chief, according with his position that the President should "command the forces of the Republic." Morris's desire to give the President the power to name officers had become the power to nominate principal officers of the executive and judicial branches – subject to Senate confirmation. The Committee of Detail's draft also reflected the Convention's decision (which Morris enthusiastically supported) that there should be one person heading the executive branch, rather than multiple office-holders working as a council. The vesting clause for the Executive Branch stated: "The Executive power of the United States shall be vested in a single person."<sup>241</sup>

As will be discussed in the next section, Morris's changes in presidential powers were subtle. He did not alter the enumeration. But he created text to provide an argument for a broad grant of powers beyond the specific enumerations in line with his goals of creating a presidency "with sufficient vigor to pervade every part of" the country and "to controul the Legislature."

### **c. Judiciary**

Morris was one of the principal advocates at the convention of the creation of a strong national judiciary. Two areas in which the Constitution, as it went into the Committee of Style, did not reflect his views were with respect to whether Congress was required to establish lower federal courts and whether federal courts would have the power of judicial review.

#### *i. Lower federal courts*

The Virginia Plan, which, as previously noted, Morris helped draft, mandated the creation of lower federal courts:

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<sup>241</sup>Committee of Style Draft, Article X, sec. I. (2 Farrand 572).



9. Resd. that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behavior . . .<sup>242</sup>

John Rutledge, supported by Roger Sherman, moved to strike “and of inferior tribunals,” contending that lower federal courts were an infringement on state authority. Rutledge argued:

[T]he State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts: that it was making an unnecessary encroachment on the jurisdiction of the States, and creating unnecessary obstacles to their adoption of the new system.<sup>243</sup>

Madison, Wilson, and Dickinson all responded, defending the Virginia Plan.<sup>244</sup> Madison stressed that lower federal courts were necessary to avoid “improper Verdicts in State tribunals obtained under the biassed directions of a dependant Judge, or the local prejudices of an undirected jury.”<sup>245</sup>

The Rutledge-Sherman proposal narrowly carried, five votes in favor, four against, and two state delegations divided.

Wilson and Madison then proposed a compromise under which Congress would have authority to establish lower federal courts, but was not required to do so:

Mr. Wilson & Mr. Madison then moved . . . to add to Resol: 9. the words following "that the National Legislature be empowered to institute inferior tribunals". They observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them. They repeated the necessity of some such provision.<sup>246</sup>

This proposal – which has come to be known in both the scholarly literature and the case law as the “Madisonian Compromise” – was adopted, eight delegations in favor, two opposed, and one divided.<sup>247</sup>

Morris did not speak in this initial debate. When, however, there was a subsequent move by Pierce Butler and Luther Martin to revisit the Madisonian Compromise and strip Congress of the power to create lower federal courts, Morris responded. He “urged the

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<sup>242</sup>1 Farrand 21

<sup>243</sup>1 Farrand 124.

<sup>244</sup>1 Farrand 124.

<sup>245</sup>1 Farrand 124

<sup>246</sup>1 Farrand 124.

<sup>247</sup>1 Farrand 124.

necessity of such a provision” giving Congress the ability to create lower federal courts.<sup>248</sup> The delegates reaffirmed the Madisonian compromise, with no delegation voting against it.<sup>249</sup>

Thus, as the Committee of Style began its work, the Constitution gave Congress the power to create lower federal courts, but did not require it to do so.

## *ii. Judicial Review*

During the revolutionary era, there had been a handful of state court cases invalidating statutes, although in a number of cases the exercise of the power had been controversial. Although judicial review was not yet well-established, the Virginia Plan did not have a textual provision giving federal courts the power of judicial review.

The Plan, instead, had two textual provisions for overriding legislation (neither of which were eventually adopted). As a check on congressional legislation, it proposed the creation of a Council of Revision, which was, to quote historian Richard Beeman, one of Madison’s “pet ideas.”<sup>250</sup> The council would have been made up of “the Executive and a convenient number of the National Judiciary.”<sup>251</sup> It would have had the power to review and veto federal legislation, subject to congressional override.<sup>252</sup> In addition, Congress would have had the power “to negative all laws passed by several States, contravening in the opinion of the National Legislature the articles of Union. . . .”<sup>253</sup>

The delegates at the constitutional convention allocated little time for the discussion of judicial powers, and the comments on judicial review were scattered and were largely (although not exclusively) made in the context of the arguments over these two proposals.

Morris spoke in favor of judicial review three times.

Morris’s first statement in support of judicial review was made in the context of a speech opposing the grant to Congress of a power to invalidate state legislation. Morris declared that he “[w]as more and more opposed to the negative. The proposal of it would disgust all the States. A law that ought to be negative will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. Law.”<sup>254</sup>

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<sup>248</sup>2 Farrand 41.

<sup>249</sup>2 Farrand 41.

<sup>250</sup>Beeman at 90.

<sup>251</sup>1 Farrand 21

<sup>252</sup>1 Farrand 21. The proposal said that the override by the state legislature would have to be “by [blank] of the members of each branch,” 2 Farrand 21, which left open the question of what percentage of the state legislators would be required for an override.

<sup>253</sup>1 Farrand 21.

<sup>254</sup>2 Farrand 28.

Morris is here simply assuming that federal courts will have the power of judicial review over state legislation – “A law that ought to be negative will be set aside in the Judiciary departmt.”

In the course of the convention’s discussion of the ratification process, Morris again assumed that courts had the power of judicial review. Ellsworth had proposed that the final document be ratified (or not) by the state legislatures. In arguing that the Constitution should be submitted to state conventions, Morris said that submission to state legislatures would reflect the view that the Constitution was to be regarded as an amendment to the Articles of Confederation, and under the terms of the Articles, amendments required unanimous consent of the state legislatures. If the Constitution were ratified by anything less than all state legislatures, courts would find it invalid under the Articles of Confederation: “If the Confederation is to be pursue no alteration can be made without the unanimous consent of the Legislatures: Legislative alterations not conformable to the federal compact, would clearly not be valid. The Judges would consider them as null & void.”<sup>255</sup>

In this speech, Morris is positing that, unless state legislatures unanimously adopted the Constitution, both the state legislative acts ratifying the Constitution and the Constitution itself would be rejected by courts because of inconsistency with the amendment process required under the Articles of Confederation.

Morris returned to the topic of judicial review a third time in the context of the debate over the executive veto. Arguing for a presidential veto that could not be overridden, Morris asserted that both such a veto and judicial review were necessary checks on Congress:

Mr. Govr. Morris, suggested the expedient of an absolute negative in the Executive. He could not agree that the Judiciary which was part of the Executive, should not be bound to say that a direct violation of the Constitution was law. A control over the legislature might have its inconveniences. But view the danger on the other side.<sup>256</sup>

Here, Morris is assuming that there will be judicial review of federal legislation by federal courts. He is envisioning two checks: the President should have power to veto congressional legislation and federal courts can “say that a [statute that was] a direct violation of the Constiution” is not “law.”

During the course of the proceedings, six delegates spoke in favor of judicial review, and two spoke against it. Morris’s three comments place him as at the extreme end of supporters of the doctrine. Like Morris, Madison spoke on behalf of the doctrine three times. Wilson spoke in support of it twice. The other three proponents of the doctrine only mentioned it once each.<sup>257</sup>

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<sup>255</sup>2 Farrand 299.

<sup>256</sup>2 Farrand 299. See also Letter from Gouverneur Morris to Lewis R. Morris in 3 Sparks 192, 195 (“[T]he judges would, it was forseen [at the convention], resist assaults on the Constitution by acts of legislation.”).

<sup>257</sup>Get cites from my Stanford article, Klarman at 160.

Despite the fact that there was more support for judicial review than opposition to it (at least among those who mentioned it) and despite the fact that the three leading voices of the nationalist delegates all favored it, as the Constitution went to the Committee of Style, there was no provision that provided textual support for the practice.

#### **d. Contract Clause and Property**

Morris was one of the great defenders of the rights of property at the Convention. Nonetheless, he opposed the contract clause when it was first proposed on the convention floor, and the clause was voted down. Neither Madison's notes of the debates nor the record of convention votes indicates that there were further discussion about the clause until the clause somehow emerged in the Committee of Style's draft (despite having been voted down the one time it was subject to debate). Thus, the clause's appearance in the Committee of Style draft and Morris's apparent reversal of his position have puzzled historians. But a close look at the historical record indicates that, through informal discussions, the clause had gained general support prior to the Committee of Style and that Morris, rather than simply opposing a contract clause, wanted a clause that was, in critical ways, broader than the one he opposed on the convention floor.

Morris's dedication to property rights was evident early in his career. In an essay from 1776, he stressed the importance of property and its protections. He distinguished between political liberty, the right of the people to participate in governance of the polity, and civil liberty, the right to be free from governmental constraint and to use one's property without governmental interference. While he thought a measure of political liberty was necessary for civil liberty, unless it were constrained, political liberty would threaten civil liberty, and a strong executive and strong judiciary were necessary to constrain political liberty. "Where political Liberty is in Excess," he wrote, "Property must be insecure and where Property is not secure Society cannot advance."<sup>258</sup> "A nation of Politicians, neglecting their own Business for that of the State, would be the most weak miserable and contemptible Nation on Earth." He celebrated commerce, which "requires not only the perfect security of property but perfect good faith." To protect commerce it was necessary to "increase civil and to diminish political liberty." But the balance was valuable because promoting commerce was "the best Means of Promoting human Happiness."<sup>259</sup> Similarly, in a published essay from 1780, he declared, "[I]f the rights of property are invaded, order and justice will at once take their flight, and perhaps forever."<sup>260</sup>

At the convention, Morris was a champion of the protection of private property. Unlike fellow nationalists, Madison and Wilson, he believed that the principal purpose of the state was the protection of property.<sup>261</sup> "Life and liberty were generally said to be of more value, than

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<sup>258</sup>McDonald 4 -5.

<sup>259</sup>McDonald 4-5 and Kaufman treatise (which transcribes the essay Liberty) at 2, 448-54. Reprinted in Barlow (below).

<sup>260</sup>Gouverneur Morris, To the Inhabitants of North America (March 11, 1780) 131, 137 in Gouverneur Morris, To Secure the Blessings of Liberty: Selected Writings of Gouverneur Morris (J. Jackson Barlow ed., 2012).

<sup>261</sup>For a comparison of the three delegates' diverging views on the protection of property and the fact that Morris was more protective of property than Madison and Wilson, see Jennifer Nedelsky at 68-75.

property. An accurate view of the matter would nonetheless prove that property was the main object of the State,<sup>262</sup> he declared. He argued that only freeholders should have the vote and that Senators should serve for life, not be paid, and represent property interests. In a letter written to Morris's biographer Jared Sparks in 1831, Madison accurately captured Morris's commitment to the protection of property at the convention. Morris, Madison wrote with understatement, did not "incline to the democratic side." He "contended for certain Articles (a Senate for life particularly) which he held essential to the stability and energy of a Government capable of protecting the rights of property against the spirit of democracy. He wished to make the weight of wealth to balance that of numbers, which he pronounced to be the only effectual security to each, against the encroachments of the others."<sup>263</sup>

In accordance with his concern about protecting property rights, one month before Rufus King proposed the contract clause, Morris had given a speech that seems to call for a constitutional bar on interference with contract rights:

He concurred in thinking the public liberty in greater danger from Legislative usurpations than from any other source. It had been said that the Legislature ought to be relied on as the proper Guardians of liberty. The answer was short and conclusive. Either bad laws will be pushed or not. On the latter supposition no check will be wanted. On the former a strong check will be necessary: And this is the proper supposition. Emissions of paper money, largesses to the people — a remission of debts and similar measures, will at sometimes be popular, and will be pushed for that reason. At other times such measures will coincide with the interests of the Legislature themselves, & that will be a reason not less cogent for pushing them. It might be thought that the people will not be deluded and misled in the latter case. But experience teaches another lesson.<sup>264</sup>

He is arguing here for a "strong check" on legislation that provides for "a remission of debts." This speech would appear to be a call for a contract clause. Moreover, in 1814, reflecting on his role at the convention, he remembered that "[p]ropositions to countenance the issuance of paper money, and the subsequent violation of contracts, must have met with all the opposition I could make."<sup>265</sup> Again, this statement suggests that he favored a contract clause.

Nonetheless, when Rufus King proposed a contract clause, Morris spoke in opposition.

According to Madison's notes, on August 28, as the Convention debated the provisions restricting state governments, "Mr King moved to add, in the words used in the Ordinance of Congs establishing new States, a prohibition on the States to interfere in private contracts."<sup>266</sup> He was apparently referring to the contract clause of the Northwest Ordinance, which provided:

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<sup>262</sup>1 Farrand 533

<sup>263</sup>James Madison to Jared Sparks, 8 April 1831.

<sup>264</sup>2 Farrand 76.

<sup>265</sup>3 Farrand 419-20.

<sup>266</sup>2 Farrand 439.

And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.<sup>267</sup>

Morris responded:

This would be going too far. There are a thousand laws relating to bringing actions — limitations of actions & which affect contracts— The Judicial power of the U— S— will be a protection in cases within their jurisdiction; and within the State itself a majority must rule, whatever may be the mischief done among themselves.<sup>268</sup>

Wilson and Madison then spoke in behalf. Mason voiced opposition, echoing Morris:

This is carrying the restraint too far. Cases will happen that can not be foreseen, where some kind of interference will be proper, & essential— He mentioned the case of limiting the period for bringing actions on open account — that of bonds after a certain (lapse of time,) — asking whether it was proper to tie the hands of the States from making provision in such cases?<sup>269</sup>

Madison then records a brief series of speeches, concluding with a substitution for King’s motion:

Mr. Wilson. The answer to these objections is that retrospective interferences only are to be prohibited.

Mr. Madison. Is not that already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void.

Mr. Rutledge moved instead of Mr. King’s Motion to insert — “nor pass bills of attainder nor retrospective\* laws” . . .<sup>270</sup>

Rutledge’s motion passed, seven states in favor and three opposed, and thus the prohibition on bills of attainder and retrospective laws replaced the contract clause. The contract clause was not discussed on the floor of the convention again until the Committee of Style submitted its draft where the contract clause somehow reemerged.

Historians have struggled with this turn of events. It has been suggested that, in Committee of Style meetings, Hamilton or Wilson convinced Morris to insert in his draft a

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<sup>267</sup>Northwest Ordinance Article II.

<sup>268</sup>2 Farrand 439.

<sup>269</sup>2 Farrand 440.

<sup>270</sup>2 Farrand 440.

clause he had opposed on the floor of the Convention and that had been rejected by the delegates or that the Committee of Style somehow forgot that the clause had been voted down.<sup>271</sup>

Those explanations do not, however, comport with the other activities of the Committee of Style. As will be discussed later in this paper, the changes in the Committee's draft were all subtle. There was nothing as "audacious"<sup>272</sup> as attempting to slip through a clause that had been voted down. And it is hard to believe that, when the delegates debated the Committee of Style's draft, they would all have missed the fact that a provision that had been voted down was now in the Constitution. Moreover, they modified the Committee's proposal and considered expanding its reach to the national government. The claim that the delegates overlooked the fact that the provision had been voted down is not tenable.

The explanation for the clause's reemergence seems to lie in discussions held off the convention floor. In the debate on King's proposal, Madison had asserted that ex post facto clause covered contracts. The following day, Dickinson announced that this position was incorrect:

Mr. Dickenson mentioned to the House that on examining Blackstone's Commentaries, he found that the terms "ex post facto" related to criminal cases only;<sup>4</sup> that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite.<sup>273</sup>

Dickinson's research suggested that the ex post facto clause was only limited to criminal cases, and he called for adoption a "provision" applying to civil cases. Although the historical record is not complete, Dickinson's call and the limited type of changes the Committee of Style made in other contexts suggest that, prior to the beginning of the work of the Committee, a decision had been informally reached to add a contract clause.<sup>274</sup>

With respect to Morris, the argument that Hamilton or King convinced him in the committee to re-insert the clause<sup>275</sup> misses the nature of his objection. He was not objecting to a contract clause per se (although the standard view among scholars is that he was arguing against the inclusion of a contract clause in the Constitution). He was arguing, instead, that the Northwest Ordinance went "too far." His specific concern – and Mason's as well – seems to have been with legislation that affected statutes of limitations. And the relevant text of the Northwest Ordinance is broad in scope, covering legislation which "shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed." Morris's speech earlier in the convention reflects concern with statutes that involved "remission of debts."<sup>276</sup> His concern with King's proposal – and its coverage of

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<sup>271</sup>McDonald

<sup>272</sup>Brookhiser

<sup>273</sup>2 Farrand 448.

<sup>274</sup>See Wright at 10; Crosskey.

<sup>275</sup>See McDonald

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state statutes that “*in any manner* whatever, interfere with or affect private contracts or engagements in any manner whatever, interfere with or affect private contracts or engagements”<sup>277</sup> - was that it went beyond this core to and called into question “a thousand laws relating to bringing actions.”

Even more significant than their overlooking Morris’s view that the contract clause went “too far,” scholars have overlooked the area in which Morris would have thought the cause did not go “far enough.” The Northwest Ordinance, by its terms, only applied to “private contracts or engagements.” The historical record indicates that Morris would have wanted the contract clause to reach beyond contracts between private parties. In particular, while there was no discussion at the convention of the applicability of the contract clause to bar revocation of state grants of corporate charters, Morris had previously suggested that, as a matter of constitutional law, a state should not be able to revoke a corporate charter.

The context of his suggestion was his argument to the Pennsylvania Assembly when it was considering repealing the statute incorporating the Bank of North America. The Bank was the brainchild of the two Morrises. It was privately funded (and Gouverneur Morris was a stockholder), but created pursuant to statutes of the Continental Congress and the Pennsylvania legislature. It was, in effect, the first national bank, and its notes circulated as currency.<sup>278</sup> It was controversial, and in 1785, there was a move in the Pennsylvania Assembly to repeal that statute of incorporation. Morris responded with an address that defended the bank as playing a crucial role in the economy. In addition to his prudential defense of the bank, he also forcefully argued that the legislature should not test whether it had the constitutional power to revoke the statute. He began by suggesting that, even though judicial review was still novel, a court might review the revoking statute for constitutionality:

An inquiry whether the law would be effectual involves a doubt of your power, and may, therefore, offend the weak or illiberal, but wise representatives of free citizens will listen candor and form a dispassionate judgment. They know that the boasted omnipotence of legislative authority is but a jingle of words. In the literal meaning it is impious. And whatever interpretation lawyers may give, free-men must feel it to be absurd and unconstitutional. Absurd, because laws cannot alter the nature of things; unconstitutional, because the Constitution is no more, if it can be changed by the Legislature. A law was once passed in New Jersey, which the judges pronounced to be unconstitutional, and therefore void. Surely no good citizen can wish to see this point decided in the tribunals of Pennsylvania. Such power in judges is dangerous; but unless it somewhere exists, the time employed in framing a bill of rights and form of government was merely thrown away.<sup>279</sup>

Turning to the substance of the constitutional issue, he suggested that a court might conclude that the legislature lacked the power to extinguish a right it had created:

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<sup>277</sup>2 Farrand 448 (emphasis added).

<sup>278</sup>W Adams at 132-33.

<sup>279</sup>3 Sparks 438.



The doubt which arises on this occasion, as to the extent of your authority, is not founded on the charter granted by Congress; but supposing the incorporation of the Bank to have been the same in its origin as that of a church, we ask whether the existence and the rights acquired by law can be destroyed by law. Negroes have by law acquired the right of citizens; would a subsequent law take that right away? It is not true that the right to give involves the right to take. A father, for instance, has no power over the life of his child, nor can a felon or traitor, pardoned by act of grace, be by repeal of that act condemned and executed. Should an act be passed to cancel the public debts, would that act be valid? Where an estate has been granted by law, can it be revoked by a subsequent law? Could the lands forfeited and sold be resumed and conveyed to the original owners? Many such questions might be put, and a judicial decision, either affirmative or negative, would be inconvenient and dangerous. Look then to the end ere you commence the labor.<sup>280</sup>

Morris is urging the legislature to avoid presenting a court with the question whether a contractual “right[] acquired by law can be destroyed by law.” More fundamentally, the analogies he offers indicate that a court should find such a statute unconstitutional. Each involves a clear injustice. In pressing this position, Morris did not point to any particular provision in the state constitution (and the Pennsylvania constitution did not have either a contract clause or a takings clause). Rather, he is arguing from first principles.

As will be discussed, the standard view among scholars is that the original understanding of the contract clause is that it did not apply to public statutes, such as corporate charters, and that, when the Supreme Court in the landmark decision in *Fletcher v. Peck* applied the contract clause to the legislative repeal of an incorporating statute it departed from the original understanding. Scholars, however, have failed to recognize that the person who actually wrote the contract clause wanted constitutional protection for corporate charters. The section below that discusses the contract clause will show how Morris revised the Northwest Ordinance in a way that provided a basis for the argument that it covered corporate charters and that Federalists had relied on that argument before *Fletcher*.

#### e. Slavery and New States

Two areas in which Morris’s stood alone at the convention were slavery and the admission of new states. Morris was the leading voice denouncing slavery, and he was the only voice urging limits to the political power of new states. The two positions were linked. Although one reason Morris was concerned about giving new states equality with the original states was his elitism, he was also concerned that the new states would predominantly be slave states and shift the balance of national power in favor of slavery.

Slavery: Long before the federal constitutional convention, Morris was an opponent of slavery. Notably, when helping draft the New York State constitution of 1777, he fought (unsuccessfully) for a provision that would have ended slavery in the state.<sup>281</sup> At the

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<sup>280</sup>3 Sparks 438-39.

<sup>281</sup>Cite

convention, he was *the* outspoken critic of slavery. “[D]omestic slavery,” he declared, “. . . was a nefarious institution --- It was the curse of heaven on the states where it prevailed.”<sup>282</sup> He bitterly denounced the 3/5 clause, and he said he could not accept the clause, even if the failure to include it the Constitution would lead the southern states to leave the convention. Madison reports: “**Mr. Govr. MORRIS** was compelled to declare himself reduced to the dilemma of doing injustice to the Southern States or to human nature, and he must therefore do it to the former. For he could never agree to give such encouragement to the slave trade as would be given by allowing them a representation for their negroes, and he did not believe those States would ever confederate on terms that would deprive them of that trade.”<sup>283</sup> He sought to insert the word “free” in a clause that would have provided one representative “for every 40,000 inhabitants.”<sup>284</sup> Attacking the unamended provision, he declared: “The admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and S. C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & damns them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind, than the Citizen of Pa. or N. Jersey who views with a laudable horror, so nefarious a practice.”<sup>285</sup>

While Morris’s initial speeches were forceful, ultimately, he decided that there could be “a bargain among the Northern & Southern States” on the provisions involving the slave trade, taxes on exports, and regulation of navigation.<sup>286</sup> And, despite his claim that he could not accept the 3/5 clause, he did accept it when he supported the Constitution. Nonetheless, no delegate had spoken as forcibly to denounce slavery’s immorality.

New States: Alone among the delegates, Morris fought against giving new states full political equality with the original thirteen. “He [Morris] thought the rule of representation ought to be so fixed as to secure to Atlantic States a prevalence in the National Councils.”<sup>287</sup> He argued for “irrevocably fixing the number of representatives which the Atlantic States should respectively have, and the number which each new State will have.”<sup>288</sup> “He dwelt much on the danger of throwing such a preponderancy [of representation in Congress] into the Western Scale, suggesting that in time the Western people wd. outnumber the Atlantic States. He wished therefore to put it in the power of the latter to keep a majority of votes in their own hands.”<sup>289</sup> When the convention considered the Committee of Detail’s proposal that “new States shall be admitted on the same terms with the original states,”<sup>290</sup> Morris successfully urged that the language should be struck because “[h]e did not wish to bind down the Legislature to admit

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<sup>282</sup>2 Farrand 221

<sup>283</sup>1 Farrand 588.

<sup>284</sup>2 Farrand 221

<sup>285</sup>2 Farrand 222.

<sup>286</sup>2 Farrand 374

<sup>287</sup>1 Farrand 533

<sup>288</sup>1 Farrand 534.

<sup>289</sup>1 Farrand 571.

<sup>290</sup>2 Farrand 454.

Western States on the terms here stated.”<sup>291</sup>

In justifying his position, he voiced concern about the quality of the leaders the new states would have:

Among other objections it must be apparent they would not be able to furnish men equally enlightened, to share in the administration of our common interests. The Busy haunts of men not the remote wilderness, was the proper School of political Talents. If the Western people get the power into their hands they will ruin the Atlantic interests. The Back members are always most averse to the best measures.<sup>292</sup>

Madison sarcastically responded that Morris’s argument suggested that he “determined the human character by the points of the compass.”<sup>293</sup>

Focusing on the consequences of giving full representation to western states, Morris also argued that it would lead to ill-advised military conflict: “The new States will know less of the public interest than these [the original thirteen states], will have an interest in many respects different, in particular will be little scrupulous of involving the Community in wars the burdens & operations of which would fall chiefly on the maritime States.”<sup>294</sup>

Critically, however, Morris was concerned, not just that the new states would align against the original thirteen, but that they would align with the southern states against the northern states. Thus his concern about the new states was linked to his opposition to slavery. He decried the fact that “Southn. Gentleman will not be satisfied unless they see the way open to their gaining a majority in the public Councils.”<sup>295</sup> “There can be no end of demands for security if every particular interest is to be entitled to it,”<sup>296</sup> and the “interest” Southern demanded protection for was slavery: “[T]he Southn. States claim it [security] for their peculiar objects.”<sup>297</sup> He envisioned that the Southern states and the new states would form a coalition that would dominate the national government and threaten the interests of Northern states: “If the Southn. States get the power into their hands, and be joined as they will be with the interior Country they will inevitably bring on a war with Spain for the Mississippi. . . . The interior Country having no property nor interest exposed to the sea, will be little affected by such a war. He wished to know what security the Northn. & middle States will have agst. this danger.”<sup>298</sup>

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<sup>291</sup>2 Farrand 454.

<sup>292</sup>1 Farrand 583

<sup>293</sup>1 Farrand 584

<sup>294</sup>1 Farrand 533.

<sup>295</sup>1 Farrand 604.

<sup>296</sup>1 Farrand 604.

<sup>297</sup>1 Farrand 604.

<sup>298</sup>1 Farrand 604

The stakes of the new states' issue were high both for an opponent of slavery like Morris and for slavery's defenders because of the demographic change that Morris and his fellow delegates – both from the north and the south - envisioned.

In the wake of the three-fifths clause and the Connecticut Compromise, the North would have a slight advantage in both houses of Congress immediately after ratification. At the outset of government under the Constitution, there would be seven northern states and six southern.<sup>299</sup> The seven northern states would have 35 delegates, and the southern states 31.<sup>300</sup> Even though the North had a slight edge, Morris was unhappy with this allocation, which was the product of the three-fifths clause. “[T]he Southern States have by the report more than their share of representation.”<sup>301</sup> In contrast, Madison, expressing the views of the South, voiced concern that southern representatives would be in the minority. He said that he “always conceived that the difference of interest in the U. States lay not between the large & small, but the N. & Southn. States.”<sup>302</sup> Madison was unhappy with the initial allocation of representatives in the House because the “members allotted to the N. States was greatly superior.”<sup>303</sup>

But the North's advantage in the House was seen as temporary. It was generally thought that the Southern states would grow in population more rapidly than the Northern states and that population growth in the territories would also be more in the South than the North. As South Carolina's Pierce Butler observed, “The people & strength of America are evidently bearing Southwardly & S. westwly.”<sup>304</sup> Morris's unsuccessful arguments that majority of representation should remain in the original thirteen states had been a counter to these demographic trends. Similarly, he argued (again unsuccessfully) against the constitutional provision that there be a census and that representation in the House be adjusted in accordance with its findings about population.<sup>305</sup>

The North's slight advantage in the Senate might prove more enduring, so long as the number of new southern states to be admitted did not exceed the number of new northern states. Strikingly, in the wake of adoption of the three-fifths clause, Morris, who had been one of the strongest critics of equal representation of the states, came to support the Connecticut Compromise, declaring “he shall be obliged to vote for ye. vicious principle of equality in the 2d. branch in order to provide some defence for the N. states.”<sup>306</sup> The Senate would be the bulwark against the South.

Morris's fight on the floor against provisions that he saw as leading to an increase in the political power of the South and the West had been repeatedly unsuccessful. He had, however,

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<sup>299</sup>For the North: Massachusetts, New Hampshire, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania. For the South: Maryland, Delaware, Virginia, North Carolina, South Carolina, Georgia.

<sup>300</sup>Cite to Con

<sup>301</sup>1 Farrand 567.

<sup>302</sup>1 Farrand 601.

<sup>303</sup>1 Farrand 602.

<sup>304</sup>1 Farrand 605. See Klarman at 256 (discussing consensus about demographic trends).

<sup>305</sup>1 Farrand 583-84.

<sup>306</sup>1 Farrand 604.

achieved a significant victory, although he achieved it through deception, rather than the force of argument.

Towards the end of the convention, the Committee of Detail had put together a draft Constitution, which the delegates worked through provision by provision. When they turned to the Committee of Detail's provision on new states, Morris rose to propose the addition of a new provision. Madison's notes report:

Mr Govr Morris moved to postpone this [discussion of the new states provision] in order to take up the following. "The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. States; and nothing in this constitution contained, shall be so construed as to prejudice any claims either of the U-- S-- or of any particular State."<sup>307</sup>

There was no substantive discussion of the meaning of the clause, except that Maryland's Luther Martin proposed the addition of a provision that any claims could be litigated in the Supreme Court, which Morris responded was "unnecessary, as all suits to which the U.S. – are parties – are already to be decided by the supreme Court of the U – States."<sup>308</sup> Without further debate, Morris's addition of this clause on territorial governance was adopted, with Maryland alone dissenting.<sup>309</sup>

While the clause was thus adopted without discussion of its import, Morris saw it as profoundly consequential. Writing a letter to Henry Livingston in 1803, at the time of the Louisiana Purchase, he boasted that he had crafted the territories clause in such a way that it would bar newly-acquired territories from becoming states, but that he had hidden the clause's meaning so that his fellow framers would fail to realize what the clause meant: "I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article [of the Constitution], I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made."<sup>310</sup>

As he predicted, Morris's language was to prove important, although the territories acquired by the United States in the first hundred years of the republic all became states. But Puerto Rico and Guam – territories acquired in by the United States as a result of the Spanish American War – have been governed as territories, rather than being admitted as states, and courts and the executive branch have justified this treatment by relying on the language Morris added from the floor.<sup>311</sup>

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<sup>307</sup>2 Farrand 466.

<sup>308</sup>2 Farrand 466.

<sup>309</sup>2 Farrand 466.

<sup>310</sup>3 Farrand 404.

<sup>311</sup>Cite to Insular cases; OLC opinions.

Morris's amendment to the territories clause foreshadowed his work on the Committee of Style. Morris's fellow delegates were uniformly in favor of political equality for the territories, enabling them to become states on an equal footing with the original thirteen. Morris alone was not. Having failed to persuade others in substantive debates, he crafted language designed to reverse that outcome. He is making it possible for Congress to govern territories permanently, rather than moving them to statehood. At the same time, he masked his intent and, because any clearer language would be rejected, he used language that, rather than explicitly vesting Congress with the power to govern territories permanently as territories, was ambiguous. "I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made." He slipped language into the Constitution that future political actors could draw on. He acted in precisely the same way repeatedly as he crafted the Committee of Style's draft.

#### Conclusion

This section has surveyed Morris's positions at the constitutional convention before the Committee of Style began its work on the areas of central importance to him. He was a champion of the power of the national government. He fought for a strong executive. He believed in the necessity of judicial review and a strong federal judiciary. He saw the protection of private property as the fundamental reason for government's existence. He opposed slavery and wanted to constrain the admission of new states. While he achieved substantial successes during the floor debates, the Constitution was the work of compromise. As the Committee of Style began its work, the Constitution fell short of his vision in each critical dimension.

### VI. The Work of the Committee of Style

This section examines the provisions of the Constitution whose substantive meaning was changed by the Committee of Style. There were other provisions of the Constitution whose text was changed by the Committee, but this section only discusses the provisions where the changes had substantive consequence.<sup>312</sup>

These provisions typically follow a pattern. Morris was reversing a loss he had suffered during the convention proceedings or, at the least, advancing a position that the prior draft of the Constitution had not reflected. Morris's changes reflected not only his vision of the Constitution but positions that the Federalists would champion in the early republic. He was, in effect, creating a Federalist constitutional playbook. At the same time, the changes were subtle and often so ambiguous that Republicans could offer an alternative reading. Finally, in many cases, Hamilton and Wilson, with whom Morris had worked on the committee, were fighting for the reading of the text Morris would have wanted.

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<sup>312</sup>I am sure I have missed some. I have been working on this article well over a decade and am still occasionally surprised by looking closely at a clause and finding that Morris changed its meaning. So, I am confident that there are other clauses I have overlooked. And I should add that my experience in repeatedly finding new shifts in meaning after working many years on this project helps me understand how Morris's fellow delegates failed to see changes in meaning as they rapidly worked through the Constitution in the convention's final days.

## a. The Preamble

### *Proceedings of the Convention Referred to the Committee of Style and Arrangement*

Preamble: We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity.

*Report of Committee of Style Preamble:* We, the People of the United States, in order to form a more perfect union, to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish the Constitution for the United States of America.

The changes in the Preamble reframed the document, converting it from a document establishing a confederation without overarching purpose, to a document creating a nation animated by powerful goals. It not only represented a new statement of the nation and its purposes, it had significant legal consequence: in the early Republic, Federalists repeatedly relied on the Preamble as a grant of power, although Republicans rejected this view.

It is, however, orthodoxy today among legal scholars and courts that the Preamble is not a grant of power and that it has “little or no legal value or judicial usefulness.”<sup>313</sup> This approach has consequences of the greatest significance. Most significantly, it means that the grants of power to Congress set forth in Article I (or related powers implicit in those grants) are the only arguable basis for assertions of national authority in cases like *National Federation of Independent Business v. Sebelius*.<sup>314</sup> This approach has consequence beyond the construction of the Preamble itself. It supports Justice Scalia’s view for the Court in *Heller*, in interpreting the Second Amendment’s Preamble, that “apart from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.”<sup>315</sup> It also accords with the Court’s conclusion in *Eldred v. Ashcroft* in upholding the Copyright Term Extension Act that the Copyright Clause’s Preamble - “promote the Progress of Science”<sup>316</sup> “is [not] an independently enforceable limit on Congress’ power.”<sup>317</sup>

The central authority for the proposition that the Constitution’s Preamble does not confer powers is Joseph Story, who wrote in his Commentaries:

The preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power per se; it can never amount,

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<sup>313</sup>USC at 1024.

<sup>314</sup>567 U.S. 519 (2012).

<sup>315</sup>*Heller* at 578. While Justice Scalia did not reference *Jacobson* and Story in his opinion for the Court, counsel for *Heller*, Alan Gura did, arguing at length that “the Constitution’s other preambles are given no weight.” Alan Gura, Briefing the Second Amendment Before the Supreme Court, 47 Duq. L. Rev. 225, 240 (2009); see generally *id.* at 239-41 (discussing other preambles and that they serve only to clarify ambiguity).

<sup>316</sup>Art. I, § 8, cl. 8.

<sup>317</sup>*Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003).

by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the constitution. Its true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution, and not substantively to create them.<sup>318</sup>

In 1905, the Supreme Court in *Jacobson v. Massachusetts*,<sup>319</sup> citing Justice Story, held that the Preamble was not a grant of authority:

Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on of any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom. 1 Story's Const. § 462.<sup>320</sup>

At least since *Jacobson*, the standard view has been that the Preamble is not a grant of power, and when it has been discussed in the law review literature, it has typically been treated as aspirational. With the exception of Professor Mikhail's work and that of Professor William Crosskey, where the Preamble has been accorded interpretive weight, it has been seen as a gloss on other powers.<sup>321</sup>

But the history of the Preamble in the early Republic reflect a very different view.

Strikingly, and surprisingly, the notes of the convention do not report any discussion about the Committee of Style's revised Preamble. But Antifederalists bitterly attacked the phrase "We, the People" in the state ratifying conventions. Since the debates in Philadelphia were secret, non-participants did not know about the enumeration of states in the Committee of Detail's Preamble, but they were aware of the opening provision of the Articles of Confederation, which declared the document to be the "Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia." The Constitution's formulation was dramatically different. "What right had they to say, We, the people?" Patrick Henry angrily demanded. "My

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<sup>318</sup>Joseph Story, *Commentaries of the Constitution of the United States* § 462 (1833).

<sup>319</sup>*Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

<sup>320</sup>197 U.S. at 22.

<sup>321</sup>See John Welch & James Heilpern, *Recovering our Forgotten Preamble*, 91 S. Cal. L. Rev. 1022, 1116-26 (2018). While Welch and Heilpern take issue with what they see as the disregard of the Preamble, they do not see it as a grant of power. Examples of cases following *Jacobson* and holding that the Preamble is not a grant of power. *Carter v. Carter Coal*, 298 US 238, 292 (1936). Akhil Reed Amar is the leading modern scholar who accords legal weight to the Preamble, see Akhil Reed Amar, *America's Constitution: A Biography* 471 (2005), but Amar also does not see it as a grant of power.



political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorized them to speak the language of We, the people, instead of We, the states?"<sup>322</sup>

Scholars, have, however, repeatedly argued that, as Clinton Rossiter put it, "[w]e ought not attach too much significance to this change."<sup>323</sup> On August 31, shortly before the Committee of Style began its work, the Convention had decided that the new government would come into being if nine states ratified the Constitution. Rossiter writes, "Since no one could tell for certain which states would ratify and which would stall or even refuse flatly to join, the sensible course was to leave out any mention at all of New Hampshire and her twelve sisters."<sup>324</sup>

As a matter of drafting, however, one can easily frame options other than "We, the People" that account for the possibility that one or more states might not have ratified the document. For example, the essential formulation of the Committee of Detail's Preamble could have been preserved by beginning the Constitution: "We the People of the States of the United States . . ." "The selection of "We, the People," rather than such a plausible alternative text suggests that Morris's phrasing "We, the People" reflects a substantive vision.

Indeed, as previously discussed, Morris's statements at the Convention reflect his belief that the Constitution should create a government for a unified nation, rather than for a confederation of states. Rather than being a representative of Pennsylvania, he was "a representative of America."<sup>325</sup> His aim was to "form a compact for the good of America."<sup>326</sup> As he expressed his view of the framing in a speech in the Senate in 1802:

Never, in the flow of time, was there a moment so propitious, as that in which the Convention assembled. The States had been convinced, by melancholy experience, how inadequate they were to the management of our national concerns. The passions of the people were lulled to sleep; State pride slumbered; the Constitution was promulgated; and then it awoke, and opposition was formed; but it was in vain. The people of America bound the states down by this compact.<sup>327</sup>

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<sup>322</sup> THE FOUNDERS' CONSTITUTION 10 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>323</sup>CLINTON ROSSITER, 1787: THE GRAND CONVENTION 229 (1966); accord 1 JOHN VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING (2005); Stewart; FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); see also Madison (A constructive ingenuity and interpretation of Preamble). In his magisterial *Novus Ordo Seclorum*, Forrest McDonald argues that, despite that the Preamble invocation of "We the People" as opposed to listing states "does not prove anything" and he offers as evidence the fact that the Constitution consistently refers to United States in the plural. FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 281 N.37 (1985). As I have previously argued, however, the reference to United States in the plural does not prove anything: in the late eighteenth century, spelling rules dictated that nouns ending in "s" were paired with plural verbs. "United States" took a plural verb; so did "news." William Michael Treanor, *Taking Text too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487 (2007).

<sup>324</sup>CLINTON ROSSITER, 1787: THE GRAND CONVENTION 229 (1966).

<sup>325</sup>Madison 232.

<sup>326</sup>Madison 268.

<sup>327</sup>3 Farrand 391.

As the last sentence suggests, for Morris, the opening words of the Preamble reflected his conception of who the sovereign creators of the Constitution were: the Constitution was the creation, not of the people of the various states acting in concert, but of “[t]he people of America.”

Morris’s preamble not only changed who the authors of the Constitution were, it announced their goals: “to form a more perfect union, to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” The Committee of Detail’s preamble, in contrast, had not offered any statement of goals.

Again, Rossiter minimizes the significance of Morris’s enumeration. It is a “polished statement of the purposes of the Constitution, for which Morris had drawn on traditional sources.”<sup>328</sup>

Brookhiser is more celebratory - Morris’s Preamble “showed creativity, and condensed thought”<sup>329</sup> - but he finds the Preamble’s significant contribution in “We, the People,” not in the enumeration.

But, in assessing the significance of the Preamble, it is important to see the ways in which (contrary to Rossiter’s statement), Morris departed from the other statements of goals available to him. The Articles of Confederation “proclaimed itself a firm league of friendship” entered into by the States for “their common defense, the security of their liberties, and their mutual and general welfare.”<sup>330</sup> Following the Articles of Confederation, the Virginia Plan’s first article asserted that the “objects” of “Confederation” should be “common defence, security of liberty and general welfare.”<sup>331</sup> The first article of the New Jersey Plan announced its goals to be “to render the federal Constitution adequate to the exigencies of Government, and the preservation of the Union.”<sup>332</sup> The third plan presented to the Constitution, Charles Pinckney’s, was like the Committee of Detail’s plan in not framing goals in its introductory article.<sup>333</sup>

The final three goals of Morris’s Preamble – “provide for the common defence, promote the general welfare, and secure the blessings of liberty” - track both Madison’s list and the list in the Articles of Confederation. But the first three goals – “to form a more perfect union, to establish justice, insure domestic tranquility” - are not included in any of the predecessor documents. The New Jersey Plan also speaks of “union”, but the focus is dramatically different. The New Jersey Plan’s end is maintaining the current arrangement - the “preservation of the Union.” Morris’s goal is, very literally, reformulation: “to form a more perfect union.”

John Mikhail has recently suggested that Morris and other strong nationalists among the

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<sup>328</sup>Rossiter 229.

<sup>329</sup>Brookhiser at 90.

<sup>330</sup>ARTICLES OF CONFEDERATION OF 1787, Art. III.

<sup>331</sup>3 Farrand 593. Madison was the principal author of the Virginia Plan.

<sup>332</sup>3 Farrand 611.

<sup>333</sup>3 Farrand 595.

Founders understood the specification of goals in the Preamble as expanding the powers of the national government.<sup>334</sup> The goals' enumeration in the Preamble made them "Powers vested by this Constitution in the Government of the United States" under the "necessary and proper" clause; because that clause gave Congress the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution [those] Powers", the Preamble became, indirectly, a grant of authority to Congress.<sup>335</sup> Examination of the early history supports this view and highlights the significance of Morris's additions.

The Preamble figured in the first significant debate in Congress about the meaning of the Constitution – the debate about whether the President alone had the power to remove principal officers. Congressman Laurence invoked the preamble as a basis for presidential power. "Would a regulation" that reflected the view that Congress had removal authority "be effectual to carry into effect the great objects of the constitution?" the Congressman asked.<sup>336</sup> He responded that it would not. Invoking the Preamble's "general welfare" clause, he said that measures inconsistent with "carrying of the constitution into effect . . . must be rejected as dangerous and incompatible with the general welfare." Thus, in Laurence's view the Preamble granted authority to the President to remove executive officers.

The Preamble played a central role in the first great debate in Congress that involving the scope of congressional authority – the debate about the constitutionality of the legislation creating the Bank of the United States. Most Congressman who spoke in favor of the bill and its constitutionality invoked the Preamble.

Congressman Elbridge Gerry employed the argument discussed by Mikhail in contending that Congress had the power under the Constitution to create a Bank of the United States:

"The causes which produced the Constitution were an imperfect union, want of public and private justice, internal commotions, a defenseless community, neglect of the public welfare, and danger to our liberties. These are known to be the causes not only by the preamble of the Constitution, but also from our own knowledge of the history of the times that preceded the establishment of it. If these weighty causes produced the Constitution, and it not only gives power for removing them, but also authorizes Congress to make all laws necessary and proper for carrying these powers into effect, shall we listen to the assertions that these words have no meaning, and that this Constitution shall have no more energy than the old."<sup>337</sup>

Gerry thus linked the Preamble and the necessary and proper clause in arguing for the Bank's constitutionality. Congress has the power under the necessary and proper clause for

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<sup>334</sup>Mikhail, *supra* note , at [ ].

<sup>335</sup>Cite to Mikhail. William Crosskey earlier advanced this reading. See William Crosskey, Mr. Justice John Marshall at 3, 12 in Mr. Justice (Allison Dunham and Philip Kurland eds., 1964 (rev. ed)). Crosskey argued that "all other Powers vested by the Constitution in the Government of the United States" must refer to the Preamble since, outside of the Preamble, there is no enumeration of powers to the federal government; all other enumerations are to a department or an officer.

<sup>336</sup>Gienapp at 2914.

<sup>337</sup>2 Annals 1950.

“carrying these powers [the powers specified in the Preamble] into effect.”

Similarly, the *Federal Gazette*, a Philadelphia newspaper, reported that Congressman Fisher Ames, in arguing in support of the Bank’s constitutionality, “adverted to the preamble of the constitution, which declares that it was established for the general welfare of the Union; [that] this vested Congress with the authority over all objects of national concern or of a general nature; [that] a national bank undoubtedly came within this idea.”<sup>338</sup> For Ames, the Preamble was a grant of power.

Similarly, the Annals of Congress report that Congressman Laurence (who had appealed to the Preamble in the removal debate) declared: “The great objects of this Government are contained in the context of the Constitution. He recapitulated these objects and inferred that every power necessary to secure these objects must necessarily follow. . . .”<sup>339</sup>

Congressman Boudinot also relied on the Preamble as providing authority for establishing the Bank:

Mr. B. then took up the Constitution, to see if this simple power [the power to incorporate a bank] was not fairly to be drawn by necessary implication from those vested by this instrument in the legislative authority of the United States. It sets out in the preamble with declaring the general purposes for which it was formed: “the insurance of domestic tranquility, provision for the common defence, and promotion of the general welfare.” These are the prominent features of this instrument, and are confirmed and enlarged by the specific grants in the body of it. . . .”<sup>340</sup>

Opponents of the Bank denounced this reliance on the Preamble. Madison’s attack was forceful:

The preamble to the Constitution, said he, has produced a new mine of power; but this is the first instance he had heard of, in which the preamble had been adduced for such a purpose. In his opinion, the preamble only states the objects of the Confederation, and the subsequent clauses designate the express powers by which those objects are to be obtained; and a mean is proposed through which to acquire those that may be found still

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<sup>338</sup>*Federal Gazette* (February 15, 1791) quoted in Crosskey at 1313 n. 30. See also 2 Annals at 1909 (“The preamble to the Constitution warrants this remark, that a bank is not repugnant to the spirit and essential objects of that instrument.”) (Rep. Ames).

<sup>339</sup>2 Annals 1914-15. Crosskey at 200. While the Annals does not specifically cite Lawrence as referencing the Preamble, it is clear from the context that he is referencing the Preamble. See Crosskey at 200. Moreover, Congressman Jackson, the next speaker, in responding to Lawrence’s argument, made explicit that Lawrence had been discussing the Preamble: “He adverted to the preamble and context of the Constitution, and asserted that this context is to be interpreted by the general powers contained in the instrument. . . . The ‘general welfare’ are the two words that to involve and justify the assumption of every power. But what is this general welfare? It is the welfare of Philadelphia, New York, and Boston; for as to the States of Georgina and New Hampshire, they may as well be out of the Union for any advantages they will receive from the institution.” 2 Annals 1918.

<sup>340</sup>2 Annals 1921.

requisite, more fully to effect the purposes of the Confederation.”<sup>341</sup>

Other opponents of the Bank similarly attacked the view that the Preamble was a grant of power. Congressman Giles stated:

“To establish the affirmative of this proposition, arguments have been drawn from several parts of the Constitution; the context has been resorted to. “We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity,” &c. It has been remarked, that here the the ends for which the government was established are clearly pointed out; the means to produce the ends are left to the choice of the Legislature, and that the incorporation of a bank is one necessary means to produce these general ends. It may be observed, in reply, that the context contemplates every general object of Government whatever . . .

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Congressman Stone crisply made the same point, “I would ask if there is any power under Heaven which could not be exercised within the extensive limits of this preamble.”<sup>343</sup>

In his opinion on the Bank bill, Attorney General Randolph similarly argued that the Preamble was hortatory:

“The Preamble to the Constitution has also been relied on as a source of power.

“To this, it will be here remarked, once for all, that the Preamble if it be operative is a full constitution of itself, and the body of the Constitution is useless; but that it is declarative only of the views of the convention, which they supposed would be best fulfilled by the powers delineated; and that such is the legitimate nature of preambles.”

The debate about the Bank of the United States thus prominently featured a fight about whether the preamble was a grant of power. Most of the Federalists who spoke in the House relied on the Preamble (among other grounds), and the Republicans argued that the Preamble was not a grant of power. The Federalists prevailed, which provides originalist support for reading the Preamble as a grant of power. At the same time, the position was contested.

It should be noted, however, that Hamilton’s defense of the bank, unlike the defenses of many Federalist Congressman, did not explicitly draw on the Preamble. Hamilton argued that the Bank was constitutional by appealing to the sovereign power of the government – without an invocation of the Preamble – and the necessary and proper clause.<sup>344</sup>

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<sup>341</sup>2 Annals 1957.

<sup>342</sup>2 Annals 1939.

<sup>343</sup>2 Annals 1931.

<sup>344</sup>Cite to Hamilton Bank Opinion

Hamilton had referenced the Preamble in the Federalist, although, again, not as a grant of power. In Federalist 84, he wrote:

Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations. "We the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.<sup>345</sup>

Hamilton is construing the Preamble as a statement of "popular rights." "[T]he people" are creating the national government for particular ends, but he is not reading the Preamble as a grant of authority. The closest Hamilton came to reading the Preamble as a grant of authority came in his 1791 Report on Manufactures, where he justified the use of the taxing authority to provide funding for bounties for manufacturers. In discussing the use of "general welfare" in Article I, section 8's grant to Congress of a taxing and spending authority, Hamilton wrote: "The phrase ['General Welfare'] is as comprehensive as any that could be used; because it was not fit that the constitutional authority of the Union, to appropriate its revenue shou'd have been restricted within narrower limits than the 'General Welfare' and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition."<sup>346</sup> Peter Charles Hoffer has argued that, in making this argument, Hamilton was seeking to read Article I's "general welfare" clause expansively, in light of the Preamble.<sup>347</sup> Even, here, however, Hamilton is not reading the Preamble as a separate grant of authority. Rather, it is serving as a gloss on the way the phrase "general welfare" is used elsewhere in the document.

The congressional debates in 1798 about the constitutionality of the Alien and Sedition Acts, however, echoed the debates in the Bank controversy in the use of the Preamble and criticism of that use. Congressman Gallatin argued that Congress lacked authority to pass the Sedition Act. Congressman Sewell responded "with three different arguments . . . why he supposed Congress had the power of making the proposed regulation. And the first thing he referred to was the general nature of the Constitution itself, which he drew from the preamble, in the following words: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our prosperity, do ordain" &C. The Constitution, therefore, he said, in the outset, establishes the sovereignty of the United States, and that sovereignty must reside in the government of the United States."<sup>348</sup>

Congressman Williams, an opponent of the Sedition Act, responded with a forceful rejection of Sewell's view of the Preamble as a grant to Congress of broad powers. "If the

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<sup>345</sup>Federalist 84.

<sup>346</sup>Report on Manufactures

<sup>347</sup>Hoffer at 95.

<sup>348</sup>8 Annals 1957.

principle which the gentlemen from Massachusetts have drawn from the preamble of the Constitution, of providing for the common defence and welfare of the Union, be correct, it appeared to him unnecessary to have any other provision in the Constitution beside the preamble, as it may be inferred from that, that Congress has all power whatever.”<sup>349</sup>

The debate about the Preamble occurred again when Jeffersonian Republicans acted to repeal the Judiciary Act of 1801, which had established circuit courts. Morris, now a Senator from New York, argued that the proposed legislation was unconstitutional. His argument began with an invocation of the Preamble. “To form, therefore, a more perfect union, and to ensure domestic tranquillity,” he declared, “the Constitution has said there shall be courts of the Union to try causes, by the wrongful decision of which the Union might be endangered or domestic tranquility be disturbed.”<sup>350</sup> In addition to the preamble, Morris relied on the judicial powers clause (which he had also re-written when on the Committee of Style)<sup>351</sup> as he made the case that Congress had a constitutional obligation to establish lower federal courts. Morris contended that federal courts strengthened union and promoted tranquility, and the elimination of courts that had been established was unconstitutional. He closed his argument by invoking Framers’ intent and implicitly invoking the goal of “ensur[ing] domestic tranquility.”

The Convention contemplated the very act you now attempt. They knew also the jealousy and power of the States; and they established for your and for their protection this most important department. I beg gentlemen to hear and remember what I say: It is this department alone, and it is the independence of this department, which can save you from civil war.<sup>352</sup>

Thus, Morris was using the Preamble as grant of power to Congress mandating the establishment of lower federal courts.

Arguing for repeal, Congressman Baldwin dismissed Morris’s reliance on the Preamble: “It had been contended in the early years of the Government, repeatedly, and with much earnestness, that the preamble of the Constitution was a grant of powers, and when a measure was proposed, if it could be shown to have a tendency ‘to form a more perfect union, establish justice, and insure domestic tranquillity, &c., it was Constitutional . . .”<sup>353</sup> “Many questions of this kind have already been so far settled by practice on our Constitution that they have rarely been stirred of late,” he asserted. He concluded, “It was some reward, he said, for the trouble they had on similar occasions, that the greater part appeared now to have been settled, as such instances occurred much less frequently than formerly: the one which presents itself now is new; he expressed his confidence that a result as proper and satisfactory would take place on this, as on former

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<sup>349</sup>8 Annals 1962.

<sup>350</sup>3 Farrand 391.

<sup>351</sup>See infra at ———

<sup>352</sup>3 Farrand 393.

<sup>353</sup>11 Annals 105.

occasions.”<sup>354</sup>

The other primary use of the Preamble in the early republic was in *Chisholm v. Georgia*. Both Justice Wilson and Chief Justice Jay relied on the Preamble as justifying the Court’s holding that it had jurisdiction over Georgia. Chief Justice Jay found the Court’s jurisdiction grounded in the Preamble’s assertion that the federal government was “to establish justice.”<sup>355</sup> Wilson construed the Preamble at length:

“Fair and conclusive deduction, then, evinces that the people of the United States did vest this Court with jurisdiction over the State of Georgia. The same truth may be deduced from the declared objects, and the general texture of the Constitution of the United States. One of its declared objects is, to form an union more perfect, than, before that time, had been formed. . . . Another declared object is, "to establish justice." This points, in a particular manner, to the Judicial authority. And when we view this object in conjunction with the declaration, "that no State shall pass a law impairing the obligation of contracts;" we shall probably think, that this object points, in a particular manner to the jurisdiction of the Court over the several States. What good purpose could this Constitutional provision secure, if a State might pass a law impairing the obligation of its own contracts; and be amenable, for such a violation of right, to no controuling judiciary power? . . . A third declared object is -- "to ensure domestic tranquillity." This tranquillity is most likely to be disturbed by controversies between States. These consequences will be most peaceably and effectually decided by the establishment and by the exercise of a superintending judicial authority.”<sup>356</sup>

Thus, the early history of the Republic show that the Preamble was not only a powerful statement of nationhood, but a provision of real legal consequence. The debates about the Bank and the Sedition Act show that Morris had added language to the Constitution that Federalists viewed as a grant of authority (although Republicans disagreed and Hamilton was an exception to the standard Federalist view). Moreover, his language was used (by Morris himself) to support the position that Congress had to create lower federal courts and in *Chisholm* to support the assertion of jurisdiction over the states. At the same time, Republicans argued that the Preamble did not increase national power. So, the meaning of the clause was contested, but those who saw it as a grant of power were on the winning side: both the Bank Bill and the Sedition Act passed.

### **b. Three Articles for Three Branches and Three Vesting Clauses**

*Proceedings of the Convention Referred to the Committee of Style and Arrangement*

Article II: The Government shall consist of supreme legislative, executive and judicial

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<sup>354</sup>11 Annals 105.

<sup>355</sup>2 U.S. at 475.

<sup>356</sup>2 U.S. at 465 (Wilson, J.)



powers.

Article III: The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives, and a Senate. The Legislature shall meet at least once in every year, and such meeting shall be on the first Monday in December unless a different day shall be appointed by law. . . .

Article X: The Executive power of the United States shall be vested in a single person. His title shall be, "The President of the United States of America;" and his title shall be, "His Excellency." He shall hold his office during the term of four years, and together with the Vice President, Chosen for the same term, be electing in the following manner. . . .

Article XI: The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

*Report of Committee of Style:*

Article I, section 1: ALL legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

. . . .

Article II, section 1: The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected in the following manner:

. . . .

Article III, section 1: The judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Alongside the changes to the Preamble and the contract clause, the most obvious change made by the Committee of Style is its restructuring of the provisions concerning the branches into three parallel articles, and one of the most legally consequential has been its alteration of the vesting clauses of Articles I and II.

One of the most familiar aspects of the Constitution is its treatment of the three branches in three parallel articles: Article I (Congress), Article II (the Executive), and Article III (the Federal Judiciary). That division is wholly the work of the Committee of Style. None of the state constitutions had that framework. None of the various plans presented to the Convention (the Virginia Plan, the New Jersey Plan, Pinckney's Plan) had that framework. The Committee of Detail's draft Constitution began with an article stating that the "style" of the government should be "The United States of America," followed it with a separation of powers article that was Article II (reprinted above), then wended its way through the powers of Congress in a long series of articles (Article III through IX), before treating the Executive in Article X and the Judiciary in Article XI.

The parallel structuring of the three articles connotes parallel stature and authority. While that idea may strike us today as a commonplace of the United States constitutional system, it was not orthodoxy at the time of the founding. The first state constitutions had placed overwhelming authority in the legislatures, and the revolutionary era document of national governance – the Articles of Confederation – was a document of legislative governance (without separate judiciary or executive). Moreover, the idea of the judiciary as a separate branch was contested: in British constitutional theory, the judiciary was part of the executive, and that position had adherents in the United States (including John Adams). While the arc of constitutional development during the revolutionary era had been towards greater authority for the executive and the judiciary than they had in the first state constitutions, the notion that the other two branches were co-equal with the legislature was controversial. The Committee of Detail’s structuring – with eight articles about the Congress appearing before the article on the executive and the article on the judiciary – accords with the view that Congress was preeminent and the other branches almost an after thought.

As discussed in the previous section, at the convention, Morris had been, with Wilson, the greatest champion of a strong executive, and he also had been one of the principal advocates of a strong judiciary. While there is certainly a stylistic element to the simplification of ten articles into three, it also reflected Morris’s vision of elevating the Presidency and the federal courts. The re-structuring supports the view that the three branches are co-equal and independent of each other. The textual change conveys a powerful vision.

If the structuring of three parallel articles for three branches has largely symbolic import, the revisions to the vesting clauses have had a direct impact.

Morris made two changes to the vesting clauses that merit highlighting.

First, he dramatically, if subtly, reworked the executive branch vesting clause.

The version referred to the Committee read:

“The Executive power of the United States shall be vested in a single person. . . .”

This clause focuses on *who* has the executive power. “[A] single person” has “[t]he Executive power.” Again, this may seem totally unremarkable today that one person should have the executive authority, but one of the major debates at the convention had been over who should have the executive authority – whether it would be multiple people or one person. The convention ultimately decided it would be one person, and the version sent to the Committee (which had been crafted in the Committee of Detail) underscores that decision. “[A] single person” has “[t]he Executive power.”

The Committee of Style’s version shifts focus, and in shifting focus, it shifts meaning. As it emerges from the committee, the clause has become: “The executive power shall be vested in a president of the United States of America.” The clause reads now, not as a definition of who the executive is, but as a grant of executive power to the President. The “president of the

United States of America” has “[t]he executive power.” As will be seen, the provision as revised has been read since the early republic as a broad grant of power to the President. It would have been much harder, as a textual matter, to read the earlier version as a broad grant of power.

Second, Morris qualified the grant of authority to the Congress in a way that he did not qualify the grant of authority to the President. The vesting provisions for the legislature and the executive sent to the Committee of Style are parallel: “The legislative power shall be vested in a Congress . . .”; “The Executive power of the United States shall be vested in a single person . . .” The vesting clauses produced by the Committee are not: “ALL legislative power herein granted shall be vested in a Congress of the United States . . .”; “The executive power shall be vested in a president of the United States of America.” Congress receives the legislative powers “herein granted”; the President receives executive powers, without limitation.

Some commentators have argued that the Committee’s addition of “herein granted” should be read as a limitation of legislative powers.<sup>357</sup> That reading, however, would be inconsistent with Morris’s nationalism, and I do not know of anyone in the early republic who advanced such a reading.

But the distinction between the two grants of power can be read, not as a limitation on the legislative power, but as a statement that the executive power is capacious, and such a reading is consistent with Morris’s constitutional vision, and it was advanced in one of the critical debates of the early republic, the debate about whether President Washington had the power to issue a neutrality proclamation.

Close reading of the vesting clauses, resting on Morris’s two changes, has played a critical role in modern constitutional jurisprudence, providing the textual support for the unitary executive theory, in which the President has all executive powers and that grant is broadly understood.

The landmark case modern case is *Myers*, where Chief Justice Taft declared:

“It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the cooperation of the Senate in the appointment of officers and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties. The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the Constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the

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<sup>357</sup>Barnett

government, the expressions are 'All legislative powers herein granted shall be vested in a congress of the United States.' In that which grants the executive power, the expressions are 'The executive power shall be vested in a President of the United States.'<sup>358</sup>

Thus, in finding that the President's removal power cannot be limited by Congress, Taft is both reading the text of the Article II vesting clause to grant the President all executive powers ("It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause . . .") and contending that the difference between the two vesting clauses reinforces that reading ("The different mode of expression employed in the Constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference."). Taft's approach has a range of modern analogues, including Justice Scalia's dissent in *Morrison v. Olson*<sup>359</sup> the OLC torture memo of 2003,<sup>360</sup> the substantial body of unitary executive scholarship,<sup>361</sup> the opinion for the Court in *Free Enterprises Fund v. PCAOB*<sup>362</sup> and Justice Thomas's recent dissent in *Zivotofsky v. Kerry*.<sup>363</sup>

The first argument – that the text of the Article II vesting clause gives the President all executive powers – made its appearance in the first great constitutional debate, the 1789 debate in the House about whether the President had a constitutional right to remove executive officers, even though the Constitution did not explicitly provide that right. As with the Preamble, Fisher Ames, Morris's good friend, invoked Morris's text to support an outcome that Morris would have favored. Arguing that the President had the removal power, Ames observed that the Constitution declares "that the executive power shall be vested in the president" and added that "under these terms all the powers properly belonging to the executive department of the government are given, and such only taken away as are expressly excepted."<sup>364</sup> John Vining of Delaware similarly declared that "there was a strong presumption that [the President] was invested with [the removal power]; because, it was declared, that all executive

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<sup>358</sup>Myers at 138.

<sup>359</sup> 87 U.S. 654, 732 (1988).

<sup>360</sup>Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel of the Dep't of Def., Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003).

<sup>361</sup>See, e.g., Saikrishna Prakash, Regulating Presidential Powers, 91 Cornell L. Rev. 215 (2005); Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 565 (1994); Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 Yale L.J. 231 (2001); Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153 (1992); Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush (2008); Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 Iowa L. Rev. 1267 (1996). For a discussion of the literature, see Victoria Nourse, Reclaiming the Constitutional Text from Originalism: The Case of Executive Power, 106 Calif. L. Rev. 1 (2018).

<sup>362</sup>*Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010).

<sup>363</sup>135 U.S. 2076, 2101 (2015) (Thomas, J., dissenting). There are different approaches to the unitary executive theory, and in particular whether the President's executive power trumps otherwise applicable law under certain circumstances. See John Harrison, The Unitary Executive and the Scope of Executive Power, 126 Yale L.J. F. 374 (2017)

<sup>364</sup>11 First Congress at 979.

power should be vested in him, except in cases where it is otherwise qualified."<sup>365</sup> George Clymer of Pennsylvania argued that "the power of removal was an executive power, and as such belonged to the president alone, by the express words of the constitution, 'the executive power shall be vested in a president of the United States of America.'"<sup>366</sup>

While he believed that the President had the removal power, Madison did not, initially, embrace the vesting clause argument to support his position. Instead, he at first advanced functional arguments.<sup>367</sup> A requirement of senatorial advice and consent for removal "would be found very inconvenient in practice" and would "tend[] to lessen [the] responsibility" of the President over his subordinates,<sup>368</sup> he asserted. He, ultimately, however, advanced the vesting clause argument, after others had previously made it. He first advanced the vesting clause argument on June 17, a month into the debate and a month after he first argued that the President had the removal power under the Constitution [ck], when he noted the clause and contended that the requirement of senatorial advice and consent for appointments was "an exception to this general principle; and exceptions to general rules are ever taken strictly."<sup>369</sup>

But while the argument that the vesting clause conferred all executive powers on the President was made, it was controversial. Most of the Congressman who argued that the President had the removal power under the Constitution did not mention the vesting clause and either relied on other constitutional provisions or made structural arguments.<sup>370</sup>

Moreover, the votes of a substantial number of the members of Congress reflect the view that the President did not have the removal power.<sup>371</sup> And several Congressman explicitly rejected the vesting clause argument. Congressman William Smith said that the Vesting Clause argument "proves too much, and therefore proves nothing; because it implies that powers which are expressly given by the constitution would have been in the president without the express grant."<sup>372</sup> Alexander White contended that "the [only] executive powers [that are] vested, are those enumerated in the constitution."<sup>373</sup> James Jackson argued, even if removal were an executive function "it does not follow that it vests in the president alone because [the President] alone does not possess all executive powers."<sup>374</sup>

Thus, "the great constitutional debate of 1789" does not reflect a consensus about whether the vesting clause conferred a broad power on the President that ran beyond his

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<sup>365</sup>10 First Congress at 728.

<sup>366</sup>10 First Congress at 738.

<sup>367</sup>See Bradley and Flaherty at 549.

<sup>368</sup>10 id. at 735.

<sup>369</sup>11 id. at 896; see also 11 id. at 922 (invoking the Vesting Clause).

<sup>370</sup>Bradley and Flaherty at 658.

<sup>371</sup>The series of voting is complicated and difficult to parse, but it is clear that a substantial number of Congressmen opposed the vesting clause theory. For analysis, see Bradley and Flaherty at 662-63 (examining the relevant votes); Currie at 40-41; Calabresi and Prakash at 645.

<sup>372</sup>11 FCC at 936-37.

<sup>373</sup>11 FCC at 872.

<sup>374</sup>11 FCC at 912.

enumerated powers.

The vesting clause thesis had substantial support, but a significant number of Congressman did not accept it.

The disagreement about the meaning of the vesting clause was also central to the first great debate about the President's foreign affairs powers: the 1793 debate between Hamilton and Madison about the constitutionality of the Neutrality Proclamation.

Hamilton, writing as Pacificus, relied on the vesting clause thesis to justify President Washington's issuance of the Neutrality Proclamation. Like the adherents in 1789 of the view that there was a presidential power to remove officers, he argued that the vesting clause gave the President all executive powers, except where specific constitutional provisions took that power away. In his first Pacificus letter, he began by quoting the vesting clause and then the Constitution's enumeration of executive powers. He argued that, under standard principles of construction, the enumeration did not imply that the President was not fully vested with the executive power:

"It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications; as in regard to the cooperation of the Senate in the appointment of Officers and the making of treaties; which are qualifica<tions> of the general executive powers of appointing officers and making treaties: Because the difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms—and would render it improbable that a specification of certain particulars was designd as a substitute for those terms, when antecedently used."<sup>375</sup>

Thus, the only limits on the President's possession of executive powers were the specific limitations specified in the document (such as with the making of treaties).

Hamilton then advance a second vesting clause argument (one not advanced in the removal debate):

"The different mode of expression employed in the constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference. In the article which grants the legislative powers of the Governnt. the expressions are—"All Legislative powers herein granted shall be vested in a Congress of the UStates"; in that which grants the Executive Power the expressions are, as already quoted "The Executive Po<wer> shall be vested in a President of the UStates of America."

Hamilton is here relying on the difference between the Article I and Article II vesting clauses as a basis for reading the President's power broadly. Morris's phrasing – and, to be specific, his insertion of "herein granted" into the Article I vesting clause – become the basis of

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<sup>375</sup>Pacificus, Letter 1.

Hamilton's argument for a broad understanding of the President's powers, a constitutional goal that both Hamilton and Morris shared. Hamilton concludes: "The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the exceptions and qu[a]lifications which are expressed in the instrument."<sup>376</sup>

"The different mode of expression employed in the constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference. In the article which grants the legislative powers of the Govern. the expressions are—"All Legislative powers herein granted shall be vested in a Congress of the UStates"; in that which grants the Executive Power the expressions are, as already quoted "The Executive Po<wer> shall be vested in a President of the UStates of America."<sup>377</sup>

Madison's response as Helvidius was sharp. He begins:

"Several pieces with the signature of Pacificus were lately published, which have been read with singular pleasure and applause, by the foreigners and degenerate citizens among us, who hate our republican government, and the French revolution . . ." <sup>378</sup>

Helvidius reflects a different view of the vesting clause than Pacificus. Madison observes that Pacificus's vision of executive power accords with the views of Locke and Montesquieu, but dismisses them and the English precedent, declaring, "Both of them [Locke and Montesquieu] too are evidently warped by a regard to the particular government of England, to which one of them owed allegiance;\* and the other professed an admiration bordering on idolatry."<sup>379</sup> Madison argues that the power to proclaim neutrality falls within the legislative sphere because it follows from the power to make war and to make treaties, both legislative powers.<sup>380</sup>

There is a "tension" between Madison's broad conception of the scope of executive power in the removal debates and the narrow view in his Helvidius essays.<sup>381</sup> At the same time, Madison in Helvidius explicitly embraces his earlier position in the removal debate. He argues that removal is an executive power, but that neutrality is not.<sup>382</sup> The Helvidius-Pacificus debate thus involves two different views of the meaning of the scope of the grant in the vesting clause, rather than a debate between a proponent who reads it to be a grant of power and one who does not.

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<sup>376</sup>Pacificus, Letter 1.

<sup>377</sup>Pacificus, Letter 1.

<sup>378</sup>Helvidius, Letter 1.

<sup>379</sup>Helvidius, Letter 1.

<sup>380</sup>Helvidius, Letter 1.

<sup>381</sup>See Calabresi and Yoo, 47 Cas. W. Res. at 505 ("Madison's argument in the Helvidius letters is in tension with, but is not necessarily inconsistent with, his argument for a presidential removal power derivable from the Vesting Clause.").

<sup>382</sup>Helvidius, Letter 1.

To sum up: Morris's reformulation of the vesting clauses of Article I and II was consequential and played a critical role in the first two great debates about the scope of executive power. His language provided the basis for a broad reading of the executive power in the removal debate and by Pacificus in the fight over the Neutrality Proclamation. At the same time, there was not a consensus about how to read the constitutional language. The removal debate shows that here was a disagreement about whether the Article II vesting clause provided the President with powers greater than those in the specific enumerated grants, and the Helvidius-Pacificus debate shows that, while both Hamilton and Madison used the unitary executive theory, there was disagreement between them as to the scope of executive power.

### c. The Qualifications Clause

#### *Report of the Committee on Detail:*

Article IV, Section 2: "Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of the United States for at least three years before his election; and shall be, at the time of this election, a resident of the State in which he shall be chosen."

Article VI, section 2: "The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient."<sup>383</sup>

#### *Proceedings of the Convention Referred to the Committee of Style and Arrangement:*

Article IV, Section 2: Every Member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen of the United States for at least seven years before his election; and shall be at the time of his election, an inhabitant of the State in which he shall be chosen.<sup>384</sup>

#### *Report of Committee of Style:*

Article I, section 2, clause 2: No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.<sup>385</sup>

The Committee of Detail's proposals – the first versions of the qualifications clause quoted above - gave Congress the power to establish property requirements for membership (along with the age, citizenship and residency requirements). Reviewing the Committee of Detail's draft of Article VI, section 2, the delegates at the convention debated whether Congress should have such a power to impose property requirements. Madison stated that he "was opposed to the Section as vesting an improper & dangerous power in the Legislature,"<sup>386</sup> and Franklin objected to the provision because it "betray[ed] a great partiality to the rich."<sup>387</sup>

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<sup>383</sup>2 Farrand 248, n.6.

<sup>384</sup>2 Farrand 565.

<sup>385</sup>2 Farrand 590.

<sup>386</sup>2 Farrand 249.

<sup>387</sup>2 Farrand 249.



While Madison and Franklin would have removed the one grant of power to Congress in the Committee of Detail's proposal – the grant to limit membership on the basis of property ownership - Morris took a diametrically opposite position. He “moved to strike out ‘with regard to property’ in order to leave the Legislature entirely at large.”<sup>388</sup> Morris would have given Congress the power to add whatever limitations it wanted: “The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House as to the said Legislature shall seem expedient.”

No one spoke in favor of Morris's proposal, and Madison and Williamson spoke against it. It was rejected by a vote of 4 states in favor (including Morris's Pennsylvania) and 7 against (including Madison's Virginia).<sup>389</sup>

Agreeing with Madison, Wilson then moved that the provision in the Committee of Detail's proposed Constitution giving Congress the power to impose property qualifications for membership be removed. That motion carried, with seven states agreeing with Wilson (including Pennsylvania and Virginia) and three (Massachusetts, New Hampshire, and Georgia) favoring retention of the provision.<sup>390</sup>

Thus, the qualifications provisions referred to the Committee of Style reflected the first proposal from the Committee of Detail (concerning the fixed requirements of age, citizenship, and residency), but not the second proposal (which would have given the Houses the opportunity to add property requirement) and not Morris's proposal (which would have given the Houses to ability to add any additional requirements they thought appropriate). The only substantive change in the first proposal was that the citizenship requirement was increased from three years to seven years, in response to a successful motion by Mason and Morris.<sup>391</sup>

When the convention turned to the Committee of Detail's proposed expulsion clause, Morris again unsuccessfully pressed for broad legislative control over its membership. The

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<sup>388</sup>2 Farrand 250. Morris's view that Congress should have the ability to add whatever qualifications it wanted was a departure from his view earlier in the convention. Mason had proposed "that the Committee of detail be instructed to receive a clause requiring certain qualifications of landed property & citizenship of the U. States in members of the Legislature, and disqualifying persons having unsettled Accts. with or being indebted to the U. S. from being members of the Natl. Legislature." 2 Farrand 121. Morris responded, "If qualifications are proper, he wd. prefer them in the electors rather than the elected. As to debtors of the U. S. they are but few. As to persons having unsettled accounts he believed them to be pretty many. He thought however that such a discrimination would be both odious & useless. and in many instances unjust & cruel. The delay of settlemt. had been more the fault of the public than of the individuals. What will be done with those patriotic Citizens who have lent money, or services or property to their Country, without having been yet able to obtain a liquidation of their claims? Are they to be excluded?" 2 Farrand 121. But the Morris's objection in this context was to the qualifications Mason was proposing – Mason would have barred those to whom the United States owed money from Congress and used only landed property, rather than other monetary assets, to meet the property qualification – rather than to the idea of qualifications for service.

<sup>389</sup>2 Farrand at 250. The printed journal recorded a slightly different vote: 4 Ayes and 6 Noes. Madison recorded Delaware as voting against the Morris plan; the journal records Delaware as not voting. 2 Farrand 250\*.

<sup>390</sup>2 Farrand 251.

<sup>391</sup>2 Farrand 216.

Committee of Detail had proposed: “Each House . . . may punish its members for disorderly behaviour; and may expel a member.”<sup>392</sup> Madison thought “the right of expulsion . . . was too important to be exercised by a bare majority of a quorum”<sup>393</sup> and proposed a requirement that 2/3 of the members have to vote in favor of expulsion. Morris was the lone opponent of the proposal, declaring, “This power may be safely trusted to a majority. To require more may produce abuses on the side of the minority.”<sup>394</sup> No delegation agreed with Morris, and Madison’s proposal passed, 10 delegations in favor, none against, and Morris’s Pennsylvania delegation divided evenly.<sup>395</sup>

The Committee of Style did not change the expulsion clause, but it did change the qualifications clause, but in a subtle way. The Committee of Style converted a series of positive requirements (“Every Member of the House of Representatives *shall be* . . .”) into a series of disqualifying attributes (“No person shall be a representative who *shall not* . . .”).

As noted above, in *Powell v. McCormack*, the Court rejected the House’s argument that the negative framing meant that it could add additional requirements and that the House therefore had the power to refuse to seat Congressman Powell for reasons other than those enumerated in the qualifications clause. Writing for a unanimous Court, Chief Justice Warren found that the Committee of Style had no power to change the meaning of the text, and he ruled that the text referred to the Committee (rather than the text adopted by the convention and subsequently ratified) was controlling.

Strikingly, in its review of the drafting history, the Court simply dismisses Morris as the outlier. The Chief Justice observes that “the Convention rejected . . . Gouverneur Morris’ motion”<sup>396</sup> to empower Congress to add whatever requirements it wanted. The Court follows the historian Charles Warren in concluding that the convention was rejecting Morris’s view that the Houses should have discretion in favor of the Madisonian view that the qualifications should be fixed by the Constitution. Chief Justice Warren stated:

Charles Warren . . . concluded that the Convention’s decision to reject Gouverneur Morris’ proposal and the more limited proposal of the Committee of Detail was an implicit adoption of Madison’s position that the qualifications of the elected ‘were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution.’ 2 Farrand 249-250. See Warren, *supra*, at 420-421. Certainly, Warren argued, ‘such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress . . . the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself . . . . For certainly it did not intend that a single branch of Congress should possess a power

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<sup>392</sup>2 Farrand 254, n. 15 (quoting Committee of Detail’s proposal).

<sup>393</sup>2 Farrand 254.

<sup>394</sup>2 Farrand 254.

<sup>395</sup>2 Farrand 254. The final version of the expulsion clause as adopted by the convention reflects Madison’s motion: “Each House [of Congress] may determine the Rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.” Article I, Section 5(a).

<sup>396</sup>395 U.S. at 536.

which the Convention had expressly refused to vest in the whole Congress.’ *Id.*, at 421.<sup>397</sup>

Similarly, the Court gives weight to the acceptance of Madison’s motion on the expulsion clause and portrays Morris as an irrelevant dissenter. “One other decision made the same day [as the vote on the qualifications clause] is very important to determining the meaning of Art. I, § 5,”<sup>398</sup> Chief Justice Warren writes. Warren notes that Madison proposed that expulsion required a 2/3 vote, rather than a majority. “With the exception of one State, whose delegation was divided, the motion was unanimously approved without debate, although Gouverneur Morris noted his opposition.”<sup>399</sup> Warren concludes that “the Convention’s decision to increase the vote required to expel, because that power was ‘too important to be exercised by a bare majority,’ while at the same time not similarly restricting the power to judge qualifications, is compelling evidence that they considered the latter already limited by the standing qualifications previously adopted.”<sup>400</sup>

The Court overlooks one important fact: it never notes that Morris – the outlier in its view – wrote the text.

It is Morris’s text, and Morris’s qualifications clause falls into a pattern that we see repeatedly: as he wrote the Committee of Style draft, he made a subtle change that reversed a loss on the convention floor. The framing – a negative, rather than a positive, construction of qualifications for congressional service – is ambiguous, but it permits the argument (the one unsuccessfully made in *Powell*) that the House can add requirements.

#### **d. The Federal Judiciary**

As has been noted, Morris wrote, “On that subject [the judiciary], conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their selflove. . . .” Using words that did not highlight what he was doing, he was able to create a textual basis for judicial review and to provide text that could be used to argue that Congress’ was required to lower federal courts.

##### *i. Judicial Power clause*

###### *Proceedings of the Convention Referred to the Committee of Style and Arrangement*

Article XI: The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

###### *Report of Committee of Style:*

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<sup>397</sup>395 U.S. at 536, n. 69.

<sup>398</sup>395 U.S. at 536.

<sup>399</sup>395 U.S. at 536.

<sup>400</sup>395 U.S. at 536.

Article III, section 1: The judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

As noted above, the question whether to empower Congress to create lower federal courts divided the convention. In the face of a vote that would have taken from the Congress the power to create such federal courts, Wilson and Madison successfully offered a compromise proposal “that the National Legislature be empowered to institute inferior tribunals.” The proposal has become known as the “Madisonian Compromise,” and, as it emerged from the Committee of Detail, it gave Congress the power to create inferior courts “when necessary, from time to time.”

While Morris did not participate in the debate that led to the Madisonian controversy, in a subsequent debate about the provision “that Natl. <Legislature> be empowered to appoint inferior tribunals,”<sup>401</sup> Morris weighed in on behalf of the necessity for lower federal courts.<sup>402</sup>

Consistent with his commitment to a strong judiciary and national power, when Morris revised the vesting clause for the judiciary as a member of the Committee of Style, he removed the threshold barrier imposed in the Committee of Detail’s draft for the creation of lower courts. Congress’ power to create lower courts “when necessary” because language that can be read as a mandate to create inferior courts “from time to time.”

This leading exponent of reading the text as requiring lower federal courts was the constitutional historian Julius Goebel. “[T]he Committee of Style robbed Congress of discretion whether or not to create inferior federal courts and left only discretion as to what courts were to be set up and make changes,”<sup>403</sup> Goebel wrote in his 1971 account of the historical antecedents of the Supreme Court. Focusing on the constitutional text, he observed:

The effect of eliminating the words “as shall, when necessary” was to deprive Congress of power to decide upon the need for inferior courts and so to give full imperative effect to the declaration that “The judicial power . . . shall be vested in one supreme court, and in such inferior courts . . .” That the Committee intended to convey the sense of an imperative is apparent from the choice of the most forceful words in the contemporary constitutional vocabulary -- “ordain and establish” -- to direct what Congress was to do.<sup>404</sup>

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<sup>401</sup>2 Farrand 45.

<sup>402</sup>2 Farrand 46.

<sup>403</sup>Goebel, *History of the Supreme Court*, at 243, n.228.

<sup>404</sup>Goebel, *History of the Supreme Court* at 247.

Two well-known arguments that appear similar to Goebel’s, but that are in fact dissimilar should be noted. Justice Story in *Martin v. Hunter’s Lessee* finds a constitutional mandate to establish lower federal courts, but Story does not base his position on the language Goebel (“may from time to time”) is construing. Story stated:

It is manifest that a supreme court must be established; but whether it be equally obligatory to establish inferior courts, is a question of some difficulty. If congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases the judicial power could nowhere exist. The supreme court can have

Goebel's argument that Congress had a constitutional obligation to create lower federal courts under the judicial powers clause has been the subject of overwhelming criticism.

Some scholars have disagreed with Goebel because they read the text of the clause differently. "[I]t remains to be seen that the words 'ordain and establish' are significantly more imperative than the phrasing of the original draft," Professors Redish and Woods have contended.<sup>405</sup> But the principal criticism of the Goebel reading is that it is inconsistent with the Madisonian Compromise. For example, Professor Robert Clinton has written, "Goebel's claim seems insupportable insofar as it suggests the tacit adoption by the Committee of a mandatory obligation by Congress to establish inferior federal courts. Such a conclusion is contradicted by the almost unquestioned adherence of the Convention to the Madisonian compromise and the limited charge of the Committee of Style "to revise the style of and arrange the articles agreed to by the House. . . ."<sup>406</sup> "Goebel's attribution of deft sleight-of-hand to subvert the June 5th compromise dishonors the Style Committee members and supposes the other delegates fools," Professor David Engdahl asserts.<sup>407</sup>

What this criticism misses is the fact that here and elsewhere Morris's goal was, not to comply with the Convention's decisions, but to overturn them. Indeed, even Goebel, in arguing that the clause was inconsistent with the Convention's prior decision, fails to see that it is part of

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original jurisdiction in two classes of cases only, viz. in cases affecting ambassadors, other public ministers and consuls, and in cases in which a state is a party. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself; and if in any of the cases enumerated in the constitution, the state courts did not then possess jurisdiction, the appellate jurisdiction of the supreme court (admitting that it could act on state courts) could not reach those cases, and, consequently, the injunction of the constitution, that the judicial power "shall be vested," would be disobeyed. It would seem, therefore, to follow, that congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

*Martin v. Hunter's Lessee*, 14 U.S. 304, 330-31(1816).

Similarly, Professor Amar in his classic *A Neo-Federalist View of Article III*, 65 B.U. 205 (1985) argues for a broad range of cases in which federal jurisdiction is mandated, but, unlike Goebel, he argues that there is no mandate for Congress to create lower federal courts. *Id.* At 206 ("Thus, following Hart, I seek to establish that the Framers did not intend to require the creation of lower federal courts; but, following Story, I shall show that they did require that some federal court -- supreme or inferior -- be open, at trial or on appeal, to hear and resolve finally any given federal question, admiralty, or public ambassador case.")

<sup>405</sup>Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 61 (1975). See also Sager, *The Supreme Court, 1980 Term -- Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv.L. Rev. 17, 34 n. 47 (1981);

<sup>406</sup>Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 794 n.169 (1984).

<sup>407</sup>David Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U.L. Rev. 75, 102 n. 106.

a larger pattern of revision by Morris.

Undoubtedly, the revised language is ambiguous, and its meaning can be debated. Thus, in the debates over the Judiciary Act of 1789, Madison (consistent with the Madisonian Compromise) contended that the Constitution permitted Congress to empower state courts to act as federal courts (although he also argued that this was unwise).<sup>408</sup> But, undermining the Madisonian Compromise, Morris had created text that supporters of the creation of lower federal courts could turn to support their view that Congress was constitutionally mandated to create lower federal courts. In the debates over the Judiciary Act of 1789, they repeatedly did so. Congressman William Smith, the “primary spokesperson for the federalists”<sup>409</sup> argued that the word “shall” and the text as a whole mandated creation of lower federal courts. “The words, ‘shall be vested,’ have great energy, they are words of command; they leave no discretion to Congress to parcel out the Judicial powers of the Union to State judicatures . . . . Does not, then, the constitution, in the plainest and most unequivocal language, preclude us from allocating any part of the Judicial authority of the Union to the State Judicature. . . .”<sup>410</sup> Congressman Benson denounced a proposal that would have given lower federal courts only the admiralty jurisdiction as inconsistent with the Constitution’s text. “It is not left to the election of the legislature of the United States whether we adopt or not a judicial system like the one before us; the words in the constitution are plain and full and must be carried into operation.”<sup>411</sup> Congressman Gerry declared, “You cannot make Federal courts of the State courts, because the constitution is an insuperable bar . . . We are to administer this constitution, and therefore we are bound to establish these courts, let what will be the consequence.”<sup>412</sup> And Congressman Fisher Ames, Morris’s good friend, once again read Morris’s text in accordance with their shared constitutional vision. Opposing a motion that would have barred the creation of lower federal courts, Ames stated, “His wish was to establish this conclusion, that offences against statutes of the United States, and actions, the cognizance whereof is created de novo, are exclusively of Federal jurisdiction . . . . These, with the admiralty jurisdiction, which it is agreed must be provided for, constitute the principal powers of the district courts.”<sup>413</sup>

Most probatively, Morris read his own text to require establishment of lower federal courts. In 1802, when he was a Senator, during the debate over the repeal of the Judiciary Act of 1801, he read the judicial powers clause and then stated:

“This, therefore, amounts to a declaration, that the inferior courts shall exist. . . . In declaring then that these tribunals shall exist, it equally declares that the Congress shall ordain and establish them. I say they shall; this is the evident intention, if not the express words, of the Constitution. The Convention in framing, the American people in adopting, that compact, did

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<sup>408</sup>See 1 Annals 812-13. For discussion, see Fletcher at 942-43.

<sup>409</sup>William Fletcher, Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word “All” in Article III, 59 Duke L.J. 929, 941 (2010).

<sup>410</sup>1 Annals at 850.

<sup>411</sup>1 Annals at 835.

<sup>412</sup>1 Annals at 860.

<sup>413</sup>1 Annals at 808.

not, could not presume, that the Congress would omit to do what they were thus bound to do.”<sup>414</sup>

The delegates had agreed to a compromise under which Congress did not have to create lower federal courts. As Morris’s view of the text indicates, however, he had written language that could be read, and was read by a range of political leaders (including himself), to mandate the creation of lower federal courts.

*ii. Law of the Land Clause*

*Proceedings of the Convention Referred to the Committee of Style and Arrangement*

Article VIII: This Constitution and the Laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; any thing in the constitutions or laws of the several States to the contrary notwithstanding.

*Report of Committee of Style*

Article VI: . . . This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

While judicial review is not explicitly provided for in the Constitution in so many words, scholars have argued that the law of the land provision authorizes federal court review of statutes for constitutionality<sup>415</sup> and the clause was relied on in the landmark judicial review case, *Hayburn’s Case*, as well as *Marbury*.<sup>416</sup> The pattern with respect to the history of the language providing the basis for judicial review should be familiar by now. As we have seen, Morris (and others who would be on the Committee of Style) had supported judicial review on the Convention floor but the text referred to the Committee did not explicitly provide for judicial review; Morris and the Committee revised the text in a way that advanced their ends (adding the “law of the land” formulation); committee members (Hamilton and Wilson) subsequently drew on this language in contending that the Constitution provided for judicial review. The Committee of Style’s introduction of the law of the land language accorded with the support for judicial review already advanced by most of its members and provided for the first time in the convention’s proceedings a textual basis for federal court review of the constitutionality of federal statutes.

The relevant clause in the Committee of Detail’s draft had mandated state court review of state statutes for consistency with the federal constitution: “This Constitution . . . shall be the

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<sup>414</sup>11 Annals of Congress 79. For discussion, see Michael Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wisconsin 39, 63.

<sup>415</sup>See, e.g., Bradford R. Clark, The Supremacy Clause as a Constraint on Federal Power, 71 Geo. Wash. L. Rev. 91, 91 (2003); Saikrishna B. Prakash & John C. Yoo, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887, 907 (2003).

<sup>416</sup>*Marbury v. Madison*, 5 U.S. at 137, 176, 180 (1803).

supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions. . . .” The exclusive focus is on the states and their courts. The Constitution is “the supreme law of the several States.” “[T]he judges in the several States shall be bound thereby in their decisions. . . .”

By providing that “[t]his constitution . . . shall be the supreme law of the land,” the Committee of Style dramatically altered the sentence’s import. In substituting “the supreme law of the land,” for “the supreme law of the several States,” the Committee of Style made the Constitution binding on federal officials, as well as state officials. The back half of the sentence is essentially unchanged. In the Committee of Detail’s version it was: “and the judges in the several States shall be bound thereby in their decisions; any thing in the constitutions or laws of the several States to the contrary notwithstanding.” In the Committee of Style’s version it becomes: “and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.” But because of the front half of the sentence’s declaration that the Constitution is the “supreme law of the land,” federal, as well as state, judges are now required to review statutes for consistency with the federal constitution.

There is, however, one complication. Washington, D.C. is not in a state, so Supreme Court justices do not fall into the category of “judges in the several states” if the words are literally read. At the same time, a literal reading would not exempt *all* federal judges. Acting pursuant to the Constitution, the first Congress enacted the Judiciary Act of 1789, establishing Circuit Courts comprised of a Supreme Court Justice and a district court judge and which heard cases around the nation. So, under a literal parsing of the law of the land provision, when the Justices heard cases sitting as Circuit Court Justices, they were bound to disregard a statute that was inconsistent with the federal constitution, but they were not so bound when the case was appealed to the Supreme Court.

Such a result would not make sense and the law of the land provision was not so construed (as the embrace of judicial review in *Marbury* indicates). The question then becomes why the second half of the provision was not revised to read to encompass judges sitting in the district where the nation’s capital was to be located, as well as the states.

One answer that has been suggested is that the problem was one of sloppy drafting. At the time of the Committee of Detail’s report, it had been contemplated that the seat of government would be located in one of the states. The decision to create a separate district for the seat of government was not arrived at until September 5, shortly before the Committee of Style began its work. As Morris and his fellow committee members rapidly rewrote much of the Constitution, they missed the need to revise what became the “law of the land” clause so as to make it applicable to judges sitting in the nation’s capital.<sup>417</sup>

This explanation may be right - the record is too thin for one to know definitively - but an alternate explanation is that Morris did not make the change because he did not want to call attention to the more important change that he was making in the provision. The change from “supreme law of the several states” to “supreme law of the land” has great legal consequences,

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<sup>417</sup>See, e.g., McDonald at 255.



but is a small change textually and could easily be overlooked by members of the convention as they rapidly ran through the Committee of Style's draft. But if he were to also make the provision binding on judges sitting in the nation's capital by adding language to that effect, it would be more likely that members of the convention might focus on the provision as one being revised and, attending to the provision, they might object to the "law of the land language." Only making the more important, and easily overlooked, change to the provision would be consistent with Morris's statement to Pickering that, in drafting provisions of the Constitution concerning the judiciary, he "select[ed] phrases, which expressing my own notions would not alarm others."<sup>418</sup>

In any event, the provision soon provided the basis for judicial review, with Committee of Style members playing a crucial role. In Federalist 16, Hamilton stated that judges "would pronounce the resolutions" "[of] a factious majority in the Legislature" "to be contrary to the supreme law of the land, unconstitutional and void."<sup>419</sup> In Federalist 33, he stated that congressional statutes "which *are not* pursuant to its constitutional powers . . . will [not] become the supreme law of the land."<sup>420</sup> "These will be merely acts of usurpation, and will deserve to be treated as such."<sup>421</sup>

In his lectures on the law, James Wilson also invoked the "law of the land" provision as the basis for judicial review. He stated that, when a congressional statute was "manifestly repugnant to some part of the constitution," a federal court would have "the right and . . . the duty" to invalidate it because the "supreme power in the United States has given one rule: a subordinate power in the United States has given a contradictory rule: the former is the law of the land: as a necessary consequence, the latter is void, and has no operation."<sup>422</sup> Similarly, in the first case in which Supreme Court justices confronted the question whether to enforce an unconstitutional statute, the 1792 *Hayburn's Case*, when riding Circuit, Wilson, along with Justice Blair and Judge Peters, invoked the law of the land provision as support for their decision to refuse to follow the Invalid Pensioners Act.<sup>423</sup>

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<sup>418</sup>3 Farrand 420.

<sup>419</sup>Federalist 16 (Hamilton) at 79. See also Federalist 33 ("Though a law, therefore, for laying a tax for the use of the United States would be supreme in its nature and could not legally be opposed or controlled, yet a law for abrogating or preventing the collection of a tax laid by the authority of a State (unless upon imports and exports) would not be the supreme law of the land, but a usurpation of power not granted by the Constitution.") For discussion, see Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *Yale L.J.* 502, 554-55 (2006).

<sup>420</sup>Federalist 33 (Hamilton) at 158 (emphasis in original). While Hamilton in Federalist 33 does not explicitly invoke judicial review to invalidate unconstitutional statutes, it is implicit, particularly in light of his embrace of judicial review of congressional statutes in Federalist 78. See Bradford Clark, *The Constitutional Origins of Judicial Review: Unitary Judicial Review*, 72 *Geo. Wash. L. Rev.* 319, 331 & n.84 (2003).

<sup>421</sup>Federalist 33 (Hamilton) at 158.

<sup>422</sup>1 *The Works of James Wilson* 329-30 (Robert G. McCloskey ed., 1967). See also Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 *Geo. Wash. L. Rev.* 113,

December, 2003 164-65.

<sup>423</sup>See *Hayburn's Case*, 2 U.S. 409, 410 n.2 (1792) ("This Constitution is 'the Supreme Law of the Land.' This supreme law 'all judicial officers of the United States are bound, by oath or affirmation, or support.'"). For discussion of Justice Wilson's opinion in *Hayburn's Case*, see Maeva Marcus and Robert Teir, *Hayburn's Case: A*

Although no committee member was involved, the “law of land” provision also was critical to another important pre-Marbury judicial review case, the 1795 case of *Van Horne’s Lessee v. Dorrance*. Justice Paterson, a former convention delegate, told the jury that “the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established . . . . It contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature . . . . If a legislative act oppugns a constitutional principle . . . in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void.”<sup>424</sup> Similarly, although it does not play a central role in the decision, Chief Justice Marshall invoked the law of provision as his final argument in *Marbury*:

“It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.”<sup>425</sup>

The Committee of Style’s revision to the law of the land clause and the interpretations of the clause by committee members, therefore, played a critical role in the establishment of judicial review.

### **e. The Contract Clause**

*Northwest Ordinance* (1787): Article II: . . . . And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed.

*Proceedings of the Convention Referred to the Committee of Style and Arrangement*

Article XII: No State shall coin money; nor emit bills of credit, nor make anything but gold or silver coin a tender in payment of debts; nor pass any bill of attainder or ex post facto laws; nor grant letters of marque and reprisal, nor enter into any treaty, alliance, or confederation; nor grant any title of nobility.

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Misinterpretation of Precedent, 1988 Wis. L. Rev. 527, 533-34; Treanor, Stanford, 533-38.

<sup>424</sup>*Van Horne’s Lessee v. Dorrance*, 28 F. Cas. 1012, 1014-15 (C.C.D. Pa. 1795) (No. 16,857) (jury instructions by Paterson).

<sup>425</sup>*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

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Article I, Sect. 10: No state shall coin money, nor emit bills of credit, nor make any thing but gold or silver coin a tender in payment of debts, nor pass any bill of attainder, nor ex post facto law, nor laws altering or impairing the obligation of contracts; nor grant letters of marque and reprisal, nor enter into any treaty, alliance, or confederation, nor grant any title of nobility.

The backstory of the contracts clause, prior to the work of the Committee of Style, has already been told. King proposed that a clause like the contracts clause of the Northwest Ordinance be adopted. Mason and Morris opposed it. While the basis of Morris's objection is not clear – he spoke of the proposal as going “too far” – it appears that his principal concern is that the language would have altered statute of limitations. King's proposal failed. It is not clear how the clause was resurrected in the Committee of Style's proposal and there is nothing in Madison's notes that answers the question, but Madison's notes were increasingly inadequate as the convention proceeded, so there may have been some floor discussion or there might have been an agreement reached informally through discussions off the convention floor. Since Morris spoke against King's proposal, scholars have suggested that King or Hamilton might have been responsible for the clause's return, but the scholarship has failed to see that Morris opposition was likely only to a particular aspect of the clause's reach (i.e., to statute of limitations) rather than to the idea of a contract clause itself and that, as an attorney arguing before the Pennsylvania legislature against the end of the Bank of North America's corporate charter, he had suggested that it might be unconstitutional for a state legislature to repeal a corporate charter.

In light of this history, it is interesting to note that Morris (or the Committee) departed from the Northwest Ordinance in three ways. First, in one way, it is arguably narrower in its scope: “in any manner whatever, interfere with or affect private contracts” becomes “laws altering or impairing the obligation of contracts.” The language of the Northwest Ordinance is so broad that it affect statutes of limitations, which was apparently Morris's concern. While there is an ambiguity to the Committee's language, “altering or impairing the obligation of contracts” seems less absolute and enabled the Court and state courts to uphold state statutes involving statutes of limitations on the grounds that they affected “remedies,” rather than the “obligation” of contracts.<sup>426</sup>

Second, and more significantly, Morris (or the Committee) removed the word “private.” “[I]nterfere with or affect private contracts or engagements” becomes “altering or impairing the obligation of contracts.” “[P]rivate” has disappeared. The change would appear intentional: A decision that the clause applied to public contracts would have been consistent with the position that Morris took in suggesting that the Pennsylvania legislature could not constitutionally revoke the charter of the Bank of North America.

Third, the Northwest Ordinance by its terms applies only to “previously formed”

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<sup>426</sup>See *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457 (1831). The Court in *Hawkins* upheld a state statute Kentucky statute of limitations that restricted to seven years the time period during which landowners could sue to recover possession of their property from occupying claimants. For further discussion, see Michael Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 Va. L. Rev. 1111, 1151-52 (2001).

contracts; the contract clause does not have text limiting it to previously formed contracts.

There was almost no discussion of the clause on the convention floor after it was proposed by the Committee. The words “altering or” were dropped without recorded discussion. Gerry, the only speaker to discuss the clause, moved that the clause apply to the federal government, as well as the states, but no one seconded his motion. No one seconded his motion, the convention adjourned, and when they reconvened the following day, they moved on to other topics. That is only record we have of the Convention’s consideration of the Committee of Style’s proposal.<sup>427</sup>

There was also little discussion of the clause during the ratification debates. While Anti-Federalists Patrick Henry of Virginia and James Galloway suggested that the clause might reach contracts between the states and private individuals, the few Federalists who addressed the issue and Antifederalist convention delegates Martin and Mason all maintained that it only applied to private contracts.<sup>428</sup> As convention delegate William Davie put it in the North Carolina ratification debates, “The clause refers merely to contracts between individuals.”<sup>429</sup> In light of this history, the standard view among historians and legal scholars is that, when Chief Justice Marshall in *Fletcher v. Peck* applied the contracts clause to a public contract, his opinion was inconsistent with the original understanding.<sup>430</sup>

However, a countervailing (if still minority) view of the original understanding of the clause has emerged in recent years. Douglas Kmiec and John McGinnis have focused on the absence of the word “private” in the clause to argue that, pursuant to the original understanding of the clause, it applies to public, as well as private, contracts.<sup>431</sup>

While it is inconsistent with the position Federalists took during ratification, the Kmiec-McGinnis view is consistent with Morris’s position in the debate about the Bank of North America.

It is also consistent with the position that two committee members prominently took in the years immediately after ratification. In *Chisholm*, Justice Wilson opined that the contract clause applied to public contracts: “What good purpose could this Constitutional provision secure, if a State might pass a law impairing the obligation of its own contracts; and be

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<sup>427</sup>See 2 Farrand 619.

<sup>428</sup>See Benjamin Wright, *The Contract Clause* 12-16 (1938).

<sup>429</sup>3 Farrand 350.

<sup>430</sup>See, e.g., William Wiecek, *Liberty Under Law* 43-44 (1978); James E. Ely, *The Marshall Court and Property Rights*, 33 *J. Marshall L. Rev.* 1023, 1031 (2000); Michael Klarman, *Majoritarian Judicial Review*, 85 *Geo. L.J.* 491, 545 & n. 257 (1997). The classic study finding *Fletcher* inconsistent with the original understanding is Benjamin Wright, *The Contract Clause of the Constitution* 27-34 (1938).

<sup>431</sup>Douglas Kmiec and John McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 *Hastings Const. L. Q.* 529, 539 (1987). Accord, James E. Ely, *The Marshall Court and Property Rights*, 33 *J. Marshall L. Rev.* 1023, 1031 (2000). See also Richard Epstein, *Toward a Revitalization of the Contract Clause*, 51 *U. Chi. L. Rev.* 703, 705 (1984) (textual analysis of contracts clause leading to the conclusion that it “a sharp restriction of the power of the state to regulate economic affairs”).

amenable, for such a violation of right, to no controuling judiciary power? We have seen, that on the principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages.”<sup>432</sup>

Alexander Hamilton, in the opinion he wrote for property owners who held land pursuant to the contested Yazoo land grant from Georgia, took the same position. Hamilton argued that the Georgia legislature’s statute overturning its prior land grant was unconstitutional under the contract clause because public contracts fell within the ambit of the clause:

“Every grant from one to another, whether the grantor be a state or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me that taking the terms of the Constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States, and, therefore null.”<sup>433</sup>

The contract clause, then, fits into the pattern we have seen previously: The Committee of Style’s draft departed from prior language (the Northwest Ordinance Clause’s contract clause) in ways that reflected Morris’s views; in the years after ratification, members of the Committee (and, once again, Wilson and Hamilton) drew on the language of the clause as adopted to advance views that they shared with Morris and that were at odds with the standard views of the delegates (represented, in this case, by the delegates’ arguments in state conventions).

#### **f. Engagements Clause**

##### *Proceedings of the Convention Referred to the Committee of Style and Arrangement*

Article VII, Sect. I . . . All debts contracted and engagements entered into, by or under the authority of Congress shall be as valid against the United States under this constitution as under the confederation.

##### *Report of Committee of Style*

Article VI. All debates contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the confederation.

Morris was a forceful advocate for federal assumption of all revolutionary war debts. On August 22, he proposed a provision stating, “The Legislature *shall* discharge the debts & fulfil the engagements <of the United States>.”<sup>434</sup> While his motion was successful, the convention soon backtracked. Mason objected to the provision’s imposition of an obligation to repay all debts. “The use of the term *shall* will beget speculations and increase the pestilential

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<sup>432</sup>Chisholm v. Georgia, 2 U.S. 419, 465 (1793) (Wilson, J.).

<sup>433</sup>Hamilton opinion, excerpted in Wright at 22.

<sup>434</sup>2 Farrand 377.

practice of stock-jobbing.”<sup>435</sup> Supporting Mason, Randolph proposed the language noted above. (“All debts contracted and engagements entered into, by or under the authority of Congress shall be as valid against the United States under this constitution as under the confederation.”). It passed, 10 states in favor and one against, with only Morris speaking against the proposal and with only Morris’s Pennsylvania voting against Randolph’s proposal.<sup>436</sup>

Morris’s language for the Committee did not overturn the Convention’s decision that repayment was not mandatory. He did, however, neatly expand the scope of the clause in an important way. The previously adopted language authorized assumption only of debts incurred “by or under the authority of Congress.” Implicitly, that language did not allow assumption of state debts that had not been authorized by Congress. However, the Committee of Style’s language – covering debts incurred “before the adoption of this Constitution” – allowed Congress to assume state debts, regardless of whether those debts had been previously authorized by Congress.<sup>437</sup> As Secretary of Treasury, Alexander Hamilton used this power to assume state revolutionary war debts, regardless of whether they had been authorized by Congress, and Federalist members of Congress agreed that the Constitution gave the national government this power.<sup>438</sup>

#### **g. Slavery**

##### *Proceedings of the Convention Referred to the Committee of Style and Arrangement*

Article XV: . . . . If any Person bound to service or labor in any of the United States shall escape into another State, He or She shall not be discharged from such service or labor in consequence of any regulations subsisting in the State to which they escape; but shall be delivered up to the person justly claiming their service or labor.

##### *Report of Committee of Style*

Article IV, Sect. 2 . . . . : No person legally held to service or labour in one state, escaping into another, shall in consequence of regulations subsisting therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labour may be due.

As previously discussed, no delegate at the convention expressed opposition to slavery more forcefully than Morris (and no one came close, although King and Hamilton were both deeply opposed to slavery). It was, he declared, “the curse of heaven.” The 3/5 clause rewards “the inhabitants of Georgia and South Carolina who goes to the coast of Africa and, in defiance of the most sacred laws of humanity, tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages.”

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<sup>435</sup>2 Farrand 413 (emphasis in original).

<sup>436</sup>2 Farrand 414.

<sup>437</sup>See Pfander, Cornell, at 1291-93.

<sup>438</sup>See McDonald at — (scope of assumption); 2 Annals at 1363 (Clymer) (“assumption of the state debts appeared to him a matter of a federal complexion”); 2 Annals at 1365 (Sherman) (assumption is constitutional because state debts “are to be looked at as the absolute debts of the Union”); 2 Annals at 1371 (Gerry) (arguing for the constitutionality of assumption of the state debts).

Morris had little room to edit in confronting the clauses of the Constitution which (although the word “slave” was never used) concerned slavery<sup>439</sup> because the provisions concerning slavery were the subject of fierce scrutiny by pro-slavery delegates. However, he did make one small, but significant change. As the fugitive slave clause emerged from the Committee of Detail, it provided that the captured slave “shall be delivered up to the person justly claiming their service or labor.” As it emerged from the Committee of Style, the clause provided that the captured slave “shall be delivered up on claim of the party to whom such service or labour may be due.” Morris had eliminated the word “justly.”

The change was profound. As historian Sean Willentz has recently written, “To describe a person’s claim as just could also imply that the state laws establishing such a claim were just. To say that the person may or may not be due the fugitive’s service or labor avoided that implication while it conveyed uncertainty about the justice of the state law or laws in question.”<sup>440</sup> Removing the word “justly” from the fugitive slave clause, the Committee of Style . . . had gone out of its way to ensure that the fugitive slave clause did not acknowledge property in man, let alone slaveholders’ rights to such property.<sup>441</sup> During the antebellum period, abolitionists argued that the Constitution did not sanction slavery. Morris’s elimination of the word “justly” made that argument possible.

#### **h. New States Clause**

##### *Proceedings of the Convention Referred to the Committee of Style and Arrangement*

Article XVII: New States may be admitted by the Legislature into this Union: but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States, without the consent of the Legislature or such State as well as of the general Legislature. Nor shall any State be formed by the junction of two or more States or parts thereof without the consent of the Legislatures of such States as well as of the Legislature of the United States.

##### *Report of Committee of Style*

Article IV, Sect. 3: New states may be admitted by the Congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures concerned as well as of Congress.

As previously noted, Morris believed that the new states should not be created in the west. The west, he asserted could not produce “enlightened” legislators because “the busy haunts of men, not the remote wilderness, were the proper school of political talents.”<sup>442</sup>

As we have also seen, at the time of the Louisiana Purchase, Morris claimed that the

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<sup>439</sup>See 3 Farrand at 436 (Madison’s statement that the word “slave” did not appear in the Constitution because “some of the States . . . had scruples against admitting the terms ‘slaves’ into the instrument”).

<sup>440</sup>Willentz, *No Property in Man at 1865* (Kindle cite)

<sup>441</sup>Willentz at 2423 (Kindle cite).

<sup>442</sup>Madison 261.

Territories Clause, which he had drafted, barred the creation of new states from territories, but that he had written it in such a way that the others framers had not realized the clause's meaning when they adopted it.

As he revised it as part of his work on the Committee of Style, the new states clause advanced a similar end. The Committee of Detail's version of the New States Clause permitted new states to be created within the territory of existing states if the State legislature and Congress approved. Morris revised the provision so that the language about permission from the state legislature and Congress did not apply to the creation of a new state from land within the boundary of a current state. Morris's version flatly prohibits creation of a new state in such circumstances, regardless of what the affected State or Congress want.

In addition to reflecting Morris's concern about new states generally, his text was also consistent with his opposition to slavery. A literal reading of his text would have barred the admission of the two new slave states on the horizon in 1787: Kentucky (which was split from Virginia) and Tennessee (which had been part of North Carolina). But the free state whose admission was on the horizon – Vermont – was not, as of 1787, a part of another state. It was an independent republic. Thus, Kentucky and North Carolina, but not Vermont, were not “within the jurisdiction of any other state.” It was remarkably elegant.

No one, however, read the constitutional text closely. In reviewing the congressional debates about the admission of Kentucky and North Carolina, I did not find anyone who grappled with the question whether they were barred from admission because they were “within the jurisdiction of [another] state.” The new states were simply admitted. When there was a relevant controversy in the early republic, the other clauses discussed here had someone who argued for the reading of the text that Morris would have favored. For whatever reason, the new states clause is the exception.<sup>443</sup>

#### **i. Impeachment Clause**

*Proceedings of the Convention Referred to the Committee of Style and Arrangement:*

Article X, sec. 2: “He [the President] shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason or bribery or other high crimes and misdemeanors against the United States. . . .”

*Report of Committee of Style:*

Article III, sec. 4: “The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”

The Committee of Style dropped “against the United States”: “other high crimes and misdemeanors against the United States. . . .” became “other high crimes and misdemeanors.”

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<sup>443</sup>I believe Kesavan and Paulsen were the first to advance the reading of the new states clause discussed here, see Kesavan and Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291 (2002), although, as previously discussed, they opposed giving the clause the reading that Morris would have favored.



As previously discussed, the question whether this change was legally consequential played a central role in the debate about whether the impeachment of President Clinton was constitutionally permissible, and it has appeared in early debates about possible impeachment of President Trump. Reflecting an approach similar to that in *Powell*, the dominant view is that the change in language should be ignored and the clause should be read as if it still contained the “against the United States” language. Jack Rakove, advocating this view, has argued that Morris (as well as other members of the Committee) was a champion of a strong executive and would not have wanted to expand the scope of impeachment.<sup>444</sup> A leading voice on the other side of the originalist debate, Jonathan Turley struggled with the fact that Morris “represented the original extreme wing on impeachment, opposing any impeachment for the chief executive”<sup>445</sup> and was unable to offer a clear theory on what the Committee was trying to do in changing the language.

What these accounts both miss is that Morris changed his mind about impeachment. In the critical debate, the debate of July 20, he began by arguing against impeachment for the President because “it will render the Executive dependent on those who will impeach.”<sup>446</sup> But, then, after listening to Mason and Franklin’s arguments for impeachment, he decided impeachment was appropriate. “[C]orruption & some other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated & defined.”<sup>447</sup> But as the debate continued, he changed his position yet again, adopting a more expansive view of impeachment:

Mr. Govr. Morris, ’s opinion had been changed by the arguments used in the discussion. He was now sensible of the necessity of impeachments, if the Executive was to continue for any time in office. Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst it by displacing him. . . . The Executive ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment.<sup>448</sup>

Morris’s final statement about impeachment suggests that his removal of “against the United States” did not indicate that he thought the phrase redundant. Rather, he had a capacious view on when impeachment was appropriate, including circumstances like “incapacity” and being in “foreign pay” and the modification was consistent with that view.

#### **j. Presidential Succession Clauses (section to be added)**

#### **h. Conclusion**

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<sup>444</sup>Rakove, [GW], at 687 n.25.

<sup>445</sup>Turley at 1814.

<sup>446</sup>2 Farrand 65.

<sup>447</sup>2 Farrand 65.

<sup>448</sup>2 Farrand 68-69.

This section has shown that, while the mandate of the Committee of Style was limited, as drafter for the Committee Gouverneur Morris covertly challenged the results of the convention's prior proceedings and revised a striking number of fundamentally important constitutional provisions in order to advance his constitutional agenda. He wrote text that could be read to, among other things, expand national authority, provide the basis for judicial review, mandate the establishment of lower federal courts, bar states from interfering with their own contracts, expand the range of the presidential impeachment clause, block the admission of the slave states of Kentucky and Tennessee, and remove the Constitution's recognition of the ownership of enslaved people as "just[]." A prior section has shown that he also wrote text that gave Congress the power to enact legislation to promote the general welfare (although his "trick" was discovered and the earlier language restored) and the power to create crimes against the law of nations (and here he convinced the convention to keep his language).

Morris placed in the Constitution language that Federalists (including Alexander Hamilton and James Wilson) repeatedly relied on in the great constitutional debates of the early republic. At the same time, Republicans also made textualist arguments, drawing, like Federalists, on Morris's text, as they fought the Federalists. Morris did not write text that clearly transformed constitutional meaning. His changes were subtle, and his text appropriately subject to competing interpretations. As drafter, working with text that reflected victories at the convention for positions he opposed, he created ambiguity, inserting into the Constitution language that provide the basis for constitutional arguments in accordance with his constitutional vision.

## VII. The Committee of Style and Constitutional Interpretation

When he denounced Gouverneur Morris on the floor of Congress, Albert Gallatin had more reason to be angry than he knew. Morris had not simply attempted one "trick" and been caught by a suspicious Roger Sherman. Rather, the brilliant craftsmen had devised a whole series of "trick[s]" and, with one exception, he had gotten away with it. Working with a document that reflected a series of compromises and many lost arguments, Morris in a matter of days created a Federalist constitution. He transformed a document that began with a wearying roll call of the states and no goal beyond the creation of the Constitution itself into a document that proudly announced itself as the work of "We, the People of the United States" animated by a grand vision for the nation, and "We, the People of the United States" then ratified Morris's words.

From the perspective of the modern constitutional decision maker or theorist, the question then becomes what the significance of this history is. Or, to quote Bernard Bailyn, the eminent historian of eighteenth century America, so what?

The Supreme Court's answer, if it follows the approach in *Powell*, would be that Morris's changes should be disregarded. The Chief Justice writes, was created by the convention "to revise the stile of and arrange the articles which had been agreed to." "The Committee . . . had no authority from the Convention to make alterations of substance in the

Constitution as voted by the Convention . . .” This statement indicates that, had the Committee sought to change the Constitution’s meaning, such an act would have been ultra vires. Warren then bolsters his position by observing that the Committee had not informed the Convention that it was “purport[ing] to change the meaning of the clause and that the Convention members did not intend to change the clause’s meaning (“and certainly the Convention had no belief . . . that any important change was, in fact, made”).

The Chief Justice might contend that the history revealed in this article reinforces his position: the Committee’s changes did not reflect bad drafting; they reflected bad intent. Respect for drafters’ intent mandates wholesale rejection of the Committee’s work (except, perhaps, with the offences against the law of nations clause, which was carefully reviewed by the Convention).

Warren’s approach is a product of a period in which drafting history (and legislative history) were accorded particular weight. It would not be too much of a caricature of the argument to say that it reflects the view that, because the drafting history is clear, the text can be disregarded. His analysis reflects intentionalism, the interpretive school that looks to drafters’ intent or ratifiers’ intent. While once the dominant originalist approach, intentionalism has been largely supplanted as a school of thought. To the extent that intentionalism retains influence, scholars focus on ratifiers’ intent, rather than drafters’ intent. The ratifiers were “We, the People” meeting in the state conventions. In contrast, the drafters were operating in secret so their discussions did not influence ratifiers’ debate, their intent was not of legal consequence (since they were simply preparing a document for the consideration of the ratifying conventions, and the ratifying conventions were the legally empowered actors), and, it has been generally assumed since Jefferson Powell published his classic article, *The Original Understanding of Original Understanding*, that the founding generation considered drafters’ intent irrelevant.<sup>449</sup>

The principal argument advanced in support of originalism sounds in majoritarian theory: We the People ratified the Constitution; respect for majoritarian decisionmaking means that courts (and other governmental actors) should give effect to that decision and to the original understanding of the document that informed We the People’s decision to ratify. Originalists recognize the significant limitations to their majoritarian claims (and, in particular, both the dead hand problem and the serious process problem because women, enslaved people, Native Americans, and, to a limited extent, people without property were excluded from participating in the ratification process) but argue that, nonetheless, ratification has a stronger majoritarian basis than any other jurisprudential approach.

Recent scholarly rejection of intentionalism – and particularly intentionalism that looks to the drafters’ intent – reflects the fact that it is not grounded in majoritarian decisionmaking.

Warren’s approach in *Powell* is a particularly striking example of the problems with drafters’ intent originalism. A number of the provisions that reflected the Committee of Style’s changes were extensively discussed in the state ratifying conventions and in the popular

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<sup>449</sup>H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARVARD L. REV. 885 (1984). For a more complete discussion of the competing originalist schools, see Treanor, *Against Textualism*, 103 NORTHWESTERN L. REV. 983 (2009).

press during the ratification process. In particular, the Preamble,<sup>450</sup> the law of the land provision,<sup>451</sup> the clause concerning creation of inferior courts,<sup>452</sup> and the contract clause<sup>453</sup> received significant attention. The approach in *Powell* would replace language that ratifiers specifically considered and debated – and that was part of their decision whether to support the Constitution – with language they never saw. While the Committee of Style did not act in accordance with the convention’s charge to simply make stylistic changes, the text the committee proposed was the text adopted by the convention and ratifiers. As Dean Manning has argued, to disregard the ratifiers’ decision is to disregard what We the People decided. If rigorously followed, the *Powell* approach would read out of the Constitution salient language (like the final versions of the vesting clauses and the contract clause) in favor of text only known to the drafters participating in their secret meetings.

Indeed, Warren’s approach is problematic even from the perspective of discerning the drafters’ intent. Warren’s approach would mean, for example, that the contract clause would be deleted from the Constitution, but it is unknowable whether there were backroom discussions about this change (or some other of this committee’s changes). As noted above, historians have suggested a consensus might have emerged to add the clause even though that consensus was not evidenced by the debates. The approach in *Powell* thus relies on drafting history that may be incomplete in critical ways. Moreover, the history of the Committee’s addition of the word “punish” to the offenses against the law of nations clause shows that changes made by the committee potentially commanded the support of a majority of the states. There, by a narrow margin, a majority of the states favored the word added in the Committee’s draft. Morris may, at least in some instances, have been risk averse, rather than acting contrary to the will of the majority. He may have been importing changes into the text because he did not want to risk the end result that debate would produce, not because he was confident the convention would reject his text. The debates about the law of nations clause indicates that it would be a mistake for modern courts to assume that *all* of the substantive changes made by the committee would have been rejected by the convention had they been subject to debate and vote.

The history of the Committee of Style also gives particular force to the objection to intentionalism first voiced by Paul Brest in “The Misconceived Quest for the Original Understanding,” a work written at the dawn of modern originalism: the people involved in drafting and ratifying a document do not share a collective intent; they have different conceptions of what the text means.<sup>454</sup> Morris’s goals were different from those of many of his fellow delegates. His comments about the provision involving the judiciary is generally applicable: he “select[ed] phrases, which expressing my own notions would not alarm others, nor shock their selflove. . . .” The debates in the early republic about the meaning of the text he wrote show that there was no collective intent about how to understand the Constitution’s words.

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<sup>450</sup>2 The Founders’ Constitution, Preamble, Documents 8-16.

<sup>451</sup>4 The Founders’ Constitution 597-606

<sup>452</sup>4 The Founders’ Constitution 139-145

<sup>453</sup>2 Founders’ Constitution, Contract Clause, Documents 4-9.

<sup>454</sup>Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 213-17, 222-34 (1980).

The approach taken by Kevasan and Paulsen and by Chief Justice Rehnquist in *Nixon* avoids certain of the problems of the *Powell* approach. Under the Kesavan/Paulsen/Rehnquist approach, the text referred to the Committee of Style glosses the text written by the Committee. The earlier text is evidence of original public meaning. This approach avoids the difficulty of ignoring the text adopted by the ratifiers (e.g., the contract clause or the vesting clauses). The earlier text does not override the adopted text. Rather, when there is ambiguity, it helps resolve it.

From the perspective of majoritarian-originalist theory, one problem with this approach is that it strongly privileges usages in the convention over other contemporary uses. The way in which people in the convention might have read the text is only one source of original public meaning, and it should not outweigh other evidence of public meaning.

But, apart from this general theoretical concern, this approach is particularly flawed with respect to the construction of Morris's text. The Kesavan/Paulsen/Rehnquist approach assumes an honest scrivener – one who was trying to write text that reflected previous discussions. And that was, very precisely, what Morris was not doing. He was choosing language that departed from the previous understanding. The prior text cannot be used to gloss his text. In fact, it is important to focus on the differences between the previously agreed to text and Morris's text because *the differences* are a useful guide to how Morris intended the text be read. He was writing language that would have a different meaning than the previous version.

This recognition also reveals the problem with the approach taken by Dean Manning and Justice Thomas. In accordance with original public meaning theory, both “focus on the words of the adopted Constitution.”<sup>455</sup> From a majoritarian/originalist perspective, that is the correct analytic approach: the people ratified the text sent to them by the Convention, and that is the language to be interpreted. But, critically, Morris's language does not have *one* meaning. In order to get his text through the convention, Morris was intentionally using language that would escape notice and that was, as a result, ambiguous. Examination of the early history of debates about how to interpret the Constitution shows that there was both a Republican and a Federalist reading of his text. Morris created a Federalist Constitution, but he could not displace the Republican Constitution.

Thus, focus on original public meaning does not yield one way to read Morris's text. It reveals two. The modern originalist therefore cannot simply rely on text to answer whether the Preamble is a grant of power, whether the vesting clauses are a broad grant to power to the President, whether the contract clause covers public contracts, whether Congress can eliminate lower federal courts, or a host of other questions. Professor Solum's idea of a construction zone necessarily comes into play. The modern interpretive must move beyond text and employ other sources of constitutional meaning as she chooses between competing versions of original public meaning.

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<sup>455</sup> Evans.

## Conclusion

Early in the new republic, a Congressman charged on the floor of the House that Gouverneur Morris, the drafter for the Committee of Style, had tried to revise the general welfare clause in order to expand the powers of Congress, but that a fellow delegate had caught the “trick” and restored the original constitutional text. Despite the fact that this charge was made more than two hundred years ago and despite Morris’s reputation as lacking integrity, no previous work of scholarship has compared the constitutional provisions referred to the Committee of Style with the Committee of Style’s proposals in order to assess whether he altered text in order to advance his constitutional vision. This article undertakes that comparison. It shows that Morris, a committed nationalist who favored a strong executive and judiciary and protection for private property, who opposed slavery and the grant of political power to the West, subtly revised the text of a breathtaking range of clauses in order to advance his constitutional vision, repeatedly seeking to gain victory in crucial areas where he had been unable to obtain the result he desired during earlier convention debates. He wrote text that expanded the power of the national government (the Preamble), strengthened the executive (the vesting clauses of Articles I and II), mandated the creation of lower federal courts (judicial power clause), provided a textual basis for judicial review (the law of the land clause), elevated the constitutional position of both the executive and federal courts (the basic structure of Article I, Article II, and Article III), barred state interference with public contracts (the contract clause), blocked the admission to the Union of slave states Kentucky and Tennessee while permitting the admission of the free state of Vermont (new states clause), removed constitutional text suggesting that slavery was “just[]” (the fugitive slaves clause), empowered the national government to assume state debts (the engagements clause), allowed Congress to add qualifications to membership (the qualifications clause), expanded the grounds for impeachment (impeachment clause), and expanded congressional jurisdiction over criminal law (the offenses against the law of nations clause). It is a remarkable list of some of the fundamentally important parts of the Constitution.

Morris’s text provided Hamiltonian Federalists with language that they repeatedly relied on in the major constitutional debates of the early republic, as they argued for presidential power to remove executive branch officers, the presidential ability to issue a Neutrality Proclamation, Congress’s power to create the Bank of the United States and to enact the Sedition Act, federal courts’ right to hold congressional and state statutes unconstitutional, and Congress’ obligation to create lower federal courts. Morris’s text provided a playbook for Federalist constitutionalists, including Alexander Hamilton and James Wilson, who had both worked with him on the Committee of Style.

At the same time, Morris’s changes were subtle. Rather than creating clear constitutional meaning, he created ambiguity. In the great debates of the early republic, Republicans fought Federalists with their own readings of the text.

Morris’s language has had a major effect on constitutional law in areas where courts have not recognized that relevant language was inserted by the Committee of Style – such as cases involving the significance of the vesting clause to executive power and the applicability of the contract clause to public contracts. At the same time, in those cases where the work of the

Committee of Style has been highlighted, the Court has consistently ruled that the Committee of Style had no power to change constitutional meaning. Only Justice Thomas has dissented from this position.

The Court's position reflects a reliance on drafters' intent that is at odds with the basic modern originalist principle that the ratifiers, not the drafters, were "We the People." For an originalist, the constitutional text adopted by the ratifiers (rather than the text produced prior to the work of the Committee of Style) is controlling because that it is the text adopted in ratification.

At the same time, Morris's constitutional text is consistently ambiguous. He created Federalist readings but did not extinguish Republican readings. Thus, for a public meaning originalist, the text has legitimate alternate readings. In construing Morris's text, a constitutional decision maker is in the construction zone and must seek sources of meaning beyond text to resolve controversy.

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