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FRAMING THE FRAMER: A COMMENTARY ON TREANOR'S GOUVERNEUR MORRIS AS "DISHONEST SCRIVENER"

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INTRODUCTION

Dean William Treanor's masterful article, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*,[1] makes a major contribution to scholarship on the founding, one that will have a profound impact on how we read and understand the Constitution. Treanor's keen analyses and his presentation of important-but-overlooked historical details support the article's central and historically significant arguments. Treanor's research is at the forefront of emerging scholarship seeking to recover "the Federalist Constitution," a body of constitutional interpretations favored by those Framers who advocated a strong national government. These nationalist interpretations were subsequently emphasized by the Federalist Party in the early decades of politics and policy under the Constitution.[2] But many of these interpretations have been washed away or buried, as the political triumph of Jeffersonian-Madisonian Republicanism after 1800 settled into constitutional orthodoxy. Treanor's work is thus a crucial contribution to the excavation of ideas whose appreciation is essential to a thorough understanding of our Constitution.

Treanor's main thesis and insights are captured by his subtitle alone: Constitutional Convention delegate Gouverneur Morris of Pennsylvania was indisputably a leading figure, and arguably *the* leading figure, in the creation of the Federalist Constitution. The final text of the Constitution, heavily influenced by Morris's own work, supports numerous nationalistic interpretations, and Federalist politicians and statesmen advanced those interpretations in debates in the early republic. Many of those interpretations have been forgotten, as they were sooner or later displaced by Jeffersonian-Madisonian Republican

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1. William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1 (2021).

2. For a detailed outline of specific positions and interpretations that comprise the Federalist Constitution, see David S. Schwartz, Jonathan Gienapp, John Mikhail & Richard Primus, *Foreword: The Federalist Constitution*, 89 FORDHAM L. REV. 1669 (2021), and the various articles in that symposium.

interpretations that have become conventional. Yet, as Treanor shows, because of the Federalists' success in crafting language amenable to their positions—due in no small measure to the efforts of Morris as principal draftsman on the Committee of Style—those Republican interpretations have had to rely on "loose" or atextual construction.[3]

But Treanor's arguments would have been better presented without the theme embedded in his before-the-colon title. Treanor claims that delegate Gouverneur Morris was a "dishonest scrivener" who misused his role as lead writer of the penultimate draft of the Constitution, the Committee of Style draft, to covertly "reverse losses he suffered on the Convention floor" and thus "write into the Constitution his vision of what the Constitution should entail."[4] Treanor identifies fifteen revisions that Morris "smuggled"[5] into the Constitution a few days before the Convention closed its business, sneaking them past "[t]he weary delegates" who "quickly went through the document in order to bring the Convention to a close."[6]

The "framing" of Morris as the "dishonest scrivener"—"framing" both as an organizing device and as an unfair accusation—detracts from Treanor's superbly presented research. There is an understandable writerly appeal to building a historical narrative around the brilliant and roguish character of Gouverneur Morris (who Treanor brings to life in a vivid biographical sketch).[7] But ultimately, as I will try to show, the evidence of dishonest intent on the part of Morris is too thin and speculative to sustain the "dishonest scrivener" narrative.

That narrative is not only tangential to Treanor's most valuable arguments, but also works against them. If Morris had to "smuggle in" substantive changes to the language of the Constitution at the eleventh hour, that would imply that a Federalist constitutional vision was not knowingly approved by the Convention. This in turn creates the misimpression—surely unintended by Treanor—that the Philadelphia Convention leaned more "Republican" than "Federalist."[8] Moreover, the dishonest scrivener narrative creates a spurious basis to delegitimize the language introduced by the Committee of Style.

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3. Treanor, *supra* note 1, at 8

4. Treanor, *supra* note 1, at 27.

5. *Id.* at 48 n.275.

6. *Id.* at 20.

7. *Id.* at 10–15.

8. In this article, I will follow Treanor's use of the terms "Federalist" and "Republican," as extremely useful, albeit somewhat anachronistic, shorthands. The term "Federalist" and "Antifederalist" emerged shortly *after* the close of the Philadelphia Convention to label the supporters and opponents of ratification. *See* PAULINE MAIER, RATIFICATION, at xiv–xv, 92–95 (2010). "Federalist" morphed into a party label in the 1790s as the name of the party of Washington, Hamilton, and Adams. The opposition, led by Jefferson and Madison, coalesced into a party that named itself "Republican." *See* GORDON S. WOOD, EMPIRE OF LIBERTY 53, 161–63 (2009). The major line of division relevant to the current discussion is that Federalists leaned toward a strong national government, while Republicans favored states' rights and a narrow construction of national powers.

It thus supports the very argument that Treanor otherwise persuasively refutes: the strange notion that pre-Committee of Style draft language should be given precedence whenever it appears that the Committee of Style made an arguably substantive change.[9] In short, when we strip away the distracting and debatable imputation of dishonesty to Morris and the Committee of Style, Treanor's arguments become stronger and clearer. Accordingly, notwithstanding its length, the critique that follows should be read as a substantial but friendly amendment.

In Part I of this Essay, I highlight Treanor's historical insights and contributions and locate them at the forefront of emerging scholarship on the Federalist Constitution. In Part II, I identify five implications, or premises, of the "dishonest scrivener" narrative and briefly suggest why they are misleading. And in Part III, I examine each of the fifteen changes that Treanor claims reflect "a larger pattern"[10] in which Morris misused "his role as drafter to reverse losses he suffered on the Convention floor and to write into the Constitution his vision of what the Constitution should entail."[11] I argue that none of these changes reflect dishonest scrivening.

I. TREANOR, MORRIS, AND THE FEDERALIST CONSTITUTION

Treanor's article is a vitally important contribution to an emerging body of scholarship on "the Federalist Constitution."[12] The long-standing, received wisdom tells us that the Constitution is a "Madisonian" document, shaped largely by Madison himself and congenial to the views of his later Republican party. Many interpretations of key constitutional provisions, particularly those emphasizing "dual sovereignty" and "limited enumerated powers," were those that were favored by Jeffersonian-Madisonian Republicans.[13] Translated to present-day constitutional politics, these Republican interpretations are congenial to politically conservative originalists, and are assumed to reflect the Constitution's original meaning.[14] Yet it was not the original language of the Constitution that dictated these interpretations. Rather, it was the electoral dominance of the Republican Party and its Jacksonian-Democratic heirs, be-

9. *See* Treanor, *supra* note 1, at 1.

10. *Id.* at 25.

11. *Id.* at 27.

12. *See* Schwartz et al., *supra* note 2.

13. *Id.* at 1670.

14. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 561 (2012) (Roberts, C.J., plurality opinion) (adopting Madison's narrow interpretation of implied powers); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 90 (2013) (describing narrow construction of commerce power as "a long-standing originalist interpretation of the Constitution"); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 42–43 (2018) (stating New Deal commerce power cases were not "good faith" interpretations).

ginning in 1800 and continuing up to 1860, that "settled" those interpretations.[15] The Constitution's actual language was infused with the more nationalist constitutional vision of the Federalists, and Federalists often predominated in debates over constitutional interpretation during the first decade following ratification.[16] The Federalist constitutional vision included an operative preamble, broad legislative power to address all national problems (including the regulation of slavery), federal common law, and the subordinate status of state governments, among other elements. [17] These original features of the Constitution have been lost to our understanding of the Constitution's "original meaning" due to the post-1800 political success of the Federalists' opponents. But constitutional scholars are beginning to rediscover their place and importance in founding era history.

Treanor advances this historical understanding of the Constitution's founding in several important ways. First, by establishing the Committee of Style's influence on the nature and language of the Constitution, Treanor helps to clear away the layers of mythology identifying James Madison as the protagonist of the Constitutional Convention and "the father of the Constitution."[18] In particular, Treanor's emphasis on Morris's leading role on the Committee of Style breaks down the "Madison (or Jefferson) versus Hamilton" narrative of founding history that conflates the particular views of individual "great men" with those of the movements they represent. Morris was a leading figure—and arguably one of the two leading figures, along with his Pennsylvania co-delegate James Wilson—in a predominant Federalist bloc at the Convention. The ideas of that bloc profoundly shaped the final document.[19] Treanor's emphasis on Morris is an important corrective helping us to right-size the roles of Jefferson, Madison, and Hamilton in the founding; but we should be careful not fall into the same trap by substituting Morris for one of these Founders as a purported "indispensable man."

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15. Schwartz et al., *supra* note 2, at 1670–71; *see also* Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783, 1788 (2021) (arguing that Federalists harnessed social contract theory to justify expansive governmental authority); James E. Pfander & Elena Joffroy, *Equal Footing and the States "Now Existing": Slavery and State Equality over Time*, 89 FORDHAM L. REV. 1975, 1978 (2021) (arguing that the Constitution empowered Congress to foreclose expansion of slavery); Richard Primus, *Reframing Article I, Section 8*, 89 FORDHAM L. REV. 2003, 2005 (2021) (arguing that the Constitution's enumeration of congressional powers is a "means of empowerment, rather than limitation").

16. *See* Treanor, *supra* note 1 at 5–6.

17. *See* sources cited in *supra* note 15.

18. For a leading account portraying Madison as the founding's protagonist, see JACK N. RAKOVE, ORIGINAL MEANINGS 36 (1996). Citations to additional expositors of that view, and a critique of that view, are found in David S. Schwartz & John Mikhail, *The Other Madison Problem*, 89 FORDHAM L. REV. 2033 (2021).

19. *See* Treanor, *supra* note 1, at 7–8. On the importance of James Wilson to the Constitution's framing, see John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014), and William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901 (2008).

Second, Treanor shows how key language produced in the Committee of Style draft figured prominently in important debates in the 1790s, as Federalist politicians and statesmen deployed them in constitutional arguments. In so doing, Treanor establishes that historical accounts which seek to erase the Committee of Style's work are misguided. Both historians and Supreme Court justices have made this error, either by dismissing the Committee's work as merely stylistic finishing touches, or by bypassing the Committee of Style draft language in favor of earlier draft language.[20] The assumption underlying such views is that the Committee of Style limited its work to reducing the twenty-three draft articles into a more elegant seven, and replacing prior draft language with purely synonymous words or phrases of greater elegance or concision. But in fact, as Treanor shows, the Committee of Style went beyond that, channeling the Federalist Constitution into final form by clarifying and reinforcing Federalist interpretations.[21] The mistaken disregard of the Committee of Style's work is problematic when an interpreter decides that the Committee of Style substantively changed the meaning of a previous provision and stipulates that the previous provision must control the interpretation—or in some cases, that a later Republican interpretation is the authoritative "original meaning."

This leads directly to Treanor's third important contribution: his compelling demonstration of a conundrum at the heart of present-day "public meaning" originalism. Due in large part to the clarifying work of Morris and the Committee of Style, many key constitutional provisions are most naturally read to support, or at least permit, Federalist interpretations. But in several important areas, original public meaning originalists prefer Madisonian-Republican interpretations.[22] Paradoxically, this requires such originalists—as was the case with their Madisonian forebears—to engage in "loose construction" rather than apply the literal "original public meaning" of constitutional text. [23]

In support of these major themes and arguments, Treanor drills down to analyze numerous constitutional provisions whose former importance has been forgotten. Some such provisions, like the New States Clause, addressed issues that have gone dormant for many decades but may soon return to the forefront.[24] Others, like the Judicial Vesting Clause, have long-settled interpretations.[25] By placing these clauses in their historical and political contexts, Treanor reminds us that the Constitution was as much a product of politics as

20. Treanor, *supra* note 1, at 104–14; *see, e.g.*, Powell v. McCormack, 395 U.S. 486, 538 (1969).

21. Treanor, *supra* note 1, at 7–8; *see infra* Part III.

22. *See supra* note 14 and accompanying text; *see also* Treanor, *supra* note 1, at 114–17 (suggesting that Federalist interpretations are at least as plausible as purported originalist ones).

23. *See* Treanor, *supra* note 1, at 8, 113, 116.

24. *Id.* at 98–101.

25. *Id.* at 89–92.

political philosophy, and shows that the "original meaning" of several provisions is either at odds with settled interpretations, ambiguous, or misaligned with the preferred interpretations of many contemporary originalists.

In this vein, Treanor highlights the importance of the Constitution's Preamble and lays the groundwork for a long-overdue debate about its status.[26] While conventional and long-settled doctrine holds that the Preamble is mere fluff, like the mission statement of a strategic plan, Treanor shows that Federalists in the early republic viewed the Preamble as legally operative.[27] Some early Federalists read the Preamble as an interpretive guide to more specific constitutional provisions. Still others viewed the "ends" or "objects" of the national government to be, not the enumerated powers in Article I, Section 8, but the objects stated in the Preamble.[28] The powers of the national government under this view included all powers necessary and proper, inter alia, to "promote the general welfare."

Treanor's significant and persuasive presentation of the Federalist constitutional vision and Morris's role in it do not depend at all on the narrative that Morris was a "dishonest scrivener." All of the above arguments hold—indeed, they are strengthened—if we assume that Morris faithfully conveyed the predominant views of the Convention delegates in the Committee of Style draft. In any case, the final language of the 1787 Constitution is what it is, whether it found its way there through good or bad faith. The delegates had three full days to review the approximately 4,500-word Committee of Style draft, and they ultimately approved it after making a handful of specific emendations.[29]

II. FRAMING THE FRAMER: THE DUBIOUS CASE AGAINST MORRIS

The "dishonest scrivener" narrative is based on weak circumstantial evidence. Moreover, it implies five factual premises that are either misleading or against the weight of evidence.

A. *The Weak Circumstantial Evidence against Morris*

The "dishonest scrivener" is an unduly thick narrative of duplicitous individual intentions given the thinness of the circumstantial evidence it relies on. The Committee of Style made several changes, and most of those comport with a Federalist constitutional vision. Those Federalist views were not unique to Morris, and they would have been shared by at least two of the four other Committee of Style members—Alexander Hamilton and Rufus King—even if not in all particulars by the two other members, James Madison and William

26. *Id.* at 48–59.

27. *Id.*

28. *Id.* at 49–55; *see infra* Section III.A.1.

29. *See infra* Section II.B.5.

Johnson.[30] These facts alone are as consistent with good faith as with dishonest scrivening. What is the evidence of any "dishonesty" on Morris's part?

Treanor relies heavily on three pieces of thin circumstantial evidence. First, Treanor cites an accusation that Morris substituted a semicolon for a comma in Article I, Section 8, Clause 1, to change the meaning of the General Welfare Clause from a harmless explanation of the Taxing and Spending Power into a full-blown enumerated power to legislate "for . . . the general welfare." As I explain in Part III, this story is most likely bunk, though Treanor makes it Exhibit A in his case.[31]

Second, Treanor relies on an 1803 letter in which, he says, Morris "boasted that he had crafted the Territories Clause in such a way that it barred newly acquired territories from becoming states."[32] As explained below, this change was made by floor motion before the Committee of Style was appointed, so it cannot constitute an example of dishonest scrivening. Presumably, Treanor offers it as a specific instance of Morris's supposed general penchant for subtle manipulation, albeit in a different context from the one charged. Although historians are not barred from considering what would be inadmissible character evidence under the Federal Rules of Evidence,[33] neither this instance nor Morris's roguish reputation more generally advances the case very much.

Third, Treanor sees something approaching a direct confession in Morris's 1814 letter boasting that the Constitution "was written by the fingers, which write this letter."[34] Morris went on to say that, as to "a part of what relates to the judiciary" in the Constitution, "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."[35] The quote makes Morris sound like a dishonest scrivener, and by his own admission. But as Treanor carefully acknowledges, the admission relates only to a single revision about the judiciary and is not a full confession.[36] What's more, the provision in question—most likely the Judicial Vesting Clause, discussed below—was barely, if at all, a substantive change.

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30. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 547 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (listing members of Committee of Style).

31. *See* Treanor, *supra* note 1, at 5, 20–24, 117–18. *But see infra* Section III.B.1 (debunking story).

32. Treanor, *supra* note 1, at 14–15 (citing Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *in* 3 FARRAND'S RECORDS, *supra* note 30, at 404).

33. *See* FED. R. EVID. 404(b)(1) ("Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

34. Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), *in* 3 FARRAND'S RECORDS, *supra* note 30, at 419, 420. Given the fussiness about punctuation underlying the semicolon controversy, I can't help but note that Morris's quotation violates today's grammar rule against setting off a restrictive clause with a comma.

35. *Id.*

36. *See* Treanor, *supra* note 1, at 7, 16.

This evidence, which is thin in itself and touches on only two Committee of Style changes, hardly seems sufficient to sustain Treanor's fifteen-count indictment. Moreover, the "bad character" inference dissipates when we see how the specific changes made by the Committee of Style fail to support the dishonest scrivener charge.

B. *The Implausibility of the Dishonest Scrivener Narrative*

The dishonest scrivener narrative misleads more than it reveals. By logical implication or Treanor's suggestion, the narrative has five premises, all of which are misleading or doubtful:

1) that a draft Constitution in the form of a single authoritative document was turned over to the Committee of Style;

2) that the Committee of Style draft was the product of Morris alone;

3) that the changes made by Morris diverged from majority views of the Convention delegates, which leaned Republican rather than Federalist;

4) that any substantive changes proposed by the Committee of Style were ultra vires and therefore illegitimate; and

5) that Morris could reasonably anticipate that no one would carefully read the Committee of Style draft, enabling him to "smuggle in" numerous changes consistent with his peculiar constitutional vision.

Although Treanor does not fully embrace all of these assertions, and offers careful qualifications to some of them, readers persuaded by the dishonest scrivener narrative would likely infer and accept these premises in broad-brush fashion. A thorough examination of these five premises requires more detail than possible in a response essay, and I undertake that task elsewhere.[37] Here, I summarize them briefly.

1. There Was No Single Authoritative Draft

It is common for judges and constitutional scholars to refer to a pre-Committee of Style "draft" of the Constitution.[38] While there is no surviving record of what exactly was given to the Committee of Style, we do know that there

37. *See, e.g.*, David S. Schwartz, *The Committee of Style and the Federalist Constitution* 70 BUFF. L. REV. 781 (2022).

38. *See, e.g.*, Utah v. Evans, 536 U.S. 452, 474 (2002) ("[T]he Committee of Detail sent the draft to the Committee of Style."); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1204 (2003) (referring to "the draft of the Framers submitted to the Committee of Style and Arrangement"); Treanor, *supra* note 1, at 46 (citing "the text referred to the Committee of Style"); *see also* RICHARD BEEMAN, PLAIN, HONEST MEN 345 (2009) ("[The Committee of Style] was working to provide the 'last polish' to the document.").

was no complete and authoritative pre-Committee of Style "draft" of the Constitution. Convention Secretary William Jackson tried to keep such a draft by making handwritten markups to his printed Committee of Detail broadside as amendments to that early draft were adopted between August 6 and September 8; apparently, Jackson turned this copy over to the Committee of Style.[39] But Jackson's "official" copy of the proceedings was incomplete: among other errors and omissions, it failed to incorporate the infamous General Welfare Clause into Article I, Section 8, Clause 1.[40]

Max Farrand's *Records of the Federal Convention of 1787*, the go-to source for documentation of the Convention, produces a tidy, apparently unified draft which he labels "Proceedings of Convention Referred to the Committee of Style and Arrangement."[41] This "document" extends over the next fifteen pages, under the running header "Committee of Style," implying that this was a document given to the Committee of Style to revise. But in a tiny and easily-overlooked footnote, Farrand admits that his so-called draft is an editorial convenience compiled by himself.[42] Farrand thus misleadingly implies the existence of a single, complete, and authoritative draft. Yet Farrand had to refer to other documents to produce his version—for example, to add the General Welfare Clause to the first enumerated power, which Jackson had omitted.

The Committee of Detail report was a printed broadside compiling the first draft of the Constitution and distributed to the delegates on August 6. Undoubtedly, this was the template for the delegates, as they debated it clause by clause and made dozens upon dozens of changes to it between August 6 and September 8. I have not counted these changes, but they were all among the 269 motions that were voted on by the Convention in that five-week period.[43] In contrast to the printed Committee of Detail report itself, these motions were all handwritten and not distributed to the delegates, but rather read aloud to them.[44] Delegates, if they took notes at all, probably interlineated

39. *See* Schwartz, *supra* note 37. A copy with interlineations in Jackson's handwriting was found among the papers of the Committee of Style chairman, William Johnson. J.H. POWELL, THE BOOKS OF A NEW NATION 64 (1957); *see William Samuel Johnson Papers, 1745–1936*, LIBR. OF CONG., https://catalog.loc.gov/vwebv/search?searchArg=William+Samuel+Johnson+Papers%2C+1745%E2%80%931936&searchCode=GKEY%5E*&searchType=0&recCount=25 [perma.cc/3RSX-XNUL]. On Jackson as convention secretary, see Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1625, 1640–48 (2012).

40. *See William Samuel Johnson Papers, 1745–1936*, *supra* note 39.

41. 2 FARRAND'S RECORDS, *supra* note 30, at 565.

42. *Id.* at 565 n.1.

43. Farrand sequentially numbered all the floor motions recorded in the Convention Journal. On August 7, the first day of debate on the Committee of Detail report, the first numbered motion was number 233. *Id.* at 195. On September 8, the day the Committee of Style was appointed, the last numbered motion was number 501. *Id.* at 546.

44. Some motions proposed constitutional language directly. Other motions voted to adopt, amend, language proposed by committees in so-called "committee reports." Convention motions could be written or oral, and committee reports were typically written. These writings were probably presented in handwritten form to the Convention secretary, Major William Jackson. *See, e.g.*, *id.* at 493 (stating that the committee report was "delivered in at the Secretary's

their personal copies of the Committee of Detail report during these five weeks to keep track of the evolving constitutional draft, as Secretary Jackson tried to do. And, as with Jackson, it is probable that most or all of the delegates failed to keep up completely and accurately with all the approved changes. Most likely, the Committee of Style members would have had their personal interlineated Committee of Detail drafts, plus several dozen handwritten motions and committee reports, and perhaps also the Convention journals handwritten by Jackson.[45] The challenge of making a verbatim concordance of these papers in the three and a half days between the appointment of the Committee of Style and its September 12 report would likely have been complicated by variations in the delegates' notes and recollections of the precise wording (let alone punctuation!) that had been agreed upon.

Treanor understandably relies on this useful compilation by Farrand to compare prior draft language with the Committee of Style draft.[46] But most readers of Treanor's article will not realize that the Convention delegates had no such single text cumulating all the changes. Subtle variations would be inevitable even by a scrivener acting in scrupulous good faith. Nor can we be sure that Farrand's compilation is accurate. Because Secretary Jackson burned all the motions and committee reports along with all the other "loose scraps of paper which belong to the Convention,"[47] Farrand would necessarily have relied on Jackson's handwritten Convention journals for the text of at least some of the amendments to the Committee of Detail report. Any errors by Jackson in transcribing those (now lost) original motions and reports into the Convention journals would be difficult to detect.

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table"). Committee reports were read aloud, either by Jackson or by the committee chair "in his place" (i.e., at his seat or desk on the Convention floor) and "afterwards delivered in at the Secretary's table" and "again read" by Jackson. *Id.* This reading procedure conformed to the rules adopted on May 28:

> A motion made and seconded, shall be repeated and, if written, as it shall be when any member shall so require, read aloud, by the Secretary, before it shall be debated . . . .
>
> . . . .
>
> A Writing, which contains any matter brought on to be considered, shall be read once throughout, for information, then by paragraphs, to be debated, and again, with the amendments, if any, made on the second reading . . . .

1 FARRAND'S RECORDS, *supra* note 30, at 8–9.

45. *See* Bilder, *supra* note 39, at 1625, 1640–48.

46. *See* Treanor, *supra* note 1, at 4 n.5. Treanor carefully acknowledges that Farrand's presentation is a compilation, but he doesn't consider how this might have obscured our awareness of the drafting challenges for even an honest scrivener.

47. Letter from William Jackson to General Washington (Sept. 17, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 30, at 82.

2. Morris Was Not a Lone Penman

Emphasizing Morris as "*the* dishonest scrivener" encourages readers to believe that the Committee of Style's apparent departures from a purely stylistic role were all the work of Morris. That assertion is highly conjectural and assumes that because Morris *wrote out* the Committee draft,[48] he must have personally conceived all the changes wrought by the Committee. That inference does not follow, and the evidence suggests otherwise.

According to the diary of Committee of Style chairman William Johnson, the full Committee met on September 8, 10, and 11.[49] On September 11, the Convention, which convened every day (except Sundays) at 10:00 AM, immediately adjourned to await the Committee of Style report. This would have given the Committee members the entire day to meet. The Committee thus had ample opportunity to supervise and revise Morris's work before its report was presented to the full Convention the next morning, September 12.[50] Given the stature and strong-mindedness of the other members, including Hamilton, Madison, and King, it is simply not plausible that Morris was given a free hand to "smuggle in" changes on his own.

3. The Committee of Style's Federalist Leanings Conformed to the Convention as a Whole

Treanor's suggestion that Morris's Federalist constitutional vision had to be smuggled past a hostile majority of Convention delegates creates a potentially misleading impression—surely not intended by Treanor—that "the Federalist Constitution" was a distinctly minority viewpoint and that the Convention on the whole leaned Republican. Constitutional scholars and historians broadly—and correctly, in my view—agree that the Convention leaned nationalist compared to the overall political views of the state legislatures and

48. This is the general consensus of historians. The transmittal letter to Congress, also drafted by the Committee of Style, is in Morris's handwriting. *See* Treanor, *supra* note 1, at 29. However, the handwritten draft of the Committee of Style report was apparently not found by Farrand, or anyone else. *See* 2 FARRAND'S RECORDS, *supra* note 30, at 582 n.1 (stating that handwritten Committee of Style report handed in to Secretary Jackson was not found among Jackson's papers). Presumably, it was burned along with the other "loose scraps of paper" destroyed by Jackson. *See supra* note 47 and accompanying text.

49. Diary of William Samuel Johnson, 1787, *in* 3 FARRAND'S RECORDS, *supra* note 30, at 552, 554. The Convention rules specified that "Committees do not sit whilst the House shall be or ought to be, sitting." 1 FARRAND'S RECORDS, *supra* note 30, at 17. Committees typically met "both before & after the hours of the House." MARY SARAH BILDER, MADISON'S HAND 142 (2015) (quoting Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), *in* 10 THE PAPERS OF JAMES MADISON 163 (Robert A. Rutland et al. eds., 1977)). The full House met from Monday through Saturday each week. Between May 29 and August 18, they usually met from 10:00 AM–3:00 PM, and thereafter, from 10:00 AM–4:00 PM. *See* 2 FARRAND'S RECORDS, *supra* note 30, at 328; BEEMAN, *supra* note 38, at 290.

50. *See* Schwartz, *supra* note 37, at 39–42.

the nation at large.[51] Despite the views of a vocal minority who preferred merely tweaking the Articles of Confederation, the great majority of delegates endorsed or agreed with the overhaul-from-scratch approach adopted by the Virginia-Pennsylvania Plan.[52] Inattentive readers or those unfamiliar with the constitutional politics of the Convention could easily misconstrue the "dishonest scrivener" narrative to suggest that the Convention delegates generally leaned toward "Republican" views. That would seriously mischaracterize the prevailing politics of the Convention.

4. The Committee Was Not Formally Restricted to Style

Historians and the Supreme Court have accepted the view that the Committee of Style lacked formal authority to propose substantive changes. Treanor also accepts this view, which comports with the dishonest scrivener narrative: dishonest changes are unauthorized ones.[53] Unfortunately, this view also forms the basis for the idea that Committee of Style changes should be discounted or disregarded as ultra vires.[54] But the claim that the Committee of Style lacked authority to engage with substance is speculative and probably mistaken. It stems from the bald assertion by historian Charles Warren in a footnote in his 1928 history of the Convention,[55] and was repeated by the Supreme Court in *Powell v. McCormack*.[56] It has never been seriously examined by any constitutional scholar.

Warren claimed 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."[57] This statement is doubly misleading. It lacks supporting evidence beyond the mere wording of the motion, which appointed the Committee "to revise the style of and arrange the articles

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51. *See, e.g.*, BEEMAN, *supra* note 38, at 20–21; MICHAEL J. KLARMAN, THE FRAMERS' COUP 8 (2016); MAIER, *supra* note 8, at 466; FORREST MCDONALD, NOVUS ORDO SECLORUM 186–88, 199–202 (1985). Based on my analysis of the biographical data found primarily at *Meet the Framers of the Constitution*, NAT'L ARCHIVE, https://www.archives.gov/founding-docs/founding-fathers [perma.cc/4TD3-SUDQ], I estimate that only about one-third of the delegates would go on to join the Jeffersonian-Madisonian opposition or the Republican Party before 1800.

52. *See, e.g.*, KLARMAN, *supra* note 51, at 144. In a prior draft posted to SSRN, Dean Treanor suggested that these proposals, popularly known as the Virginia Plan, would "more accurately be labelled the Virginia-Pennsylvania Plan" in light of the Pennsylvania delegation's probable substantial contribution. *See* William Michael Treanor, The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution 9 (Dec. 1, 2020) (unpublished manuscript) (on file with author). I follow this excellent suggestion, though Treanor has omitted it from his final published version.

53. *See* Treanor, *supra* note 1, at 112–13; Schwartz, *supra* note 37, at 19–26.

54. *See* Treanor, *supra* note 1, at 10 ("[T]he various names used to describe [the Committee of Style] reflect an understanding that its mandate was simply stylistic.").

55. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 422 n.1 (1928).

56. 395 U.S. 486, 538–39 (1969).

57. WARREN, *supra* note 55.

agreed to by the House."[58] And it begs the question of whether the Committee of Style had authority to *propose*—not *make*—substantive alterations. *No* committee at the Convention had authority to "make" substantive changes or additions. Instead, committees uniformly made *proposals* to be approved, modified, or rejected by vote of the full Convention. Committee reports had the same status as floor motions. Other than the rules committee at the start of the Convention, all committees made substantive proposals. The question thus becomes whether the Committee of Style was uniquely *prohibited* from doing so.

As I argue elsewhere, there are several reasons to doubt that.[59] It is not clear that the Convention delegates were sticklers about formal committee jurisdiction at any time during the Convention, and there is evidence that they were manifestly not such sticklers by late August. All prior committees were asked to propose substantive language for consideration. Significantly, the Committee of Detail, like the Committee of Style, was nominally conceived as a non-substantive compiling committee, yet it made numerous substantive additions and a few changes, without provoking "jurisdictional" objections either from the Convention delegates or later historians.[60] The absence of a single authoritative pre-Committee of Style draft suggests that the Committee of Style had discretion to sort through substantive ambiguities, if any were to be found among the different handwritten versions of approved motions. At least one substantive issue—the Contracts Clause—had been left unresolved and no one objected to the fact that the Committee of Style proposed to resolve it.[61] Finally, the very premise of a sharp distinction between style and substance, with the Committee formally restricted to a narrow understanding of "style" editing, does not withstand close scrutiny. [62]

5. The Convention Delegates Were Not Dupes

Even if the four foregoing "dishonest scrivener" premises were true, the "dishonest scrivener" narrative would still fail if the Convention knowingly approved the Committee of Style changes. Here, Treanor's account relies heavily on a bit of plausible narrative color: by September 13, the morning that they received the printed Committee of Style report, the delegates were "weary" and "quickly went through the document in order to bring the Convention to a close."[63] But this is not an argument in itself. It relies on reading "quickly" to mean "carelessly," and to infer first, that the delegates failed to read and understand the Committee of Style changes; and second, that the Committee of Style *anticipated* that the delegates would fail to do so. This pair

58. 2 FARRAND'S RECORDS, *supra* note 30, at 547.

59. *See* Schwartz, *supra* note 37, at 19–26.

60. *See id.* at 20–24.

61. *See infra* text accompanying notes 84–93.

62. *See* Schwartz, *supra* note 37, at 26–27.

63. *See* Treanor, *supra* note 1, at 20.

of inferences seems much less plausible than the alternative: that, weary and homesick as they may have been, the delegates read the Committee of Style draft carefully. The delegates probably could have found the time between the morning of September 13 and the afternoon of September 15 to read the 4,500-word typeset broadside draft carefully and with reasonably acute comprehension. After all, given the numerous changes that had been made to the Committee of Detail report, the Committee of Style broadside was the first opportunity for the delegates to see a printed copy of their work as a whole.[64] It is at least as plausible to surmise that the delegates would have read this report eagerly and attentively, to get a holistic sense of what they had created.

The idea that Morris or anyone else on the Committee of Style believed that they could have their way with a tired and lazy group of delegates who would sign without reading—as if the draft Constitution were a verbose End User License Agreement—is conjectural, and implausible. The delegates knew the wording would be changed by the Committee: that was its job, after all. The delegates were sophisticated lawyers, merchants, and legislators familiar with drafting and reading legal instruments of one kind or another. They must have known that even purportedly "stylistic" changes could, by accident or design, change meaning—assuming that this "style only" limitation was even meant to be in place.

III. RECONSIDERING THE FIFTEEN "DISHONEST" REVISIONS

Treanor's careful comparison of the compilation of provisions referred to the Committee of Style on September 8 and the Committee's draft reported out on September 12–13 is an illuminating analysis that, as he observes, has never previously been undertaken.[65] Treanor examines fifteen provisions in which the Committee of Style revised prior draft language in a noteworthy way.[66] We can learn a great deal from that valuable analysis without accepting the overlay of the "dishonest scrivener" narrative. As Treanor shows, the general tenor of the Committee's revisions was to promote Federalist readings of the Constitution, either by ambiguating language that leaned Republican, or by clarifying points that favored Federalist interpretations. That analysis alone makes Treanor's article a vital contribution to the literature on the framing of the Constitution.

But do these fifteen revisions by the Committee of Style support a charge that Morris "systematically altered constitutional meaning to advance his own constitutional vision"?[67] To answer this question, we need to unpack the elements underlying this accusation. They are that the Committee of Style's revisions (1) changed the substantive meaning of a prior draft provision, (2)

64. *See* BILDER, *supra* note 49, at 3 (observing that "the politics and process of drafting the document deferred comprehension of the Constitution as a unified text"); Schwartz, *supra* note 37, at 46.

65. Treanor, *supra* note 1, at 1–2.

66. *Id.* at 2, 46–104.

67. *Id.* at 114.

"reverse[d] losses [Morris] suffered on the Convention floor" to implement Morris's preference,[68] (3) diverged from the majority will of the Convention, *and* (4) escaped the Convention's notice. All four of these elements are implicit in a charge of dishonest scrivening; the absence of any one of them refutes the charge. This Section reviews each of the fifteen Committee of Style revisions and concludes that none of the revisions bear all four of these elements of the dishonest scrivener charge. Most fail at least two of these essential elements.

A. *Revisions That the Convention Noticed*

Dishonest scrivening necessarily implies that the revisions were "smuggled in." In three instances, that contention is refuted by the evidence. The Preamble is, quite simply, a glaring change: it cannot be plausibly maintained that this dramatic change escaped notice. The revisions to the Fugitive Slave Clause and the Contracts Clause were actually noticed and debated. These revisions fail to meet other aspects of the dishonesty charge as well.

1. The Preamble

The Preamble was dramatically rewritten by the Committee of Style, or Morris himself with the Committee's approval. The language was famously changed from "We the people of the States," followed by a list of the thirteen states, to "We, the People of the United States," followed by a broad list of national purposes of the government, which were entirely absent from the Committee of Detail draft.[69] This nationalistic turn comports with statements made by Morris—but also Committee of Style members Hamilton and King—that the United States was a sovereign nation rather than a league of states.[70]

The revised Preamble, which leaps off the page at the very beginning of the document, could not possibly have gone unnoticed. The Convention approved the Preamble without a single objection recorded in Madison's notes.[71]

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68. *Id.* at 27.

69. *Compare* 2 FARRAND'S RECORDS, *supra* note 30, at 590 (Committee of Style Preamble), *with id.* at 177 (Committee of Detail Preamble).

70. *See* Treanor, *supra* note 1, at 29–30 (describing Morris's nationalism). For King's nationalistic views, see, for example, 1 FARRAND'S RECORDS, *supra* note 30, at 323 ("The states were not 'sovereigns' . . . . A Union of the States is a union of the men composing them, from whence a *national* character results to the whole. Cong[ress] can act alone without the States."), and *id.* at 492 ("King was for preserving the States in a subordinate degree . . . ."). For Hamilton's views, see, for example, *id.* at 291 (stating the national legislature should have "power to pass all laws whatsoever").

71. *See* 2 FARRAND'S RECORDS, *supra* note 30, at 633 (recounting the final approval of Committee of Style Draft). On September 12, when the draft was read aloud, the first thing the delegates would have heard was the Preamble. Madison records no discussion of it that day. *See id.* at 582, 585. Nor is there any record of any discussion of the Preamble after the Committee of Style broadside was distributed on September 13. *See id.* at 606–40.

The Convention's approval of this, the most striking and potentially far-reaching change by the Committee of Style, was not a rogue departure by a dishonest scrivener. Indeed, the Convention's approval of the Preamble is more plausibly understood as capturing the Convention's overall sense of what the Constitution was, and it suggests an approving orientation toward pro-Federalist revisions in general.[72] This at once supports Treanor's broader thesis about the nature and original prominence of the Federalist Constitution and undercuts the "dishonest scrivener" narrative.

Today we say the Preamble is meaningless fluff, but that view is based on trying to harmonize it with limited enumerated powers, not on an analysis of eighteenth-century preambles.[73] According to William Blackstone, "[i]f words happen to be still dubious, we may establish their meaning from the context" and "[t]hus the proeme, or preamble, is often called in to help the construction."[74] Blackstone was arguably viewed as the leading authority on Anglo-American law in the founding era, and would have been known to most or all of the lawyer-delegates at the Convention.[75] Given the various ambiguities built into the Constitution's text and the interpretive disputes that the delegates could assume would arise, it is unlikely that the delegates would have dismissed the Preamble as fluff. And indeed, as Treanor demonstrates, Federalists built interpretive arguments relying on the Preamble in the constitutional debates of the 1790s.[76]

If the Preamble had substantive interpretive consequence, was it a substantive *change*? Perhaps. It certainly reinforced one side of an argument about the Constitution's ambiguous spirit. It can be understood as reinforcing language in the General Welfare Clause that Congress could legislate for all national purposes—to promote the general welfare, as stated in the Preamble.

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72. *See* Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. F. 183, 194–209 (2020); *see also* 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 497–508 (1953).

73. Examination of the question of the substantive import of the Preamble is shockingly scant. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) (concluding that the Preamble "has never been regarded as the source of any substantive power"); Milton Handler, Brian Leiter & Carole E. Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 123–31 (1990) (arguing that conventional disregard of the Preamble relies on brief reference to two mid-nineteenth century treatises). *See generally* David S. Schwartz, *Reconsidering the Constitution's Preamble: The Words that Made Us U.S.*, 37 CONST. COMMENT. (forthcoming 2022) (manuscript at 3 nn.7–8) (on file with author) (discussing the broad scope of the Preamble).

74. 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 60 (St. George Tucker ed., Philadelphia, Birch & Small 1803).

75. *See* 2 FARRAND'S RECORDS, *supra* note 30, at 448 (stating that Dickinson "examin[ed] Blackstone's Commentaries" to determine the meaning of "ex post facto" laws); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 776 (2009).

76. *See* Treanor, *supra* note 1, at 54–55.

But the Preamble did not reverse a Federalist loss: rather, it reinforced an ambiguous Federalist win.

For both its salience (its very lack of subtlety) and its consistency with prior adopted provisions, the Preamble cannot sustain a charge of dishonestly on the part of Morris or the committee.

2. The Fugitive Slave Clause

The South Carolina and Georgia delegations were so intent on the inclusion of the Fugitive Slave Clause that any change to its language could not plausibly have gone unnoticed—by them, at least. Any of six members of these two delegations who ultimately signed the Constitution would have caught even a subtle substantive change. John Rutledge, Charles Pinckney, and Pierce Butler of South Carolina in particular were active delegates throughout the Convention, were attentive to wording, and maintained a laser-like focus on provisions touching on slavery. [77]

But we need not rely on inference: there is affirmative evidence that the Convention focused on the Committee of Style's revision of the Fugitive Slave Clause. The pre-Committee of Style version read:

> 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.[78]

The Committee of Style's only arguably substantive change was to drop the word "justly."[79] Yet here again, as Treanor acknowledges, the change reflected a consensus among the delegates, not a "smuggled-in" minority viewpoint. With the exception of a handful of pro-slavery firebrands in the deep south, the Convention delegates were not proud of slavery. As Madison noted, they avoided using the words "slave" or "slavery" so as not to "admit in the Constitution the idea that there could be property in men."[80] Dropping "justly" was consistent with this view. Not only was that change not "smuggled in," but it was also extended by the full Convention. As Treanor also explains, the Committee of Style version began, "[n]o person *legally* held to service or labour in

77. For example, Charles Pinckney of South Carolina proclaimed on August 21 that "[i]n every proposed extension of the powers of Congress, [South Carolina] has expressly & watchfully excepted that of meddling with the importation of negroes." 2 FARRAND'S RECORDS, *supra* note 30, at 364; *see also* 1 *id.* at 605 (recounting Butler's insistence on "security" for slavery); 2 *id.* at 95 (describing similar insistence by C.C. Pinckney); *id.* at 416 (recounting Baldwin's motion "to restrain & more explicitly define" taxes on slaves). Rutledge offered numerous subtle word changes in the Committee of Detail Drafts. *See id.* at 137–50, 163–75.

78. 2 FARRAND'S RECORDS, *supra* note 30, at 577 (emphasis added).

79. Treanor, *supra* note 1, at 97.

80. 2 FARRAND'S RECORDS, *supra* note 30, at 417.

one state."[81] On September 15, the Convention voted to change this to "[n]o person held to service or labor in one state, *under the laws thereof*."[82] This was done, according to Madison, "in compliance with the wish of some who thought the term [legal] equivocal, and favoring the idea that slavery was legal in a moral view."[83]

3. The Contracts Clause

The Committee of Style added a prohibition against states "altering or impairing the obligation of contracts."[84] For modern readers, the addition of this "Contracts Clause" might seem subtle, since it appears to be buried in the middle of a list of prohibitions on states that we now either take for granted or dismiss as unimportant (because we don't understand them).[85] But this presentist eye-glazing should not be imputed to the Framers, for whom limits on state exercises of sovereignty were extremely important. Most likely, this addition of a wholly new item to this list of state prohibitions would not have been subtle at all.

In any case, the addition of this new provision—not a revision to an existing one—was not overlooked by the Convention, because it was expressly debated. Treanor argues that a prior version of the Contracts Clause was "rejected" and "somehow reemerged" in changed form in the Committee of Style draft.[86] Rufus King had proposed "a prohibition on the States to interfere in private contracts" on August 28.[87] The motion was not rejected: discussion of it was derailed by a substitute motion regarding ex post facto laws, and as Treanor points out, the delegates assumed they would have to revisit the issue after at least some of them became convinced that the prohibition of ex post facto laws would apply only to criminal cases.[88] This issue was probably deemed one of the "parts of the Constitution as have been postponed" that were referred to the Committee on Postponed Parts.[89] King, Madison, and

81. Treanor, *supra* note 1, at 97 (emphasis added) (quoting 2 FARRAND'S RECORDS, *supra* note 30, at 601–02).

82. 2 FARRAND'S RECORDS, *supra* note 30, at 628 (emphasis added); *see* Treanor, *supra* note 1, at 97.

83. 2 FARRAND'S RECORDS, *supra* note 30, at 628. Worth noting, though outside the scope of Treanor's argument, are two other features of the pre-Style version of the Fugitive Slave Clause. The phrase "He or She" is the only place in any draft of any proposed or adopted text at the Convention using a feminine pronoun. One could argue, therefore, that by referring to the president with the masculine "he," the Framers intended to preclude female presidents—another conundrum for originalism. Perhaps even more intriguing is the Framers' use of the plural pronoun "their" to refer to individuals of non-specified gender.

84. *Id.* at 597.

85. *See* U.S. CONST. art. I, § 10.

86. *See* Treanor, *supra* note 1, at 40.

87. 2 FARRAND'S RECORDS, *supra* note 30, at 439.

88. *Id.* at 439–40; *see* Treanor, *supra* note 1, at 75.

89. 2 Farrand supra note 30, at 473.

Morris were members of that Committee, as well as the later Committee of Style, and would have been well aware that the Contracts Clause issue remained unresolved. In any event, the earlier tabling of the Contracts Clause was not exactly a loss on the Convention floor. Moreover, there is no particular reason to assume that it was created from whole cloth by the Committee of Style; indeed, Treanor concedes that the matter was probably discussed off the Convention floor.[90]

The provision hardly snuck by the Convention unnoticed. As Treanor further acknowledges, on September 14, Elbridge Gerry made a speech on the "importance" and "propriety" of the Contracts Clause and moved that the same "restraint" be extended to the national government.[91] The Convention apparently preferred to leave this aspect of the provision as is, for Gerry's motion was not seconded.[92] The fact that the words "altering or" were deleted from the final version of the Contracts Clause supplies further evidence that the Convention paid close attention to that Clause. [93] The explicit adoption of this provision means that the Contracts Clause fails to meet the second through fourth elements of the dishonest scrivener charge.

B. *Revisions Clarifying or Reinforcing Federalist Successes*

Rather than sneakily reversing prior losses, several of the Committee of Style revisions cited by Treanor reinforced or clarified prior successes by Federalists at the Convention. Some of those successes may have been partial or may have taken the form of strategically ambiguous language reflecting a compromise. While the revisions were subtle, most of them do not reflect substantive meaning changes at all. Even if the meaning was subtly changed, the revisions do not conflict with broadly-supported views of the delegates reflected in prior floor votes. Therefore, these revisions are not persuasive examples of dishonest scrivening, even if their subtlety was such as to make the revision hard to notice.

1. The General Welfare Clause

Treanor gives altogether too much credence to the story that Morris surreptitiously attempted to alter the meaning of the General Welfare Clause in Article I, Section 8, Clause 1, by switching the comma after "excises" to a semicolon. That clause now provides: "To lay and collect Taxes, Duties, Imposts and Excises, [comma] to pay the Debts and provide for the common Defence and general Welfare of the United States."[94] The purported pre-September 8

90. *See* Treanor, *supra* note 1, at 75.

91. 2 FARRAND'S RECORDS, *supra* note 30, at 619.

92. *Id.*

93. *Compare* 2 FARRAND'S RECORDS, *supra* note 30, at 597, *with* U.S. CONST. art. I, § 10, cl. 1.

94. U.S. CONST. art. I, § 8, cl. 1.

draft of the enumeration of powers provided: "The Legislature shall have power to lay and collect taxes, duties, imposts and excises, [comma] to pay the debts and provide for the common defence and general welfare of the United States."[95] This language was not part of the Committee of Detail draft, but a proposal from the so-called "Committee on Postponed Parts," adopted on September 4.[96] The Committee of Style report "changed" this to: "The Congress . . . shall have power . . . To lay and collect taxes, duties, imposts and excises; [semicolon] to pay the debts and provide for the common defence and general welfare of the United States.[97]

Treanor recounts the following story. Fast-forward to the 1798 House debate over the proposed Alien and Sedition Acts, in which Republican Congressman Albert Gallatin argued that those unwise laws fell outside the limited enumerated powers of Congress. To refute the Federalist argument that they were authorized by Congress's power to legislate "for the common defence and general welfare," pursuant to Article I, Section 8, Clause 1,[98] Gallatin claimed

> [T]hose words had originally been inserted in the Constitution as a limitation to the power of laying taxes. 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. The trick, however, was discovered by a member from Connecticut, now deceased, and the words restored as they now stand.[99]

According to Max Farrand a century later, the Pennsylvania delegate was Morris, the Connecticut delegate was Roger Sherman, and the "distinct paragraph" was the switch from a comma to a semicolon.[100]

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95. 2 FARRAND'S RECORDS, *supra* note 30, at 569.

96. *Id.* at 493; *see id.* at 473 (showing appointment of Committee on Postponed Parts).

97. *Id.* at 594 (footnote omitted). Farrand reproduces Madison's copy of the Committee of Style broadside, which contains an erroneous period following "shall have power" that does not appear on the other existing copies of the broadside. *See, e.g.*, *Creating the United States: Report on the Committee of Style*, LIBR. OF CONG., https://www.loc.gov/exhibits/creating-the-united-states/convention-and-ratification.html [perma.cc/J97D-J684] (containing an image of Charles Pinckney's interlineated copy of Committee of Style broadside). The Madison copy also contains various interlineations by Madison, including lettering the enumerated powers as "(a), (b)," et cetera, which were not in the original broadside. *See* 2 FARRAND'S RECORDS, *supra* note 30, at 594–95.

98. *See, e.g.*, 8 ANNALS OF CONG. 1959 (1798) (statement of Harrison Gray Otis) ("If Congress have not the power of restraining seditious persons, it is extremely clear they have not the power which the Constitution says they have, of providing for the common defence and general welfare of the Union.").

99. 3 FARRAND'S RECORDS, *supra* note 30, at 379.

100. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 181–83 (1913).

This story has all of the elements of dishonest scrivening: a last-minute change so subtle that it would likely escape notice. And the Federalist interpretive implications seem stunning: by placing a mere dot on top of a comma, Morris would have converted the Constitution from a moderate government of limited enumerated powers desired by the delegates into a consolidated national government with unlimited powers. Treanor's temptation to embrace and foreground this Gallatin-Farrand story is understandable, and one wonders how much impetus it gave the "dishonest scrivener" framing.

The problem, however, is that the story was so misinterpreted by Farrand as to make the imputation against Morris totally false. We can hold to one side the possibility that the story is a complete fabrication. The entirety of the evidence for it is the hearsay statement of Gallatin, a politically motivated congressmen who was not present at the Constitutional Convention, based on an unnamed source who might also have lacked personal knowledge. The only other evidence in addition to this anonymous hearsay informant was the mere fact of the punctuation change itself.

More importantly, Farrand (and Treanor) misinterpret Gallatin's story by treating it as "the case of the Sinister Semicolon." Gallatin claimed an effort "to throw" the General Welfare Clause "into a distinct paragraph." That implies a line break, not the change from a comma to a semicolon within a single unbroken block of text. But the Committee of Style broadside did not put the General Welfare Clause in a separate line or paragraph. Moreover, Gallatin did not name Morris, and the delegate from Pennsylvania could have been James Wilson, who some historians believe was kibbitzing the Committee of Style. Finally, the timing is all wrong: Gallatin claims that "the trick" occurred "[a]fter . . . the Constitution *was completed*."[101] But Morris's alleged duplicity occurred at the Committee of Style report stage—three days *before* the Convention gave final approval to the Constitution, and five days before signing it. Farrand simply assumed that the accusation referred to Morris and the semicolon, and the story has gained legs from uncritical repetition.[102] But Farrand's haste to explain the comma-semicolon change by blaming Morris's "fingers" led him to ignore how poorly the evidence fit his conclusion.

Farrand's sinister semicolon story assumes that the delegates approved the purportedly original comma. In fact, the delegates probably never approved the comma version as such: The September 4 committee report containing the comma was read aloud to the delegates.[103] It seems unlikely that those who read it aloud would verbalize distracting punctation marks. The

101. 3 FARRAND'S RECORDS, *supra* note 30, at 379.

102. *See, e.g.*, MCDONALD, *supra* note 51, at 265; Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?,* 90 CALIF. L. REV. 291, 338–39, 339 n.151 (2002) (accepting the story but questioning its interpretive relevance).

103. *See supra* note 44 and accompanying text (explaining the procedure for reading committee reports aloud). The Committee of Postponed Parts report containing the purportedly original comma in the proposed General Welfare Clause was read aloud by Committee Chair David Brearley and then re-read by Secretary Jackson. 2 FARRAND'S RECORDS, *supra* note 30, at 493.

first version the delegates would have *seen* and approved—with punctuation—was the Committee of Style version *with the semicolon*. Whoever changed it *to a comma* did so after the amended Committee of Style draft was approved on September 15 and did so apparently without the knowledge of the delegates. The delegates would not have seen the engrossed parchment Constitution with the supposedly "restored" comma until they queued up on September 17 to sign the document. It is inconceivable that anyone would have stood there and proofread the punctuation of the entire Constitution while the other delegates waited in line behind them to sign. So the semicolon was approved by Convention vote. The comma was not.

Perhaps the biggest reason to question the credibility of Gallatin's story is the disingenuous half-truth at its heart. It is false, or at least very misleading, to say that the General Welfare Clause was "inserted in the Constitution as a limitation to the power of laying taxes."[104] That was Sherman's own highly tendentious interpretation of the language.[105] Two weeks before the semicolon version was approved by the Convention, Sherman had proposed language expressly limiting the taxing power to federal purposes; his motion was overwhelmingly rejected, ten states to one.[106] So if anything was snuck in, it was the comma, which purportedly served the interpretation favored by Sherman.[107] And if anyone attempted to reverse a loss on the Convention floor by changing a punctuation mark, it was Sherman—not Morris. Since Morris's reputation has been placed in issue, let us consider Sherman's: "cunning as the Devil," "not easily managed,"[108] and "extremely artful in accomplishing any particular object . . . . [H]e seldom fails."[109] So a more likely culprit (if there was a culprit) was Roger Sherman in changing the semicolon to a comma.

Having said that, the semicolon versus the comma simply doesn't bear the interpretive weight assigned to it—determining the difference between limited enumerated powers and a broad power to legislate for the general welfare. Madison, who hated the General Welfare Clause, nevertheless admitted years later that "taken literally," the Clause "convey[s] the comprehensive power" claimed by Federalists; whereas the punctuation argument did not deserve

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104. *See* Treanor, *supra* note 1, at 22 (quoting 3 FARRAND'S RECORDS, *supra* note 30, at 379).

105. *See* David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857, 917–27 (2022). It is unfortunate that Treanor, who so acutely analyzes the pro-Federalist ambiguity of other Committee of Style revisions, *e.g.*, Treanor, *supra* note 1, at 116, simply accepts Sherman's interpretation as "the standard understanding," *id.* at 21. The interpretation of the General Welfare Clause as a limitation on the taxing power was never "standard," was contested from the beginning, and was ultimately rejected. *See* Schwartz, *supra*, at 873–80.

106. 2 FARRAND'S RECORDS, *supra* note 30, at 414.

107. *See* Treanor, *supra* note 1, at 21.

108. Letter from Jeremiah Wadsworth to Rufus King (June 3, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 30, at 33, 33–34.

109. William Pierce: Character Sketches of Delegates to the Federal Convention, *in* 3 FARRAND'S RECORDS, *supra* note 30, at 87, 88–89.

"the weight of a feather" in interpreting the General Welfare Clause.[110] As Professor William Crosskey observed, "As the repunctuated clause is still undeniably open to [the general welfare] interpretation as a mere matter of English," the reinsertion of the comma "as the method chosen by the skilled lawyers of the Federal Convention" to negate that interpretation would have been "singularly inept and ineffective."[111] But even that assumes that the Framers followed the same syntax rules regarding commas and semicolons that we do today. In fact, not only did they not follow our comma/semicolon distinctions, but they also delegated at least some discretion to printers and engrossers to insert or change punctuation marks.[112] It's thus not even clear that the Committee of Style meant to put the semicolon there.

I do not believe the punctuation mark carries interpretive significance, one way or the other. But if it did, the semicolon did not reverse a Federalist loss on the Convention floor. Most delegates probably believed, like Madison, that the General Welfare Clause was more naturally read as authorizing a power to legislate for the general welfare.[113] The semicolon either had no consequence or, at most, very slightly reinforced the Federalist reading, albeit without eliminating the ambiguity surrounding the Clause's meaning.

2. "Herein Granted"

Article I, Section 1 provides, "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States."[114] The prior version of this clause, as drafted by the Committee of Detail, provided, "[t]he legislative power shall be vested in a Congress."[115] The conventional understanding of this language insists that the phrase "herein granted" is meant to confirm that

110. Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), *in* 9 THE WRITINGS OF JAMES MADISON 411, 417 (Gaillard Hunt ed., 1910) [hereinafter Madison to Stevenson]; Memorandum Not Used in Letter to Mr. Stevenson, *in* 9 THE WRITINGS OF JAMES MADISON, *supra*, at 412–14 n.2.

111. 1 CROSSKEY, *supra* note 72, at 394; *see also* Kesavan & Paulsen, *supra* note 102, at 339 n.151 (questioning the semicolon's interpretive relevance); Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 286 n.25 (1987) (same).

112. *See* DANIELLE ALLEN, OUR DECLARATION 77 (2014).

113. *See* Schwartz, *supra* note 105, at 925–26.

114. U.S. CONST. art. I, § 1, cl. 1 (emphasis added).

115. 2 FARRAND'S RECORDS, *supra* note 30, at 177.

Congress is limited to its enumerated powers,[116] and Treanor does not challenge this view.[117]

Why would a nationalistic "dishonest scrivener" such as Morris, or a Committee which largely shared Morris's views, change the legislative vesting clause to limit Congress to its enumerated powers when it had just added a new Preamble to imply the opposite—that Congress could legislate on all national matters? How did this change advance the Federalist agenda, either honestly or dishonestly?

The Executive Vesting Clause (Article II, Section 1) provides, "[t]he executive power shall be vested in a President." In his 1792 op-ed debate with Madison, Alexander Hamilton argued that the contrast between the legislative and executive vesting clauses—the absence of "herein granted" in the latter—meant that the President was vested with vast unenumerated powers. [118] Hamilton thus made the seminal argument that "herein granted" established or affirmed the principle of limited enumerated powers.[119] According to historian Jonathan Gienapp, Hamilton was thereby willing to concede Federalist ground on congressional powers in order to win a point about broad executive power.[120] While Gienapp is assuredly right about that, Treanor is on shakier ground in assuming that the Committee of Style had that tradeoff in mind five years earlier in revising the Legislative Vesting Clause.

Despite its acceptance by the conventional wisdom, Hamilton's argument was post hoc and flimsy. Several scholars have begun to question the long-

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116. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 592 (1995) (Thomas, J., concurring) ("Even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers 'herein granted' by the rest of the Constitution." (quoting U.S. CONST. art. 1, § 1)); D.A. Jeremy Telman, *A Truism That Isn't True? The Tenth Amendment and Executive War Power*, 51 CATH. U. L. REV. 135, 150 (2001) (arguing the "herein granted" language, "read together with the explicit enumeration in Section Eight of Article I, indicates the Framers' intention to limit the Legislature to those powers"); *see also* John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1080–81 (2015) (critically discussing examples in which "many commentators" understand "herein granted" to say that Congress is textually limited to its enumerated powers). For a powerful critique of the "herein granted" argument for enumerationism, see Richard Primus, *Herein of "Herein Granted": Why Article I's Vesting Clause Does Not Support the Doctrine of Enumerated Powers*, 35 CONST. COMMENT. 301 (2020).

117. *See* Treanor, *supra* note 1, at 62–67.

118. Jonathan Gienapp, *National Power and the Presidency: Rival Forms of Federalist Constitutionalism at the Founding*, *in* POLITICAL THOUGHT AND THE ORIGINS OF THE AMERICAN PRESIDENCY 127, 130–31 (Ben Lowe ed., 2021).

119. Thus, proponents of broad, unenumerated executive powers assume "herein granted" is a foil, necessarily meaning limited enumerated powers. *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 34–35 (2015) (Thomas, J., concurring in part) ("By omitting the words 'herein granted' in Article II, the Constitution indicates that the 'executive Power' vested in the President is not confined to those powers expressly identified in the document."); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 256–57 (2001) (arguing that Article II's vesting clause "must" be a grant of power because Article I refers only to those powers "herein granted").

120. Gienapp, *supra* note 118.

standing assumption that the text of the Constitution clearly limits Congress to its enumerated powers.[121] Like any list or enumeration in a legal instrument, Congress' enumerated powers in the Constitution create an inherent ambiguity: are the listed items meant to be exclusive (precluding items not listed) or illustrative (suggesting other unlisted items of a similar nature or scope)? Normally, this ambiguity is resolved by contextual provisions in the legal instrument. The Constitution contains three provisions indicating an intention to negate the inference of an exclusive enumeration of powers. The Preamble and the General Welfare Clause demonstrate that Congress has the power to legislate for the "general Welfare," that is, on all matters of national rather than purely local concern. The Necessary and Proper Clause functions as a "sweeping clause"—a kind of "et cetera" at the end of the Article I, Section 8 enumeration—and refers open-endedly to "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[122] Extended arguments for these points have been aptly made elsewhere.[123]

Admittedly, the Constitution could have been drafted to make the nonexclusive nature of the enumeration crystal clear, even to the most obdurate advocate of limited enumerated powers. Yet as a textual matter, the exclusivity-negating meanings of the Preamble, the General Welfare Clause, and the Necessary and Proper Clause are clear enough that enumerationists must resort to what Treanor aptly calls "looser construction."[124] They insist that the Preamble is surplusage, that the General Welfare Clause means something other than what its words say when "taken literally" (as Madison put it), and that the Necessary and Proper Clause ends with "the foregoing powers," ignoring the part that says "and all other Powers."[125] Here, Treanor's insight about modern constitutional interpretation has particular force: interpreters,

121. *See* Schwartz, *supra* note 105, at 886–92; Primus, *supra* note 15; John Mikhail, *Fixing Implied Constitutional Powers in the Founding Era*, 34 CONST. COMMENT. 507, 510–13 (2020); Gienapp, *supra* note 72; David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 575, 581–82 (2017) (originating and defining the term "enumerationism"); Calvin H. Johnson, *The Dubious Enumerated Powers Doctrine*, 22 CONST. COMMENT. 25, 27 (2005); *see also* Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3 (2019) (questioning limited enumerated powers); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010) (arguing that the original meaning of the Commerce Clause was to function as a broad, national legislative authorization).

122. U.S. CONST. art. I, § 8, cl. 18.

123. *See* Schwartz, *supra* note 105 (General Welfare Clause); Mikhail, *supra* note 19, at 1048 ("Sweeping Clause"); Primus, *supra* note 15 (ambiguous structure of the enumerated powers).

124. *See* Treanor, *supra* note 1, at 83, 116–17.

125. Madison to Stevenson, *supra* note 110, at 417; Mikhail, *supra* note 19, at 1058–71 (quoting U.S. CONST. art I, § 8, cl. 18) (describing the Court's tendency to ignore "all other Powers" provision).

past and present, who wish the Constitution to conform to Jeffersonian-Madisonian Republican constitutional politics must ignore or explain away constitutional text rather than hew closely to it.[126]

The argument that "herein granted" is intended to establish the exclusivity of the enumeration is fatally circular. If the legislative powers granted by the Constitution are a general authorization to address all national problems, as suggested by the Preamble and the General Welfare Clause, then the phrase "herein granted" refers to that general authorization, and not to a purportedly limiting enumeration. "Herein granted" limits Congress to its enumerated powers only if one assumes that the enumeration is inherently limiting—the very point in controversy.

So why use a different phrase in the legislative vesting clause in contrast to the executive vesting clause? The answer, indeed, is that the Constitution does not grant "all legislative power" to the United States. But this does not inexorably mean limited enumerated powers. Here we collide with the longest-running logical fallacy in U.S. constitutional history. From the first ratification debates to the present-day Supreme Court, it has been asserted that the federal government has either limited enumerated powers or an unlimited police power.[127] Consistently overlooked is a third, middle option: the federal government has a limited *general* (not enumerated) power to legislate on all *national* problems (for the general welfare).[128] This is not the same as a "general police power" to legislate on absolutely everything. To be sure, the distinction between national and local regulatory issues is gray and shifting. But that doesn't eliminate the concept of limited general powers any more than the fuzziness or subjectivity of "mild" temperatures requires us to recognize only "hot" and "cold."

A better explanation for the Committee of Style's insertion of "herein granted" than Hamilton's post-hoc argument is that the Committee was trying to reassure moderate delegates that the Constitution made an express—albeit general—grant of legislative powers on all national matters (for the "general Welfare") that would not by implication absorb all local matters. To be sure, many Federalists would change their tune temporarily in the ratification debates and pay lip service to limited enumerated powers. But at the Convention, this change—like the Preamble—was consistent with the General Welfare Clause, which had already been approved.

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126. *See* Treanor, *supra* note 1, at 116–17.

127. *See, e.g.*, THE FEDERALIST NO. 41 (James Madison); United States v. Lopez, 514 U.S. 549, 567–68 (1995); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012); *see also* THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (contrasting federal powers that are "few and defined" with "numerous and indefinite" state police powers). For a critique of this false dichotomy, see Schwartz, *supra* note 105, at 868–69.

128. *See* Schwartz, *supra* note 105, 868–69.

3. The Engagements Clause

On August 25, the Convention adopted a motion by Edmund Randolph to provide that "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."[129] The Committee of Style replaced the words "by or under the authority of Congress" with "before the adoption of this Constitution."[130] The final text is now the Engagements Clause of Article VI. Treanor argues that the subtle linguistic change created space for the federal assumption of state Revolutionary War debts, a controversial policy favored by Federalists that would be adopted in 1791 as part of Hamilton's national economic plan. But the state war debts had not been assumed by the Confederation Congress, and thus did not fall within the terms of the Engagements Clause: even though they were "debts contracted . . . before the adoption of this Constitution," they remained debts of the states in 1787.[131]

Treanor is undoubtedly right that the Constitution left room for federal assumption of state Revolutionary War debts, a policy favored by the Federalists. But this did not result from a change to the Engagements Clause by the Committee of Style. Instead, as I have argued elsewhere, this was accomplished in the Article I, Section 8 authorization of Congress "to pay the debts."[132] The Engagements Clause was intended, not to authorize debt assumption, but rather to split off the uncontroversial obligation of the government to honor its pre-existing Confederation debts from the controversial issue of assumption. To be sure, one can read the Engagements Clause as extending to debts by whomever assumed prior to ratification, but that is true of either version. Indeed, Randolph's August 25 version is ambiguous about when Congress should have contracted the debt, even though it was undoubtedly intended to address debts contracted by the Confederation Congress. The Committee of Style version clarified that the Engagements Clause referred to pre-existing Confederation debts, thereby *excluding*—not including—federally assumed state debts, which lay in the post-ratification future.[133]

In any event, this change is not subject to a charge of dishonesty even under Treanor's interpretation, because federal assumption of state Revolutionary War debts was not a minority viewpoint. The Convention had already determined to eliminate any constitutional argument against assumption. On August 21, an all-states Committee proposed adding a provision that "[t]he Legislature of the United-States shall have power to fulfil the engagements which have been entered into by Congress, and to discharge as well the debts of the United States, as the debts incurred by the several States during the late

129. 2 FARRAND'S RECORDS, *supra* note 30, at 408.

130. *Id.* at 603.

131. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 136–61 (1993).

132. Schwartz, *supra* note 105, at 908–11, 923 & n.341.

133. *Id.* at 909–10.

war, for the common defence and general welfare."[134] The delegates debated assumption at length, focusing on whether assumption should be obligatory or discretionary, and on August 23, the Convention unanimously approved Morris's motion that "[t]he Legislature *shall* fulfil the engagements and discharge the debts of the United-States."[135] After Pierce Butler of South Carolina moved to reconsider this provision on August 25 and stirred up opposition to assumption, the Convention ultimately settled on the watered-down and ambiguous "to pay the debts."[136] As both Hamilton and Madison explained in later years, it was clear to all that "to pay the debts" referred to the assumption of Revolutionary War debts.[137] Thus, however one reads the Engagements Clause in Article VI, it did not covertly establish a point at odds with a Convention decision.

4. The Judicial Vesting Clause

Resolution 9 of the Virginia-Pennsylvania Plan[138] had provided "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."[139] John Rutledge of South Carolina argued that state courts ought to be the courts of first resort in all federal cases, and moved to strike the clause regarding inferior tribunals.[140] He carried his controversial point by a slim plurality margin, 5–4 with two states divided.[141] Wilson and Madison then moved to replace the stricken language with a provision "that the National Legislature be empowered to institute inferior tribunals," which passed 8–2.[142] The shift from mandatory to discretionary creation of lower federal courts has come to be known as the "Madisonian Compromise."[143]

Treanor accuses Gouverneur Morris of trying to reverse the Madisonian Compromise through the Committee of Style draft.[144] Though not certain, this is probably the provision that Morris was referring to when he wrote that he "select[ed] phrases, which expressing my own notions would not alarm

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134. 2 FARRAND'S RECORDS, *supra* note 30, at 352.

135. *Id.* at 382 (emphasis added).

136. *Id.* at 392, 413, 499; *see* Schwartz, *supra* note 105, at 922–23.

137. Madison to Stevenson, *supra* note 110, at 418 (stating that the General Welfare Clause was a "provision for the debts of the Revolution"); *see also* Letter from Alexander Hamilton to Edward Carrington (May 26, 1792), *in* 3 FARRAND'S RECORDS, *supra* note 30, at 467–68 (describing Madison and Hamilton's agreement that the assumption power was best left vague).

138. *See supra* note 52.

139. 1 FARRAND'S RECORDS, *supra* note 30, at 21.

140. *Id.* at 124 (quoting Rutledge as saying that "the State Tribunals might and ought to be left in all cases to decide in the first instance").

141. *Id.* at 124–25.

142. *Id.* at 125.

143. *See* Treanor, *supra* note 1, at 89–91. *But see* Schwartz & Mikhail, *supra* note 18, at 2064 & n.186 (questioning attribution to Madison).

144. *See* Treanor, *supra* note 1, at 89–90.

others."[145] But it is difficult to see much if any substantive change of meaning. The pre-Committee of Style version provided that the "Judicial Power" "shall be vested . . . in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States."[146] The Committee of Style changed this language to "shall be vested . . . in such inferior courts as the Congress may from time to time ordain and establish."[147] Some modern commentators have argued that "ordain and establish" connotes mandatory in a way that "be constituted" does not, but that is hardly clear.[148] Moreover, it is hard to see how "*shall* . . . be constituted" connotes discretion while "*may* . . . ordain and establish" connotes obligation. To be sure, as Treanor tells us, Federalists did indeed argue during the debates over the 1789 Judiciary Act that the final version of the Constitution obligated Congress to create lower courts. But those Federalists focused on a phrase *which appears in both versions*: "shall be vested."[149]

Thus, the change that ambiguated the Madisonian Compromise was added *before* the Committee of Style was appointed. How did "shall be vested" get inserted into this provision in the first place? That was the work of the Committee of Detail. Edmund Randolph's first draft for the Committee of Detail provided that the national judiciary shall consist of "one supreme tribunal . . . and of such inferior tribunals, as the legislature may appoint."[150] Rutledge changed "appoint" to "establish," presumably because "appoint" implied that the courts already existed.[151] It was James Wilson who wrote for the Committee of Detail that "[t]he Judicial Power of the United States shall be vested in one Supreme National Court, and in such other Courts as shall, from Time to Time, be constituted by the Legislature of the United States."[152] Rutledge then changed "Supreme National" to "Supreme" and "other" to "inferior."[153] Someone, most likely Rutledge, inserted "when necessary," before "from time to time" in the final version of the Committee of Detail draft reported out on August 6.[154] This language was approved without discussion on August 27.[155]

Given that the critical phrase in later debates was "shall be vested," the relevant "scrivener" was not Morris, but James Wilson. Yet Wilson can hardly

145. Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), *in* 3 FARRAND'S RECORDS, *supra* note 30, at 420.

146. 2 FARRAND'S RECORDS, *supra* note 30, at 575.

147. *Id.* at 600.

148. *See* Treanor, *supra* note 1, at 89–93.

149. *Id.* at 89–91.

150. 2 FARRAND'S RECORDS, *supra* note 30, at 146.

151. *Id.* at 137 n.6, 146.

152. *Id.* at 163 n.17, 172.

153. *Id.*

154. *Id.* at 186.

155. *Id.* at 428. The delegates added "both in law and equity" to the jurisdiction of the federal courts but made no other changes to this clause. *Id.*

be charged with dishonesty since his Committee of Detail drafting was carefully reviewed by John Rutledge, the original objector to mandatory creation of lower federal courts. The more likely explanation for this episode is that Rutledge's objection to lower federal courts was a minority position that was accommodated, a majority of delegates favored creation of lower federal courts, and the language leaving room to argue for mandatory creation of lower federal courts was a consciously strategic ambiguity that all were willing to accept. The most the Committee of Style can be accused of here is reinforcing the Federalist interpretation of an already ambiguous provision.

5. The Executive Vesting Clause

The Committee of Detail had written: "The Executive Power of the United States shall be vested in a single person. His stile shall be 'The President of the United States of America.' "[156] The Committee of Style changed this to: "The executive power shall be vested in a president of the United States of America."[157] According to Treanor, this change was a subtle but marked substantive shift from an emphasis on "single person" to an emphasis on "the executive power" and thus supported arguments for expansive executive power.[158]

Treanor is persuasive in suggesting that the Committee of Detail wished to highlight the controversial matter of whether the executive would be a single person or a multi-member council. "Single person" was in effect a placeholder: While the Convention had agreed on June 4 on a single-person executive,[159] the Committee of Detail was well aware that this issue would be hotly debated again when its draft would thereafter be reconsidered by the Convention. That issue was settled in late August in favor of a "single person" executive.[160] Thus, by the time the Committee of Style convened in the second week of September, there was no need for special emphasis on "single person."

Yet calling this a substantive change is strained. Once the Convention definitively decided on a single person, the Committee of Detail's two-sentence version became wordy, and the Committee of Style draft was likely nothing more than an effort at conciseness. The notion that "single person" in the Committee of Detail draft was so salient as to distract readers from the potentially vague parameters of "the executive power" is just not persuasive. Nor is it plausible that post-ratification debates over the scope of executive power would have differed in any way had the Committee of Detail version been adopted into the final Constitution. The wording change was just not substantive.

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156. *Id.* at 185.

157. *Id.* at 597.

158. Treanor, *supra* note 1, at 61–62.

159. 1 FARRAND'S RECORDS, *supra* note 30, at 93.

160. 2 *id.* at 401.

6. "Sole Power of Impeachment"

The Committee of Style added "the sole" before "power" to the prior wording, "The Senate . . . shall have power to try all impeachments."[161] While Charles Pinckney and Madison preferred presidential impeachments to be tried at the Supreme Court, they lost this point. Treanor acknowledges that Morris, who preferred a Senate trial, "and prevailed in the relevant floor vote" was trying "not to overturn a defeat but to consolidate a victory."[162] More to the point, he was clarifying what was agreed upon and fairly obvious. This purely stylistic revision did not change prior meaning.

7. "Law of the Land"

The Supremacy Clause, in its pre-September 8 form, provided that the Constitution, laws, and treaties of the United States "shall be the supreme law of the several States, and of their citizens and inhabitants."[163] The Committee of Style changed the wording to "shall be the supreme law of the land."[164] Treanor asserts that this change "dramatically altered the sentence's import" by shifting "exclusive focus" from "the states and their courts" to an implicit command to review federal and state laws for consistency with the Constitution.[165] As Treanor shows, Morris and other Federalists favored judicial review and would later argue that the Supremacy Clause implicitly authorized that practice. Treanor also perceptively reveals that the Supremacy Clause was revised to authorize judicial review.[166] But he is mistaken about when and how this revision occurred.

The Supremacy Clause first appeared in the New Jersey plan on June 15, was successfully moved to adoption by Luther Martin on July 17, and was revised by the Committee of Detail in its August 6 report.[167] Those three initial versions gave supreme status only to "the Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States."[168] In other words, the first three versions of the Supremacy Clause omitted the Constitution itself as supreme law. It was the addition of "This Constitution" before the references to statutes and treaties that gave the strongest indication that the Constitution itself was supreme law and a basis for judicial review. *That addition was not made by the Com-*

161. *Compare id.* at 572, *with id.* at 592.

162. Treanor, *supra* note 1, at 87.

163. 2 FARRAND'S RECORDS, *supra* note 30, at 409.

164. *Id.* at 603.

165. Treanor, *supra* note 1, at 94–95.

166. *Id.* at 93–96.

167. 1 FARRAND'S RECORDS, *supra* note 30, at 245 (New Jersey Plan); 2 *id.* at 28–29 (Martin's motion); *id.* at 183 (Committee of Detail version). There were wording changes across these three versions, but all omitted "This Constitution" as a source of supreme law.

168. 2 *id.* at 183.

mittee of Style. Rather, it was a motion made by John Rutledge and unanimously adopted without debate on August 23 that amended the Supremacy Clause to begin with "*[t]his Constitution* & the laws of the U.S. . . . shall be the supreme law."[169]

Thus, even if the Committee of Style draft gave a subtle nudge in emphasis from the previous version, the major change embracing judicial review had occurred over two weeks earlier—and without dissent.

C. *Other Revisions That Fail to Show Dishonesty*

The remaining five revisions fail to demonstrate one or more of the elements of dishonest scrivening.

1. The New States Clause

The debate over the provisions affecting admission of new states—the New States Clause and the Territories Clause—is necessarily confusing to any modern reader. It involved a mashup of governance of existing territories, anticipated acquisition of new territories, the impending cession by states of existing claims to western lands, and the partition of states into new ones—including the breakaway of Vermont from New York, which was a virtual fait accompli, and that of Kentucky from Virginia, which wasn't.[170] These issues produced cross-cutting cleavages among the delegates' interests. For example, a New England delegate would likely favor Vermont's independence from New York but might be of two minds about splitting off a new state of Kentucky from Virginia. He might favor the split out of a worry that a huge and growing Virginia would unduly dominate the national councils; or, for nearly identical reasons, oppose that split out of a concern that Kentucky's two additional senators would align with Virginia's two senators.

Treanor observes that Morris opposed admission of new western states generally.[171] Significantly, this was not a hobby horse peculiar to Morris. New Englanders worried about a proliferation of new western and southern states becoming predominant. Thus, Massachusetts delegate Elbridge Gerry, for example, warned of "dangers apprehended from Western States" and moved adoption of a provision that lower house representation of new states should never exceed that of the original ratifying states.[172] Rufus King, another Massachusetts delegate and a member of the Committee of Style, seconded this motion; it was voted down, 4–5–1, with Massachusetts and Connecticut, joined by Maryland and Delaware, voting in favor.[173]

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169. *Id.* at 389. On August 25, the language was further amended on a motion by Madison to add the words "or which shall be made" in order "to obviate all doubt" that both existing and future treaties would be included. *Id.* at 417.

170. *See* Treanor, *supra* note 1, at 100–01.

171. *Id.* at 99.

172. 2 FARRAND'S RECORDS, *supra* note 30, at 2–3.

173. *Id.* at 3.

In an 1803 letter, Morris admitted to crafty drafting of "the third section of the fourth article."[174] But that was not the New States Clause. Morris was saying that he drafted the *Territories Clause* to require that territories acquired post-ratification would be governed as "provinces," rather than admitted as states, which would in turn "allow them no voice in our councils."[175] To that end, Morris explained, "In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made."[176] However crafty as Morris was in drafting this language, he did so, not in the Committee of Style draft, but in a motion on the Convention floor on August 30—which he won.[177] It thus offers no instance of reversing a loss via the Committee of Style. That Committee made no substantive change to the Territories Clause.

To be clear, Treanor's claim of dishonest scrivening here is not based on the Territories Clause (Clause 2 of Article IV, Section 3), but the New States Clause (Clause 1 of that section). There, the change in question depends on another purportedly sinister semicolon. The Convention had adopted this language on August 30:

> 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 of 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.[178]

And the Committee of Style changed it to this:

> 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 of the states concerned as well as of the Congress.[179]

The change is the switch from a comma to a semicolon after the otherwise-synonymous italicized phrases in the two versions. As Treanor points out, this could be read as prohibiting state partitions in all cases, while permitting state mergers, but only state mergers with the approval of Congress and the involved state legislatures.[180] Treanor suggests that Morris intended that result

174. Treanor, *supra* note 1, at 15 (quoting Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *in* 3 FARRAND'S RECORDS, *supra* note 30, at 404).

175. Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *in* 3 FARRAND'S RECORDS, *supra* note 30, at 404.

176. *Id.*

177. 2 FARRAND'S RECORDS, *supra* note 30, at 466.

178. *Id.* at 458 (emphasis added).

179. *Id.* at 602 (emphasis added).

180. Treanor, *supra* note 1, at 99.

to promote his opposition to the creation of new western states.[181] That would indeed have been a dirty drafting trick.

But the problem with this interpretation is that Morris himself had drafted and successfully moved to include the language *allowing* state partitions with state and congressional consent—the first sentence of the New States Clause—on August 29.[182] Morris never spoke in opposition to state partitions per se, but he did speak against partitions forced on states by Congress.[183] He would have been playing a deep game indeed had he been pretending to favor consensual state partitions when he in fact opposed them. And it is implausible that he was playing this game, for two reasons. First, on August 29, when Morris proposed language permitting consensual state partitions, it seems doubtful that he knew he would be on a later revision committee affording him an opportunity to sneak in a blanket prohibition on state partitions. Second, as Treanor points out, apparently neither Morris nor anyone else argued after ratification that state partitions were barred by this clause. [184]

The better explanation is that this semicolon, too, was not sinister.[185] On August 30, shortly after the Convention adopted Morris's motion for the inclusion of the first sentence of the New States Clause, an additional motion added the second sentence regarding merger.[186] Arguably, Morris simply combined these two sentences for elegance. The semicolon was only a slightly harder stop than a comma and does not grammatically preclude the consent language from applying to the partition clause as well as the merger clause.

2. The Qualifications Clause

The Committee of Style changed the qualifications of House members from an affirmative framing to a negative one. The Committee of Detail draft, as subsequently amended, provided that "Every member of the House of Representatives shall be" at least twenty-five years old, a United States citizen of three years, and a resident of the state electing him.[187] The Committee of Style changed the framing to "No person shall be a representative who shall not

181. *Id.*

182. 2 FARRAND'S RECORDS, *supra* note 30, at 455. The motion was approved on August 30. *Id.* at 464.

183. *Id.* at 455–56.

184. Treanor, *supra* note 1, at 102.

185. This seems to be the conclusion of the extensive and fascinating analysis of this and other punctuation marks in the Constitution in Kesavan & Paulsen, *supra* note 102, at 340–50 (concluding that the semicolon in the New States Clause has "incredible ambiguity" and "is not a reliable guide to discovering the meaning of Article IV, Section 3").

186. 2 FARRAND'S RECORDS, *supra* note 30, at 465.

187. *Id.* at 178.

have" those attributes.[188] The Supreme Court deemed this difference to be material in *Powell v. McCormack*,[189] concluding that the affirmative framing was controlling and was meant to be exhaustive; therefore, Congress could not add qualifications.

Powell is the leading case for the proposition that because the Committee of Style was authorized to make stylistic changes and not substantive ones, its language—even where adopted as the final language of the Constitution—must be disregarded in favor of prior draft language that appears materially different. Treanor persuasively concludes that this proposition is strange and ultimately wrong, but he accepts *Powell*'s equally strange conclusion that the positive and negative framings are materially different. Treanor argues that Morris was trying to force ajar a door previously closed by the Convention, which had refused to add property or other qualifications for House membership at the discretion of Congress.[190]

But no rule of English grammar makes an affirmative list exhaustive and a negative list non-exhaustive. Applied to the Constitution, a rule that negative framing is always non-exhaustive is nonsensical. For instance, the Impeachment Trial Clause provides, "no Person shall be convicted without the Concurrence of two thirds of the Members present."[191] Under the *Powell* assumption about negative framing, this would permit other voting conditions on impeachment convictions to be added on by statute or Senate rule: for example, a requirement that at least ten Senators from the president's party must vote to convict, or even that the vote required for conviction must be three-fourths (which includes two-thirds). It seems doubtful that the Supreme Court would consider itself bound by *Powell* to reject a textual argument that the two-thirds requirement is exclusive.[192]

I can't explain why the *Powell* Court concluded otherwise. Most likely, the Court was grasping for an original-meaning argument where other modes of interpretation did not readily apply. Significantly, both the *Powell* Court and Treanor overlooked the fact that the Presidential Qualifications Clause was also framed in the negative. As proposed by the Committee on Postponed Parts and adopted by the Convention on September 4, Section 2 of the article on the presidency provided:

> No person except a natural born citizen, or a Citizen of the [U.S.] at the time of the adoption of this Constitution shall be eligible to the office of President; nor shall any person be elected to that office, who shall be under the age of

188. *Id.* at 590.

189. 395 U.S. 486, 537–41 (1969).

190. Treanor, *supra* note 1, at 68–70.

191. U.S. CONST. art. I, § 3, cl. 6.

192. There are several other examples of arguably exclusive negative framings in the Constitution. *See, e.g.*, *id.* art. I, § 6, cl. 2 ("No Senator or Representative shall . . . be appointed to any civil Office."); *id.* art. I, § 8, cl. 12 (stating "but no Appropriation of Money to that Use"); *id.* art. II, § 1, cl. 5 (listing presidential qualifications).

> thirty five years, and who has not been in the whole, at least fourteen years a resident within the [U.S.].[193]

The change of the House (and Senate) qualifications from affirmatively to negatively framed was most likely intended to do nothing more than to make those provisions consistent with the presidential qualifications clause based on a purely stylistic preference.

3. "Actual Enumeration"

The delegates spent a great deal of time and effort in designating the number of House representatives that would be apportioned to each state. They were purely spitballing in arriving at these numbers of representatives in Article I, Section 2, Clause 3, and their population estimates were substantially off. Morris, as chair of a five-member "special committee" that produced these estimates, said that his Committee's report "is little more than a guess."[194] While there were intensive disagreements over the basis of representation, the Convention broadly agreed that population guesstimates were unsatisfactory and resolved to base representation on the "number . . . taken in such manner as the said Legislature shall direct."[195] The Committee of Style changed this to "actual enumeration."[196] Treanor construes this phrase to require a literal headcount and preclude estimation or sampling, a method that would purportedly make the whole process of numerical representation—which Morris opposed—so difficult as to break down.[197] Yet there is no compelling reason to understand "actual enumeration"—which the Constitution elsewhere equates with "census"[198]—as demanding an individual headcount as opposed to a range of methods more precise and scientific than the guesstimates underlying Article I, Section 2, Clause 3. Viewed this way, the change merely clarified the Convention's existing intention.

4. Presidential Succession Clause

The Committee of Style changed "officer of the United States" to "officer" in the clause defining those whom Congress may place in the line of presidential succession.[199] Presumably, this opened the door to including members of Congress, such as the speaker of the house. While this change appears to have gone against the tenor of the previous floor discussion and vote on this question, Treanor himself dismisses this charge of dishonesty by acknowledging that "unlike the other changes surveyed," this one did not "clearly advance[]

193. 2 FARRAND'S RECORDS, *supra* note 30, at 498.

194. *Id.* at 560; *see id.* at 538 (designating a "special committee").

195. 2 *id.* at 183.

196. *Id.* at 590–91.

197. *See* Treanor, *supra* note 1, at 71.

198. U.S. CONST. art. I, § 9, cl. 4 ("Census of Enumeration").

199. *Compare* 2 FARRAND'S RECORDS, *supra* note 30, at 573, *with id.* at 599.

goals that Morris had unsuccessfully fought for."[200] That concession implies that the change may have come from a Committee of Style member other than Morris or a broader Convention agreement reached off the Convention floor.

5. Presidential Impeachment Clause

The Committee of Style deleted "against the United States" from "other high crimes and misdemeanors."[201] Treanor observes that this is an arguable and subtle broadening of the impeachment catchall language to extend to state law crimes and was thus consistent with Morris's final evolving view that the grounds of impeachment should be broad.[202] Whether the change represented pulling a fast one on the Convention is unclear. "High crimes and misdemeanors against the United States" was added on September 8 to expand the list of impeachable offenses, which previously included only treason and bribery.[203] This change was not germane to the actual debate over the grounds of impeachment. Madison had opposed including "maladministration"—which would necessarily be "against the United States"—because it would justify impeachments over policy differences.[204] The Convention as a whole apparently agreed on that specific point, but there is no evidence that a majority would have been opposed to Morris's change. It was George Mason, hardly a staunch nationalist, who advocated for expanding the list of impeachable offenses. This suggests that the change was not particularly "Federalist" in nature, making this change at most a weak addition to Treanor's case of dishonest scrivening.

CONCLUSION

The truly important takeaways of Treanor's article are undisturbed by the foregoing critique. Treanor demonstrates that significant portions of the Constitution reflect Federalist interpretations that have been minimized or forgotten in post-ratification constitutional history. Several of these interpretations were advanced by Federalist politicians in early debates over constitutional meaning. In several instances, Treanor argues, a departure from the Federalist interpretation requires loosely, not strictly, construing or even ignoring the language reported out of the Convention and ratified by the people. These interpretive moves and developments raise serious questions about present-day originalist interpretations and methods. Treanor presents a compelling critique of the Supreme Court's denigration of the Committee of Style's revisions and of originalist gymnastics in working around the most natural interpretations of the Committee of Style's language.

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200. Treanor, *supra* note 1, at 82

201. *Compare* 2 FARRAND'S RECORDS, *supra* note 30, at 575, *with id.* at 600.

202. Treanor, *supra* note 1, at 83-86.

203. *Compare* 2 FARRAND'S RECORDS, *supra* note 30, at 495, *with id.* at 545.

204. *See id.* at 550.

In suggesting that we strip away the dishonest scrivener story, I am not criticizing Treanor's core argument. The dishonest scrivener narrative not only distracts from his core claims but stands in tension with them. By characterizing the Committee of Style's work as "dishonest," together with attributing them to Gouverneur Morris as a rogue "lone penman," Treanor's framing device tends to delegitimize the Committee of Style's revisions. It needlessly drives a wedge between what Treanor calls "drafters' intent" and "Framers' intent."[205] It unduly strengthens the argument advanced by the Supreme Court and others that constitutional text should be disregarded if it was produced by the Committee of Style and arguably differs from earlier draft language: the language found in the Committee of Detail draft as amended by the numerous motions between August 6 and September 12. And it forces those who would adhere to the Committee of Style's wording in such instances to justify their position by arguing in an original public meaning mode when they otherwise would not have to.

Treanor's "dishonest scrivener" framing has an undeniable surface appeal for readers with a taste for character-driven historical narrative, but it distorts more than it reveals. We can agree that Gouverneur Morris was a major player at the Convention and a leader of the Federalist bloc without attributing to him sole authorship of Federalist ideas. Personalizing the Federalist constitutional vision to Morris makes those ideas seem unduly idiosyncratic, when in truth they were widely shared and, in most cases, predominant at the Convention. By suggesting that Morris dishonestly and systematically reversed numerous convention losses by smuggling pro-Federalist revisions past a weary and unsuspecting Convention, the dishonest scrivener narrative wrongly implies that the majority of delegates at the Philadelphia Convention preferred, and believed they had, a far more Jeffersonian Republican constitution than the one they got.

A better reading of the historical evidence is that the Committee of Style, perhaps led by Morris, produced a draft that emphasized, clarified, or reinforced Federalist understandings, virtually all of which were already there. Many of the Federalists' specific positions were presented ambiguously. But that had to do with placating Convention minority views or with anticipating Anti-Federalist resistance in the ratification process. The Federalists at the Convention were not strong enough to carry all before them, but neither were they so weak as to have to sneak their agenda through at the eleventh hour. Both on and off the Convention floor, and with Morris playing an overt and leading role, the Federalists shaped a Constitution that comported with their nationalist agenda. The "dishonest scrivener" aside, Treanor demonstrates that major point with depth and great insight.

205. Treanor, *supra* note 1, at 104–07.