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Gouverneur Morris and the Drafting of the Federalist Constitution

William M. Treanor
Georgetown University Law Center, wtreanor@law.georgetown.edu

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EIGHTH ANNUAL SALMON P. CHASE LECTURE

Gouverneur Morris and the Drafting of the Federalist Constitution[†]

WILLIAM MICHAEL TREANOR*

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† I have adapted this essay from the Eighth Annual Salmon P. Chase Distinguished Lecture, which I gave on November 17, 2021. The legal analysis in that lecture drew on my article, William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1 (2021). Any quotes not footnoted is this essay are from that article. The slides used in the talk are referenced in this essay's footnotes.

* Dean and Executive Vice President, Paul Regis Dean Leadership Chair, Georgetown University Law Center.

The Salmon P. Chase Colloquium series has had two themes: One is great moments in constitutional law, and the other is people who have been forgotten but should not have been. This colloquium is primarily in the latter category—it is about a forgotten founder of the Constitution. But the Constitution has more than one forgotten founder. I did a Google search this afternoon for "Forgotten Founder" and there are a whole series of books on various people who are the Constitution's Forgotten Founder. So the Chase Colloquium series has another decade of subjects: Luther Martin, George Mason, Charles Pinckney, Roger Sherman. There is a lot to work with.

Gouverneur Morris is the one "forgotten founder" who really shouldn't be forgotten. The classic picture of Gouverneur Morris is actually a joint picture painted by Charles Willson Peale in 1783. Gouverneur Morris is on the left, and Robert Morris is on the right.[1] They weren't relatives, despite the shared last name, but they were very close. Gouverneur Morris and Robert Morris were business partners during the Revolutionary War. Robert Morris, who is kind of the Jeff Bezos of the 1780s, was as close as the United States had to a president during the Revolutionary War. He was the head of finance and Gouverneur Morris was his number two. I will be focusing today on Gouverneur Morris's work on the Committee of Style at the end of the Federal Constitutional Convention.

As the Federal Constitutional Convention is drawing to close, it's hot and everybody's tired. It has been four weeks since they had a draft of the Constitution, which was composed by the Committee of Detail. There has been a month of debate and votes up, votes down. There's no draft constitution, even though the Convention is near the end of its work. So, the delegates together form a committee—the Committee of Style and Arrangement—and over three days this committee drafts the Constitution with Morris as the lead drafter. And then, very hurriedly, the Convention reviews it, almost completely adopts it, and goes home. The work of the Committee is supposed to be polishing the Constitution—taking what's already been agreed to and putting it in a final document.

But what I argue in a recently published article in the *Michigan Law Review*—the basis of this talk—is that, as the drafter on the Committee of Style, Morris

1. Referencing "Gouverneur Morris and Robert Morris," Charles Willson Peale, oil on canvas (1783). Available at https://www.pafa.org/museum/collection/item/gouverneur-morris-robert-morris [https://perma.cc/4GL6-KTUJ].

made fifteen substantive changes.[2] As you'll see, most of them are very subtle, but they have incredible consequence: He carefully picked words to advance particular substantive ends. With the passage of time, we have lost the meaning of much of this text. But if we are going to read the Constitution clearly—and as it was ratified at the time—we must recover the meaning of the texts that, on fifteen occasions, he changed. This is particularly important at a time when four members of the Supreme Court are originalists and focus on the original meaning of these words.

One part of this talk is about the changes he made. There were a number of basic causes Gouverneur Morris tried to advance during the Constitutional Convention, and he lost a lot of those battles in the months before he became the Committee of Style's drafter. He was a big government person. He was probably, with the possible exception of Alexander Hamilton, the strongest nationalist at the Convention. He was a big protector of private property. He was a champion of the judiciary and judicial review, and he was unquestionably the fiercest opponent of slavery at the Convention. And he was, with James Wilson, the Convention's leading champion of the Presidency. In each of those areas, on the Committee of Style, he made very subtle changes to advance his goals. If you read the text in accordance with the meaning of the words in 1787, you'll see how it reflects his meanings, what he wanted to achieve.

Taken all together, with these changes, Morris created the Federalist Constitution. That will be the subject of the first part of this talk. But most originalists today read the Constitution very differently. They see the Constitution as a Jeffersonian Republican Constitution, not as a Federalist Constitution. And the reason why that occurred is the topic of the final part of this talk. I will discuss how the Constitution's original meaning was lost.

My thesis here is a simple one, but an important one for constitutional law. At the Convention, the Federalists won the battle over the Constitution's text. In the years that followed, however, they lost the battle over what that text means.

* * *

THE FORGOTTEN GOUVERNEUR MORRIS

I was at the National Archives before the pandemic, and they had an exhibit on the Constitution. There was an exhibit on Gouverneur Morris that said that he, on the Committee of Detail, drafted the Constitution. Obvious mistake—Committee of Style, not Committee of Detail. I thought, "I can get somebody from the Archives to correct this obvious error but I'm sure people are pointing this out to them all the time—I don't want to come across as a nerd." So, I said nothing and just left. Two months later, I come back to the Archives and, would you believe it, nobody has corrected the error. There happened to be a senior official at the Archives, and I ran over and said, "I'm sure you're on top of this, but I just want

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

to let you know that, where it says 'Gouverneur Morris drafted the Constitution on the Committee of Detail,' it was actually the Committee of Style, right?" The senior official at the Archives—I actually haven't gone back to check whether it's been done because I'm afraid of being dispirited—said, "We will of course change that." Then the person said, "But I have to say, this is not my period and I don't know who Gouverneur Morris is."

At the Archives there is a great mural of the Convention delegates that appears on the ceiling above the Constitution.[3] The senior official at the Archives told me, "I have no idea who Gouverneur Morris is. For all I know," and the person pointed up at the mural, "he could even be the guy with the peg leg." And I said, "As it would happen, that is Gouverneur Morris."

He's been unjustly forgotten. I think he is actually, and that's what I will be talking about, the central person in the drafting of the Constitution.

JAMES MADISON - THE FATHER OF THE CONSTITUTION?

Now, who does everybody *think* is the father of the Constitution?

James Madison[4] is so firmly established as the Father of the Constitution that modern originalist battles are really a fight over Madison's legacy, right? So this slide is, of course, the Federalist Society's classic James Madison tie[5], which I think is $60 and it's quite attractive.

People don't remember this, but when the American Constitution Society began 20 years ago—and I am now showing you an article about it[6]—it started with our own Professor Peter Rubin, who's now on the bench. The liberal alternative to the Federalist Society was originally called the Madison Society.

There's a real struggle on both left and right for Madison's legacy. And why do we think of Madison as the father of the Constitution? It's because we have a standard story, and it is the story that Madison told and it placed Madison at the center.

It begins in 1786. Madison is at Montpelier, his family plantation, confronting a United States that is falling apart, and he is thinking deep thoughts about what the Constitution should be.

He convinces Washington to come to the Federal Constitutional Convention, despite Washington's reluctance. Then, the Virginians are the first ones at the Convention. Everybody else is late. The Virginians seize the moment—meeting by themselves before the Convention starts, they come up with the Virginia Plan, which then alters what the Convention is about. The Convention was supposed to be about reworking the Articles of Confederation. But, with Madison's leadership, it

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3. Referencing "The Constitution," Barry Faulkner, oil on canvas (1936). Available at https://www.archives.gov/founding-docs/constitution-mural [https://perma.cc/UP5Y-CWAH].

4. Referencing "James Madison Jr.," Bradley Stevens, oil on canvas (2002). Available at https://www.senate.gov/about/images/madison-james-ushouse.htm [https://perma.cc/3JZD-4LTH].

5. Referencing "FedSoc Tie–Madison Head Dots," Federalist Society, woven silk. Available at https://fedsoccommunity.force.com/lightningcommunity/s/store#/store/browse/detail/a13410000037tuwAAA [https://perma.cc/N7MQ-V4FR].

6. Crystal Nix Hines, *Young Liberal Law Group Expanding*, N.Y. TIMES, June 1, 2001, at A17.

becomes, instead, about writing a wholly new document that is much more nationalistic. The Virginia Plan becomes the starting point of the framing.

And after the Plan is proposed, the Convention centers on two debates, both of which end in compromises. There is a debate between the slave states and the free states about whether representation should reflect the number of free people or the number of free people and enslaved people, and it leads to the Three-Fifths Compromise. And there is a debate between the big states and the small states about whether states should be represented equally in Congress or whether representation should be based on population. Again, the final result is a compromise, where the states have equal representation in the Senate and representation in the House is based on population.

Madison is the genius of the Convention. He is the Convention's great thought leader. He is also its scribe, taking reliable notes from the beginning through the end. Even though he does not always win, he drives the Convention's intellectual dialogue. He continues to be the dominant figure after the Convention. With Hamilton (and a little help from Jay), he writes *The Federalist*, and the most important paper is his Federalist 10, which brilliantly captures an argument he had advanced at the Convention about the way in which a large nation better protects minorities than individual states. He writes the Bill of Rights. In the constitutional debates of the Washington and Adams administrations, he argues powerfully for his constitutional vision. He eventually becomes president and, at the end of the day, his notes of the Convention are published post-mortem, allowing us to understand what happened in Philadelphia.

That's how we understand the Constitution, right? The way in which we think about the Constitution is really Madison's story.

What I'm going to talk about is important ways in which that's *not* right, or in which that's incomplete.

WASHINGTON'S FRIENDSHIP WITH THE MORRISES AND HIS HISTORIC DECISION ABOUT WHERE HE STAYS DURING THE CONVENTION

Let me begin with the first part in which it's incomplete.

This slide shows Robert Morris's house.[7] It is really nice. As I said, he's the Jeff Bezos of 1787—incredibly rich. Washington, when he's in Philadelphia during the Revolutionary War, stays with Robert Morris. That is, in part, because they are the two principal figures in the government, and they have a great deal to talk about. It's also because this house is really nice. And it's also—and this is something we don't think about—because Washington is not from a noble family, and he develops a very close personal tie with Robert Morris.

We think of Washington as part of the Virginia planter aristocracy, and he is—he owns hundreds of enslaved people. But at the same time, it's striking that his closest

7. Referencing "The Robert Morris House at 190 High Street in Philadelphia, Pennsylvania," unknown author, wood engraving (early 19th century). Available at https://www.granger.com/results.asp?inline=true&image=0076869&wwwflag=4&itemx=35 [https://perma.cc/X5G9-EEQG].

relationships are not with Edmund Randolph, the governor of Virginia, or Jefferson or Madison, people who are very literally to the manor born. In a society based on primogeniture, they are first borns destined to great position from birth.

Washington, and we forget this, is not the firstborn. Washington is a child of his father's second marriage. As compelling as he is—he's an extraordinary 6'4", he's a great horseman, he's immensely strong—as a young man, he's not going very far because he is from the second family. He almost joined the British Navy as a youth because his prospects were so limited. He only comes to own Mount Vernon because, by the time he's 29, his father has died young, his older half-brother (whom he worships) has died young, and his four nieces and nephews have died. So you get a sense of how far along the chain of inheritance he was before he inherited Mount Vernon. He had spent his childhood—with all of his talents—as an outsider with his nose pressed against the glass looking in. The ties that he has, his strongest personal ties, are not with a Jefferson or a Madison or a Randolph. His ties are with the northerners who have really come from nothing, or with people who are like him—people who are not first-borns, who make it on their own.

One who is close to him is Robert Morris, who is illegitimate and a very successful person, but is raised by his grandmother. And Washington has a kind of kinship with him that he doesn't have with the Virginians. So whenever he comes to Philadelphia, until 1783, he stays with Robert. And then he stops, because of the Newburgh Conspiracy.[8]

At the end of the Revolutionary War, in 1783, the soldiers had not been paid and their pensions were unfunded. Congress has said that they will be paid, but the soldiers do not think Congress will honor that commitment. The officers gather in Newburgh in the barracks of the base. And they're thinking, do they have to seize power to get paid? Washington is not supposed to be in the room as they're meeting. Then, all of a sudden, the door swings open, and Washington in his full uniform, unannounced and unexpected, moves forward and to the front of the room. He speaks and he gives—Washington is not a great speaker—what I think is his most brilliant speech, about the importance of the military yielding to civilian authority.

But, for the first time, he does not have the audience. People are hissing and catcalling—that has never happened to Washington. This moment is sometimes called by historians the last temptation of George Washington. If he had wanted to become king, he had a barracks filled with angry officers ready to go. But he gives them a speech about the importance of ceding to the majority, to civilian government. They're catcalling and booing. He then says, "I have a letter from a member of Congress promising your pension, and I would like to read it to you." And he reaches into his pocket and takes out the letter and he holds it. But he can't read it, so he takes out his reading glasses. You can see in the picture on the

8. Referencing "The Newburgh Conspiracy," Jane Sutherland. Available at https://www.mountvernon.org/plan-your-visit/be-washington/newburgh-conspiracy/#g-1849_m-newburgh-glasses [https://perma.cc/AU3C-XZKN].

screen he's wearing his reading glass. Nobody has ever seen Washington in reading glasses. He is always perfect. He puts down the letter and says, "I have grown gray in your service and now I find I have grown blind as well."

That's the end of the mutiny. People start to cry, they sob, they leave by the back door. The potential mutiny has been crushed, but Washington suspects that the Morrises are behind it. Furious, he writes a letter that says, "The financier is behind this." Then he writes a letter subsequently that no, it's Gouverneur Morris who's behind it. He has had this incredibly close relationship with the two of them. And they are now dead to him.

* * *

Somehow, by 1787, the Morrises are back. We don't know how the relationship has been restored, but it has been.

Madison had invited Washington to stay with him at Mrs. House's boarding house during the Convention, and Washington says yes. Morris had also invited Washington, but Washington had declined.

It's kind of touching that Madison is staying with Mrs. House, given Madison's backstory at the rooming house. Madison is shy and not physically compelling. He is 5'6", he's under 100 pounds, he's balding. Not that that's unattractive, of course. In 1783, when living in Mrs. House's boarding house, he had fallen in love for the first time in his life. He falls in love with a young woman named Kitty Floyd, and they become engaged. Then, she breaks off the engagement and he is devastated. But, despite these sad memories, he still stays at the boarding house, and he invites Washington to stay with him.

Washington proceeds from Mount Vernon, with people cheering him all along the way, and when he arrives at Mrs. House's boarding house, who is there? Robert Morris and his servants. Morris says, "I insist you stay with me." And Washington says, "Okay."

So Robert Morris brings Washington to his house. Now, Washington is actually a master of theater. For example, a lot of historians think the Newburgh Conspiracy bit was all scripted, including the part with the glasses. And, similarly, Washington might very well have planned, as a way to explain why he was staying with Robert Morris, that Morris would meet him when Washington arrived at Mrs. House's and appear to convince him to change his plans.

But in any case, Washington stays with Robert Morris and spends the entire Convention with Robert and Gouverneur Morris. Washington, during the break in the Convention proceedings, goes traveling with Gouverneur Morris. And the close ties among the three men last throughout the Convention. In fact, on the last day, after the Convention concludes, Washington has breakfast with the two Morrises and then they escort him out of Philadelphia.

Now, I think that this is the most consequential rooming arrangement of all time. There are others that are more *amusing*. I always wonder—Cole Porter and Dean Acheson were roommates, and I would be fascinated to know what that was like. What did they talk about?

THE VIRGINIA-PENNSYLVANIA PLAN

But George Washington being with the Morrises was not simply an interesting factoid about the Convention. It was significant. It meant that, at the end of every day, Washington was with the *Pennsylvanians*, not with the *Virginians*.

We normally think that the Convention began with the Virginia Plan because the Virginians had been meeting together and prepared it. In fact, they had been meeting, not just with each other, but with Wilson and Morris *all the way through the preparation of the plan*. So the Virginia Plan is actually much more the Virginia–*Pennsylvania* Plan. Professor John Mikhail has done important work on the text of the Plan: Its big pro-nationalist clause, which a lot of historians say is just a placeholder, was actually probably drafted by Wilson, who is a big nationalist and wanted to get nationalism on the table at the very start.[9] This is just an example, which continues all the way through, of how Morris's bringing Washington into his home is central in a way we don't think about: Washington comes home at night, every night, to the Morrises. The Virginians can't deliberate among themselves. As a result, the Virginia Plan is really a Virginia–*Pennsylvania* Plan.

THE KEY SPEAKERS AND DRAFTERS

At the Convention, we think about Madison as central. He's not. He talks a lot, but Morris talks more. There are more *Morris* speeches than *Madison* speeches. (Wilson is second.) It is actually remarkable, because Madison is a planner and a hard worker, but even though Morris takes a month off in the middle of the Convention to go deal with his business affairs, he talks more than anybody else. He is on more committees—that are elected by other people—than Madison. His motions are more successful than Madison's.

Most important, particularly at a time in which we emphasize textualism, the Constitution *was not written* by Madison.

The two key documents are the Committee of Detail's draft constitution and the Committee of Style's draft constitution.

The Committee of Detail is the product of a tug of war. If you look at the handwriting on the various drafts, you see that Randolph and John Rutledge are responsible for the states' rights text and Wilson is responsible for the nationalist text. The three of them are negotiating throughout. The document is their joint work, Wilson wins some, Randolph and Rutledge win some. Most significant, as John Mikhail has argued, Wilson crafts the Necessary and Proper Clause so that it vests broad power in Congress.[10]

Morris is the drafter of the Committee of Style report. There are five members of the committee—Morris, Hamilton, Madison, Rufus King, and chair William

9. John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1048 (2014). The clause is Resolution VI, which would have given Congress the power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911).

10. *See* Mikhail, *supra* note 9.

Johnson—but everybody agrees that the person who actually writes the Constitution is Morris, even though Wilson (who is not on the committee) seems to have reviewed the text. James Madison—who, as the years pass, comes to hate Morris (a feeling that is reciprocated)—says, "The finish given to the style and arrangement of the Constitution belongs to the pen of Mr. Morris . . . A better choice could not have been made, as the performance of the task proved."

* * *

WAS MORRIS AN HONEST DRAFTER?

Now, was Morris an honest drafter? Spoiler alert—the title of my article in the *Michigan Law Review* is *The Case of the Dishonest Scrivener*. Here is an example: This is the General Welfare Clause as it comes out of the Committee of Style draft—

> Article I, Section 8: The Congress . . . shall have Power. ≪a≫ To lay and collect Taxes, Duties, Imposts and Excises; to pay Debts and provide for the common Defence and general Welfare of the United States.

Here, however, is the text that had gone into the Committee:

> The Legislature shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.

What comes out of the Committee of Style is the same as what was sent into the Committee, except for a semicolon after "imposts and excises," instead of a comma. That changes the meaning, right? Although it is not unambiguous, with the semicolon, the General Welfare Clause reads as creating a separate power to provide for the common defense and general welfare of the United States. With the comma, the General Welfare Clause can still be read as a grant of power to provide for the common defense and general welfare; alternately, it can be read as qualifying the clause concerning taxing power—taxes can be levied to provide for the common defense and general welfare.

What ends up in the Constitution is actually a comma. Why?

Because of Roger Sherman of Connecticut.[11] Sherman has seen a semicolon substituted for a comma and he's mad. Sherman is really the great proofreader of the Constitution. You all in law school have done Bluebooking. This shows why it matters. Sherman apparently sees the comma has become a semicolon and changes it back. How do we know this? Albert Gallatin, who is the brains of the Republican Party, makes that change about 10 years after the Convention in a debate about the

11. Referencing "Roger Sherman (1721–1793, M.A. [Hon.] 1768)," Ralph Earl, oil on canvas (1775). Available at https://artgallery.yale.edu/collections/objects/2448 [https://perma.cc/RC9J-J6WS].

General Welfare Clause in Congress. He says, "Roger Sherman caught the trick." Now, by this point, Sherman is dead and Morris is in Europe, where he spends about a decade. So we don't know the backstory—Morris never admits trying to change the meaning of the text covertly—either here or elsewhere.

The question is, did he make subtle changes in the Constitution or was this punctuation change just an honest error? Surprisingly, before my article, almost nobody had ever really looked at that. Clinton Rossiter's *1787: The Grand Convention* is one of the few works of scholarship —actually the only one that I know of—that looked at it before my article.[12] Rossiter says that Morris was a faithful servant and that the changes he made were not substantive.

THE SUPREME COURT AND THE COMMITTEE OF STYLE

Now, interestingly we have four Supreme Court cases in the past 50 years in which the question before the court has been, "Do you look at the draft that goes into the Committee of Style or do you look at the Constitution as actually adopted?" And four times the Supreme Court has said, "Oh no, no, no, you look at the draft that went into the Committee of Style, not what was actually adopted."

Powell v. McCormack is one case. Writing for the court, Chief Justice Warren observes:

> 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; and certainly the Convention had no belief . . . that any important change was, in fact, made in the provisions as to qualifications [previously] adopted by it on August 10.[13]

Utah v. Evans is the most recent case, saying the same:

> [T]he Committee . . . added the words 'actual Enumeration.' Although not dispositive, this strongly suggests a similar meaning, for the Committee of Style 'had no authority from the Convention to alter the meaning' of the draft Constitution submitted for its review and revision. Hence, the Framers would have intended the current phrase, 'the actual Enumeration shall be made . . . in such Manner as [Congress] . . . shall by Law direct,' as the substantive equivalent of the draft phrase, 'which number [of inhabitants] shall . . . be taken in such manner as [Congress] shall direct.'[14]

The Court says in four cases: Don't look at the Constitution that's ratified—look at the report that went into the Committee, because the Committee of Style and Arrangement was only empowered to work on style and arrangement, so they could not have changed the meaning. The only person who has disagreed with

12. Clinton Rossiter, *1787: The Grand Convention*, 24 WASH. & LEE L. REV. 168 (1967).
13. Powell v. McCormack, 395 U.S. 486, 539 (1969) (Warren, C.J.).
14. Utah v. Evans, 536 U.S. 452, 474–475 (2002) (internal citations omitted).

that is Justice Thomas—even Justice Scalia voted with the majority holding that changes by the Committee of Style should be disregarded.

Justice Thomas is alone, and he says, "I focus on the words of the adopted Constitution."[15] Everybody else has said *style and arrangement* was supposed to be *style and arrangement*, so they could not have made any substantive changes. And so, the Court's majority had said that we should look at what had been previously adopted, not the text of the Constitution.

All of the historians who have looked at the Committee of Style's work have said that Morris was an honest broker.[16] For example, in his excellent history of the Convention, David Stewart says, "[the Committee of Style's draft] had to be faithful to the Convention's actions. Morris could be trusted to do that."[17]

In fact, he couldn't.

* * *

GOUVERNEUR MORRIS AND *THE* MILITARY CAPITAL OF THE REVOLUTION

Why did I focus on him? Nobody had ever focused on Gouverneur Morris and the Committee of Style.

I am from Morristown, New Jersey. The print that I am showing here – which is from 1961 – describes Morristown as *a* military capital of the American Revolution.[18] This is fairly modest. In Morristown we like to think of ourselves as *the* military capital of the American Revolution. The army was there for two years, and no other city had more than one year.

I was focused on Morristown's role in history —and on Morris—as a small child because of a major event in Morristown. When I was probably about six, the Governor Morris Inn opened in Morristown. As this newspaper headline trumpets: "The Governor Morris Inn is New Jersey's first all-new hotel in a quarter of a century."[19] This was a big deal.

But speaking of the comma–semicolon difference, do you see a problem with the *Governor* Morris Inn? It's not spelled the way Gouverneur Morris's name was. As an adult, I thought, "I've been interested in Gouverneur Morris because of the inn, but Governor Morris Inn is not actually named for him. It's named after somebody who was a Morris, who was a governor."

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15. *Id*. at 496 (Thomas, J., dissenting).

16. *See* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION (2009) ("[The Committee of Style] was working to provide the 'last polish' to the document."); *see also* MICHAEL KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016) ("[The Committee of Style] put the finishing touches of the Constitution.").

17. DAVID STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 233 (2007).

18. Referencing "Cover, *Morristown: A Capital of the American Revolution*," unknown author, print (1961). Available at https://www.gutenberg.org/files/62651/62651-h/62651-h.htm [perma.cc/DP5Y-J6UB].

19. Referencing "Photo: Framed article about the history of the hotel," Michelle L, photo, unknown date. Available at https://www.tripadvisor.com/ShowUserReviews-g60906-d98246-r246352348-The_Westin_Governor_Morris_Morristown-Morristown_Morris_County_New_Jersey.html#photos;aggregationId=&albumid=&filter=2&ff=119381167 [https://perma.cc/P89W-S3HL].

I then did further research and learned that actually they meant to name it after Gouverneur Morris but they misspelled his name. If you are in Morristown and you go to the Governor Morris Inn, you'll discover that this is the brand of the hotel—the restaurant there was named after Aaron Copland and they misspelled his name, too. So they're pretty consistently on message.

That's how I became interested in Gouverneur Morris.

THE PENMAN OF THE CONSTITIUTION

Allison, my long-suffering wife, is with me tonight as I deliver this lecture. Last Fall, she was also gracious enough to accompany me to the Bronx, which is where Gouverneur Morris is from, and he's buried at St. Ann's in the Bronx. She took a picture of his tombstone and me, and I am now showing it on the slide.[20]

20. Referencing photo of author at Gouverneur Morris's gravestone, below.

It's understated: It says Gouverneur Morris was the "penman of the Constitution" in quotes. They should have just embraced that he was in fact the penman. There's no need for quotes around it.

UNDERSTANDING GOUVERNEUR MORRIS

YOU should know a couple of things about Gouverneur Morris before we get into his constitutional vision. First, what do people today remember about Gouverneur Morris? I think people know that Gouverneur Morris is, first, in the words of Richard Beaman—who wrote one of the best Convention histories—a "serial philanderer." Look at any of the biographies of Gouverneur Morris. For example, in William Howard Adams's biography of Morris, in the index Adams lists 37 pages under "romances." If you look for "Committee of Style," no entry. So he's famous for being a serial philanderer. He is also famous, to the extent that he is famous, for having a peg leg. And the two popular stories about Morris are linked. Some historians think, and the story that Morris liked to encourage was, that his leg shattered when he jumped out of a second-story window to evade a jealous husband.

Morris is very physically dominant. He's 6'4". Think about what that means in a small room. So again, Madison was 5'6" and under a hundred pounds, Morris is 6'4". I mean, if you think about it today, that's like seven feet tall—and the same size as Washington. He dominated every room he was in.

I mention Washington because I am now showing you a slide of the most famous statue of George Washington.[21]

This is done by Jean-Antoine Houdon, and it's in the Richmond Capitol, but it's the standard Washington statue that is copied again and again, including in Independence Hall in Philadelphia and the U.S. Capitol. It is supposed to depict Washington, but that is only partially true. It is Washington's head—Houdon made a life mask of Washington—but it's Gouverneur Morris's body. Morris was ambassador to France when Houdon was sculpting the statue, and Houdon knew that Morris was the same size as Washington. So he asked if Morris could be a—to use Morris's term—"manikin." Morris would go over to Houdon's studio and Houdon would copy him. I don't mean to speak ill of the dead, but it is lucky for Washington that Morris was the model because Washington was pear-shaped. Being pear-shaped made Washington a great horseback rider and a great dancer—having a low center of gravity actually helps for those activities. It's not so good for a heroic image. The statue's heroic physique is actually Morris's and Washington was very lucky.

What else do we need to know? The Morrisania section of the Bronx was his estate. As I said, this is the family estate[22]; he didn't inherit it. He became a

21. Referencing "George Washington," Jean-Antoine Houdon, marble (1785). Available at https://www.khanacademy.org/humanities/ap-art-history/later-europe-and-americas/enlightenment-revolution/a/houdon-george-washington [perma.cc/569S-GEGH].

22. Referencing "Gouverneur Morris Mansion," unknown author, pencil on verso (1900). Available at https://collections.mcny.org/CS.aspx?VP3=SearchResult&VBID=24UAYWL5VQY76&PN=28&IID=2F3XC5IOCSK7 [perma.cc/T4C5-DGGH].

lawyer and a businessperson who was very successful, and he *bought out* his step-brothers' birthright in Morrisania.

A couple of other things—he had a gift for friendship. Washington loved him after they got over the Newburgh Conspiracy. Washington didn't love a lot of people. I think Washington found him very amusing, which he was. He had a great sense of humor. Morris was convivial.

Robert Morris, whom we talked about, he was close to him and thought of Gouverneur as his best friend. But he was also Hamilton's best friend. When Aaron Burr shot Hamilton, Betsey Hamilton asked for Gouverneur Morris, and he was the one person who came to his deathbed. When Robert Morris left debtors' prison after going bankrupt, Gouverneur Morris was the one who provided him a house and an annuity.

He was a wonderful friend; those ties made him incredibly helpful at the Convention, building relationships and getting things done.

He was a genius by everybody's estimation, and he is a great speaker. If you read the speeches at the Convention, he is brilliant in a way that nobody else is. He's funny, he's emotionally powerful, and he's rhetorically superb in a way that literally nobody else is.

But he is not trustworthy. William Pierce, a Convention delegate from Georgia, said of Morris:

> Mr. Gouverneur Morris is one of those geniuses in whom every species of talent combined to render him conspicuous and flourishing in public debate: He winds through all the mazes of rhetoric, and throws around such a glare that he charms, captivates, and leads away the senses of all who hear him.

Partly Morris is distrusted because of the Newburgh Conspiracy and his role in it—it wasn't clear what his role was but he did encourage the military to take some action. There's also a suspicion, which I think is unwarranted, that he and Robert Morris benefited from their role in the finances of the nation.

At the time of the Convention, the French embassy, like William Pierce, prepared short biographies of the delegates, and this is what they wrote about Morris:

> Celebrated lawyer, one of the best smartest men in the continent, but without morals. And if you believe his enemies: without principles.

According to the French embassy, everybody says he's without morals. His enemies add that he's without principles.

But he *was* dazzling. This is how Max Farrand, who compiled the records of the Convention notes and also wrote one of the best histories of the Convention, described Morris a hundred years ago:

> Gouverneur Morris was probably the most brilliant member . . . of the convention . . . . Sharp-witted, clever, startling in his audacity, and with a wonderful command of language, he was admired more than he was trusted . . . .[23]

The most brilliant member of the Convention—this is from Farrand, and Farrand knew the record better than anyone else. It's not Hamilton, it's not Franklin, it's not Wilson, it's not Madison. The scholar who knew the delegates better than any other concluded that the most brilliant member was Morris.

* * *

So, let me go through some of the changes he made on the Committee of Style.

THE PREAMBLE

Let's start with the Preamble. What goes into the Committee of Style is:

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

The Committee of Style converts the Preamble to:

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

The Preamble is the most famous part of the Constitution, and the language is Morris's. All the edits in the Preamble are Morris's. None of them are there when it goes into the Committee of Style. And Morris is responsible for the document's immortal opening: "We, the People of the United States."

We tend to think about the Preamble as a gloss on specific powers that are granted or a rhetorical flourish. But Morris, who was both a master stylist and a brilliant lawyer, wrote language that had legal effect at the time.

Let me offer as an example the argument of Congressman Fisher Ames—who was another one of Morris's friends—explaining why Congress had the power under the Constitution to incorporate the Bank of the United States. Ames's argument is based on the Preamble. The Congressional Record reports:

> [Ames] adverted to the preamble of the constitution, which declares that it was established for the general welfare of the Union; [that] this vested Congress

23. MAX FARRAND, FRAMING OF THE CONSTITUTION 21 (1913).

> with the authority over all objects of national concern or of a general nature; [that] a national bank undoubtedly came within this idea.

Proponents of the Bank prevailed and, if you look at the debates, most of the speakers who defended the Bank's constitutionality relied on the Preamble. Striking.

The modern approach to the Preamble was not the founding generation's approach. If we are seeking to recover original public meaning, as originalists tell us we should, the original public meaning is that the Preamble was a grant of power.

During the Convention, Wilson and Morris worked very closely together. When Wilson is on the Supreme Court in *Chisholm v. Georgia*, he relies on the Preamble as justifying jurisdiction over Georgia.[24] So, his approach is like Ames's.

Madison disagrees. He does not see the Preamble as a grant of power:

> The preamble to the Constitution, said he, has produced a new mine of power; but this is the first instance he had heard of, in which the preamble had been adduced for such a purpose. In his opinion, the preamble only states the objects of the Confederation. . . .[25]

For Madison, the Preamble is just a flourish. But in the first years of the Republic, Madison's view is a minority view. The Federalists win all the big battles of the 1790s, and they rely on the Preamble as having substantive meaning. So, the original public meaning is that the Preamble was a grant of power to the national government.

THE CONTRACT CLAUSE

Another major change made by the Committee of Style is the Contract Clause. The history here is complicated. The one time the Contract Clause had been discussed on the floor of the Convention, it's voted down. But then it emerges in the Committee of Style draft. Morris had spoken against it on the floor, but he was not against it on principle. I think that he looked at it as needing to be revised to add some kind of statute of limitations restriction.

The Northwest Ordinance, which the Constitution's Contract Clause is based on, says no law can "interfere with or affect private contracts or engagement."[26] Let me emphasize the language. *Private* contracts or engagement. When it comes out of the Committee of Style, the clause is there for the first time and the word

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24. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 465 (Wilson, J.) (1793) ("Fair and conclusive deduction, then, evinces that the people of the United States did vest this court with jurisdiction over the State of Georgia. The same truth may be deduced from the declared objects and the general texture of the Constitution of the United states. One of its declared objects is to form an Union more perfect than, before that time, had been formed. . . . Another declared object is, 'to establish justice.' This points, in a particular manner, to the judicial authority.").

25. 2 ANNALS OF CONG. 1957 (1791).

26. An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50 (1789).

private has been dropped. So, as a textual matter, the clause now applies to public (as well as private) contracts.

This is an important change. Public contracts include land grants from legislatures and one of the most important legal issues in the early Republic was whether states could revoke land grants. Because the word "private" has been deleted from the clause, they could not. As a result of the Committee's work, in *Chisholm v. Georgia*, Justice Wilson opined that the Contract Clause applied to public contracts: "What good purpose could this Constitutional provision secure, if a State might pass a law impairing the obligation of its own contracts?" he asked.[27] Similarly, Hamilton, Morris's best friend, working as a lawyer and arguing that the Georgia legislature could not revoke land grants, asserted that the clause applies to public contracts.[28] When Chief Justice Marshall applied the Contracts Clause to a land grant in *Fletcher v. Peck*,[29] his opinion was consistent with the opinions of Hamilton and Wilson and reflected the text's clear meaning.

During the Ratification Debates, when Federalists discussed the Contract Clause, they repeatedly said it applied only to private contracts, and, as a result, the orthodox view among scholars is that *Fletcher v. Peck* is inconsistent with the original meaning of the Contract Clause.[30] But Marshall was reading the text—it was Morris's text and he wrote it to apply to public contracts.

JUDICIAL REVIEW

The popular view—most prominently associated with Alexander Bickel[31] but very much the popular view—is that judicial review was not part of the original understanding and that it was created out of whole cloth by Chief Justice Marshall in *Marbury v. Madison*.[32]

But this overlooks the text of the Law of the Land clause as revised by Morris, an advocate of judicial review.

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27. *Chisholm*, 2 U.S. (2 Dall.) at 465 (Wilson, J.), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

28. 4 THE LAW PRACTICE OF ALEXANDER HAMILTON 430, 431 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980). See also FLETCHER B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 22 (1938), quoting Hamilton on the Yazoo Purchase:

> Every grant from one to another, whether the grantor be a state or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted a-gainst the grantor, and his representatives. It therefore appears to me that taking the terms of the constitution, in their large sense, and giving them effect according to the general spirit and policy of the provisions: the Revoca-tion of the grant by the act of the legislatiure of Georgia, may justly be considered as contrary to the constitution of the United States, and therefore null.

Id.

29. 10 U.S. (6 Cranch) 87, 137–39 (1810).

30. Treanor, *supra* note 2, at 77.

31. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962) ("If any social progress can be said to have been 'done' at a given time and by a given act, it is Marshall's achievement. The time was 1803; the act was the decision in the case of *Marbury v. Madison*.").

32. 5 U.S. (1 Cranch) 137 (1803).

The Law of the Land Clause had been, "the Constitution shall be the supreme law of the several states." He converted it to "the supreme law of the land." This new text was then relied on in the early judicial review cases as a basis for judicial review.

In the first judicial review case that Justices of the Supreme Court heard (while riding circuit), *Hayburn's Case*, the Supreme Court Justices—Blair and, of course, Wilson—as well as the district court judge hearing the case anchored their exercise of judicial review on this language: "This Constitution [is] the Supreme Law of the land."[33] Justice Paterson also relied on this language in the early judicial review case of *Van Horne's Lessee*.[34] *Marbury v. Madison*, too, relies on "the supreme law of the land."[35]

Marshall's text thus provided the basis for judicial review.

LOWER FEDERAL COURTS

He also changed the Judicial Vesting Clause. When the Clause went to the Committee of Style, it provided: "The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States." This language reflected what is known as the Madisonian Compromise, under which Congress could create lower federal courts, but did not have to.

Morris, however, who wanted to *require* lower federal courts, changed the language, so it became: "The judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."

In the early Republic, Federalists repeatedly read this language to mandate the creation of lower federal courts. As Congressman William Smith said, "The words, 'shall be vested,' have great energy, they are words of command; they leave no discretion to Congress to parcel out the Judicial powers of the Union to State judicatures."[36]

But the leading modern originalists on the Court have missed the original reading of the text that was actually adopted. Justice Scalia in *Printz v. United States* and Justice Thomas in *Patchak v. Zinke* both say the so-called Madisonian Compromise, which is what Morris was changing, resolved the Framers' disagreement over creating lower federal courts by leaving that decision to Congress.[37] Again, the Court looks at *the debates*. They have failed to read carefully the text that Morris wrote.

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33. Hayburn's Case, 2 U.S. (2 Dall.) 408, 410 n.* (1792) (Justices Wilson and Blair and District Judge Peters, from the circuit court for the district of Pennsylvania, made the statement in a letter jointly addressed to the president of the United States).

34. Van Home's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308–09 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,857) ("[T]he Constitution contains the permanent will of the people, and is the supreme law of the land.").

35. *Marbury*, 5 U.S. (1 Cranch) at 180.

36. 1 ANNALS OF CONG. 818–19 (1789) (Joseph Gales ed., 1834).

37. Printz v. United States, 521 U.S. 898, 907 (1997) (Scalia, J.) ("In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress. . . ."); Patchak v. Zinke, 138 S. Ct. 897, 906 (2018)

VESTING CLAUSES

When the Vesting Clauses were referred to the Committee of Style, they read:

> Article I: The Government shall consist of supreme legislative, executive and judicial powers.
>
> Article III: The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives, and a Senate.
>
> Article X: 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;" and his title shall be, "His Excellency."
>
> Article XI: The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

Morris converted the clauses to:

> Article I, Section 1: ALL legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
>
> Article II, Section I: The executive power shall be vested in a president of the United States of America.
>
> Article III, Section 1: The judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.

This is very significant.

When we think about the basic elements of the Constitution, one of the first things that comes to mind is the Article I, Article II, Article III structure. Far from being a shared product of the Convention's deliberations, however, it is a last-minute creation of the Committee of Style. An advocate of the President and the courts, Morris wanted the three branches to be seen as of equal stature, and the Article I, II, III structure does that.

Morris also changed the Vesting Clauses in a way that strengthened presidential power. The texts that went into the Committee read: "The Executive Power of the United States shall be vested in a single person" and "all legislative power shall be vested in a Congress." What came out was, "The executive power shall be vested in a president of the United States" but "ALL legislative power herein granted shall be vested in a Congress." He added "herein granted" to Article I, and that language has become central to the modern debate about executive power.

Reliance on the difference in language between the two clauses began with Alexander Hamilton, Morris's best friend, in the Pacificus–Helvidius Debates,

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(Thomas, J., plurality) ("The so-called Madisonian Compromise resolved the Framers' disagreement about creating lower federal courts by leaving that decision to Congress.")

which concerned whether President Washington could issue the Neutrality Proclamation. Hamilton argued that the difference between the two Vesting Clauses connoted that, while Congress only had the powers granted by the Constitution, the President had *all* executive powers.[38]

Beginning with Chief Justice Taft's opinion in *Myers v. United States*,[39] modern champions of broad executive power have similarly relied on this difference between the two Vesting Clauses to support the view that the president has all executive powers. Leading recent examples include the Office of Legal Counsel torture memo of 2003[40] and Justice Thomas's recent opinion concerning the presidential recognition power in *Zivotofsky v. Kerry*.[41]

SLAVERY

Morris was the biggest opponent of slavery at the Convention. And his speeches are powerful: "Domestic slavery," he declared, "was a nefarious institution—it was the curse of heaven on the states where it prevailed." In opposing the slave trade, he said:

> The admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and S. C. who goes to the Coast of Africa and in the defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & damns them to the most cruel bondages. . . .[42]

Morris made two changes in the Committee of Style that reflected his opposition to slavery. The first involved the Fugitive Slave Clause. The Clause submitted to the Committee provided that enslaved people "shall be delivered up to the person justly claiming their service or labor."

Morris took out the word "justly," and that became crucial in the early abolitionist debates. Because of Morris, there was no language in the Constitution indicating that slavery was moral. As historian Sean Willentz has observed, "[t]he committee's revision removed the possible implication that there was justice in slavery."[43]

His changes to the New States Clause are complicated, but I have to say, this is my favorite one of his changes. It is clever, elegant, and he undertook it for a significant reason.

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38. Alexander Hamilton, *Pacificus Number 1* (June 29, 1793), *reprinted in* ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS–HELVIDIUS DEBATES OF 1793–1794, at 12 (2007).

39. 272 U.S. 52 (1926).

40. Memorandum from John C. Yoo to William J. Haynes II, at 4–5 (Mar. 14, 2003), available at https://www.aclu.org/sites/default/files/pdfs/safefree/yoo_army_torture_memo.pdf [https://perma.cc/U34J-P3JF].

41. 576 U.S. 1, 34–35 (2015) (Thomas, J., concurring in part and dissenting 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.").

42. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 222 (Max Farrand ed., 1911).

43. SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 111 (2018).

The Clause, as referred to the Committee of Style and Arrangement, read:

> Article XVII: New States may be admitted by the Legislature into this Union: but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States, without the consent of the Legislature or such State as well as of the general Legislature. Nor shall any State be formed by the junction of two or more States or parts thereof without the consent of the Legislatures of such States as well as of the Legislature of the United States.

As the Clause came out of the Committee, it read:

> Article IV, Section 3: New states may be admitted by the Congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures concerned as well as of Congress.

Again, Morris has changed punctuation—converting the period before the word "Nor" into a semicolon, and converting two sentences into one.

Why does he do this? If you think about the thirteen first states, depending on how you count them, it's seven and six: seven north, six south. The anti-slavery north has a razor-thin margin.

What states are going to come in next? Vermont, which is the fourteenth state and has already been separated from New Hampshire and New York as an independent republic, and in the south, Kentucky and Tennessee, which are actually both part of Virginia and North Carolina, are the likely first states to be admitted.

What Morris does here is he changes the text from, "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 the Legislature of the United States"—so basically, if Congress and the home state okay a split, the split is okay—to "no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction two or more states, or parts of states, without the consent of the legislatures concerned as well as of Congress."

What he's saying here is—a state *can't be divided*. He does that by converting a *period* to a *semicolon*. He makes the change because he wants Vermont, which has already separated, to become a new state, but not Kentucky or Tennessee. Now this one is so clever that nobody gets it. Kentucky and Tennessee *are* admitted without anyone recognizing the constitutional text makes the constitutionality of that admission questionable. There's a great article by Michael Paulson called *Is West Virginia Unconstitutional?*, which draws on this language to argue that West Virginia is not constitutional because it was split off from Virginia.[44] By the same reasoning, if Morris's text had been read carefully, Kentucky and

44. *See* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291 (2002).

Tennessee would not have been admitted to the Union, and the initial northern dominance of the Senate would have been preserved.

MADISON'S VICTORY

There are two committees that draft the constitutional text. In this talk, I have discussed the Committee of Style, and I have shown how Morris crafted language that advanced the goals that mattered most to him. The Preamble gave Congress broad powers. The Vesting Clauses gave the president broad powers. The Law of the Land Clause provided a basis for judicial review. Morris also made subtle changes that advanced his anti-slavery views. Similarly, on the Committee of Detail, Wilson crafted the Necessary and Proper Clause in a way that expanded congressional power.

But Madison—not Wilson or Morris—has come to be known as the Father of the Constitution. Why?

It is, in part, because Madison played the long game. He kept the notes that provide our principal record of the Convention and, as Mary Bilder's recent work suggests, he revised them to suggest that his views at the Convention were less nationalist than they had in fact been.[45] He pushed his constitutional vision throughout his long tenure in government, and his presidency gave him stature which helped make his views preeminent. In his retirement years, he continued to press his constitutional vision and to argue that it had been dominant at the Convention, and, of course, he continued to work on his notes.

And what of Wilson? Wilson's post-Convention career is one of the most spectacular flameouts in American history.

A lifelong aggressive investor, while sitting as an Associate Justice on the Supreme Court in the 1790s he becomes a risk-taker to the point of irrationality. At one point he is one of the five richest people in the country. But then, in the panic of 1796–97, there is a liquidity crisis. Debts are called in, and Wilson can't pay his enormous debts. As a Justice of the Supreme Court riding circuit, he is fleeing his debtors. He is also criticized for marrying a teenager. He dies under house arrest for bankruptcy over a tavern in North Carolina. He is seen as a disgrace.[46]

In the Pennsylvania Ratifying Convention, as a law professor, and while serving on the Court, Wilson had continued to push his view of the Constitution. Morris is exactly the opposite.

At the end of the Constitution Convention, he's really done. Hamilton says to him: "I'm thinking of doing a defense of the Constitution. We'll call it the Federalist. Would you be my co-author?" Morris is like: "No, I'm done. And I'm going to be focusing on making money and having a good time." Then, Hamilton turns to Madison. When we think about Federalist 10, Madison is the most successful understudy in American history. He was the second pick.

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45. *See* MARY SARAH BILDER, MADISON'S HAND (2017).

46. The classic, if dated, biography of Wilson is CHARLES PAGE SMITH, JAMES WILSON, FOUNDING FATHER (1956).

During the Ratification Debates, the only record that we have of Morris's thinking is that he went to Virginia, watched the Convention, and wrote poetry, making fun of various people participating in the debate. The doggerel is his only contribution to the record of the ratification.

During the Virginia Ratification, he stayed with his friend Thomas Mann Randolph, Sr. Randolph has two daughters, Nancy, who at the time is 17, and Judith, who a little bit older.[47] As fascinating as the story I have told here about Gouverneur Morris is, the story about Nancy is even more remarkable. Nancy is a Randolph, one of the great families of Virginia, and her mother dies. Her father remarries, and his new wife is a teenager. She doesn't like having stepchildren who are her age in the house, so Nancy and Judith are pushed out. They become engaged to cousins, but Nancy's fiancé dies. She lives with Judith and Richard, her sister and brother-in-law. Nancy becomes pregnant. Richard was probably the father.

They went to visit relatives at a near by plantation. Nancy was hiding the pregnancy. She, Judith, and Richard stayed over, and in the middle of the night people heard screams. They ran towards the room in which Nancy was staying. Richard locked the door and would not let anybody in. The following morning, one of the enslaved people walked out behind the mansion and saw a body—either a fetus or a baby that had been killed. He ran back to get other people, but when they came back, the body had been removed. The fetus or the baby was not there.

Richard was tried for infanticide. He hired John Marshall and Patrick Henry to represent him. Because an enslaved person could not testify at the trial of a white person, there was no one who could testify about the body. The defense argued that Nancy had never been pregnant. Richard was acquitted.

Nancy went back to live with her sister and brother-in-law. Three years later, he died. People think, well, maybe it's natural. Others thought that Judith might have poisoned him. Others believed that Nancy poisoned him. In any event, she continued to live in the house with Judith. Then after a few years, Judith kicked her out. We don't know how Nancy survives, but she's a pariah in Virginia society and so heads north.

Then somehow, she meets Morris, who had known her when she was a teenager, and he asks her if she would run his estate—run Morrisania. She says yes, she moves there, and they fall in love. And he decides he wants to marry her. But he's a little worried about the poison thing. So he writes a letter to John Marshall and he says, "I don't want to invade attorney-client privilege, but I know you are familiar with Nancy Randolph and I'm thinking of marrying her; would I be misadvised to do so?" And Marshall says, "No, you can go ahead, marry Nancy."

And he does, at the age of 57. Shortly thereafter they have a son, Gouverneur Morris II, who's called "Cut-us-off-us the First" by the jealous relatives who've been looking forward to the big Gouverneur Morris inheritance.[48]

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47. Referencing "Cover, *Mistress Nancy*," unknown author, print, unknown date. Available at https://www.amazon.com/Mistress-Nancy-Barbara-Bentley/dp/0070167222 [perma.cc/A5DF-W5B2].

48. For further details, see CYNTHIA KIERNER, SCANDAL AT BIZARRE (2006).

And when she dies, the son builds a church in the Bronx that is named St. Ann. Nancy's full name, or actually her proper name, was Ann. And that's where Gouverneur Morris is buried. If you go to the Bronx, it's on St. Ann's and 141st Street. On the gravestone of Gouverneur Morris, it says, and this is written by Ann (Nancy), "Conjugal affection Consecrates this spot where the Best of man was laid." And that really captures at the core who Morris was.

Shortly after the Convention, Morris wrote what can be accurately described as his motto for life:

> To try to do good, to avoid evil, a little severity for one's self, a little indulgence for others—this is the means to obtain some good results out of our poor existence. To loved one's friends, to be beloved by them—this is the means to brighten it.[49]

So among a generation that was concerned with their place in history and who dedicated themselves to government and to creating a personal legacy, Morris was concerned in part with building society, but he was also concerned with the people he knew and loved. You get a sense of that from the picture we saw of the two Morrises.[50] That's the only picture I know of that depicts two founders together. All the others are of individuals.

And look at the difference between these portraits—the portraits of Hamilton,[51] Washington,[52] Madison,[53] and the two Morrises are like pictures of people from a different movie. The others are looking into the distance—towards history and to posterity, but for the Morrises, it's about friendship and supporting the people we love. They are together and they are smiling.

And so, let me sum up. Morris crafted the Constitution, he wrote the text that has endured for more than 200 years, but that is not all that he valued. What he valued, as well, is cherishing the people he loved.

As my conversation at the National Archive suggests, Morris has been forgotten. The purpose of this talk has been to make us aware of him. He is there in the Constitution's text. And he is also there in the statues of Washington that dot the country. He is constantly before us, and, from the perspective of history and of law, it is important that we recognize his presence.

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49. 2 DIARY AND LETTERS OF GOUVENEUR MORRIS 23 (Anne Morris ed., 1888).

50. Referencing "Gouverneur Morris and Robert Morris," Charles Willson Peale, oil on canvas (1783). Available at https://www.pafa.org/museum/collection/item/gouverneur-morris-robert-morris [perma.cc/JN8D-T54A].

51. Referencing "Alexander Hamilton," John Trumbull, oil on canvas (1806). Available at https://www.nga.gov/collection/art-object-page.567.html [perma.cc/MX7Z-ECE6].

52. Referencing 1796 Gilbert Stuart portrait of George Washington (the "Landsdowne" portrait). Availiable at https://npg.si.edu/blog/gilbert-stuart-paints-george-washington [perma.cc/R8EH-GP2B].

53. Referencing "James Madison Jr.," Bradley Stevens, oil on canvas (2002). Available at https://www.senate.gov/about/images/madison-james-ushouse.htm [https://perma.cc/3JZD-4LTH].