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How Bad Were the Official Records of the Federal Convention?

*Mary Sarah Bilder**

Abstract

The official records of the Constitutional Convention of 1787 have been neglected and dismissed by scholars for the last century, largely to due to Max Farrand's criticisms of both the records and the man responsible for keeping them—Secretary of the Convention William Jackson. This Article disagrees with Farrand's conclusion that the Convention records were bad, and aims to resurrect the records and Jackson's reputation. The Article suggests that the endurance of Farrand's critique arises in part from misinterpretations of certain procedural components of the Convention and failure to appreciate the significance of others, understandable considering the inaccessibility of the official records. The Article also describes the story of the records after the Convention but before they were published, including the physical limbo of the records in the aftermath of the Convention and the eventual deposit of the records in March 1796 amidst the rapid development of disagreements over constitutional interpretation. Finally, the Article offers a few cautionary reflections about the lessons to be drawn from the official records. Particularly, it recommends using caution with Max Farrand's records, paying increased attention to the procedural context of the Convention, and recognizing that Constitutional interpretation postdated the Constitution.

Table of Contents

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* Professor and Michael and Helen Lee Distinguished Scholar, Boston College Law School. The author would like to thank Bernard Bailyn, Warren Billings, Alfred Brophy, Bradford Clark, the late Morris Cohen, John Gordan, III, John Kaminski, Susan Lively, David Mackey, Maeva Marcus, Jeff Powell, Peter Smith, John Vile, and the other participants at *The George Washington Law Review*'s Symposium Commemorating the 100th Anniversary of Farrand's *Records of the Federal Convention*, and Ann Blair, David Hall, and participants at the Harvard University Humanities Center Seminar in the History of the Book. At the Center for the Study of the American Constitution, John Kaminski and David Fields generously shared the printed drafts. David Langbart (National Archives and Records Administration ("NARA")), Julie Miller (Library of Congress ("LC")), L. Maria Haude (LC), Sara Sikes (Massachusetts Historical Society ("MHS")), Conrad Wright (MHS), and the archivists and librarians at the Bienecke Library (Yale), Huntington Library, and the MHS provided invaluable help. My thanks also to Kelli Farrington for assisting with interlibrary loans and to Katherine McAllister for footnote assistance.

INTRODUCTION

The Convention that wrote the Constitution in Philadelphia in 1787 kept official records of the proceedings.[1] At the end of the Convention, they did not destroy all those records. For the last century, however, the records have been relegated to relative obscurity. The personal notes of delegates, most importantly those by member James Madison, have become the ubiquitous documentary source for the history of the Convention.

Responsibility—or blame—for the disregard of the official records can be placed with Max Farrand. In 1911, Farrand collected the official and personal delegate records into *The Records of the Federal Convention of 1787*.[2] His introduction criticized the official records as "carelessly kept."[3] Farrand warned the records "cannot be relied upon absolutely."[4] The "determination of those questions and in particular the votes upon them should be accepted somewhat tentatively."[5] By 1938, Farrand had become dismissive. He referred to the "pitiful record" received by "the Convention and posterity."[6] He rather nastily commented that the Secretary, William Jackson, had been "overpaid" by receiving $866.60 for four months of work.[7]

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1 Records of the Continental and Confederation Congresses and the Constitutional Convention, Record Group 360 (National Archives).

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

3 1 *id.* at xiii; *see* Max Farrand, *The Records of the Federal Convention,* 13 AM. HIST. REV. 44, 47–50 (1907).

4 1 FARRAND'S RECORDS, *supra* note 2, at xiii.

5 *Id.* at xiv.

6 Max Farrand, *If James Madison Had Had a Sense of Humor,* 62 PA. MAG. HIST. & BIOGRAPHY 130, 130–31 (1938).

7 *Id.*; *see* 4 FARRAND'S RECORDS, *supra* note 2, at 77 n.2 (Max Farrand ed., 1937) (reprinting Convention expenses). This volume 4 was eventually replaced by SUPPLEMENT TO MAX

For the last century, Farrand's conclusion has been passively accepted. Professor John Vile summarizes in his helpful encyclopedia on the Convention: "[S]cholars have been generally disappointed" with Jackson's notes.[8] Disappointment, indeed, is a generous description for Jackson's treatment in modern narrative histories of the Constitution.[9] Vile explains, Jackson's notes "consist simply of records of motions and the votes of states on each one, and the notes were in relative disarray."[10] They "were not very complete, and serve mostly to confirm more extensive notes that James Madison took of the Convention."[11]

The endurance of Farrand's critique arises in part from little interest in the parliamentary procedure structuring the Convention. There is no article, never mind book, on the records. Most narrative accounts focus on substantive issues based on the speeches described in delegates' personal notes of the debates.[12] The use of committees and the technique of postponement have been of some interest. But the significance of divided questions, motions to amend and adjourn, and withdrawn motions has remained uncharted territory. Even with respect to explorations of the committees and printed drafts, relatively little attention has been given to the way in which these devices structured and bounded the discussion.[13]

FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (James H. Hutson ed., 1987) [hereinafter SUPPLEMENT].

8 1 JOHN R. VILE, *Jackson, William (1759–1828)*, *in* THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING 371, 372 (2005).

9 *See* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 70 (2009) (declaring Jackson "an exceptionally poor choice" whose "skills as a lobbyist far surpassed those he possessed as a note taker"); CAROL BERKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION 44 (2002) (describing Jackson only as a "wartime friend"); CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION: MAY TO SEPTEMBER 1787, at 30 (1966) (describing Jackson as a man who "finds it hard to keep up with his clever acquaintances"); CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787, at 81 (1986) (suggesting that Madison "did not trust" Jackson to "keep adequate notes, and in this he was correct"); CLINTON ROSSITER, 1787: THE GRAND CONVENTION 163 (1966) (describing Jackson as "bumbling"); DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION (2007) (not mentioning Jackson's existence).

10 1 VILE, *supra* note 8, at 372.

11 *Id.*

12 *See, e.g.*, BOWEN, *supra* note 9.

13 *See, e.g.*, William Ewald & Lorianne Updike Toler, *Early Drafts of the U.S. Constitution*, 135 PA. MAG. HIST. & BIOGRAPHY 227 (2011); John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765 (1990); John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147 (2006). Professor

This disregard is somewhat understandable because the official records remain difficult to access. The 1819 edition of the journals produced by John Quincy Adams rearranged the records.[14] Max Farrand made similar editorial decisions.[15] The only attempt at a verbatim transcript of the journals, the *Documentary History of the Constitution*, struggled to reproduce the vote tallies.[16] The microfilm of the official records is unwieldy. Even in digital form, the microfilm fails to show important details.[17] The National Archives and Records Administration ("NARA") has not made available digital images.[18] In 2010, I inquired as to the possibility of purchasing digital images; NARA responded that such images are not possible given the fragile state of the records.[19] Because of the importance of the official records, I hope that funds will be made available to NARA to produce high-resolution digital images.

I disagree with Farrand's conclusion that the Convention records were bad. The Convention records were not bad; indeed, they were quite good considering the circumstances. Later generations have judged them incomplete and disappointing because they do not contain the information we expect or want them to contain. That judgment reflects changing assumptions and expectations. They were records for a different time and a different purpose. The fact that they do not answer our questions demonstrates the distance between us and the Convention, as well as certain misunderstandings about the Convention itself.

Bill Ewald is in the process of completing an essay on the Committee of Detail that will be published in *Constitutional Commentary*.

14 JOURNAL, ACTS AND PROCEEDINGS, OF THE CONVENTION, ASSEMBLED AT PHILADELPHIA, MONDAY, MAY 14, AND DISSOLVED MONDAY, SEPTEMBER 17, 1787, WHICH FORMED THE CONSTITUTION OF THE UNITED STATES (John Quincy Adams ed., 1819) [hereinafter ACTS AND PROCEEDINGS].

15 1 FARRAND'S RECORDS, *supra* note 2, at xxiii.

16 Receipt by Secretary of State, Timothy Pickering (March 19, 1796), *in* 1 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 47, 47 (1894) [hereinafter DHC].

17 Such details include pencil marks, erasures, razoring, and alterations to the manuscript. Microfilm obscures the difference between original and later insertions, as well as conservation efforts.

18 One digital image can be found of the voting tallies. *See Voting Record of the Constitutional Convention, 1787 (First Page)*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, http://www.archives.gov/press/press-kits/american-originals-photos/constitution-voting-record.jpg (last visited Aug. 25, 2012).

19 E-mail from David Langbart, Archivist, National Archives and Records Administration, to author (Nov. 22, 2010) (on file with author).

When I began this Article, I assumed it would be brief. I envisioned a conventional comment on the danger of applying twenty-first century assumptions to eighteenth-century legal records.[20] After puzzling through the records, I am persuaded that the records' view of the Convention is different from the powerful narrative provided by James Madison. None of us can entirely escape Madison's version.[21] It has been part of our national story for nearly two centuries. In fact, as Richard Bernstein points out, Madison "was not above hinting in congressional debate that his notes . . . would support a given reading" if he could share them.[22] But as the extensive scholarship on Madison demonstrates, throughout the summer Madison argued repeatedly for structural elements that the Convention never adopted.[23] The official records provide a more detached angle on the Convention.

Without attempting to be exhaustive, I sketch here aspects of the records that have been intriguing to me. The scholarship on the Convention is vast and I apologize for overlooking some relevant secondary accounts and for omitting works using the records to establish the meaning of various provisions. In addition, I have not attempted to catalog discrepancies between the Secretary's record and Madison's notes to determine which actual errors occur in the records. I have noted where relevant, however, a few instances where the Secretary made the occasional actual error.[24] These inevitable small errors have little bearing on my question throughout this Article: *Why did the Secretary write what he did and what does it tell us?*

I frame the first three Parts around Farrand's two lasting critiques: the Secretary's lack of qualifications and his abysmal records. Instead of casting evaluative judgment, I have tried to consider the

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20 *See, e.g.*, Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 503 (2006); Mary Sarah Bilder, *Expounding the Law*, 78 GEO. WASH. L. REV. 1129 (2010); Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 YALE J.L. & HUMAN. 47 (1999).

21 I am completing a book on James Madison's creation and revision of his Convention notes: MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (under contract, Harvard University Press). For more on this topic, see James H. Hutson, *The Creation of the Constitution: Scholarship at a Standstill*, 12 REVIEWS AM. HIST. 463 (1984) (describing historiography).

22 R.B. BERNSTEIN, THE FOUNDING FATHERS RECONSIDERED 150 (2009).

23 *See* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 111–91 (1995); JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 61–79, 232–34 (3d ed. 2007); David Brian Robertson, *Madison's Opponents and Constitutional Design*, 99 AM. POL. SCI. REV. 225, 235–42 (2005); David Reich, *A More Perfect Union?*, BOS. C. MAG., Spring 2010, at 46 (recounting Bernard Bailyn's talk, *How Historians Get It Wrong: The American Constitution, for Example*).

24 *See, e.g.*, *infra* notes 238, 268.

Secretary and his records from the perspective of the summer of 1787. Jackson's qualifications differed little from other national legislative clerks, but he embodied national identity over state interest. His method indicates a shared culture of American parliamentary procedure as well as the Convention's uncertainty about the future purpose of the records. The records themselves suggest that we have developed misinterpretations of some procedural components of the Convention and fail to appreciate the significance of others. Part IV explores the official records in the immediate aftermath of the Convention. The records existed in physical limbo between September 17, 1787 and March 1796. The story of how and why George Washington deposited the records in the State Department reveals the speed with which disagreements over constitutional interpretation arose. The Conclusion offers a few cautionary reflections about the lessons to be drawn from the official records.

A Note on the Records

Some readers may be familiar with the materials that constitute the "official records" of the Convention, but for others, here is a summary.[25] The Secretary for the Convention was William Jackson; he was not a delegate. At the conclusion of the Convention, Jackson burned "all the loose scraps of paper" that belonged to the Convention.[26] He turned over to George Washington "the Journals and other papers" pursuant to a final vote of the Convention.[27] One book contained the journal of the Convention.[28] A second book contained a journal of the Convention sitting as a Committee of the Whole House between May and late June.[29] A third book contained vote tallies from the Committee of the Whole and the Convention.[30] In addition,

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25 For a description of "official records," see Records of the Constitutional Convention of 1787, at ii, vi–x (Kenneth E. Harris ed., 1971), *microformed on* Microfilm Publication M866 (Nat'l Archives & Records Admin.) [hereinafter Records], *available at* http://www.fold3.com/image/#246—3777980.

26 Letter from William Jackson to George Washington (Sept. 17, 1787), *in* 5 The Papers of George Washington: Confederation Series 329 (W.W. Abbot et al. eds., 1997) [hereinafter Washington Papers].

27 *Id.*

28 *See* Records, *supra* note 25, at vi (Formal Journal of the Proceedings of the Convention, May 14–Sept. 15, 1787. 1 vol. 153 pages). The documents themselves bear no titles or original endorsements. The descriptions in *infra* notes 29–34 are from Harris. *Id.* at vi–vii.

29 *See id.* at vi (Journal of the Proceedings of the Committee of the Whole House, May 30–June 19, 1787. 1 vol. 28 pages).

30 *See id.* (Voting Record of the Convention: Ayes, Noes, and Divided Votes. 1 vol. 8 pages).

five loose sheets had additional vote tallies.[31] Other papers include two manuscripts of the resolutions adopted by the Convention as the Committee of the Whole House,[32] a copy of the printed August 6 draft of the Constitution with editorial revisions by Washington,[33] and a series of letters to the Convention.[34] Washington retained a copy of the printed September 12 draft of the Constitution, again with editorial revisions noted by himself and Jackson. He never deposited this draft with the official papers.[35]

For eight and a half years, Washington had custody of these records. On March 19, 1796, Washington deposited the records with the Department of State.[36] In 1819, they were arranged in a government publication edited by Secretary of State John Quincy Adams.[37] In 1830, this edition was republished by Jonathan Elliot.[38] In 1894, the State Department printed a literal transcript of the journals as the first volume of *The Documentary History of the Constitution of the United States of America* ("*DHC*").[39] In 1911, Max Farrand combined the journals with private records from each day as *The Records of the Fed-*

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31 *See id.* (Voting Record of the Convention: Loose Sheets of Ayes, Noes, and Divided Votes. 1 vol. 9 pages).

32 *See id.* at vii ("State of the resolutions submitted . . . as agreed to in a Committee of the Whole House" and "State of the resolutions submitted . . . as altered, amended, and agreed to in a Committee of the Whole House.")

33 *See id.* (First Printed Draft of the Constitution, Reported to the Convention by the Committee of Detail, Aug. 6, 1787.). Jackson did not specify which papers he gave to Washington. Historians have assumed that the papers deposited by Washington in 1796 were identical to those given by Jackson; neither Jackson nor Washington, however, provided an itemized receipt.

34 *See id.* at vii–viii. The letters notably include one from Rhode Islanders , *id.* (May 11, 1787), and one from "Jonas Phillips a Jew," *id.* (Sept. 7, 1787); Herbert Friedenwald, *A Letter of Jonas Phillips to the Federal Convention*, *in* 2 PUBLICATIONS OF THE AMERICAN JEWISH HISTORICAL SOCIETY 107, 110 (1894).

35 *See* 5 WASHINGTON PAPERS, *supra* note 26, at 324; Constitution, Printed, with Marginal Notes by George Washington, September 12, 1787, *in* GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741–1799: SERIES 4, GENERAL CORRESPONDENCE. 1697–1799, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=mgw4&fileName=gwpage097.db&recNum=232. The Washington Papers also include, in Washington's hand, Propositions from the Delegates of New Jersey to the Constitutional Convention, May 1787. *Id.*, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=mgw4&fileName=gwpage097.db&recNum=108.

36 1 DHC, *supra* note 16, at 47.

37 ACTS AND PROCEEDINGS, *supra* note 14.

38 4 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1830) [hereinafter THE DEBATES]. In subsequent editions, this volume was placed first. CHECKLIST OF UNITED STATES PUBLIC DOCUMENTS, 1789–1909, at 1669 (August Donath, ed., 3d ed. 1911).

39 Bureau of Rolls and Library, Dep't of State, *Introductory Note*, *in* 1 DHC, *supra* note 16, at iii–iv.

eral Convention of 1787.[40] Since then, no new edition of the official records has appeared.

I have relied on the microfilm,[41] the *DHC* transcript, and materials printed in the first volume of *The Documentary History of the Ratification of the Constitution*.[42] The Adams edition reflects early nineteenth-century understandings of official legislative publications but nonetheless usefully arranges various documents.[43] Farrand's edition helpfully assigns numbers to the votes and notes discrepancies among the various records.[44] Neither Adams nor Farrand, however, intended a verbatim transcript of the originals, and their editions contribute convenience rather than accuracy.

I. The Secretary

Max Farrand began by criticizing the man.[45] He considered Jackson unqualified.[46] This inadequacy explained the many problems in the records. Jackson lacked prior experience. His appointment was due more "to influence than to any special fitness for the position."[47] Moreover, Jackson had "somewhat neglected his official duties" to keep private notes.[48] Each conclusion reflected misunderstandings.

The Secretary's job was new. When the Convention met in May 1787, no federal constitutional Convention had been in session long enough to require a secretary.[49] The only analogous meeting was the Annapolis Convention from September 11 to September 14, 1786.[50] That Convention produced a brief formal journal and a report.[51] The formal journal shows a chair elected, credentials presented, the minutes of several consecutive meetings, and the final report prepared

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40 The Records of the Federal Convention of 1787 (Max Farrand ed., 1911).

41 The microfilm records used for this research are available at http://www.fold3.com. My thanks to Andrew Golden, who several years ago spent hours printing out the microfilm. NARA policy is to "make the originals available only if there is text that is obscured or otherwise unreadable on the film." E-Mail from David A. Langbart, Archivist, National Archives and Records Administration, to author (Nov. 23, 2010) (on file with author).

42 *See* Constitutional Documents and Records 1776–1787, 1 DHC, *supra* note 16; 1 The Documentary History of the Ratification of the Constitution 231–320 (Merrill Jensen ed., 1976) [hereinafter DHRC].

43 *See* Acts and Proceedings, *supra* note 14.

44 *See* Farrand's Records, *supra* note 2.

45 1 Farrand's Records, *supra* note 2, at xii–xiv.

46 *Id.*

47 *Id.* at xii n.6.

48 *Id.*

49 *See* 1 DHRC, *supra* note 42, at 176–77.

50 *See id.* at 177.

51 *Id.* at 181–85 (Proceedings and Report of the Commissioners at Annapolis, Maryland).

and signed.[52] Only the report, however, was sent to Congress and the states.[53] The formal proceedings remained in manuscript. The extant minutes and proceedings were created by delegates, either Alexander Hamilton or New York Attorney General Egbert Benson.[54] Indeed, the lesson from Annapolis may have been the need to appoint a nondelegate secretary to keep a record.

One man in America had experience taking the minutes of a national legislative proceeding. Charles Thomson was the Secretary of the Confederation Congress.[55] Notably, Thomson had no prior experience with legislative secretarial duties when appointed as the first secretary of Congress in 1774.[56] He had been a writer, shopkeeper, and revolutionary activist.[57] He remained the only man to hold the position through 1789.[58] He devised and kept multiple journals for Congress without shorthand.[59] He was responsible for the continuity of Congress's parliamentary practice as the institutional memory of Congress.[60] In the summer of 1787, however, Congress planned to remain in session in New York. Thomson could not serve as Secretary of the Convention.[61]

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52 *Id.*

53 *Id.* at 185 n.1.

54 Hamilton is credited with writing the proceedings and report. *Id.* Extant minutes are believed to be in Benson's handwriting. *Egbert Benson's Minutes of the Annapolis Convention*, *in* THOMAS ADDIS EMMET COLLECTION, NOS. 9398–9399 (1977) (I have not personally examined these minutes); *see Annapolis Convention, Address of the Annapolis Convention*, *in* 3 PAPERS OF ALEXANDER HAMILTON 686 n.1 (Harold C. Syrett ed., 1962); Howard H. Wehmann, *The "Lost" Records of the Annapolis Convention, 1786–1986*, 38 MANUSCRIPTS 101 (1986).

55 Cyril M. White, *Charles Thomson: The Irish-Born Secretary of the Continental Congress 1774–1789*, 68 STUDIES: IRISH Q. REV. 33, 34–35 (1979).

56 *Id.* at 33.

57 *See* J. EDWIN HENDRICKS, CHARLES THOMSON AND THE MAKING OF A NEW NATION, 1729–1824, at 3, 9, 88–91, (1979); BOYD STANLEY SCHLENTHER, CHARLES THOMSON: A PATRIOT'S PURSUIT 35, 48, 57–71 (1990); White, *supra* note 55, at 33. Older works, which refer to him as the Secretary of the Stamp Act Congress, do not appear to be accurate. SCHLENTHER, *supra*, at 249 n.26.

58 White, *supra* note 55, at 34–35.

59 HENDRICKS, *supra* note 57, at 129–30; SCHLENTHER, *supra* note 57, at 150.

60 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS v (Edmund C. Burnett ed., 1921).

61 In 1789, Thomson lost his last-minute attempt to serve as the new Secretary of the Senate. SCHLENTHER, *supra* note 57, at 186–88. The man selected was Samuel Allyne Otis, brother of James Otis and Mercy Otis Warren. *Id.* Otis had been Speaker of the Massachusetts House of Representatives and a member of Congress. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 1685 (Andrew R. Dodge & Betty K. Keed eds., 2005). John Adams—President of the Senate, Vice President of the United States, and Otis's friend—pushed for his appointment. SCHLENTHER, *supra* note 57, at 186.

Legislative secretarial experience seemed so unnecessary that the candidate with such experience was discouraged from applying. Born in England, John Beckley had served as clerk of the Virginia legislature for a number of years.[62] James Madison, however, believed that Beckley should not even bother traveling to Philadelphia. The "chance of his success ought hardly to recommend the trip."[63] Other "solicitations" would oppose his, "backed by services in a more conspicuous & in the common opinion, more meritorious line."[64] Although Beckley failed to obtain the Convention position, in 1789, he became Clerk of the new United States House of Representatives.[65] As clerk, he had an idiosyncratic approach, destroying various early documents as long as a copy existed.[66] Beckley spent much of his time as Clerk as political promoter for Thomas Jefferson and the incipient republican group.[67] His reputation, indeed, is as "an early American party manager" for Jefferson.[68] Richard Brookhiser comments: "Beckley knew people's business, and shared what he knew."[69] Beckley knew how to keep a journal; however, he lacked experience with national and international political issues and perhaps, even in 1787, impartial discretion.

In the end, the Convention decided between two candidates for the position of secretary: William Temple Franklin (known as Temple)

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62 EDMUND BERKELEY & DOROTHY SMITH BERKELEY, JOHN BECKLEY: ZEALOUS PARTISAN IN A NATION DIVIDED 3, 22 (1973) [hereinafter BERKELEY & BERKELEY, ZEALOUS PARTISAN]; JUSTIFYING JEFFERSON: THE POLITICAL WRITINGS OF JOHN JAMES BECKLEY 9–10 (Gerard W. Gawalt ed., 1995); Edmund Berkeley & Dorothy S. Berkeley, *"The Ablest Clerk in the U. S.": John James Beckley*, 70 VA. MAG. HIST. & BIOGRAPHY 434, 436–37 (1962) [hereinafter Berkeley & Berkeley, *Ablest Clerk*]; Noble E. Cunningham, Jr., *John Beckley: An Early American Party Manager*, 13 WM. & MARY Q. 40, 40–41 (1956).

63 Letter from James Madison to Edmund Randolph (April 22, 1787), *in* 9 PAPERS OF JAMES MADISON 397, 398 (Robert A. Rutland & William M. E. Rachal eds., 1975).

64 *Id*.

65 Berkeley & Berkeley, *Ablest Clerk*, *supra* note 62, at 439.

66 Charlene Bangs Bickford, *"Public Attention Is Very Much Fixed on the Proceedings of the New Congress": The First Federal Congress Organizes Itself*, *in* INVENTING CONGRESS: ORIGINS AND ESTABLISHMENT OF THE FIRST FEDERAL CONGRESS 138, 157 (Kenneth R. Bowling & Donald R. Kennon eds., 1999).

67 Cunningham, *supra* note 62, at 41–42.

68 *Id.* at 40–44; *see also* Philip M. Marsh, *John Beckley: Mystery Man of the Early Jeffersonians*, 72 PA. MAG. HIST. & BIOGRAPHY 54, 54 (1948) (describing Beckley as an "undercover political strategist" and "an ever-present figure behind the curtain of party affairs"); Jeffrey L. Pasley, *"A Journeyman, Either in Law or Politics": John Beckley and the Social Origins of Political Campaigning*, 16 J. EARLY REPUBLIC 531, 531 (1996) ("[B]y the mid-1790s, Beckley had become in effect Jefferson's 'campaign manager . . . .").

69 RICHARD BROOKHISER, JAMES MADISON 101 (2011).

and William Jackson.[70] Beyond first name, they had much in common. They were roughly the same age: Franklin was born in 1760;[71] Jackson in 1759.[72] Both were born in England: Franklin in London and illegitimate;[73] Jackson in northern England.[74] Both were raised apart from their parents: Franklin in part by his grandfather, Benjamin Franklin;[75] Jackson in Charleston by Owen Roberts after his parents' death.[76] Both had served as aides and secretaries abroad in positions requiring significant discretion, organizational skills, and good handwriting: Franklin as Secretary to the Treaty of Paris delegation;[77] Jackson for American diplomats, including John Laurens, John Adams, and Benjamin Franklin.[78] Both were well versed in the problems facing the nation. Both had worked for men who wanted solutions. Neither man had prior experience as a legislative secretary.[79]

On Friday, May 25, 1787, the Convention elected William Jackson to be the Secretary.[80] Alexander Hamilton nominated Jackson and the Pennsylvania delegates proposed Franklin.[81] James Madison recorded the votes of five state delegations for Jackson and two for Franklin.[82]

What made Jackson the strongly preferred candidate? Farrand saw only inappropriate influence.[83] In April 1787, Jackson wrote Washington: "Flattered by the opinions of some of my friends, who have expressed a wish that I would offer myself a Candidate for the

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70 1 VILE, *supra* note 8, at 372.

71 Nian-Sheng Huang, *Notes and Documents: The Literary Legacy of William Temple Franklin: Controversies over the Publication of Franklin's Autobiography*, 116 PA. MAG. HIST. & BIOGRAPHY 213, 213 (1992).

72 Charles Willing Littell, *Major William Jackson: Secretary of the Federal Convention*, 2 PA. MAG. HIST. & BIOGRAPHY 353, 354 (1878).

73 Huang, *supra* note 71, at 213.

74 Littell, *supra* note 72, at 354.

75 Huang, *supra* note 71, at 213.

76 Littell, *supra* note 72, at 354.

77 1 VILE, *supra* note 8, at 372.

78 Littell, *supra* note 72, at 356–60.

79 For further background on Jackson, see Robert K. Wright, Jr. & Morris J. MacGregor, Jr., *William Jackson*, *in* SOLDIER-STATESMEN OF THE CONSTITUTION 127, 127–29 (1987); *Documents: William Jackson on Conditions in France, 1794*, 9 AM. HIST. REV. 525 (1904).

80 1 VILE, *supra* note 8, at 371.

81 *Id.*

82 *Id.* Two other nondelegates were present. Nicholas Weaver was appointed messenger and Joseph Fry the doorkeeper. *See Fry, Joseph*, *in* 1 VILE, *supra* note 8, at 298; *Weaver, Nicholas*, *in* 2 VILE, *supra* note 8, at 833.

83 MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 56 (1913) (describing Jackson's "electioneering in advance").

Office of the Secretary to the fœderal Convention."[84] He also contacted members of the Connecticut delegation.[85]

Jackson's "friends," however, were a remarkable group spanning the strong regional interests that characterized the pre-1787 nation. As a young man in South Carolina during the Revolution, Jackson had served in the South Carolina military under Charles C. Pinckney.[86] Through Pinckney, Jackson met and became an aide to Benjamin Lincoln of Massachusetts, rising quickly to become Assistant Secretary at War.[87] Through Lincoln, Jackson met Alexander Hamilton, with whom he remained close throughout his life.[88] After the Convention, Jackson served as personal secretary to Washington.[89] In a country in which men often retained state allegiances, he seemed to have none.

Jackson had a notable military career on behalf of the United States. In contemporary correspondence, he is usually referred to as "Major Jackson."[90] In 1778 and 1779, he was involved in major battles.[91] In 1780, he was among the troops defending Charleston and subsequently imprisoned for six months until finally exchanged.[92] At the Philadelphia Convention, where men such as Madison had never served in the military, Jackson had the unusual distinction of having been imprisoned for the nation. He personally embodied stronger national commitment and weaker state identity.

Farrand's misleading depiction of an unqualified political crony was bolstered by Jackson's apparent practice of taking notes of the Convention debates. To Farrand, these private notes explained neglect of the official minutes.[93] Jackson's alleged notes, however, have never been seen. Their existence is assumed because Jackson told

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84 Letter from William Jackson to George Washington (Apr. 24, 1787), *in* 4 DHC, *supra* note 16, at 121–22.

85 Letter from Jared Ingersoll to William Samuel Johnson (Apr. 28, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 2, at 18.

86 Littell, *supra* note 72, at 354.

87 *Id.* at 354, 361.

88 Letter from Charles Stewart to Alexander Hamilton (Mar. 27, 1782), *in* 27 PAPERS OF ALEXANDER HAMILTON, *supra* note 54, at 8–9. Jackson eventually served as second to Hamilton in an attempt at a duel in the late 1790s. Letter from Alexander Hamilton to Oliver Wolcott, Jr. (June 25, 1798), *in* 21 PAPERS OF ALEXANDER HAMILTON, *supra* note 54, at 519 n.4.

89 Littell, *supra* note 72, at 364. Jackson lived out his life in Philadelphia where he married Elizabeth Willing, daughter of prominent merchant Thomas Willing. *See id.* at 355–56.

90 *See, e.g.*, *id.* at 358.

91 *See id.* at 354–55 (discussing Jackson's participation in the expedition against St. Augustine, Florida in 1778 and in battles in Tullifiny Bridge, Stono Ferry, and Savannah in 1779).

92 *Id.* at 355–56.

93 1 FARRAND'S RECORDS, *supra* note 2, at xii n.6.

John Quincy Adams in 1818 and Timothy Pickering in 1827 that he had "extensive minutes."[94] He claimed to have promised Washington not to publish them in his lifetime.[95] Both men expressed some doubt about the claim, seeing it as related to Jackson's financial difficulties. Jackson told Adams that his promise "had been a loss to him of many thousand dollars."[96] Pickering was even more dubious about the notes, remarking that Jackson's newspaper had been "defunct" for some years and he had no "business or employment, public or private."[97] After forty years, "it is to be apprehended that those speeches may remain locked up forever, in the Major's ab[b]reviations."[98]

Did Jackson have private minutes? If they exist, they have not yet surfaced. Jackson died in December 1828.[99] His wife survived him by nearly three decades and several daughters lived into the 1870s.[100] Even as interest grew in the private notes of the Convention, Jackson's notes never surfaced. The "Major's abbreviations" might have been insufficient to reconstruct speeches several decades after the Convention, never mind over a century.[101] Alternatively, the notes may not have existed. Historians can have surprising difficulty believing that facts stated by participants in the historical record are less than accurate. But Jackson could have exaggerated his "extensive minutes" or even entirely made them up.

In any case, Jackson's private minutes were not incompatible with his duties. Charles Thomson on occasion took private notes. Thomson had extensive notes of debates in Congress for several days in July

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94 John Quincy Adams: Memoirs (Nov. 19, 1818), *reprinted in* 3 FARRAND'S RECORDS, *supra* note 2, at 426.

95 *Id.*

96 *Id.* Jackson had called on Adams when acting as agent to gain more remuneration for the former officers of the Revolutionary War. John Quincy Adams, Diary (Nov. 19, 1818), *in* 30 THE DIARIES OF JOHN QUINCY ADAMS: A DIGITAL COLLECTION, Massachusetts Historical Society 444, *available at* http://www.masshist.org/jqadiaries.

97 Timothy Pickering: Memorandum (Aug. 11, 1827), *in* SUPPLEMENT, *supra* note 7, at 315–16.

98 *Id.*

99 Littell, *supra* note 72, at 368.

100 *Id.* at 369 (describing end of family line).

101 *See* Elizabeth Gregory McPherson, *Reports of the Debates of the House of Representatives During the First Congress, 1789–1791*, 30 Q. J. SPEECH 64, 64 (1944) [hereinafter McPherson, *Reports*] (describing gap between notes and actual speeches); Marion Tinling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM. & MARY Q. 519, 530–32 (1961); Elizabeth Gregory McPherson, The History of Reporting the Debates and Proceedings of Congress 3 (1940) (unpublished Ph.D. dissertation, University of North Carolina) [hereinafter McPherson, History].

1777 and late July to September 1782.[102] Particularly during the debates in the Committee of the Whole House, Jackson could have kept notes on the lengthy speeches—some amounting to hours—and recorded the occasional procedural matters. Indeed, for a man who was not permitted to vote, notes could have alleviated the inevitable boredom. Such notes could have helped Jackson recollect the proceedings to ensure that his official minutes represented the proper procedural history.

II. The Convention and Parliamentary Procedure

The Convention had no American publication to turn to for the parliamentary procedure appropriate for a constitutional convention. English treatises formed the backdrop and congressional practice occupied the foreground. These understandings were shared through oral conversations and the official printed journals of Congress. The Convention drew upon these understandings to craft its own rules. These rules diverged in two crucial respects from congressional understandings with respect to vote tallies and the journal.

A. American Understandings

No printed treatise on American parliamentary procedure existed in 1787.[103] Parliamentary procedure—the term we still use today—was described in English treatises explaining the practices and precedents of Parliament.[104] These procedures were not mere rules; they were the guarantees of English constitutionalism. The classic text was a product of the Revolution of 1688–1689, when Parliament had effectuated the replacement of James II with James's daughter, Mary, and her husband, the Dutch Stadholder, William of Orange.[105] The ubiquitous *Lex Parliamentaria* (1689) was repeatedly printed throughout the eighteenth century with few changes.[106] Another popular text, Henry Scobell's *Remembrances of Methods, Orders, and Proceedings, Heretofore Used and Observed in the House of Lords*, dated from the earlier Commonwealth period in the aftermath of the English Civil

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102 *See* 1 Letters of Members of the Continental Congress, *supra* note 60, at v.

103 *See* Sanford W. Peterson, The Genesis and Development of Parliamentary Procedure in Colonial America, 1609–1801, at 1–36 (July 1983) (unpublished Ph.D. dissertation, Indiana University) (on file with Wells Library, Indiana University).

104 *Id.* at 2.

105 *See generally* Steve Pincus, 1688: The First Modern Revolution (2009).

106 *Id.* at 3–7; G.P., Lex Parliamentaria: or, a Treatise of the Law and Custom of the Parliaments of England (1689) (possibly attributed to George Petyt).

War, but was republished in 1689.[107] In the 1780s, a third important text appeared: John Hatsell's *Precedents of Proceedings in the House of Commons*.[108] These texts discussed rules on members' motions, comments, and discussion; voting and vote counting; and committees and committee procedures.[109]

Although the treatises addressed Parliament, Americans interpreted the treatises as general guides to legislative practices. In 1790, Thomas Jefferson wrote, "For parliamentary knowle[d]ge the Lex parliamentaria is the best book."[110] Jefferson relied heavily on these English works in compiling his parliamentary commonplace.[111] When he created parliamentary rules for the Senate in 1801, he again drew rules from these sources.[112] In 1791, Jeremy Bentham likewise relied on English treatises for his manuscript on parliamentary procedure.[113] Jefferson and Bentham discarded practices particular to English constitutionalism and retained what they considered a core of generic required legislative practices. This selection process culminated in 1856 in Luther Stearns Cushing's American guide to parliamentary procedure, appropriately titled, *Lex Parliamentaria Americana*.[114]

According to English practice, the clerk and his journal served as the constitutional core of parliamentary procedure. Hatsell and Scobell had served as clerks and included a section entitled, "The

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107 HENRY SCOBELL, REMEMBRANCES OF METHODS, ORDERS, AND PROCEEDINGS, HERETOFORE USED AND OBSERVED IN THE HOUSE OF LORDS: EXTRACTED OUT OF THE JOURNALS OF THAT HOUSE (1689).

108 JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS; UNDER SEPARATE TITLES WITH OBSERVATIONS (2d ed. 1785) (2 vols.).

109 *See* HATSELL, *supra* note 108; SCOBELL, *supra* note 107.

110 Letter from Thomas Jefferson to Thomas Mann Randolph, Jr. (May 30, 1790), *in* 16 PAPERS OF THOMAS JEFFERSON 448, 449 (Julian P. Boyd et al. eds., 1961).

111 JEFFERSON'S PARLIAMENTARY WRITINGS: PARLIAMENTARY "POCKET BOOK" AND A MANUAL OF PARLIAMENTARY PRACTICE, THE PAPERS OF THOMAS JEFFERSON SECOND SERIES 41–46 (Wilbur Samuel Howell ed., 1988) [hereinafter JEFFERSON'S PARLIAMENTARY WRITINGS]; DARWIN PATNODE, A HISTORY OF PARLIAMENTARY PROCEDURE 47–50 (3d ed. 1982); Peterson, *supra* note 103, at 67–93; *see also id.* at 178–89 (reprinting Jefferson's letters regarding the pocketbook's composition).

112 JEFFERSON'S PARLIAMENTARY WRITINGS, *supra* note 111, at 355–56.

113 THE COLLECTED WORKS OF JEREMY BENTHAM: POLITICAL TACTICS 72–109 (Michael James et al. eds., 1999).

114 LUTHER STEARNS CUSHING, LEX PARLIAMENTARIA AMERICANA: ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA (1856); *see* PATNODE, *supra* note 111, at 51–53. Cushing's guide remained the American treatise until replaced by *Robert's Rules of Order* in the twentieth century. *See* Don H. Doyle, *Rules of Order: Henry Martyn Robert and the Popularization of American Parliamentary Law*, 32 AM. Q. 3, 5–6 (1980).

Clerk."[115] Among other duties, the texts emphasized the clerk's journal.[116] The clerk had to record in his journal the formal passage or rejection of a bill.[117] The treatises addressed which proceedings belonged in the journal and which did not.[118] Scobell emphasized that the clerk only should enter orders with the assent of the house.[119] Hatsell explained that the clerk should not "make minutes of particular men's speeches."[120] He was to "confine himself merely to take notes of the orders and proceedings of the House."[121] Of particular importance, the clerk was to keep the secrecy of the proceedings.[122]

Charles Thomson conformed to these English parliamentary understandings for his congressional journals. He recorded only the "finished result of the deliberations."[123] Thomson explained: "[W]hat congress adopted, I committed to writing; with what they rejected, I had nothing farther to do."[124] The twentieth-century editor of the congressional journals, Edmund Burnett, explained: "Motions which failed, measures which were proposed but rejected, arguments, discussions, statements of any sort from the floor of the house, even the yeas and nays, would on this principle find no place in the record."[125] Thomson's biographer Stanley Schlenther notes that Thomson originally excluded "the names of movers and seconders of all motions, the texts of all motions eventually rejected by Congress, all debates on motions, all enumeration of votes, and all business done in committees."[126]

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115 2 HATSELL, *supra* note 108, at 180–201.

116 *See, e.g.*, *id.* at 184, 193–95.

117 *See id.* at 194–95.

118 *See id.* at 194–97.

119 SCOBELL, *supra* note 107.

120 2 HATSELL, *supra* note 108, at 195; *see* CUSHING, *supra* note 114, at 130 (quoting the same words from Hatsell)

121 2 HATSELL, *supra* note 108, at 195.

122 *See* MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 228–30 (1943) (discussing colonial disputes over appointing the clerk and the oath of secrecy).

123 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, *supra* note 60, at v.

124 SCHLENTHER, *supra* note 57, at 148 (internal quotation marks omitted) (quoting Charles Thomson).

125 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, *supra* note 60, at v.

126 SCHLENTHER, *supra* note 57, at 148. Burnett points out that the approach had "many advantages" for the "immediate purposes of the secretary's office" but "tended to strip the journals proper of essential information." 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, *supra* note 60, at v.

In one important respect, Congress decided to diverge from English parliamentary recording practices.[127] Beginning in 1777, Congress permitted the clerk to record the yeas and the nays—in essence, roll call voting.[128] In Congress, each state had one vote; without the yeas and nays, no record existed of individual members' positions. The yeas and nays were not the default voting method; a member had to request that they be recorded.[129] Moreover, a subsequent vote could remove the individual votes from the formal record. The yeas and nays would not then appear in the published journal.[130] Calling for the yeas and nays and deciding whether or not they were to be published became a repeated political contest.

No single journal represented the daily activities of Congress. Thomson recorded information in multiple journals.[131] During the actual congressional sessions, Thomson kept rough notes. He appears to have transcribed ongoing notes into a series of journals, known as the "rough journals."[132] These journals were read to Congress for approval.[133] Thomson recorded secret proceedings in separate journals: the *Secret Journals* and the *More Secret Journal*.[134] Thomson also kept the motions made in Congress, often with notes of the results of votes.[135] Committee reports were kept separately.[136] Thomson subsequently prepared a transcript for printing. These versions deleted

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127 *See* CALVIN JILLSON & RICK K. WILSON, CONGRESSIONAL DYNAMICS: STRUCTURE, COORDINATION, & CHOICE IN THE FIRST AMERICAN CONGRESS, 1774–1789, at 17–42 (1994) (discussing English and colonial legislative precedents); PATNODE, *supra* note 111, at 39–42; Donald S. Lutz, *The Colonial and Early State Legislative Process*, *in* INVENTING CONGRESS, *supra* note 66, at 49–74; Thais M. Plaisted, *The Source of Colonial Parliamentary Rules*, 17 PARLIAMENTARY J. 7, 9 (1976).

128 *See* CUSHING, *supra* note 114, at 155–64; JILLSON & WILSON, *supra* note 127, at 176; Rick K. Wilson, *Transitional Governance in the United States: Lessons from the First Federal Congress*, 24 LEGIS. STUD. Q. 543, 555 (1999).

129 CUSHING, *supra* note 114, at 165.

130 *Id.* at 579–81 (discussing the manner in which motions for taking yeas and nays may be reconsidered at any point before the decision is announced).

131 *See* HOWARD H. WEHMANN, NAT'L ARCHIVES & RECORDS ADMIN., A GUIDE TO PRE-FEDERAL RECORDS IN THE NATIONAL ARCHIVES 7–9 (rev. Benjamin L. DeWhitt, 1989).

132 *Id.* at 7; *see* HENDRICKS, *supra* note 57, at 130; SCHLENTHER, *supra* note 57, at 148. Although it seems more probable that the rough journals were not made during the session, there is some ambiguity about that fact. *See* SENATE LEGISLATIVE JOURNAL, 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789–MARCH 3, 1791, at x (Linda Grant De Pauw et al. eds., 1972) [hereinafter DHFFC] (noting that in the Senate, the rough journal was read each day).

133 *Id.*; White, *supra* note 55, at 35.

134 *See* WEHMANN, *supra* note 131, at 8 (describing the multiple secret journals, the *More Secret Journal*, and the rough secret journal of CC.360.13).

135 *See id.* at 8 (describing CC.360.15).

136 *Id*. at 8–9 (describing CC.360.14 and CC.360.17).

matters considered inappropriate or irrelevant for publication and often included committee reports, credentials, and other papers presented. Even with committee reports added, the printed journals offered a limited window on congressional activity. Between 1776 and 1789, Congress had a "staggering" 3232 committees and their deliberations remained closed.[137] A significant exception was the publication by Congress of the journal of the Committee of the States in 1784. The Committee had been appointed to remain in session while Congress adjourned over the summer.[138] Perhaps because of that fact, Congress published the Committee minutes. Throughout Congress's existence, the printed journal remained a formal representation of Congress intended for the public.[139]

This formal printed journal served as the only public version of congressional proceedings. Congress accepted English parliamentary assumptions that the legislature was a closed proceeding.[140] Members alone were to be present during the deliberations. Only in June 1789 did an American national legislative body depart from this practice. The House of Representatives began by admitting the public.[141] The Senate, however, remained closed until December 1795.[142] Nevertheless, the Constitution's requirement to keep and publish a journal led

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137 Rick K. Wilson & Calvin Jillson, *Leadership Patterns in the Continental Congress: 1774–1789*, 14 LEGIS. STUD. Q. 5, 21 (1989).

138 JOURNAL OF THE COMMITTEE OF THE STATES: CONTAINING THE PROCEEDINGS FROM THE FIRST FRIDAY IN JUNE, 1784, TO THE SECOND FRIDAY IN AUGUST, *in* 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 560–638 (Gaillard Hunt ed., 1928). It appears to have been bound with the ninth volume of the Journal of Congress (1783–1784). *See* 10 BULLETINS OF THE BOSTON PUBLIC LIBRARY 159 (Apr. 1891–Jan. 1892).

139 *See, e.g.*, 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 957–69 (John C. Fitzpatrick ed., 1934) (listing in bibliographical notes the number of printed copies of various reports and journals); *see also* Herbert Friedenwald, *The Journals and Papers of the Continental Congress*, 21 PA. MAG. HIST. & BIOGRAPHY 161, 361–75, 445–65 (1897); *Journal of the House of Representatives*, GOV'T PRINTING OFFICE, http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=HJOURNAL (last visited May 28, 2012) (describing the modern House legislative journals as "rendition of all the official actions of the House, including every motion made and every vote taken").

140 *See* CUSHING, *supra* note 114, at 137 ("In theory, the internal proceedings of all deliberative bodies . . . are supposed to be conducted with closed doors, and in secret; the result only of their deliberations being made known . . . ." (footnote omitted)); Charlene Bangs Bickford, *Throwing Open the Doors: The First Federal Congress and the Eighteenth-Century Media*, *in* INVENTING CONGRESS, *supra* note 66, at 166, 167–71.

141 Bickford, *supra* note 140, at 166.

142 Elizabeth G. McPherson, *The Southern States and the Reporting of Senate Debates, 1789–1902*, 12 J. S. HIST. 223, 238–39 (1946).

the Senate to provide the Senate's formal journal to newspapers during the initial years.[143]

Before 1789, Congress followed the closed-door practice far more strictly than the English parliament. Parliament was closed but nonmembers could gain access to watch. They could be cleared, however, by a member's words: "I spy strangers." As a legal matter, unauthorized printed parliamentary proceedings were a breach of legislative privilege. Nevertheless, sporadically over the eighteenth century, private newspaper and magazine publishers gained access and printed the debates of Parliament. The necessity for quasi-covert recording and the limits of shorthand technologies and memory prevented any aspirations to a verbatim record. The English printed reports of debates were understood to be only loosely based on actual speeches.[144] Unlike Parliament, the old Congress does not appear to have permitted any nonmember access and reports of congressional debates were not published in American newspapers.[145]

In 1785, public expectations in America began to shift as debates in state legislatures slowly appeared in newspapers.[146] In the 1760s and 1770s, Massachusetts and Pennsylvania had begun to permit the public into its legislative galleries.[147] Elsewhere, assemblies generally remained closed.[148] In 1786, Mathew Carey printed some of the de-

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143 1 ROBERT C. BYRD, THE SENATE, 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 26–28 (1988) (describing belief by Republican papers that the journal had been "tampered with to suit the Federalist majority").

144 For discussion of English parliamentary practice, *see, e.g.*, BENJAMIN BEARD HOOVER, SAMUEL JOHNSON'S PARLIAMENTARY REPORTING: DEBATES IN THE SENATE OF LILLIPUT (1953); ANDREW SPARROW, OBSCURE SCRIBBLERS: A HISTORY OF PARLIAMENTARY JOURNALISM 41 (2003); Arthur Aspinall, *The Reporting and Publishing of the House of Commons' Debates, 1771–1834*, *in* ESSAYS PRESENTED TO SIR LEWIS NAMIER 227, 229–30 (Richard Pares and A.J.P. Taylor eds., Macmillan 1956); John Ferris, *Before Hansard: Records of Debate in the Seventeenth Century House of Commons*, 20 ARCHIVES 198, 198 (1992); Peter D.G. Thomas, *The Beginning of Parliamentary Reporting in Newspapers, 1768–1774*, 74 ENG. HIST. REV. 623, 623–36 (1959).

145 *See* Bickford, *supra* note 140, at 170–71. One famous incident involved possible leakage of Thomson's journal by Thomas Paine to John Dunlap. *Id.* at 171.

146 *See id.* (describing the *Charleston Evening Gazette*, in South Carolina, as the first to cover legislative debates).

147 WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 247–48 (Rita and Robert Kimber trans., Rowman & Littlefield expanded ed. 2001).

148 SANDRA M. GUSTAFSON, IMAGINING DELIBERATIVE DEMOCRACY IN THE EARLY AMERICAN REPUBLIC 22 (2011); *see* SANDRA M. GUSTAFSON, ELOQUENCE IS POWER: ORATORY & PERFORMANCE IN EARLY AMERICA 150 (2000).

bates of the Pennsylvania Assembly.[149] The public interest in the debates over the ratification of the Constitution brought increased demand for printed accounts. Newspaper reporters and recorders covered some ratification conventions with varying results.[150] After 1789, congressional debates began to regularly appear in newspapers.[151] Decades, however, would pass before relatively reliable government accounts of debates were published.[152] Not until 1873 did Congress employ government employees as reporters and publish the *Congressional Record*.[153] Even then, the *Congressional Record* was designed to be only "*substantially* a verbatim report of proceedings."[154]

Because Jackson had never served in Congress, his assumptions about appropriate American legislative minutes were likely formed from reading the printed journals of Congress or state legislative journals. Assembly journals were in "rather wide circulation" in the eighteenth-century colonies.[155] Jackson's manuscript journal resembles the general style of the printed journals from Congress.[156] Having never

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149 *See* ERIC SLAUTER, THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION 148–64 (2009) (discussing shorthand transcription and publishing debates).

150 *See, e.g.*, 2 DHRC, *supra* note 42, at 59; 3 *id.* at 336; 8 *id.* at xlv; 19 *id.* at lxix–lxx; Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 481.

151 *See* Elizabeth Gregory McPherson, *Reporting the Debates of Congress*, 28 Q. J. SPEECH 141, 141–42 (1942); *see also* McPherson, *Reports*, *supra* note 101, at 64; McPherson, *supra* note 142, at 223; Tinling, *supra* note 101, at 519.

152 McPherson, *supra* note 151, at 146–47. Only after 1848 did the invention of phonetic (Pitman) shorthand permit a stenographer to keep up with a speaker. *See* Amy Atchison & Jennifer Lentz, *Questions & Answers*, 18 LEGAL REFERENCE SERVICES Q. 97, 99 (2001). The Government Printing Office did not begin until 1861, and early private printers were "remembered for bribery, lost manuscripts, overcharging, and inspiring scandals and congressional investigations." JUDITH SCHIEK ROBINSON, TAPPING THE GOVERNMENT GRAPEVINE: THE USER-FRIENDLY GUIDE TO U.S. GOVERNMENT INFORMATION SOURCES 18 (3d ed. 1998).

153 Atchison & Lentz, *supra* note 152, at 99; Michelle Springer, *The Congressional Record: "Substantially a Verbatim Report?,"* 13 GOV'T PUBLICATIONS REV. 371, 374 (1986).

154 44 U.S.C. § 901 (2006) (emphasis added); MILDRED L. AMER, CONG. RESEARCH SERV., CRS 93-60, THE CONGRESSIONAL RECORD: CONTENT, HISTORY AND ISSUES 6 (1993). C-Span video coverage now records the proceedings but members abbreviate motions to save time. Ironically, the *Congressional Record* is "a more reliable account" because it prints the procedures as if everything had been read and stated in full. *Id.* at i. On contemporary coverage, see generally Atchison & Lentz, *supra* note 152, at 97–100 (discussing the history of reporting and recording congressional debates).

155 CLARKE, *supra* note 122, at 232.

156 *See* 1 DHRC, *supra* note 42, at 181–85 (Proceedings and Report of the Commissioners at Annapolis, Maryland). The journals of the state constitutional conventions were not printed until years later. *See, e.g.*, JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY (1832) (citing that the Convention was

served in Congress, Jackson could not know what had been omitted. Nevertheless, the printed congressional journals suggested a general approach to the genre.[157] He did not know whether his journal would be published. He was thus making his best guess as to how to take the minutes and how to arrange them so that they could create a publishable text.

B. The Convention's Understanding

The Convention drew on these understandings to establish the rules about recordkeeping. Four-fifths of the delegates had served in Congress and the congressional model was influential.[158] The Convention appointed a *Secretary*, rather than a *clerk,* hinting at congressional practice.[159] Charles Thomson may have even assisted Jackson in the early days. In May 1787, Thomson left New York for "private business" and traveled to Philadelphia.[160] Beyond rounding up delegates for Congress, no one has ever been sure what he was doing there.[161] Thomson was widely trusted.[162] Even if he did not look at Jackson's minutes, he could have explained to Jackson the methods by which he had taken votes and recorded minutes.

After electing officers, the Convention appointed a committee to draw up rules.[163] The three members—George Wythe as chair,

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held in 1779–80); JOURNAL, ACTS AND PROCEEDINGS, OF A GENERAL CONVENTION OF THE COMMONWEALTH OF VIRGINIA (1829).

157 Readex's *Early American Imprints, 1639–1800* curiously does not list legislative journals on its "genre" page, available at www.readex.com (subscription required). The journals can be found with United States Continental Congress as an author or alternatively with "Journal of the Proceedings of the Congress." *See, e.g.*, JOURNAL OF THE UNITED STATES IN CONGRESS ASSEMBLED: CONTAINING THE PROCEEDINGS FROM THE FIRST MONDAY IN NOVEMBER, 1784 (1785); JOURNAL OF THE UNITED STATES IN CONGRESS ASSEMBLED: CONTAINING THE PROCEEDINGS FROM THE 3D DAY OF NOVEMBER, 1785, TO THE 3D DAY OF NOVEMBER, 1786 (1786). THE JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 138, are not a transcript of the original journals.

158 R.B. Bernstein, *Parliamentary Principles, American Realities: The Continental and Confederation Congresses, 1774–1789*, *in* INVENTING CONGRESS, *supra* note 66, at 78.

159 A distinction existed between the two titles but the connotation remains unclear. In August 1789, the House provided the Secretary of the Senate and the Clerk of the House with a "principal clerk." *See* 1 DHC, *supra* note 16, at 49 (electing a Secretary); *id.* at 51 (referring to a Secretary in the Convention rules).

160 SCHLENTHER, *supra* note 57, at 182.

161 *See id.* (commenting that Thomson met informally with delegates even though he was not one).

162 *Id.* (noting that Thomson was considered a reliable source of information).

163 3 DHC, *supra* note 16, at 9. Jackson was not present until after his election as Secretary. After Jackson was elected, he was "called in and took his seat." 1 FARRAND'S RECORDS, *supra* note 2, at 6 (notes by Yates for May 25). His very first notes thus were likely copied from other notetakers.

Charles Pinckney, and Alexander Hamilton—had served in Congress and their state legislatures.[164] Wythe was an expert at parliamentary procedures. As the legislative clerk in Virginia, Wythe had created a commonplace on parliamentary procedures. At William and Mary, he conducted a moot legislature for students.[165]

The rules were designed to organize and regulate the discussion. They reflected Congress's practices and American adaptations of parliamentary procedures.[166] Some controlled speaking: no one could speak a second time until everyone who wanted to speak had done so once; no one could speak more often than twice without leave; everyone had to speak while standing. Some emphasized etiquette: members could be asked to explain reprehensible conduct or questions; reading, talking, or passing notes during speeches was barred. Some delineated power: the President decided all questions of order; committees were elected by ballot, not appointed. Some imposed order: oral motions would be put into writing if necessary; writings were to be read once through, debated by paragraphs, read with amendments, and then voted as an entire question. Some bounded acceptable political strategies: only motions to amend, commit, or postpone were permitted on a question (i.e., the motions had to relate to the question); questions could be divided; a vote on a question could be postponed; a motion could be withdrawn before a vote. Lastly, some controlled the beginning and ending points of each day: orders of the day came after the minutes; motions to adjourn when seconded could not be debated.[167]

Under the rules, the Secretary read the "minutes of the preceding day" before any other business.[168] Congress had a similar requirement and Thomson read those minutes each day.[169] Jackson never recorded the reading of the minutes; however, neither did Thomson in the printed congressional journals.[170] In several instances, Jackson appears to have corrected his notes; the corrections may have been made by the Convention. If Jackson read the minutes, the records

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164 *Id.*; WRIGHT & MACGREGOR, *supra* note 79, at 96, 117; Peterson, *supra* note 103, at 47, 50.

165 *See* PATNODE, *supra* note 111, at 47–48; Peterson, *supra* note 103, at 48, 55.

166 *See* Wilson, *supra* note 128, at 559 (explaining that English parliamentary procedure was melded into the Continental Congress); Peterson, *supra* note 103, at 137–76 (reprinting various early legislative rules). *See generally* George B. Galloway, *Precedents Established in the First Congress*, 11 W. POL. Q. 454 (1958).

167 1 DHC, *supra* note 16, at 51–53.

168 *Id.* at 51 (referring to reading the minutes before the "orders of the day").

169 SCHLENTHER, *supra* note 57, at 149.

170 HENDRICKS, *supra* note 57, at 130; SCHLENTHER, *supra* note 57, at 149.

reflect the Convention's tacit approval or corrections. If the Convention silently waived the reading, the delegates likely had few or no concerns about Jackson's minutes.

The Convention considered and rejected the congressional practice of recording the yeas and nays.[171] The objections assumed that the record would probably be made public. According to Madison, Rufus King argued that "it was unnecessary to exhibit this evidence of the votes" because constituents were not bound.[172] George Mason explained that "in case" the record was "hereafter promulgated," it would "furnish handles to the adversaries of the Result of the Meeting."[173] Both worried that a record of individual members' votes would discourage compromise and changes of opinions.[174]

The committee report on the rules had been silent on publication—official and unofficial. After the debate over the ayes and nays, Pierce Butler apparently raised concern about "licentious publications of their proce[e]dings."[175] *Licentious* implied a member conveying the proceedings to a newspaper. On Tuesday, May 29, additional new rules sought to prevent such an occurrence.[176] Perhaps recollecting a congressional controversy over whether Thomson or Thomas Paine had illicitly shown secret information from the minutes to printer John Dunlap, a new rule explicitly stated that only members could inspect the journal.[177] Another rule barred copies of the journal without permission.[178] The rule made it difficult for members to have accurate personal notes and also made it easier to track access in case of a publication. Lastly, the Convention explicitly closed the doors:

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171 3 DHC, *supra* note 16, at 10 (describing the original committee report with a rule permitting the members "to call for the yeas & nays and have them entered on the minutes"); *see* ROBERT ZEMSKY, MERCHANTS, FARMERS, AND RIVER GODS: AN ESSAY ON EIGHTEENTH-CENTURY AMERICAN POLITICS 21, 239–42 (1971) (discussing limited publication of yeas and nays in Massachusetts). On August 10, the Convention debated whether the Constitution should regulate the "yeas & nays" and members' ability to enter the reasons for dissent in the journal of the House and the Senate. *See* 1 DHC, *supra* note 16, at 501–02 (debating Article VI, Section 7 of the August 6 report).

172 3 DHC, *supra* note 16, at 10.

173 *Id.*

174 *Id.* (describing King's argument that the minutes would be filled "with contradictions" and Mason's argument that the "record of the opinions" would be an "obstacle to a change of them on conviction").

175 *Id.* at 13.

176 1 DHC, *supra* note 16, at 53–54.

177 *Id.* at 54.

178 *Id.*

"[N]othing spoken in the House [could] be printed, or otherwise published, or communicated without leave."[179]

These rules did not address publication of the journal. Madison characterized them as the "Rule[s] restraining members from communicating the proceedings of the Convention &c."[180] Members continued to assume that the journal could or would be published. According to Madison, as the new rules were being amended and approved, Charles Pinckney requested a committee to "superintend the minutes."[181] Robert Morris objected: the secretary was the "impartial officer."[182] A committee might "have an interest & bias in moulding the entry according to their opinions and wishes."[183] Both comments suggest significant concern about a published future record. The motion lost by one vote.[184] The vote left Jackson in control of the composition of the written records.

The rules led the Convention to observe the bar on contemporaneous communication more strictly than members tended to do in Congress. The word "secret" appears in correspondence that summer about the Convention.[185] By *secret*, they meant confidential. Moreover, it was a relative term as suggested by the *Secret* and *More Secret* journals used to record congressional foreign affairs.[186] Members who had served in Congress considered closed doors to impose discretion on members about communications, not absolute secrecy. They regularly communicated information to political allies and trustworthy friends.[187]

In comparison, the Convention was slightly more successful at limiting outside communications that summer—or at least at ensuring that those who shared information made certain to leave relatively

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179 *Id.*

180 3 DHC, *supra* note 16, at 10 (recording it on May 28).

181 *Id*. at 13.

182 *Id.*

183 *Id.*

184 *Id*. According to Madison, the motion lost by 5 noes to 4 ayes. *Id.* Jackson nowhere recorded this motion. As a technical matter, it may have been an amendment to the committee report.

185 *See, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History,* 91 GEO. L.J. 1113 (2003) (interpreting the Convention as "secret").

186 *See supra* note 134 and accompanying text.

187 See, for example, James Madison's correspondence during his time in Congress, contained in various volumes of *The Papers of James Madison*. Burnett notes that quite a bit of information slipped out of Congress. 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, *supra* note 60, at v–vi. *See also id.* at 374 (discussing congressional discussion of violation of secrecy).

few traces. John Franklin Jameson noted that "not every member . . . observed the rule with the utmost strictness."[188] Arriving late to the Convention, for example, delegate Nathaniel Gilman wrote that "secrecy is not otherwise enjoined than as prudence may dictate to each individual."[189] In fact, extant private correspondence records various communications about the important structural choices made by the Convention.[190] In letters written to departed members, there is a "greater freedom of utterance."[191] The Philadelphia newspapers reported the names of the committee members of the Committee of Detail and their task to "'arrange and systemize'" the materials.[192] As John Alexander demonstrates, "leaks occurred," although the pro-Convention press underreported "possibly undesirable news."[193] We do not know about conversations that occurred as delegates repeatedly left to travel home or to Congress. Indeed, information may have been shared between Congress and the Convention.[194] The general public may not have known about the daily decisions of the Convention; however, politically connected allies and congressional members may have known quite a bit about structural decisions, trends, and strategies.[195]

The Convention, Jackson, and the journal are silent about future publication. The early minutes suggest Jackson assumed that the record would be published at least in the sense of being read by those who had not been members.[196] For example on May 25, he inserted that the "following credentials were produced and read—(here insert the Credentials)."[197] The "insert" instruction implied a planned future

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188 John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, 1 ANN. REP. AM. HIST. ASS'N 87, 90 (1902).

189 Letter from Nicholas Gilman to Joseph Gilman (July 31, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 2, at 66; *see* Jameson, *supra* note 188, at 91.

190 *See* 1 FARRAND'S RECORDS, *supra* note 2, at 15 n.2.

191 Jameson, *supra* note 188, at 91.

192 1 DHRC, *supra* note 42, at 260. The Convention's bar on members' copies of the proceedings to date limited the ability to share specific details during the lengthy recess.

193 JOHN K. ALEXANDER, THE SELLING OF THE CONSTITUTIONAL CONVENTION: A HISTORY OF NEWS COVERAGE 216–17 (1990) (discussing press coverage of reported divisions and antidemocratic ideas).

194 *See, e.g.*, Edward Coles, *History of the Ordinance of 1787* (June 9 1856), *in* SUPPLEMENT, *supra* note 7, at 321 (describing "inter-communication of the members"); Staughton Lynd, *The Compromise of 1787*, 81 POL. SCI. Q. 225, 227 (1966); James H. Hutson, *Riddles of the Federal Constitutional Convention*, 44 WM. & MARY Q. 411, 416–18 (1987) (analyzing Lynd's argument); *see also* BEEMAN, *supra* note 9, at 246–47; STEWART, *supra* note 9, at 115.

195 *See* Lynd, *supra* note 194, at 227.

196 *See* 1 DHC, *supra* note 16, at 49.

197 *Id.*

revision of the journal. Jackson similarly wrote on the following day to "insert" the credentials.[198] Despite this evidence, if the Convention explicitly discussed print publication, no one recorded the discussion.

Nevertheless, Jackson's minutes were compatible with eventual publication as a printed journal. Throughout the journal, Jackson took care to protect individual members' political positions.[199] The Convention rule did not explicitly bar the Secretary from recording the vote with the respective tally of the states' votes.[200] The Secretary, however, wrote simply "passed in the affirmative" or "passed in the negative."[201] After June 20, Jackson similarly did not usually include the names of the mover and the seconder.[202] In Congress, the printed journal often contained this information. Jackson often recorded the name of the proposer of an amendment in his vote tallies.[203] Nonetheless, the journal itself maintained anonymity. Throughout the summer, Jackson and the Convention created a publishable, printable record, postponing any decision about printing.

III. The Official Records

With respect to the official records, Farrand offered a "word of warning."[204] The first complaints surfaced thirty years after the Convention. In 1818, John Quincy Adams was tasked by President James Monroe and Congress to publish the records.[205] In Adams's diary, he recorded his exasperation.[206] The journal was "no better than the daily minutes from which the regular journal ought to have been, but never was, made out."[207] Adams decided to insert the vote tallies into each day's proceedings.[208] He also decided to finish the apparent "in-

198 *Id.* at 50.

199 *See id.* at 68.

200 Madison compulsively recorded each state's vote but he rarely recorded individual names except in instances of a split vote or a division on the Virginia delegation. *See, e.g.*, 1 Farrand's Records, *supra* note 2, at 50. Yates recorded at most the tally, noting only which side New York fell on. *See, e.g.*, *id.* at 105. King often recorded no votes, occasionally wrote down the states, and other times simply summarized the totals. *See, e.g.*, *id.* at 56.

201 *See, e.g.*, 1 DHC, *supra* note 16, at 68.

202 *See, e.g.*, *id.* at 67 (including information); *id.* at 68 (no longer including the information). He included this information in the Committee of the Whole House journal for the first weeks. *See id.* at 199–218.

203 *See, e.g.*, *id.* at 232, 256.

204 1 Farrand's Records, *supra* note 2, at xiii.

205 *Id.* at xii.

206 John Quincy Adams: Memoirs, *in* 3 Farrand's Records, *supra* note 2, at 430–34.

207 *Id.* at 433.

208 *Id.*

complete state" of the records.[209] The entry for September 15 "terminated abruptly" after being partially "crossed out with a pen."[210] There was no entry for September 17. Adams wrote Madison. Madison eventually "furnished, from his own minutes" a list of motions and questions for vote tallies on the final days.[211] The Secretary's records did not comport with Adams's and Farrand's nineteenth- and twentieth-century conceptions.

The Secretary's records, however, help us see the Convention through the lens of the summer of 1787. Our historical narrative of the Constitution focuses on the political substantive issues such as representation, nationalism, federalism, bicameralism, separation of powers, executive power, citizenship, and slavery. The structure and process of the Convention are incorporated in supporting roles. This Part discusses various aspects of the records that indicate some needed reconsideration or change in emphasis of conventional narratives.

A. Formal Descriptions

Titles matter in the official records. The Secretary carefully distinguished the various collective bodies. He was precise about the names and tasks of committees. He was specific about the descriptions of various drafts and reports. The formal descriptions suggest the importance of the tasks delegated to the various deliberative bodies.

The records curiously do not refer to "a Convention." The official records in fact suggest the Convention's disavowal of the name, which we colloquially give it. After May 28, the Secretary did not use "Convention." The word reappeared at the very end on the printed broadside containing the members' signatures as *witnesses*. The subscription read "*done in Convention by the Unanimous Consent of the States present*" on September 17, 1787.[212] Commentators since James Madison have emphasized the clever solution of consent by the states with the individual members as witnesses. Equally intriguing is the phrase "done in Convention." The phrase is wonderfully ambiguous, awkward, and attenuated. "Done" is a weak verb. The subject of the

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209 1 THE DEBATES, *supra* note 38, at 123.

210 *Id.*

211 I have not located the vote tallies that Madison returned to Adams. Letter from James Madison to John Quincy Adams (June 27, 1819), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 139 (1884) ("I return the list of yeas and nays . . . with the blanks filled.").

212 U.S. CONST. art. VII (emphasis added).

phrase is absent, presumably the document but not explicitly stated. The object is missing. It is not "the Convention." It is not "the States." It seems to be "the unanimous consent"—which is hard to grasp. "Convention" here is not so much a noun referring to a group of people ("the Convention") as a parliamentary procedure and process ("in Convention").

The Secretary was careful not to employ "Convention" to refer to the specific deliberative bodies. He used *House* to describe the collective deliberative body from May to September.[213] He used the *Committee of the Whole House* to describe the body that debated issues from Wednesday, May 30 to Tuesday, June 19.[214] In fact, the Secretary employed a larger description of this Committee that included its purpose. Its formal title was "a Committee of the whole House to consider of the state of the American union."[215] Congress had used a similar title in its Committees of the Whole on "the state of America."[216] The title reveals the reliance on adaptations of congressional parliamentary procedures. Of equal importance, when the Secretary read the minutes of the prior day, the name of the Committee reminded the Convention of the charge to devise a successful American *union*.

The Secretary recorded a longer name for what we call the Committee of Detail. The Convention agreed "unanimously" to elect a Committee "for the purpose of reporting a Constitution conformably to the Proceedings."[217] The formal name emphasized the extensive apparent discretion given to the committee as opposed to our tendency to assume that the Committee of Detail was only supposed to fill in minor details. The word "conformably" left considerable room for committee discretion. Indeed, the House referred the Pinckney and Paterson propositions to the new Committee.[218] Although the five committee members were given the resolutions that had been agreed on, the House explicitly barred other members from making copies.[219] The decision made it difficult for any member to argue later

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213 1 DHC, *supra* note 16, at 56.

214 *Id.*

215 *Id.*

216 4 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 4705, at 986 (1907). The phrase remains part of the House of Representatives title for a Committee of the Whole House. On Committees of the Whole in Congress, see Wilson, *supra* note 128, at 552–53.

217 1 DHC, *supra* note 16, at 107. A printer hand was used to insert the words.

218 *Id.* at 109.

219 *Id.* at 255. A copy of these proceedings appears in the Wilson papers. 2 FARRAND'S RECORDS, *supra* note 2, at 129. The Convention may have signaled various degrees of Commit-

about specific divergences between the earlier resolutions and the Committee's proposed draft.[220] The Secretary's formal name suggests that we might be advised to refer to the Committee *to* detail, not *of* Detail.

The Secretary had a different name than we do for the Committee of Style. The formal name was "to revise the style of and arrange the articles."[221] On September 11, 12, 13, and 14, the Secretary referred to it as a "Committee of revision."[222] He did not refer to it as a committee of style. McHenry similarly referred to it as the committee to "revise and place the several parts under their proper heads."[223] Our name—used by Madison in his notes—minimizes its jurisdiction and implies that it was simply to fix the occasional missing comma, and that its reshaping of the Constitution was somehow untoward.[224] The final committee report returned to the House on Wednesday, September 12, however, contained "the Constitution as revised and arranged."[225] Again, the Secretary's formal name suggests that we might be advised to refer to the Committee of *Revision*, not of *Style.*

As the Secretary's record makes apparent, the September 12 committee had another intertwined task: a draft of a letter to Congress.[226] Before the House considered the final draft of the Constitution, it read and approved the letter by paragraphs.[227] Broad national authorities,[228] the sacrifice of certain "Rights of independent Sover-

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tee discretion. For example, some resolutions sent to the Committee contained the word "shall." Other resolutions used language that "Provision ought to be made for . . . ." *Id.* at 133.

220 Indeed, discrepancies seem to exist in the language given to the committee and modern reconstructions of the proceedings. *Compare* 2 FARRAND'S RECORDS, *supra* note 2, at 129–30, *with* 1 DHRC, *supra* note 42, at 256–57.

221 1 DHC, *supra* note 16, at 191. "Style" meant the official formal presentation—not our modern notion of decoration.

222 *Id.* at 193–96.

223 *Documents: Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 AM. HIST. REV. 595, 616 (1906).

224 Gouverneur Morris later made an intriguing comment to Timothy Pickering. He noted that he had written the instrument and "believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary." Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), *in* 3 FARRAND'S RECORDS, *supra* note 2, at 420. With respect to that part, "conflicting opinions had been maintained with so much professional astuteness" that "phrases" had to be selected "which expressing my own notions would not alarm others, nor shock their selflove." *Id.* Morris added that he thought "this was the only part which passed without cavil." *Id. But see* Letter from Timothy Pickering to John Lowell (Jan. 14, 1828), *in* SUPPLEMENT, *supra* note 7, at 317.

225 1 DHC, *supra* note 16, at 194.

226 *Id.*

227 *Id.*

228 The powers of "making war Peace and Treaties, that of levying Money & regulating

eignty" of the states, and the "Consolidation of our Union" despite differences in "Situation Extent Habits and particular Interests" were the important elements.[229] The States had been "less rigid on Points of inferior Magnitude" and led by "mutual Deference & Concession."[230] The Constitution was not perfect or designed to win unanimous consent but it had as "few Exceptions as could reasonably have been expected."[231] The letter offered the Convention's interpretation of itself and the Constitution.[232]

Even with respect to the many smaller committees, the Secretary's titles suggest a different emphasis than our own. John Vile notes that it "takes considerable care to trace committee assignments and reports through the Convention records."[233] Madison focused on issues with relatively little regard to the form in which those issues were presented. His notes obscure the location of decisions. By contrast, the Secretary emphasized committee reports, discussion of committee reports, and voting on the reports.[234] Between Monday, July 2 and Monday, July 16, committees were used to design a compromise on the representation in the two branches.[235] From August 18 to September 10, committees handled almost every disputed issue.[236] Most

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Commerce" and "corresponding executive and judicial Authorities" were to be "fully and effectually vested" in the general government of more than "one Body of Men." *Id.* at 273.

229 *Id.* at 273–74.

230 *Id.* at 274.

231 *Id.*

232 *Id.*at 273–74.

233 *Committees at the Constitutional Convention*, *in* 1 VILE, *supra* note 8, at 119.

234 On Monday, July 16, the House agreed to the amended committee report on representation. 1 DHC, *supra* note 16, at 94. The Convention then devoted basically one additional week to completing consideration of the remaining sections of the Committee of the Whole House report.

235 *See generally Committees at the Constitutional Convention*, *in* 1 VILE, *supra* note 8, at 118. A committee of a member from each state was elected by ballot to attempt a compromise over the July 4 recess. *See Committee of Compromise on Representation in Congress (July 2)*, *in* 1 VILE, *supra* note 8, at 104–05. On Thursday July 5, the House began to debate this committee report—but foundered again. *See id.* at 104. On Friday, the House elected a committee of five to reconsider the first branch representation in the most recent committee report. *See id.* at 105. Morris chaired this committee but not until Monday did the committee finally submit a report. *See Committee on Original Apportionment of Congress (July 6)*, *in* 1 VILE, *supra* note 8, at 113. No sooner had the committee reported, than a new committee of a member of each state was sent to once again reconsider the issue. *See id.*; *Committees to Reconsider Representation in the House (July 9)*, *in* 1 VILE, *supra* note 8, at 116.

236 *See generally Committees at the Constitutional Convention*, *in* 1 VILE, *supra* note 8, at 118. On August 18, the House sent to a committee of eleven the problems of federal assumption of state debts and the militia. *See Committee on State Debts and Militia (August 18)*, *in* 1 VILE, *supra* note 8, at 115. The committee's report came back on August 21; the House adopted the proposals on August 23. *See id.* at 115–16. On August 22, the House sent to another committee

days during the final month, the House began by committing or recommitting items to committees, agreeing to or postponing a committee report.[237] By September, so many committee reports were being considered that even the Secretary became confused.[238]

We tend to refer to committees by their substantive task (e.g., the Committee on postponed matters). The Secretary referred to them by the date of the report, the number of members, and the name of the chair.[239] As the Secretary's entry demonstrated, the number of members declared the nature of the committee's power. Eleven (a committee of a "member from each state") meant that each state could be consulted by having a representative.[240] Five meant the House had elected the individual members for particular reasons.[241] The House's deference—or lack thereof—to committee reports is intriguing. For example, the five-man committee to deal with bankruptcy and the Full Faith and Credit Clause was filled with members with legal experience and its report was largely adopted.[242] The Secretary's minutes also

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of eleven another group of difficult issues—importation of people held as slaves, the permissible taxes or duties, and control over navigation laws. *See Committee on Slave Trade and Navigation (August 22)*, *in* 1 VILE, *supra* note 8, at 115. This committee's report came in on August 24. *See id.* On August 25, another committee of eleven was created for issues relating to duties and tonnage. *See Committee on Commercial Discrimination (August 25)*, *in* 1 VILE, *supra* note 8, at 111–12. The committee's August 31 report was again largely adopted. *See id.* at 112. On August 31, as the Convention completed consideration of the 22nd article of the August 6 report, a final decision was made to refer everything open to a committee of eleven. *See Committee on Postponed Matters (August 31)*, *in* 1 VILE, *supra* note 8, at 113; 1 DHC, *supra* note 16, at 173. On September 1, the House heard the initial report from this final committee (the Brearley committee) and the report on legal matters. 1 DHC, *supra* note 16, at 174. The following week—from September 3 to 8—the House focused entirely on the Brearley Committee report. *See id.* at 175–91. Only on Monday, September 10, with the final drafting committee already appointed and working, did the House return to consider the August 6 report and decide on the mechanisms for ratification. *See id.* at 191–93.

237 *See supra* notes 235–36 and accompanying text.

238 *See* 1 DHC, *supra* note 16, at 174 (incorrectly referring to the committee of August 28 instead of August 29). The confusion may have resulted from the Secretary's incorrect dating of Wednesday, August 29 as August 28. *See id.* at 165. Farrand does not show the error. *See* 2 FARRAND'S RECORDS, *supra* note 2, at 445.

239 *See supra* notes 235–36 and accompanying text.

240 These committees reflected the underlying struggle—two were committees of a member from each state (July 2, July 9) and one a committee of five (July 6). *See* 1 DHC, *supra* note 16, at 79, 81, 84.

241 *See id.* at 81.

242 The members were Johnson, Gorham, Wilson, Randolph, and Rutledge. *See id.* at 165–74. Gorham had briefly served as a judge and had presided over the Committee of the Whole House. *See, e.g.*, *id.* at 56. Created on August 29, it returned on September 1. *See id.* at 165–74. (The committee was basically the Committee to detail with Johnson substituted for Ellsworth.) *Compare id.* at 165, *with Committee of Detail (July 24)*, *in* 1 VILE, *supra* note 8, at 106.

emphasized the chair. David Brearley, for example, led the committee that handled the postponed matters of the August 6 report.[243] Because the committees kept no minutes, the importance of the chair remains a matter of speculation.[244] At a minimum, the chair presented the committee report and served as the official representative of the committee.

The multiple committee reports near the end of the Convention suggest that the implications of the entire document were likely difficult to grasp and absorb. The Convention unanimously approved the document but few members had time to ponder every word. Focusing on the committees emphasizes that the Constitution was created *in Convention*.

B. Plans

The Secretary did not keep any of the four plans presented to the Convention in the first month. To be sure, for historical reasons it would be nice to have the original copies. But as a procedural matter, the plans became irrelevant. One plan was amended. One plan was referred. One plan was rejected. And one plan was never even introduced as a formal matter. We fail to recognize the important procedural differences among the House's responses to the plans.

The first two plans—those of Edmund Randolph and Charles Pinckney—were both referred to the Committee of the Whole House.[245] The Secretary's description of the two plans emphasized the crucial difference. Randolph's "sundry propositions, in writing" concerned the "american confederation, and the establishment of a national government."[246] The summary emphasized a shift from confederation to national government. The Secretary described the draft by Charles Pinckney as a "fœderal government to be agreed upon between the free and independent States of America."[247] Like the delegates themselves, we can quibble about the meanings of "national" and "federal." The Secretary's description, however, juxtaposed "national" to "federal," "confederation" to "free and independent states." The Committee's decision to debate only Ran-

243 *Brearley, David*, *in* 1 VILE, *supra* note 8, at 67.

244 *See* Wilson & Jillson, *supra* note 137 (discussing the importance of chairs and committee composition).

245 1 DHC, *supra* note 16, at 55.

246 *Id.*

247 *Id.*

dolph's *national* propositions was thus loaded with political implications.

Procedural nicety explains the disappointing absence of original copies of Randolph's propositions and Pinckney's draft. Once the documents were read in the House and referred, they belonged to the Committee of the Whole House. The Secretary or the Chair, Nathaniel Gorham, may have had a working copy of Randolph's plan from which to read the resolution under debate. The only document that was to return to the House as part of the record of proceedings was the Committee Report. The Committee prepared such a report two weeks after it had begun. The Secretary first prepared a document containing the agreed-upon resolutions.[248] After the Committee dealt with sections "postponed, or not agreed to," the Secretary prepared a new document that showed the resolutions as "altered, amended, and agreed to" by the Committee.[249] In each section, he arranged the more disputed amended sections beneath the agreed-upon sections of the Randolph resolutions. The text thus intriguingly moved in each section from consensus to more disputed components.

The lengthy notes left by multiple members mislead us into equating the Randolph plan and the subsequent Paterson plan.[250] The official records instead emphasize procedural courtesies and the careful scripting of a formal response to the Paterson plan. After the Committee report was returned favoring the Randolph plan, Randolph politely moved to postpone discussion of the report in the House on June 13 and then again seconded Paterson's motion to further postpone the next day.[251] When Paterson's new resolutions were read in the Convention and referred, Rutledge and Hamilton courteously moved to have the Committee report recommitted also.[252] Every notetaker enjoyed recording the differences between the two plans as explained by Lansing, Paterson, and Wilson. But one day of debate was sufficient and the Paterson resolutions were postponed

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248 *See* 1 DHC, *supra* note 16, at 262–66. Farrand seems to have thought the document was a "misleading" version of the final committee report. 1 FARRAND'S RECORDS, *supra* note 2, at 224–25 n.4. He concluded the document's "peculiar value" lay in the chronological account of the resolutions. *Id.*

249 1 DHC, *supra* note 16, at 267–72; 1 DHRC, *supra* note 42, at 247–50. Farrand points out that Madison's version is almost identical. 1 FARRAND'S RECORDS, *supra* note 2, at 235 n.17. Various other delegates kept similar versions. *Id.*

250 1 FARRAND'S RECORDS, *supra* note 2, at 249–80.

251 1 DHC, *supra* note 16, at 64.

252 *Id.* at 65.

and then rejected.[253] Washington kept a copy of the plan; the Secretary properly did not.[254]

The plan of Alexander Hamilton was never even introduced. The plan—robust, complicated, imaginative, and arguably more national and powerful than the Committee Report—would come to haunt Hamilton after the Convention. The Secretary recorded nothing about the plan. Hamilton made no motion and never formally offered the plan on June 18.[255] He was hardly a neophyte at parliamentary procedure. An entire day used up for an alternative plan never finally presented seems a strategic ploy. The plan implicitly suggested that an infinite number of plans could be proposed, some far more controversial. Moreover, it bought a day to consolidate votes. As Jack Rakove notes, the speech "had at least one of its likely intended effects," as Madison used it as a "foil for his own vision of national power."[256] Hamilton may have agreed with his plan or not. The liberal sprinkling of absolutes—"utterly void," "all," "sole"—seem as much designed to draw fire as to be adopted.[257] Hamilton also ensured there was no formal record of it. He may have later regretted his decision to provide Madison with a copy.[258]

C. The Journal of the Committee of the Whole House

Jackson kept a separate journal of the minutes of the Committee of the Whole House. For members, the Committee had a significant advantage: speakers could speak more than once. For the Secretary, the three weeks of the Committee of the Whole House were an invaluable learning experience.[259]

In the first days of the Committee of the Whole House, Jackson gradually learned to take notes. On the very first day, May 30, he

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253 *Id.* at 66–67.

254 *See* New Jersey Delegates to Congress, May 1787, Propositions of the Delegates of New Jersey to the Convention, May 1787, *in* GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741–1799, ser. 4,. The Secretary likely kept a copy until the end of July. The Paterson plan and the Pinckney plan were later referred to the Committee to detail. *See supra* text accompanying note 218.

255 *See* 1 DHC, *supra* note 16, at 66.

256 JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 64 (1997).

257 *See* 1 FARRAND'S RECORDS, *supra* note 2, at 292–93 (Madison's copy of Hamilton's plan).

258 *See id.* at 293 n.9 (describing Madison's acquisition of the plan).

259 The Convention journal up to June 13 was a formulaic account of the convening of the House, the reorganization into the Committee of the Whole House, and the reconvening as the House. Jackson wrote these entries sequentially, occasionally noting the arrival of new delegates. *See* 1 DHC, *supra* note 16, at 55–64 (May 30–June 13).

went back to insert that Randolph and Morris were the mover and seconder. He forgot initially to include who had submitted the original resolution.[260] He decided to add that the first resolution should start with the "opinion of this Committee."[261] The following day, Jackson abandoned recording the names of the movers and seconders, but then forgot to mention that certain motions had been seconded. He later added that in.[262] He neglected to explain that a resolution had been divided into separate questions.

But Jackson learned quickly. By the end of the first week, he was keeping careful track of the question. He indicated whether it was postponed, struck, filled up, or amended.[263] By June 6, the questions recorded in the journal repeatedly and comfortably used the rhetoric of proper parliamentary procedure.

In the Committee of the Whole House, Jackson had several men to assist him. He could turn to Nathaniel Gorham who served as Chair of the Committee. Gorham had served as president of the Congress and had been a long-time member of Congress.[264] He had begun his career as a notary and had served as speaker of the Massachusetts House.[265] Until June 4, Jackson could also ask George Wythe for assistance. Wythe then left the Convention. As noted earlier, outside of the Convention, Jackson may have been able to obtain the assistance of Congress's Secretary Charles Thomson.[266]

Jackson learned how to keep track of voting during these first weeks. As with the minutes, at first he struggled. On a loose sheet of paper, Jackson drew a grid with thirteen numbers and the names of the states at the top.[267] He left no room to record the question and no space to record the final tally. By the sixth vote, Jackson began to record the tally in the blank for the absent New Hampshire delega-

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260 *Id.* at 199.

261 *Id.* at 200.

262 *Id.* at 201.

263 *Id.* at 212–14.

264 *Gorham, Nathaniel (1738–1796)*, *in* 1 VILE, *supra* note 8, at 323.

265 HENRY D. COOLIDGE & JAMES W. KIMBALL, MANUAL FOR THE USE OF THE GENERAL COURT 269 (1913).

266 *See* note 160 and accompanying text.

267 *See* OFFICIAL RECORDS OF THE CONSTITUTIONAL CONVENTION: VOTING RECORD OF THE CONVENTION: LOOSE SHEETS OF AYES, NOES, AND DIVIDED VOTES, *microformed on* Microfilm Publication M866 (Nat'l Archives & Records Admin.) [hereinafter VOTING RECORD] (the verso of this sheet appears to contain the tally for the President of the Whole House); 1 DHC, *supra* note 16, at 260–61. The *DHC* misrepresents the grid by leaving a large space for "R.I." *See* 1 DHC, *supra* note 16, at 260. The columns are of equal size. The microfilm contains two images for each loose sheet. Interested readers are encouraged to print and tape the images with appropriate overlaps. The *DHC* does not show the page divisions in the loose sheets.

tion. By the ninth vote, Jackson began to record the question in miniscule handwriting in the blank for the absent Rhode Island delegation.[268]

Again, Jackson learned quickly. By June 6, he modified his approach as he drew the lines on a new sheet of paper.[269] He grouped the states in columns on the left, created a column for "Questions," and another for the ayes, noes, and divided votes. He used this system to record the rest of the Committee of the Whole House and the Convention. The system had two significant advantages. First, Jackson did not have to rely on his memory or extrapolate from his minutes about the substance of the vote. Second, the system was accessible to a member who asked to see a vote. The new system provided a record comprehensible over time.

Why did Jackson keep the minutes of the Committee of the Whole House? Why did he keep the votes of the Committee of the Whole? Why did he copy some of these votes into the small book that he later came to use to record votes of the Convention?[270] All three decisions suggest that we need to be wary about adopting an overly strict interpretation of the Committee of the Whole House as a committee whose minutes and votes were irrelevant once the House reconvened. Keeping the minutes and rewriting the most significant votes in the Committee of the Whole House made the most sense if Jackson felt some need to be able to refer back to the decisions and votes. The decision suggests that Jackson anticipated delegates asking questions about the Committee's votes and decisions.

If the House journal had been published after the Convention, would the Committee journal have been included? Again, we do not know. Congress usually did not publish such material but had printed the Committee of the States journal on one occasion. By carefully recording the Committee's minutes in a separate journal, Jackson made sure either decision would be possible.

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268 Jackson made occasional errors in recording these votes. He changed some ayes to noes, noes to ayes, or ayes or noes to divided votes. These were likely errors at the time in calculating the final vote of the state. Indeed, they may have been caused by confusion or by switches in voting. Jackson's columns are in accord with the final votes. The *DHC* does not show these alterations.

269 *See* VOTING RECORD, *supra* note 267, at 2 (a small "2" can be seen in the lower left hand corner); 1 DHC, *supra* note 16, at 244.

270 *See* VOTING RECORD, *supra* note 267, at 1; 1 DHC, *supra* note 16, at 227. The votes recorded related to the single Executive, the method of electing the two branches of the Legislature, the method of electing the Executive, the concept of a negative to be exercised by the Executive and judiciary, and the rules of suffrage for the two branches.

D. Printed Reports

We focus on private notes of members, but more than any other genre of material of the Convention, the printed reports of August 6 and September 12 survive.[271] As a technical matter, these documents were committee reports; we consider them drafts of the Constitution. Sixty copies of each are believed to have been printed. With fifty-five elected members, the sixty copies would have permitted one per member. With far fewer members present (Gordon Lloyd concludes that only twenty-two delegates are known positively to have been at the Convention on August 6), members may have been given more than one copy or extras may have been destroyed.[272] Seventeen copies of the August 6 report are known to be extant.[273] Fourteen copies of the September 12 report are extant.[274] Members who kept few or no minutes nonetheless kept these printed documents.

The reports were printed on only one side of a page with wide margins. They were printed to be written on. Madison's extant copies are atypical. He made few changes on the August 6 report; other extant copies show numerous alterations.[275] Some August 6 printed re-

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271 There is almost no scholarship on the various extant copies except selected comments on the August 6 drafts reproduced by James Hutson. SUPPLEMENT, *supra* note 7, at 207–12.

272 Gordon Lloyd, *Constitutional Convention Attendance Record*, TEACHING AM. HISTORY, http://teachingamericanhistory.org/convention/attendance/module.html#/August%206 (last visited May 30, 2012).

273 SUPPLEMENT, *supra* note 7, at 207. Hutson counts eighteen but includes the proof copy. John Kaminski at the Center for the Study of the Constitution graciously made available the following list of reports known to the Center: Abraham Baldwin (Pierpont Morgan Library), David Brearley (NARA), Pierce Butler (Gilder Lehrman Library), Pierce Butler (Lilly Library, Indiana University), John Dickinson (Library Company, Philadelphia), Elbridge Gerry (MHS), Nicholas Gilman (New Hampshire Society of the Cincinnati), William Samuel Johnson (DLC), James Madison (DLC), George Mason (Huntington Library), Charles C. Pinckney (DLC), Edmund Randolph (Historical Society of Pennsylvania ("HSP")), George Washington (NARA), Hugh Williamson (DLC), James Wilson (Gilder Lerhman Collection, New-York Historical Society ("NYHS")), unknown (DLC, Force Collection), unknown (Huntington Library). E-mail from Sarah Danforth on behalf of John Kaminski, Director, Center for the Study of the American Constitution at University of Wisconsin-Madison, to author (Jan. 5, 2012) (on file with author).

274 John Kaminski at the Center for the Study of the Constitution graciously made available the following list of reports known to the Center: Abraham Baldwin (Georgia Historical Society), David Brearley (NARA), Jacob Broom (HSP), Pierce Butler (Gilder Lehrman, Morgan Library), John Dickinson (Library Company), Elbridge Gerry (MHS), William Samuel Johnson (DLC), Rufus King (New Hampshire Society of the Cincinnati), William Livingston (NYHS), James Madison (DLC), George Mason (Williams College), Charles C. Pinckney (DLC), George Washington (DLC), Hugh Williamson (DLC). E-mail from Sarah Danforth on behalf of John Kaminski, Director, Center for the Study of the American Constitution at University of Wisconsin-Madison, to author (Jan. 5, 2012) (on file with author).

275 Madison's extant copy for August 6 has almost no edited marks on it other than cor-

ports appear to have been ongoing working copies as the House altered the report between August 7 and early September. Others may represent a final copy of the report after the House finished debating it.[276] The minimal alterations on the extant copies of the September 12 report testify to the noted deference to the committee draft.

Jackson's and George Washington's handwriting appears together on the August 6 report that is in the official records. Perhaps Washington had begun to assist Jackson or Jackson may have used a draft started by Washington. Each provision is marked up or amended. The words "agreed," "disagreed," or "postponed" appear in the left hand margin, although not for the initial sections. Jackson's name also appears on the top of the copy of the August 6 report in the Johnson papers. William Samuel Johnson was the chair of the final committee appointed to revise and arrange the Constitution. Perhaps this second copy was prepared by Jackson for the committee's use.[277]

Mystery surrounds the Secretary's copy of the September 12 report. The only extant copy of a report with Jackson's handwriting is in the George Washington papers. The official records contain no such draft. As with the August 6 draft, both men's handwriting is apparently present. Perhaps Washington considered this version his personal copy. If so, it would suggest that the Secretary prepared a final copy for the printer.[278] That copy, if it existed, was not returned to the Secretary. Alternatively, at some point, Washington may have removed the September 12 copy from the papers given to him by Jackson. If so, this copy should be considered part of the official records.

The engrossed Constitution retained by the Secretary offers a final observation on the Convention process.[279] Four additional

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recting the misprint in the numbering of the articles. Unless Madison kept track of the changes on another copy, he would have had difficulty reconstructing what the draft looked like as it was altered during these weeks.

276 David Brearley's copy, for example, consistently uses much the same marginalia as the Jackson/Washington copy.

277 William Jackson, Aug. 6, 1787 Draft of the U.S. Const., art. I, *available at* http://www.loc.gov/exhibits/treasures/images/vc4.7.jpg; Report of the Committee of Detail at 5, U.S. Const. Convention, 1787, *available at* http://myloc.gov/Exhibitions/CreatingtheUS/interactives/constitution/HTML/executive/enlarge1.html. Neither draft contains the extensive additions produced by David Brearley's Committee of Eleven to the postponed sections of the draft after August 31.

278 *See* Leonard Rapport, *Printing the Constitution: The Convention and Newspaper Imprints, August–November 1787*, 2 PROLOGUE J. NAT'L ARCHIVES 69, 72 (1970).

279 *See* Denys P. Myers, *History of the Printed Archetype of the Constitution of the United States*, S. DOC. NO. 49, at 49 (1961), *reprinted in* 11 GREEN BAG 2D 217 (2008).

changes were made to the engrossed Constitution. They were made prior to the printing of the Constitution as a broadside (which was the version republished in newspapers).[280] One was significant: representation in the House of Representatives was altered to "not exceed one for every thirty thousand" instead of forty thousand.[281] Contemporary notes describe this change occurring on September 17.[282] Three others were smaller: two "the"'s were added, as were the words "is tried."[283] No notetaker recorded those three changes. Presumably they were made as the document was read to the House and prior to the witnessing of the document. But as a technical matter the records provide no evidence.[284]

E. Voting Tallies

By the conclusion of the Committee of the Whole House on June 19, Jackson knew how to keep votes. But he remained uncertain about who would need to understand the vote tallies for the remainder of the proceeding. At first, the Secretary continued with his long-ruled sheets.[285] He seems to have then tried to leave a more cohesive record. He turned to a small book but skipped the first eleven pages. The simplest explanation—the one favored by Farrand—is that the Secretary planned to copy the loose vote tallies over.[286] On the first

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280 *See id.* at 220–21.

281 *See id.* at 221; U.S. CONST. art. I, § 2, cl. 3.

282 *See* 2 FARRAND'S RECORDS, *supra* note 2, at 644 (Madison's notes); *id.* at 649 (McHenry's notes).

283 1 DHRC, *supra* note 42, at 316–17 (errata note on engrossed copy describing addition of "the," "thirty," "is tried," and "the").

284 1 DHRC, *supra* note 42, at 304 (noting that it "is unclear when" Jacob Shallus "engrossed the form of signing and the last minute changes"); *see* Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment,* 97 YALE L.J. 281, 283 (1987) (suggesting delegates did not examine the final document).

285 VOTING RECORD, *supra* note 267, at 2v–4v; 1 DHC, *supra* note 16, at 246–58; *see* 1 FARRAND'S RECORDS, *supra* note 2, at 282 (vote 64, the only vote on June 18, is the first vote on the third loose sheet). On the microfilm, 2v has a faint "2" at the top; 4v has an "8." The DHC reproduces, and the microfilm orders, sheets 7 and 8 in the reverse order. On 1 DHC, *supra* note 16, at 257, "To insert ten days Sundays excepted" is the final vote (vote 301) on August 15, *see* 2 FARRAND'S RECORDS, *supra* note 2, at 296. The next vote on 1 DHC, *supra* note 16, at 257, "To adjourn till wednesday" is vote 232 from August 6, *see* 2 FARRAND'S RECORDS, *supra* note 2, at 176. The Secretary wrote several votes at the bottom of loose sheets when he had not yet prepared his new voting records. *See* 1 FARRAND'S RECORDS, *supra* note 2, at 241 n.3 (explaining that the last vote on the loose sheet page 2 recto (vote 63) belongs to July 21 not June 15–19).

286 VOTING RECORD, *supra* note 267, at 12; *see* 2 FARRAND'S RECORDS, *supra* note 2, at 304 n.3. At the end of the Convention, the book contained a page of Committee of the Whole votes, two pages of votes at the end of the Convention, eight blank pages, and then five pages with vote counts from August 16 onward. *See* 2 FARRAND'S RECORDS, *supra* note 2, at 304 n.3.

page, he began to copy the significant votes of the Committee of the Whole House.[287] Before the Convention ended, he had abandoned the plan. On September 14, he reached the end of the book and began to use the early still-blank pages to record the remaining votes.[288] He only wrote in selected questions and tallied only the occasional vote. When the Convention ended, he left the voting record in this casual state.[289]

More than any other part of the record, the vote tallies reflect the changing tempo of the Convention. The Committee of the Whole House vote tallies are neat with the lines ruled in advanced.[290] Double lines separate various headings.[291] Two horizontal hatch marks occupy the initially absent New Hampshire and Rhode Island columns.[292] Through June and early July, Jackson kept the votes in a relatively neat format with nearly identical size and spacing of the rows and columns. By mid-July, Jackson began to squish more rows onto the page.[293] With the August 6 report, he seems to have thought he would need less room for the questions and left little space.[294] He quickly returned, however, to his typical spacing on the following page.[295] When Jackson shifted to the small book around August 16, he began to make the rows smaller. By August 28, his handwriting had grown smaller.[296] By September, the speed became explicit.[297] On September 5, he had to add printer hands to correct several questions.[298] On September 8, he squished the repeated votes on the Senate's right to vote on treaties into the remaining small space on the page.[299] Be-

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287 *Id.*

288 *See* VOTING RECORD, *supra* note 267, at 2, 3, 16; 1 DHC, *supra* note 16, at 227–29, 242 (not distinguishing page breaks).

289 *See* 2 FARRAND'S RECORDS, *supra* note 2, at 304 n.3.

290 VOTING RECORD, *supra* note 267, at 3.

291 *Id.*

292 *Id.* at 2–4.

293 *Id.* at 5. Near the bottom of this sheet, Jackson recorded a vote for August 16. *See* 2 FARRAND'S RECORDS, *supra* note 2, at 61 n.3. He may have moved to ruling the rows as he went for they are on occasion uneven and occasionally drawn freehand. This is not shown by Farrand. On July 26, right before the Convention adjourns until August 6, the Secretary had to uncharacteristically cross out his initial version of a vote and then write it again below. *See* VOTING RECORD, *supra* note 267, at 8–9.

294 *Id*. at 8.

295 *Id.* at 9.

296 Id. at 14.

297 *Id.* at 15–16.

298 *Id.* at 15; 1 DHC, *supra* note 16, at 238.

299 VOTING RECORD, *supra* note 267, at 9.

tween Wednesday September 12 and September 17, he recorded sixty votes but wrote the questions for only twenty-seven.[300]

The final page of the vote tally shows delight in completion. Jackson twice records in large decisive handwriting that the Constitution was unanimously agreed to—the second time apparently after North Carolina had returned to the floor.[301] The Secretary's bold handwriting emphasized the document's identity as "The Constitution."[302] The words appear by themselves on the left side of the entry with "unanimously agreed to" adjacent.[303] The vote tallies reflect a unanimity not necessarily undercut by the decisions of three members not to sign the attestation. The Secretary recorded only one final vote—with Maryland dissenting—"to deliver over the Journals and papers to the President."[304]

Jackson's voting record importantly suggests a distinction between consensus and contention. He did not record every vote taken in the Convention but apparently those on which the House wanted a roll call. The voting tallies do not record most unanimous votes. These votes reflected known support so broad that no one needed a roll call. Although some were technical matters,[305] two instances are particularly significant. Jackson never recorded vote tallies for the unanimous vote permitting the affirmation of an oath of office and the unanimous vote barring religious tests for offices.[306] Conversely, a rare unanimous vote recorded in the tallies was the motion on Saturday, June 30 to adjourn before deciding a motion on the second branch.[307] The Secretary may have been instructed to record the vote

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300 *Id.* at 2–3, 16; 1 DHC, *supra* note 16, at 227–29 (Sept. 14–17); *id.* at 241–42 (Sept. 12–14).

301 *Id.* at 3.

302 *Id.*

303 *Id.*

304 *See id.* Madison in his notes added an additional unanimous resolution that "he retain the Journal and other papers, subject to the order of Congress, if ever formed under the Constitution." 3 DHC, *supra* note 16, at 770. No one else recorded such a restriction—and it appeared nowhere in the official records. For discussion, see *infra* text accompanying note 341.

305 *See* 1 DHC, *supra* note 16, at 109; 2 FARRAND'S RECORDS, *supra* note 2, at 98 (the unanimous votes on July 24 to refer Pinckney's and Paterson's propositions to the Committee of detail).

306 *See* 1 DHC, *supra* note 16, at 170 (Aug. 30); *id.* at 235 (no vote tally), 2 FARRAND'S RECORDS, *supra* note 2, at 461 ("But no religious test shall ever be required as a qualification to any office or public trust under the authority of the United States" passing "unan: in the affirmative"); *id.* ("affirmative" vote to add the words "or affirmation" after the words "oath"); *see also* 1 DHC, *supra* note 16, at 240 (voting on United States and removal for impeachment).

307 1 DHC, *supra* note 16, at 248; 1 FARRAND'S RECORDS, *supra* note 2, at 480 (vote 109); *see* 1 DHC, *supra* note 16, at 78 (journal not recording vote).

because delegates assumed it would be controversial. Usually, Jackson did not record the decision to adjourn. When motions to adjourn appear in the voting tallies, the vote counts suggest the motion may have been intended to disrupt or close down a controversial debate.[308]

The voting tallies lacked signals that would be easily decipherable to others. Jackson did not record when he switched from taking votes in the Committee of the Whole House and the Convention. He kept the names of the members who raised certain alterations but did not include them often in the minutes. On several occasions, he apparently ran out of paper and quickly recorded the vote in a blank space. He likely kept all the vote tallies with him on a daily basis for he recorded these errant votes on pages far removed from the ongoing debates. Perhaps some no longer visible mark on the record indicated the vote's proper place or Jackson may have depended on his memory to know that the vote belonged elsewhere. In these moments (which Farrand considered "misleading"), we glimpse the Secretary confident as we all are in our own time that he understood his own records.[309]

The relationship between the vote tallies and the journal hints that the journal was written after the vote counts. If Jackson kept rough notes during the session, he likely created the journal by combining the vote tallies and his rough notes.[310] Jackson's descriptions of the votes often used concepts rather than the precise language of the motion.[311] Withdrawn motions appear to have been omitted.[312] Cer-

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308 *See, e.g.*, 1 DHC, *supra* note 16, at 251; 1 FARRAND'S RECORDS, *supra* note 2, at 577 (vote 135) (July 11 rejection of motion); *id.* at 600 (vote 153) (July 13 6–4 vote to adjourn); 2 *id.* at 15 (votes 158–59); 1 DHC, *supra* note 16, at 236; 2 FARRAND'S RECORDS, *supra* note 2, at 484 (adjourning after having heard the Brearley report); 1 DHC, *supra* note 16, at 237; 2 FARRAND'S RECORDS, *supra* note 2, at 496 (Sept. 4) (adjourning after having postponed the Brearley report).

309 Farrand assumed that the Secretary was supposed to be keeping the voting tallies so that a third party would follow them. He was exasperated when the Secretary apparently on several occasions ran out of paper and recorded a vote in a space where it did not technically belong. *See, e.g.*, 2 FARRAND'S RECORDS, *supra* note 2, at 61, 71, 304 (July 20–21, Aug. 16).

310 For example, on Thursday, July 19, the Convention reconsidered the clauses in the ninth resolution relating to the appointment of the Executive. 1 DHC, *supra* note 16, at 102. The vote was 9–1, but the Secretary noted that "No Caroa withdraw their negative." *Id.* at 253. He thus recorded it in the journal as "unanimously agreed to" reconsider. *Id.* at 102.

311 For example, a July 21 resolution stated: "Resolved that the national Executive shall have a right to negative any legislative act, which shall not be afterwards passed unless by two third parts of each Branch of the national Legislature." *Id.* at 105. The voting question was phrased: "That the supreme Executive shall possess a revisionary negative." *Id.* at 253. The Secretary's phrasing made the "supreme Executive" parallel to his description of the "supreme Judiciary" in the prior vote. *Id.*

312 For example, on July 26, the Secretary recorded a final instruction to the committee relating to the seat of government. *Id.* at 112. The resolution was moved and seconded but then

tain votes were never recorded in the journal. Jackson did not record in the journal a vote that the members of the Committee of Revision and Arrangement "be furnished with copies of the proceedings."[313] Nor did he include the close losing vote (5–6) that the members of the house could take "copies of the resolutions which have been agreed to."[314] These votes may have fallen outside of the matters thought to be appropriate for inclusion. Alternatively, the Convention may have unanimously ordered Jackson not to record these votes in the journal. The vote tallies indicate that the journal was indeed closer to a finished fair copy.

The vote tallies help to explain why Jackson never finished the journal. Farrand declared the records from September 12 on "more unsatisfactory than ever."[315] This conclusion misunderstood the Convention's approach to the September 12 draft. The records suggest a two-step process with respect to the September 12 draft.

First, on September 12 and 13, the Convention addressed issues of possible reconsideration. McHenry labeled them "attempts to amend several parts of the system."[316] On Wednesday, September 12, the Convention altered the vote needed to override a presidential negative from three-fourths to two-thirds.[317] The House then rejected a motion to elect a committee to write a bill of rights.[318] The House agreed to reconsider the section addressing duties and on Thursday, September 13, agreed to an amendment.[319] The Committee of Revision also reported three new paragraphs to deal with ratifications, the election of the new government, and duties—all quickly agreed to.[320]

Second, only after these matters were finished on September 13 did the Convention "proceed to the comparing of the report, from the Committee of Revision, with the articles which were agreed to by the House; and to them referred for arrangement."[321] McHenry described the process as "some verbal alterations."[322] On September 13, the

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moved and seconded to postpone consideration. *Id.* The Secretary never recorded a vote. *Id.* at 255; 2 FARRAND'S RECORDS, *supra* note 2, at 118. Madison's notes suggest that the mover, Col. Mason, withdrew the motion. 2 FARRAND'S RECORDS, *supra* note 2, at 127–28.

313 1 DHC, *supra* note 16, at 255.

314 *Id.*

315 2 FARRAND'S RECORDS, *supra* note 2, at 582 n.2.

316 *Id.* at 589.

317 1 DHC, *supra* note 16, at 194.

318 *Id.*

319 *Id.* at 196.

320 *Id.* at 195–96.

321 *Id.* at 196.

322 2 FARRAND'S RECORDS, *supra* note 2, at 609.

Secretary simply described the report "read by paragraphs, compared, and in some places corrected and amended."[323] On September 14, the Secretary started to create an entry with more details. But he then crossed that out and simply again summarized that the report was "read, debated by paragraphs, amended, and agreed to as far as the first clause of the 10 section of the first article inclusive."[324] He may have still been reading the minutes to the Convention: he had to insert "amended," emphasizing that changes continued to be made.[325] On September 15, he again began a formal entry but then crossed it out.[326] Whether the crossing out was at the Convention's request, Jackson's decision, or even some later pen is a mystery.

Decades later, Jackson insisted that nothing had occurred in the two final days.[327] As the printed drafts show, changes were made to the text.[328] Jackson may have meant that nothing significant and controversial was altered. In his mind, the final changes to the text were those of consensus. The final Constitution reflected the alterations; the journal did not need to detail them. The record would have looked better if Jackson had written out an entry for September 17. But the absence of the entry testifies to the speed with which the Convention completed its task, not to any general incompetence of the Secretary.

IV. After the Convention

Standard accounts of the official records move abruptly from September 17, 1787 to March 1796. Jackson burns the loose papers, he gives the records to Washington, and Washington eventually deposits them.[329] But the story of the records after the Convention is considerably more mysterious.

On September 17, 1787, Jackson made decisions about which papers should be saved and which destroyed. The last vote recorded in the journal was "[t]o deliver over the Journals and papers to the President."[330] Jackson accomplished the task, taking no time to complete

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323 1 DHC, *supra* note 16, at 196.

324 *Id.* at 196–97.

325 *Id.* at 197.

326 *Id.*

327 *See* Letter from William Jackson to John Quincy Adams (Oct. 21, 1818), *in* Supplement, *supra* note 7, at 310 (describing an adjournment from September 14 to 17 and "no other business," then the letter and the signing occurring on September 17).

328 1 DHC, *supra* note 16, at 196–97.

329 Acts and Proceedings, *supra* note 14, at 389.

330 Voting Record, *supra* note 267, at 10.

the records. Like other members, Washington was determined to leave town.

At the outset of the Convention, publication had been a possibility.[331] No vote was ever recorded in the Convention about publication. The Secretary's journal would have accommodated publication without much difficulty. Nothing barred the members from talking about the proceedings. Dr. McHenry recorded on the final day, "Injunction of secrecy taken off."[332] Various members of the Convention were elected to serve in the ratifying conventions with the understanding that they would be able to share or communicate the ideas and decisions of the Convention.[333] Essays written during ratification directly referenced the Convention.[334] Yet to publish the journal in the days following the Convention may have made little sense. As Pauline Maier emphasizes, there was no consensus that ratification would be successful and the "Constitution's prospects could easily unravel."[335] If the Constitution itself could not be ratified, who would care about the proceedings?

Madison's notes—and only Madison's notes—depicted an explicit discussion on the relationship of the journals to ratification. King suggested they destroy the "Journals of the Convention" or deposit them with the President.[336] He feared that "bad use" would be made of them to oppose adoption of the Constitution.[337] Wilson recommended giving Washington custody. He thought that "as false suggestions may be propagated it should not be made impossible to contradict them."[338] After the Convention voted to give the papers to Washington, Madison recorded a further discussion. He initially recorded Washington's question: "[W]hether it was intended that the Journal and papers were to be kept from."[339] Madison struck those words out and composed instead a more detailed description:

> The President asked what the Convention meant should be done with the Journals &c, whether copies were to be given to members if applied for. It was Resolved nem: con: "that

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331 3 DHC, *supra* note 16, at 10 (seconding, Col. Mason added that "such a record of the opinions of members would be an obstacle to a change of them on conviction").

332 2 FARRAND'S RECORDS, *supra* note 2, at 650.

333 PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 235 (2010).

334 *See, e.g.*, THE FEDERALIST NO. 2 (John Jay).

335 MAIER, *supra* note 333, at x.

336 3 DHC, *supra* note 16, at 769.

337 *Id.*

338 *Id.*

339 *Id.* at 770.

> he retain the Journal and other papers, subject to the order of Congress, if ever formed under the Constitution."[340]

The unfinished original sentence left ambiguous from whom the records were to be kept. The second version left ambiguous the answer to whether members could make copies.

Madison's record is curious. The Secretary did not record this second vote at all. The Secretary might have seen the unanimous vote as merely confirming the first vote, that the records were not to be considered Washington's private records and Washington was not to destroy them. Madison could have become confused in rewriting his rough notes and the apparent second resolution was simply the formal version of the motion to deposit the papers with Washington. Or, perhaps, Madison could have included a second vote to clarify that the Convention had not barred a member from later making a copy of the journals.

In the late summer of 1789, Washington—now President of the United States—had charge of the records of the old Congress and the Convention. With respect to the records of the old Congress, Washington directed their transmission. In late July 1789, Charles Thomson resigned and gave the records to Washington.[341] As a technical matter, the "books records and papers of the late Congress" were transmitted to Roger Alden, the former deputy secretary of Congress.[342] On September 15, 1789, Congress made the Department of State the depository for the records.[343] John Jay apparently held over in his old office until the spring of 1790.[344] Thomas Jefferson then became the first Secretary of State; Edmund Randolph the second. The two men controlled the office until August 1795.[345] Washington did not turn the Convention records over to them.

Wherever Washington kept the records and regardless of what Madison believed about permissible copies, in the fall of 1789,

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340 *Id.* at 770 (Madison added "having" before asked, struck "was" after asked, and replaced "given" with "allowed.")

341 Carl L. Lokke, *The Continental Congress Papers: Their History, 1789–1952*, 51 NAT'L ARCHIVES ACCESSIONS 1 (1954).

342 EDMUND CODY BURNETT, THE CONTINENTAL CONGRESS 726 (1941). In 1803, John Dickinson sent the original papers from the Annapolis Convention to Jefferson as Chief Executive to be deposited in the public office. *See* Wehmann, *supra* note 54, at 102.

343 *See* Andrew H. Allen, *Memorandum on the Acquisition and Preservation of the Historical Archives*, *in* LETTER FROM THE SECRETARY OF STATE, S. DOC. NO. 53–22, at 8 (1894); Lokke, *supra* note 341, at 1.

344 Myers, *supra* note 279, at 222.

345 GRAHAM H. STUART, THE DEPARTMENT OF STATE: A HISTORY OF ITS ORGANIZATION, PROCEDURE, AND PERSONNEL 14–28 (1949).

Madison copied the journal of the Convention and the journal of the Committee of the Whole.[346] When Madison copied the journal, he placed the minutes of the Committee of the Whole House within each day's proceeding. Because neither Madison nor Washington openly acknowledged the existence of Madison's copy, we do not know how Madison gained access.[347] We do not know who knew of the copy—perhaps Madison never even told Jefferson. Only in 1930, after Charles Roy Keller and George Pierson wrote their extraordinary account, did scholars realize Madison had early access to the official journals.[348] Madison repeatedly trusted the journals over the version he had in his own notes. After 1789, Madison altered his Convention notes to conform more precisely to the journals.

In addition to Madison's copy, a clerk of the Secretary of Congress copied the delegates' credentials, likely in 1789. Jackson never inserted a copy of the credentials into the journal. He recorded that the credentials were read as the delegates arrived. He then noted "here insert the credentials . . . ."[349] The original credentials presented by the delegates were not deposited by Washington in 1796. They are not known to be extant. A copy of the credentials, however, appears in a record created by Benjamin Bankson, a clerk in the office of the Secretary of Congress.[350] *Bankson's Journal* is the source for subse-

346 On Madison's copy of the journal, see Charles Roy Keller & George Wilson Pierson, *A New Madison Manuscript Relating to the Federal Convention of 1787*, 36 AM. HIST. REV. 17 (1930). Although I am uncertain, he seems not to have copied the voting tallies. Certainly no record in Madison's hand is known to be extant. After the Adams edition appeared with the vote tallies incorporated, Madison amended his notes to make them correspond to the votes in the Adams edition or to note divergences from the printed journal. *See id.* at 27.

347 Madison referred obliquely to "my extract" from the "original journal" in a letter to Adams questioning the assignment of a motion on September 7 to Madison instead of Mason. Letter from James Madison to John Quincy Adams (June 13, 1820), *in* 3 FARRAND'S RECORDS, *supra* note 2, at 445.

348 When Farrand compiled the *Records* in 1911, he did not know of the copy's existence. *See* SUPPLEMENT, *supra* note 7, at 12. The author's forthcoming book discusses the implications of this fact.

349 1 DHC, *supra* note 16, at 50 (May 28, 1787).

350 RATIFICATION OF THE CONSTITUTION ("BANKSON'S JOURNAL") 1786–91, Roll 10, Target 17 (Nat'l Archives & Records Admin.) *available at* http://www.fold3.com/image/#1—9265327 [hereinafter BANKSON'S JOURNAL]. On the record, *see* 1 DHRC, *supra* note 42, at 195. The *DHRC* volumes reprint the appointments from state records. Volume 1 of the *DHC* appears to reprint the first sections of *Bankson's Journal*, including the narrative explanations. *See, e.g.*, 1 DHC, *supra* note 16, at 6 (The paragraph including "The foregoing Letter . . ." appears in *Bankson's Journal*). The credentials do not seem to appear in the microfilm version of *Bankson's Journal*. Pages 2–43 are missing. For reference, see BANKSON'S JOURNAL, *supra*, at 5. The first section of *Bankson's Journal* containing the record of the Annapolis Convention is separately numbered from the section beginning with the February 21, 1787 congressional resolution; however, it was written to be incorporated with the section beginning page 1 (as shown by the carry

quent printings of the credentials.[351] *Bankson's Journal* seems to have been created in the late fall of 1789.[352] If the credentials copied by Bankson were the official ones deposited at the Convention, Washington may have transmitted the credentials to Congress. If the credentials used by Bankson belonged to the Convention, they were never returned to the official records.[353]

Meanwhile, between 1789 and 1796, Congress and the Washington administration repeatedly struggled with the sheer number of interpretive problems raised by the Constitution and the establishment of the new government.[354] Bernard Bailyn explains, "[T]he whole thing was merely words on paper until implemented by Washington's government."[355] Various members of the Convention were elected to Congress. Various interpretative strategies were advanced in early congressional sessions.[356] Twelve amendments to the just-ratified Constitution were passed and sent out in turn for ratification. Unlike the Constitution, not all would achieve success. The first two failed to garner a sufficient number of state votes.[357] As Gordon Wood comments, "most Americans promptly forgot about the first ten amendments to the Constitution."[358]

At the end of 1789, Thomas Jefferson returned from France having missed the Convention and the ratification process. In 1791, he

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reference at bottom of page [iv] (referring to the following page)). The writing towards the end of the journal is different. *See id.* at 199 (page 199 as numbered in the manuscript is labeled in the fold 3 microfilm as page 159 of the film).

351 The Adams edition did not note where it took the copy from but presumably it was *Bankson's Journal*. For discussion of credentials, see 1 DHRC, *supra* note 42, at 195.

352 *See* BANKSON'S JOURNAL, *supra* note 350, at 186. A change in the manuscript seems to appear around or before the North Carolina ratification in November 1789 and the Rhode Island ratification in 1790.

353 *See generally* BANKSON'S JOURNAL, *supra* note 350. The handwritten journal began with the Annapolis Proceedings and then included the congressional responses, the Constitution, the September 17 request to submit for ratification and order for execution of the Constitution, the letter to Congress from Washington, the ratifications, Congress's report on the ratifications in September 13, 1788, the Rhode Island ratification, the first twelve amendments, and the ratification of those amendments through 1791. *Id.*

354 *See* RAKOVE, *supra* note 256, at 347–65.

355 BERNARD BAILYN, TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS 106 (2003).

356 *See* Donald O. Dewey, *James Madison Helps Clio Interpret the Constitution*, 15 AM. J. LEGAL HIST. 38 (1971); Kent Greenfield, *Original Penumbras: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79 (1993); H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949 (1993); Louis J. Sirico, Jr., *Original Intent in the First Congress,* 71 MO. L. REV. 687 (2006).

357 GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 69 n.55 (2009).

358 *Id.* at 72.

joined Madison in the famous clash with Alexander Hamilton over the creation of a national bank.[359] Textual arguments about constitutional power were among a broad array of arguments about the national bank. Professor Jefferson Powell explains that "constitutional discussion . . . was richly infused with moral, political, and prudential considerations, considerations that were treated as equally integral to the task of interpreting a constitution as reasoning from its text."[360] Although this Part focuses on the arguments that alluded to the written record, these arguments were never the sole arguments advanced on either side.

In the House, Madison led the opposition against the bank bill passed at the end of January in the Senate.[361] Madison's arguments on February 2 against the bank were numerous and wide ranging. As reported, Madison's speech contained caveats, often significantly undercutting his construction. He argued against "latitude of interpretation."[362] Then he declared: "It is not pretended that every insertion or omission in the constitution is the effect of systematic attention. This is not the character of any human work, particularly the work of a body of men."[363]

Madison cited the history of the Convention: "His impression might perhaps be the stronger, because he well recollected that a power to grant charters of incorporation had been proposed in the general convention and rejected."[364] The credibility of his recollection relied on the memory of former Convention members in Congress about his notetaking. He did not refer explicitly to his notes or offer to read them. Instead, he turned to the ratifications process and "read sundry passages from the debates of the Pennsylvania, Virginia and North-Carolina conventions."[365] Madison, however,

> did not undertake to vouch for the accuracy or authenticity of the publications which he quoted—he thought it probable

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359 *See* H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 21–29 (2002); Benjamin B. Klubes, *The First Federal Congress and the First National Bank: A Case Study in Constitutional Interpretation*, 10 J. EARLY REPUBLIC 19, 19, 21–22 (1990); Colleen A. Sheehan, *Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion*, 98 AM. POL. SCI. REV. 405, 405–06 (2004).

360 POWELL, *supra* note 359, at 11.

361 *See* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 39 (M. St. Clair Clarke & D.A. Hall eds., Augustus M. Kelley 1967) (1832) [hereinafter HISTORY OF THE BANK].

362 13 PAPERS OF JAMES MADISON, *supra* note 63, at 378.

363 *Id.*

364 *Id.* at 374.

365 *Id.* at 380.

> that the sentiments delivered might in many instances have been mistaken, or imperfectly noted; but the complexion of the whole, with what he himself and many others must recollect, fully justified the use he had made of them.[366]

Madison's argument—and Madison himself—were strongly rebutted.[367] Elbridge Gerry rejected Madison's memory of the Convention. Gerry explained that "memories of different gentlemen" differed.[368] He declared that "no motion" had been made and "therefore none could be rejected."[369] Gerry described the proposition at the Convention as one to "enable Congress to erect *commercial* corporations."[370] Turning to the ratification conventions, Gerry explained that these journals were "partial and mutilated" and "more on one side of the question."[371] Of particular annoyance to certain members was Madison's apparent hypocrisy. Gerry described how Madison had made the opposite interpretive arguments in the summer of 1789 in debates over the Constitution and presidential appointment power.[372] Madison lost, 39–20.[373]

Washington requested opinions from his Secretary of State (Jefferson), his Attorney General (Randolph), and his Secretary of Treasury (Hamilton). The three had differing perspectives on the Convention. Jefferson, of course, had not been present.[374] Randolph had refused to sign on the last day.[375] Hamilton had served on the final September 12 Committee of Revision and Arrangement.[376] The three men took the assignment seriously. They all prepared lengthy private memoranda to Washington.

Intriguingly, the four men had various degrees of intimacy with Madison's notes. By 1791, Jefferson knew of Madison's notes; later

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366 *Id.*

367 *See, e.g.*, HISTORY OF THE BANK, *supra* note 361, at 45 (Fisher Ames on Madison); *id.* at 50 (Theodore Sedgwick on Madison); *id.* at 53 (Lawrence on Madison); *id.* at 63 (Smith on Madison); *id.* at 81 (Vining on Madison).

368 *Id.* at 79; 3 FARRAND'S RECORDS, *supra* note 2, at xx (Elbridge Gerry in the house of representatives on Feb. 7, 1791).

369 *Id.* at 80.

370 *See id.* at 75–80.

371 *See id.* at 80.

372 *See id.* at 79.

373 *Id.* at 85 (February 8, 1791 vote tally including former members of the Convention on both sides).

374 POWELL, *supra* note 359, at 16.

375 BROOKHISER, *supra* note 69, at 62.

376 2 FARRAND'S RECORDS, *supra* note 2, at 585.

that year he may have had a private copy made of them.[377] He alone, however, had no way to judge the notes' accuracy. Randolph knew that Madison had been revising and reconstructing his notes. He knew they were significantly incomplete. In August 1789, Madison had written to obtain Randolph's introductory speech at the Convention because the notes were insufficient.[378] Hamilton might have seen the notes or learned of their state of incompletion when he worked with Madison to coauthor *The Federalist* essays in New York City.[379] Lastly, unless Madison copied the journals without Washington's knowledge, the President himself knew Madison had a private copy of the journals. Washington may have suspected that Madison's notes were less than complete.

Jefferson's memorandum explicitly relied on the Convention history to argue that the United States did not have the powers under the Constitution for the incorporation.[380] To support his point, he referred to the Convention. "It is known that the very power now proposed *as a means* was rejected *as an end* by the Convention . . . ."[381] He referred to the procedural history: "A proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected . . . ."[382] Jefferson continued, "[O]ne of the reasons of rejection urged in debate was, that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject adverse to the reception of the Constitution."[383]

Jefferson had not been at the Convention and his summary thus required a source. Jefferson's summary could not have been drawn from an official record. The official journal (in Washington's possession) stated nothing about any proposition on September 14. It summarized only that the "report from the Committee of revision . . . was

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377 SUPPLEMENT, *supra* note 7, at xxiii–xxiv (describing copy made by John Wayles Eppes sometime after the spring of 1791).

378 *See* Letter from James Madison to Edmund Randolph, 12 PAPERS OF JAMES MADISON, *supra* note 63, at 348–49.

379 *See* THE FEDERALIST NOS. 11, 12, 16, 30; Editors' Note to Publius, THE FEDERALIST NO. 1; 13 DHRC, *supra* note 42, at 486–89. The edition of Madison's notes published after his death contained a footnote indicating that Hamilton had looked over at least his speech in the notes. *See* 2 THE PAPERS OF JAMES MADISON, *supra* note 63, at 892–93 (note to speech of Alexander Hamilton on June 18, 1787).

380 *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), *in* 19 PAPERS OF THOMAS JEFFERSON, *supra* note 110, at 275–82.

381 *Id.* at 277.

382 *Id.*

383 *Id.* at 277–78.

read, debated by paragraphs, amended, and agreed to."[384] The separate vote tallies included a question "[t]o grant letters of incorporation for Canals &c."[385] The vote had lost 3–8.[386] The next vote—also lost—was to "establish an University."[387] The records at best showed a vote had occurred but offered no explanation or interpretation.

Washington likely guessed that Jefferson had relied on Madison's notes. Indeed, Madison's notes contained a rather lengthy discussion of the issue. According to Madison's notes, it had been Madison who had suggested a power to grant charters of incorporation.[388]

Madison's notes, however, were considerably more ambiguous than Jefferson's summary. King "thought the power unnecessary"—but without further explanation.[389] Wilson thought the *states* would need to be prevented from obstructing general welfare.[390] King suggested that people in Philadelphia and New York would think the issue was to "refer[ ] to the establishment of a Bank"—a "subject of contention" there.[391] He noted, however, that others would assume it involved "mercantile monopolies."[392] Wilson disagreed with King. Mason in turn disagreed with Wilson, whose views he characterized as supposing that "monopolies of every sort" were "already implied by the Constitution."[393] Further down the page, when Madison moved to "establish an University, in which no preferences or distinctions should be allowed on account of religion," Morris argued: "It is not necessary. The exclusive power at the Seat of Government, will reach the object."[394] In reading Madison's notes, Jefferson had been highly selective in choosing the argument that supported his interpretation and ignoring contrary comments.

The Attorney General, Edmund Randolph, steered a "middle position" and cautioned against overreliance on remembered history.[395] He suggested that the use of the history of the Convention was a "mi-

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384 1 DHC, *supra* note 16, at 196–97.

385 *Id.* at 228.

386 *Id.*

387 *Id.*

388 3 DHC, *supra* note 16, at 744.

389 *Id.* at 745. McHenry's notes contain the same two votes. *See Documents: Papers of Dr. James McHenry on the Federal Convention of 1787*, *supra* note 223, at 616–17.

390 3 DHC, *supra* note 16, at 745.

391 *Id.*

392 *Id.*

393 *Id.*

394 *Id.* at 745–46.

395 *See* Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 119, 121–30 (1994).

nor class of arguments."[396] He did not assume the history to be necessarily illegitimate but asked awkwardly: "But ought not the Constitution to be decided on by the import of its own expressions?"[397] Randolph then alluded to the problem of the written record. "What may not be the consequence if an almost unknown history should govern the construction?"[398] "Almost unknown" neatly captured the claims of memory and Madison's private notes.

For Hamilton, the arguments against the bill were part of a larger concern. Repeatedly in his first paragraph, he emphasized the arguments of the Secretary of State and Attorney General.[399] The "principles of construction like those espoused" by Jefferson and Randolph "would be fatal to the just & indispensible authority of the United States."[400] The sentence hinted at the irony of constructions advocated by a man not present during the adoption of the Constitution and one who refused to sign. With frustration, Hamilton protested that "[i]magination appears to have been unusually busy" constructing a "strange fallacy" that "an incorporation" was a "great, independent, substantive thing."[401]

Amid the lengthy responses to every argument, Hamilton addressed the history of the Convention. Hamilton seems to have examined the official records. He stated: "As far as any such document exists, it specifies only canals."[402] The fact appeared on the vote tallies.[403] Wherever the vote tallies were in 1791, Hamilton appears to have had access to them. Hamilton emphasized that no "authentic document" explained the "precise nature or extent of this proposition,

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396 *Id.* at 121.

397 *Id.* at 129.

398 *Id.*

399 Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, *in* 8 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 54, at 97.

400 *Id.*

401 *Id.* at 101.

402 *Id.* at 110. Hamilton offered an interpretation of that fact alone:

> If this was the amount of it, it would at most only prove, that it was thought inexpedient to give a power to incorporate for the purpose of opening canals, for which purpose a special power would have been necessary; except with regard to the Western Territory, there being nothing in any part of the constitution respecting the regulation of canals.

Id. at 110–11. He concluded, "If then a power to erect a corporation, in any case, be deducible by fair inference from the whole or any part of the numerous provisions of the constitution of the United States, arguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected." *Id.* at 111.

403 *See supra* note 385 and accompanying text.

or what the reasons for refusing it."[404] "Authentic" emphasized the distinction between the official records and Madison's notes. "[A]ccurate recollection" also did not support Jefferson's interpretation.[405]

Hamilton also seems to have talked to former Convention members. He explained that "very different accounts are given of the import of the proposition and of the motives for rejecting it."[406] He summarized the variety of opinions:

> Some affirm that it was confined to the opening of canals and obstructions in rivers; others, that it embraced banks; and others, that it extended to the power of incorporating generally. Some again alledge, that it was disagreed to, because it was thought improper to vest in Congress a power of erecting corporations—others, because it was thought unnecessary to *specify* the power, and inexpedient to furnish an additional topic of objection to the constitution.[407]

Hamilton concluded: "In this state of the matter, no inference whatever can be drawn from it."[408]

Turning to the relationship of text and intent, Hamilton suggested that "intention is to be sought for in the instrument itself, according to the usual & established rules of construction."[409] He then promptly followed that sentence by emphasizing, "Nothing is more common than for laws to *express* and *effect*, more or less than was intended."[410] Hamilton did not believe that the constitutional power could be interpreted legitimately as narrowly and strictly as Jefferson insisted.

What did Washington conclude from the conflicting memoranda? Washington had been at the Convention. He presumably had his own opinion about the debate of September 14.

For Washington, the three memoranda showed that ingenious, intelligent men could make the text of the Constitution lead to contradictory conclusions. Jefferson's memorandum reflected a theoretical interpretation freed from the constraints of experience with the historical framing and ratification. The authentic documents contained just enough information to open the door to imagination. Randolph's memorandum warned of the "almost unknown," of claims based in

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404 *Id.* at 110.

405 *Id.*

406 *Id.* at 111.

407 *Id.*

408 *Id.*

409 *Id.*

410 *Id.*

ambiguous historical memory. Hamilton's memorandum pointed to the reality that, less than four years after the Convention, the members had different explanations of the purpose of the text and the significance of the vote. Yet, as Washington may have realized, Jefferson's selective description of the true "reasons" threatened seductively to overwhelm the reality of historical uncertainty. Moreover, Jefferson's memoranda made clear that he was willing to use Madison's notes for strategic, political purposes.

Four years later, Washington remembered the threat.[411] By 1795, Jefferson and Madison had become leaders of the opposition to the Washington administration. In June 1795, the Senate had passed the Jay Treaty.[412] The debates had been conducted behind closed doors, the norm for the Senate, which would not open its doors until the end of that year.[413] In August, despite publicity against the treaty (which had been leaked), Washington signed the treaty.[414] Washington, however, needed the House to fund various commissions established by the treaty.[415] He waited until March 1796.[416] Madison and allies advanced a seemingly endless set of arguments designed to counter the treaty.[417] After a protracted fight in the newspapers and House floor, the House voted in favor at the end of April 1796.[418]

In the surrounding debate, Madison and Hamilton made use of arguments about the Convention for opposite conclusions. At the beginning of January 1796, Hamilton published two essays under the pen name Camillus to support the treaty. Hamilton responded to contrary arguments based on "pretended interference with the power of Con-

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411 *See* STUART LEIBIGER, FOUNDING FRIENDSHIP: GEORGE WASHINGTON, JAMES MADISON, AND THE CREATION OF THE AMERICAN REPUBLIC 197–214 (1999) (describing the Washington-Madison relationship during this period).

412 JERALD A. COMBS, THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS 160–61 (1970); TODD ESTES, THE JAY TREATY DEBATE, PUBLIC OPINION, AND THE EVOLUTION OF EARLY AMERICAN POLITICAL CULTURE 2 (2006).

413 ESTES, *supra* note 412, at 2.

414 *Id.* at 3.

415 *Id.*

416 *Id.*

417 *See id.* at 104–26. As a technical matter, the argument involved whether Washington had to give to Congress papers relating to the instructions and negotiations by Jay. *Id.* at 110–12. But the issue raised the larger contention relating to the House's role with respect to the validity and execution of treaties. *See id.* at 110–16. Hamilton's response apparently came after Washington had already decided on a course of action. *See id.* at 116–26. Hamilton and Ellsworth both recommended against turning over the papers. *See id.*

418 *Id.* at 104–26 (discussing the rhetorical debates over the Treaty). This summary is drawn from Estes's excellent overview.

gress."[419] Among lengthy arguments based on public policy and practice, Hamilton argued that his understanding had been shared by the Convention and the "people in adopting it."[420] He noted that he could not have "any formal proof of the opinions and views which prevailed in digesting the power of treaty."[421] However, "from the *best opportunity of knowing the fact*," he argued it "was understood *by all* to be the intent of the provision to give to that power the most ample latitude."[422] He "appeal[ed] . . . with confidence to every member of the Convention—particularly to those in the two houses of Congress."[423] He named Madison and Baldwin. He added, to "suppose them capable of such a denial were to suppose them utterly regardless of truth."[424]

Washington took no risk that Madison and Jefferson might suddenly publish Madison's notes to prove their "denial." On March 19, Washington deposited the official records with Secretary of State, Timothy Pickering.[425] Pickering's receipt carefully described every piece of paper.[426] He noted that a page near the end of the journal had come loose.[427] Pickering's receipt attempted to forestall any accusations of manipulation of the records.

On March 30, 1796, Washington wrote a message to Congress to explain his reluctance to turn over papers relating to the treaty.[428] Todd Estes declares it a "command performance."[429] Washington

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419 *The Defence No. XXXVII* (Jan. 6, 1796), *in* 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 54, at 13. Hamilton noted that "direct proof of the views of the Convention on the point cannot be produced." *The Defence No. XXXVIII* (Jan. 9, 1796), *in* PAPERS OF ALEXANDER HAMILTON, *supra* note 54, at 22.

420 *The Defence No. XXXVIII* (Jan. 9, 1796), *in* PAPERS OF ALEXANDER HAMILTON, *supra* note 54, at 22.

421 *Id.*

422 *Id.*

423 *Id.*

424 *Id.* at 23.

425 3 FARRAND'S RECORDS, *supra* note 2, at 370.

426 *Id.*

427 *Id.*

428 *See* Letter from George Washington to the House of Representatives of the United States (March 30, 1796), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 194–96 (James D. Richardson ed., 1896) [hereinafter COMPILATION]. Although Madison was convinced that Hamilton was behind the speech, Washington received Hamilton's arguments after having already decided on a course of action. Washington knew, of course, of Hamilton's general opinion, but certain aspects of the speech seem to have been most likely the product of Washington's own instinct.

429 ESTES, *supra* note 412, at 156; *see also* GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 175–78 (1993); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 242–44 (2005); Todd Estes, *The Art*

noted that he had "been a member of the General Convention, and knowing the principles on which the Constitution was formed," he had long "entertained but one opinion on this subject."[430] The "power of making treaties is exclusively vested in the President" with advice and consent of the Senate and a treaty thus promulgated was the law.[431] Washington offered an array of arguments about the understanding of foreign nations, the prior practice of the House, the state ratifying conventions, and the "plain letter of the Constitution itself."[432]

Washington turned to the official records, now accessible as evidence. If "other proofs" were necessary of Washington's position, they existed in "the journals of the General Convention."[433] Washington cited the August 23, 1787 vote.[434] The proposition was made and "explicitly rejected" that "no treaty should be binding on the United States which was not ratified by a law."[435] The suggested amendment lost by eight noes, one aye, and one divided vote.[436]

The vote appeared to represent rejection of Madison's position. As Stuart Leibiger notes, Washington's argument "challenged" Madison's credibility.[437] At the time, Fisher Ames wrote that Madison was "irrevocably disgraced, as a man void of sincerity and fairness."[438]

Four days later, Madison wrote Jefferson.[439] "If you do not at once perceive the drift of the appeal to the Genl. Convention & its journal, recollect one of Camillus's last numbers, & read the latter

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of Presidential Leadership: George Washington and the Jay Treaty, 109 VA. MAG. HIST. & BIOGRAPHY 127, 151 (2001); Quincy Wright, *The Constitutionality of Treaties*, 13 AM. J. INT'L L. 242, 242 n.3 (1919). For the vote, see 2 FARRAND'S RECORDS, *supra* note 2, 282–83, 392. At the end of the entry for August 23, Madison suggests the interpretation that he later advanced. *Id.* at 393–94. On September 7, Madison included an argument from Wilson to add the House of Representatives and the sentence "As treaties he said are to have the operation of laws, they ought to have the sanction of laws also." *Id.* at 538.

430 Message to the House of Representatives (March 30, 1796), *in* 1 COMPILATION, *supra* note 428, at 195.

431 *Id.*

432 *Id.* at 195–96.

433 *Id.* at 196.

434 *Id.*

435 *Id.*

436 2 FARRAND'S RECORDS, *supra* note 2, at 383.

437 LEIBIGER, *supra* note 411, at 204.

438 Letter from Fisher Ames to George Richard Minot (Apr. 2, 1796), *in* 2 WORKS OF FISHER AMES 1140 (W.B. Allen ed., 1983).

439 Letter from James Madison to Thomas Jefferson (Apr. 4, 1796), *in* 16 PAPERS OF JAMES MADISON, *supra* note 63, at 285. He wrote Jefferson that the refusal was "unexpected." *Id.* at 286. The contention feels somewhat disingenuous and based on Madison's description of an "absolute refusal." *Id.* Madison had attempted in Congress to amend the call for the papers to permit Washington discretion.

part of Murray's Speech."[440] Madison considered Washington's "quotation" from the records "nothing to the purpose."[441] Madison, however, did not elaborate. Madison went on to suggest that Washington's actions were ultra vires.[442] He wrote that the "Journal of the Convention was by a vote deposited with the P. to be kept sacred until called for by some competent authority."[443] He asked, "How can this be reconciled with the use he has made of it?"[444]

Madison asked Jefferson to send whatever Madison had written in his convention notes "on the subject."[445] Jefferson dutifully looked up the final page of Madison's notes.[446] Jefferson had no independent knowledge of the Convention's charge to Washington. Madison's request thus served to ensure that Jefferson believed Madison's claim that Washington (implicitly at Hamilton's urging) had acted extralegally in depositing the records.[447] Jefferson copied the final pages of the "Conventional history" and sent it back to Madison.[448]

Madison's behavior here is peculiar. There appears to be no record of any other complaints about Washington's deposit of the records. Madison did not make the claim in public. Moreover, Madison had made a copy of the journals—an act contradictory to his contention that Washington was required to hold them "sacred." In fact, if Madison had publicly contested Washington's action, Washington could have revealed Madison's copy of the journals. If Madison had kept his copy's existence secret from Jefferson, the revelation could have proved fatal to that relationship.

Madison was trapped. On April 6, 1796, he walked into the House and gave a speech designed to draw attention away from the official records.[449] Madison explained that "he had not a single note in

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440 *Id.* at 286.

441 *Id.*

442 *See id.*

443 *Id.*

444 *Id.*

445 *Id.*

446 Letter from Thomas Jefferson to James Madison (Apr. 17, 1796), *in* 16 PAPERS OF JAMES MADISON, *supra* note 63, at 328–29 (enclosing extract from the next to last page and last page of Madison's notes).

447 *See* Letter from James Madison to Thomas Jefferson (Apr. 4, 1796), *in* 16 PAPERS OF JAMES MADISON, *supra* note 63, at 286, 287 n.5; *see also* Letter from Thomas Jefferson to James Madison (Apr. 17, 1796), *in* 16 PAPERS OF JAMES MADISON, *supra* note 63, at 328 (writing that according to the records Madison requested, Washington's recollection in the March 30 address was inaccurate).

448 Letter from Thomas Jefferson to James Madison (Apr. 17, 1796), *in* 16 PAPERS OF JAMES MADISON, *supra* note 63, at 329–30.

449 Madison's Speech (April 6, 1796), *in* 16 PAPERS OF JAMES MADISON, *supra* note 63, at

this place, to assist his memory."[450] The phrase "in this place" alluded to his evidently rather well-known notes back in Virginia. Madison flipped every argument that he and Jefferson had made in 1791 about historical recollections. He now suggested that it was not appropriate to testify to "their own ideas at that period" or the "intention of the whole body: many members of which, too had probably never entered into the discussions of the subject."[451] He added that the "sense" of the Constitution appeared to differ among members of the Convention with respect to the treaty.[452] Madison even noted that when he had made a comment about the Convention in 1791 during the bank debate, Gerry had opposed the argument as inappropriate.[453] Unlike the 1791 debate, Washington's reference to the vote in the journal seemed rather on point. Madison acknowledged the journal vote was "more precise" than debates or memory.[454] But Madison asked, "[W]hat did this abstract vote amount to?"[455] In a not entirely comprehensible argument, he attempted to explain away the vote as reflecting a belief about peace treaties rather than all treaties and a technical meaning of the concept, "to ratify."

Seeming to feel himself on shaky ground, Madison quickly switched to argue that the more legitimate meaning of the Constitution was drawn from the ratification conventions.[456] Madison knew how few records existed for these conventions, and he alluded only generally to three of them.[457] In 1791, he had cited to them and emphasized their inaccuracies. Now he did not even bother to read from them, explaining that they were quite possibly inaccurate.[458] He turned instead to a record that seemed more precise: the proposed amendments from the ratifying conventions to Congress.[459] Madison argued that the amendments proposed from Virginia suggested the limited nature of treaty-making power.[460] He pointed to several other proposed amendments that he read to suggest something other than

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290–301. For Madison's notes on his speech, see http://memory.loc.gov/master/mss/mjm/06/0200/0292d.jpg.

450 *Id.* at 294.

451 *Id*.

452 *Id.*

453 *Id.* at 294–95.

454 *Id.* at 295.

455 *Id.*

456 *Id.* at 296.

457 *Id.*

458 *Id.*

459 *Id.* at 296–97.

460 *Id.* at 297.

"absolute and unlimited power" in the President through the treaty clauses.[461]

Madison, of course, knew that the state conventions had sent amendments that were recommendatory and nonbinding.[462] In 1789, Madison had read over the numerous recommended amendments in drafting his proposed amendments to the Constitution.[463] Madison had likely relied on the 1788 printed collection of amendments by Augustine Davis, of which he had a copy.[464] It is uncertain how well known the collection was. The only other extant record of the recommendatory amendments appears to have been in *Bankson's Journal* in the congressional records.[465] For many members, the reference to a few recommendatory amendments was a nod to a forgotten, possibly even unknown, history.

Behind the public declarations, the four men were struggling for control of the history of the Constitution. By depositing the records in the Secretary of State's office—notably after Jefferson had left the office—Washington placed the records into a place of permanent physical safety. Several years later, in 1799, the year of Washington's death, Jefferson urged Madison to publish his "debates of the Convention."[466] Jefferson was not alone in this desire; an undisclosed "society of members" shared this "most anxious desire."[467] If published, the Constitution would "receive a different explanation."[468] Madison demurred: "[T]he whole volume ought to be examined with an eye to the use of which every part is susceptible."[469] Madison predicted that "[other] reports of the proceedings . . . would perhaps be made out &

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461 *Id.* at 297–99.

462 *See* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OR RIGHTS 191 (2006).

463 *Id.* at 199.

464 THE RATIFICATIONS OF THE NEW FEDERAL CONSTITUTION, TOGETHER WITH THE AMENDMENTS, PROPOSED BY THE SEVERAL STATES (Richmond, Aug. Davis 1788). My gratitude to John Kaminski for his expertise on this point. The *American Museum* had printed the ratification forms as they had been passed by the states. *See* 8 NYPL BULLETIN 111–15. Madison sent a copy to Jefferson. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 121 PAPERS OF JAMES MADISON, *supra* note 63, at 295, 297, 300 n.2.

465 *See* note 350 and accompanying text.

466 Letter from Thomas Jefferson to James Madison (Jan. 16, 1799), *in* 17 PAPERS OF JAMES MADISON, *supra* note 63, at 208, 210.

467 *Id.*

468 *Id.* at 210.

469 Letter from James Madison to Thomas Jefferson (Feb. 8, 1799), *in* 17 PAPERS OF JAMES MADISON, *supra* note 63, at 229–30.

mustered for the occasion."[470] He explained, "[I]t is a problem what turn might be given to the impression on the public mind."[471]

Madison's concern was not a commitment to posthumous publication. Madison knew that the various written records and numerous still living memories would testify to competing and contradictory accounts. Unlike Jefferson, who was persuaded of the validity of his own approach to the Constitution, Madison was not at all certain that his version would prove most persuasive to the public mind.

In fact, not one of the succeeding presidents—Adams, Jefferson, or Madison—chose to print the official records of the Convention. Only after William Plumer and William Plumer, Jr. of New Hampshire wrote requesting to make a copy for publication did the Monroe administration pursue the effort.[472] In 1817, Adams asked Madison whether the records should be published. Madison cagily answered that he could not "take the same abstract view of the subject."[473] Congress went ahead with the plan. The official records finally appeared in a print publication in 1819. For the remainder of the nineteenth century, the manuscripts remained in the State Department, apparently in "the little red trunk" ironically alleged to have been given by Thomas Jefferson.[474]

A Cautionary Conclusion

What lessons do the official records teach? No doubt many readers with varying approaches to contemporary interpretation of the Constitution will draw their own conclusions. I conclude with three final thoughts.

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470 *Id.* at 229.

471 *Id.*

472 Letter from John Quincy Adams to James Madison (Dec. 15, 1817), *in* 6 Writings of John Quincy Adams 271 (W.C. Ford. ed., 1913); Letter from James Madison to John Quincy Adams (Dec. 23, 1817), *in* 3 Papers of James Madison, *supra* note 63, at 52–53; Letter from John Quincy Adams to William Plumer (July 6, 1818), *in* 6 Writings of John Quincy Adams, *supra*, at 380–81. While serving in the Senate, William Plumer had gathered "a great many documents" from Congress from 1774 onward to rescue them from "inevitable ruin." William Plumer, William Plumer's Memorandum of Proceedings in the United States Senate, 1803–1807, at 537–39 (Everett S. Brown ed., 1923). The elder Plumer was involved in the Dartmouth College case and "slow to believe" that the constitutional clause had been intended to apply. William Plumer, Life of William Plumer 460 (1856).

473 Letter from James Madison to John Quincy Adams (Dec. 23, 1817), *in* 3 Letters & Other Writings of James Madison, 1816–1828, 52 (New York, R. Worthington 1884) (describing final Convention votes on subject).

474 Friedenwald, *supra* note 34, at 107.

We should be more cautious about our use of Max Farrand's 1911 records. The chronological arrangement of Farrand's records remains indispensable. Farrand's substantive conclusions, however, should be approached more warily. The most useful contribution that Farrand made was one of arrangement. Many of the records had been printed before.[475] Perhaps because of the reality of his valuable but more modest contribution, or perhaps because he had become enamored with Madison's extraordinary record, Farrand could not help but criticize the official records. He praised Madison's notes for being "our first rational narrative."[476] But a "rational narrative" may be precisely what the records of the Convention make impossible.

We should pay more attention to the parliamentary and procedural context of the Convention. The Convention was not a legislature, although it borrowed legislative procedures; nor was it a settled type of proceeding with different rules. Not everything could be said; not everything could be written down. Only certain kinds of amendments were permitted. The types of permissible arguments differed at the various stages. Discussions in the Committee of the Whole were meaningfully different from debates in the Convention. Arguments over propositions differed from disputes over draft reports. Issues dealt with by the committees sent to reach political compromises represented something other than expressions of political theory. Discussions after August 6, 1787 are qualitatively distinct from those after September 12, 1787. The 1787 constitution is not a poem, a statute, or even a modern constitution. It is a series of words, structures, votes, compromises, and alterations *done in Convention*.

Lastly, we should remember that the members at the Convention created the Constitution without solving or even having to think extensively about the problem of constitutional interpretation. Constitutional interpretation postdated the Constitution. The Convention left open the Constitution's relationship to the written record of creation. Washington, Madison, Hamilton, Jefferson, Randolph, and every other early political leader struggled in the first decade with the proper balance among national practice, international understandings, official written records of the Convention, unofficial unwritten and written records of the Convention, official written records of ratification, unofficial written records of ratification, memory, and the text.

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475 The third volume contained many documents from the *Documentary History of the Constitution*'s incredible collection of volumes 4 and 5. *See* Gaillard Hunt, Book Review, 1 YALE REV. 144, 144 (1912) (noting reprinting of documents).

476 Farrand, *supra* note 6, at 131.

Washington's most important contribution to the Convention and the Constitution may have been his decision to deposit the official records. Secretary Jackson's lasting contribution was a set of official records sufficiently accurate to have caused problems for everyone.

So, how bad were the original records? Not perfect, but not so bad after all. Our understanding of them, however, has not been particularly good.