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The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution

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THE CASE OF THE DISHONEST SCRIVENER: GOUVERNEUR MORRIS AND THE CREATION OF THE FEDERALIST CONSTITUTION

*William Michael Treanor**

At the end of the Constitutional Convention, the delegates appointed the Committee of Style and Arrangement to bring together the textual provisions that the Convention had previously agreed to and to prepare a final constitution. Pennsylvania delegate Gouverneur Morris drafted the document for the Committee, and, with few revisions and little debate, the Convention adopted Morris's draft. For more than two hundred years, questions have been raised as to whether Morris covertly altered the text in order to advance his constitutional vision, but modern legal scholars and historians studying the Convention have either ignored the issue or concluded that Morris was an honest scrivener. No prior article has systematically compared the Committee's draft to the previously adopted resolutions or discussed the implications of those changes for constitutional law.

* Dean and Executive Vice President, Paul Regis Dean Leadership Chair, Georgetown University Law Center. Previous drafts of this article have been presented at the Annual Hugh & Hazel Darling Foundation Originalism Works-in-Progress Conference, the Second Circuit Judicial Conference, the Washington D.C. Legal Historians Roundtable, the Fordham University School of Law Conference on New Originalism, the Pew Charitable Trust Judicial Congressional Dialogue Series, the Paul Regis Dean chair installation, and the Georgetown Law faculty workshop, as well as to John Mikhail's and my class on drafting the Constitution at Georgetown and to John Feerick's constitutional history class at Fordham. Thanks to the attendees at these presentations and to Jane Aiken, Akhil Amar, Randy Barnett, Mary Bilder, Bill Buttrick, Laura Donohue, Joseph Ellis, Bill Eskridge, Dan Ernst, William Ewald, John Feerick, Francois Furstenberg, Jonathan Gienapp, Vicki Jackson, Calvin Johnson, Michael McConnell, T.J. Maloney, Maeva Marcus, John Mikhail, Henry Monaghan, Julian Mortenson, Victoria Nourse, Tim O'Neill, Richard Primus, Jack Rakove, Michael Ramsey, Michael Rappaport, Dennis Rasmussen, Robert Reinstein, John Rogan, Howard Shapiro, Larry Solum, Alison Spada, David Stewart, Seth Tillman, Amanda Tyler, David Vladeck, and Derek Webb for helpful comments. I am grateful to research assistants Francis Aul, Mark Keurian, and Justin Rattey for their excellent work, to Liz Cavender and Kelsey Levin-Epstein for their great care in preparing the manuscript, and to law librarians Andy Lang, Jenifer Davitt, Andrea Muto, and Thanh Nguyen of the Georgetown Law Library for superb support. My deepest debt of gratitude is to Allison, Katherine, and Liam Treanor for their love and support and for putting up with many years of discussion about "the Gouv."

This Article is dedicated to the late Judge Robert A. Katzmann, who was extraordinarily supportive of this project and whose comments improved it immeasurably. As a scholar and a jurist, Judge Katzmann was a preeminent authority on the use of legislative history, and, as a judge and a civic leader, he was a champion of the great values that underlie constitutional democracy. His recent passing, when he was far too young, was tragic, his legacy is great, and it is an honor to dedicate this Article to his memory.

This Article undertakes that comparison. It shows that Morris made fifteen significant changes to the Constitution and that many of the Constitution's central elements were wholly or in critical part Morris's work. Morris's changes strengthened the national executive and judiciary, provided the textual basis for judicial review, increased presidential accountability through an expansive conception of impeachment, protected private property, mandated that the census report reflect "actual enumeration," removed the constitutional text suggesting that slavery was just, and fought slavery's spread.

This Article also shows that Morris created the basis for the Federalist reading of the Constitution. Federalists—notably including fellow Committee member Alexander Hamilton—repeatedly drew on language crafted by Morris as they fought for their vision of the Constitution. Because the changes Morris made to the Convention's agreed language were subtle, both Republicans and Federalists were able to appeal to text in the great constitutional battles of the early republic. Modern originalists claim that the Republican reading reflects the original understanding of the Constitution, but this Article argues that the largely dismissed Federalist reading explains words, phrases, and punctuation that the Republican reading ignores or renders unintelligible. By contrast, the Federalist reading of the Preamble (which they saw as a grant of substantive power), the Article I and Article II Vesting Clauses (which were contrasted to argue for expansive executive power), the Article III Vesting Clause (which they read to mandate the creation of lower federal courts), the Contracts Clause (which they read to cover public as well as private contracts), the Impeachment Clause (which they read to cover both nonofficial and official acts), and the "law of the land" provision (which they construed as a basis for judicial review) gives effect to Morris's—and the Constitution's—words.

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INTRODUCTION

That instrument [the Constitution] was written by the fingers, which write this letter.

—Gouverneur Morris to Timothy Pickering¹

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

—James Madison to Jared Sparks²

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

—Max Farrand, *The Framing of the Constitution*³

After more than three months of debate—including a month debating the final draft of the Constitution—the delegates to the Constitutional Convention elected “a Committee of five to revise the style of and arrange the articles agreed to by the House.”⁴ The chair of the Committee asked delegate Gouverneur Morris to prepare a draft constitution, which Morris did over the course of three days. With limited debate and minor changes, Morris’s draft was adopted by the Convention and became the Constitution submitted to, and ratified by, the states.⁵

1. Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 419, 420 (Max Farrand ed., Yale Univ. Press rev. ed. 1966) [hereinafter FARRAND’S RECORDS].

2. Letter from James Madison to Jared Sparks (Apr. 8, 1831), in 3 FARRAND’S RECORDS, *supra* note 1, at 498, 499.

3. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 21 (1913).

4. 2 FARRAND’S RECORDS, *supra* note 1, at 547.

5. For discussion of the work of the Committee, see *infra* Section I.C. For the complete text of the Committee’s report, see Report of Committee of Style (Sept. 12, 1787), in 2 FARRAND’S RECORDS, *supra* note 1, at 590. For a photographic reproduction of the original report, see *Committee of Style Report*, AM. TREASURES, <https://constitutioncenter.org/american-treasures/committee-of-style-report/kiosk> [perma.cc/VCJ9-CX36]. In producing his record of the Convention, constitutional historian Max Farrand assembled the previously adopted provisions as they were referred to the Committee of Style. See Proceedings of Convention Referred to the Committee of Style and Arrangement [hereinafter Convention Proceedings], in 2 FARRAND’S RECORDS, *supra* note 1, at 565. The Appendix to this Article presents the text of the provisions adopted by the Convention and referred to the Committee of Style alongside the Committee’s revised text.

Largely forgotten today, Morris had been a dominant figure at the Convention. He fought for a constitutional vision that largely anticipated the Federalist agenda in the early republic: he pushed for a national government with expansive powers; he wanted a powerful executive who would be held accountable by a Congress with broad impeachment powers; he supported a strong federal judiciary, including judicial review of federal and state legislation and the creation of lower federal courts; he pressed for strong protection for private property; and he denounced slavery with more fierceness than any other delegate to the Convention.⁶

Morris's forceful views and rhetorical gifts aroused the suspicion of his contemporaries. During a House debate on the scope of the General Welfare Clause in 1798, Congressman Albert Gallatin charged Morris with deceptively (and subtly) changing the text of that clause. Gallatin accused Morris of converting a comma into a semicolon in order to convert a limitation on the taxing authority into a broad positive grant of power, but delegate Roger Sherman caught the "trick" and restored the original punctuation.⁷

Gallatin's charge has been noted by a range of modern scholars, and it has been discussed in the context of academic work on individual clauses.⁸ Yet both scholars studying the Convention and Morris's biographers have either ignored the charge or concluded that Morris was an honest scrivener.⁹ Remarkably, no scholarly work has systematically compared the provisions referred to the Committee of Style with the draft the Committee produced.

Comparison of the document Morris and the Committee produced with the text previously approved by the Convention reveals a series of crucial (if typically subtle) changes, including changes to some of the most prominent part of the Constitution. "We the People of the United States"—the opening words of the Preamble and undoubtedly the most famous phrase in the document—was the Committee's creation, as were the Preamble's substantive ends: "in Order to form a more perfect Union, establish Justice, insure domes-

6. For Morris's personal history, see *infra* Section I.B. For his views at the Convention, see *infra* Part II.

7. For Gallatin's charge, see 3 FARRAND'S RECORDS, *supra* note 1, at 379. For discussion, see *infra* Section I.D.

8. See, e.g., Akhil Reed Amar, Comment, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 286 n.25 (1987) (noting charge); David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 252–54 (1995) (General Welfare Clause); Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271, 317 n.112 (same); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 28 (2003) (same); Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291 (2002) (New States Clause); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1292 (1998) (Engagements Clause). For further discussion, see *infra* Part IV.

9. See *infra* Part IV.

tic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty" The Committee reinserted the Contract Clause into the Constitution—it had been rejected on the floor—and altered the clause's scope, providing a textual basis for it to reach public contracts. It created the familiar structure of the Constitution: Article I (legislative), Article II (executive), and Article III (judicial). It differentiated the Article I Vesting Clause from that of Article II and revised the Vesting Clauses of Articles II and III. It altered, in important (though unobvious) ways, the language of the law-of-the-land provision, the Engagement Clauses, the Qualifications Clause, the Impeachment Clause, the Census Clause, the Presidential Succession Clause, and the New States Clause. Finally, the Committee removed the word "justly" from the Fugitive Slave Clause.¹⁰

Morris's contemporaries—apart from Gallatin—failed to recognize the significance of Morris's changes. Yet they were of immediate consequence. During the great constitutional controversies of the Washington and Adams administrations, Federalists repeatedly invoked language that Morris had placed in the Constitution. Morris authored the constitutional text that Federalists invoked in the debates over the Judiciary Act of 1789, the Sedition Act, the creation of the Bank of the United States, the presidential succession act, state statutes repealing land grants, the Quaker antislavery petitions, and the first impeachment case to be considered by the House and Senate, as well as the early cases establishing judicial review. Most notably, Federalists read the Preamble, now treated as hortatory or as a gloss on powers otherwise granted Congress, as a separate (and capacious) grant of power.

Even though the Committee's mandate was limited to style and arrangement, Morris covertly made fifteen substantive changes to the text. These changes advanced ends that he had unsuccessfully fought for on the Convention floor. The man who drafted the final version of the Constitution did not limit his work to matters of style and arrangement. He was a dishonest scrivener.

The primary focus of this Article is historical. Part I discusses the Committee of Style, its membership, and its mandate as well as presenting a mini-biography of Morris. Part I also discusses the scholarly consensus that as Professor Michael Klarman observes in his leading account of the origins of the Constitution the Committee simply "put the finishing touches on the Constitution."¹¹ Part II studies Morris's constitutional philosophy (an almost unexamined topic) and highlights the ways he failed to achieve his goals during floor debates before the Committee of Style began its work.

Part III is the heart of the Article. It discusses the fifteen substantive changes Morris made and how they advanced goals that were central to his constitutional vision. This Part also shows the role of those changes in early constitutional debates. As the drafter for the Committee of Style, Morris

10. See *infra* Part III.

11. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 188 n.* (2016).

sought to shift meaning without being discovered by delegates who disagreed with him. He later admitted to having covertly made substantive changes to the Constitution's provisions concerning the judiciary: "[I]t became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their selflove . . ."¹² While this is the only substantive change he confessed to having made, the same description is equally applicable to his other changes. As a result, Federalists and Jeffersonian Republicans alike were able to rely on his text in the major constitutional debates of the early republic. At the same time, Morris's words were (unsurprisingly) more consistent with the Federalist vision than with the Republican vision—Jeffersonian Republicans had to dismiss critical words as without substantive meaning or ignore them altogether in order to advance their constitutional arguments. Finally, Part III discusses modern interpretations of the clauses changed by Morris and highlights how modern originalists have generally favored Republican readings while disregarding Federalist readings.

Part IV discusses the implications of this historical research for modern constitutional law. It first shows that recognizing Morris's role as dishonest scrivener offers a new justification for one of the primary objections to drafters' intent originalism, namely, that there was no collective intent among the drafters as to what constitutional clauses meant. The Part also shows that, even though drafters' intent originalism is now largely rejected as a matter of constitutional theory, it still shapes current conceptions of the original understandings of clauses revised by the Committee of Style, leading commentators to rely on the debates at the Convention before the Committee began its work while ignoring the actual text of the Constitution. The Part also looks at the Supreme Court case law involving the Committee of Style. While the Court has never recognized that the Committee systematically departed in substantive ways from text previously agreed to—since that fact has never before been shown—a number of cases have asked the Court to decide whether to rely on text submitted to the Committee of Style or to treat the Committee of Style's text (which is the ratified constitutional text) as controlling. Remarkably, with only Justice Thomas dissenting, the Court has consistently either relied on the text referred to the Committee or assumed that the text referred to the Committee has the same meaning as that of the ratified Constitution. This Part explains why the first approach is inconsistent with democratic theory and the second is at odds with the actual drafting history. From the standpoint of public meaning originalism, Justice Thomas's approach is the correct one.

Finally, Part IV shows that Morris's changes established the basis for the Federalist Constitution. Morris crafted the Constitution to reflect his political ideals: a national government of broad powers (beyond those enumerated in Articles I and II), a strong executive, a broad conception of impeachment that included impeachment for nonofficial acts, a strong judiciary (involving both judicial review and a requirement that there be lower federal courts), and protection for public contracts against state interference. Furthermore, because

12. Letter from Gouverneur Morris to Timothy Pickering, *supra* note 1, at 420.

of Morris, the Constitution did not embrace slavery as moral, and its text could have prevented the creation of new slave states partitioned from existing slave states.

Academics have long embraced the view that Hamilton and the Federalists practiced “loose construction” of the Constitution, whereas Madison and the Republicans were “strict constructionists.” But at least with respect to the crucially important parts of the Constitution revised by Morris, the Federalist reading parsed the Constitution’s text more carefully than that of the Republicans. On point after point, the Federalist reading of the Constitution is truer to Morris’s words. Or, to put it another way, the Federalist reading is more faithful to the original understanding of the Constitution’s words.

I. THE COMMITTEE OF STYLE AND MORRIS’S CONSTITUTION

This Part discusses the Committee of Style’s mandate, the selection of its members, Morris’s biography, the questions about his integrity, and his role as draftsman. It also discusses the Convention’s consideration of the Committee of Style’s draft constitution, with a focus on its review of the General Welfare Clause. Finally, it discusses the fact that modern scholars have failed to recognize that Morris was a dishonest scrivener.

A. *The Membership of the Committee*

Although standard accounts of the Constitutional Convention highlight the floor debates that led to the Connecticut Compromise and the three-fifths rule, much of the critical drafting at the Convention took place in the committees, of which there were a total of twelve.¹³ The membership of the Committee of Style was unlike the membership of any other committee. Selected by their fellow delegates, the Committee consisted of Alexander Hamilton, William Johnson, Rufus King, James Madison, and Gouverneur Morris.¹⁴ James Wilson, although not a Committee member, worked informally with the Committee as it prepared its draft.¹⁵ Uniquely among all the Convention’s committees, the membership of the Committee of Style was strikingly nationalist. While Johnson has been categorized as a moderate nationalist, all the others—Hamilton, King, Madison, Morris, and Wilson—were among the small group of strongly nationalist delegates.¹⁶ Indeed, these five were (along with Washington) not only members of the nationalist wing of delegates but were its

13. John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147, 174 (2006).

14. 2 FARRAND’S RECORDS, *supra* note 1, at 553.

15. See 3 *id.* at 170. For further discussion, see *infra* Section I.C.

16. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 186–87 (1985).

leaders.¹⁷ It was also strikingly a committee from the northern states—with only one representative from the South (Madison) and no one from the Deep South.

The membership of the Committee reflected in part the change in who was attending the Convention. As the Convention drew towards its close and the adoption of the Constitution came to seem inevitable, delegates who were ambivalent or hostile to the Constitution began to head home. Thirteen of the fifty-five delegates were no longer attending in the last month, and the group included some of the most forceful critics of proposals for a strong national government.¹⁸ Only one delegate who had been absent returned at the end of the proceedings, the strongly nationalist Alexander Hamilton.¹⁹

It reflected, as well, the process by which the Committee was selected. The Convention had two different types of committees, and there were different selection processes for the different types.²⁰ Virtually all the committees had one member from each state and each states' delegation chose its own representatives; the combination led to committees embodying diverse perspectives.²¹ In contrast, the two drafting committees—the Committee of Detail and the Committee of Style—each had only five members, which meant that not all states were represented, and these committees' members were chosen by the votes of individual delegates (rather than having a state's delegate chosen by the state's representatives).²² The combination of these factors produced a committee unlike any of its predecessors—weighted towards the North and towards the nationalist wing of the delegates.

The prior drafting committee—the Committee of Detail—had presented its report on August 6,²³ and its proposals had been subject to a series of votes.²⁴ When the Committee of Style was elected on September 8 and given

17. See JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 57–58 (2018).

18. See 3 FARRAND'S RECORDS, *supra* note 1, at 586–90 (noting attendance records); RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 353 (2009).

19. BEEMAN, *supra* note 18, at 202–03.

20. David O. Stewart, *Who Picked the Committees at the Constitutional Convention?*, J. AM. REVOLUTION (Sept. 13, 2018), <https://allthingsliberty.com/2018/09/who-picked-the-committees-at-the-constitutional-convention> [perma.cc/33MM-JV9T]. I would like to thank Professor Stewart for writing this article, which he wrote in response to our discussions about how the committees at the Convention were selected. For a competing view, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 379 n.38 (1996) (arguing that each delegate voted as an individual for all committees). Both the Rakove and the Stewart view lead to the same conclusion for the Committee of Style: delegates voted individually to select the Committee members.

21. Stewart, *supra* note 20. Rhode Island did not send delegates, and two of New York's three delegates departed early (leaving Hamilton as the sole delegate; two delegates were necessary for a state to vote). BEEMAN, *supra* note 18, at 81, 202–03. Thus, the committees of eleven represented each of the delegations that could vote.

22. Stewart, *supra* note 20.

23. 2 FARRAND'S RECORDS, *supra* note 1, at 177.

24. *Id.* at 193–95.

responsibility for preparing for the delegates' consideration a final draft, the delegates did not formulate a charge for the Committee, but the various names used to describe it reflect an understanding that its mandate was simply stylistic. According to the official Convention records, it was a committee "to revise the style of and arrange the articles agreed to by the House."²⁵ Madison described it in similar terms in his notes: it was a committee "to revise the stile of and arrange the articles which had been agreed to by the House."²⁶ Others used different names. Using a shorter version of these formulations, the Convention's secretary, William Jackson, called it the "Committee of revision,"²⁷ and Maryland delegate James McHenry referred to it in his notes as the committee "to revise and place the several parts under their proper heads."²⁸ Following Madison's notes and the Convention records, the Committee has come to be known as the Committee of Style and Arrangement or, more briefly, the Committee of Style.²⁹

B. *Gouverneur Morris*

When the Committee convened, Johnson, the chair, asked Morris ("with the ready concurrence of the others," Madison observed) to prepare a draft Constitution.³⁰ As a strong nationalist, Morris had views in that area that aligned with those of the other Committee members, and like most of the Committee members, he came from a northern state. Given Morris's strength and experience as a wordsmith and legislative drafter and the respect in which he was held, he was an obvious selection even among a very talented group. But his reputation was complicated.

There is a great irony to Morris's place in history: he is both largely forgotten and seemingly unforgettable. Even apart from his role at the Constitutional Convention, he led a life crowded with incident and work of profound consequence.³¹

25. *Id.* at 547.

26. *Id.* at 553.

27. 1 U.S. DEP'T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 193–96 (1894).

28. 2 FARRAND'S RECORDS, *supra* note 1, at 554.

29. For anyone interested in independently pursuing the Supreme Court's treatment of the Committee of Style through a database search, I note that, for some reason, the Supreme Court has (erroneously) referred to the committee as the "Committee on Style" (ten times) more than it has called it by its correct name of the "Committee of Style" (eight times). See Lexis search: "committee pre/2 style" in cases/Supreme Court (conducted February 12, 2020).

30. 3 FARRAND'S RECORDS, *supra* note 1, at 499.

31. Morris is the subject of four serious, relatively recent biographies (although the treatment in each of the Committee of Style is limited). See WILLIAM HOWARD ADAMS, GOUVERNEUR MORRIS: AN INDEPENDENT LIFE (2003); RICHARD BROOKHISER, GENTLEMAN REVOLUTIONARY: GOUVERNEUR MORRIS, THE RAKE WHO WROTE THE CONSTITUTION (2003); JAMES J. KIRSCHKE, GOUVERNEUR MORRIS: AUTHOR, STATESMAN, AND MAN OF THE WORLD (2005); MELANIE RANDOLPH MILLER, AN INCAUTIOUS MAN: THE LIFE OF GOUVERNEUR MORRIS

Gouverneur Morris—the name Gouverneur was his mother’s maiden name³²—was a descendant of one of the wealthiest, most politically prominent families in New York.³³ Trained as a lawyer,³⁴ he became politically active in the movement for independence. In 1775, at twenty-three, he became a member of the New York Provincial Congress,³⁵ and in May 1776, he delivered a lengthy oration arguing for independence.³⁶ In 1777, Morris was one of the three principal drafters of the New York State Constitution (along with his close friend John Jay and Robert Livingston).³⁷ That year, he was also elected as one of New York’s representatives to the Continental Congress, where he served for two years before being denied reelection.³⁸ From 1781 through 1784, he was the nation’s assistant finance minister, serving under his close friend and future business partner Robert Morris, the superintendent of finance (no relation).³⁹ From 1784 to 1787, with the conclusion of the war, he focused on his business activities, which were principally with Robert Morris.⁴⁰

Morris was physically unforgettable and had a vivid personality. Like Washington, he stood over six feet tall,⁴¹ and the two towered over most of their fellow delegates. Indeed, the two men were of such similar size that the sculptor Jean-Antoine Houdon used Morris as the model for Washington’s

(2008). Another study covers his life during the revolution and through ratification of the Constitution. MARY-JO KLINE, GOUVERNEUR MORRIS AND THE NEW NATION, 1775–1788 (1978). An older biography covers his entire life but (despite its title) focuses on his public career. MAX M. MINTZ, GOUVERNEUR MORRIS AND THE AMERICAN REVOLUTION (1970). Morris is also the subject of a popular biography that primarily focuses on his romantic relationships. HOWARD SWIGGETT, THE EXTRAORDINARY MR. MORRIS (1952). For an invaluable early biography accompanied by primary source material, see 1–3 JARED SPARKS, THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS (Boston, Gray & Bowen 1832). President Theodore Roosevelt wrote an engaging biography which displays a great deal of affection for his fellow aristocratic New Yorker. THEODORE ROOSEVELT, GOUVERNEUR MORRIS (Boston, Houghton Mifflin 1888). Morris’s principal writings have recently been collected. GOUVERNEUR MORRIS, TO SECURE THE BLESSINGS OF LIBERTY: SELECTED WRITINGS OF GOUVERNEUR MORRIS (J. Jackson Barlow ed., 2012).

32. BROOKHISER, *supra* note 31, at 1.

33. *Id.* at 1–8.

34. ADAMS, *supra* note 31, at 21–28.

35. KIRSCHKE, *supra* note 31, at 31–32.

36. *Id.* at 38. For the surviving (although incomplete) manuscript of the speech, see Gouverneur Morris, Oration on the Necessity of Declaring Independence from Great Britain (1776), in MORRIS, *supra* note 31, at 13.

37. ADAMS, *supra* note 31, at 52, 78–88.

38. *Id.* at 95–122.

39. KIRSCHKE, *supra* note 31, at 113–58; see also CHARLES RAPPLEYE, ROBERT MORRIS: FINANCIER OF THE REVOLUTION 236–40 (2010) (discussing the two Morrises’ work together in the Finance Office).

40. See ADAMS, *supra* note 31, at 140–45.

41. BROOKHISER, *supra* note 31, at 11.

body when he created the statues of Washington that now stand outside Independence Hall and the state capitol in Richmond.⁴² By comparison, Madison was five feet four inches,⁴³ and Alexander Hamilton was five feet seven inches.⁴⁴ Morris's right arm was scalded as a result of a childhood accident, and he had a peg leg.⁴⁵ It was rumored that his leg was shattered when he jumped out of a window to avoid a jealous husband.⁴⁶ Although historians attribute the injury to a carriage accident, Morris's promiscuity has become central to his historical reputation: one leading modern biography is subtitled “The Rake Who Wrote the Constitution,”⁴⁷ a second has the subtitle “Man of the World,”⁴⁸ and a third has seventeen entries under “romances” and none under “Committee of Style.”⁴⁹ He was irreverent, witty, and gregarious, and he had a gift for friendship.⁵⁰

Morris's ability left a profound impression on his fellow delegates. In his private character sketches of fellow Convention delegates, Georgia's William Pierce wrote:

Mr. Gouverneur Morris is one of those Genius's in whom every species of talents combine to render him conspicuous and flourishing in public debate:—He winds through all the mazes of rhetoric, and throws around him such a glare that he charms, captivates, and leads away the senses of all who hear him.⁵¹

Like Pierce, Madison and Hamilton both chose the same word to describe Morris: they called him a “genius.”⁵²

Morris played a leadership role from the start of the Constitutional Convention. Before the deliberations began, Morris and fellow Pennsylvania delegate James Wilson worked closely with James Madison and the Virginia delegation on the highly influential Virginia Plan, the strongly nationalist draft constitution that Governor Edmund Randolph presented at the beginning of the Convention.⁵³ After Randolph presented the Virginia Plan, Morris

42. MILLER, *supra* note 31, at 91; BEEMAN, *supra* note 18, at 45.

43. GARRY WILLS, JAMES MADISON 3 (2002).

44. MICHAEL E. NEWTON, ALEXANDER HAMILTON: THE FORMATIVE YEARS 196 (2015).

45. BROOKHISER, *supra* note 31, at 62–63.

46. See ADAMS, *supra* note 31, at 127; BROOKHISER, *supra* note 31, at 61–62.

47. BROOKHISER, *supra* note 31.

48. KIRSCHKE, *supra* note 31.

49. ADAMS, *supra* note 31, at 341.

50. See BROOKHISER, *supra* note 31, at 221; MINTZ, *supra* note 31, at vii, 39–40, 62–66.

51. MINTZ, *supra* note 31, at 181.

52. Letter from Alexander Hamilton to Gouverneur Morris (Feb. 27, 1802), in 25 THE PAPERS OF ALEXANDER HAMILTON 544, 545 (Harold C. Syrett ed., 1977); Letter from James Madison to Jared Sparks, *supra* note 2, at 500.

53. BEEMAN, *supra* note 18, at 52–54, 86–87. Although a New Yorker, Morris lived in Pennsylvania in 1787. His naming to Pennsylvania's delegation was probably due to the urging of his influential friend Robert Morris. See MILLER, *supra* note 31, at 59–61.

rose to advocate for it, an apparently choreographed effort to build support for the proposal at the Convention's outset.⁵⁴ Morris went on to speak more than any delegate—173 times.⁵⁵ He also proposed more resolutions than any other delegate (39) and had more resolutions adopted than any other delegate (22).⁵⁶

Beyond his eminence at the Convention, Morris's involvement in drafting the New York Constitution of 1777 made him the logical choice to serve as the Committee's drafter.⁵⁷ Even apart from that experience, however, Morris had a strong background as a drafter of legal documents. As a New York legislator, Continental Congress representative, and assistant superintendent of finance, he had been called upon to write literally hundreds of reports and statutes, including major documents such as Congress's 1778 rejection of the British peace commission's proposal to end the war and grant America a measure of self-rule.⁵⁸ At the Convention, Morris had already been enlisted to prepare critical parts of the Brearley Committee report, which proposed many changes to the constitutional text—including the creation of the electoral college—and which was the last committee report before the Committee of Style began its work.⁵⁹

Morris's eloquence was equally relevant to his selection as drafter. His speeches at the Convention read differently than those of his fellow delegates. In contrast to Madison and Wilson, who were typically dry and careful, Morris—to again quote fellow delegate Pierce—"winds through all the mazes of rhetoric, and throws around him such a glare that he charms, captivates, and

54. Jack Heyburn, Comment, *Gouverneur Morris and James Wilson at the Constitutional Convention*, 20 U. PA. J. CONST. L. 169, 175–76 (2017).

55. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 252 (1966). Wilson was the second most (168) and Madison the third most (161) frequent speaker. The fact that Morris was the most frequent speaker was particularly noteworthy since he took three weeks off in the middle of the Convention to attend to business matters. By contrast, Wilson and Madison attended every session. *Id.* at 164.

56. Keith L. Dougherty & Jac C. Heckelman, *A Pivotal Voter from a Pivotal State: Roger Sherman at the Constitutional Convention*, 100 AM. POL. SCI. REV. 297, 300 tbl.1 (2006) (charting motions made and passed at the Convention).

57. See ADAMS, *supra* note 31, at 78–86 (discussing Morris's drafting of New York's 1777 constitution).

58. See *id.* at 80, 105, 111, 113, 120, 134–35 (discussing Morris's drafting of government documents). Indeed, Morris's most influential contribution to the English language is arguably not "We the People of the United States," *see discussion infra* Section III.A. As assistant superintendent of finance, Morris invented the word "cent" in connection with his plan that the nation's monetary system be based on the decimal system. Morris also argued that the Spanish term "dollar" should be the term adopted for the basic unit of currency. 1 SPARKS, *supra* note 31, at 274–75; ROOSEVELT, *supra* note 31, at 102.

59. For notes from the debate over the Brearley Committee report, see 2 FARRAND'S REC-ORDS, *supra* note 1, at 493–564. For Morris's role as the drafter on the committee, see KIRSCHKE, *supra* note 31, at 188 (arguing that it was "certain" that he wrote at least the passages on the presidency).

leads away the senses of all who hear him.”⁶⁰ The fact that he delivered the eulogies of both Hamilton and Washington⁶¹ reflected not just the closeness of his ties to them but acknowledgement of his gifts as an orator. As historian Richard Brookhiser recently observed, there were four great writers in the Revolutionary generation—Morris, Jefferson, Paine, and Franklin.⁶² Jefferson and Paine were not at the Convention, and Franklin was in intellectual decline, so Morris’s selection as the Committee’s drafter was logical.

Perhaps the most striking recognition of Morris’s power with words is that Hamilton asked Morris to join him in the writing of *The Federalist*.⁶³ Indeed, Hamilton turned to Madison only after Morris rebuffed him, which almost certainly makes Madison the most consequential backup choice in the history of political theory. One such consequence was that *The Federalist*, for all of its intellectual contributions and historical significance, lacks the rhetorical power and eloquence that Morris could have brought to the project. To quote Brookhiser, “[T]he *Federalist Papers* [Hamilton, Madison, and Jay] wrote are clear, earnest, and intelligent, often ringing, but they have made their way without Morris’s sparkle.”⁶⁴ Thus, people in the Revolutionary era and early republic repeatedly turned to Morris when words mattered.

Equally significant for Morris was words and precise word choice. A powerful example of his attention to language (as well as his capacity for deception) is the Territories Clause. Morris wanted to limit the number of new states and their political power, and he covertly secured constitutional language to advance this end. Toward the end of the Convention, as the delegates worked through the Committee of Detail’s draft and turned to its provision on new states, Morris rose to propose a new clause:

The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. States; and nothing in this constitution contained, shall be so construed as to prejudice any claims either of the U— S— or of any particular State.⁶⁵

While the clause was adopted without discussion of its import, Morris saw its oblique language vesting in Congress the power to “make all needful rules and regulations respecting the territory or other property belonging to the U. States” as profoundly consequential. In a letter to Henry Livingston written at the time of the Louisiana Purchase in 1803, Morris boasted that he had crafted the Territories Clause in such a way that it barred newly acquired

60. 3 FARRAND’S RECORDS, *supra* note 1, at 92.

61. RON CHERNOW, ALEXANDER HAMILTON 939 (2004).

62. RICHARD BROOKHISER, JAMES MADISON 106 (2011).

63. 3 FARRAND’S RECORDS, *supra* note 1, at 421 (“I was warmly pressed by Hamilton to assist in writing the *Federalist*, which I declined.”).

64. BROOKHISER, *supra* note 31, at 93.

65. 2 FARRAND’S RECORDS, *supra* note 1, at 466.

territories from becoming states. Moreover, Morris admitted that he had hidden the clause's meaning so that his fellow Framers would fail to realize what the clause meant:

I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article [of the Constitution], I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made.⁶⁶

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

At the same time, Johnson picked someone whose integrity was widely questioned. “[T]he world in general allows greater credit for [Morris’s] abilities than his integrity,” Hamilton’s good friend John Laurens wrote to Hamilton in a 1779 letter.⁶⁷ Delegate William Pierce said Morris was “fickle and inconstant.”⁶⁸ According to a confidential report prepared by the French embassy, Morris was “without morals, and, if one believes his enemies, without principles.”⁶⁹ As the great constitutional historian Max Farrand observed, Morris “was admired more than he was trusted.”⁷⁰ Challenges to Morris’s integrity and morality had several bases. His promiscuity appalled many of his fellow delegates.⁷¹ Others suspected him of enriching himself while serving as assistant superintendent of finance.⁷² Perhaps most important, he was suspected of having encouraged (unsuccessfully) a mutiny of the army’s officers in 1783 in the hope that the mutiny would force Congress to assert greater power.⁷³

Morris’s deceptive crafting of the Territories Clause suggests the challenges to his integrity were justified. It gives credibility to Gallatin’s charge and warrants a close examination of his work as drafter.

66. Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), in 3 FARRAND’S RECORDS, *supra* note 1, at 404.

67. Letter from Lieutenant Colonel John Laurens to Alexander Hamilton (Dec. 18, 1779), in 2 THE PAPERS OF ALEXANDER HAMILTON 230, 231 (Harold C. Syrett ed., 1961).

68. 3 FARRAND’S RECORDS, *supra* note 1, at 92.

69. *Id.* at 236 (my translation of the original French).

70. FARRAND, *supra* note 3, at 21.

71. See BROOKHISER, *supra* note 31, at 127–29.

72. See ADAMS, *supra* note 31, at 116.

73. BROOKHISER, *supra* note 31, at 71–72; DAVID HEAD, A CRISIS OF PEACE: GEORGE WASHINGTON, THE NEWBURGH CONSPIRACY, AND THE FATE OF THE AMERICAN REVOLUTION 80–81 (2019); KLARMAN, *supra* note 11, at 27–28.

C. Morris's Draft and the Work of the Committee

We have limited historical information about the Committee's deliberations. Unlike the Committee of Detail's drafts, the Committee of Style's drafts were not preserved, and as Jared Sparks, Morris's first biographer, wrote, Morris left "hardly a scrap of paper on the subject of the Convention."⁷⁴ There are no notes of the discussions. We do know, however, from letters written by Morris and Madison that Morris was the Committee's drafter. Madison described Morris's work as stylistic, rather than substantive. Morris's own account was similar, asserting that he had only tried to change the Constitution's meaning in one area. Yet each had reasons to state that Morris had not changed the meaning of the text.

Morris addressed the work of the Committee in an 1814 letter to Timothy Pickering. Morris's letter began by dismissing the relevance of drafting history for constitutional interpretation and instead championed a textualist approach: "[W]hat can a history of the Constitution avail towards interpreting its provisions. This must be done by comparing the plain import of the words, with the general tenor and object of the instrument."⁷⁵ Such an approach is not surprising for someone who, as this Article shows, selected words to advance his own constitutional goals rather than those of the delegates as a whole. He elevated text, rather than drafting history, because the text he drafted departed from the expressed views of the Convention majority.

Morris then proclaimed that he had written the Constitution and that he had been (largely) an honest scrivener, with the sole exception of the Constitution's treatment of the judiciary:

That instrument was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their selflove, and to the best of my recollection, this was the only part which passed without cavil.⁷⁶

Madison described Morris's role on the Committee of Style in a letter to Jared Sparks from 1831. Sparks, as he was writing Morris's biography, had written to Madison to ask about what role Morris had played at the Convention.⁷⁷ Madison responded:

The *finish* given to the style and arrangement of the Constitution fairly belongs to the pen of Mr Morris; the task having, probably, been handed over

74. Letter from Jared Sparks to James Madison (Nov. 14, 1831), in 3 FARRAND'S RECORDS, *supra* note 1, at 513, 514.

75. Letter from Gouverneur Morris to Timothy Pickering, *supra* note 1, at 420.

76. *Id.*

77. Letter from Jared Sparks to James Madison (Mar. 30, 1831), in 3 FARRAND'S RECORDS, *supra* note 1, at 497.

to him by the chairman of the Committee, himself a highly respectable member, and with the ready concurrence of the others. A better choice could not have been made, as the performance of the task proved. It is true, that the state of the materials, consisting of a reported draft in detail, and subsequent resolutions accurately penned, and falling easily into their proper places, was a good preparation for the symmetry and phraseology of the instrument, but there was sufficient room for the talents and taste stamped by the author on the face of it. The alterations made by the Committee are not recollected. They were not such, as to impair the merit of the composition. Those, verbal and others made in the Convention, may be gathered from the Journal, and will be found also to leave that merit altogether unimpaired.⁷⁸

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

It is but due to Mr Morris to remark, that, to the brilliancy of his genius, he added, what is too rare, a candid surrender of his opinions, when the lights of discussion satisfied him, that they had been too hastily formed, and a readiness to aid in making the best of measures in which he had been overruled.⁷⁹

This comment suggests that Morris was an honest scrivener bowing to the decisions of the whole. The description of the Committee’s mandate in Madison’s notes characterized its role as a committee “to revise the stile of and arrange the articles which had been agreed to by the House”⁸⁰ and similarly emphasized that the Committee’s work was about “style.”

Two other primary sources bearing on authorship are hearsay from non-Committee members. One is the diary of Ezra Stiles, the president of Yale College. Stiles reported that he had been visited by Georgia delegate Abraham Baldwin shortly after the Convention’s end.⁸¹ Baldwin summarized the Convention’s proceedings and concluded with a discussion of the Committee of Style’s work. According to Baldwin, “a Committee of 5 viz, Mess. Dr Johnson, Governeur Morris[,] Wilson . . . reduced [the Constitution] to the form in which it was published. Messrs Morris & Wilson had the chief hand in the last Arrangt & Composition.”⁸²

In an 1828 letter to John Lowell, Timothy Pickering also reported that Wilson had a limited role in the Committee’s work. Pickering wrote that Wilson had informed him that he reviewed the Committee’s final draft purely for matters of style:

78. Letter from James Madison to Jared Sparks, *supra* note 2, at 499.

79. *Id.* at 500.

80. 2 FARRAND’S RECORDS, *supra* note 1, at 553.

81. 3 *id.* at 168.

82. *Id.* at 170.

In conversation with . . . [Wilson], above thirty years ago, he told me, that after the entire instrument had been agreed on, in its existing form, the final revision of it was committed to him in regard to *grammatical accuracy or correctness of style* (such is the impression in my memory); certainly not to introduce a single idea.⁸³

Stiles's account is the only one that equates Wilson's role with Morris's. Moreover, it reports hearsay from a delegate who was not on the Committee (Baldwin) and who erred in listing the Committee membership (including Wilson and omitting Madison and King). Pickering describes Wilson's role as limited: he gave the Committee report a final review when it had been completed to check for "grammatical accuracy" and "correctness of style." By contrast, both Morris and Madison are clear that Morris was the drafter. Gallatin's account also implicitly identifies Morris as the drafter.⁸⁴

Madison's and Morris's letters share the common theme that Morris, as drafter for the Committee, was simply making stylistic changes (with Morris suggesting that the only time he had shifted the meaning of the Constitution concerned the judiciary). Nonetheless, Morris made a series of subtle textual changes of great import. So, why did Madison and Morris both minimize the Committee's work?

By the time Madison wrote his letter about the Committee in 1831, he had largely broken with the constitutional jurisprudence he held at the time of the Convention. In the 1790s Madison adopted a constitutional vision that involved a national government of limited powers and a constrained role for the executive and the judiciary.⁸⁵ By providing support for a broad role for the national government, a strong executive, and a powerful federal judiciary, Morris's changes contradicted Madison's mature constitutional vision at each point. In critical fights in the 1790s, Madison battled Hamilton and other Federalists about how to read the Constitution and advanced readings of the text at odds with Morris's constitutional vision.⁸⁶ Thus, Madison's assertion that Morris had only given the Constitution its "finish" reflected the way he had come to read that text. Equally significant, Madison was in a real sense boxed in. If Morris had written text that altered the Constitution's meaning, Madison, as a Committee member, was either complicit in the change or had failed

83. Letter from Timothy Pickering to John Lowell (Jan. 14, 1828), in *SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 317 (James H. Hutson ed., 1987). In an earlier draft of this letter, Pickering wrote that Wilson "once told me, that after all the articles and parts of it had been agreed on, arranged, and in its present form adopted and fixed, its final revision, in regard to correctness of style, was committed to him." *See id.* at 317 n.1. Later that year, Pickering made the same point in a letter to Chief Justice Marshall. *See id.* ("[Wilson] once told me, that after the Constitution had been finally settled, it was committed to him to be critically examined respecting its style in order that the instrument might appear with the most perfect precision and accuracy of language.").

84. *See supra* text accompanying note 7; *infra* Section I.D.

85. *See BROOKHISER, supra* note 62, at 37–109.

86. *See* Colleen A. Sheehan, *Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion*, 98 AM. POL. SCI. REV. 405 (2004).

to detect it. Both as a champion of a particular constitutional vision and as a politician protecting his reputation and legacy, Madison had to treat Morris's changes as merely stylistic.

Morris also had reason to minimize his contributions. Morris could not acknowledge that he had intentionally crafted text to change the Constitution's meaning without undermining the legitimacy of his work. Such an acknowledgment would indicate that Morris's changes were at odds with the views of a majority of the Convention's delegates and thereby undercut the goals he wanted to advance.

The one area in which Morris acknowledged altering the Constitution's meaning was with respect to the judicial role, but this was also the one area in which he had a record to contend with. In 1802, then-Senator Morris argued that the Preamble was a constitutional bar to the Jeffersonian attempt to eliminate federal courts of appeals.⁸⁷ The Committee of Style's Preamble was dramatically different than the Preamble that had been drafted by the Committee of Detail;⁸⁸ Morris, in invoking the Preamble as supporting a strong federal judiciary, relied on language he had drafted.⁸⁹ Similarly, in that speech he looked to language from the Article III Vesting Clause that he had also crafted.⁹⁰ Writing in 1814, Morris would therefore have found it hard to deny that language he had crafted provided support for a strong federal judiciary, since he had publicly relied on that language to support that view. But because in no other case did Morris rely on his text to defend a view of the Constitution, he was free to claim that, except with respect to the judicial role, his drafting was purely stylistic.

A related question is whether Committee members other than Madison were aware of Morris's changes. There is no direct evidence indicating their awareness of the changes. The most relevant indirect evidence concerns how the Committee members construed the constitutional text they produced. The historical record of how King and Johnson interpreted the Constitution in the great debates of the early republic is limited: though both served in the Senate after ratification, Senate debates of the period were not recorded. By contrast, there is ample evidence of Wilson and Hamilton repeatedly drawing on subtle changes made by the Committee. Wilson, as an associate justice of the Supreme Court, used Committee of Style language in asserting the power of judicial review,⁹¹ states' usability in federal court,⁹² and the Contract Clause's coverage of public contracts.⁹³ Hamilton used Committee language in arguing

87. See *infra* text accompanying notes 331–332.

88. See *infra* Section III.A.

89. See *infra* text accompanying note 331.

90. See *infra* note 522 and accompanying text; *see also* discussion *infra* Sections III.A, III.H.1.

91. See *infra* text accompanying notes 543–544.

92. See *infra* text accompanying note 335.

93. See *infra* text accompanying note 430.

for judicial review and broad presidential power over foreign affairs, in supporting federal assumption of state government Revolutionary War debts, and (like Wilson) in taking the position that the Contract Clause covered public contracts.⁹⁴

Both men may have independently arrived at these readings of the Committee of Style's text. Alternatively, they may have become aware of these readings by participating in the drafting of the relevant constitutional provisions. Thus, though the historical record does not reveal whether Morris acted alone or whether others on the Committee were aware of the changes, if there was complicity, Hamilton and Wilson were the Committee members most likely to have been complicit.

D. *The Convention's Consideration of the Committee of Style's Draft and the Committee's Punctuation of the General Welfare Clause*

In any event, the Committee's work was rapid. The Committee was selected on September 8.⁹⁵ On September 12, it delivered its report to the Convention.⁹⁶ The Convention spent three days reviewing the Committee's draft and discussing other matters (primarily the possibility of a Bill of Rights) before voting in favor of the Constitution on September 15. The weary delegates quickly went through the document in order to bring the Convention to a close.⁹⁷

Madison's notes of these discussions are cursory, and they reflect no recognition by the delegates that the Committee had made substantive changes.⁹⁸ The one change that led to limited discussion—though not about the change itself—was the Committee's inclusion of the Contract Clause. While the clause had been voted down the only time it had been discussed on the Convention floor,⁹⁹ no delegate mentioned that fact or that the scope of the clause was different than the version previously considered. Elbridge

94. See discussion *infra* Sections III.A (suability of states), III.B (executive power), III.E (Contract Clause), III.H.2 (judicial review), III.K (Engagements Clause).

95. 2 FARRAND'S RECORDS, *supra* note 1, at 547.

96. *Id.* at 582.

97. For the records of the debates about the Committee of Style report, see *id.* at 609–649.

98. On the poor quality of Madison's notes in the final weeks of the Convention, see MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 141–53 (2015). While Madison took rough notes during this period, he did not prepare his draft of these debates until after the fall of 1789 and thus the records are “particularly unreliable.” *Id.* at 141. More generally, Professor Bilder convincingly argues that Madison's revision of his notes undermines their integrity as records of the debates, particularly with respect to Madison's own speeches. See *id.* at 179–201. For discussion of Bilder's important book, see Jonathan Gienapp, *Notes on the State of the Constitution*, 74 WM. & MARY Q. 145 (2017) (book review); Jack Rakove, *A Biography of Madison's Notes of Debates*, 31 CONST. COMMENT. 317 (2016) (book review).

99. See discussion *infra* Section II.D.

Gerry suggested that the clause be extended to both the national government and the states, but no one agreed with Gerry, and his motion was rejected.¹⁰⁰

Madison's notes do not mention the only Committee change that was discovered and rejected: its altered punctuation of the General Welfare Clause was noted, and the original punctuation was restored. The General Welfare Clause, as it had been approved by the Convention before the Committee of Style began its work, provided that “[t]he Legislature shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States.”¹⁰¹ By contrast, the Committee of Style's draft gave Congress the power to “lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and general welfare of the United States.”¹⁰²

In the version of the clause sent to the Committee, Congress is granted the taxing power (and the power to impose duties, imposts, and excises) to provide money to pay for “the common defence and general welfare.” Although there was some disagreement about how to read the clause,¹⁰³ the standard understanding is that the reference to “the common defence and welfare” was a limitation on the taxing authority, not a separate grant of congressional authority. Thus, to the extent that Congress *otherwise* has power to legislate for the “common defence and general welfare,” the clause provided Congress with a way to pay for relevant expenditures.

In the printed report of the Committee of Style, the comma that follows the word “excises” in the provisions referred to the Committee became a semicolon.¹⁰⁴ While the Committee of Style's version has some ambiguity, the semicolon at the very least would have made possible the argument that the language about the “common defence and welfare” should be understood as a separate grant of power to Congress to legislate for “the common defence and welfare.” Thus, Article I, Section 8 would have provided for three separate grants of power to Congress: “[t]o lay and collect taxes, duties, imposts and excises”; “to pay the debts . . . of the United States”; and to “provide for the

100. See 2 FARRAND'S RECORDS, *supra* note 1, at 619.

101. Convention Proceedings, *supra* note 5, at 569.

102. Report of Committee of Style, *supra* note 5, at 594 (footnote omitted).

103. See THE FEDERALIST NO. 41, at 268 (James Madison) (Edward Mead Earle ed., 1941) (rebutting Antifederalist argument that the clause “amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defence or general welfare”); 11 ANNALS OF CONG. 105 (1802) (statement of Sen. Baldwin) (“It had been contended in the early years of the Government, repeatedly, and with much earnestness, that [the General Welfare Clause] . . . authoriz[ed] Congress to build manufacturing towns, a National University, and to carry on any pecuniary enterprises, with the public money; deliberate practice seems for many years to have settled the construction that those words should not be considered as a distinct grant of power, but a limitation of the power . . . ”).

104. Report of Committee of Style, *supra* note 5, at 594.

common defence and general welfare of the United States.”¹⁰⁵ In the version of the Constitution that was finally adopted by the Convention, the semicolon in the Committee of Style’s report had become a comma again. So, the ratified Constitution has a comma, not a semicolon.¹⁰⁶

Morris never commented on the Committee of Style’s alteration of the General Welfare Clause’s punctuation, but the revised punctuation accorded with his belief that the General Welfare Clause *should* be a broad grant of power. The relevant evidence comes from Maryland delegate James McHenry’s notes of a conversation that he had had with Morris, Nathaniel Gorham of Massachusetts, and Thomas Fitzsimons of Pennsylvania shortly before the Committee of Style began its work. The topic under discussion was whether the national government had the power to construct piers. According to McHenry’s notes, Morris told the others that he read the General Welfare Clause as vesting that power in the national government but found that they disagreed.¹⁰⁷ Thus, the punctuation change would have advanced the reading that Morris (but none of the fellow delegates he was speaking to) wanted the clause to have.

The punctuation shift became the subject of public notice because of Congressman Albert Gallatin’s 1798 speech, which took place as part of a debate about the meaning of the General Welfare Clause. Gallatin, who had not attended the Philadelphia Convention, stated that “he was well informed that those words had originally been inserted in the Constitution as a limitation to the power of laying taxes.”¹⁰⁸ He added:

After the limitation had been agreed to, and the Constitution was completed, a member of the Convention, (he was one of the members who represented

105. *Id.* For more on this reading, see McDONALD, *supra* note 16, at 264–65; Amar, *supra* note 8, at 286 n.25.

106. U.S. CONST. art. I, § 8, cl. 1 (authorizing Congress “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”).

107. McHenry records that he told Morris, Gorham, and Fitzsimons that he favored adding a clause empowering Congress to erect piers. Gorham said that he opposed granting Congress such a power. Fitzsimons and Morris both said that they thought Congress should have such a power, but Morris added that the new clause was unnecessary: “[I]t may be done under the words of the I clause I sect 7 art. amended—‘and provide for the common defence and general welfare.’” 2 FARRAND’S RECORDS, *supra* note 1, at 529. Professor Hoffer has argued that Morris, working as member of the Brearley Committee, was “likely” responsible for the presence of the General Welfare Clause in the Constitution even before the Committee of Style began its work. See PETER CHARLES HOFFER, FOR OURSELVES AND OUR POSTERITY: THE PREAMBLE TO THE FEDERAL CONSTITUTION IN AMERICAN HISTORY 73 (2013). Yet the phrase was used at the Convention from the start. The Virginia Plan called for a government that would accomplish the objectives of “common defence, security of liberty and general welfare.” See 1 FARRAND’S RECORDS, *supra* note 1, at 20. Moreover, the Articles of Confederation enumerated the objectives of “general welfare,” “common defense” and protecting “liberties.” See ARTICLES OF CONFEDERATION of 1781, art. III.

108. 3 FARRAND’S RECORDS, *supra* note 1, at 379.

the State of Pennsylvania) being one of a committee of revisal and arrangement, attempted to throw these words into a distinct paragraph, so as to create not a limitation, but a distinct power.¹⁰⁹

He is clearly referring here to Morris, the only Pennsylvanian on the Committee of Style. (Wilson was not a member, although he reviewed the document.)

Gallatin concluded by observing that the ploy had proven unsuccessful and the original language restored: “The trick, however, was discovered by a member from Connecticut, now deceased, and the words restored as they now stand.”¹¹⁰ The heroic proofreader of Gallatin’s account was Roger Sherman, the only member of the Connecticut delegation no longer living in 1798.¹¹¹

Madison discussed the punctuation issue at the end of his life, at a time in which the question of whether the General Welfare Clause was a grant or a limitation was again a topic of great moment. Madison wrote (but did not publish) a memorandum about the clause’s meaning. He declared, “It was not the intention of the general or of the State Conventions to express, by the use of the terms common defence and general welfare, a substantive and indefinite power.”¹¹² He acknowledged that some published editions of the Constitution had a semicolon after the word “excises,” but he asserted that this was a mistake. He wrote that the correct punctuation was a comma because the engrossed copy of the Constitution, the copy of the Constitution sent by the Philadelphia Convention to the Continental Congress, the copies of the Constitution sent by Congress to the states, and the surviving copies of the official versions of the Constitution printed by the ratifying states all had a comma after “excises.”¹¹³

His memorandum then turned to the punctuation in the Committee of Style’s report: “The only instance of a division of the clause afforded by the journal of the Convention is in the draught of a Constitution reported by a committee of five members, and entered on the 12th of September.”¹¹⁴ Madison strikingly distanced himself here from the Committee of Style; he gave no indication that he was one of its five members.

Madison’s memorandum dismissed the significance of the “division of the clause”—that is, the break caused by the semicolon—in the Committee of Style’s report. He noted that in the provision referred to the Committee of Style, “the parts of the clause are united, not separated.”¹¹⁵ The punctuation in the Committee of Style’s draft “must have been an erratum of the pen or of

109. *Id.*

110. *Id.*

111. McDONALD, *supra* note 16, at 265.

112. 3 FARRAND’S RECORDS, *supra* note 1, at 491.

113. *Id.* at 492.

114. *Id.*

115. *Id.*

the press.”¹¹⁶ As in his letter to Sparks about Morris’s contributions as the Committee of Style’s drafter, Madison took the position that the Committee did not try to change the substantive meaning of the Constitution. Thus, where Gallatin saw a “trick,” Madison saw a transcription error.

E. Scholarship on the Committee of Style

Gallatin’s charge raises the question whether Morris was an honest scribe-
ner. Remarkably, despite the fact that Gallatin challenged Morris’s integrity as drafter more than two hundred years ago and the fact that there is (to put it mildly) a substantial body of historical and legal scholarship closely probing the Constitution’s text, there has not been a single study systematically examining the changes that Morris made as drafter for the Committee of Style.

The brief historical treatments of the Committee of Style’s revision of the General Welfare Clause have split on whether Gallatin’s charge has merit. Professor David Engdahl dismisses Gallatin’s charge as “hearsay.”¹¹⁷ Professor Robert Natelson reaches the same result, observing that “[t]he story assumes that Morris thought he was playing with fools, easily hoodwinked—at the

116. *Id.* The difference between a semicolon and a comma at the time of the ratification was the same as it is currently, with a semicolon marking a stronger break than a comma. See W.C. FOWLER, ENGLISH GRAMMAR: THE ENGLISH LANGUAGE IN ITS ELEMENTS AND FORMS WITH A HISTORY OF ITS ORIGIN AND DEVELOPMENT 743 (New York, Harper & Bros. 1868) (“The comma (,) denotes the smallest division in the construction of sentences on the printed page . . .”); *id.* at 749 (“The SEMICOLON is placed between the members of a sentence which are not so closely connected as those which are separated by a comma.”); ALLEN FISK, MURRAY’S ENGLISH GRAMMAR SIMPLIFIED 154 (Hallowell, ME, Glazier, Masters & Smith 1846) (“When a longer pause than a comma is required, and yet the sense is incomplete, a semicolon may be used . . .”); *see also* James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1541 n.105 (2001) (“Grammarians from the eighteenth and nineteenth centuries generally agree that the semicolon retains its original function in conveying a pause somewhere between the comma and the colon.”). The case law was inconsistent on whether punctuation should be considered part of a statute. *Compare* *Black v. Scott*, 3 F. Cas. 507, 510 (Marshall, Circuit Justice, C.C.D. Va. 1828) (No. 1,464) (“[I]n the printed code, the comma is place[d] after the word, ‘curator’ . . . I am, however, aware, that not much stress is to be laid on this circumstance; and that the construction of a sentence in a legislative act does not depend on its pointing.”), *with* *Ewing v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837) (“Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to, when all other means fail . . .”). For current academic debate about the comma–semicolon divide in the early republic, *compare* Caleb Nelson, *Premption*, 86 VA. L. REV. 225, 258–59 (2000) (arguing for existence of a canon in which punctuation was not legally significant), *with* Pfander, *supra*, at 1541–42 (arguing for the significance of the different forms of punctuation). Clearly, however, the Founders grasped the significance of the distinction between a comma and a semicolon. Both Gallatin’s charge that Morris had dishonestly changed the punctuation of the General Welfare Clause and Madison’s careful effort to show that the correct punctuation was a comma reflect the recognition that this was a consequential matter.

117. Engdahl, *supra* note 8, at 252.

Philadelphia convention, the ‘assembly of demigods!’”¹¹⁸ But historian Forrest McDonald is convinced that Morris secretly changed the punctuation when he found that McHenry and Gorham disagreed with his reading of the General Welfare Clause.¹¹⁹ The key for McDonald is his assessment of Morris as a person: he was “audacious.”¹²⁰ The more important question, however, is not whether Morris altered the punctuation of the General Welfare Clause to advance a particular end, but whether there was a larger pattern of Morris covertly making changes.

Recent years have seen a serious focus on the drafting history of the Constitutional Convention, including three important studies by David Stewart, Richard Beeman, and Michael Klarman. But none of these studies even notes the controversy about whether Morris attempted covertly to alter the Constitution’s meaning. They simply see Morris and the Committee as successfully executing the important but nonsubstantive task of producing a coherent constitution from the Committee of Detail’s draft, the work of the five subsequent committees, and the various floor votes over the previous month. David Stewart observes that “[the Committee of Style’s draft] had to be faithful to the Convention’s actions. Morris could be trusted to do that.”¹²¹ Morris had a “cooperative spirit,”¹²² and he produced a “masterful final draft of the Constitution.”¹²³ The Committee “put the finishing touches on the Constitution,” according to Michael Klarman.¹²⁴ The Committee “was working to provide the ‘last polish’ to the document,” Richard Beeman reports.¹²⁵ Gallatin’s charge is simply absent from the leading recent accounts of the Convention.

Three earlier historians of the Convention noted Gallatin’s charge, compared the Committee of Style’s draft with the provisions referred to it, and pronounced Morris an honest scrivener. Each treatment, however, is conclusory and does not offer textual analysis to support its conclusion. In his important 1967 study, *1787: The Grand Convention*, Clinton Rossiter reported:

Although Morris liked to think in later years, as did some of his enemies in the Jeffersonian ranks, that he had taken certain ‘liberties’ in order to give the national government even more strength and tone, the fact is that he was a faithful servant of the committee and the committee of the Convention.¹²⁶

118. Natelson, *supra* note 8, at 28.

119. McDONALD, *supra* note 16, at 265.

120. *Id.* at 272.

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

122. *Id.*

123. *Id.* at 180.

124. KLARMAN, *supra* note 11, at 189.

125. BEEMAN, *supra* note 18, at 345.

126. ROSSITER, *supra* note 55, at 228–29 (footnotes omitted).

He concluded, "The report of the committee of style was an adroit and tasteful rendering of the will of the Framers."¹²⁷

In his history of the Convention, Max Farrand noted that "just a little suspicion attaches to the work of Morris in preparing this last draft of the constitution."¹²⁸ But he compared the Committee's draft with previously adopted provisions and concluded that "no undue liberties had been taken."¹²⁹ Similarly, in *The Making of the Constitution*, Charles Warren asserted that "the Committee . . . had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so . . ."¹³⁰

Morris has been the subject of four biographies in the past fifteen years. Only one biographer, Richard Brookhiser, looks at the question whether Morris tried to alter the Constitution's meaning as the Committee of Style's drafter. "Did the careful scribe try to smuggle in an argument for nationalism?" Brookhiser asks.¹³¹ After noting Gallatin's charge, Brookhiser dismisses it out of hand: "At the time the charge was made, Sherman was dead, and Morris was out of the country[.] Morris was not above sleight of hand, but he made his convictions explicit elsewhere."¹³² Thus, Brookhiser concludes that Morris did not try to change the Constitution's meaning, although such manipulation would not have been out of character. The other three recent biographies of Morris by Professors Adams,¹³³ Kirschke,¹³⁴ and Miller¹³⁵ do not note the charge at all.

While a number of law review articles have discussed the changes the Committee made to a particular clause, and some have even noted Gallatin's charge, none of these articles has confronted the question of how, as a matter of constitutional theory, the Committee's changes should be viewed today.¹³⁶ Instead, articles have, without extensive (or in some cases any) analysis, simply asserted one of three very different positions. Some articles point out that the Committee's mandate was limited to style and any substantive changes should be disregarded. Others argue that regardless of whether the

127. *Id.* at 228. Rossiter noted the change in the Preamble and the introduction of the Contract Clause but found that neither reflected bad faith on Morris's part. He argued that "We the People of the states of . . ." became "We the People of the United States" out of concern that not all states would ratify the Constitution. He noted that Morris opposed the Contract Clause and suggested that King or Hamilton was responsible for its inclusion. *Id.* at 229–30.

128. FARRAND, *supra* note 3, at 182.

129. *Id.* at 181–82.

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

131. BROOKHISER, *supra* note 31, at 90.

132. *Id.*

133. ADAMS, *supra* note 31.

134. KIRSCHKE, *supra* note 31.

135. MILLER, *supra* note 31.

136. For a list of these articles, see *supra* note 8.

Committee exceeded its mandate, the ratified text of the Constitution should be applied today because the ratified text was the text adopted by “We the People.” Still others frame the provisions referred to the Committee of Style as an interpretive gloss to the Committee’s proposals because the drafters assumed that the earlier proposal and the Committee’s text had the same meaning.¹³⁷ All these articles, however, view a particular change in isolation. None has recognized that there are many changes and that they fit into a larger pattern. By contrast, this Article argues that Morris used his role as drafter to reverse losses he suffered on the Convention floor and to write into the Constitution his vision of what the Constitution should entail.

To develop this argument, the next Part discusses Morris’s constitutional vision and the extent to which the Constitution failed to embody that vision before the Committee of Style began its work. The following Part then analyzes how the changes Morris made as drafter for the Committee of Style incorporated his positions into the Constitution’s text.

II. GOUVERNEUR MORRIS’S CONSTITUTIONAL VISION

Despite his central role at the Convention, Morris’s constitutional philosophy has received almost no scholarly attention.¹³⁸ This Part examines his

137. See discussion *infra* Part III.

138. The best study of Morris’s political philosophy is a short essay by Forrest McDonald in an online publication. See Forrest McDonald, *The Political Thought of Gouverneur Morris*, IMAGINATIVE CONSERVATIVE (May 18, 2013), <https://theimaginativeconservative.org/2013/05/political-thought-gouverneur-morris.html> [perma.cc/C2A4-5PUP]. Morris’s constitutional thought is also the subject of an unpublished doctoral dissertation. See Arthur Paul Kaufman, *The Constitutional Views of Gouverneur Morris* (June 30, 1992) (Ph.D. dissertation, Georgetown University) (ProQuest). John Patrick Coby has recently argued that Morris’s political vision of the executive and his thinking about the division between the classes were similar to Machiavelli’s. See John Patrick Coby, *America’s Machiavellian: Gouverneur Morris at the Constitutional Convention*, 79 REV. POL. 621 (2017). Morris’s arguments at the Convention are surveyed in Heyburn, *supra* note 54. An important unpublished study, which extensively draws on this Article, is Dennis C. Rasmussen, *The Constitution’s Penman: Gouverneur Morris and the Creation of America’s Basic Charter* (Apr. 5, 2021) (unpublished manuscript) (on file with author). When published, it will be the first in-depth analysis of Morris’s constitutional thought. Although her analysis is limited to questions involving property, Professor Jennifer Nedelsky has written an excellent analysis of Morris’s thought in this area, contrasting it with Wilson’s and Madison’s. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990). The lack of attention to Morris’s thought is probably due in part to his failure to author major political writings—notably, he turned down the opportunity to join in the writing of *The Federalist*, see *supra* text accompanying note 63—and in part to the assumption among scholars that Morris did not have an overarching philosophy. See Coby, *supra*, at 626. Yet Morris’s speeches at the Convention reflect a coherent constitutional vision. Moreover, while his speeches demonstrate a range of approaches—by turns witty, sarcastic, angry, and rhetorically powerful—he did not invoke political thinkers at the Convention in the way that some delegates did. He wore his learning lightly. At the same time, he clearly treasured books. According to president of Yale College Ezra

speeches at the Convention to reveal his core principles. Morris was a strong nationalist. He championed both a strong executive and a strong judiciary. He stood apart from his fellow delegates in his devotion to the protection of private property, his elitism, and his opposition to slavery. He sought to limit the political power of new western states. In addition to uncovering Morris's constitutional vision, this Part shows that, before the Committee of Style began its work, the provisions of the Constitution that had been adopted by the delegates dramatically differed from Morris's goals in each area.

A. *Nationalism*

Throughout the Convention, Morris was one of the few forceful and consistent nationalist voices, and his conception of the proper scope of national power was broad.¹³⁹ Morris favored a strong and supreme federal government, even taking the controversial position that the federal government should possess the police power. By the time the Committee of Style began its work, however, the draft constitution adopted by the Convention was far from reflective of Morris's nationalist values.

Where other delegates at the Convention spoke of themselves as representatives of their states, Morris (a New Yorker elected to represent Pennsylvania) proclaimed that he came "as a Representative of America . . . in some degree as a Representative of the whole human race."¹⁴⁰ He denounced those who sought "to truck and bargain for [their] particular States."¹⁴¹ "State attachments, and State importance," he declared, "have been the bane of this Country."¹⁴² He was explicit that state interests must yield to national interests: "It had been one of our greatest misfortunes that the great objects of the nation had been sacrificed constantly to local views . . . [P]articular States ought to be injured for the sake of a majority of the people, in case their conduct should deserve it."¹⁴³

At the start of the Convention, the Virginia Plan provided a broad grant of power to the national government. It provided that

the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in

Stiles, Morris owned the second largest library in the country, surpassed only by Harvard College's. *Id.* at 626 n.9. While scholars have generally decided that Morris does not merit study as a political thinker, it is unquestionable that, at the very least, he owned a lot of books!

139. MCDONALD, *supra* note 16, at 186–87; GIENAPP, *supra* note 17, at 58.

140. 1 FARRAND'S RECORDS, *supra* note 1, at 529.

141. *Id.*

142. *Id.* at 530.

143. *Id.* at 552.

all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation¹⁴⁴

Morris rose to enthusiastically endorse this plan. He declared “that a Union of the States merely federal” would not accomplish the goals that the Articles of Confederation had sought to achieve, “namely common defence, security of liberty, & genl. welfare.”¹⁴⁵ He asserted that “a *national* Government” should be created and that that it should “consist[] of a *supreme* Legislative, Executive & Judiciary.”¹⁴⁶

He later sought to vest the national government with the power to “attend to matters of general police, the State of Agriculture and manufactures, the opening of roads and navigations, and the facilitating communications thro’ the U. States.”¹⁴⁷ This was a capacious conception of the scope of the national government, particularly in its use of the word “police,” which meant, to quote Dr. Johnson’s Dictionary, “[t]he regulation and government of a city or country, so far as regards the inhabitants.”¹⁴⁸ No one else at the Constitutional Convention argued that the national government should have the “police” power. To the extent that other delegates spoke of the “police” power, they discussed it as a power of the states.¹⁴⁹

Morris’s fight for a strong national government continued until literally the end of the Convention. The Convention’s last document was its letter, under Washington’s signature, transmitting to Congress the Constitution the delegates had adopted. That letter was produced by the Committee of Style and is in Morris’s handwriting.¹⁵⁰ It states: “In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence.”¹⁵¹ Thus, this letter, which Professor Daniel Farber has referred to as the Constitution’s

144. *Id.* at 21.

145. *Id.* at 33.

146. *Id.*

147. 2 *id.* at 342–43.

148. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755).

149. See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 476 (2004). Surveying the history of the Convention and ratification, Professor Barnett concludes that “examining the few instances where [the term “police”] was discussed reveals that it referred originally to those powers not delegated to the federal government.” *Id.* While I disagree with Professor Barnett because Morris’s usage was in reference to national power, his basic point highlights the fact that Morris’s usage of “police” as a power of the national government was unique.

150. FARRAND, *supra* note 3, at 183.

151. 2 FARRAND’S RECORDS, *supra* note 1, at 667.

“cover letter,”¹⁵² explicitly presented the Constitution as an act of “consolidation.” During the Convention, delegates repeatedly expressed their opposition to “consolidation,”¹⁵³ and no delegate on the Convention floor used the word “consolidation” positively.¹⁵⁴ Having fought throughout the Convention for a strong national government, Morris used this sensitive word and reinforced the reading that the document embraced his nationalist goals.

The provisions that the Convention adopted and that were referred to the Committee of Style, however, were well short of Morris’s goals for the Constitution. The general grant of power featured in the Virginia Plan was replaced with a list of enumerated powers.¹⁵⁵ In a similar vein, the Preamble presented the Constitution as a document created by the people of the individual states:

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity.¹⁵⁶

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

B. *The Presidency*

With Wilson, Morris was the principal voice for a powerful president at the Convention. Before the Committee of Style began its work, Morris had made crucial gains toward creating a strong executive that he saw as imperative for efficient governance and checking Congress, but the text still fell short of his vision.

While Morris was a consistent champion of a powerful executive, his position on impeachment shifted during the course of the Convention. He first strongly opposed it, but later called for an expansive impeachment provision. The text that the Convention sent to the Committee reflected a narrower conception of impeachment than the one Morris ultimately embraced.

152. Daniel A. Farber, *The Constitution’s Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 615 (1995).

153. See 1 FARRAND’S RECORDS, *supra* note 1, at 90 (Dickinson) (“I dread a Consolidation of the States[.]”); *id.* at 264 (Lansing) (“[T]he People . . . never will agree to a consolidation[.]”); *id.* at 350 (Sherman) (“I . . . am agt. a consolidation”); *id.* at 490 (Bedford) (“[C]onsolidation . . . is out of the question”).

154. The Kindle version of Farrand’s *Records* is searchable. I have reviewed the various usages of the word “consolidation” during the debates and none is positive.

155. See Convention Proceedings, *supra* note 5, at 569–71 (congressional powers).

156. See *id.* at 565 (Preamble).

1. Presidential Powers

Shortly after the Convention, Morris wrote a letter explaining his expansive vision of the presidency:

The extent of our country, and the deliberative freedom of its legislative authority, require an active and vigorous executive. Every subordinate power should be tied to the chief, by those intermediate links of will and pleasure, which, like the elasticity of the arterial system, render sensible the pulsations of the heart at the remotest extremities.¹⁵⁷

There were deep conflicts over the Presidency at the Convention.¹⁵⁸ Not only did Morris confront delegates who favored a weak presidency, but the weak-presidency champions were dominant for much of the Convention. The idea that there would be one president was itself controversial. At least twelve delegates believed that the presidency should be shared by several people,¹⁵⁹ and the New Jersey Plan embodied this vision of a plural executive.¹⁶⁰

As of early August, the Constitution gave the president only two limited powers, apart from his veto: “[the] power to carry into execution the National Laws” and the power “to appoint to Offices in cases not otherwise provided for.”¹⁶¹ Moreover, the appointment power was limited because the “cases . . . otherwise provided for” were significant: the Senate would appoint judges.¹⁶² Until early September, the Senate alone had the power to make treaties.¹⁶³ The idea of even a qualified veto was controversial, with Gunning Bedford opposing giving the president any veto power.¹⁶⁴ Perhaps most significant, for most of the Convention the Constitution contemplated a parliamentary system in which Congress had the power to select the president.¹⁶⁵

157. Letter from Gouverneur Morris to William Carmichael (July 4, 1789), in 2 SPARKS, *supra* note 31, at 72, 73.

158. For an overview of the delegates’ creation of the presidency and the evolution of concepts of the office at the Convention, see RAKOVE, *supra* note 20, at 245–87. For an account of the Convention’s decisions about the presidency that highlights Morris’s role, see RAY RAPHAEL, MR. PRESIDENT: HOW AND WHY THE FOUNDERS CREATED A CHIEF EXECUTIVE 93–125, 281–84 (2012).

159. See McDONALD, *supra* note 16, at 240, 240–41 n.48 (citing arguments at the Convention).

160. 1 FARRAND’S RECORDS, *supra* note 1, at 244 (stating that the “federal Executive” shall consist of “persons”—the precise number of “persons” left blank).

161. *Id.* at 230 (Committee of the Whole agreement to the quoted text). This text was subsequently referred to the Committee of Detail for further consideration. See 2 *id.* at 132 (Wilson’s notes of provisions referred to the Committee of Detail).

162. 2 *id.* at 134.

163. Compare *id.* at 183 (vesting treaty-making power in Senate), with *id.* at 540 (vesting treaty-making power in president, with advice and consent of Senate).

164. See 1 *id.* at 106, 109.

165. For discussion of the evolution of the constitutional provisions on presidential selection, see RAKOVE, *supra* note 20, at 259–60, 264–65.

Morris fought forcefully on each of those points. He argued that a properly constituted presidency was crucial to “the efficacy & utility of the Union among the present and future States.”¹⁶⁶ Morris also believed that the size of the United States mandated a strong presidency: “We must either then renounce the blessings of the Union, or provide an Executive with sufficient vigor to pervade every part of it.”¹⁶⁷ The nation also needed a strong executive as a check on Congress:

It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, agst. Legislative tyranny, against the Great & the wealthy who in the course of things will necessarily compose—the Legislative body. . . . The Executive therefore ought to be so constituted as to be the great protector of the Mass of the people.¹⁶⁸

Morris and Wilson argued against congressional selection because it would undermine presidential independence. Each pushed initially for the president to be elected by popular vote.¹⁶⁹ When that failed, Morris proposed the germ of what became the electoral college.¹⁷⁰ When the Brearley Committee (on which Morris served) presented a complete version of the electoral college, Morris was the principal defender of the plan.¹⁷¹ Morris wanted an absolute presidential veto and initially opposed impeachment of the president (though he ultimately changed his mind).¹⁷² He opposed presidential term limits and argued for either lifetime tenure or unlimited eligibility for reelection.¹⁷³ He wanted the president alone to appoint judges and “ministerial officers for the administration of public affairs.”¹⁷⁴

Morris articulated an expansive conception of presidential power. He contended that the president should be responsible for “the discharge of military duties.”¹⁷⁵ His vision of domestic presidential powers was of unrivaled breadth. He envisioned a cabinet—his term was “Council of State”—that would “assist the President in conducting the Public affairs.”¹⁷⁶ It would include secretaries of commerce and finance, foreign affairs, war, marine, and

166. 2 FARRAND’S RECORDS, *supra* note 1, at 52.

167. *Id.*

168. *Id.*; see also *id.* at 35–36 (voicing support for Madison’s statement about the importance of a strong presidency).

169. See 2 *id.* at 29–31 (arguing for popular election of the president); *id.* at 56 (same).

170. See *id.* at 403–04. On Morris’s plans for selection of the president, see ADAMS, *supra* note 31, at 155–56, and STEWART, *supra* note 121, at 213.

171. 2 FARRAND’S RECORDS, *supra* note 1, at 497–502.

172. *Id.* at 68–69, 78–79.

173. *Id.* at 54.

174. *Id.* at 52.

175. *Id.* at 52–53.

176. *Id.* at 342.

state; and the scope of their offices reflected both Morris's hope for a strong national government and a strong executive under the president's direction.¹⁷⁷

While Morris, more than any delegate, was responsible for the fact that the presidency was as powerful as it was before the Committee of Style began its work,¹⁷⁸ that power was nonetheless limited.¹⁷⁹ The list of enumerated executive powers—not meaningfully different from the powers listed in the Constitution as eventually adopted—was brief. Significantly, the text of the Vesting Clause did not provide an obvious basis for recognizing presidential powers beyond those specifically enumerated. It read: “The Executive power of the United States shall be vested in a single person.”¹⁸⁰ The emphasis is on *who*—one person, not several—rather than *what* power that person would have. The text clarifies that there was to be one president, not the multiple presidents many delegates had sought. And the text explicitly did not appeal to the capacious British concept of the executive: its subject was “[t]he Executive power of *the United States*.”

2. Impeachment

Though Morris championed a strong presidency, he also came to believe that the possibility of impeachment was an important check. The critical debate for the evolution of Morris's position occurred on July 20. Morris began by arguing against impeachment for the president because it “w[ould] render the Executive dependent on those who are to impeach.”¹⁸¹ But after listening to Mason and Franklin's arguments for impeachment, he decided impeachment was appropriate under certain circumstances: “[C]orruption & some few other offences to be such as ought to be impeachable; but . . . the cases ought to be enumerated & defined.”¹⁸²

But as the debate continued, he changed his position yet again, adopting a more expansive view of impeachment. Madison reports:

Mr. Govr. Morris's opinion had been changed by the arguments used in the discussion. He was now sensible of the necessity of impeachments, if the Executive was to continue for any time in office. Our Executive was not

177. Each department's description reflects a wide scope of authority. For example, “[t]he Secretary of foreign affairs . . . [would] attend to the interests of the U- S- in their connections with foreign powers.” “[t]he Secretary of Commerce and Finance . . . [would] recommend such things as may in his Judgment promote the commercial interests of the U.S.” Most capacious, the “Secretary of Domestic Affairs” would “attend to matters of general police, the State of Agriculture and manufactures, the opening of roads and navigations, and the facilitating communications thro' the U. States.” *Id.* at 342–43.

178. See *id.* at 53.

179. See RAPHAEL, *supra* note 158, at 53, 74, 93–120 (discussing Morris's contributions to the evolving design of the presidency).

180. Convention Proceedings, *supra* note 5, at 572.

181. 2 FARRAND'S RECORDS, *supra* note 1, at 64–65.

182. *Id.* at 65.

like a Magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst it by displacing him The Executive ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment.¹⁸³

Similarly, Morris proposed that cabinet members should be impeachable “for neglect of duty malversation, or corruption.”¹⁸⁴ Few delegates had such an expansive view of the grounds of impeachment.

Morris appears to have again argued for an expansive conception of impeachment in the final debate in the Convention on the topic, which took place on September 8. Prior to that debate, the Impeachment Clause provided that the Senate could convict for “Treason (or) Bribery.”¹⁸⁵ Mason proposed on September 8 that the president also be impeachable for “maladministration.”¹⁸⁶ Madison argued against the term—“So vague a term will be equivalent to a tenure during pleasure of the Senate.”¹⁸⁷ According to Madison’s notes, Morris responded, “it will not be put in force & can do no harm—An election of every four years will prevent maladministration.”¹⁸⁸

Morris’s statement, as recorded by Madison, is not a model of clarity. It appears, however, that Morris supported using the term “maladministration,” positing that it “can do no harm” because as a practical matter, maladministration would not be used as a basis for impeachment “[i]t will not be put in force.” The position that maladministration should be a basis for impeachment is consistent with the approach in the New York Constitution of 1777, of which Morris was a principal drafter.¹⁸⁹ Article 33 of that constitution provided that officers could be impeached “for mal and corrupt conduct.”¹⁹⁰ It is also consistent with his proposal that other officers be impeachable for “malversation.”¹⁹¹

Despite Morris’s support of “maladministration,” Mason withdrew the term and substituted “other high crimes & misdemeanors.” As the clause was submitted to the Committee of Style, it provided that the president “shall be removed from his office on impeachment by the House of representatives, and conviction by the Senate, for treason or bribery or other high crimes and misdemeanors against the United States.”¹⁹²

183. *Id.* at 68–69.

184. *Id.* at 344.

185. *Id.* at 172.

186. *Id.* at 550.

187. *Id.*

188. *Id.*

189. RAPHAEL, *supra* note 158, at 53.

190. N.Y. CONST. of 1777, art. XXXIII.

191. 2 FARRAND’S RECORDS, *supra* note 1, at 344.

192. Convention Proceedings, *supra* note 5, at 575.

C. The Judiciary

Morris was one of the principal advocates at the Convention for the creation of a strong national judiciary. As the Committee of Style began its work, the Constitution did not reflect his views in two critical ways: Congress was not required to establish lower federal courts, and the text did not give federal courts the power of judicial review.

1. Lower Federal Courts

The Convention's deliberations reflected sharp disagreement among the delegates on whether there should be lower federal courts. The Virginia Plan, which Morris helped draft and which Randolph introduced, mandated their creation.¹⁹³ John Rutledge, supported by Roger Sherman, countered that lower federal courts would be an infringement on state authority,¹⁹⁴ and the Rutledge-Sherman proposal providing that the Supreme Court would be the only federal court was narrowly adopted.¹⁹⁵ Wilson and Madison then offered a compromise under which Congress would have authority to establish lower federal courts but would not be required to do so. Their proposal provided "that the National Legislature be empowered to institute inferior tribunals."¹⁹⁶ This proposal—which has come to be known in both the scholarly literature and the caselaw as the "Madisonian Compromise"¹⁹⁷—was adopted, eight delegations in favor, two opposed, and one divided.¹⁹⁸

Although Morris did not speak in this initial debate, he opposed a subsequent attempt by Pierce Butler and Luther Martin to revisit the Madisonian Compromise and strip Congress of the power to create lower federal courts. Randolph responded to Butler and Martin by asserting that "the Courts of the States can not be trusted with the administration of the National laws."¹⁹⁹ With its suspicion of state courts, Randolph's statement reflected, not the Madisonian Compromise, but his Virginia Plan's mandate that Congress create lower federal courts. According to Madison's notes, Morris was the next speaker: "Mr. Govr. Morris urged also the necessity of such a provision."²⁰⁰

193. See 1 FARRAND'S RECORDS, *supra* note 1, at 21 ("Resd. that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour . . .").

194. *Id.* at 124.

195. *Id.* at 125.

196. *Id.*

197. See, e.g., Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39.

198. 1 FARRAND'S RECORDS, *supra* note 1, at 125.

199. 2 *id.* at 46.

200. *Id.*

Morris's brief statement echoed Randolph's position. The delegates reaffirmed the Madisonian Compromise, with no delegation voting against it.²⁰¹

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

2. Judicial Review

During the Revolutionary era, there were a handful of state court cases invalidating statutes, although in a number of these cases the exercise of the power was controversial.²⁰² The Virginia Plan did not mention judicial review.²⁰³ The delegates at the Constitutional Convention spent comparatively little time discussing judicial powers, and the comments on judicial review were scattered. Morris was a leading advocate for the power, and he expressed his belief that federal courts would be able to hold both state and federal legislation unconstitutional and that judicial review was desirable.

Morris and Madison were the two delegates who spoke most often about judicial review, each speaking three times.²⁰⁴ Morris made his first statement about judicial review in a speech opposing granting Congress a power to invalidate state legislation. He said that a negative was unnecessary because of judicial review: "A law that ought to be negatived will be set aside in the Judiciary departmt."²⁰⁵ He later invoked judicial review when arguing that the Constitution should be submitted to conventions rather than legislatures. He said that if it were submitted to legislatures and not all approved it, courts would find the Constitution "null & void" because the Articles of Confederation required legislative unanimity.²⁰⁶ Finally, Morris asserted that a veto and judicial review were necessary checks on Congress in the context of the debate over an absolute executive veto that could not be overridden.²⁰⁷

201. *Id.* at 40–41.

202. See William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 473–97 (2005) (discussing seven Revolutionary-era judicial-review cases).

203. The Plan, instead, had two textual provisions for overriding legislation (neither of which were eventually adopted). It proposed a Council of Revision to serve as a check on congressional legislation, which was, to quote historian Richard Beeman, one of Madison's "pet ideas." BEEMAN, *supra* note 18, at 90. The council would have been made up of "the Executive and a convenient number of the National Judiciary." 1 FARRAND'S RECORDS, *supra* note 1, at 21. It would have had the power to review and veto federal legislation, subject to congressional override. *Id.* In addition, Congress would have had the power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." *Id.*

204. Wilson spoke about judicial review twice; the other six delegates who mentioned judicial review did so only once. See Treanor, *supra* note 202, at 469–70 (discussing statements).

205. 2 FARRAND'S RECORDS, *supra* note 1, at 28.

206. *Id.* at 92.

207. *Id.* at 299 ("He could not agree that the Judiciary which was part of the Executive, should be bound to say that a direct violation of the Constitution was law."); see also Letter from Gouverneur Morris to Lewis R. Morris (Dec. 10, 1803), in 3 SPARKS, *supra* note 31, at 192, 195

Despite the fact that there was more support for judicial review than opposition to it (at least among those who mentioned it)²⁰⁸ and the fact that Morris, Madison, and Wilson—the three leading voices of the nationalist delegates—all favored it, there was no provision that provided textual support for the practice as the Constitution went to the Committee of Style.

D. *Property*

Morris fought forcefully for property rights at the Convention. Most of the ideas he championed were rejected. At the same time, the most salient protection for private property in the Constitution is the Contract Clause. But, when a contract clause was proposed, Morris argued against it. Historians have erroneously assumed that Morris was opposed to the idea of a contract clause. Closer study, however, indicates he was sympathetic to the goals of a contract clause, was only speaking against the particular proposal that had been made, and, in fact, believed that public contracts, as well as private contracts, deserved constitutional protection.

1. Morris's Commitment to Property

Morris's commitment to the protection of private property was profound. He believed that the principal purpose of the state was protecting private property. "Life and liberty were generally said to be of more value[] than property," Morris observed, but he rejected that view.²⁰⁹ "An accurate view of the matter," he declared, "would nevertheless prove that property was the main object of Society."²¹⁰

Morris, Madison wrote with more than a hint of sarcasm, did not "incline to the democratic side."²¹¹ He "contended for certain articles, . . . which he held essential to the stability and energy of a government, capable of protecting the rights of property against the spirit of democracy."²¹² But while Madison derided Morris as too protective of property interests, Morris had a greater suspicion of the propertied than Madison. Madison believed that the

("[T]he judges would, it was foreseen [at the Convention], resist assaults on the Constitution by acts of legislation.").

208. See Treanor, *supra* note 202, at 469–70.

209. 1 FARRAND'S RECORDS, *supra* note 1, at 533.

210. *Id.* For a comparison of the diverging views of Morris, Madison, and Wilson on the protection of property that asserts that Morris was more protective of property than the other two, see NEDELSKY, *supra* note 138, at 68–75, 92, 96.

211. Letter from James Madison to Jared Sparks, *supra* note 2, at 499.

212. *Id.*

wealthy, having acquired a level of resources sufficient to satisfy their own interests, would support the common good.²¹³ Morris believed that rich and poor alike were motivated by economic self-interest and that the Constitution should be constructed to protect against misrule by the wealthy as well as by those without property.²¹⁴ Reflecting this concern about giving the wealthy too much power, Morris's advocacy of a strong executive was rooted in part in the expectation that the president would be "the guardian of the people, even of the lower classes, agst. Legislative tyranny, against the Great & the wealthy who in the course of things will necessarily compose—the Legislative body."²¹⁵

Most of Morris's focus at the Convention, however, was on protecting property rights and the interests of the propertied. As a delegate, Morris made five property-related proposals. He argued that only property owners should be able to vote. If the propertyless were enfranchised, Morris forecasted that "they w[ould] sell [their vote] to the rich who will be able to buy them."²¹⁶ He contended that the House and Senate should be able to establish property requirements for service in Congress, along with other conditions.²¹⁷ He proposed that senators serve for life, be unpaid, and represent property interests.²¹⁸ He argued that each state's representation in Congress should be based on the value of its property as well as its population.²¹⁹ Finally, he wanted a ban on states' ability to issue paper money, reflecting support for the interests of creditors over the interest of debtors, who favored an inflationary money supply.²²⁰

Morris's defense of property and other qualifications for representatives and senators is particularly noteworthy since Morris's position on qualifications was discussed by the Supreme Court in *Powell v. McCormack*.²²¹ Morris wanted "to leave the Legislature entirely at large" in choosing whether to add requirements for service, but the majority of the delegates opposed his view.²²² The Convention ultimately rejected all of Morris's proposals other than the ban on states issuing paper money.

213. See NEDELSKY, *supra* note 138, at 50–52; Christopher L. Eisgruber, *Property and the Unwritten Constitution*, 66 N.Y.U. L. REV. 1233, 1237 (1991) (reviewing JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990)).

214. See NEDELSKY, *supra* note 138, at 68–95.

215. 2 FARRAND'S RECORDS, *supra* note 1, at 52.

216. *Id.* at 202.

217. *Id.* at 250.

218. 1 *id.* at 513–14.

219. *Id.* at 533–34, 581–83.

220. 2 *id.* at 76.

221. 395 U.S. 486, 535–36 (1969); see discussion *infra* Section III.C.

222. 2 FARRAND'S RECORDS, *supra* note 1, at 250.

2. The Contract Clause

In addition to these proposals championed by Morris, the Convention considered one other major proposal concerning property rights—the Contract Clause. Morris's position here is complicated. Morris made conflicting statements about the desirability of a contract clause at the Convention, suggesting his support for such protection at one point, then speaking strongly against a proposed contract clause at another. Morris's true position has consequently been subject to misinterpretation, and scholars have suggested he was opposed to such a clause. This view is incorrect. Morris believed in the need to prevent state interference with contracts, and the Committee of Style's last-minute resurrection of the Contract Clause reflected his unwavering commitment to safeguarding property rights.

During the Convention, Morris gave a speech that seems to call for a constitutional bar on interference with contract rights:

Emissions of paper money, largesses to the people—a remission of debts and similar measures, will at sometimes be popular, and will be pushed for that reason . . . It might be thought that the people will not be deluded and misled in the latter case. But experience teaches another lesson.²²³

Arguing for a strong check on legislation that provides for “a remission of debts,” Morris appears to be calling for a contract clause. Reflecting on his role at the Convention in 1814, Morris remembered that “[p]ropositions to countenance the issuance of paper money, and the consequent violation of contracts, must have met with all the opposition I could make.”²²⁴ Again, this statement suggests that he favored a contract clause.

Nonetheless, when Rufus King proposed a contract clause, Morris spoke in opposition. According to Madison's notes, as the Convention debated the provisions restricting state governments, “Mr King moved to add, in the words used in the Ordinance of Cong[ress]s establishing new States, a prohibition on the States to interfere in private contracts.”²²⁵ King was apparently referring to the contract clause of the Northwest Ordinance, which provided that “no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed.”²²⁶ Morris responded negatively to King's proposal:

This would be going too far. There are a thousand laws relating to bringing actions—limitations of actions & which affect contracts—The Judicial power of the U— S— will be a protection in cases within their jurisdiction; and

223. *Id.* at 76.

224. 3 *id.* at 419–20.

225. 2 *id.* at 439.

226. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 n.a.

within the State itself a majority must rule, whatever may be the mischief done among themselves.²²⁷

While Wilson and Madison spoke on behalf of King's contract clause proposal, Mason echoed Morris and voiced opposition, observing that "[t]his is carrying the restraint too far"²²⁸ and suggesting that states should have the freedom to alter statutes of limitations.²²⁹

After a number of other speeches, Rutledge proposed that a prohibition on bills of attainder and a ban on retrospective laws be substituted for a contract clause.²³⁰ Rutledge's motion passed with seven states in favor and three opposed.²³¹ The Contract Clause, once rejected, was not discussed on the floor of the Convention again until the clause somehow reemerged in the Committee of Style's draft.²³²

While it has often been argued that Morris's speech reflected opposition to a contract clause,²³³ that conclusion misconceives the nature of Morris's objection to King's proposal. His earlier speech at the Convention attacking state "remission of debts and similar measures" and his 1814 letter suggest support for a contract clause. In opposing King's proposal, Morris was not objecting to a contract clause *per se*. He was instead arguing that the Northwest Ordinance went "too far." The relevant text of the Northwest Ordinance is broad in scope, covering legislation which "shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed." Morris's objection to King's proposal—and its coverage of state statutes that "*in any manner* whatever, interfere with or affect private contracts or engagements"—was that it was too open-ended, calling into question "a thousand laws relating to bringing actions."²³⁴

Even more significant than their overlooking Morris's view that the contract clause went "too far," scholars have overlooked the situation in which Morris would have thought the clause did not go "far enough." The Northwest Ordinance's contract clause, by its terms, applied only to "private contracts or engagements."²³⁵ While there was no discussion at the Convention of the applicability of the Contract Clause to bar revocation of state grants of corporate charters, Morris had previously suggested that a state should not be able to revoke a corporate charter as a matter of constitutional law.

227. 2 FARRAND'S RECORDS, *supra* note 1, at 439.

228. *Id.* at 440.

229. *Id.*

230. *Id.*

231. *Id.*

232. For discussion of the Committee of Style's contract clause, see *infra* Section III.E.

233. See, e.g., McDONALD, *supra* note 16, at 272.

234. 2 FARRAND'S RECORDS, *supra* note 1, at 439.

235. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 n.a. For the full text of the provision, see text accompanying note 412.

Morris first advanced this argument before the Pennsylvania Assembly when it was considering repealing the statute incorporating the Bank of North America. The Bank was the brainchild of Robert and Gouverneur Morris.²³⁶ It was privately funded (and Gouverneur Morris was a stockholder),²³⁷ but created pursuant to statutes of the Continental Congress and the Pennsylvania legislature.²³⁸ It was, in effect, the first national bank, and its notes circulated as currency.²³⁹ It was also controversial, and in 1785, the Pennsylvania Assembly moved to repeal the bank's statute of incorporation.²⁴⁰ Reflecting his belief in the sanctity of corporate charters, Morris's address to the legislature argued that the repeal of the charter was unconstitutional because "rights acquired by law can[not] be destroyed by law."²⁴¹

Thus, Morris's floor opposition to King's proposed contract clause does not show that he opposed the concept in principle. Although Morris thought King's proposed contract clause went "too far" by affecting statutes of limitation, he generally favored protecting contracts from state interference. And as his defense of the Bank of North America shows, he also wanted that protection to include contracts to which the state was a party.

E. Slavery and New States

Two areas of central concern to Morris were slavery and the admission of new states. Morris was the leading voice at the Convention denouncing slavery, and he was one of the principal voices urging limits to the political power of new states. The two positions were linked. Although Morris's elitism spurred his concerns about giving new states equality with the original states, he was also concerned that the new states would predominantly be slave states and shift the balance of national power in favor of slavery.

1. Slavery

An opponent of slavery throughout his career,²⁴² Morris was unquestionably *the* most forceful critic of slavery at the Convention. Only a handful of his fellow delegates (primarily Luther Martin and Rufus King) expressed opposition to slavery.

236. RAPPLEYE, *supra* note 39, at 236–67.

237. KIRSCHKE, *supra* note 31, at 137.

238. 3 SPARKS, *supra* note 31, at 437.

239. ADAMS, *supra* note 31, at 132–33.

240. JAMES WILSON, *CONSIDERATIONS ON THE BANK OF NORTH AMERICA* (1785), reprinted in 1 COLLECTED WORKS OF JAMES WILSON 60, 60 (Kermit L. Hall & Mark David Hall eds., 2007).

241. 3 SPARKS, *supra* note 31, at 438–39.

242. See ADAMS, *supra* note 31, at 81–82, 84 (discussing Morris's unsuccessful efforts to secure a provision in New York's constitution ending slavery in the state).

“[D]omestic slavery,” Morris declared, “was a nefarious institution—It was the curse of heaven on the States where it prevailed.”²⁴³ He bitterly denounced the Three-Fifths Clause, which dramatically increased representation in the House of states with large numbers of enslaved people. He said he could not accept the Clause, even if the failure to include it in the Constitution would lead the southern states to leave the Convention.²⁴⁴ Madison reports Morris asserting that he “was compelled to declare himself reduced to the dilemma of doing injustice to the Southern States or to human nature, and he must therefore do it to the former.”²⁴⁵

In addition to attacking the Three-Fifths Clause, Morris tried to diminish the slave states’ representation in the House through an amendment to the provision concerning the size of congressional districts. When the Convention was debating a proposal stating that Congress shall “regulate the number of representatives by the number of inhabitants . . . at the rate of one for every forty thousand,”²⁴⁶ Morris moved that the word “free” be inserted before “inhabitants.”²⁴⁷ Attacking the unamended provision, he declared:

The admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and S. C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & dam(n)s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind, than the Citizen of Pa or N. Jersey who views with a laudable horror, so nefarious a practice.²⁴⁸

Morris lost on each substantive provision concerning slavery. This meant that before the Committee of Style began its work, the delegates had accepted the Three-Fifths Clause, guaranteed that the importation of enslaved people would continue until 1808, and adopted the Fugitive Slave Clause.

None of these clauses, however, used the word “slave.” The Three-Fifths Clause spoke of “three fifths of all other persons not comprehended in the foregoing description.”²⁴⁹ The Slave Trade Clause barred federal legislation prohibiting “[t]he migration or importation of such persons as the several States now existing shall think proper to admit.”²⁵⁰ And the Fugitive Slave Clause referred to “any Person bound to service or labor in any of the United States.”²⁵¹

243. 2 FARRAND’S RECORDS, *supra* note 1, at 221.

244. 1 *id.* at 588.

245. *Id.*

246. 2 *id.* at 219 n.8.

247. *Id.* at 221.

248. *Id.* at 222.

249. Convention Proceedings, *supra* note 5, at 571.

250. *Id.*

251. *Id.* at 577.

These words allowed the drafters to avoid an explicit textual recognition of slavery. The decision not to use the word “slave” was intentional. Even as the Constitution protected slavery in a range of provisions, the word choice reflected a recognition by many of the delegates that slavery was at odds with basic moral and political principles.²⁵² James Madison declared during the Convention that he “thought it wrong to admit in the Constitution the idea that there could be property in men.”²⁵³ While Madison’s statement during the Convention was framed as his personal view against use of the word, years later he suggested that opponents of slavery were responsible for the exclusion of the word “slave” from the Constitution. Some states “had scruples against admitting the term ‘Slaves’ into the Instrument,” he wrote in 1819.²⁵⁴ Regardless of whether the decision not to use the word “slave” reflected the concerns of supporters like Madison or opponents, or some mix of both, the term was not used and, as Madison’s statements show, the decision not to use it was a considered one.

Nonetheless, as the Committee of Style began its work, there was one point at which the constitutional text viewed slavery as “just”: the Fugitive Slave Clause provided that enslaved people who had escaped “shall be delivered up to the person *justly* claiming their service or labor.”²⁵⁵ As historian Sean Wilentz has recently written:

To describe a person’s claim as just could also imply that the state laws establishing such a claim were just. To say that the person may or may not be due the fugitive’s service or labor avoided that implication while it conveyed uncertainty about the justice of the state law or laws in question.²⁵⁶

The use of the word “justly” in the Fugitive Slave Clause was thus profoundly significant. Elsewhere, the Framers struggled to avoid using the word “slave.” In the Fugitive Slave Clause, they suggested that slavery was “just.”

2. New States

Morris fought against giving new states full political equality with the original thirteen. Morris argued for “irrevocably fixing the number of representatives” of the original states so as to guarantee their “prevalence in the National Councils.”²⁵⁷ Morris feared that “in time the Western people w[ould] outnumber the Atlantic States. He wished therefore to put it in the power of

252. See SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING 96–98 (2018).

253. 2 FARRAND’S RECORDS, *supra* note 1, at 417.

254. 3 *id.* at 436.

255. 2 *id.* at 453–54 (emphasis added).

256. WILENTZ, *supra* note 252, at 111.

257. 1 FARRAND’S RECORDS, *supra* note 1, at 533–34.

the latter to keep a majority of votes in their own hands.”²⁵⁸ When the Convention considered the Committee of Detail’s proposal that new states “be admitted on the same terms with the original States,”²⁵⁹ Morris successfully urged that the language be struck because “[h]e did not wish to bind down the Legislature to admit Western States on the terms here stated.”²⁶⁰

In justifying his position, he voiced concern about the quality of the leaders the new states would have: “The Busy haunts of men[,] not the remote wilderness, was the proper School of political Talents.”²⁶¹ Madison sarcastically responded that Morris’s argument suggested that “he determined the human character by the points of the compass.”²⁶²

Critically, however, Morris was concerned not just that the new states would align against the original thirteen but that they would become slave states and align with the southern states against the northern states. Thus, his apprehension about the new states was linked to his opposition to slavery. He decried the fact that “Southn. Gentlem[e]n will not be satisfied unless they see the way open to their gaining a majority in the public Councils.”²⁶³ Morris likewise lamented that “[t]here can be no end of [Southern states’] demands for security” to protect their “interest” in slavery.²⁶⁴ He even envisioned the southern states and the new states forming a coalition that would dominate the national government and threaten the interests of northern states:

If the Southn. States get the power into their hands, and be joined as they will be with the interior Country they will inevitably bring on a war with Spain for the Mississippi. . . . The interior Country having no property nor interest exposed on the sea, will be little affected by such a war. He wished to know what security the Northn. & middle States will have agst. this danger.²⁶⁵

The stakes of the new-states issue were high for both opponents and defenders of slavery. In the wake of the Three-Fifths Clause and the Connecticut Compromise, the North would have a slight advantage in both houses of Congress immediately after ratification. The seven northern states would have thirty-five delegates, and the six southern states would have thirty.²⁶⁶ The North’s slim advantage in the House was understood to be temporary. It was generally thought that the southern states would grow in population more

258. *Id.* at 571.

259. 2 *id.* at 454.

260. *Id.*

261. 1 *id.* at 583. Morris also argued, “The new States will . . . be little scrupulous of involving the Community in wars the burdens & operations of which would fall chiefly on the maritime States.” *Id.* at 533.

262. *Id.* at 584.

263. *Id.* at 604.

264. *Id.*

265. *Id.*

266. See U.S. CONST. art. I, § 2 (listing representatives from each state prior to first census).

rapidly than the northern states and that population growth in the territories would also be more in the South than the North. As South Carolina's Pierce Butler observed, "The people & strength of America are evidently bearing Southwardly"²⁶⁷ Morris's unsuccessful arguments that the majority of representation should remain in the original thirteen states were meant to counter these demographic trends.

One focal point of the debate about the representation to which new states would be entitled was Randolph's proposal for a census and a requirement that representation in the House be adjusted in accordance with its findings.²⁶⁸ Morris "opposed it as fettering the Legislature too much."²⁶⁹ Morris "dwelt much on the danger of throwing such a preponderancy into the Western Scale, suggesting that in time the Western people w[ould] outnumber the Atlantic States," and he urged that Congress retain the power to decide whether to "readjust the Representation."²⁷⁰ Therefore, Morris's support for the original thirteen states enjoying a permanent representational advantage over new states, as well as his aversion to population-based reapportionment, reflected a desire "to keep a majority of votes in [the North's] own hands."²⁷¹

While the census posed a threat to the North's edge in the House, the potential admission of new states posed a threat to its edge in the Senate. In the wake of the Convention's adoption of the Three-Fifths Clause, Morris—originally one of the strongest critics of equal representation for the states—came to support the Connecticut Compromise, declaring that "he shall be obliged to vote for ye. vicious principle of equality in the 2d. branch in order to provide some defence for the N. States."²⁷² The Senate would be the bulwark against the South—unless slave states were admitted in greater number than free states.

As previously discussed, Morris had been able to achieve a significant victory with respect to the admission of new states through the Territories Clause. Although the victory was achieved through deception rather than the force of the argument, the Territories Clause enabled Congress to permanently govern newly acquired territory as territories rather than as states.²⁷³ But as the Committee of Style began its work, the provisions on slavery and the admission of new states reflected the Convention's rejection of Morris's positions.

* * *

This Part surveyed Morris's positions on the issues that were most important to him at the Constitutional Convention and the status of those issues

267. 1 FARRAND'S RECORDS, *supra* note 1, at 605; *see also* KLARMAN, *supra* note 11, at 192 (discussing consensus about demographic trends).

268. 1 FARRAND'S RECORDS, *supra* note 1, at 570–71, 583–84.

269. *Id.* at 571.

270. *Id.*

271. *Id.*

272. *Id.* at 604.

273. *See supra* text accompanying notes 65–66.

before the Committee of Style began its work. Morris championed a powerful national government. He fought for a strong executive while defending a broad conception of grounds for impeachment. He believed in the necessity of judicial review and a strong federal judiciary, and he sought to oblige Congress to create lower federal courts. Because he saw the protection of private property as the fundamental reason for government's existence, Morris wanted Congress to have the power to establish property requirements for membership and the Constitution to prohibit state interference with both public and private contracts. He opposed slavery and wanted to check the political power of new states. As the Committee of Style began its work, the Constitution fell short of his vision on each of these critical dimensions.

III. THE WORK OF THE COMMITTEE OF STYLE

This Part examines the provisions of the Constitution whose substantive meaning was changed by the Committee of Style. These changes follow a uniform pattern. With each substantive change, Morris reversed a loss he suffered during the Convention proceedings or advanced a position not reflected in prior drafts of the Constitution. Morris's changes expressed his vision of the Constitution and provided textual support for positions that the Federalists would champion in the early republic. He was, in effect, creating a Federalist Constitution. But the changes were subtle, and those who held a competing view would not have noticed them as the Constitutional Convention drew rapidly to a close. During the constitutional debates of the early republic, Republicans could offer alternative readings of these texts. But as Republicans advanced their readings, they frequently had to ignore some of Morris's words or dismiss them as simply matters of style. In addition to discussing how Morris's textual changes advanced his constitutional goals and how the language he drafted was construed in the early republic, this Part examines modern interpretations of the clauses Morris changed. Strikingly, courts and modern originalist scholars have adopted Republican readings for the most part.

Let me add a brief comment on how this Article was developed. I first paired the text referred to the Committee of Style with the text drafted by the Committee on a chart similar to that in the Appendix, but lengthier. I then studied the two texts to see where there were changes worth scrutinizing (such as added, deleted, or substituted words and punctuation). I also read Morris's speeches at the Convention, Convention histories, and Morris's biographies to unearth his constitutional vision. Next, I tried to determine whether the changes in text that seemed worth scrutinizing aligned with Morris's constitutional vision. Finally, I examined how the relevant text was used in the major constitutional debates of the early republic.

I did not begin this project with any presupposition as to whether Gallatin's charge about the General Welfare Clause was well-grounded or whether Morris tried to change the meaning of other clauses. Indeed, I have written a number of articles arguing that Founding-era judges and political

actors did not carefully parse constitutional text.²⁷⁴ I was therefore surprised to repeatedly find that the Committee's subtle textual changes advanced goals Morris unsuccessfully fought for on the Convention floor and that Morris's text figured prominently in the major early constitutional debates. Frankly, the fact that both Morris and those construing the Constitution focused on precise wording was an unanticipated discovery.

Some changes made by Morris and the Committee did not advance Morris's constitutional goals (or, if they did advance Morris's goals, I missed something, which is certainly possible). These changes seem purely stylistic and without legal consequence or reflective of an attempt to be consistent in word choice.²⁷⁵ By contrast, the Presidential Succession Clause is an outlier in this

274. Treanor, *supra* note 202; William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487 (2007); William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983 (2009).

275. For example, the deletion of "duly and" from the Take Care Clause was a stylistic change because the revised language had the same meaning as the language sent to the Committee. *Compare* Convention Proceedings, *supra* note 5, at 574 ("[H]e shall take care that the laws of the United States be duly and faithfully executed . . ."), *with* Report of Committee of Style, *supra* note 5, at 600 ("[H]e shall take care that the laws be faithfully executed . . ."). See generally Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2127 (2019) (suggesting the term was eliminated because it was "redundant"). The Committee also made several changes in the provisions concerning variations on the words "Officer" and "Office" that deserve comment. In the Presidential Succession Clause, it changed "officer of the United States" to "officer." See discussion *infra* Section III.F. *Compare* Convention Proceedings, *supra* note 5, at 573 (empowering Congress to decide which "officer of the United States" shall be in the line of presidential succession), *with* Report of Committee of Style, *supra* note 5, at 599 (empowering Congress to decide which "officer" shall be in line of succession). It also deleted "other" from the Impeachment Clause: the Committee changed "the Vice President and other civil Officers" to "[t]he president, vice-president and all civil officers." *Compare* Convention Proceedings, *supra* note 5, at 575, *with* Report of Committee of Style, *supra* note 5, at 600. Finally, it slightly revised the language of the Religious Test Clause, removing the words "the authority of." *Compare* Convention Proceedings, *supra* note 5, at 579 (barring religious test for "any office or public trust under the authority of the United States"), *with* Report of Committee of Style, *supra* note 5, at 603 (barring religious test for "any office or public trust under the United States"). In a series of articles, Professor Seth Tillman explores the meaning of the various constitutional provisions using variants on the word "officer," and the Committee of Style's changes figure prominently in his analysis. For example, he argues that the Incompatibility Clause (which bars someone serving in Congress from being "appointed to any civil Office under the Authority of the United States" and also bars someone who holds "any Office under the United States" from serving in Congress, U.S. CONST. art. I, § 6, cl. 2) does not apply to the president and therefore that someone could be, for example, both a senator and the president. See Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107 (2009). In arguing that the president and vice president are not "Officers of the United States," Tillman highlights the Committee of Style's deletion of the word "other" from the Impeachment Clause. *Id.* at 121–22. He also draws on the Committee's changes to support his position that the presidency is not an "Office of Profit or Trust under [the United States]," the term used in the Foreign Emoluments Clause. U.S. CONST. art. I, § 9, cl. 8; see Seth Barrett Tillman, *The Foreign Emoluments Clause—Where the Bodies Are Buried: "Idiosyncratic" Legal Positions*, 59 S. TEX. L. REV. 237, 263 (2017). Tillman's thesis has been the subject of academic challenge, see Victoria Nourse,

list: Morris made a change (revising the text so that it apparently enabled the placement of congressional officers into the presidential line of succession) that does not reflect an argument that he made at the Convention or a position he held prior to the Convention. I have still included discussion of the Presidential Succession Clause because Federalists relied on his text in one of the major constitutional debates of the early republic and because, given his care with other texts, it seems likely that Morris intended a substantive change. All the other changes discussed here advanced Morris's constitutional vision.

A. *The Preamble*

PROCEEDINGS OF THE CONVENTION REFERRED TO THE COMMITTEE OF STYLE

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity.²⁷⁶

REPORT OF COMMITTEE OF STYLE

Reclaiming the Constitutional Text from Originalism: The Case of Executive Power, 106 CALIF. L. REV. 1, 26–28 (2018); resolution of this controversy is outside the scope of this Article. This Article contends that Morris smuggled substantive changes into the Constitution relating to goals he was unable to achieve on the Convention floor. Tillman's thesis instead concerns technical changes using terms of art with accepted meanings that created a coherent framework of office holding. The changes he describes are consistent with the mandate of a committee of style and arrangement. There are other changes that the Committee made that, arguably, had substantive consequences but that I do not explore here because I did not see the change as made to advance Morris's constitutional vision or because the change seemed technical and uncontroversial. An example is the addition to the clause giving Congress the power to coin money of the related power to "regulate the value thereof." *Compare* Report of Committee of Style, *supra* note 5, at 595 (providing that Congress shall have the power "[t]o coin money, regulate the value thereof, and of foreign coin"), *with* Convention Proceedings, *supra* note 5, at 569 (providing that Congress shall have the power "[t]o coin money; [t]o regulate the value of foreign coin"). Presumably, the prior draft—which gave Congress the power to regulate the value of foreign coin but not of United States coin—reflected an unintentional omission that the Committee corrected. Congress's power to regulate the value of coinage was not controversial. Even Jefferson believed that the Confederation Congress should have that power. *See* PROPOSITIONS RESPECTING THE COINAGE OF GOLD, SILVER, AND COPPER (May 13, 1785), *reprinted in* 7 THE PAPERS OF THOMAS JEFFERSON 194, 194–98 (Julian P. Boyd ed., 1953) (discussing value to be assigned coins). The most significant change made by the Committee that does not appear to have advanced some agenda of Morris's is the change to the Pardon Clause, to which the Committee added the phrase "offences against the United States." *Compare* Convention Proceedings, *supra* note 5, at 575, *with* Report of Committee of Style, *supra* note 5, at 599. Taking an approach like the one it would later adopt in *Powell*, in *Ex parte Grossman* the Court stated that "[i]t can not be supposed that the Committee on Revision by adding these words, or the Convention by accepting them, intended *sub silentio*" to change the clause's meaning. 267 U.S. 87, 113 (1925).

276. Convention Proceedings, *supra* note 5, at 565.

We, the People of the United States, in order to form a more perfect union, to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.²⁷⁷

The Committee of Style's changes to the Preamble reframed the Constitution, converting it from a document establishing a confederation without an overarching purpose to one creating a nation animated by powerful goals. This new statement of the nation and its purposes, which reflected Morris's own views about the national government, had significant legal consequence during the early republic. Today's legal scholars and courts generally conclude that the Preamble is not a grant of power and that it has "little or no legal value or judicial usefulness"²⁷⁸ or is at most a gloss on powers otherwise granted in the Constitution.²⁷⁹ However, Founding-era Federalists repeatedly relied on the Preamble as a grant of power over the objections of their Republican opponents. Courts' failure to recognize the Federalist approach to interpreting the Preamble—an approach that was guided by Morris's changes to the Preamble's text—has consequences of the greatest significance.

Strikingly, the Convention records do not report any discussion about the Committee of Style's revised preamble. But Antifederalists bitterly attacked the phrase "We, the People" in the state ratifying conventions. Since the debates in Philadelphia were secret, nonparticipants did not know about the enumeration of states in the Committee of Detail's preamble, but they were aware of the opening provision of the Articles of Confederation, which declared the document to be the "articles of Confederation and perpetual Union between the states of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia."²⁸⁰ The Constitution's formulation was dramatically different. "What right had they to say, *We, the people?*" Patrick Henry angrily demanded.²⁸¹ "My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorized them to speak the language of, *We, the people*, instead of, *We, the states?*"²⁸²

277. Report of Committee of Style, *supra* note 5, at 590.

278. John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 S. CAL. L. REV. 1021, 1024 (2018); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 471 (2005) ("The modern Supreme Court has had almost nothing to say about the Preamble, and modern law students likewise skate past this text with Olympic speed.").

279. *See* AMAR, *supra* note 278, at 21–39.

280. ARTICLES OF CONFEDERATION of 1781, pmb.

281. 2 THE FOUNDERS' CONSTITUTION 10, 10 (Philip B. Kurland & Ralph Lerner eds., 1987).

282. *Id.*

Scholars have repeatedly argued that, as Clinton Rossiter put it, “[w]e ought not attach too much significance to this change.”²⁸³ On August 31, shortly before the Committee of Style began its work, the Convention decided that the new government would come into being if nine states ratified the Constitution.²⁸⁴ Rossiter writes, “Since no one could tell for certain which states would ratify and which would stall or even refuse flatly to join, the sensible course was to leave out any mention at all of New Hampshire and her twelve sisters.”²⁸⁵

As a matter of drafting, however, one can easily frame options other than “We the People of the United States” that would have accounted for the possibility that one or more states might not ratify the document. For example, the essential formulation of the Committee of Detail’s preamble could have been preserved by beginning the Constitution with the words: “We the People of the States of the United States . . .” The selection of “We the People of the United States” rather than such a plausible alternative suggests that Morris’s “We the People of the United States” reflects a substantive vision.

Morris’s statements at the Convention reflect his belief that the Constitution should create a government for a unified nation rather than for a confederation of states. As he said at the Convention, rather than being a representative of Pennsylvania, he was “a Representative of America.”²⁸⁶ He expressed his view of the framing in an 1802 Senate speech:

Never, in the flow of time, was there a moment so propitious, as that in which the Convention assembled. The States had been convinced, by melancholy experience, how inadequate they were to the management of our national concerns. The passions of the people were lulled to sleep; State pride slumbered; the Constitution was promulgated; and then it awoke, and opposition was formed; but it was in vain. The people of America bound the States down by this compact.²⁸⁷

As the last sentence suggests, for Morris, the opening words of the Preamble reflected his conception of who the sovereign creators of the Constitution were: the Constitution was the creation not of the people of the various states acting in concert but of “[t]he people of America.”²⁸⁸

Morris’s preamble not only changed who the authors of the Constitution were but also announced their goals: “to form a more perfect union, to establish justice, insure domestic tranquillity, provide for the common defence,

283. ROSSITER, *supra* note 55, at 229; accord McDONALD, *supra* note 16, at 280–81, 280 n.37; see also Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 166 (1996) (noting that although its motivation was unclear, “the committee of style cleverly avoided the difficulty” posed by the older formulation of the preamble if a state did not ratify (quoting FARRAND, *supra* note 3, at 190–91)).

284. ROSSITER, *supra* note 55, at 229.

285. *Id.*

286. 1 FARRAND’S RECORDS, *supra* note 1, at 529.

287. 3 *id.* at 390, 391.

288. *Id.*

promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” This listing was novel. The Committee of Detail’s preamble, by contrast, had not offered any statement of goals.²⁸⁹ The final three goals of Morris’s preamble—“provid[ing] for the common defence, promot[ing] the general welfare, and secur[ing] the blessings of liberty”—were in the Virginia Plan and were similar to those in the Articles of Confederation, although the focus in the Articles was on the defense, security of liberty, and general welfare of *the states*. But the second three goals—“to form a more perfect union, to establish justice, insure domestic tranquillity”—are not included in any of the predecessor documents. The New Jersey Plan also spoke of “union,” but the focus is dramatically different. The New Jersey Plan sought to maintain the current arrangement—the “Preservation of the Union.” Morris’s goal is, very literally, reformulation: “to form a more perfect union.”

Despite Morris’s additions to the Preamble, courts and scholars today generally do not treat the Preamble as a source of substantive powers for the federal government. This leaves the specifically enumerated grants of power to Congress (or related powers that are implicit in those grants) as the only arguable basis for assertions of national authority. Writing for the Court in *National Federation of Independent Business v. Sebelius*, Chief Justice Roberts stated, “The Federal Government ‘is acknowledged by all to be one of enumerated powers.’ That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government’s powers.”²⁹⁰ Similarly, in *Bond v. United States*,²⁹¹ the Court relied on the Marshall Court decisions in *McCulloch v. Maryland*²⁹² and *Cohens v. Virginia*²⁹³ for the proposition that the federal government lacked a “police power” and narrowly construed the Chemical Weapons Convention Implementation Act²⁹⁴ to avoid reaching local criminal conduct.²⁹⁵ The enumerated powers doctrine has also led to the invalidation

289. See 2 *id.* at 177. The Articles of Confederation proclaimed itself “a firm league of friendship” entered into by the states for “their common defence, the security of their Liberties, and their mutual and general welfare.” ARTICLES OF CONFEDERATION of 1781, art. III. Following the Articles of Confederation, the Virginia Plan’s first article asserted that the “objects” of “Confederation” should be “common defence, security of liberty and general welfare.” 1 FARRAND’S RECORDS, *supra* note 1, at 20. The first article of the New Jersey Plan announced its goals to be “to render the federal Constitution adequate to the Exigencies of Government, & the Preservation of the Union.” 3 *id.* at 611. Like the Committee of Detail’s plan, the third plan presented to the Convention, Charles Pinckney’s, did not frame goals in its introductory article. See *id.* at 595.

290. 567 U.S. 519, 534 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)).

291. 572 U.S. 844 (2014).

292. 17 U.S. (4 Wheat.) 316 (1819).

293. 19 U.S. (6 Wheat.) 264 (1821).

294. 18 U.S.C. § 229(a).

295. See *Bond*, 572 U.S. at 854 (“For nearly two centuries it has been ‘clear’ that, lacking a police power, ‘Congress cannot punish felonies generally.’” (quoting *Cohens*, 19 U.S. at 428)).

of congressional legislation in important recent cases such as *United States v. Morrison*,²⁹⁶ *United States v. Lopez*,²⁹⁷ and *New York v. United States*.²⁹⁸

The conception of the Preamble as merely stylistic (or a gloss) also has implications for judicial power. Judge Staton's dissent from the Ninth Circuit's recent decision in *Juliana v. United States* invokes the Preamble's reference to "our posterity" as the basis for exercising judicial authority to protect future generations against the harmful effects of climate change,²⁹⁹ but I have found no other modern cases that make a similar argument (and the *Juliana* majority does not even rebut the dissent on this point).

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

The preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power *per se*; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the constitution. Its true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution, and not substantively to create them.³⁰⁰

Citing Justice Story, the Supreme Court held in *Jacobson v. Massachusetts* that the Preamble was not a grant of authority: "Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on of any of its Departments."³⁰¹

At least since *Jacobson*, the standard view has been that the Preamble is not a grant of power, and when it has been discussed in the law-review literature, it has typically been treated as aspirational. Apart from the important recent work of Professors Mikhail³⁰² and Primus³⁰³ and the (widely attacked and

296. 529 U.S. 598, 610, 627 (2000) (Violence Against Women Act).

297. 514 U.S. 549, 566–68 (1995) (Gun-Free School Zones Act).

298. 505 U.S. 144, 177 (1992) (Low-Level Radioactive Waste Policy Amendments Act of 1985).

299. 947 F.3d 1159, 1178 (9th Cir. 2020) (Staton, J., dissenting).

300. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 221, at 164 (Boston, Hilliard, Gray & Co. 1833).

301. 197 U.S. 11, 22 (1905).

302. John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implication, and Implied Powers*, 101 VA. L. REV. 1063, 1084–91 (2015); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1104–06 (2014).

303. Richard Primus, "The Essential Characteristic": *Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415, 463–65 (2018).

almost completely forgotten) older work of Professor William Crosskey,³⁰⁴ academics have concluded that the Preamble was understood as either a rhetorical flourish or a gloss on other powers at the time of the Founding.³⁰⁵ But it is clear from Justice Story's *Commentaries* that he was not setting forth a universally accepted position. He was taking a side in a debate. Admittedly, he asserts that "[t]he preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments."³⁰⁶ But the previous sentence is: "And, here, we must guard ourselves against an error, which is too often allowed to creep into discussions upon this subject."³⁰⁷ Justice Story was attacking a position "too often heard." And the history of the Preamble in the early republic provides many examples of the Preamble being read as a grant of power.

While there was little discussion of the significance of the Preamble's objects during the ratification debates, the most sophisticated Antifederalist writer, Melancton Smith, recognized their importance and decried the Preamble in the essays he wrote under the pseudonym Brutus.³⁰⁸ Smith attacked the Preamble as conferring plenary power on the national government: "If the end of the government is to be learned from [the Preamble's] words, which are clearly designed to declare it, it is obvious it has in view every object which is embraced by any government."³⁰⁹ In writing his *Federalist* essays, Hamilton

304. 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 365–66, 374–79, 393–401 (1953). On the controversy initially generated by Crosskey's book and the later disregard of the book by academics and courts, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 9–24 (1982) ("[Crosskey's book] has, with its brilliant and eccentric author, sunk beneath the waves of our constitutional consciousness.").

305. See HOFFER, *supra* note 107, at 83–109 (discussing uses of the Preamble in the early republic); Welch & Heilpern, *supra* note 278, at 1116–26 (discussing treatment of Preamble by academics and courts). While Welch and Heilpern take issue with what they see as the disregard of the Preamble, they do not see it as a grant of power. Akhil Reed Amar has made the most prominent argument that the Preamble has legal weight, but in his view the Preamble has weight as a gloss on other grants of power rather than as an independent source of power. See AMAR, *supra* note 278, at 21–39, 471.

306. STORY, *supra* note 300, at § 221, at 164.

307. *Id.*

308. See Michael P. Zuckert & Derek A. Webb, *Introduction to THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE*, at xi–xxxii (Michael P. Zuckert & Derek A. Webb eds., 2009) (convincingly identifying New York politician Melancton Smith as the author of the Brutus essays).

309. *Essay No. XII* (Feb. 7, 1788), in *THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE*, *supra* note 308, at 239, 241; see also *id.* at 243 ("[I]f the spirit of this system is to be known from its declared end and design in the preamble, its spirit is to subvert and abolish all the powers of the state government, and to embrace every object to which any government extends."); George Clinton, Remarks Against Ratifying the Constitution (July 11, 1788), in *22 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 2142, 2146 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler & Charles H. Schoenleber eds., 2008) ("The objects of [the Preamble] . . . include every object for which government was established amongst men . . .").

was generally very attentive to acknowledging and countering Brutus's arguments.³¹⁰ He did not, however, rebut this argument.³¹¹

Morris's preamble was to play a central role in the major constitutional debates of the early republic and, contrary to the standard position enunciated in *Jacobson*, it served "as the source of . . . substantive power conferred on the Government of the United States . . . [and] its Departments."³¹² During debates over presidential authority, slavery, establishing a national bank, the Alien and Sedition Act, the Judiciary Act, and federal court jurisdiction over states, the Preamble was used for ends of fundamental importance to Morris.

The Preamble was first invoked as a grant of power during the first significant debate in Congress about the Constitution's meaning—the 1789 debate about whether the president alone had the power to remove principal officers. Congressman John Laurance invoked the Preamble as a basis for presidential power: "Would a regulation" that reflected the view that Congress had removal authority "be effectual to carry into effect the great objects of the constitution?" the Congressman asked.³¹³ Invoking the Preamble's General Welfare Clause, Laurance said that measures inconsistent with the "carrying of the constitution into effect, must be rejected as dangerous and incompatible with the general welfare."³¹⁴ In Laurence's view, the Preamble granted authority to the president to remove executive officers.

The following year, Benjamin Franklin (Morris's fellow Pennsylvania delegate) appealed to the Preamble as granting Congress the power to fight slavery in a letter to Congress on behalf of the Pennsylvania Abolition Society. Invoking the language of the Preamble, Franklin "observed, with real satisfaction, that many important and salutary powers [were] vested in [Congress] for 'promoting the welfare and securing the blessings of liberty to the people of the United States.'"³¹⁵ Franklin urged Congress "to countenance the restoration of liberty to those unhappy men, who alone, in this land of freedom,

310. See William M. Treanor, *The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary*, in THE CAMBRIDGE COMPANION TO THE FEDERALIST 464, 464–65 (Jack N. Rakove & Colleen A. Sheehan eds., 2020).

311. That said, Hamilton did argue that the Preamble met Antifederalists' demands for a Bill of Rights. See THE FEDERALIST, *supra* note 103, NO. 84, at 558–59 (Alexander Hamilton) ("Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights . . .").

312. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

313. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 909 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) [hereinafter DHFFC].

314. *Id.*

315. 2 ANNALS OF CONG. 1197–98 (1790); see John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter? A Commentary on "A Great Power of Attorney": Understanding the Fiduciary Constitution* by Gary Lawson and Guy Seidman, 17 GEO. J.L. & PUB. POL'Y 407, 429–30 n.95 (2019) (book review) (discussing petition's use of the Preamble to argue for abolition).

are degraded into perpetual bondage” and to “step to the very verge of the power vested in you for discouraging every species of traffic in the persons of our fellow-men.”³¹⁶ For Franklin, the Preamble was a grant of power that Congress could draw on to combat slavery.

The Preamble also played a central role in the first great debate in Congress involving the scope of congressional authority—the debate about the constitutionality of the legislation creating the Bank of the United States. A review of the legislative record shows that most congressmen who spoke in favor of the bill’s constitutionality invoked the Preamble.

Elbridge Gerry argued that the Preamble was a source of power that Congress could draw on to create a Bank of the United States:

The causes which produced the Constitution were an imperfect union, want of public and private justice, internal commotions, a defenceless community, neglect of the public welfare, and danger to our liberties. These are known to be the causes not only by the preamble of the Constitution, but also from our own knowledge of the history of the times that preceded the establishment of it. If these weighty causes produced the Constitution, and it not only gives power for removing them, but also authorizes Congress to make all laws necessary and proper for carrying these powers into effect, shall we listen to the assertions that these words have no meaning, and that this Constitution has not more energy than the old?³¹⁷

In arguing for the Bank’s constitutionality, Gerry thus linked the Preamble and Congress’s power under the Necessary and Proper Clause to “carry[] [the powers specified in the Preamble] into effect.”³¹⁸

Fisher Ames similarly argued that the Preamble “vested Congress with the authority over all objects of national concern or of a general nature” and that “a national bank undoubtedly came under this idea.”³¹⁹ So too John Laurance, who—in keeping with his appeal to the Preamble during the removal-power debate—declared that the “great objects of this Government are contained in the context of the Constitution” and “inferred that every power necessary to secure these must necessarily follow.”³²⁰ Finally, Elias Boudinot also relied on the Preamble as providing authority for establishing the Bank:

316. 2 ANNALS OF CONG. 1198 (1790).

317. *Id.* at 1950 (1791).

318. *Id.*

319. 2 CROSSKEY, *supra* note 304, at 1313 n.30; *see also* 2 ANNALS OF CONG. 1909 (1791) (statement of Rep. Ames) (“The preamble of the Constitution warrants this remark, that a bank is not repugnant to the spirit and essential objects of that instrument.”).

320. 2 ANNALS OF CONG. 1914–15 (1791). While Laurance does not specifically mention the Preamble, it is clear from the context and his allusion to the “objects” of government that he is referencing the Preamble. *See* 1 CROSSKEY, *supra* note 304, at 200. Moreover, James Jackson’s response to Laurance’s argument makes it explicit that Laurance had referenced the Preamble:

[Jackson] adverted to the preamble and context of the Constitution, and asserted that this context is to be interpreted by the general powers contained in the instru-

Mr. B. then took up the Constitution, to see if [the power to incorporate a bank] was not fairly to be drawn by necessary implication from those vested by this instrument in the legislative authority of the United States. It sets out in the preamble with declaring the general purposes for which it was formed: "the insurance of domestic tranquillity, provision for the common defence, and promotion of the general welfare." These are the prominent features of this instrument, and are confirmed and enlarged by the specific grants in the body of it . . .³²¹

Opponents of the Bank denounced this reliance on the Preamble. Madison's attack was forceful: "The preamble to the Constitution, said he, has produced a new mine of power; but this is the first instance he had heard of, in which the preamble has been adduced for such a purpose. In his opinion, the preamble only states the objects of the Confederation."³²² Other opponents of the Bank similarly attacked the view that the Preamble was a grant of power. William Branch Giles stated:

To establish the affirmative of this proposition, arguments have been drawn from the several parts of the Constitution; the context has been resorted to. "We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," &c. It has been remarked, that here the ends for which this Government was established are clearly pointed out; the means to produce the ends are left to the choice of the Legislature, and that the incorporation of a bank is one necessary mean to produce these general ends. It may be observed, in reply, that the context contemplates every general object of Government whatever . . .³²³

Michael Jenifer Stone crisply made the same point: "I would ask if there is any power under Heaven which could not be exercised within the extensive limits of this preamble."³²⁴ Edmund Randolph, attorney general during the Bank controversy, similarly argued that the Preamble was hortatory:

The preamble to the Constitution has also been relied on, as a source of power. To this it will be here remarked, once for all, that the preamble, if it be operative is a full constitution of itself; and the body of the Constitution is useless; but that it is declarative only of the views of the convention, which

ment. . . . The "general welfare" are the two words that are to involve and justify the assumption of every power. But what is this general welfare? It is the welfare of Philadelphia, New York, and Boston; for as to the States of Georgia and New Hampshire, they may as well be out of the Union for any advantages they will receive from the institution.

2 ANNALS OF CONG. 1918 (1791).

321. 2 ANNALS OF CONG. 1921 (1791).

322. *Id.* at 1957.

323. *Id.* at 1939.

324. *Id.* at 1931.

they supposed would be left fulfilled by the powers delineated; and that such is the legitimate nature of preambles.³²⁵

The debate about the Bank of the United States thus prominently featured a fight about whether the Preamble was a grant of power. Most of the Federalists who spoke in the House relied on the Preamble (among other grounds), and the Republicans argued that the Preamble was not a grant of power. The Federalists prevailed, which provides originalist support for reading the Preamble as a grant of power.³²⁶

The congressional debates in 1798 about the constitutionality of the Alien and Sedition Acts echoed the Bank controversy: Federalists relied on the Preamble, and Republicans criticized that reliance. Responding to Albert Gallatin's argument that Congress lacked authority to pass the Sedition Act, Samuel Sewall referred to "the general nature of the Constitution itself, which he drew from the preamble."³²⁷ Sewall quoted the Preamble and then observed, "The Constitution, therefore, . . . in the outset, establishes the sovereignty of the United States, and that sovereignty must reside in the Government of the United States."³²⁸ Robert Williams, an opponent of the Sedition Act, forcefully rejected Sewall's view of the Preamble as a grant to Congress of broad powers:

325. Edmund Randolph, Enclosure: Opinion on the Constitutionality of the Bank (Feb. 12, 1791), in 7 THE PAPERS OF GEORGE WASHINGTON, DECEMBER 1790 – M ARCH 1791, at 331, 335 (Jack D. Warren, Jr. ed., 1998).

326. The outlier among the Federalists was Hamilton. His defense of the Bank did not explicitly draw on the Preamble. It may be that he felt that he could do so because in *Federalist* 84 he had described the Preamble not as a grant of authority but as a reservation of "popular rights" that made a Bill of Rights unnecessary. See *supra* text accompanying note 311. The closest Hamilton came to reading the Preamble as a grant of authority was in his 1791 *Report on Manufactures*, in which he justified the use of the taxing authority to provide bounties for manufacturers. In discussing the use of "general welfare" in Article I, Section 8's grant to Congress of a taxing and spending authority, Hamilton wrote:

The phrase is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union, to appropriate its revenues shou'd have been restricted within narrower limits than the "General Welfare" and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.

Alexander Hamilton, Report on the Subject of Manufactures Communicated to the Speaker of the House of Representatives (Dec. 5, 1791), in 10 THE PAPERS OF ALEXANDER HAMILTON 230, 303 (Harold C. Syrett ed., 1966). Peter Charles Hoffer argues that Hamilton read Article I's "general welfare" clause expansively in light of the Preamble. See HOFFER, *supra* note 107, at 95. Even here, however, Hamilton did not read the Preamble as a separate grant of authority. Rather, Hamilton glossed other uses of the phrase "general welfare" in the Constitution in light of the Preamble.

327. 8 ANNALS OF CONG. 1957 (1798).

328. *Id.*

If the principle which the gentlemen from Massachusetts have drawn from the preamble of the Constitution . . . be correct, it appeared to him unnecessary to have any other provision in the Constitution besides the preamble, as it may be inferred from that, that Congress has all power whatever.³²⁹

The debate about the Preamble occurred again when Jeffersonian Republicans acted to repeal the Judiciary Act of 1801, which established the federal circuit courts. Gouverneur Morris, now a senator from New York, argued that the proposed legislation was unconstitutional. Morris relied on the Preamble and the Judicial Powers Clause (which he also rewrote while serving on the Committee of Style)³³⁰ to make the case that Congress had a constitutional obligation to establish lower federal courts. “To form, therefore, a more perfect union, and to insure domestic tranquility,” he declared, “the Constitution has said there shall be courts of the Union to try causes, by the wrongful decision of which the Union might be endangered or domestic tranquillity be disturbed.”³³¹ Morris contended that federal courts strengthened union and promoted tranquility and that eliminating duly established courts would be unconstitutional. He closed his argument by invoking the Framers’ intent and, implicitly, the goal of ensuring “domestic tranquility”:

The Convention contemplated the very act you now attempt. They knew also the jealousy and the power of the States; and they established for your and for their protection this most important department. I beg gentlemen to hear and remember what I say: It is this department alone, and it is the independence of this department, which can save you from civil war.³³²

Thus, Morris understood the Preamble to mandate Congress’s establishment of lower federal courts.

The other notable use of the Preamble in the early republic was in *Chisholm v. Georgia*.³³³ Both Justice Wilson and Chief Justice Jay relied on the Preamble to justify the Court’s exercise of jurisdiction over Georgia. Chief Justice Jay grounded that jurisdiction in the Preamble’s assertion that “the people of all the *United States*” created the federal government “to establish justice.”³³⁴ And Wilson construed the Preamble at length:

Fair and conclusive deduction, then, evinces that the people of the United States did vest this Court with jurisdiction over the State of Georgia. The

329. *Id.* at 1962.

330. See *infra* Section III.H.1.

331. 11 ANNALS OF CONG. 78 (1802).

332. *Id.* at 87. Georgia senator Abraham Baldwin dismissed Morris’s reliance on the Preamble. Although he conceded that “[i]t had been contended in the early years of the Government, repeatedly, and with much earnestness that the preamble of the Constitution was a grant of powers,” Baldwin noted that that argument “occurred much less frequently [now] than formerly.” *Id.* at 105.

333. 2 U.S. (2 Dall.) 419 (1793).

334. *Chisholm*, 2 U.S. at 474 (opinion of Jay, C.J.) (quoting U.S. CONST. pmb.).

same truth may be deduced from the declared objects, and the general texture of the Constitution of the United States. One of its declared objects is, to form an union more perfect, than, before that time, had been formed. . . . Another declared object is, “to establish justice.” This points, in a particular manner, to the Judicial authority. . . . A third declared object is—“to ensure domestic tranquillity.” This tranquillity is most likely to be disturbed by controversies between States. These consequences will be most peaceably and effectually decided by the establishment and by the exercise of a superintending judicial authority.³³⁵

For Wilson, federal court jurisdiction over states is logically necessary because of the Preamble.³³⁶

Thus, the early history of the Republic shows that for the Federalists, the Preamble was not simply a powerful statement of nationhood. They read it to create presidential power to remove executive branch officials and congressional power to charter the Bank and pass the Alien and Sedition Acts. They used it to contend that Congress had an obligation to create lower federal courts and that federal courts had jurisdiction in *Chisholm*. The Federalists believed the Preamble vested substantial legal power in each branch of the national government.

B. *Three Articles for Three Branches and Three Vesting Clauses*

PROCEEDINGS OF THE CONVENTION REFERRED TO THE COMMITTEE OF STYLE

The Government shall consist of supreme legislative, executive and judicial powers.

The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives, and a Senate.

The Executive power of the United States shall be vested in a single person. His stile shall be, “The President of the United States of America;” and his title shall be, “His Excellency.”

The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.³³⁷

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All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

335. *Id.* at 465 (opinion of Wilson, J.) (emphasis omitted).

336. Wilson’s involvement with the Committee of Style’s work has already been discussed. Jay was personally close to Morris, and the two had long worked together. Most notably, they were two of the three principal drafters of the 1777 New York constitution. *See supra* note 57 and accompanying text. Thus, apart from simply their reading of the text, their understanding of the Preamble may have grown out of work on the Committee (Wilson) or discussion with Morris (Jay).

337. Convention Proceedings, *supra* note 5, at 565, 572, 575 (Articles II, III, X, and XI).

The executive power shall be vested in a president of the United States of America.

The judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.³³⁸

Alongside the changes to the Preamble, the most obvious change made by the Committee of Style was its restructuring of the provisions concerning the branches of government into three parallel articles, conveying a sense of their coequality. In addition to this structural change, the Committee modified the Vesting Clauses for each branch of government. Its alteration of Articles I and II's Vesting Clauses has become one of its most legally consequential changes; politicians, judges, and scholars closely parse Morris's language to advocate for their competing views on the scope of legislative and executive power.³³⁹ But although modern participants in these debates give great weight to the Vesting Clauses' phrasing, they have largely failed to recognize that the Vesting Clauses were significantly changed at the last minute and that the changes were not debated on the Convention floor. And even those who recognize the Committee's textual changes fail to grasp that those changes were substantive.³⁴⁰

One of the most familiar aspects of the Constitution is its treatment of the three branches in three parallel articles: Article I (legislative), Article II (executive), and Article III (judicial). Comparing the provisions produced by the Committee with the original provisions shows that this division is wholly the Committee of Style's work. None of the state constitutions had that framework, nor did any of the various plans presented to the Convention such as the Virginia Plan, the New Jersey Plan, and Pinckney's Plan. The Committee of Detail's draft constitution began with an article stating that the "stile" of the government should be "The United States of America" followed by a separation-of-powers article (Article II); the draft then wended its way through Congress's powers (Articles III through IX) before treating the executive in Article X and the judiciary in Article XI.³⁴¹

The parallel structuring of the three articles connotes parallel stature and authority. While today that idea may strike us as commonplace, it was not orthodoxy at the time of the Founding. The first state constitutions placed overwhelming authority in the legislatures, as did the Articles of Confederation, which did not provide for a separate judiciary or executive.³⁴² The very

338. Report of Committee of Style, *supra* note 5, at 590, 597, 600 (Article I, Section 1; Article II, Section 1; Article III, Section 1).

339. See *infra* notes 366–378 and accompanying text.

340. See *infra* notes 366–378 and accompanying text.

341. Convention Proceedings, *supra* note 5, at 565–76.

342. See ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 97 (4th ed. 1970) (describing the "ascendancy of legislature over executive" found in early state constitutions).

idea of the judiciary as a separate branch was contested: in British constitutional theory, the judiciary was part of the executive,³⁴³ and that position had adherents in the United States, including John Adams.³⁴⁴ Though the arc of constitutional development during the Revolutionary era bent toward greater authority for the executive and the judiciary, the notion that the other two branches were coequal with the legislature was novel. The Committee of Detail's structuring—eight articles about Congress appearing before an article on each of the executive and the judiciary—accords with the view that Congress was preeminent and the other branches almost an afterthought. While there were certainly stylistic reasons for reducing the ten original articles to three, that simplification also reflected Morris's desire to elevate the presidency and the federal courts. It powerfully conveyed a vision of three coequal and independent branches.

If the structuring of three parallel articles for three branches has largely symbolic import, the revisions to the Vesting Clauses' language have had a direct impact. Morris made three changes to the executive and legislative Vesting Clauses that merit highlighting.

First, Morris dramatically, if subtly, reworked the Article II Vesting Clause. The version referred to the Committee focuses on *who* has the executive power. Again, it may seem totally unremarkable today that one person should have the executive authority, but, as has been noted, one of the major debates at the Convention had been over whether multiple people or one person would wield the executive power. The Convention ultimately decided it would be one person, and the version sent to the Committee underscores that decision. “[A] single person” has “[t]he Executive power.”

The Committee of Style's version shifts focus, and in shifting focus, it shifts meaning. The clause now reads not as a definition of who the executive is but as a grant of executive power to the president. The “president of the United States of America” has “[t]he executive power.” From the early republic on, advocates of a powerful presidency have read the revised provision to

343. For discussion of the British conception of the judiciary as part of the executive and the emergence of a separation-of-powers concept with three branches, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 159–60 (1998); Treanor, *supra* note 202, at 467–68. On Blackstone's conception of the judiciary as part of the executive, see 1 WILLIAM BLACKSTONE, *COMMENTARIES* *267. Locke's view was similar to Blackstone's, with government divided into the legislative, the executive (which included the judiciary), and the federative (which involved dealings with foreign governments). See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* §§ 143–48, at 364–66 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

344. See John Adams, *The Earl of Clarendon to William Pym*, BOS. GAZETTE, Jan. 27, 1766, at 4, reprinted in 1 PAPERS OF JOHN ADAMS, SEPTEMBER 1755–OCTOBER 1773, at 164 (Robert J. Taylor ed., 1977).

reflect a broad grant of power.³⁴⁵ It would have been much harder, as a textual matter, to read the earlier version as broadly.³⁴⁶

Second, Morris changed “[t]he Executive power of the United States” to “[t]he executive power.”³⁴⁷ Reference to the “United States” was dropped. This permitted supporters of a powerful president to define the executive with reference to the British model—and to the King’s authority—in ways that they could not have under the earlier text.³⁴⁸

Third, Morris qualified the grant of authority to the Congress but not the grant of authority to the president. The vesting provisions for the legislature and the executive sent to the Committee of Style are parallel, but the Vesting Clauses produced by the committee are not. While “ALL legislative power[] herein granted” is vested in Congress, “[t]he executive power” is vested in the president.³⁴⁹ Congress receives the legislative powers “herein granted”; the president receives executive powers without this limitation.³⁵⁰

The argument that Article II’s revised Vesting Clause gives the president *all* executive powers (other than those limited or delegated elsewhere in the Constitution) made its appearance in the debate about the president’s constitutional authority to remove executive officers notwithstanding the Constitution’s silence on the issue. As with his references to the Preamble during that debate, Fisher Ames invoked Morris’s Article II Vesting Clause to support his argument that the president enjoyed the removal power. Ames observed that the Constitution declares “that the executive power shall be vested in the president” and added that “[u]nder these terms all the powers properly belonging

345. *See supra* text accompanying notes 276–298.

346. Just as the Committee of Style’s changes increased executive power beyond the Committee of Detail draft, the Committee of Detail’s draft itself expanded executive power by adding a vesting clause to the short list of enumerated powers arrogated to the executive before the Committee of Detail began its work. *See* Michael W. McConnell, *James Wilson’s Contributions to the Construction of Article II*, 17 GEO. J.L. & PUB. POL’Y 23, 40–41 (2019).

347. Report of Committee of Style, *supra* note 5, at 597.

348. For an influential example of modern scholarship drawing on royal precedent, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252–56 (2001). For thoughtful critiques, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 560–71 (2004); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1181–83 (2019).

349. Report of Committee of Style, *supra* note 5, at 590, 597.

350. One qualification should be noted: Because the Constitution allocates to Congress some traditional executive powers (such as the power to declare war) and a share in others (such as the treaty-making power), even early proponents of a strong executive and their modern descendants recognize that the president does not have *all* executive powers. For discussion, see *infra* Section III.B; Mortenson, *supra* note 348, at 1181–83 (discussing the “Royal Residuum” theory of executive power); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 613–16 (2008) (discussing the Constitution’s departure from British precedent in treatymaking).

to the executive department of the government are given, and such only taken away as are expressly excepted.”³⁵¹

John Vining similarly declared that “there was a strong presumption that [the president] was invested with [the removal power]; because, it was declared, that all executive power should be vested in him, except in cases where it is otherwise qualified.”³⁵² George Clymer argued that “the power of removal was an executive power, and as such belonged to the president alone, by the express words of the constitution, ‘the executive power shall be vested in a president of the United States of America.’”³⁵³

While he believed that the president had the removal power, Madison initially did not embrace the Vesting Clause argument to support his position but advanced functional arguments.³⁵⁴ Requiring senatorial advice and consent for removal “would be found very inconvenient in practice” and would “tend[] to lessen [the] responsibility” of the president over his subordinates,³⁵⁵ he asserted. Madison only advanced the Vesting Clause argument on June 17, one month after he first argued that the president had the removal power under the Constitution. Referring to the Vesting Clause, Madison contended that requiring senatorial advice and consent for appointments was “an exception to this general principle; and exceptions to general rules are ever taken strictly.”³⁵⁶

Yet several congressmen explicitly rejected the Vesting Clause argument. William Smith said that the Vesting Clause argument “proves too much, and therefore proves nothing; because it implies that powers which are expressly given by the constitution, would have been in the president without the express grant.”³⁵⁷ Alexander White contended that “the [only] executive powers so vested, are those enumerated in the constitution.”³⁵⁸ James Jackson argued that even if removal is an executive function, “it does not follow that it vests in the president alone, because [the president] alone does not possess all executive powers.”³⁵⁹

The disagreement about the meaning of the Vesting Clause was also central to the first great debate about the president’s foreign affairs powers: the Pacificus-Helvidius debate between Hamilton and Madison about the constitutionality of the Neutrality Proclamation.

Writing as Pacificus, Hamilton appealed to the text of the Article II Vesting Clause to justify President Washington’s issuance of the Neutrality Proclamation. Like supporters of a presidential removal power, he argued that the

351. 11 DHFFC, *supra* note 313, at 979.

352. 10 *id.* at 728.

353. *Id.* at 738.

354. See Bradley & Flaherty, *supra* note 348, at 549 n.17.

355. 10 DHFFC, *supra* note 313, at 735.

356. 11 *id.* at 896; *see also id.* at 922 (invoking the Vesting Clause).

357. *Id.* at 936–37.

358. *Id.* at 872.

359. *Id.* at 912.

Vesting Clause gave the president all executive powers not withheld by specific constitutional provisions.³⁶⁰ Quoting the Vesting Clause and the Constitution's enumeration of executive powers, Hamilton argued that the enumeration did not imply that the president was not fully vested with the executive power: "It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications . . ."³⁶¹ The only limits on the president's possession of executive powers were those the Constitution explicitly specified, such as its restriction on the president unilaterally exercising the treaty power.

Hamilton then advanced a second Vesting Clause argument—one not advanced in the removal debate:

The different mode of expression employed in the constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference. In the article which grants the legislative powers of the Governt. the expressions are—"All Legislative powers herein granted shall be vested in a Congress of the UStates"; in that which grants the Executive Power the expressions are, as already quoted "The EXECUTIVE PO<WER> shall be vested in a President of the UStates of America."³⁶²

Relying on Morris's insertion of "herein granted" into the Article I Vesting Clause, Hamilton thus argued that the absence of a similar qualification in Article II's Vesting Clause supported a broad understanding of the president's powers, a constitutional goal that both Hamilton and Morris shared. In contrast to Congress, which only possesses the powers Article I "herein grant[s]," the president has all executive powers not expressly limited.

Madison's response as Helvidius reflects a different view of the Vesting Clause and the scope of executive power than Hamilton's. Madison argued that the power to proclaim neutrality fell within the legislative sphere because it followed from the power to make war and to make treaties, both legislative powers.³⁶³ Despite the tension between Madison's broad conception of the scope of executive power in the removal debates and the narrow view in his Helvidius essays, Madison explicitly reaffirmed his position on the removal

360. Alexander Hamilton, *Pacificus Number 1* (June 29, 1793), reprinted in ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794, at 8, 12 (Morton J. Frisch ed., 2007) [hereinafter PACIFICUS-HELVIDIUS].

361. *Id.* at 12.

362. *Id.*

363. James Madison, *Helvidius Number 1* (Aug. 24, 1793), reprinted in PACIFICUS-HELVIDIUS, *supra* note 360, at 55, 59-64. Madison observed that Hamilton's vision of executive power accorded with the views of Locke and Montesquieu—views he dismissed as "warped by a regard to the particular government of England." *Id.* at 58.

power in his exchange with Hamilton.³⁶⁴ He argued that removal is an executive power but that neutrality is not.³⁶⁵

Morris had crafted language which shifted the meaning of the Vesting Clause from identifying who would have the executive power (one president, rather than several people sharing the office) to a grant of authority (the president received executive power). In the *Helvidius-Pacificus* debate, both Madison and Hamilton drew on Morris's language and read the Article II Vesting Clause as a grant of power. Their disagreement was over the scope of that grant. Hamilton also relied on Morris's insertion of "herein granted" into the Vesting Clause of Article I. Although Madison did not address that textual argument, it would be a mistake to see Hamilton's argument as reflecting a standard approach at the time of the Founding. I have not found any evidence of anyone else (in the ratification debates or early constitution debates) making the "herein granted" argument as a basis for an expansive concept of executive power.

To sum up: Morris's reformulation of the Article I and II Vesting Clauses was consequential, and it played a critical role in the first two great debates about the scope of executive power. His language provided the basis for a broad reading of the executive power in the removal debate and by Hamilton in the fight over the Neutrality Proclamation. At the same time, there was no consensus about how to read the constitutional language. The removal debate shows that there was disagreement about whether the Article II Vesting Clause provided the president with powers greater than those in the specifically enumerated grants. And the *Pacificus-Helvidius* debate shows that, while both Hamilton and Madison read the Article II Vesting Clause as a grant of executive power to the president, there was disagreement between them as to the scope of executive power.

Morris's language has been central to modern debates about executive power, but there has been no recognition that he changed the Constitution's meaning. Thus, modern advocates of broad executive powers have strongly relied on Morris's Article II Vesting Clause language and the presence of "herein granted" in Article I but not Article II. The landmark modern case is *Myers v. United States*.³⁶⁶ In finding that the president's removal power could not be limited by Congress, Chief Justice Taft read the executive Vesting Clause as granting the president all executive powers (except for those textually placed elsewhere): "It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the

364. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RSRV. L. REV. 1451, 1507 (1997) ("Madison's argument in the *Helvidius* letters is in tension with, but is not necessarily inconsistent with, his argument for a presidential removal power derivable from the Vesting Clause.").

365. Madison, *supra* note 363, at 55, 62–63.

366. 272 U.S. 52 (1926).

more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations”³⁶⁷ He then contended that the difference between the two Vesting Clauses reinforced that reading: “The different mode of expression employed in the Constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference.”³⁶⁸

Taft’s approach has a range of modern analogues. Justice Scalia’s dissent in *Morrison v. Olson* begins by observing that “[t]he principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles.”³⁶⁹ He then highlighted the fact Congress has only legislative powers “herein granted,” while the president has all executive powers.³⁷⁰ The Office of Legal Counsel (OLC) torture memo of 2003,³⁷¹ the substantial body of unitary executive scholarship,³⁷² and Justice Thomas’s recent opinion concerning the presidential recognition power in *Zivotofsky v. Kerry*³⁷³ similarly rely on the language of the Vesting Clauses in Articles I and II.

367. *Myers*, 272 U.S. at 138.

368. *Id.*

369. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

370. *Morrison*, 487 U.S. at 697–98.

371. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Off. of Legal Couns., to William J. Haynes II, Gen. Couns., U.S. Dep’t of Def. 4–5 (Mar. 14, 2003) [hereinafter OLC Torture Memo], <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-combatantsoutsideunitedstates.pdf> [perma.cc/54XP-FXGU].

372. Proponents of the unitary executive approach believe the president has all executive powers except those expressly limited and they understand those powers broadly. See, e.g., SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 35–42, 61, 66–68 (2015); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1196 (1992); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 565 (1994); Calabresi & Yoo, *supra* note 364, at 1453–55; Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 65 (2004); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215 (2005) (reviewing HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005)); Prakash & Ramsey, *supra* note 348. For a critical discussion of the literature, see Nourse, *supra* note 275.

373. *Zivotofsky v. Kerry*, 576 U.S. 1, 34–35 (2015) (Thomas, J., concurring in part and dissenting in part) (“By omitting the words ‘herein granted’ in Article II, the Constitution indicates that the ‘executive Power’ vested in the President is not confined to those powers expressly identified in the document.”). There are different approaches to the unitary executive theory and in particular to whether the president’s executive power trumps otherwise applicable law under certain circumstances. See John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 YALE L.J.F. 374 (2017).

Unlike most advocates of the unitary executive theory, Professors Calabresi and Prakash recognize that the “herein granted” language was added at the last minute by the Committee of Style and never debated. Yet they argue that the addition did not alter the Constitution’s meaning, because the idea that the president received all executive powers while Congress received only enumerated legislative powers was already implicit in the text. See Calabresi & Prakash, *supra* note 372, at 576 (“Presumably, the change induced no debate or discussion precisely because it

Proponents of a limited conception of executive power have advanced a position on Morris's changes that mirrors that of unitary-executive advocates. As the critics argue for a limited conception of executive power, they also contend that Morris and the Committee of Style did not change the Constitution's meaning. Thus, Professors Lessig and Sunstein argue that "the Vesting Clause 'says who has the executive power; not what that power is.'"³⁷⁴

Champions of the limited view of executive power have repeatedly dismissed the phrase "herein granted" as without substantive meaning. For instance, Professors Sunstein and Lessig assert that

the addition of "herein granted[]" . . . was made at the last moment by the Committee on Style, a committee without the authority to make substantive changes. The change induced no debate at all; this suggests that the framers saw it as having an effect as slight as we argue it should have.³⁷⁵

In his dissent in *Myers*, Justice McReynolds wrote: "The words 'herein granted' were inserted by [the Committee of Style] . . . and there is nothing whatever to indicate that anybody supposed this radically changed what already had been agreed upon."³⁷⁶ And according to Professor Martin Flaherty, "Given the amorphous nature of executive authority during this era, it is implausible that the popular understanding of Morris's Executive Power Clause was in any way different from the Convention's understanding of Wilson's earlier version."³⁷⁷ Commenting on the Committee of Style's addition of "herein granted," Professor Monahan observes: "[T]he 'legislative history' of the difference in language . . . provides no basis for ascribing any importance to this difference."³⁷⁸ "The difference . . . may well have been accidental,"³⁷⁹ Professor David Currie suggests.

Thus, advocates of a broad conception of executive power and advocates of a limited conception alike rely on Morris's text, and neither see him changing the Constitution's meaning. But early debates about the meaning of the Constitution show that Morris's revisions gave advocates of a powerful executive the language they relied on, even as the opponents of this view advanced a competing view of that text.

so thoroughly conformed to the Convention's understanding about the difference between the Article I and the Article II and III Vesting Clauses."); *see also* PRAKASH, *supra* note 372, at 81 (arguing that the addition of "herein granted" to Article I's vesting clause "did nothing more than clarify the legislative power" and that "[n]o such limitation was added to Article II").

374. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47–48 (1994).

375. *Id.* at 48–49.

376. *Myers v. United States*, 272 U.S. 52, 231 (1926) (McReynolds, J., dissenting).

377. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1791 (1996).

378. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 22 (1993).

379. David P. Currie, *The Constitution in Congress: The Third Congress, 1793–1795*, 63 U. CHI. L. REV. 1, 9 (1996); *see also* Bradley & Flaherty, *supra* note 348, at 554.

C. Qualifications Clause

REPORT OF THE COMMITTEE OF DETAIL

Every Member of the House of Representatives shall be of the Age of twenty five Years at least; shall have been a Citizen in the United States for at least three Years before his Election; and shall be, at the Time of his Election, a Resident of the State in which he shall be chosen.

The Legislature of the United States shall have Authority to establish such (uniform) Qualifications of the Members of each House, with Regard to Property, as to the said Legislature shall seem (proper and *fit*) expedient.³⁸⁰

PROCEEDINGS OF CONVENTION REFERRED TO THE COMMITTEE OF STYLE

Every Member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen of the United States for at least seven years before his election; and shall be, at the time of his election, an inhabitant of the State in which he shall be chosen.³⁸¹

REPORT OF COMMITTEE OF STYLE

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.³⁸²

Morris's reframing of the Qualifications Clause so that it set forth specific disqualifying characteristics (rather than prerequisites for membership) represents an attempt to give Congress the power to impose additional requirements (like property qualifications) on officeholders. The change can easily be read as simply stylistic, but Morris had the substantive goal of altering the clause's meaning to advance his larger project of protecting private property.³⁸³

The Committee of Detail's proposals—the first versions of the Qualifications Clause quoted above—gave Congress the power to establish property requirements for membership, alongside explicit age, citizenship, and residency requirements. Madison and Franklin argued against giving Congress the power to establish such property requirements.³⁸⁴ Morris, taking a diametrically opposite position, “moved to strike out ‘with regard to property’ in order to leave the Legislature entirely at large.”³⁸⁵ Morris would have given Congress the power to add whatever limitations it wanted: “The Legislature of the United States shall have authority to establish such uniform qualifications

380. 2 FARRAND'S RECORDS, *supra* note 1, at 164, 165 (Articles IV and VI).

381. Convention Proceedings, *supra* note 5, at 565 (Article IV, Section 2).

382. Report of Committee of Style, *supra* note 5, at 590 (Article I, Section 2, Clause a).

383. On Morris's attempts to protect property rights, see Section II.D.

384. 2 FARRAND'S RECORDS, *supra* note 1, at 249.

385. *Id.* at 250.

of the members of each House, with regard to property, as to the said Legislature shall seem expedient.”³⁸⁶ Morris’s proposal was rejected,³⁸⁷ and the Convention voted to remove the Committee of Detail’s provision giving Congress the power to impose property qualifications for membership.³⁸⁸ The only substantive change in the first proposal was that the citizenship requirement was increased from three years to seven years in response to a successful motion by Mason and Morris.³⁸⁹

Morris subtly changed the Qualifications Clause while serving on the Committee of Style. He converted a series of positive requirements (“Every Member of the House of Representatives *shall be* . . .”) into a series of disqualifying attributes (“No person shall be a representative who *shall not* . . .”). Nearly two centuries later, the House of Representatives argued in *Powell v. McCormack* that this negative formulation enabled it to add requirements for service in the House beyond citizenship and age.³⁹⁰ Writing for the Court, Chief Justice Warren dismissed this contention:

[R]espondents’ argument misrepresents the function of the Committee of Style. It was appointed only “to revise the stile of and arrange the articles which had been agreed to” “[T]he Committee . . . had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so; and certainly the Convention had no belief . . . that any important change was, in fact, made in the provisions as to qualifications adopted by it on August 10.”³⁹¹

Rather than apply the language of the ratified Constitution, Warren treated the language referred to the Committee of Style as controlling. An irony is that Warren observed that only one delegate “noted his opposition” to taking the ability to add additional requirements for membership away from Congress: Morris.³⁹² Warren dismissed Morris as the outlier, failing to recognize that Morris was the one who wrote the final text.

The Supreme Court reaffirmed *Powell*’s interpretation of the Qualifications Clause in *U.S. Term Limits, Inc. v. Thornton*.³⁹³ *Thornton* presented the question whether Arkansas could impose term limits on members of the House of Representatives. As the House did in *Powell*, in *Thornton* the state argued that the negative phrasing of the Qualifications Clause “suggests that

386. *Id.* at 248 n.6.

387. *Id.* at 250. The printed journal recorded a slightly different vote: four ayes and six noes. Madison recorded Delaware as voting against the Morris plan; the journal records Delaware as not voting. *Id.*

388. *Id.* at 251.

389. *Id.* at 216.

390. 395 U.S. 486, 537–38 (1969).

391. *Id.* at 538–39 (citation omitted) (quoting 2 FARRAND’S RECORDS, *supra* note 1, at 553, and WARREN, *supra* note 130, at 422 n.1).

392. *Id.* at 536; *see* discussion *infra* Section IV.B.

393. 514 U.S. 779, 792 n.8 (1995).

they were not meant to be exclusive.”³⁹⁴ The *Thornton* Court reviewed *Powell*’s examination of the drafting history, including the Convention’s rejection of Morris’s proposal that the House be able to add qualifications.³⁹⁵ It found that treatment of the history convincing: “We thus conclude now, as we did in *Powell*, that history shows that, with respect to Congress, the Framers intended the Constitution to establish fixed qualifications.”³⁹⁶ With respect to the negative phrasing issue, the Court cited the segment of the *Powell* opinion on the Committee of Style and stated: “This [negative phrasing] argument was firmly rejected in *Powell*, and we see no need to revisit it now.”³⁹⁷

The Qualifications Clause is a case study consistent with a recurring pattern involving Morris’s changes. Morris’s revisions to the Qualifications Clause represented both an attempt to reverse a loss on the Convention floor (concerning the text of the clause) and an attempt to advance a larger constitutional goal important to him (the protection of private property). Morris’s negative phrasing did not make clear that additional requirements could be added. But it created ambiguity where none had existed before—which is why the House and the State of Arkansas were able to press their argument that qualifications could be added. Yet the Court decided to disregard Morris’s—and the Constitution’s—text. It treated the Committee’s mandate as limited to matters of style and therefore gave legal effect to the text referred to the Committee rather than the Committee’s text.

D. Enumeration Clause

PROCEEDINGS OF CONVENTION REFERRED TO THE COMMITTEE OF STYLE

The proportions of direct taxation [and representation] shall be regulated by the whole number of free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within three years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct.³⁹⁸

REPORT OF COMMITTEE OF STYLE

Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to servitude for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the

394. *Thornton*, 514 U.S. at 815 n.27.

395. *Id.* at 791.

396. *Id.* at 792–93.

397. *Id.* at 816 n.27 (citation omitted); see discussion *infra* Section IV.B.

398. Convention Proceedings, *supra* note 5, at 571 (Article VII, Section 3).

United States, and within every subsequent term of ten years, in such manner as they shall by law direct.³⁹⁹

The significant change between the two versions is the committee's addition of an "actual enumeration" requirement. This language was not discussed at the Convention. We have no direct evidence of why Morris added it, but at the Convention he opposed both the constitutional requirement that representation in the House be revised in accordance with population changes and the requirement of a census.⁴⁰⁰ While he was unsuccessful in these efforts, the "actual enumeration" language advanced the same underlying goals at the core of his constitutional vision: limiting the power of new states and weakening the slave states.

In the late eighteenth century, there were two ways to assess population: actual counting of individuals and assessment based on educated estimates. Before the "actual enumeration" requirement was added, the constitutional text would have permitted either methodology. "[A]ctual enumeration" requires counting.⁴⁰¹

Without a census to rely on, delegates to the Constitutional Convention assigned the initial number of seats each state would have in the House based on estimates of their population. It was a contentious process, particularly because the decision affected the balance of power between northern and southern states. Morris was intimately involved in these discussions, having chaired the committee that first examined the question.⁴⁰² Ultimately, the Convention fixed on an allocation under which thirty-five representatives would be from the seven northern states and thirty from the six southern states. Of the thirty southern representatives, eight would be from the Deep South (Georgia and South Carolina).⁴⁰³

Those numbers were revised after the 1790 census. After the first census was conducted, Washington wrote to Morris bemoaning that "the *real* number will greatly exceed the *official* return."⁴⁰⁴ Although Washington was disturbed by this result, Morris would not have been.

399. Report of Committee of Style, *supra* note 5, at 590–91 (Article I, Section 2, Clause b).

400. See Section II.E.2; Convention Proceedings, *supra* note 5, at 571.

401. See Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an "Actual Enumeration,"* 77 WASH. L. REV. 1, 18–32 (2002).

402. 1 FARRAND'S RECORDS, *supra* note 1, at 540 (Morris's proposal for committee); *id.* at 542 (named to committee); *id.* at 559 (committee chair). For further discussion, see Vile, *supra* note 13, at 160–61.

403. See U.S. CONST. art. I, § 2, cl. 3 (listing number of representatives by state).

404. Letter from George Washington to Gouverneur Morris (July 28, 1791), 8 THE PAPERS OF GEORGE WASHINGTON, 22 MARCH 1791–22 SEPTEMBER 1791, at 381, 384 (Mark A. Mastromarino ed., 1999).

Given the general consensus among the Founders that population growth would be to the South and West,⁴⁰⁵ the first census might have been expected to result in increased representation of the South (and particularly of the Deep South). Precisely the opposite happened. The census of 1790 produced slightly increased representation of the North and occasioned a sharp decline in representation from the Deep South.⁴⁰⁶ Most notably, although the overall number of representatives increased by more than 60 percent, Georgia lost a seat.⁴⁰⁷ Thus, Morris's adding the "actual enumeration" requirement advanced his goals: the difference between the delegates' estimate of representation and the actual census indicate that "actual enumeration" led to the undercounting of population in the frontier areas in the South and the West whose political power he wished to diminish.

While the goals that Morris fought for at the Convention would suggest he sought to make a substantive change when he added the phrase "actual enumeration," the Supreme Court took the opposite interpretive approach in *Utah v. Evans*,⁴⁰⁸ assuming consistency, not change. *Evans* was the Court's most recent encounter with the question whether to follow the ratified text or the text referred to the Committee of Style. Utah argued that the Census Bureau's use of sampling violated the constitutional requirement of "actual enumeration."⁴⁰⁹ In holding that sampling was permissible, Justice Breyer stressed the fact that the words "actual enumeration" were added by the Committee of Style:

[T]he Committee of Detail sent the draft to the Committee of Style, which, in revising the language, added the words "actual Enumeration." Although not dispositive, this strongly suggests a similar meaning, for the Committee of Style "had no authority from the Convention to alter the meaning" of the draft Constitution submitted for its review and revision. Hence, the Framers would have intended the current phrase, "the actual Enumeration shall be made . . . in such Manner as [Congress] . . . shall by Law direct," as the substantive equivalent of the draft phrase, "which number [of inhabitants] shall . . . be taken in such manner as [Congress] shall direct." And the Committee of Style's phrase offers no linguistic temptation to limit census methodology in the manner that Utah proposes.⁴¹⁰

Breyer employed a strong presumption that the words used by the Committee of Style did not alter the meaning of the words used by the Committee

405. See *supra* text accompanying notes 266–267.

406. See Off. of the Historian, *Representatives Apportioned to Each State: 1st to 23rd Census, 1790–2010*, U.S. HOUSE OF REPRESENTATIVES, https://historycms2.house.gov/Institution/Apportionment/state_apportionment [perma.cc/E9VS-PSXU].

407. *Id.*

408. 536 U.S. 452 (2002).

409. *Evans*, 536 U.S. at 473.

410. *Id.* at 474–75 (citations omitted). Justice Breyer also had another ground of decision, holding that sampling was "actual Enumeration." *Id.* at 475–76.

of Detail. The result was that the Committee of Style's text, rather than being closely parsed by the Court, was understood as not changing the meaning of the Committee of Detail's text.

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

Carrying the majority's "argument to its logical conclusion would constrain us to say that the *second to last draft* would govern in every instance where the Committee of Style added an arguable substantive word. Such a result is at odds with the fact that the Convention passed the Committee's version, and with the well-established rule that the plain language of the enacted text is the best indicator of intent." Rather than rely on the draft, I focus on the words of the adopted Constitution.⁴¹¹

Justice Thomas is alone in taking this approach. The Court has either disregarded the Committee of Style's language (as in *Powell*) or strongly presumed that the Committee of Style's language meant what the previously adopted text meant (as in *Evans*). But with respect to his addition of "actual enumeration," Morris was likely trying to do precisely what the Court majority in both *Powell* and *Evans* presumed was not happening: he wanted to change the clause's meaning.

E. *Contract Clause*

NORTHWEST ORDINANCE (1787)

[I]n the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever interfere with, or affect private contracts or engagements, bona fide, and without fraud previously formed.⁴¹²

PROCEEDINGS OF CONVENTION REFERRED TO THE COMMITTEE OF STYLE

No State shall coin money; nor emit bills of credit, nor make anything but gold or silver coin a tender in payment of debts; nor pass any bill of attainder or ex post facto laws; nor grant letters of marque and reprisal, nor enter into any treaty, alliance, or confederation; nor grant any title of nobility.⁴¹³

REPORT OF COMMITTEE OF STYLE

No state shall coin money, nor emit bills of credit, nor make any thing but gold or silver coin a tender in payment of debts, nor pass any bill of attainder,

411. *Id.* at 496 (Thomas, J., concurring in part and dissenting in part) (citations omitted) (quoting *Nixon v. United States*, 506 U. S. 224, 231–32 (1993)).

412. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 n.a.

413. Convention Proceedings, *supra* note 5, at 577 (Article XII).

nor ex post facto laws, nor laws altering or impairing the obligation of contracts; nor grant letters of marque and reprisal, nor enter into any treaty, alliance, or confederation, nor grant any title of nobility.⁴¹⁴

Morris had been the preeminent defender of property rights during the Convention debates. He proposed limiting the franchise to property owners, empowering Congress to establish property qualifications for membership in the House and Senate, and barring compensation for senators.⁴¹⁵ By contrast, Morris's position on the Contract Clause was more complicated. Though Morris had made the argument that government modification of public contracts was unconstitutional when Pennsylvania was considering cancelling a corporate charter, at the Convention he opposed adding a contracts clause modeled on the Northwest Ordinance's to the Constitution.⁴¹⁶

Of all the clauses in the Committee of Style draft, the Contract Clause may be the most puzzling. Every other change made by the Committee of Style reflected a reworking of text previously approved by the Convention. But the only time the Contract Clause had been considered by the Convention, it was voted down. Nonetheless, the clause reemerged and appeared in a modified form in the Committee proposal.

Historians and legal scholars have made two claims about this turn of events. The first aims to explain why Morris went from opposing a proposed Contract Clause to writing one into the Constitution. It posits that one of Morris's fellow Committee members (King, Hamilton, or de facto committee member Wilson) must have persuaded Morris to include the Contract Clause.⁴¹⁷ The second is an explanation of how a provision rejected by the Convention majority ended up in the Committee's draft. It argues that the Committee dishonestly changed the Constitution's substance.⁴¹⁸

Neither argument, however, withstands close scrutiny. Morris's argument that it would be unconstitutional for the Pennsylvania legislature to revoke the Bank of North America's charter shows that he favored prohibiting state interference with contracts, including public contracts.⁴¹⁹ There was thus no need for fellow Committee members to convince him that a clause barring state interference with contracts was a good idea.

It is also unlikely that the Committee would try to sneak a clause rejected by the Convention delegates into its draft constitution. The other delegates would not have missed the Committee's addition of a clause that they rejected.

414. Report of Committee of Style, *supra* note 5, at 596–97 (Article I, Section 10) (footnote omitted).

415. See *supra* text accompanying notes 182–196.

416. See *supra* Section II.D.

417. See, e.g., McDONALD, *supra* note 16, at 272–73.

418. *Id.* at 272; ROSSITER, *supra* note 55, at 228–30; see also NEDELSKY, *supra* note 138, at 299 n.141 (suggesting Wilson “likely . . . inserted such a clause”).

419. See *supra* text accompanying notes 225–238.

And Morris's changes to the constitutional text were mostly subtle (except for the revisions to the Preamble) and lacking in obvious substantive import.

Significantly, the Convention records provide indirect evidence that the delegates adopted a contracts clause at some point before the Committee of Style began its work. The day after the Convention rejected the Contract Clause, John Dickinson noted that because the term "ex post facto" applied only to criminal cases, "some further provision" would be necessary to "restrain the States from retrospective laws in civil cases."⁴²⁰ In other words, Dickinson informed the delegates that a contract clause was necessary because the ban on ex post facto legislation they had already adopted would not prevent state interference with contracts. While Madison reports no further discussion of the Contract Clause prior to the work of the Committee of Style, Dickinson's speech almost certainly prompted both discussion of (either not recorded by Madison or taking place off the Convention floor) and agreement on a contract clause.

The Committee of Style's draft departed in three ways from the Northwest Ordinance's contract clause. First, the Committee's clause is narrower in one way: "in any manner whatever, interfere with or affect private contracts" becomes "laws altering or impairing the obligation of contracts." Morris had objected to King's proposal as "going too far. There are a thousand laws relating to bringing actions—limitations of actions which affect contracts . . ."⁴²¹ Both removing the phrase "in any manner whatever" and substituting "altering or impairing" for "interfere with or affect" seem to address this concern and to limit the open-ended nature of the clause.

Second, and more significantly, Morris removed the word "private." "[I]nterfere with or affect private contracts or engagements" becomes "altering or impairing the obligation of contracts." The change appears intentional: it supported the clause's application to public contracts, which was consistent with the position that Morris took in suggesting that the Pennsylvania legislature could not constitutionally revoke the charter of the Bank of North America.⁴²²

Third, while the Northwest Ordinance by its terms applies only to "previously formed" contracts, the Contract Clause is not limited to previously formed contracts. This change was to be consequential when Chief Justice Marshall (unsuccessfully) argued that the Contact Clause applied prospectively (specifically, to bankruptcy legislation) in *Ogden v. Saunders*.⁴²³ While there is no evidence that Morris would have wanted the clause to have prospective application, given his concern with protecting private property it seems likely that he would have viewed the question as the Chief Justice did—and therefore that Morris's omission of "previously formed" was intentional.

420. 2 FARRAND'S RECORDS, *supra* note 1, at 448–49.

421. *Id.* at 439.

422. See *supra* text accompanying notes 236–241.

423. 25 U.S. (12 Wheat.) 213, 354 (1827) (Marshall, C.J., dissenting).

At least according to Madison's notes, there was almost no discussion of the clause on the Convention floor after it was proposed by the Committee. The words "altering or" were dropped without recorded discussion.⁴²⁴ Elbridge Gerry, the only speaker to discuss the clause, moved that the clause apply to the federal government as well as the states, but no one seconded his motion. After Gerry's unsuccessful motion, the Convention adjourned. When they reconvened the following day, they moved on to other topics. That is the only record we have of the Convention's consideration of the Committee of Style's proposal.⁴²⁵

There was little discussion of the clause during the ratification debates. Antifederalists Patrick Henry⁴²⁶ and James Galloway⁴²⁷ suggested that the clause might reach contracts between the states and private individuals. By contrast, Antifederalist delegates to the Convention like George Mason and Luther Martin did not explicitly address whether the clause applied to public contracts.⁴²⁸ In general, when Federalists discussed the clause, they spoke of its application to private contracts; Convention delegate William Davie was the only Federalist to state clearly that the clause "refer[red] merely to contracts between individuals."⁴²⁹

Nonetheless, in the years following the Convention, two Committee of Style members stated that the clause reached public contracts. In *Chisholm v. Georgia*, Justice Wilson opined that the Contract Clause applied to public contracts:

What good purpose could this Constitutional provision secure, if a State might pass a law impairing the obligation of its own contracts; and be amenable, for such a violation of right, to no controlling judiciary power? We have seen, that on the principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages.⁴³⁰

424. Compare 2 FARRAND'S RECORDS, *supra* note 1, at 619 (reporting the approved text of the Contract Clause and noting that it had been "altered" from the prior version), with Report of Committee of Style, *supra* note 5, at 596–97 (presenting Contract Clause reported by the Committee of Style).

425. See 2 FARRAND'S RECORDS, *supra* note 1, at 619.

426. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 474 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott 2d ed. 1836) ("The expression includes public contracts, as well as private contracts between individuals.").

427. 4 *id.* at 190–91 ("That clause of the Constitution may compel us to make good the nominal value of these [public] securities.").

428. BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 16 (1938). Scholars have debated whether these statements implicitly reflect the understanding that the Contract Clause was limited to private contracts or whether they are simply silent on the issue. Compare *id.* at 12–16 (arguing that statements reflect understanding that the clause was limited to private contracts), with JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 20 (2016) (contending that statements "cast [no] light on the subject").

429. 3 FARRAND'S RECORDS, *supra* note 1, at 350.

430. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 465 (1793) (Wilson, J.), superseded by constitutional amendment, U.S. CONST. amend. XI.

Alexander Hamilton, in the opinion he wrote for property owners who held land pursuant to the contested Yazoo land grant from Georgia, took the same position. Hamilton argued that the Georgia legislature's statute overturning its prior land grant was unconstitutional under the contract clause because public contracts fell within the ambit of the clause:

Every grant from one to another, whether the grantor be a state or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me that taking the terms of the constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the act of the legislature of Georgia, may justly be considered as contrary to the constitution of the United States, and, therefore, null.⁴³¹

Similarly, in his jury charge in the case of *Vanhorne's Lessee v. Dorrance*, former Convention delegate Justice William Paterson declared that a state statute repealing a land grant "impairs the obligation of a contract, and is therefore void."⁴³² And when Chief Justice Marshall applied the Contracts Clause to a land grant in *Fletcher v. Peck*,⁴³³ his opinion was consistent with the opinions of Hamilton, Wilson, and Paterson.⁴³⁴

Focusing on the absence of the word "private" in the Contract Clause, Douglas Kmiec and John McGinnis have argued that *Fletcher* is consistent with the original understanding of the clause.⁴³⁵ Making that textual argument as well as pointing to the evidence of Hamilton, Wilson, and Paterson's statements, Professor James Ely has reached the same conclusion.⁴³⁶

This is, however, a minority view. In his classic study *The Contract Clause of the Constitution*, Benjamin Wright argues that the the Contracts Clause was originally understood to apply only to private contracts. Wright's argument rests on the view that the Constitution's language was modeled on the Northwest Ordinance.⁴³⁷ Pulitzer Prize historian Leonard Levy similarly declares that the Court "transmogrified" the Contract Clause by departing from the clearly established original understanding that the Contract Clause applied

431. 4 THE LAW PRACTICE OF ALEXANDER HAMILTON 430, 431 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980).

432. 2 U.S. (2 Dall.) 304, 320, 28 F. Cas. 1012, 1019 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,857).

433. 10 U.S. (6 Cranch) 87 (1810).

434. See *Fletcher*, 10 U.S. at 137–39.

435. Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 538–39 (1987).

436. ELY, *supra* note 428, at 19 ("I wish to challenge this conventional wisdom and to propose . . . that the contract clause could fairly be construed to safeguard both private and public contracts from state abridgement . . .").

437. See WRIGHT, *supra* note 428, at 4–8, 27–34; see also ELY, *supra* note 428, at 19 ("Wright and others appear to proceed on the problematic assumption that the clause was simply intended to replicate the earlier provision in the Northwest Ordinance.").

only to private contracts in *Fletcher*.⁴³⁸ That view continues to hold sway. Thus, Professor Bradford Clark wrote in the *Harvard Law Review* in 2010 that “the clause was generally understood to apply only to private contracts between individuals, not to a state’s own contracts” and that it “was modeled on the Northwest Ordinance of 1787.”⁴³⁹

The Contract Clause, then, fits into the pattern we have seen previously: the Committee of Style’s draft departed from prior language (the Northwest Ordinance’s contract clause) in ways that reflected Morris’s views. In the years after ratification, members of the Committee (and, once again, Wilson and Hamilton) drew on the clause to advance views that they shared with Morris. Nonetheless, leading academic commentators have read the clause by focusing on the Convention debates before the Committee began its work, rather on the text and the way it was construed in the early republic.

F. Presidential Succession Clause

PROCEEDINGS OF THE CONVENTION REFERRED TO THE COMMITTEE OF STYLE

The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or disability of the President and Vice President; and such Officer shall act accordingly, until such disability be removed, or a President shall be elected.⁴⁴⁰

REPORT OF COMMITTEE OF STYLE

[T]he Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or the period for chusing another president arrive.⁴⁴¹

When rearranging the Constitution’s text on presidential succession, Morris changed “officer of the United States” to “officer.” While other changes made by Morris and the Committee of Style have had more impact on our constitutional history, this is one of the changes that has received the most scholarly attention (although the fact that Morris was the author of the change has once again been ignored).⁴⁴² In part, that attention reflects the significance

438. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 132 (1988).

439. Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1907 (2010); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 545 & n.257 (1997).

440. Convention Proceedings, *supra* note 5, at 573 (Article X, Section 1).

441. Report of Committee of Style, *supra* note 5, at 598–99 (Article II, Section 1, Clause e).

442. See, e.g., Akhil Reed Amar & Vikram David Amar, *Essay, Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 115–16, 118–19 (1995); John F. Manning, *Response Essay, Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 142–45 (1995); Steven G. Calabresi, *Response Essay, The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 158–59 (1995); Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 1019–22 (2010); Tillman, *supra* note 275, at 111 n.117; Vasan Kesavan & Michael Stokes

of the text. Depending on how the clause is read, the statute that places the speaker of the House second in the line of presidential succession after the vice president may be unconstitutional.⁴⁴³ And in part it presents an intellectual puzzle for originalists, since the text that was referred to the Committee of Style and Madison's reading of the text proposed by the Committee of Style point to one understanding of who can succeed the president, whereas the text of the Succession Clause and the First Congress's interpretation of it in light of other constitutional provisions point to another.

Until late in the Convention's proceedings, the Constitution did not provide for a vice president. The draft Constitution provided that the president was to be succeeded by the president of the Senate up to the end of August.⁴⁴⁴ Morris objected to this proposal and suggested that the chief justice should be the presidential successor. He did not offer an explanation, but in the same speech, he referenced his proposal that the chief justice be part of the president's cabinet, which suggests that his preference for the chief justice stemmed from his belief that the chief justice might counsel the president and be part of his cabinet.⁴⁴⁵ Madison followed Morris and also objected to the designation of the Senate president, although it was not because of the possibility that the chief justice would be in the cabinet.⁴⁴⁶ Since the delegates were contemplating a new election if a president died, Madison argued that if the president of the Senate were acting president, the Senate "might retard the appointment of a President in order to carry points whilst the revisionary power was in the President of their own body."⁴⁴⁷

The delegates returned to this clause after they had decided to create the vice presidency. Randolph then proposed what is, in substance, the first Succession Clause above—in which Congress has the power to establish which "officer of the [United States]" shall succeed the president and vice president.⁴⁴⁸ The one difference between the Randolph proposal and the clause referred to the Committee of Style is that, in Randolph's proposal, the designated "officer of the [United States]" would have served "until the time of electing a President shall arrive."⁴⁴⁹ Madison objected that the language "would prevent a supply of the vacancy by an intermediate election."⁴⁵⁰ He proposed the substitute language "until such disability be removed, or a President shall be elected." Morris seconded the proposal, which narrowly

Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1207–08 (2003).

443. See 3 U.S.C. § 19.

444. See 2 FARRAND'S RECORDS, *supra* note 1, at 186.

445. *Id.* at 427.

446. *Id.*

447. *Id.*

448. *Id.* at 535.

449. *Id.*

450. *Id.*

passed—six states to four, with one state divided. One ground for objection was that Congress should not be limited to selecting only “officers of the [United States]” to fill the vacancy.⁴⁵¹ “They wished it to be at liberty to appoint others than such,” Madison observes in his notes.⁴⁵² He does not indicate who voiced this objection, although presumably Morris was not among this group since he had seconded Madison’s proposal.

The Incompatibility Clause of Article I, Section 6 provides that sitting members of Congress cannot hold “any Office under the United States.”⁴⁵³ The standard reading is that because of the Incompatibility Clause, members of Congress are not “officers of the United States.”⁴⁵⁴ Thus, if the terminology in the two clauses are read to have consistent meanings, as the Succession Clause was submitted to the Committee of Style, Congress was empowered to place members of the executive and judicial branch in the line of presidential succession, but not members of Congress.

But Morris’s beliefs at the time may not have aligned with this textual inference, as he seems to have believed members of Congress would be in the presidential line of succession. Shortly after the delegates voted to adopt the language concerning presidential succession and “officer[s] of the United States,” in a debate concerning who would preside over the Senate, Morris observed that “[i]f there should be no vice president, the President of the Senate would be temporary successor.”⁴⁵⁵ Although Morris did not develop this statement (or, at least, Madison did not record any further explanation), Morris appears to have believed that, if something happened to the vice president, the president of the Senate would become the “temporary” vice president.⁴⁵⁶

When Congress passed the first Succession Act in 1792, it placed the president *pro tempore* of the Senate and the Speaker as next in the line of succession following the vice president.⁴⁵⁷ During the debate over the statute, a number of Republican congressman unsuccessfully argued that, as a constitutional matter, members of Congress could not be in the line of succession because they were not “officers.” Jonathan Sturges declared that he “could not find that the Speaker of the House, or President of the Senate *pro tem.* were officers of the Government in the sense contemplated by the Constitution.”⁴⁵⁸ William Branch Giles agreed: “The characters referred to he did not think

451. *Id.* (cleaned up).

452. *Id.*

453. U.S. CONST. art. I, § 6, cl. 2.

454. See, e.g., Amar & Amar, *supra* note 442, at 115, 118–19; Manning, *supra* note 442, at 142; Calabresi, *supra* note 442, at 159; Goldstein, *supra* note 442, at 1020.

455. 2 FARRAND’S RECORDS, *supra* note 1, at 537.

456. See Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1707 n.15 (1988) (reading this statement of Morris’s to mean that if the vice president were to die, the president of the Senate would be next in the line of succession).

457. Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240 (repealed 1886).

458. 3 ANNALS OF CONG. 281 (1791).

were officers.”⁴⁵⁹ Madison had the same view of the presidential Succession Clause, observing in a letter that Congress “certainly err[ed]” and “it may be questioned whether [the Speaker and president *pro tempore*] are officers, in the constitutional sense.”⁴⁶⁰

Madison and the other Republicans seem to have read “officer” as having the same meaning as “officer of the United States,” even though the Committee of Style had deleted “of the United States” from the clause. They imposed a restriction on who was an “officer” that neither the final provision itself nor related provisions of the Constitution imposed. Indeed, a couple of representatives read the Constitution as if the Committee of Style had not altered the clause. Alexander White “observed[] that the Constitution says the vacancy shall be filled by an officer of the United States. The President, *pro tempore*, of the Senate[] is not an officer of the United States.”⁴⁶¹ Similarly, in contending that the secretary of state should be first in the line of succession, William Loughton Smith noted that “by the Constitution, the vacancy is to be filled with an officer of the United States. This narrows the discussion very much.”⁴⁶² Both White and Smith asserted that “of the United States” was part of the clause, even though that language had been removed.

In contrast, Federalist congressman took the position that the speaker and the president *pro tempore* were “officers” within the meaning of the Constitution and could thus be placed in the line of succession. Elbridge Gerry, defending the bill, asked: “[I]f [the Speaker] is not an officer, what is he? [Gerry] then read a clause from the Constitution, which says that the House shall choose their Speaker *and other officers*.”⁴⁶³ Theodore Sedgwick was surprised to hear the idea controverted, believing it was clear that the Speaker of the House and the president *pro tempore* of the Senate were officers. “In common parlance he was sure there was no difficulty in the matter.”⁴⁶⁴

Originalist scholars have disagreed about how to read the clause. Professor Akhil Amar and Dean Vikram Amar, who have written the leading essay arguing that the current succession statute is unconstitutional, contend that “[t]here is considerable historical evidence that the Constitution’s drafters used the term ‘Officer’ in the Succession Clause as shorthand for ‘Officer of

459. *Id.*

460. Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 14 THE PAPERS OF JAMES MADISON 235, 235–36 (Robert A. Rutland et al. eds., 1983).

461. 2 ANNALS OF CONG. 1854 (1791).

462. *Id.*

463. 3 ANNALS OF CONG. 281 (1791).

464. *Id.* For discussion of the debate about the first succession bill, see JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 57–62 (1965).

the United States.’”⁴⁶⁵ They note the Committee of Style’s change but dismiss it as irrelevant.⁴⁶⁶

In support of the competing view that members of Congress can be placed in the line of succession, Dean Manning has countered that the Committee of Style’s language should be given effect because it is the text that was ratified:

[E]ven if the Committee of Style acted *ultra vires* by making substantive changes to the text, the ratifiers accepted them. . . . [T]he natural import of the *text* submitted to the States would be . . . that the unrestricted term “Officers” is broader than the phrase “Officers of the United States.” Thus, the drafting history does not provide a convincing textual argument for reading the Succession Clause to exclude members of Congress from the line of succession.⁴⁶⁷

The change that Morris made here is unlike the other changes surveyed in this Article, which clearly advanced goals that Morris had unsuccessfully fought for. That is not the case here. At the same time, examination of related arguments Morris made at the Convention suggest that he would have favored giving Congress the power to place congressional officers in the line of succession (which is what the revised text did). Morris had originally favored the chief justice succeeding the president, but that was at a stage in the proceedings when the chief justice would have been (if Morris had his way) in the presidential cabinet. That rationale disappeared when Morris’s proposal that the chief justice be in the cabinet was not accepted.

Since his earlier rationale for favoring the Chief Justice no longer applied, Morris may have changed the text because he thought the line of succession should be opened up. He generally favored giving Congress discretion to frame rules—as with his Preamble or his Qualifications Clause, which gave the House and the Senate power to establish requirements for membership—and that position suggests that he would have favored giving Congress wide discretion in framing the line of presidential succession. Moreover, his statement on the Convention floor about the president of the Senate being in the line of succession suggests that he read the pre-revision text to permit congressional members to be in the line of succession. The Committee of Style revision would then have been consistent with his overarching belief in the importance of congressional discretion, and it would have strengthened the reading he already gave to the Succession Clause.

Alternatively, this change may have been a drafting error or, as the Amars suggests, “officer” may have been a “shorthand” for “officer of the United States.” But Morris was consistently a careful drafter, which suggests that the change was intentional and that he meant to include members of Congress as potential officers in the line of succession.

465. Amar & Amar, *supra* note 442, at 116.

466. *See id.* (“A later style committee deleted the words ‘of the United States,’ but no evidence suggests that this style change was meant to change meaning.”).

467. Manning, *supra* note 442, at 144–45.

It is also noteworthy that, in the debates about the Presidential Succession Act, the Federalist congressmen read “officer” to mean “officer,” whereas Republicans read “officer” as meaning “officer of the United States.” Historians and legal scholars have repeatedly concluded that the two parties’ constitutional positions were driven by partisan interests: Republicans wanted Jefferson (the secretary of state) to be first in the line of succession after the vice president, while Federalists wanted the Federalist president of the Senate to have that position.⁴⁶⁸ But this is not a convincing explanation: the Federalists could have advanced their partisan interests by fighting to place Hamilton (the treasury secretary) in the line of succession after the vice president. The fight over succession is, however, consistent with a deeper difference in constitutional interpretation: In this instance as in others, the Federalists carefully parsed constitutional text, whereas Republicans engaged in looser construction. Although they clearly did not want to elevate Jefferson, Federalists may also have used the tighter construction here, not for partisan reasons, but because they had a consistent interpretive approach.

G. *Impeachment Clauses*

During the Convention debates, Morris initially opposed presidential impeachment, but he changed his mind and ultimately championed expansive grounds for impeachment.⁴⁶⁹ The impeachment provision referred to the Committee was not as broad as Morris wanted, and in the Committee report he revised the text to expand the grounds for impeachment and bring it closer to the conception he had unsuccessfully argued for.

While Morris did not prevail in the floor debates about the scope of impeachment, he did successfully place the trial of the impeached official in the Senate. On the Committee, he inserted language to consolidate his win by making clear that the Senate was the only possible forum for trial.

1. High Crimes and Misdemeanors

PROCEEDINGS OF THE CONVENTION REFERRED TO THE COMMITTEE OF STYLE

[The president] shall be removed from his office on impeachment by the House of representatives, and conviction by the Senate, for treason or bribery or other high crimes and misdemeanors against the United States⁴⁷⁰

468. See, e.g., DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 142 (1997); Amar & Amar, *supra* note 442, at 132; Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 459–60 (1949).

469. See *supra* Section II.B.2.

470. Convention Proceedings, *supra* note 5, at 575 (Article X, Section 2).

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The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.⁴⁷¹

Morris dropped the phrase “against the United States” from the Impeachment Clause. “[O]ther high crimes and misdemeanors against the United States” became simply “other high crimes and misdemeanors.” The question whether this change was legally consequential played a central role in the debate about whether the impeachment of President Clinton for acts not related to his exercise of office was constitutionally permissible,⁴⁷² and it has been raised more recently with respect to President Trump (although it was not at issue in his impeachment trial).⁴⁷³ The issue is whether the Constitution’s language makes impeachable activity that is criminal (or not criminal but wrong in some significant way) but that is not related to the president’s performance in office.⁴⁷⁴ Thus, scholars have debated whether lying to a grand jury about an affair or financial crimes related to business activities would be impeachable.⁴⁷⁵

The dominant view among academics is that the change in language should be ignored and the clause should be read as if it still contained the “against the United States” language. As Professor Cass Sunstein has recently written:

Was the deletion designed to broaden the legitimate grounds for impeachment? That is extremely unlikely. As its name suggests, the Committee on Style and Arrangement lacked substantive authority (which is not to deny that it made some substantive changes), and it is far more likely that this particular change was made on grounds of redundancy.⁴⁷⁶

Professor Jack Rakove, another leading adherent of this view, observes that Morris was a champion of a strong executive and an opponent of impeachment; as a result, the Committee of Style’s change should not be understood to increase the range of impeachable offenses.⁴⁷⁷ This approach, which has been called the “executive function” approach, contends that, despite the

471. Report of Committee of Style, *supra* note 5, at 600 (Article II, Section 4).

472. See Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 737 (1999).

473. See, e.g., ALLAN J. LICHTMAN, THE CASE FOR IMPEACHMENT 4–5 (2017).

474. See CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN’S GUIDE 122–23 (2017); Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 U.C. DAVIS L. REV. 1927, 1996 (2019).

475. See LICHTMAN, *supra* note 473, at 46–47; Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 GEO. WASH. L. REV. 682, 687 (1999); Turley, *supra* note 472, at 746–47; Jonathan Turley, *The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791, 1795–96 (1999) [hereinafter Turley, *Executive Function Theory*]; Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 100 (1999).

476. SUNSTEIN, *supra* note 474, at 48.

477. Rakove, *supra* note 475, at 687 n.25.

change in language, the president can only be impeached for acts related to the exercise of his office, not for personal acts.⁴⁷⁸ Like Rakove, Professor Jonathan Turley, the leading voice on the other side of the originalist debate during the Clinton impeachment (although the leading academic opponent of President Trump's impeachment), has acknowledged that Morris "represented the original extreme wing on impeachment, opposing any impeachment for the chief executive."⁴⁷⁹ Turley is unable to explain why Morris might have made the change, but Turley's broader conception of the clause focuses on both the ratified text and history.⁴⁸⁰

What these accounts both miss is that, as discussed above,⁴⁸¹ Morris changed his mind about impeachment. He initially opposed it but ultimately favored a broad conception of impeachable offenses:

He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst it by displacing him. . . . [He] ought therefore to be impeachable for treachery[,] Corrupting his electors, and incapacity . . .⁴⁸²

Morris's statement suggests that he did not remove "against the United States" because it was redundant. Rather, he had a capacious view of when impeachment was appropriate, including circumstances like "incapacity" and "Corrupting his electors" that could fall outside the ambit of acts as president; while "high crimes and misdemeanors against the United States" is typically read as limited to official acts, the deletion provided textual support for making impeachable "high crimes and misdemeanors" that did not arise from acts as president.

A related question raised by the change in the text is whether it was designed to make "maladministration" impeachable, an outcome Morris favored.⁴⁸³ Madison's notes are often read as reflecting a compromise: Mason proposes maladministration; Madison objects that this would give Congress unconstrained ability to remove from office a president it disagreed with; Morris defends "maladministration"; Mason yields to Madison and offers

478. The term "executive function" is Professor Jonathan Turley's (although he is a critic of this approach). Turley, *Executive Function Theory*, *supra* note 475.

479. *Id.* at 1814.

480. *Id.* at 1813–14.

481. See *supra* Section II.B.

482. 2 FARRAND'S RECORDS, *supra* note 1, at 68–69.

483. He spoke on behalf of Mason's proposal that "maladministration" be grounds for impeachment. 2 FARRAND'S RECORDS, *supra* note 1, at 550. When an earlier impeachment clause had been under consideration, he had argued that officers should be impeachable for "malversation," *id.* at 344, and the New York Constitution of 1777 (of which he was one of the principal drafters) made "mal and corrupt conduct" impeachable. N.Y. CONST. of 1777, art. XXXIII.

“high crimes and misdemeanors” as a narrowing substitute.⁴⁸⁴ The problem with this account is that, according to Blackstone, maladministration is one example of “high crimes and misdemeanors.”⁴⁸⁵ Thus, under one view Mason “snookered”⁴⁸⁶ Madison—expanding the scope of the clause while pretending to narrow it.

At the same time, the phrase “high crimes and misdemeanors *against the United States*” suggests a narrowing construction of the clause. The phrase “against the United States” implies that the scope of the term would be independently determined in the United States without relying on British precedent. While maladministration might be impeachable in Great Britain, the House and Senate might determine that it was not a “high crime[] and misdemeanor[] *against the United States*.” In contrast, Morris’s deleting “against the United States” textually supports continuity with British precedent. Thus, Morris’s removal of the phrase strengthened the textual argument that a president could be impeached for maladministration and for acts outside the scope of his office.

The controversy over how to read the Impeachment Clause—and the type of activities that were impeachable—was central to the first impeachment under the Constitution and only impeachment of the Federalist era, that of Republican senator William Blount. Blount was charged by the House with conspiring to launch a military attack against Spain in order to win the Louisiana territories and Florida for Great Britain.⁴⁸⁷ In the Senate, defense counsel Alexander Dallas mounted a series of jurisdictional arguments, including the argument that only acts committed by an officer in his official capacity could be the basis of impeachment: “[O]fficial offences and offenders were alone contemplated.”⁴⁸⁸ House manager James A. Bayard, a Federalist, responded with an appeal to text: “[T]here is not a syllable in the Constitution which confines impeachment to official acts”⁴⁸⁹ The Senate ultimately acquitted Blount, holding that it lacked jurisdiction.⁴⁹⁰ Blount had made a series of other jurisdictional arguments in addition to his argument about the scope of impeachable offenses, including that senators are not “civil officers” within the meaning of the Impeachment Clause and that he could not be impeached since he had resigned from office.⁴⁹¹

484. Tuan Samahon, *Impeachment as Judicial Selection?*, 18 WM. & MARY BILL RTS. J. 595, 630 (2010).

485. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *121.

486. Neil Kinkopf, *The Scope of “High Crimes and Misdemeanors” After the Impeachment of President Clinton*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 201, 209.

487. See BUCKNER F. MELTON, JR., *THE FIRST IMPEACHMENT: THE CONSTITUTION’S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT* 156 (1998).

488. 8 ANNALS OF CONG. 2269 (1799).

489. *Id.* at 2261.

490. *Id.* at 2319.

491. *See id.* at 2269, 2278.

The Senate resolution does not state which jurisdictional ground (or grounds) it relied on, and scholars have argued about what the basis of the decision was, with many contending that the decision reflected a determination that a Senator is not impeachable.⁴⁹² Moreover, even as Blount was acquitted, there had been significant support for conviction, with a majority of Federalist senators voting against Blount.⁴⁹³ The critical point is that there were competing readings of the text, and once again the Federalist position was to parse the text closely.

2. Trial by the Senate

PROCEEDINGS OF THE CONVENTION REFERRED TO THE COMMITTEE OF STYLE

The Senate of the United States shall have power to try all impeachments . . .⁴⁹⁴

REPORT OF COMMITTEE OF STYLE

The Senate shall have the sole power to try all impeachments.⁴⁹⁵

Unlike his other changes, Morris added the word “sole” not to overturn a defeat but to consolidate a victory. Morris had prevailed in the relevant floor vote. Madison had argued that, after impeachment by the House, trial should be by the Supreme Court. According to Madison, if trial was by the Senate, the president “was made improperly dependent.”⁴⁹⁶ Pinckney agreed with Madison and was also concerned that trial in the Senate would “render[] the President too dependent on the Legislature.”⁴⁹⁷ Morris countered that “[t]he Supreme Court were too few in number and might be warped or corrupted.”⁴⁹⁸ Morris prevailed by a vote of nine to two.⁴⁹⁹

This clause was at issue in *United States v. Nixon*.⁵⁰⁰ Former judge Walter Nixon argued that the Supreme Court could review his Senate trial despite the

492. See Benjamin Cassady, “You’ve Got Your Crook, I’ve Got Mine”: *Why the Disqualification Clause Doesn’t (Always) Disqualify*, 32 QUINNIPAC L. REV. 209, 220 (2014) (arguing members of Congress are not impeachable); Buckner F. Melton, Jr., *Let Me Be Blunt: In Blount, the Senate Never Said that Senators Aren’t Impeachable*, 33 QUINNIPAC L. REV. 33, 35 (2014) (rejecting this view); Seth Barrett Tillman, *Originalism & the Scope of the Constitution’s Disqualification Clause*, 33 QUINNIPAC L. REV. 59, 75–76 (2014) (finding the view that senators are not impeachable “reasonable”).

493. Brian C. Kalt, *Presidential Impeachment and Removal: From the Two-Party System to the Two-Reality System*, 27 GEO. MASON L. REV. 1, 6 n.24 (2019).

494. Convention Proceedings, *supra* note 5, at 572 (Article IX, Section 1).

495. Report of Committee of Style, *supra* note 5, at 592 (Article I, Section 3, Clause e).

496. 2 FARRAND’S RECORDS, *supra* note 1, at 551.

497. *Id.*

498. *Id.*

499. *Id.*

500. 506 U.S. 224 (1993).

Impeachment Clause's provision making the Senate the "sole" trial authority.⁵⁰¹ According to Nixon, the Committee of Style adding the word "sole" was a "cosmetic edit" without substance.⁵⁰² The opinion found against the judge on several grounds. Significantly, it relied on the *Powell* Court's accepting that "the Committee of Style had no authority from the Convention to alter the meaning of the Clause,"⁵⁰³ but it also stated that "we must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language."⁵⁰⁴ The Court assumed that the two versions of the clause have the same meaning.⁵⁰⁵ Between all the changes Morris made as the Committee's drafter, this is the one instance in which this assumption is consistent with the Convention votes: Morris had won, and he was trying to clarify the text so that it did not permit a reading inconsistent with his victory.

Adding "sole" closed off the argument that there could be other venues for the trial. Madison's proposal that the Supreme Court try the case was not clearly barred by the Committee of Detail's language, but it was clearly barred by the new language. The Committee of Style's language made the clause for the Senate parallel with the clause for the House, which provided that the House "shall have the sole power of impeachment."⁵⁰⁶ The change reinforced the point that the Senate alone could try the cases. Had the change not been made, the difference between the two clauses would have made possible the argument that other venues for the trial were possible (since "only" the House could impeach but there was no similar statement about the Senate). Morris revised the constitutional language so that his victory on the floor would not be subsequently undercut.

H. The Federal Judiciary

The one area in which Morris admitted having used his role on the Committee to deceptively change the Constitution's meaning was in his treatment of the judiciary (although he did not specify what exactly he had done).⁵⁰⁷ During the floor debates, Morris had been a fierce advocate of a strong federal judiciary. The provisions referred to the Committee were at odds with his views in two ways: Congress was not required to establish lower federal courts (although it was allowed to do so), and the text did not give federal courts the

501. *Nixon*, 506 U.S. at 232.

502. *Id.* at 231.

503. *Id.* (citing *Powell v. McCormack*, 395 U.S. 486, 538–39 (1969)).

504. *Id.*

505. See *infra* Section IV.B.

506. Report of Committee of Style, *supra* note 5, at 591.

507. See *supra* note 76 and accompanying text.

power of judicial review.⁵⁰⁸ In both areas, Morris changed the text to advance his goals.

1. Judicial Vesting Clause

PROCEEDINGS OF THE CONVENTION REFERRED TO THE COMMITTEE OF STYLE

The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.⁵⁰⁹

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The judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.⁵¹⁰

Morris's crafting of three parallel articles with three (largely) parallel Vesting Clauses has already been discussed. It reflected his desire to elevate the judiciary (and the executive) to equal stature with Congress.⁵¹¹ He also made a substantive change to the Article III Vesting Clause, and that change bore on the creation of lower federal courts.

After the question of whether to empower Congress to create lower federal courts divided the Convention, the Madisonian Compromise empowered Congress to create lower federal courts but did not require it to do so. The compromise provided "that the National Legislature be empowered to institute inferior tribunals."⁵¹² In explaining this language, Wilson and Madison said it gave Congress "discretion . . . to establish or not establish" lower federal courts.⁵¹³ The Committee of Detail then wrote the language quoted above, which also reflected the Madisonian Compromise's vesting Congress with the discretion to create (or not create) lower federal courts.⁵¹⁴ On the Committee of Style, Morris wrote text to reverse this decision. Consistent with his commitment to a strong judiciary and national power, he devised language best read to mandate that Congress create lower federal courts.⁵¹⁵ Congress's power to "constitute[]" lower courts "when necessary" became language that can be read as a mandate to "ordain and establish" inferior courts "from time to time."

In the debates over the Judiciary Act of 1789, Madison contended that the Constitution permitted Congress to empower state courts to act as federal

508. See *supra* Section II.C.

509. Convention Proceedings, *supra* note 5, at 575 (Article XI, Section 1).

510. Report of Committee of Style, *supra* note 5, at 600 (Article III, Section 1).

511. See *supra* Section II.C.

512. 1 FARRAND'S RECORDS, *supra* note 1, at 125. For prior discussion of the Madisonian Compromise, see *supra* text accompanying notes 173–176.

513. 1 FARRAND'S RECORDS, *supra* note 1, at 125.

514. See Convention Proceedings, *supra* note 5, at 575.

515. See *supra* text accompanying notes 170–176.

courts.⁵¹⁶ But Morris had drafted text that was repeatedly invoked as mandating the congressional obligation to create lower federal courts. William Smith, the “primary spokesperson for the federalists,”⁵¹⁷ argued that the word “shall” and the text as a whole mandated creating lower federal courts:

The words, “shall be vested,” have great energy, they are words of command; they leave no discretion to Congress to parcel out the Judicial powers of the Union to State judicatures

Does not, then, the constitution, in the plainest and most unequivocal language, preclude us from allotting any part of the Judicial authority of the Union to the State judicature?⁵¹⁸

Egbert Benson denounced a proposal that would have given lower federal courts only the admiralty jurisdiction as inconsistent with the Constitution’s text. “It is not left to the election of the Legislature of the United States whether we adopt or not a judicial system like the one before us; the words in the constitution are plain and full, and must be carried into operation,” Benson remarked.⁵¹⁹ Elbridge Gerry declared: “You cannot make Federal courts of the State courts, because the constitution is an insuperable bar We are to administer this constitution, and therefore we are bound to establish these courts, let what will be the consequence.”⁵²⁰ And Fisher Ames once again read Morris’s text in accordance with their shared constitutional vision. Opposing a motion that would have barred creating lower federal courts, Ames expressed the conclusion

that offences against statutes of the United States, and actions, the cognizance whereof is created *de novo*, are exclusively of federal jurisdiction These, with the admiralty jurisdiction, which it is agreed must be provided for, constitute the principal powers of the district[] courts.⁵²¹

Most tellingly, Morris read his own text to require establishment of lower federal courts. During the debate over the repeal of the Judiciary Act of 1801, then-Senator Morris and then stated that the Article III Vesting Clause

amounts to a declaration, that the inferior courts shall exist. . . . In declaring then that these tribunals shall exist, it equally declares that the Congress shall ordain and establish them. I say they shall; this is the evident intention, if not the express words, of the Constitution. The Convention in framing, the

516. See 1 ANNALS OF CONG. 812–13 (1789) (Joseph Gales ed., 1834); see also William A. Fletcher, Lecture, *Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word “All” in Article III*, 59 DUKE L.J. 929, 942–43 (2010).

517. Fletcher, *supra* note 516, at 941.

518. 1 ANNALS OF CONG. 818–19 (1789) (Joseph Gales ed., 1834).

519. *Id.* at 835.

520. *Id.* at 860.

521. *Id.* at 839.

American people in adopting, that compact, did not, could not presume, that the Congress would omit to do what they were thus bound to do.⁵²²

The delegates had agreed to a compromise under which Congress did not have to create lower federal courts. As Morris's view of the text indicates, however, he had written language that was read by a range of political leaders (including himself) to mandate creating lower federal courts. In following the Madisonian Compromise, the Court and leading commentators have relied on the debates and failed to see that Morris changed the text and that he and other Federalists read this text in a way at odds with the Madisonian Compromise.

The leading exponent of reading this text as requiring the creation of lower federal courts was the constitutional historian Julius Goebel. In his 1971 account of the historical antecedents of the Supreme Court, Goebel wrote:

The effect of eliminating the words "as shall, when necessary" was to deprive Congress of power to decide upon the need for inferior courts and so to give full imperative effect to the declaration that "The judicial power . . . shall be vested in one supreme court, and in such inferior courts . . ." That the Committee intended to convey the sense of an imperative is apparent from the choice of the most forceful words in the contemporary constitutional vocabulary—"ordain and establish"—to direct what Congress was to do.⁵²³

522. 7 ANNALS OF CONG. 79 (1802). For discussion, see Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 63.

523. 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 247 (1971). Two well-known arguments that appear similar to Goebel's but that are in fact dissimilar should be noted. Justice Story in *Martin v. Hunter's Lessee* found a constitutional mandate to establish lower federal courts, but Story did not base his position on the language Goebel ("may from time to time") construed. 14 U.S. (1 Wheat.) 304 (1816). Justice Story's conclusion was based on the observation that "[i]f congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases the judicial power could nowhere exist." *Id.* at 330. Similarly, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985), argues for a broad range of cases in which federal jurisdiction is mandated but denies that Congress must create lower federal courts. *Id.* at 206 ("Thus, following Hart, I seek to establish that the Framers did not intend to require the creation of lower federal courts; but, following Story, I shall show that they did require that some federal court—supreme or inferior—be open, at trial or on appeal, to hear and resolve finally any given federal question, admiralty, or public ambassador case.").

Professor James Pfander's reading of the Article III Vesting Clause is closer to Goebel's. "To 'ordain,'" Professor Pfander writes,

means to invest with official power and to "establish" means to erect or settle permanently. The combined requirements of investiture, creation, and permanent settlement seemingly refer to the creation of a distinctive set of new federal courts, rather than to the re-designation or appointment of an existing state court.

James E. Pfander, *Essay, Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 203 (2007). Under Pfander's reading of the clause, Morris converted language of discretion to language mandating "the creation of a distinctive set of new federal courts." *Id.*

Goebel's argument that Congress had a constitutional obligation to create lower federal courts under the Judicial Vesting Clause has been the subject of overwhelming criticism. Some scholars disagree with Goebel because they read the text of the clause differently. “[I]t remains to be seen that the words ‘ordain and establish’ are significantly more imperative than the phrasing of the original draft,” Professors Redish and Woods contend.⁵²⁴ But the principal criticism of Goebel's reading is that it is inconsistent with the Madisonian Compromise. For example, Professor Robert Clinton writes:

Goebel's claim seems insupportable insofar as it suggests the tacit adoption by the Committee of a mandatory obligation by Congress to establish inferior federal courts. Such a conclusion is contradicted by the almost unquestioned adherence of the Convention to the Madisonian compromise and the limited charge of the Committee of Style “to revise the style of and arrange the articles agreed to by the House.”⁵²⁵

Professor David Engdahl argues that “Goebel's attribution of deft sleight-of-hand to subvert the June 5th compromise dishonors the Style Committee members and supposes the other delegates fools.”⁵²⁶

Like these academic commentators, the Supreme Court's leading originalists have also assumed that the Article III Vesting Clause embodies the Madisonian Compromise. Writing for the Court in *Printz v. United States*, Justice Scalia observed that “[i]n accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress.”⁵²⁷ And in upholding a jurisdiction-stripping statute in *Patchak v. Zinke*, Justice Thomas, writing for a plurality of the Court, found that congressional statutes stripping federal courts of jurisdiction were constitutional because of the Madisonian Compromise.⁵²⁸ “[T]he so-called Madisonian Compromise,” he stated, “resolved the Framers' disagreement about creating lower federal courts by leaving that decision to Congress.”⁵²⁹

524. Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 61 (1975); see also Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 34 n.47, 68–74, 88 (1981) (accepting Madisonian Compromise and criticizing Goebel).

525. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 794 n.169 (1984) (quoting 2 FARRAND'S RECORDS, *supra* note 1, at 547); accord Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1217 (1988) (“Although some Nationalists have argued that this language requires the creation of lower federal courts and their investiture with sweeping jurisdiction, this view is implausible in light of the Madisonian Compromise.”).

526. David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 105 n.109.

527. 521 U.S. 898, 907 (1997).

528. 138 S. Ct. 897, 903, 906 (2018) (plurality opinion).

529. *Patchak*, 138 S. Ct. at 906.

What the Court and the leading scholarly voices have missed, once again, is that here (as elsewhere) Morris's goal was not to comply with the Convention's decisions but to overturn them. In arguing that the Article III Vesting Clause is inconsistent with the Convention's prior decision, even Goebel failed to recognize that the Committee's changes were part of a broader pattern of revisions by Morris.

2. Law-of-the-Land Provision

PROCEEDINGS OF CONVENTION REFERRED TO THE COMMITTEE OF STYLE

This Constitution and the Laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; any thing in the constitutions or laws of the several States to the contrary notwithstanding.⁵³⁰

REPORT OF COMMITTEE OF STYLE

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.⁵³¹

Because the Constitution does not explicitly state that federal courts have the power to invalidate federal statutes, the popular view—most prominently associated with Alexander Bickel—is that judicial review was not part of the original understanding and was created out of whole cloth in *Marbury v. Madison*.⁵³² Because judicial review is thus thought to operate outside of the original constitutional framework established by “We the People,” for Bickel and others the conflict between judicial review and popular governance gives rise to the “counter-majoritarian difficulty.”⁵³³ As Professor Barry Friedman observes, “The ‘countermajoritarian difficulty’ . . . has been the focal point of modern constitutional scholarship.”⁵³⁴

This account overlooks a great deal. There was a significant body of judicial-review caselaw before the Constitutional Convention, the overwhelming

530. Convention Proceedings, *supra* note 5, at 575 (Article VIII).

531. Report of Committee of Style, *supra* note 5, at 603 (Article VI).

532. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (2d ed. 1962) (“If any social progress can be said to have been ‘done’ at a given time and by a given act, it is Marshall’s achievement. The time was 1803; the act was the decision in the case of *Marbury v. Madison*.”).

533. *See id.* at 16 (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”).

534. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998).

majority of delegates at the Convention who spoke about judicial review were in favor of it, judicial review was endorsed during the ratifying debates, and state and federal courts frequently exercised the power in the years before *Marbury*.⁵³⁵ Because of these factors, the conventional view among academics is that judicial review was established before *Marbury*.⁵³⁶

It is also generally accepted by academics that the text of the Constitution does not provide a basis for judicial review by federal courts of federal statutes.⁵³⁷ This standard understanding, however, overlooks the “law of the land” language that Morris added to the Constitution. Challenging the conventional wisdom, a handful of scholars have recently recognized that the law-of-the-land provision authorizes federal courts to review federal statutes for constitutionality.⁵³⁸

The history of the law-of-the-land language follows what should now be a familiar pattern. Morris (and others who also served on the Committee of Style) supported judicial review on the Convention floor, but the text referred to the Committee did not explicitly provide for judicial review.⁵³⁹ By adding the law-of-the-land formulation to the Supremacy Clause, Morris and the Committee revised the text in a way that advanced their ends. Committee members Hamilton and Wilson subsequently drew on this language in contending that the Constitution provided for judicial review.

The relevant clause in the Committee of Detail’s draft had mandated that state courts be governed by the federal constitution: “[T]his Constitution . . . shall be the supreme Law of the several States, and of their Citizens and Inhabitants; and the Judges in the several States shall be bound thereby in their Decisions.”⁵⁴⁰ The exclusive focus is on the states and their courts. The Constitution is “the supreme law of the several States.” The Committee of

535. See Treanor, *supra* note 202 (discussing origins of judicial review).

536. See, e.g., KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT 38–59 (2019); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 124–27 (2004); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 6, 37–38 (1990); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 5, 87–88 (2001); Treanor, *supra* note 202.

537. See, e.g., MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 79–84 (1991); John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 857–59 (2016); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 429 (1998); Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 75 (1989); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 16–22.

538. See, e.g., Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 91–92 (2003); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 907 (2003). Prakash and Yoo also see Article III, Section 2 as a textual basis for judicial review. See *id.* at 901–02.

539. See *supra* Section II.C.2.

540. 2 FARRAND’S RECORDS, *supra* note 1, at 169.

Style dramatically altered the sentence's import by providing that "this Constitution . . . shall be the supreme Law of the land." Both federal and state judges must now review statutes for consistency with the federal constitution.

Committee of Style members played a crucial role in establishing the law-of-the-land provision as the basis for judicial review. In *Federalist* 16, Hamilton stated that judges had the power to pronounce a statute "contrary to the supreme law of the land, unconstitutional, and void."⁵⁴¹ In *Federalist* 33, he stated that congressional statutes "which are *not pursuant* to its constitutional powers . . . will [not] become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such."⁵⁴²

James Wilson also invoked the law-of-the-land provision as the basis for judicial review in his lectures on the law. He stated that when a congressional statute was "manifestly repugnant to some part of the constitution," a federal court would have "the right and . . . the duty" to invalidate it because the rules given by the "supreme power of the United States . . . [are] the law of the land" and "contradictory rule[s]" by "subordinate power[s] . . . [are] necessar[il]y void."⁵⁴³

Wilson deployed this same line of argument as a Supreme Court justice. In 1792, the Supreme Court first confronted the question of whether to enforce an unconstitutional statute in *Hayburn's Case*. Riding Circuit, Wilson, along with Justice Blair and Judge Peters, invoked the law-of-the-land provision as support for their decision to refuse to follow the Invalid Pensioners Act.⁵⁴⁴ The law-of-the-land provision also was critical to another important pre-*Marbury* judicial-review case, *Van Horne's Lessee v. Dorrance*. Justice Patterson, a former Convention delegate, told the jury that the Constitution

541. THE FEDERALIST, *supra* note 103, NO. 16, at 100 (Alexander Hamilton). For discussion of Hamilton's views, see Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 554–55 (2006).

542. THE FEDERALIST, *supra* note 103, NO. 33, at 201–02 (Alexander Hamilton). While Hamilton in *Federalist* 33 does not explicitly discuss judicial invalidation of unconstitutional statutes, it is implicitly embraced—particularly in light of Hamilton's argument for judicial review of congressional statutes in *Federalist* 78. See Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 331 & n.84 (2003).

543. 1 THE WORKS OF JAMES WILSON 329–30 (Robert Green McCloskey ed., 1967). For discussion of Wilson's position, see Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 164–65 (2003).

544. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 411 n.† (1792) ("This Constitution is 'the Supreme Law of the Land.' This supreme law 'all judicial officers of the United States are bound, by oath or affirmation, to support.'"). For discussion of Justice Wilson's opinion in *Hayburn's Case*, see Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 533–34; Treanor, *supra* note 202, at 533–38.

contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature

....

.... [I]f a legislative act oppugns a constitutional principle . . . it will be the duty of the court to adhere to the Constitution, and to declare the act null and void.⁵⁴⁵

And although it does not play a central role in the decision, the law-of-the-land provision was similarly invoked by Chief Justice Marshall in his final argument in *Marbury*:

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.⁵⁴⁶

Once again, commentators have failed to recognize either how Morris changed the meaning of the text or how the modified text was read in the Founding generation. While the conventional wisdom among academics is that the constitutional text does not provide a basis for judicial review of federal statutes by federal courts, Morris's changes to the Supremacy Clause provided that very basis, and Hamilton, Wilson, Paterson, and Marshall all read the law-of-the-land language as justifying judicial review.

I. Slavery and New States

Morris was the most vocal opponent of slavery during the Convention debates.⁵⁴⁷ Though he was unsuccessful in opposing the Three-Fifths Clause on the Convention floor,⁵⁴⁸ Morris kept up his antislavery campaign as a member of the Committee. As already noted, Morris slyly inserted language in the Territories Clause that could be used to keep potential slave states in permanent territorial status.⁵⁴⁹ Morris made two other changes to weaken slavery's constitutional footing. First, he altered the language of the Fugitive Slave Clause to remove the Constitution's one textual endorsement of slavery as moral. Second, he subtly changed the language of the New States Clause in

545. Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308–09, 28 F. Cas. 1012, 1014–15 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,857).

546. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (emphasis omitted).

547. For discussion of Morris's opposition to slavery at the Convention, see *supra* Section II.E.1.

548. See *supra* notes 244–245 and accompanying text.

549. See *supra* Section II.E.2.

a way designed to provide a textual basis for keeping potential slave states from achieving statehood.

1. Slavery and the Fugitive Slave Clause

PROCEEDINGS OF THE CONVENTION REFERRED TO THE COMMITTEE OF STYLE

If any Person bound to service or labor in any of the United States shall escape into another State, He or She shall not be discharged from such service or labor in consequence of any regulations subsisting in the State to which they escape; but shall be delivered up to the person justly claiming their service or labor.⁵⁵⁰

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No person legally held to service or labour in one state, escaping into another, shall in consequence of regulations subsisting therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labour may be due.⁵⁵¹

Because the constitutional provisions concerning slavery were fiercely scrutinized by proslavery delegates, Morris was constrained in editing those provisions. Yet he managed to make one subtle but significant change.

Like the Three-Fifths and the Slave Trade Clauses, the Fugitive Slave Clause did not use the word “slave.”⁵⁵² The Fugitive Slave Clause instead referred to “any Person bound to service or labor in any of the United States.”⁵⁵³ The absence of the word “slave” from these provisions reflected a conscious choice.⁵⁵⁴

Despite the drafters’ conscious refusal to use the word “slave,” the Fugitive Slave Clause originally provided that a captured slave “shall be delivered up to the person justly claiming their service or labor.”⁵⁵⁵ The use of the word “justly” implied that the ownership of an enslaved person was “just.”⁵⁵⁶ This was the only point in the text of the entire Constitution that referred to slavery as just or moral.

As it emerged from the Committee of Style, the Fugitive Slave Clause provided that a captured slave “shall be delivered up on claim of the party to whom such service or labour may be due.”⁵⁵⁷ Morris had eliminated the word “justly.” The change was profound. As historian Sean Willentz has recently

550. Convention Proceedings, *supra* note 5, at 577 (Article XV).

551. Report of Committee of Style, *supra* note 5, at 601–02 (Article IV, Section 2).

552. See *supra* text accompanying notes 249–251.

553. Convention Proceedings, *supra* note 5, at 577.

554. See *supra* notes 252–254 and accompanying text.

555. WILENTZ, *supra* note 252, at 106.

556. *Id.* at 111.

557. *Id.* at 110.

written, “The committee’s revision . . . removed the possible implication that there was justice in slavery.”⁵⁵⁸

When the Convention delegates reviewed the Committee of Style’s provision, they did not discuss the change and its significance. Madison’s notes indicate that the only part of the clause that the delegates debated was the use of the word “legally.” Madison reports that speakers (whom he did not name) “thought the term (legal) equivocal” and that it “favor[ed] the idea that slavery was legal in a moral view.”⁵⁵⁹ As a result, the phrase “under the laws thereof” was substituted for the word “legally.”⁵⁶⁰

The word “legally” (which Morris and the Committee of Style added as they removed the word “justly”) does not connote morality in the same strong way as the word “justly.” Nonetheless, the delegates’ argument against “legally”—that it should be removed because it suggested that “slavery was legal in a moral view”—means that the two words suggesting slavery’s morality were removed from the Constitution.

These changes proved consequential. During the antebellum period, while some abolitionists such as William Garrison attacked the Constitution as a proslavery document, other abolitionists argued that the Constitution did not sanction slavery.⁵⁶¹ It was, according to Frederick Douglass, “a glorious liberty document.”⁵⁶² By removing the Fugitive Slave Clause’s implicit linkage of slavery and morality, Morris’s elimination of the word “justly” made that argument possible.

2. New States Clause

PROCEEDINGS OF THE CONVENTION REFERRED TO THE COMMITTEE OF STYLE

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

558. *Id.* at 111.

559. 2 FARRAND’S RECORDS, *supra* note 1, at 628.

560. *Id.* The substitution produced the final version of the Fugitive Slave Clause:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3.

561. See WILENTZ, *supra* note 252, at 225–26, 229–30.

562. *Id.* at 227 (quoting Frederick Douglass, *What to the Slave Is the Fourth of July?* (July 5, 1852), in THE SPEECHES OF FREDERICK DOUGLASS 88 (John R. McKivigan, Julie Husband & Heather L. Kaufman eds., 2018) (cleaned up)).

two or more States or parts thereof without the consent of the Legislatures of such States as well as of the Legislature of the United States.⁵⁶³

REPORT OF COMMITTEE OF STYLE

New states may be admitted by the Congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.⁵⁶⁴

Morris did not want new states created in the West to have greater political power than the original thirteen states, both because he thought representatives of the western states would be poorly prepared for leadership and because he worried that adding new states would tip the balance of national power in favor of slavery.⁵⁶⁵ Intending to bar the creation of new states from territories, Morris revised the Territories Clause in such a way that the other Framers did not realize the clause's meaning when they adopted it.⁵⁶⁶

Morris's revision of the New States Clause advanced these same ends by prohibiting the creation of new states from current states. The previous version of the New States Clause permitted new states to be created within the territory of existing states if the state legislature and Congress approved.⁵⁶⁷ Morris changed the provision so that new states could never be created from the boundaries of existing states, making the language about permission from the state legislature and Congress inapplicable to the creation of new states from land within existing states.⁵⁶⁸

The independent clause "no new State shall be hereafter formed or erected within the jurisdiction of any of the present States without the consent of the Legislature or such State as well as of the general Legislature"⁵⁶⁹ became the independent clause "no new state shall be formed or erected within the jurisdiction of any other state."⁵⁷⁰ The provision about formation of new states through legislative and congressional consent now applies only to the formation of new states "formed by the junction of two or more States or parts thereof."⁵⁷¹ As with the General Welfare Clause, Morris converted a comma

563. Convention Proceedings, *supra* note 5, at 578 (Article XVII).

564. Report of Committee of Style, *supra* note 5, at 602 (Article IV, Section 3).

565. See *supra* text accompanying notes 257–265.

566. See *supra* text accompanying notes 65–66.

567. For the relevant debate, see 2 FARRAND'S RECORDS, *supra* note 1, at 454–55.

568. *Id.*

569. *Id.* at 458.

570. LUTHER MARTIN, THE GENUINE INFORMATION DELIVERED TO THE LEGISLATURE OF THE STATE OF MARYLAND RELATIVE TO THE PROCEEDINGS OF THE GENERAL CONVENTION LATELY HELD IN PHILADELPHIA, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 19, 72 (Herbert J. Storing ed., 1981).

571. 2 FARRAND'S RECORDS, *supra* note 1, at 465.

into a semicolon to change constitutional meaning.⁵⁷² Read carefully, Morris's version prohibits creating a new state through partition, regardless of the affected state's or Congress's approval.

A literal reading of Morris's text would have barred the admission of the slave state of Kentucky (which was formed out of Virginia) and Tennessee (which was formed out of North Carolina). But the free state whose admission was on the horizon—Vermont—was not, as of 1787, a part of another state. It was an independent republic.⁵⁷³ Kentucky and Tennessee, but not Vermont, were “within the jurisdiction of any other state.”⁵⁷⁴ The balance of free states would increase by one, rather than decrease by one. Morris's textual revision was remarkably elegant.

In contrast to this subtle reading of the New States Clauses, both Madison and Luther Martin read the provision to permit the creation of states through partition.⁵⁷⁵ These were the only two comments about the clause in public writings from the ratification debate, and no one addressed the clause at a state ratifying convention.⁵⁷⁶ Not only is there little evidence from the ratification debates, but this evidence is of particularly limited value because Madison was the only supporter of the Constitution opining on the clause's meaning and his readings of the constitutional text repeatedly contradicted those the Federalists would employ in the early republic.

The strongest evidence that the clause was understood to permit partition—the Madisonian reading—is the admission of Kentucky as the fifteenth state in 1792 (following Vermont's admission the previous year). Kentucky was formed out of Virginia with the Virginia legislature's consent; the congressional statute authorizing Kentucky's admission referenced Article IV, Section 3;⁵⁷⁷ and President Washington urged Kentucky's admission.⁵⁷⁸ The records of the congressional discussions indicate that no one raised the constitutional issue one way or the other. Thus, Kentucky became a state through partition, and no one objected.

Tennessee's admission followed a different path, which may have been adopted to allay concerns about the constitutionality of Kentucky's admission.

572. See *supra* note 116 and accompanying text.

573. My reading is that Vermont was admitted pursuant to the first clause of Article IV, Section 3 (and, as a result, that New York's approval was unnecessary). The Supreme Court has, however, reserved the question of whether Vermont was admitted under that clause or under the second clause of Article IV, Section 3. See *Vermont v. New Hampshire*, 289 U.S. 593, 606–08 (1933).

574. U.S. CONST. art. IV, § 3.

575. THE FEDERALIST, *supra* note 103, NO. 43, at 281 (James Madison) (referring to “[t]he particular precaution against the erection of new States, by the partition of a State without its consent”); MARTIN, *supra* note 570, at 72.

576. See Kesavan & Paulsen, *supra* note 8, at 364–68.

577. See Act of Feb. 4, 1791, ch. 4, 1 Stat. 189.

578. See Second Annual Address of President Washington (Dec. 8, 1790), in 1 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790–1966, at 5 (Fred L. Israel ed., 1967).

Rather than authorizing Tennessee's creation from within its boundaries, North Carolina ceded the area that was to become Tennessee to the United States in 1790, and it was governed as a territory for six years.⁵⁷⁹ Tennessee was finally admitted as a state in 1796.⁵⁸⁰ According to Kesavan and Paulsen's study of the New States Clause, the fact that Tennessee was not directly created through the partition of North Carolina "casts some doubt upon the interpretation of the second clause that permits the admission of new breakaway States into the Union with the consent of their parent States and of Congress."⁵⁸¹

At first glance, the question of how to construe the clause would seem of only antiquarian interest. As Kesavan and Paulsen phrase it, the issue is whether Congress made a constitutional "mistake[]" in admitting Kentucky (formed out of Virginia), Maine (formed out of Massachusetts), and West Virginia (formed out of Virginia).⁵⁸² Given the long-settled recognition of these partitions, the dislocation involved in reuniting the states, and the ambiguity of the text, there has been no push among other academics or political actors to reunite the divided states.

Yet the issue does have modern significance. The congressional statute admitting Texas gives it the right to divide into four states.⁵⁸³ After Kesavan and Paulsen wrote a law-review article noting this power and suggesting that Texas seize upon it,⁵⁸⁴ the issue has received playful attention, with Malcolm Gladwell devoting a podcast to the legal research.⁵⁸⁵ There has also been a political movement to divide California into three states, with a petition to effect partition gaining enough signatures in 2018 to be placed on the ballot.⁵⁸⁶

The limited scholarly literature on the partition question follows familiar lines. Kesavan and Paulsen conclude that partition is constitutionally permissible because they see the text as ambiguous, the drafting history supports partition, and the Supreme Court's decision in *Nixon* holds that the Committee of Style had no power to change constitutional meaning.⁵⁸⁷ Similarly, Dean

579. Kesavan & Paulsen, *supra* note 8, at 378.

580. *Id.*

581. *Id.* at 380.

582. *Id.* at 297, 363.

583. Texas Annexation Resolution, S.J. Res. 8, 28th Cong., 5 Stat. 797, 798 (1845).

584. Vasan Kesavan & Michael Stokes Paulsen, *Essay, Let's Mess with Texas*, 82 TEX. L. REV. 1587 (2004).

585. Malcolm Gladwell, *Divide and Conquer: The Complete, Unabridged History of the World's Most Controversial Semicolon*, REVISIONIST HIST., <https://revisionisthistory.com/episodes/21-divide-and-conquer> [perma.cc/UZL4-NVSK].

586. Sophia Bollag, *Opponents Sue to Nix Ballot Measure to Split California in 3*, CHI. SUN-TIMES (July 10, 2018, 9:50 PM), <https://chicago.suntimes.com/2018/7/10/18387673/oppone...sue-to-nix-ballot-measure-to-split-california-in-3> [perma.cc/5PYH-3S84]. The California Supreme Court blocked the initiative for procedural reasons. See *Planning & Conservation League v. Padilla*, No. S249859, 2018 Cal. LEXIS 6817 (Sept. 12, 2018).

587. Kesavan & Paulsen, *supra* note 442, at 1206–07; Kesavan & Paulsen, *supra* note 8, at 392–95.

McGreal writes: "We should not read the Committee's change to alter the Clause's meaning. . . . They were called the Committee of *Style*—and not the Committee of *Substantive Revisions*—for a reason: *Their role was to clean up the document's style.*"⁵⁸⁸

Unlike the other textual changes surveyed in this Article, this one did not generate Federalist arguments. I have not found any evidence of anyone arguing against Kentucky's admission on constitutional grounds, although constitutional concerns about partition may explain Tennessee's circuitous path to statehood. But once again, a close reading of the text—one that attends to the punctuation—leads to a different outcome than the conventional understanding; here, it would bar partition.

J. Engagements Clause

PROCEEDINGS OF THE CONVENTION REFERRED TO THE COMMITTEE OF STYLE

All debts contracted and engagements entered into, by or under the authority of Congress shall be as valid against the United States under this constitution as under the confederation.⁵⁸⁹

REPORT OF COMMITTEE OF STYLE

All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the confederation.⁵⁹⁰

Consistent with his support for a strong national government, Morris was a forceful advocate for federal assumption of all Revolutionary War debts. On August 22, he proposed a provision stating, "The Legislature *shall* discharge the debts [and] fulfil the engagements (of the U. States)."⁵⁹¹ While his motion was successful, the Convention soon backtracked. Mason objected to the provision imposing an obligation to repay all debts: "The use of the term *shall* will beget speculations and increase the pestilent practice of stock-jobbing."⁵⁹² Supporting Mason, Randolph proposed the language noted above.⁵⁹³ Randolph's proposal passed, ten states in favor and one against, with only Morris speaking against the proposal and with only Morris's Pennsylvania voting against Randolph's proposal.⁵⁹⁴

588. Paul E. McGreal, *There Is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 FORDHAM L. REV. 2393, 2411 (2001).

589. Convention Proceedings, *supra* note 5, at 571 (Article VII, Section 1).

590. Report of Committee of Style, *supra* note 5, at 603 (Article VI).

591. 2 FARRAND'S RECORDS, *supra* note 1, at 377.

592. *Id.* at 413.

593. *Id.* at 414 ("All debts contracted & engagements entered into, by or under the authority of Congs. shall be as valid agst the U. States under this constitution as under the Confederation.").

594. *Id.*

Morris's language for the Committee did not overturn the Convention's decision that repayment was not mandatory. He did, however, neatly expand the scope of the clause in an important way. The previously adopted language authorized assumption of debts incurred only "by or under the authority of Congress."⁵⁹⁵ Implicitly, that language did not allow assumption of state debts unauthorized by Congress. But the Committee of Style's language—covering debts incurred "before the adoption of this Constitution"—allowed Congress to assume state debts, regardless of whether those debts had been previously authorized by Congress.⁵⁹⁶ As treasury secretary, Alexander Hamilton used this power to assume state Revolutionary War debts, regardless of whether they had been authorized by Congress, and Federalist members of Congress agreed that the Constitution gave the national government this power.⁵⁹⁷

* * *

While the Committee of Style's mandate was, as its name suggests, limited to style, as the Committee's drafter Gouverneur Morris covertly challenged the results of the Convention's prior proceedings and revised a striking number of fundamentally important constitutional provisions in order to advance his constitutional agenda. He wrote text that expanded national authority, broadened presidential powers, provided the basis for judicial review, mandated the establishment of lower federal courts, increased the national government's ability to assume state debts, barred states from interfering with their own contracts, expanded the range of actions that could warrant presidential impeachment, threatened to prevent the admission of the slave states Kentucky and North Carolina, enabled Congress to add prerequisites for service in Congress, required "actual enumeration" of people when the census was conducted, and removed the Constitution's recognition of the ownership of enslaved people as "just[]." He also wrote text that gave Congress the power to enact legislation to promote the general welfare, although this "trick," unlike the others, was discovered and the earlier language restored.

Morris placed language in the Constitution that Federalists (including Alexander Hamilton and James Wilson) repeatedly relied on in the great constitutional debates of the early republic. At the same time, Republicans also made textualist arguments that interpreted Morris's text. Apart from his revival of the previously rejected Contract Clause, Morris did not write text that clearly

595. *Id.* at 408.

596. Pfander, *supra* note 8, at 1291–93 (quoting Report of Committee of Style, *supra* note 5, at 603).

597. See MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT 206–14 (2003); 2 ANNALS OF CONG. 1316 (1790) (statement of Rep. Clymer) ("[A]ssumption of the State debts appeared to him a measure of a federal complexion . . ."); *id.* at 1318 (statement of Rep. Sherman) (arguing that assumption is constitutional because state "debts are to be looked upon as the absolute debts of the Union"); *id.* at 1324 (statement of Rep. Gerry) (arguing for the constitutionality of assumption of the state debts).

transformed constitutional meaning. But Morris's language was more consistent with the readings Federalists advanced. Republicans repeatedly had to ignore or minimize words added by Morris, whereas Federalists were able to employ close readings of the constitutional text. Nonetheless, in area after area, the Republican readings have been accepted by the Supreme Court and leading academics as reflecting the original understanding.

IV. THE SIGNIFICANCE OF THE COMMITTEE OF STYLE'S CHANGES

Recognizing Morris's changes has important consequences for modern constitutional law. First, it provides important support for a central critique of traditional originalism by revealing a new problem with the search for collective intent: the Constitution's drafter, rather than crafting text that reflected the Convention's decisions, wrote language that advanced his own goals. The text does not reflect the delegates' collective intent.

Second, this Article's history is relevant to a series of important modern controversies. From the vantage point of original public meaning, the Supreme Court has repeatedly erred in recent cases involving Committee of Style language, by either dismissing the ratified constitutional text or assuming that the Committee of Style's language had the same meaning as the language previously adopted by the Convention. Of the Court's members, only Justice Thomas has recognized that, from the perspective of the public meaning originalist, the Court's role is to interpret the ratified text, which is to say Morris's text. Thus, for a public meaning originalist, Justice Thomas's approach is the correct one.

The Federalist readings of the text Morris drafted are sufficiently powerful such that a public meaning originalist should reject the mainstream view that the Republican readings best reflect the original understanding of the constitutional text. Indeed, in most cases, the Federalist reading is not simply a plausible competing reading but the superior reading of the text, because the Republican readings cannot fully explain the Constitution's text.

A. *Drafters' Intent Originalism*

When the modern jurisprudence of original understanding emerged in articles like then-Professor Robert Bork's 1971 *Neutral Principles and Some First Amendment Problems*⁵⁹⁸ and Justice Rehnquist's *The Notion of a Living Constitution*,⁵⁹⁹ and in Professor Raoul Berger's book *Government by Judiciary*,⁶⁰⁰ original understanding was conceived of as *framers'* intent, with a principle focus on *drafters'* intent—what the delegates to the Philadelphia

598. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

599. William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

600. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed. 1997).

Convention meant when they wrote the constitutional text.⁶⁰¹ While these writings offered a critique of the Warren Court's jurisprudence and an alternative to it, drafters' intent jurisprudence was not created in the 1970s but reflected an established approach to interpreting the Constitution. For example, in both *Myers v. United States*⁶⁰² and *Powell v. McCormack*⁶⁰³ the Court looked to drafters' intent as a basis for interpreting constitutional text. Indeed, the *Powell* Court appealed to drafters' intent as a basis for dismissing the significance of the changes made by the Committee of Style.⁶⁰⁴

Drafters' intent originalism has been forcefully criticized. Some critiques go to the legitimacy of originalism as an interpretive methodology.⁶⁰⁵ For example, critics have focused on the dead-hand problem presented by a decision made by those no longer alive and by a process from which women, enslaved people, Native Americans, and (in some states) people without property were excluded.⁶⁰⁶ They have also argued the methodology is inappropriate because of the frequent sparseness of the historical record,⁶⁰⁷ the failure of originalism to recognize reliance interests and established practices,⁶⁰⁸ the bad results it can produce,⁶⁰⁹ and the fact that the Founders often did not confront issues of contemporary importance.⁶¹⁰

But two critiques have been addressed not to the originalist enterprise as a whole but to drafters' intent specifically. They reflect internal critiques in which drafters' intent is challenged as being inconsistent with the premises of

601. For a good history of modern originalism that discusses the rise of a jurisprudence of Framers' intent and the eventual shift to public meaning originalism, see Kesavan & Paulsen, *supra* note 442, at 1134–48.

602. 272 U.S. 52, 109–10 (1926).

603. 395 U.S. 486, 547 (1969).

604. See *supra* text accompanying notes 277, 395–397.

605. The literature here is enormous. For some of the important discussions of these critiques (some accepting the critiques and others challenging them), see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1684–90 (2016); Thurgood Marshall, *Commentary, Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2–5 (1987); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 192–96 (2008); Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1102–05 (1998); Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780, 792–97 (2014).

606. Greene, *supra* note 605, at 1685.

607. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 33–34 (1986).

608. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN L. REV. 703, 712–13 (1975).

609. *Id.*

610. Farber, *supra* note 605, at 1093.

originalism. In *The Original Understanding of Original Intent*,⁶¹¹ Professor Jefferson Powell argues that the original interpretive understanding was that drafters' intent was not controlling. The second critique, associated with Professor Paul Brest,⁶¹² is that the search for a collective intent of the drafters must fail because individual drafters understood the text in different ways or had "no intent or an indeterminate intent" with respect to a given clause's meaning.⁶¹³ In other words, the drafters did not have a shared understanding of what the words meant.

These critiques have won wide acceptance among originalists and led to "new originalism,"⁶¹⁴ which involves a reconceptualization of the originalist's goals. As Professor Cass Sunstein recently noted, "[p]ublic meaning originalism is the dominant approach" to original understanding.⁶¹⁵ The new originalist seeks to recover the original public meaning of the text (rather than drafters' intent or ratifiers' intent). In Professor Larry Solum's influential formulation, the search for public meaning is the search for "the communicative content of the constitutional text[, which] is determined by the semantic meaning of the text as enriched by the publicly available context of constitutional communication."⁶¹⁶ The core insight of new originalism is that the democratic legitimacy that underlies originalism requires giving effect to the decision of "We the People" in adopting the Constitution. "We the People" adopted the intent of neither the drafter nor the ratifiers; "We" adopted a system of constitutional government created by particular words as those words were understood at the time of ratification.

The history of the Committee of Style bolsters the originalist case for public meaning originalism, as opposed to drafters' intent originalism, because it adds a new dimension to the critique of the search for collective intent. The problem with determining collective intent is not simply that the legislative process—given its focus on compromise and masking disagreement, as well

611. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

612. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

613. *Id.* at 214.

614. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); see also JACK M. BALKIN, LIVING ORIGINALISM (2011) (advancing a conception of new originalism and portraying it as consistent with living originalism).

615. Cass R. Sunstein, Essay, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1674 n.13 (2018).

616. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 474 (2013). For a critique of Professor Solum's approach grounded in an "original methods" originalism, see John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009) ("We find no support for constitutional construction . . . at the time of the Framing.").

as its inability to anticipate future issues—does not lead to collective understanding (the problem that Brest and others have identified).⁶¹⁷ Rather, the problem is *also* that in a series of critical cases the person who wrote the text consciously sought to advance a constitutional vision that was different than that of a majority of his fellow delegates: Morris had lost fights on the Convention floor and sought to reverse those decisions.

My point here is not that the Constitution should be interpreted in accordance with the drafter's intent (that is, Morris's intent). Giving effect to the subjective intent of the drafter is at odds with the majoritarian premises of originalism. But recognizing what Morris did—and the way in which Republicans and Federalists then battled over the meaning of his text—reveals a new reason why the search for collective constitutional meaning is illusory: Morris wrote the Constitution's text hoping to change the text's meaning while using sufficiently opaque words so that his fellow delegates would not notice the change.

But while the history presented in this Article strengthens one of the major arguments against drafters' intent originalism, to a remarkable extent the caselaw and scholarship discussed here evidence the striking, continuing influence of drafters' intent originalism, despite it having been largely discredited. As will be discussed in more detail in the next Section, the modern Supreme Court caselaw considering whether to give effect to Committee of Style text is split between cases wholly disregarding changes contained in that text and cases adopting a strong presumption that the text reflects the prior drafting history. In one of the most salient constitutional law cases of recent years, *Printz v. United States*, Justice Scalia, writing for the Court, assumed that the Constitution reflects the Madisonian Compromise, even though Morris's text departed from it.⁶¹⁸ Writing for a plurality of the Court, Justice Thomas made the same assumption in *Patchak v. Zinke*.⁶¹⁹ And as discussed in the previous Section, a veritable who's who of leading constitutional scholars, including Cass Sunstein, Jack Rakove, Akhil and Vikram Amar, Martin Redish and Curtis Woods, David Currie, Saikrishna Prakash, Martin Flaherty, Michael Paulsen and Vasan Kesavan, Richard Fallon, and Larry Lessig have all misunderstood the Constitution's text because they posit that changes made by the Committee of Style were either ultra vires or purely stylistic. Drafters' intent originalism has been discredited as a jurisprudential approach, but in practice both leading academics and the Court have continued to rely on that approach when they are interpreting text drafted by the Committee of Style.

617. See, e.g., Brest, *supra* note 612, at 214, 229.

618. 521 U.S. 898, 907 (1997).

619. 138 S. Ct. 897, 906 (2018) (plurality opinion).

B. *Relevance of the Committee of Style's Text to Current Controversies*

This Article has revealed a series of textual readings that reflect Morris's goals and that were employed by Federalists in early constitutional controversies. It has uncovered the Federalist Constitution.⁶²⁰ But these readings are consistently at odds with the mainstream academic view of the original meaning of the text. Thus, Federalists read the Preamble as a substantive grant of authority to both courts and Congress, but the conventional view is that it was purely stylistic or, at most, a gloss on Article I's grant of powers to Congress. Similarly, the dominant views among academics are that the Contract Clause did not cover public contracts, that there was no constitutional requirement for the establishment of lower federal courts, that there is no textual basis in the Constitution for judicial review of congressional statutes, and that the Impeachment Clause does not extend to nonofficial acts.

In each case, however, Federalists read the clause in a way that is different than the conventional modern views of the original understanding. And while the punctuation of the New States Clause would seem to indicate that states like California and Texas cannot be divided, no scholar has reached that conclusion. In each of these instances, scholars read the Constitution as if the Committee of Style had not changed the text.

There are two instances in which there is some support among academics for the Federalist view as reflecting the original understanding, although there is also support among academics for the Republican position. Many (pro-executive) scholars⁶²¹ (as well as the Court in *Myers* and the Office of Legal Counsel in its 2003 torture memo) have relied on the presence of "herein granted" in the Article I Vesting Clause to support a broad reading of executive power.⁶²² But numerous other prominent scholars have dismissed the significance of this phrase, treating it as simply stylistic and crediting it with no substantive significance.⁶²³

A similar point can be made about the word "officer" in the Presidential Succession Clause. Some scholars, following Madison and the Republicans, have read the phrase as if it were still "officer of the United States" (as it was before the Committee of Style began its work). Others have argued that "officer" means "officer," as the Federalists did.⁶²⁴ The question then becomes what relevance this history has for resolving current controversies.

This Section first looks at the approach the Court and commentators have employed when the Committee's language departed from previously adopted text, then discusses what approach courts *should* take.

620. The following two paragraphs summarize the conclusions of *supra* Part III.

621. See, e.g., Calabresi & Prakash, *supra* note 371, at 570–71.

622. See *Myers v. United States*, 272 U.S. 52, 138 (1926); OLC Torture Memo, *supra* note 371, at 4–5. A separate question is how broadly the "executive power" was understood to be at the time of the Founding. See *supra* Section III.B.

623. See *supra* notes 374–379 and accompanying text.

624. See *supra* Section III.F.

1. Supreme Court Case Law and Academic Commentators on the Committee of Style

In the past half century, the Supreme Court has heard four cases in which a party claimed that the Committee of Style's changes to text that the Convention had previously approved were without legal significance. Though the Court agreed in each case, its decisions reflected two different approaches: disregarding the changes entirely or presuming that the changes were not substantive. Academics have largely followed the second path, presuming that the changes were not meant to alter the meaning of the relevant provisions. Neither is a sound basis of decision for a public meaning originalist. From the perspective of public meaning originalism, the correct approach is that taken by Justice Thomas. Justice Thomas appropriately focuses on the text of the Constitution. Even though no justice has agreed with him, Thomas's approach is truest to public meaning originalism's central tenet that the role of courts is to apply the text that "We the People" adopted.

The leading Supreme Court case reflecting the first approach—disregarding the Committee of Style's revisions—is the 1969 decision *Powell v. McCormack*.⁶²⁵ Writing for the Court, Chief Justice Warren disregarded the Committee of Style's text, stating that "[t]he Committee . . . had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so."⁶²⁶ Similarly, in the 1995 decision *U.S. Term Limits, Inc. v. Thornton*, Justice Stevens cited *Powell* and stated, "This argument [the appeal to the Committee of Style text] was firmly rejected in *Powell*, and we see no need to revisit it now."⁶²⁷

The Court's approach in *Powell*—with its focus on drafters' intent and disregard of text—is not surprising. The opinion was written before originalists turned away from drafters' intent. The only surprise is that the appeal to originalism came from Chief Justice Warren, who was not generally an originalist.⁶²⁸ In light of the widespread acceptance (even among originalists) of Brest's and Powell's critiques by 1995, however, it is more surprising that Justice Stevens relied on this approach in *Thornton* in 1995.

625. 395 U.S. 486 (1969); *cf. Ex parte Grossman*, 267 U.S. 87, 113 (1925) (dismissing idea that the Committee intended to change the clause's meaning "sub silentio"); *see also supra* text accompanying notes 390–391.

626. 395 U.S. at 538–39 (citation omitted).

627. 514 U.S. 779, 792 n.8, 816 n.27 (1995) (citation omitted).

628. Warren famously dismissed the relevance of original understanding in *Brown*. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) ("[W]e cannot turn the clock back to 1868 . . ."). *Powell* was not, however, the only opinion in which Warren drew on original understanding. There was at least one other such decision. *See Trop v. Dulles*, 356 U.S. 86, 99–100 (1958) (plurality opinion) (discussing original understanding of Eighth Amendment); *see also* Greene, *supra* note 605, at 1670 ("Chief Justice Warren—*Powell* edition—is a model originalist.").

In any case, the reliance on drafters' intent reflected in both decisions is inconsistent with the majoritarian premise that lies at the heart of originalism's appeal: When the state conventions ratified the Constitution, they adopted the text before them, not the drafting history that remained secret until Madison's notes were published in 1840. For a public meaning originalist, the dismissal of the Constitution's text in *Powell* and *Thornton* was a clear mistake. To disregard the ratifiers' decision is to disregard what "We the People" decided. Text trumps secret history.

The two other Supreme Court cases did not simply dismiss the Committee's text but instead adopted a strong presumption that the Committee of Style's text meant the same as the text referred to the Committee. In *Nixon v. United States*, the Court found that the addition of the word "sole" to the Impeachment Clause did not alter the clause's meaning.⁶²⁹ Justice Rehnquist wrote:

[A]ccepting as we must the proposition that the Committee of Style had no authority from the Convention to alter the meaning of the Clause, we must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language. That is, we must presume that the Committee did its job. This presumption is buttressed by the fact that the Constitutional Convention voted on, and accepted, the Committee of Style's linguistic version. We agree with the Government that "the word 'sole' is entitled to no less weight than any other word of the text, because the Committee revision perfected what 'had been agreed to.'" Second, carrying Nixon's argument to its logical conclusion would constrain us to say that the *second to last draft* would govern in every instance where the Committee of Style added an arguably substantive word. Such a result is at odds with the fact that the Convention passed the Committee's version, and with the well-established rule that the plain language of the enacted text is the best indicator of intent.⁶³⁰

There is a significant shift in focus from *Powell* here. In *Powell*, the Court treated the language sent to the Committee of Style as dispositive. In *Nixon*, in contrast, the Court parses the Committee of Style's text (which had been adopted by the Convention) and rejected the idea "that the second to last draft would govern in every instance where the Committee of Style added an arguably substantive word."⁶³¹ Rather than disregarding the Constitution's text, the Court embraced the presumption that the text sent to the Committee and the Committee's proposal have the same meaning.

In *Utah v. Evans*, the Court's most recent confrontation with the Committee of Style, the Court again adopted the presumption approach.⁶³² The question before the Court was whether the Census Bureau's use of sampling

629. 506 U.S. 224 (1993).

630. *Nixon*, 506 U.S. at 231–32 (citations omitted).

631. *Id.* (emphasis omitted).

632. 536 U.S. 452 (2002).

violated the “actual enumeration” requirement of the Census Clause.⁶³³ Justice Breyer stated:

[T]he Committee of Detail sent the draft to the Committee of Style, which, in revising the language, added the words “actual Enumeration.” Although not dispositive, this strongly suggests a similar meaning, for the Committee of Style “had no authority from the Convention to alter the meaning” of the draft Constitution submitted for its review and revision. Hence, the Framers would have intended the current phrase, “the actual Enumeration shall be made . . . in such Manner as [Congress] . . . shall by Law direct,” as the substantive equivalent of the draft phrase, “which number [of inhabitants] shall . . . be taken in such manner as [Congress] shall direct.” And the Committee of Style’s phrase offers no linguistic temptation to limit census methodology in the manner that Utah proposes.⁶³⁴

Here, again, the Court embraced a presumption. The fact that the Committee was not empowered to change the Constitution’s meaning “strongly suggest[ed]” that that Committee’s text had “a similar meaning” to the previously adopted text. There was “no linguistic temptation” to read the Committee’s text as having a different meaning from the previously approved text.

This reliance on drafting history as a gloss on the constitutional text is consistent with one strand of public meaning originalism, a strand embraced by Justice Scalia. While Justice Scalia famously rejected the use of legislative history,⁶³⁵ he repeatedly used the drafting history of the Convention as evidence of what the words of the Constitution meant at the time of ratification.⁶³⁶ Indeed, Justice Scalia joined the majority opinion in *Nixon*.⁶³⁷

633. *Evans*, 536 U.S. at 457.

634. *Id.* at 474–75 (first alteration added) (citations omitted).

635. See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388–91 (2000) (Scalia, J., concurring); *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 482, 493 n.6 (1998); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28, 39–40 (1998); *Assocs. Com. Corp. v. Rash*, 520 U.S. 953, 963 n.4 (1997); *Dunn v. CFTC*, 519 U.S. 465, 480–81 (1997) (Scalia, J., concurring).

636. See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) (Elections Clause, U.S. CONST. art. I, § 4, cl. 1); *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (Elections Clause, U.S. CONST. art. I, § 4, cl. 1); *Printz v. United States*, 521 U.S. 898, 915 n.9 (1997); *Edmond v. United States*, 520 U.S. 651, 660 (1997) (Appointments Clause, U.S. CONST. art. II, § 2, cl. 2); *Honig v. Doe*, 484 U.S. 305, 340–41 (1988) (Scalia, J., dissenting) (Case or Controversy Clause, U.S. CONST. art. III, § 2, cl. 1); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 263 (1987) (Scalia, J., dissenting) (Commerce Clause, U.S. CONST. art. I, § 8, cl. 3). For further discussion of Justice Scalia’s use of the constitutional drafting history and his rejection of statutory legislative history, see Kesavan & Paulsen, *supra* note 442, at 1119–20; William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1301 (1998).

637. See *Nixon v. United States*, 506 U.S. 224 (1993). Justice Scalia did not join the majority in *Evans*. He wrote a separate dissent, arguing that the plaintiff lacked standing. See *Evans*, 536 U.S. at 523 (Scalia, J., dissenting).

When construing text drafted by the Committee of Style, many of the leading works of scholarship surveyed in this Article have embraced the presumption evidenced in *Nixon* and *Evans*. Cass Sunstein thus finds that the Committee's deletion of the phrase "against the United States" from the Impeachment Clause was without legal significance.⁶³⁸ And he and Professor Lessig take a similar approach in concluding that the addition of "herein granted" to the Article I Vesting Clause did not expand executive power.⁶³⁹ Professor Amar and Dean Amar read the Presidential Succession Clause as if the words "of the United States" had not been deleted.⁶⁴⁰

Professor Michael Paulsen and Vasan Kesavan offer the most sustained treatment of this presumption as a guide to interpretation.⁶⁴¹ They contend that

the draft of the Constitution referred by the Framers to the Committee of Style [should have] the status of a committee report—it is authoritative *evidence* of legal meaning, but not legal *authority*. Thus, when the text of the Constitution is unambiguous, it trumps the "second-to-last" draft of the Constitution, as is the case in statutory interpretation; but when the text of the Constitution is ambiguous, its meaning may be informed by the Constitution's "committee report." Indeed, the Constitution's committee report is superior to committee reports in ordinary legislation generally. It is a more prolix form of the final "statute," and is therefore probably less ambiguous. It is also a more reliable, consistent, and faithful guide to interpretation because it is the product of the "Congress" as a whole.⁶⁴²

Under this approach, the drafting history serves as "an extratextual dictionary of constitutional meaning."⁶⁴³

Regardless of whether the drafting history illuminates the words of the Constitution as a general matter, the presumption breaks down in the case of the dishonest scrivener. Contrary to the view expressed by Professor Klarman and the other leading historians of the Convention, Morris did not seek to simply "put the finishing touches on the Constitution."⁶⁴⁴ He did not aim to "accurately capture[] what the Framers meant in their unadorned language"⁶⁴⁵ or fashion "the substantive equivalent of the draft phrase."⁶⁴⁶ He selected words that changed the Constitution's meaning. Assuming continuity of meaning is a mistake.

638. SUNSTEIN, *supra* note 474, at 48 ("As its name suggests, the Committee on Style and Arrangement lacked substantive authority (which is not to deny that it made some substantive changes), and it is far more likely that this particular change was made on grounds of redundancy.").

639. Lessig & Sunstein, *supra* note 374, at 48–49.

640. Amar & Amar, *supra* note 442, at 116 ("A later style committee deleted the words 'of the United States,' but no evidence suggests that this style change was meant to change meaning.").

641. See Kesavan & Paulsen, *supra* note 442, at 1208.

642. *Id.* at 1208–09.

643. *Id.* at 1198.

644. KLARMAN, *supra* note 11, at 188–89 n.*.

645. *Nixon v. United States*, 506 U.S. 224, 231 (1993).

646. *Utah v. Evans*, 536 U.S. 452, 475 (2002).

The problem occurs again and again when Morris's changes are overlooked or dismissed as simply matters of style: the original public meaning of the text is lost. When he rewrote the Preamble, or changed language in Article III's Vesting Clause, or dropped "private" from the Contracts Clause, or added "herein granted" to Article I's Vesting Clause, or omitted "justly" from the Fugitive Slave Clause, or described the Constitution as "the law of the land," or used a negative framing for the Qualifications Clause, or changed the punctuation of the New States Clause or the General Welfare Clause, or made the other changes discussed in this Article, he sought to change the meaning of these clauses. Morris's changes enabled new textualist arguments about what the Constitution meant; the assumption of continuity fails to recognize this change.

Indeed, in analyzing the Committee of Style's text, scholars and jurists should operate on an assumption of discontinuity. As I have pursued the project of comparing the Committee of Style's text to the previously approved text, I have repeatedly encountered changes that at first appeared cosmetic but that in fact had substantive significance. That experience leads me to believe that, in approaching Morris's text and seeking to recover original public meaning at a distance of more than two hundred years, courts and scholars should flip the assumptions that have guided opinions like *Nixon* and *Thornton* and mainstream academic argument. I believe it is likely that further research will reveal that Morris changed other clauses to advance his constitutional goals.⁶⁴⁷ Where the Committee of Style text departs from the text previously approved by the Convention, the modern reader, rather than assuming continuity, should attempt to puzzle through the changes to see whether they in some way covertly advanced Morris's constitutional vision.

From the vantage point of constitutional jurisprudence, it is important to recognize that I am *not* arguing that courts should today apply drafter's intent *because* it is the drafter's intent. In other words, I am *not* arguing that because Morris, the drafter of the Constitution, wanted the text to be understood in a certain way, we should read it today as he would have wanted it read. The powerful critiques of Framers' intent that scholars have made apply with even more force to drafter's intent. Because the majoritarian basis of originalism rests on ratification by "the people" in the state ratifying conventions, the question is what the words meant to the ratifiers (or, under another school of originalist thought, what the words themselves meant in 1787), not what Morris (or the other people at the Convention) hoped to achieve.⁶⁴⁸ At the same time, he was a drafter with remarkable awareness of how words would be construed. This Article reveals a series of clauses whose original meaning has been wholly or largely lost. Focusing on Morris helps us uncover readings at the time of ratification and the early republic that have disappeared from our consciousness.

647. For a discussion of some of the other clauses where Morris changed text, see *supra* note 275. Although I have not found any of these clauses to reflect intentional changes of meaning, further research may produce a different result.

648. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609–10 (2004).

The final Supreme Court approach to the Committee of Style's text is the approach of Justice Thomas. In his dissent in *Utah v. Evans*, Justice Thomas attacked any use of the language referred to the Committee of Style. "The Court," he stated, "places undue weight on the penultimate version of the Clause, the iteration that was given to the Committee of Detail and Committee of Style. . . . Rather than rely on the draft, I focus on the words of the adopted Constitution."⁶⁴⁹ Justice Thomas has not been able to convince another member of the Court to join his position and has not developed a rationale for his approach. Dean Manning, however, has applied it in his analysis of the Presidential Succession Clause and the Committee's omission of the words "of the United States": "[E]ven if the Committee of Style acted ultra vires by making substantive changes to the text, the ratifiers accepted them. The relevant fact is that the ratifiers acted on the text submitted to the States, not on the sequence of 'secret deliberations' of the Constitutional Convention"⁶⁵⁰

Unlike the other two approaches, the Thomas-Manning approach recognizes (at least implicitly) the possibility that the Committee of Style altered the Constitution's meaning. Underlying the "focus on the words of the adopted Constitution,"⁶⁵¹ to use Justice Thomas's phrase, is an awareness that the words of the ratified Constitution may have had a different meaning than the words referred to the Committee of Style. This reliance on the words of the Constitution accords with public meaning originalism's core principle because its focus is on the interpretation of the words adopted by the ratifiers as "We the People" would have understood them.⁶⁵² Thus, from the vantage point of the public meaning originalist, the Thomas-Manning approach is the correct one.

Yet much of the text that Morris wrote did not have a clear meaning. Morris's changes were crafted to avoid provoking the delegates who adopted the text he was changing. Thus, the question becomes how to interpret text that can be read in different ways. That topic that is the subject of the next Section.

2. The Text, the Construction Zone, and the Federalist Constitution

Recovering the original public meaning of the Committee of Style's text at more than two hundred years' remove is complicated. It requires recognition of three points. First, the drafter of the Committee systematically altered constitutional meaning to advance his own constitutional vision. Second, the constitutional text he drafted was susceptible of competing interpretations, one he favored and one he opposed. Third, the constitutional text generally fits the reading he favored better than the reading he opposed.

649. *Evans*, 536 U.S. at 495–96 (Thomas, J., concurring in part and dissenting in part).

650. Manning, *supra* note 442, at 144.

651. *Evans*, 536 U.S. at 496 (Thomas, J., concurring in part and dissenting in part).

652. See Whittington, *supra* note 648, at 609–10.

As has been discussed, Morris acknowledged that, with respect to certain constitutional provisions, he intentionally employed opaque language to advance goals he desired while avoiding discovery: “I went as far as circumstances would permit to establish the exclusion. . . . [H]ad it been more pointedly expressed, a strong opposition would have been made.”⁶⁵³ “[I]t became necessary to select phrases, which expressing my own notions would not alarm others”⁶⁵⁴

Implicit in these statements, however, is not only the idea that the text he crafted was opaque but the idea that, when carefully read, this text supported his constitutional vision better than the alternative vision held by other delegates. Morris “select[ed] phrases, which express[ed] [his] own notions.”⁶⁵⁵ Moreover, he believed that constitutional interpretation should be about the words, not what his fellow delegates hoped to achieve. As he wrote in 1814, “[W]hat can a history of the Constitution avail towards interpreting its provisions. This must be done by comparing the plain import of the words, with the general tenor and object of the instrument.”⁶⁵⁶

Morris’s changes—adding the words “herein granted” to the Article I Vesting Clause, dropping the word “private” from the Contracts Clause, or changing “the law of the several states” to “the law of the land”—were subtle. The one dramatic change—the revision to the Preamble—could be understood as stylistic and a pragmatic response to the possibility that not all thirteen states would ratify the Constitution. As a result, exhausted delegates hurriedly reviewing the final draft missed the substantive changes to the document.

From Morris’s perspective, the weakness of his approach was that, as he created new textual readings, there were competing textual readings. Federalists could read the Preamble as a grant of authority, but Republicans dismissed it as simply rhetoric. Federalists read Article III’s Vesting Clause as mandating lower federal courts; Republicans disagreed. Hamilton and Wilson read the Contract Clause to cover contracts with the state; Randolph and Williamson read it as limited to private contracts. Moreover, when Republicans did not engage with text, they did not feel compelled to abandon their constitutional positions. Madison as Helvidius did not counter Hamilton’s use of the “herein granted” argument as Pacificus, but he still argued that Hamilton’s understanding of executive power was erroneous. Hamilton and Wilson read the law-of-the-land language to authorize judicial review, but the Constitution does not clearly grant federal courts the power to review federal statutes for unconstitutionality, and in the early republic, critics of judicial review could

653. Letter from Gouverneur Morris to Henry W. Livingston, *supra* note 66, at 404; see *supra* text accompanying note 66.

654. Letter from Gouverneur Morris to Timothy Pickering, *supra* note 1, at 420; see *supra* text accompanying notes 12, 76.

655. Letter from Gouverneur Morris to Timothy Pickering, *supra* note 1, at 420.

656. *Id.*

argue that it lacked a constitutional basis. The question then becomes how a modern court should choose between competing readings.

Professor Lawrence Solum has recently offered a valuable approach to how an originalist should decide cases. The first level of inquiry is whether “the constitutional text . . . provide[s] determinate answers to constitutional questions.”⁶⁵⁷ If the answer is no, the originalist moves to the “construction zone.”⁶⁵⁸ In the construction zone, one looks to sources beyond the text—like structure, constitutional values, or precedent—to resolve controversies pitting two plausible originalist readings against each other.⁶⁵⁹

The Federalist readings of the clauses discussed here are sufficiently complete explications of the text such that, for an originalist, these clauses either are within the construction zone or are superior readings that should be adopted without additional reference to structure, constitutional values, or precedent. Morris crafted his text so it would be, at the very least, ambiguous. Because the focus of this Article is historical, detailed analyses of how the fifteen clauses discussed here should be interpreted by a modern originalist—and whether they fall within the construction zone or whether the Federalist reading is superior—are outside of the scope of this Article. But Morris was a careful drafter, and it is striking that, in the debates in the early republic, Federalists were repeatedly able to parse the text closely and Republicans were not.

Republicans are often described as “strict constructionists,” whereas Federalists, such as Hamilton and Chief Justice Marshall, are described as “loose constructionists.”⁶⁶⁰ But in the debates surveyed here, precisely the opposite is true. The Federalists were able to explain the Constitution’s words. Republicans repeatedly had to ignore or add words—often interpreting clauses as if they still employed the language referred to the Committee of Style rather than the Constitution’s actual text. Federalists found power in the Preamble; Re-

657. Solum, *supra* note 616, at 458.

658. *Id.*

659. *Id.* at 578.

660. For classic treatments of the loose construction–strict construction divide, see LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY 273–302 (1978); RAOUL BERGER, FEDERALISM: THE FOUNDERS’ DESIGN 66–76 (1987); Powell, *supra* note 611, at 923–34. Professor Jonathan Gienapp has written an influential new study that reflects this dichotomy and traces its origins to the controversy about whether Congress could constitutionally create a bank. See GIENAPP, *supra* note 17, at 213–47. For a significant and novel perspective on the loose construction–strict construction divide, see Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020). Professor Peterson makes a strong argument that whereas the Federalist approach to constitutional interpretation was grounded in a public-legislation model, the Republican model was based on an analogy to private legislation. See *id.* at 7. This Article does not challenge Peterson’s focus on the public legislation–private legislation model. Rather, it flips the dichotomy that underlies the loose construction–strict construction debate. The traditional view is that Republicans closely parsed constitutional text and Federalists treated it as more open-ended. In contrast, the research presented here shows that, at least with respect to Morris’s text, the Federalists closely parsed the constitutional language, while Republicans were less attentive to specific word choice.

publicans treated it as stylistic. Madison, in his *Helvidius* essay, ignored Hamilton's argument about the "herein granted" text.⁶⁶¹ In the debate about the presidential succession bill, Madison interpreted the Presidential Succession Clause as if it still read "officer of the United States" rather than "officer," and several Congressman erroneously asserted that the clause read "officer of the United States." In contrast, Federalists read "officer" to mean "officer."

In the first impeachment debate, Republicans read the impeachment clause as if it still read "high crimes or misdemeanors against the United States," rather than simply "high crimes or misdemeanors." Federalists could argue that the text reached unofficial acts. The words "ordain" and "establish" in Article III's Vesting Clause are best read as words of obligation, as the Federalists read them when arguing that the Constitution mandated that Congress establish federal courts. Republicans interpreted the Contract Clause as if it still had the word "private" in it; Federalists could appeal to the Constitution's text, which did not contain a limit to "private" contracts. Federalists could invoke the text stating that the Constitution was the "law of the land" when they justified judicial review; Republican opponents of judicial review had no text to rely on.

There are a handful of clauses for which the Republican and Federalist readings are equally plausible. The New States Clause, the Territories Clause, and the Qualifications Clause fall into this category. In the clauses listed in the preceding paragraphs, the Federalist readings are more consistent with the words themselves than are the Republican readings. In contrast, with respect to the clauses in this paragraph, the Republican and the Federalist readings parse the text equally well.

But in the great majority of instances, the Federalists had the better argument in interpreting a particular clause. Republicans had to ignore words or phrases; Federalists were able to parse the text closely. This was no accident. Morris advanced his constitutional vision with extraordinary skill. He was, in the words of fellow Committee of Style members Madison and Hamilton, a "genius,"⁶⁶² and the project he was pursuing was of the most fundamental importance. He was drafting the Federalist Constitution.

CONCLUSION

In 1798, on the floor of the House, Albert Gallatin charged that Gouverneur Morris, the drafter for the Committee of Style, had tried to revise the

661. The limits of the argument here should be noted. I am suggesting that the presence of the phrase "herein granted" in the Article I Vesting Clause and its absence in the Article II Vesting Clause connotes that the president has all executive powers except for those expressly assigned elsewhere (such as the power to declare war). A separate and critical question is what the phrase "executive powers" meant, a matter of sharp controversy. *Compare* Prakash & Ramsey, *supra* note 348 (advancing the Vesting Clause thesis of broad executive power), *with* Mortenson, *supra* note 348, at 1169 ("[Executive power] extended only to the implementation of legal norms created by some other authority.").

662. See Letter from Alexander Hamilton to Gouverneur Morris, *supra* note 52 (Hamilton); 3 FARRAND'S RECORDS, *supra* note 1, at 500 (Madison); *see also supra* text accompanying notes 51–52.

General Welfare Clause in order to expand the powers of Congress but that a fellow delegate had caught the “trick” and restored the original constitutional text.⁶⁶³ Despite the fact that this charge was made more than two hundred years ago, and despite Morris’s reputation as lacking integrity, no previous work of scholarship has compared the constitutional provisions referred to the Committee of Style with the Committee of Style’s proposals in order to assess whether he altered text to advance his constitutional vision.

This Article has shown that Morris—a committed nationalist who favored a strong executive and judiciary and strong protection for private property, and who opposed slavery and the grant of political power to the West—subtly revised the text of a breathtaking range of clauses in order to advance his constitutional vision, repeatedly seeking to gain victory in crucial areas where he had been unable to obtain the result he desired during earlier Convention debates. He wrote text that could be read to expand the power of the national government (the Preamble), strengthen the executive (the Vesting Clauses of Articles I and II), mandate the creation of lower federal courts (the Article III Vesting Clause), provide a textual basis for judicial review (the law-of-the-land provision), elevate the constitutional position of both the executive and federal courts (the basic structure of Article I, Article II, and Article III), bar state interference with public contracts (the Contract Clause), block the admission of slave states Kentucky and Tennessee to the Union while permitting the admission of the free state of Vermont (the New States Clause), include members of Congress in the line of succession to the presidency (the Presidential Succession Clause), expand the ability of the national government to assume state debts (the Engagements Clause), allow Congress to add qualifications to membership (the Qualifications Clause), and broaden the grounds for impeachment (the Impeachment Clause). Morris also removed constitutional text suggesting that slavery was just (the Fugitive Slave Clause). It is a remarkable list of some of the most important parts of the Constitution.

Morris’s text provided Federalists with language that they repeatedly relied on in the major constitutional debates of the early republic. Federalists drew on Morris’s text to argue for presidential power to remove executive branch officers, the presidential ability to issue a Neutrality Proclamation, Congress’s power to create the Bank of the United States and enact the Sedition Act, federal courts’ right to hold congressional and state statutes unconstitutional, congressional power to impeach an officer for acts outside the scope of office and to place members of Congress in the line of presidential succession, and Congress’s obligation to create lower federal courts. Morris’s text was used to argue for a congressional power to abolish slavery, and abolitionists relied on his revision of the Fugitive Slave Clause when they argued that the Constitution did not endorse slavery. Yet Morris’s changes were subtle. Rather than creating clear constitutional meaning, he created text that was

663. For Gallatin’s charge, see 3 FARRAND’S RECORDS, *supra* note 1, at 379; see also discussion *supra* Section I.D.

the subject of controversy. In the great debates of the early republic, Republicans fought Federalists with their own readings of Morris's text.

Although it has never been presented with the full range of changes made by the Committee, the Supreme Court has, in four cases in the past half century, considered whether to give effect to particular language drafted by the Committee of Style. It has twice decided to disregard the Committee's language (even though it became the language of the Constitution) and twice adopted the presumption that the Committee's language had the same meaning as the language that the Convention had previously adopted. From the perspective of public meaning originalism, the dominant school of originalist thought, neither approach withstands scrutiny—the former because it ignores the ratified text, the latter because it fails to see that the text was revised by the Committee to change its meaning. Only Justice Thomas has focused on construing the text that was ratified, the proper approach for a public meaning originalist.

More broadly, on point after point, Republican readings of the Constitution have come to be seen by academics and the Court as the original understanding. From the vantage point of public meaning originalism, however, awareness of the early readings of the text written by Morris and the Committee enables reviving Morris and the Federalists' readings of the Constitution. These revived readings challenge the conventional wisdom about the original understanding of textual provisions that are central to many of the most important debates in constitutional law. Federalist readings are consistently at least as well grounded in the text as Republican readings. With respect to the great majority of clauses, the Federalist readings are textually superior.

What this Article shows, most fundamentally, is that Morris was both a legal drafter of extraordinary skill and vision and a dishonest scrivener. As a member of the Committee of Style, he covertly rewrote critical elements of the Constitution to achieve results he had been unable to achieve on the Convention floor. The charge made two hundred years ago concerned a "trick" that was uncovered and undone. But that was just one trick among many, and those other subtle but important changes have not been recognized until now. Scholars and jurists have failed to see a critical fact: Morris's tricks shaped the Constitution.

APPENDIX

PROVISION	TEXT REFERRED TO COMMITTEE OF STYLE	COMMITTEE OF STYLE TEXT
Preamble	“We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity.” ⁶⁶⁴	“We, the People of the United States, in order to form a more perfect union, to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.” ⁶⁶⁵
Vesting Clauses	Article II: “The Government shall consist of supreme legislative, executive and judicial powers.” Article III: “The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives, and a Senate.” Article X, Section 1: “The executive power of the United States shall be vested in a single person. His style shall be, ‘The President of the United States of America,’ and his title shall be, ‘His Excellency.’” Article XI, Section 1: “The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.” ⁶⁶⁶	Article I, Section 1: “ALL legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Article II, Section 1: “The executive power shall be vested in a president of the United States of America.” Article III, Section 1: “The judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.” ⁶⁶⁷

664. Convention Proceedings, *supra* note 5, at 565.

665. Report of Committee of Style, *supra* note 5, at 590.

666. Convention Proceedings, *supra* note 5, at 565 (Articles II and III); *id.* at 572 (Article X); *id.* at 575 (Article XI).

667. Report of Committee of Style, *supra* note 5, at 590 (Article I); *id.* at 597 (Article II); *id.* at 600 (Article III).

ARTICLE I

Qualifications Clause	<p>Article IV, Section 2: "Every Member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen of the United States for at least seven years before his election; and shall be, at the time of his election, an inhabitant of the State in which he shall be chosen."</p> <p>Article VI, Section 2: "The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient."⁶⁶⁸</p>	<p>Article I, Section 2, Clause a: "No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."⁶⁶⁹</p>
Enumeration Clause	<p>Article VII, Section 3: "The proportions of direct taxation [and representation] shall be regulated by the whole number of free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within three years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct."⁶⁷⁰</p>	<p>Article I, Section 2, Clause b: "Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to servitude for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct."⁶⁷¹</p>

668. Convention Proceedings, *supra* note 5, at 565 (Article IV); 2 FARRAND'S RECORDS, *supra* note 1, at 248 n.6 (Article VI).

669. Report of Committee of Style, *supra* note 5, at 590.

670. Convention Proceedings, *supra* note 5, at 571.

671. Report of Committee of Style, *supra* note 5, at 590-91.

Contract Clause		Article I, Section 10: "No state shall coin money, nor emit bills of credit, nor make any thing but gold or silver coin a tender in payment of debts, nor pass any bill of attainder, nor ex post facto laws, nor laws altering or impairing the obligation of contracts; nor grant letters of marque and reprisal, nor enter into any treaty, alliance, or confederation, nor grant any title of nobility." ⁶⁷²
Presidential Succession Clause	Article X, Section 1: "The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or disability of the President and Vice President; and such Officer shall act accordingly, until such disability be removed, or a President shall be elected[.]" ⁶⁷³	Article II, Section 1, Clause e: "[T]he Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or the period for choosing another president arrive." ⁶⁷⁴

IMPEACHMENT CLAUSES

High Crimes and Misdemeanors	Article X, Section 2: "He [the President] shall be removed from his office on impeachment by the House of representatives, and conviction by the Senate, for treason or bribery or other high crimes and misdemeanors against the United States . . ." ⁶⁷⁵	Article II, Section 4: "The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors." ⁶⁷⁶
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672. *Id.* at 596–97.

673. Convention Proceedings, *supra* note 5, at 573.

674. Report of Committee of Style, *supra* note 5, at 599.

675. Convention Proceedings, *supra* note 5, at 575.

676. Report of Committee of Style, *supra* note 5, at 600.

Trial by the Senate	Article IX, Section 1: "The Senate of the United States shall have power to try all impeachments . . ." ⁶⁷⁷	Article I, Section 3, Clause e: "The Senate shall have the sole Power to try all Impeachments." ⁶⁷⁸
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THE FEDERAL JUDICIARY

Judicial Vesting Clause	Article XI, Section 1: "The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States." ⁶⁷⁹	Article III, Section 1: "The judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." ⁶⁸⁰
Law-of-the-Land Provision	Article VIII: "This Constitution and the Laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; any thing in the constitutions or laws of the several States to the contrary notwithstanding." ⁶⁸¹	Article VI: "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." ⁶⁸²

677. Convention Proceedings, *supra* note 5, at 572.

678. Report of Committee of Style, *supra* note 5, at 592.

679. Convention Proceedings, *supra* note 5, at 575.

680. Report of Committee of Style, *supra* note 5, at 600.

681. Convention Proceedings, *supra* note 5, at 572.

682. Report of Committee of Style, *supra* note 5, at 603.

Slavery	Article XV: "If any Person bound to service or labor in any of the United States shall escape into another State, He or She shall not be discharged from such service or labor in consequence of any regulations subsisting in the State to which they escape; but shall be delivered up to the person justly claiming their service or labor." ⁶⁸³	Article IV, Section 2: "No person legally held to service or labour in one state, escaping into another, shall in consequence of regulations subsisting therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labour may be due." ⁶⁸⁴
New States Clause	Article XVII: "New States may be admitted by the Legislature into this Union: but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States, without the consent of the Legislature of such State as well as of the general Legislature. Nor shall any State be formed by the junction of two or more States or parts thereof without the consent of the Legislatures of such States as well as of the Legislature of the United States." ⁶⁸⁵	Article IV, Section 3: "New states may be admitted by the Congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress." ⁶⁸⁶
Engagements Clause	Article VII, Section 1: "All debts contracted and engagements entered into, by or under the authority of Congress shall be as valid against the United States under this constitution as under the confederation." ⁶⁸⁷	Article VI: "All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the confederation." ⁶⁸⁸

683. Convention Proceedings, *supra* note 5, at 577.

684. Report of Committee of Style, *supra* note 5, at 601–02.

685. Convention Proceedings, *supra* note 5, at 578.

686. Report of Committee of Style, *supra* note 5, at 602.

687. Convention Proceedings, *supra* note 5, at 571.

688. Report of Committee of Style, *supra* note 5, at 603.