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

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

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* Dean and Executive Vice President, Georgetown University Law Center; Paul Regis Dean Leadership Professor of Law. Ph.D., Harvard University. J.D., B.A., Yale University. Previous drafts of this article have been presented at the San Diego Originalism Conference, the Second Circuit Judicial Conference, the Washington DC Legal Historians Roundtable, the Fordham Law School 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 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, Laura Donohue, Bill Eskridge, Dan Ernst, William Ewald, John Feerick, Francois Furstenberg, Jonathan Gienapp, Vicki Jackson, Calvin Johnson, Robert Katzmann, Michael McConnell, Maeve Marcus, John Mikhail, Henry Monaghan, Julian Mortensen, Victoria Nourse, Richard Primus, Jack Rakove, Michael Ramsey, Michael Rappaport, Robert Reinsein, John Rogan, Howard Shapiro, Larry Solum, Alison Spada, David Stewart, Seth Tillman, Amanda Tyler, David Vladeck, and Derek Webb for invaluable 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 Georgetown Law librarians Andy Lang, Jenifer Davitt, Andrea Muto and Thanh Nguyen of the Georgetown Law Library for superb support.
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Abstract

At the end of the proceedings of the federal 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 subsequently adopted the constitution proposed by the Committee. For more than two hundred years, questions have been raised as to whether Morris as drafter covertly made changes to the text in order to advance his constitutional vision, but the legal scholars and modern historians studying the convention have either ignored the issue or concluded that Morris was an honest scrivener. No prior article, however, has systematically compared the Committee’s draft to the previously adopted resolutions or discussed the implications of those changes for constitutional law. This article undertakes that comparison and reveals how many changes Morris made to the text delegates had previously agreed to and how important those changes were (and are). It shows that many of the central elements of the Constitution (including the Preamble; the basic Article I, Article II, and Article III structure; the vesting clauses; the contract clause; and the impeachment clause) were wholly or in critical part the product of the Committee’s work. In total, Morris made fifteen significant changes to the Constitution, and these textual changes advanced his constitutional goals, including strengthening the national government, the executive, and the judiciary; providing the textual basis for judicial review; increasing presidential accountability through an expansive conception of impeachment; protecting private property; mandating that the census report reflect “actual enumeration,” and fighting the spread of slavery. The article also shows that, in central debates in the early republic, Federalists, and, notably, fellow committee member Alexander Hamilton, repeatedly drew on language crafted by the Committee as they fought for their vision of the Constitution. In revising the constitutional text, Morris created the basis for what was to become the Federalist reading of the Constitution.

As drafter, Morris was seeking to reverse losses he had suffered on the convention floor, and he used language that did not alert his opponents to the changes in meaning he was seeking to effect. Because the changes were subtle, Madison and Jeffersonian Republicans were, like Hamilton and the Federalists, able to appeal to text in the great constitutional battles of the early republic. Critically, in virtually every area, modern originalists have embraced the Republican reading as reflecting the original understanding, but this Article both reveals the now wholly disregarded or largely dismissed Federalist reading of the constitutional text crafted by Morris — including 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 covered public, as well as private, contracts), the impeachment clause (which they read to cover both non-official and official acts), and the law of the land clause (used as the basis...
for judicial review), as well as other constitutional clauses - and argues these readings are better able to explain the complete text than competing Republican readings because Republican readings repeatedly ignore words, phrases, and punctuation or treat text as lacking substantive meaning while the Federalist readings are able to give effect to Morris’s – and the Constitution’s - words.
The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution

Introduction

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

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

James Madison to Jared Sparks, April 8, 1831

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

Max Farrand, Framing of the Constitution (1913).

At the end of the proceedings of the federal Constitutional Convention, following more than three months of debate—including a month of debate on the last previous draft of the Constitution—the delegates elected “a Committee of five to revise the style of and arrange the articles agreed to by the House.” 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 the states and ratified.

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2 Id. at 499.
4 2 Farrand, supra note 1, at 547.
5 For discussion of the work of the Committee, see infra Section I. The Committee’s report is reprinted in 2 Farrand, supra note 1, at 590-63. A photographic reproductions of the original broadside of the report as it was given to the convention delegates can be found at: http://treasures.constitutioncenter.org/index.php/document/04-committee-of-style-report/

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 2 Farrand, supra note 1, at 565–80. The appendix to this Article presents the text of the provisions that had been adopted by the Convention and that were referred to the Committee of Style alongside the text of these provisions drafted by the Committee.
Largely forgotten today, Morris had been a dominant figure at the convention. He spoke more than any other delegate, and he had fought for a vision of constitutional governance that largely anticipated the Federalist agenda in the early republic: he pushed for a national government with expansive powers; he wanted a powerful executive, although he also advocated a broad concept of impeachment in order to check on the President; he supported a strong federal judiciary, including judicial review of federal and state legislation and a requirement that there be lower federal courts; he pressed for strong protection for private property; and, among the delegates, he was the most fierce in his denunciation of slavery.6

In 1798, in the course of a House debate on the scope of the general welfare clause, Congressman Albert Gallatin charged that Morris, in drafting the Constitution, had deceptively (and subtly) changed 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, which resonates with suspicions about Morris’s integrity that were widely shared by his contemporaries, 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 largely subtle) changes, including 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—were the creation of the Committee, as were the Preamble’s substantive ends: “in order to form a more perfect union, to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty.” The Committee re-inserted the 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 (Congress), Article II (Executive), and Article III (the Judiciary). It revised the vesting clause of Article I so that it was different from the vesting clause of Article II.

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6 For Morris’s personal history, see infra Part I. For his views at the convention, see infra Part II.
7 For Gallatin’s charge, see 3 FARRAND, supra note 1, at 379. For discussion, see infra Section I.D.
9 See infra Part IV.
It also revised the vesting clauses of Article II and Article III. It altered, in important (although not obvious) ways, the language of the law of the land clause, the engagement clauses, the qualifications clause, the impeachment clause, the census clause, the presidential succession clause, and the new states clause. The Committee removed the word “justly” from the fugitive slaves clause.\(^\text{10}\)

Each of those changes were consequential. 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. Comparison of the text previously produced by the convention with Morris’s draft shows that the person who drafted the final version of the Constitution did not limit his work to matters of style and arrangement. He was a dishonest scrivener.

Significantly, while, apart from Gallatin’s speech, there was no recognition at the time that Morris’s changes were substantive, they were of immediate consequence. In the great constitutional controversies in the Washington and Adams administration, Federalists repeatedly invoked language that Morris had placed in the Constitution. Morris in 1787 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 anti-slavery 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.

The primary focus of this article is historical. In Part I, it discusses the Committee of Style, its membership, and its mandate. It also presents a mini-biography of Morris and discusses the scholarly consensus that, as Professor Michael Klarman observed in the most recent leading account of the origins of the Constitution, the Committee simply “put the finishing touches on the Constitution.”\(^\text{11}\) Part II studies Morris’s constitutional philosophy (an almost unexamined topic) and highlights the ways in which he had failed to achieve his goals 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 the ways in which they advanced goals that were central to his constitutional vision but that he had not been able to achieve during floor debates. This Part also shows the role of those changes in early constitutional debates. As the drafter for the Committee of Style, Morris was trying 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 and said, “[I]t became necessary to select phrases, which expressing my own notions

\(^{10}\) See infra Section III.

would not alarm others, nor shock their selflove.” While this is the only substantive change he confessed to having made, the same description is equally applicable to all his others substantive changes. As a result, while Federalists relied on his text in the major constitutional debates of the early republic, Jeffersonian Republicans were also able to argue that that text supported their constitutional vision. At the same time, Morris’s words were (not surprisingly) 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, this Part discusses modern interpretations of the clauses changed by Morris and highlights the ways in which, in general, the Republican readings have been favored by modern originalists and the Federalist readings have been disregarded.

Part IV discusses a number of significant ways in which this historical research bears on modern constitutional law. It begins by showing that recognition of Morris’s role as dishonest scrivener offers a new justification for one of the primary challenges scholars have brought to drafters’ intent originalism, which is 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 caselaw involving the Committee of Style. While the Court has never recognized that the Committee’s text systematically departed in substantive ways from previously agreed to text—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 the Constitution’s text. 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 non-official 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 of Morris, the Constitution did not embrace slavery as moral, and its text could have prevented the creation of new slave states through partition from existing slave states.

12 3 FARRAND, supra note 1, at 420.
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 readings were the readings that more carefully parsed the Constitution’s text. At point after point, while the Jeffersonian Republican Constitution is now seen by academics as consistent with the original understanding, the Federalist Constitution reflects Morris’s words. Or, to put it another way, the Federalist Constitution is the understanding of the Constitution that reflects 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. 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. James Wilson, although not a committee member, worked informally with the Committee as it prepared its draft. Uniquely among all the convention’s committees, the membership of the Committee 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. Indeed, these five were (along with Washington) not only members of the nationalist wing of delegates, they were its leaders. 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.

14 2 FARRAND, supra note 1, at 553.
15 See id. at 170. For further discussion, see infra Section I.C.
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 delegates who had returned home were primarily proponents of the view that the national government should be weak. Only one delegate who had been absent returned at the end of the proceedings, and that delegate was the strong nationalist, Alexander Hamilton.\(^\text{18}\)

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.\(^\text{19}\) Virtually all of the committees had one member from each state and each state’s delegation chose its own representatives and the combination led to committees embodying diverse perspectives.\(^\text{20}\) 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).\(^\text{21}\) 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,\(^\text{22}\) and its proposals had been subject to a series of votes. When the Committee of Style was elected on September 8 and given responsibility for preparing for the delegates consideration a final draft, the delegates did not formulate a charge to 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 which had been agreed to by the House.”\(^\text{23}\) Madison described it in similar terms in his notes: it was a committee “to revise the style of and arrange the articles which had been agreed to by the House.”\(^\text{24}\) Others used different names. Using a shorter version of these formulations, the Convention’s Secretary


\(^{19}\) David O. Stewart, Who Picked the Committees at the Constitutional Convention, J. Am. Revolution (Sept. 13, 2018), available at https://allthingsliberty.com/2018/09/who-picked-the-committees-at-the-constitutional-convention/. 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) (each delegate voted as individuals for all committees). Both the Rakove and the Stewart view lead to the same conclusion for the Committee of Style: delegates voted individually to select that committee members.

\(^{20}\) Stewart, supra note 19. Rhode Island did not send delegates, and two of New York’s three delegates departed early (leaving Hamilton as the sole delegate and two delegates were necessary for a state to vote). Thus, the committees of eleven represented each of the delegations that could vote.

\(^{21}\) Id.

\(^{22}\) 2 Farrand, supra note 1, at 177.

\(^{23}\) Id. at 547.

\(^{24}\) Id. at 553.
William Jackson called it the “Committee of revision,” 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.” 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.

B. Gouverneur Morris

When the Committee convened, Johnson, the chair, asked Morris (“with the ready consent of the others,” Madison observes) to prepare a draft Constitution. As a strong nationalist, Morris’s views were in that area in alignment with 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 a legislative drafter and the respect in which he was held, he was an obvious selection even among a very talented group, but his reputation was complicated.

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.

Gouverneur Morris—the name Gouverneur was his mother’s maiden name—was a descendant of one of the most politically prominent and wealthiest families in the colony of New

25 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION OF THE UNITED STATES 193-96 (1894) [hereinafter DHC].  
26 2 FARRAND, supra note 1, at 554.  
27 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).  
28 3 FARRAND, supra note 1, at 499.  
York. Trained as a lawyer, he became politically active in the movement for independence, and in 1775, at twenty-three he became a member of the New York Provincial and in May 1776 delivered a lengthy oration arguing for independence. In 1777, Morris was one of the three principal drafters of the New York State Constitution (along with John Jay (a close friend) and Robert Livingston). 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 defeated for reelection. From 1781 through 1784, he was the nation’s Assistant Superintendent of Finance, serving under his close friend and future business partner Robert Morris, the Superintendent of Finance (and no relation). From 1784 to 1787, with the conclusion of the war, he focused on his business activities, which were principally with Robert Morris.

Morris was physically unforgettable and had a vivid personality. Like Washington, he stood over six feet tall, and the two towered over most of their fellow delegates. Indeed, the two men were of such similar size that the sculptor Jean Antoine Houdin used Morris as the model for Washington’s body when he created the statues of Washington that now stand outside Independence Hall and the state capitol in Richmond. By comparison, Madison was five feet four inches, and Alexander Hamilton was five feet seven inches. Morris’s right arm was scalded as a result of a childhood accident, and he had a peg leg.

His promiscuity has become one of the central elements of the way in which he is portrayed in historical accounts – one of his leading modern biographies has the subtitle “The Rake who Wrote the Constitution,” a second has the subtitle “Man of the World,” and a third has thirty entries under “romances” and none under “Committee of Style” – and it was rumored that his leg was shattered jumping out of a window to avoid a jealous husband, although historians have concluded the injury was caused by a carriage accident. He was irreverent and witty. He was gregarious and had a gift for friendship.

31 Id. at 1-8.
33 KIRSCHKE, supra note 29, at 31-32.
34 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 in The Blessings of Liberty, supra note 29, at 13-24.
35 ADAMS, supra note 29, at 78-88.
36 Id. at 95-122.
38 ADAMS, supra note 29, at 140-45.
39 BROOKHISER, supra note 29, at 11.
40 MILLER, supra note 38, at 91; BEEMAN, supra note 18, at 45.
41 BROOKHISER, supra note 38, at 62.
42 Id.
43 KIRSCHKE, supra note 38.
44 ADAMS, supra note 38, at 341.
45 See ADAMS, supra note 38, at 127; BROOKHISER, supra note 38, at 61-62.
He was an individual of great gifts, and they were evident to others. In his private character sketches of his fellow delegates, Georgia’s William Pierce wrote:

Mr. Gouverneur Morris is one of those Genius’s in whom every species of talents combine to render him conspicuous and flourishing in public debate: He winds through all the mazes of rhetoric, and throws around him such a glare that he charms, captivates, and leads away the senses of all who hear him.47

Like Pierce, Madison and Hamilton both chose the same word to describe Morris: they called him a “genius.”48

At the Convention, he had played a leadership role from the start. Although a New Yorker, Morris lived in Pennsylvania in 1787 and, probably because Robert Morris urged his selection, had been named to the Pennsylvania delegation to the Convention.49 Before the deliberations began, with his fellow Pennsylvanian James Wilson, Morris met repeatedly with the Virginia delegation as they prepared the highly influential Virginia Plan, the strongly nationalist draft Constitution that Governor Edmund Randolph presented at the beginning of the Convention.50 The famous Virginia Plan would more accurately be labelled the Virginia-Pennsylvania Plan, and he and Wilson often worked in tandem with Madison and the Virginians.51 After Randolph presented the Virginia Plan, Morris rose to advocate for it, an apparently choreographed effort to build support for the proposal at the Convention’s outset. Morris went on to speak more than any delegate—173 times. (Wilson was the second most (168) and Madison the third most (161).)52 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. In addition to speaking frequently, Morris proposed more resolutions than any other delegate (39) and had more adopted than any other delegate (22).53

Beyond his eminence at the convention—an eminence that only Madison and Wilson could rival—his experience in drafting made him the logical choice to serve as the committee’s drafter. Unlike any of the other committee members, he had experience in writing a constitution

47 Id. at 92.
49 MILLER, supra note 29, at 61.
50 BEEMAN, supra note 18, at 52-54.
51 Id.
53 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, 301 (2006) (chart of motions made and passed at the convention).
(the New York Constitution of 1777)\textsuperscript{54} and that experience alone would have made him the obvious candidate to prepare the draft. Even apart from that experience, however, he had a strong background as a drafter of legal documents. During his career in the New York legislature, Continental Congress, and Assistant Superintendent of Finance, he had been called upon to write literally hundreds of reports and statutes, including such major documents as Congress’s 1778 response rejecting Lord North commissioner’s entreaty to begin peace negotiations.\textsuperscript{55}

Indeed, Morris’s most influential contribution to the English language is arguably not “We the People of the United States.” As Assistant Superintendent of Finance, in a report on the national monetary system, he invented the word “cent”—in connection with his plan that the nation’s monetary system be based on the decimal system—and argued that the Spanish term “dollar” should be the term adopted for the basic unit of currency.\textsuperscript{56} At the Convention, he had already been prominently enlisted as a drafter, having prepared 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.\textsuperscript{57}

Equally relevant to his selection as drafter, he was eloquent. His speeches at the convention read differently than those of his fellow delegates. Madison and Wilson are typically dry and careful, and they appealed to reason. In contrast, Morris, to again quote fellow delegate Pierce, "winds through all the mazes of rhetoric, and throws around him such a glare that he charms, captivates, and leads away the senses of all who hear him."\textsuperscript{58} The fact that he delivered the eulogies of both Hamilton and Washington\textsuperscript{59} reflected, not just the closeness of his ties to Hamilton and Washington, 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.\textsuperscript{60} Jefferson and Paine were not at the Convention, and Franklin was in intellectual decline, so Morris’s selection as 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.\textsuperscript{61} Indeed, Hamilton turned to Madison only after Morris rebuffed him, which almost certainly makes Madison the most consequential back-up choice in the history of political theory. One consequence of Morris’s decision was that The

\textsuperscript{54} See ADAMS, supra note 38, at 78-86 (drafting of New York Constitution of 1777).
\textsuperscript{55} See id. at 80, 105, 111, 113, 120, 134-35 (discussing work as a drafter of government documents).
\textsuperscript{56} 1 SPARKS, supra note 38, at 274-75; ROOSEVELT, supra note 38, at 107.
\textsuperscript{57} For the notes of the debate about the Brearley committee report, see 2 FARRAND, supra note 1, at 493-564. For Morris’s role as the drafter on the Committee, see KIRSCHKE, supra note 29, at 188 (“certain” that he wrote at least the passages on the presidency).
\textsuperscript{58} 3 FARRAND, supra note 1, at 92.
\textsuperscript{59} RON CHERNOW, ALEXANDER HAMILTON 720 (2004).
\textsuperscript{60} RICHARD BROOKHISER, JAMES MADISON 106 (2011).
\textsuperscript{61} 3 FARRAND, supra note 1, at 421 (“I was warmly pressed by Hamilton to assist in writing the Federalist, which I declined.”).
*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 again, “[T]he Federalist Papers [Hamilton, Madison, and Jay] wrote are clear, earnest, and intelligent, often ringing, but they made their way without Morris’s sparkle.”

Thus, people in the revolutionary era and early republic repeatedly turned to Morris when words mattered. Equally significant, for Morris words—and precise word choice—mattered. A powerful example of his attention to language (as well as his capacity for deception) is the new states clause.

Morris wanted to limit the number of new states and their political power, and he covertly secured constitutional language to advance this end. Towards 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.

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. Writing a letter to Henry Livingston 1803, at the time of the Louisiana Purchase, he boasted that he had crafted the territories clause in such a way that it barred newly acquired territories from becoming states. 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.

So, when Johnson selected Morris, he picked a drafter of substantial political experience, a leading voice at the convention, someone whose great intelligence commanded respected, 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. “The 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. Delegate William Pierce said Morris was “fickle and inconstant.” According to a confidential report prepared by the French embassy, Morris was “without morals and, if one believes his enemies, without principles.” As the great constitutional historian Max Farrand has observed, Morris “was admired more than he was trusted.” Challenges to Morris’s integrity and morality had several bases. His promiscuity appalled many of his fellow delegates. Others suspected him of enriching himself while serving as Assistant Superintendent of Finance. 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.

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

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

We have limited historical information about the committee’s deliberations. Unlike 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 constitution.” 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. Each, however, had reasons to state that Morris had not changed the meaning of the text.

Morris addressed the work of the Committee in a December 22, 1814 letter to Timothy Pickering. In his discussing his role at the Convention, he began by dismissing the relevance of drafting history for constitutional interpretation and championed, instead, a textualist approach: “[W]hat can a history of the Constitution avail towards interpreting its provisions. This must be done by comparing the plain import of the words, with the general tenor and object of the instrument.” Such an approach is not surprising for someone who, this Article shows, selected

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66 3 FARRAND, supra note 1, at 92.
67 Id. at 236.
68 FARRAND, supra note 3, at 21.
69 BROOKHISER, supra note 38, at 127-29.
70 ADAMS, supra note 38, at 116.
72 3 FARRAND, supra note 1, at 514.
73 Id. at 420.
words to advance his own constitutional goals, rather than the views of the delegates as a whole. He is elevating text, rather than drafting history, because the text he drafted departed from Framers’ intent.

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

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

Madison described Morris’s role on the Committee of Style in a April 18, 1831 letter to Jared Sparks. Sparks, as he was writing Morris’s biography, had written to Madison to ask about what role Morris had played at the Convention. Madison responded:

The finish given to the style and arrangement of the Constitution, fairly belongs to the pen of Mr. Morris; the task having, probably, been handed over to him by the Chairman of the Committee, himself a highly respectable member, and with the ready concurrence of the others. A better choice could not have been made, as the performance of the task proved. It is true that the state of the materials, consisting of a Reported draft in detail, and subsequent resolutions accurately penned, and falling easily into their proper places, was a good preparation for the symmetry and phraseology of the Instrument: but there was sufficient room for the talents and taste stamped by the author on the face of it. The alterations made by the Committee are not recollected. They were not such as to impair the merit of the Composition. Those, verbal & others, made in the Convention, may be gathered from the Journal, and will be found also to leave that merit altogether unimpaired.

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. M. to remark that to the brilliancy & fertility of his genius, he added what is too rare, a candid surrender of his opinions when the lights of discussion satisfied

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74 Id.
75 Id. at 499.
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.\footnote{Id. at 500.}

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

The description of the Committee’s mandate in Madison’s notes characterized its role as a committee “to revise the style of and arrange the articles which had been agreed to by the House”\footnote{2 id. at 553.}, and similarly emphasized that the committee’s work as 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 had concluded. Baldwin gave Stiles a summary of the Convention’s proceedings and concluded with a discussion of the work of the Committee of Style. Stiles records Baldwin as telling him, “Finally a Committee of 5 viz, Mess. Dr Johnson, Governeur Morris. Wilson, —— These reduced it to the form in which it was published. Messrs Morris & Wilson had the chief hand in the last Arrangt & Composition. This was completed in September.”\footnote{3 id. at 170.}

In 1828, Timothy Pickering also reported that Wilson had a role in the Committee’s work, but a limited one. In a letter to John Lowell, Pickering wrote that Wilson had informed him that he that he reviewed the Committee’s final draft, but purely for matters of style. Pickering wrote, “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 \textit{grammatical accuracy or correctness of style} (such is the impression in my memory); certainly not to introduce a single idea.”\footnote{Letter from Timothy Pickering to John Lowell, January 14, 1828 (underscoring in original), \textit{reprinted in} 4 id. at 317. In an earlier draft of this letter, Pickering wrote that Wilson “once told me, that after all the 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 Draft letter from Timothy Pickering to John Lowell, January 9, 1828, \textit{reprinted in id.).} Later that year, Pickering made the same point in a letter to Chief Justice Marshall.\footnote{See Letter from Timothy Pickering to John Marshall, March 10, 1828, \textit{reprinted in 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.”)}

Stiles’s account is the only one that equates Wilson’s role with Morris’s. It is, however, hearsay from a delegate who was not on the committee (Baldwin) and who erred in listing the committee membership (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.” In contrast, both Morris and Madison are clear that Morris was the drafter. Gallatin’s account\footnote{See supra text accompanying note 7; infra Section I.D.} also implicitly identifies Morris as the drafter.

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?

Breaking with his constitutional jurisprudence at the time of the Convention, by the time Madison wrote his letter about the Committee (in 1831), Madison had adopted a constitutional vision that involved a national government of limited powers and a constrained role for the executive and the judiciary. Indeed, Madison largely came to embrace that vision in the 1790’s. Morris’s changes were inconsistent with the vision that Madison championed in the 1790’s and for the remainder of his career: Morris’s text provided support for a broad role for the national government, a strong executive, and powerful federal judiciary. Madison’s ultimate constitutional vision was at odds with Morris’s at each point. In critical fights in the 1790’s, Madison battled Hamilton and other Federalists about how to read the Constitution, and he had advanced readings of the text at odds with Morris’s constitutional vision. Thus, Madison’s assertion that Morris had only given the Constitution its “finish” was consistent with the way he had read that text. Equally significant, he was in a real sense boxed in. If Morris had written text that altered the Constitution’s meaning, Madison, as a committee member, was either complicit in the change or he had failed to pay attention with potentially dire consequences. Both as a champion of a particular constitutional vision and as a politician protecting his reputation and legacy, Madison had to treat Morris’s changes as merely stylistic.

Morris also had reason to minimize his contributions. If he acknowledged that he had intentionally crafted text to change the Constitution’s meaning, that assertion would have undermined the legitimacy of his work. It would have provided support for those who took a competing view of the Constitution, indicating that their view was the consensus view of the delegates and that Morris’s changes were illegitimate.

The one area in which he acknowledged seeking to alter the Constitution’s meaning was with respect to the judicial role, but this was also the one area in which he had a record to contend with. When he was a Senator, Morris argued in 1802 that the Preamble was a constitutional bar to the Jeffersonian attempt to eliminate federal courts of appeals.\footnote{See TAN 291-93, infra.} The Committee of Style’s Preamble was dramatically different than the Preamble that had been drafted by the Committee of
Style, and Morris, in invoking the Preamble as supporting a strong federal judiciary, had relied on language he had drafted. Similarly, in that speech, he relied on language from the Article III vesting clause that he had also crafted. Thus, writing in 1814, Morris would have found it hard to deny that language he had crafted had provided support for a strong federal judicial role since he had publicly relied on that language. But there was no other area in which he had relied on his text to defend a view of the Constitution, and he was thus free to claim that, except with respect to the judicial role, his drafting had only had stylistic effect.

A related question is whether the 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 they construed the constitutional text produced by the Committee. The historical record of how King and Johnson construed the Constitution in the great debates of the early republic is, however, limited because both served in the Senate after ratification and the debates of the Senate were not recorded. Wilson and Hamilton, however, repeatedly drew on subtle changes made by the Committee. Wilson, as Associate Justice of the Supreme Court, used Committee of Style language in asserting the power of judicial review and the suability of states in federal court and in asserting that the contract clause covered public contracts. Hamilton used Committee language in arguing for judicial review, for broad presidential power in the foreign affair area, in assuming state revolutionary war debts that had not been approved by the Continental Congress, and (like Wilson) in taking the position that the contract clause covered public contracts.

Both men may have independently arrived at these readings. Alternately, they may have become aware of these readings by participating in their drafting. Thus, the historical record does not reveal whether Morris acted alone or whether others on the committee were aware of the changes. But, if there was complicity, Hamilton and Wilson were the committee members most likely to have been complicit.

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

D. The Convention’s Consideration of the Committee of Style’sDraft and the Committee’s Punctuation of the General Welfare Clause

83 See infra Part III.A.
84 Id.
85 For further discussion, see infra Section III.A.
86 See TAN 493, infra.
87 See TAN 298, infra.
88 See TAN 384, infra.
89 For further discussion, see infra Section III.A (suability of states), III.B (executive power), III.E (contract clause); III.H.2 (judicial review), III.K (engagements clause).
90 3 FARRAND, supra note 1, at 547.
91 Id. at 582.
The Convention spent three days reviewing the Committee’s draft and discussing other matters (primarily the possibility of a Bill of Rights) before voting in favor of the Constitution on September 15. The weary delegates were quickly going through the document in order to bring the proceedings to a close. 92

Madison’s notes of these discussions are cursory, 93 and they reflect no recognition by the delegates that the Committee had made substantive changes. 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 previous time it had been discussed on the convention floor, 94 no delegate mentioned that fact or that the scope of the clause was different than the version previously considered. But Elbridge Gerry suggested that the clause be extended to the national government, as well as the states. No one, however, agreed with Gerry, and his motion was rejected. 95

Yet, although Madison’s notes do not mention it, one of the Committee’s changes 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:

The Legislature shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States. 96

As it emerged in the Committee of Style’s draft, the provision read:

Article I, Sect. 8: The Congress . . . shall have power.
<<a>> To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and general welfare of the United States. 96

The text of Article I, § 8, clause 1 of the Constitution as ratified reads:

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92 For the records of the debates about the Committee of Style report, see 2 id. at 582-649.
93 On the poor quality of Madison’s notes in the final weeks of the convention, see MARY 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 after the Fall of 1789 and thus the records are “particularly unreliable.” Id. at 141. More generally, Professor Bilder has convincingly argued that Madison revised his notes as he was putting them in final form in ways that undermined their integrity as records of the debates, particularly with respect to Madison’s own speeches. See id. at 179-201. For discussion of this important work, see Jonathan Gienapp, Notes on the State of the Constitution, 74 WM. & MARY Q. 145 (2017); Jack Rakove, A Biography of Madison’s Notes, 31 CONST. COMMENTARY 317 (2016).
94 For discussion, see infra Section II.D.
95 See 2 FARRAND, supra note 1, at 619.
96 Id. at 569.
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.

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,⁹⁷ the standard understanding is that reference to “the common defence and welfare” is a limitation on the taxing authority, not a separate grant of congressional authority. Thus, to the extent that Congress otherwise has power to legislate for the “common defence and general welfare,” the clause provides Congress with a way to pay for relevant expenditures.⁹⁸

In the printed report of the Committee of Style, the comma that follows the word “excises” in the provisions referred to the Committee has become a semicolon. While the Committee of Style’s version has some ambiguity, the semicolon at the very least makes possible the argument that the language about the “common defence and welfare” should be understood as a separate grant of power to Congress to legislate for “the common defence and welfare.” Thus, Article I, section 8 would provide for three separate grants of power to Congress: “[t]o lay and collect taxes, duties, imposts and excises”; “to pay the debts . . . of the United States”; to “provide for the common defence and general welfare of the United States.”⁹⁹

Somehow, the punctuation changed back in the version of the Constitution that was finally adopted by the delegates. When the Constitution was engrossed, the semicolon in the Committee of Style’s report had become a comma again. So, the ratified constitution has a comma, not a semi-colon.

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.

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⁹⁷ See THE FEDERALIST NO. 41 at 268 (James Madison) (Edward Mead Earle ed., n.d.) (rebutter Antifederalist argument that the clause “amount 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 CONGRESS 105 (speech of Senator Baldwin) (noting that “it had been contended in the early years of the Government, repeatedly and with much earnestness that [the general welfare clause] was a grant of powers . . . authorizing Congress to build manufacturing towns, a National University, and to carry on any pecuniary enterprises with the public money; deliberate practice seems for many years to have settled the construction that those words should be considered not as a grant of power, but a limitation of the power . . . ”).

⁹⁸ See THE FEDERALIST NO. 41, supra note 97, at 268 (James Madison) (reading “the common defence and welfare” language as a limit on the congressional taxing authority); 11 ANNALS OF CONGRESS 105 (speech of Senator Baldwin) (same).

⁹⁹ On this reading, see MCDONALD, supra note 16, at 264-65; Amar, supra note 8, at 286 n.25.
Gallatin, who had not attended the Philadelphia convention, stated that “he was well informed that those words had originally been inserted into the Constitution as a limitation on the power of laying taxes.”

He added:

After the limitation had been agreed to, and the Constitution was completed, a member of the Convention (he was one of the members who represented the state of Pennsylvania) being one of a committee of revisal and arrangement, attempted to throw these words into a distinct paragraph, so as to create not a limitation, but a distinct power. He is clearly referring here to Morris, the only Pennsylvanian on the Committee of Style. (Wilson was not a member, although he reviewed the document.)

Gallatin concluded by observing that the ploy had proven unsuccessful and the original language restored: “The trick, however, was discovered by a member of Congress from Connecticut, now deceased, and the words restored as they now stand.” The heroic proofreader of Gallatin’s account is Roger Sherman, the only member of the Connecticut delegation no longer living in 1798.

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

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.” He strikingly is distancing himself here from the Committee of Style; he gives no indication that he was one of the five.

He dismisses the significance of the “division of the clause”—i.e., the break caused by the semicolon—in the Committee of Style’s report. He notes that, in the provision referred to the

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100 3 FARRAND, supra note 1, at 379.
101 Id.
102 Id.
103 Id. at 491.
104 Id. at 492.
Committee of Style, “the parts of the clause are united, not separated.” 105 The punctuation in the Committee of Style’s draft “must have been an erratum of the pen or of the press.” 106 Thus, where Gallatin sees a “trick,” Madison sees a transcription error. As in his letter to Sparks about Morris contributions as drafter of the Committee of Style, Madison is taking the position that the Committee did not try to change the substantive meaning of the Constitution.

Morris never commented on the 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 notes delegate James McHenry of Maryland took 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 not at least one of the fellow delegates he was speaking to) wanted the clause to have.

E. Scholarship on the Committee of Style

Gallatin’s charge raises the question whether Morris was an honest scrivener. Despite the fact that Gallatin’s challenge to Morris’s integrity as drafter came more than two hundred years ago and the fact that there is (to put it mildly) a substantial body of historical and legal scholarship closely probing the constitution’s text, there has, remarkably, not been a single study systematically examining the changes that Morris made 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 split on its merit. Professor David Engdahl

105 Id.

106 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 infra note 461.

107 McHenry records that he told Morris and fellow delegates 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: “it may be done under the words of I clause I sect 7 art. amended - >and provide for the common defence and general welfare.” 2 FARRAND, 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 HOFER, FOR OURSELVES AND OUR POSTERITY: THE PREAMBLE TO THE FEDERAL CONSTITUTION IN AMERICAN 73 (2012). The phrase was, however, used at the convention from the start. The Virginia Plan had called for a government that would accomplish the objectives of “common defense, security of liberty, and general welfare.” See 1 FARRAND, supra note 1, at 20. Moreover, the Articles of Confederation had enumerated the objectives of “general welfare”, “common defense” and protecting “liberties.” See ART. CONFED. art. III.
dismisses Gallatin’s charge as “hearsay.”"\textsuperscript{108} Professor Robert Natelson reaches the same result, observing, “The story assumes that Morris thought he was playing with fools, easily hoodwinked—at the Philadelphia convention, the ‘assembly of demigods!’”\textsuperscript{109} 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.\textsuperscript{110} The key for McDonald is his assessment of Morris as a person: he was “audacious.”\textsuperscript{111}

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 covertly making changes.

Recent years have seen a serious focus on the drafting history of the Constitutional Convention, with three important studies by David Stewart, Richard Beeman, and Michael Klarman. But none of these studies even notes the controversy about whether Morris, as drafter, attempted covertly to alter the Constitution’s meaning. They simply see Morris and the Committee as successfully executing the important, but non-substantive and limited, task of producing a coherent constitution from the Committee of Detail’s draft, the work of the five subsequent committees, and the various floor votes over the previous month. David Stewart observes, “This draft [the Committee of Style’s draft] had to be faithful to the Convention’s actions. Morris could be trusted to do that.”\textsuperscript{112} Morris had a “cooperative spirit,” and he produced a “masterful final draft of the Constitution.”\textsuperscript{113} The Committee “put the finishing touches on the Constitution,” according to Michael Klarman.\textsuperscript{114} The Committee “was working to provide the ‘last polish’ to the document,” Richard Beeman reports.\textsuperscript{115} Gallatin’s charge is simply absent from the leading recent accounts of the convention.

Three earlier historians of the convention noted Gallatin’s charge, apparently 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 the conclusion. In his important 1967 study, \textit{1787: The Grand Convention}, Clinton Rossiter reported that: “Although Morris liked to think in his later years, as did some of his enemies in the Jeffersonian ranks, that he had taken certain ‘liberties’ in order to give the national government even more strength and tone, the fact is that he was a faithful servant of the
committee and the committee of the Convention.”116 He concludes, “The report of the committee of style was an adroit and tasteful rendering of the will of the framers.”117

In his history of the convention, Max Farrand, the editor of the convention debates, noted that “just a little suspicion attaches to the work of Morris in preparing this last draft of the constitution.”118 But he compared the Committee’s draft with previously adopted provisions and concluded “no undue liberties had been taken.”119 Similarly, in The Making of the Constitution, Charles Warren asserted, “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.”120

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 drafter of the Committee of Style proposal. “Did the careful scribe try to smuggle in an argument for nationalism?”121 Brookhiser asks. After noting Gallatin’s charge, Brookhiser dismisses it out of hand: “At the time the charge was made, Sherman was dead, and Morris was out of the country. Morris was not above sleight of hand, but he made his convictions explicit elsewhere.”122 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 two recent biographies of Morris by Professors Adams,123 Kiersche,124 and Miller125 do not note the charge at all.

While no law review article has studied the overall work of the Committee, a number have discussed the changes the Committee made to a particular clause and some, in the context of a particular clause, have noted Gallatin’s charge.126 And while none of these articles has developed a theoretical approach concerning whether or not the Committee’s changes should be given effect today, scholars have, without extensive (or in some cases any) analysis, taken one of three approaches. First, they point out that the Committee’s mandate was limited to style and any substantive changes should be disregarded. Second, they argue that the ratified text of the

116 ROSSITER, supra note 52, at 228-29.
117 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 the “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 had opposed the contract clause and suggested that King or Hamilton was responsible for its inclusion. Id.
118 FARRAND, supra note 3, at 183.
119 Id. at 182-83.
120 CHARLES WARREN, THE MAKING OF THE CONSTITUTION 539 (1928).
121 BROOKHISER, supra note 38, at 90.
122 Id.
123 ADAMS, supra note 38.
124 KIERSCHE, supra note 38.
125 MILLER, supra note 29.
126 For a list of these articles, see supra note 8.
Constitution should be applied today, regardless of whether the Committee exceeded its mandate, because the ratified text was the text adopted by “We the People.” And third, they frame the provisions referred to the Committee of Style as an interpretive gloss to the Committee’s proposals because drafters assumed that the earlier proposal and the Committee’s text had the same meaning. All of these articles, however, view a particular change in isolation. No one has recognized that there many changes and that they fit into a larger pattern: Morris was using his role as drafter to reverse losses he had 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 will discuss 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 will discuss how the changes he 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. This section examines his speeches at the convention to reveal his core principles. He was a strong nationalist. He championed both a strong executive and a strong judiciary. He stood apart from his fellow delegates in his devotion to the protection of private property, his 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 section 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.

127 For discussion, see Section III, infra.
128 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, The IMAGINATIVE CONSERVATIVE (May 18, 2013). Morris’s constitutional thought is also the subject of an unpublished doctoral dissertation. See Arthur Paul Kaufman, The Constitutional Views of Gouverneur Morris (1992) (Georgetown University). John Patrick Coby has recently argued that Morris’s political vision of the executive and his thinking about division between the classes were similar to Machiavelli’s. See John Patrick Coby, America’s Machiavelli, Gouverneur Morris at the Constitutional Convention, 79 REV. POLITICS 621 (2017). Morris’s arguments at the convention are surveyed in Jack Heyburn, Note, Gouverneur Morris and James Wilson at the Constitutional Convention, 20 U. PA. J. CONST. L. 169 (2017). Although her analysis is limited to the 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 (1990).

The lack of attention to Morris’s thought is probably due in part to his failure to author major political writings – he, notably, turned down the opportunity to join in the writing of the Federalist, see supra text accompanying note 61 – and in part to the assumption among scholars that Morris did not have an overarching philosophy. See Coby, supra, at 626. The study here of his speeches at the convention reflects, however, a coherent constitutional vision. Moreover, while his speeches at the convention reflect a range of approaches – he could be, by turns, witty, sarcastic, angry, and rhetorically powerful – he did not invoke political thinkers at the convention in the way that some other delegates did. He wore his learning lightly. At the same time, he clearly treasured books. According to Yale College President Ezra Stiles, Morris had accumulated the second largest library in the country, surpassed only by Harvard College’s. See id. 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!
A. Nationalism

Throughout the Convention, Morris was one of the small group of forceful and consistent nationalist voices and his conception of the proper scope of national power was broad.\[129\] Morris favored a strong and supreme federal government, even taking the controversial position that the federal government should possess 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—a representative in some degree of the whole human race.”\[130\] He denounced those who “sought to truck and bargain for their respective states.”\[131\] “[S]tate attachments and state importance,” he declared, “had been the bane of the country.”\[132\] 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.”\[133\]

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

[T]hat the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.\[134\]

Morris enthusiastically endorsed this plan and declared:

1. That a Union of the States merely federal (will not accomplish the objects proposed by the articles of Condeferation [sic], namely common defence, security of liberty, & genl. Welfare.)
2. that no treaty or treaties among the whole or part of the States, as individual sovereignties, would be sufficient

\[129\] McDonald, supra note 16, at 186-87; Gienapp, supra note 17, at 57.
\[130\] 1 Farrand, supra note 1, at 529.
\[131\] Id.
\[132\] Id. at 530.
\[133\] Id. at 552.
\[134\] Id. at 33.
3. that a national Government (ought to be established consisting of a supreme Legislative, Executive & Judiciary).\textsuperscript{135}

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.”\textsuperscript{136} 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, “the regulation and government of a city or country, so far as regards the inhabitants.”\textsuperscript{137} No one else at the federal 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.\textsuperscript{138}

Morris’s fight for a strong national government continued to, 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.\textsuperscript{139} It states: “In all our deliberations on this subject [the Constitution] 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.”\textsuperscript{140} Thus, this letter, which Professor Daniel Farber has referred to as the Constitution’s “cover letter,”\textsuperscript{141} explicitly presented the Constitution as an act of “consolidation.” During the Convention, delegates had repeatedly expressed their opposition to “consolidation,”\textsuperscript{142} and no delegate on the Convention floor had used the word “consolidation” positively.\textsuperscript{143} Having fought throughout the Convention for a strong national government, Morris used the sensitive word and reinforced the reading that the document embraced his nationalist goals.

\begin{footnotes}
\item[135] Id. at 33 (emphasis added).
\item[136] 2 id. at 343.
\item[137] 2 \textsc{samuel johnson}, dictionary of the \textsc{english} language n.p. (London, 1755).
\item[138] See Randy 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 concluded that “examining the few instances where it [the term ‘police’] was discussed reveals that it referred originally to those powers not delegated to the national government.” 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.
\item[139] Farrand, supra note 3, at 183.
\item[140] 2 Farrand, supra note 1, 667.
\item[142] See 1 Farrand, supra note 1, at 90 (Dickinson) (“I dread a consolidation of the states.”); id. at 264 (Lansing) (“[T]he people . . . will never agree to a consolidation.”); id. at 320 (Sherman) (“I . . . am agt. a consolidation. . . .”); id. at 490 (Bedford) (“[C]onsolidation . . . is out of the question . . . .”).
\item[143] 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.
\end{footnotes}
The provisions that the Convention had 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 had been replaced with a list of enumerated powers.  

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.

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 for the executive.

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 Morris had ultimately embraced.

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 execution. Every subordinate power should be tied to the chief by those intermediate links of will and pleasure, which, like the elasticity of the arterial system, render sensible the pulsations of the heart at the remotest extremities.

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144 See Proceedings of the Convention Referred to the Committee of Style and Arrangement, art. VII (congressional powers), reprinted in 2 FARRAND, supra note 1, at 569-71.
145 See id., Preamble, reprinted in 2 FARRAND, supra note 1, at 565.
146 Letter from Gouverneur Morris to William Carmichael (July 4, 1789), reprinted in 2 SPARKS, supra note 38, at 73.
At the Convention, there were deep conflicts about the Presidency. Not only did Morris confront delegates who favored a weak presidency, 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, and the New Jersey plan embodied this vision of a plural executive.

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

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.” 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.” 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

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147 For an overview of the creation of the presidency by the delegates and the evolution of concepts of the office at the convention, see RAKOVE, supra note 19, at 245-87. For an account of the convention’s decisions about the presidency that highlights Morris’s role, see RAY RAPHAEL, HOW AND WHY THE FOUNDERS CREATED A CHIEF EXECUTIVE 93-125, 281-84 (2012).

148 See MCDONALD, supra note 16, at 240 & n.48 (citing arguments at the convention).

149 New Jersey Plan, art. 4, reprinted in 1 FARRAND, supra note 1, at 244 (stating that the “federal Executive” shall consist of “persons” – the precise number of “person” left blank).

150 1 FARRAND, supra note 1, 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 FARRAND, supra note 1, at 132 (Wilson’s notes of provisions referred to the Committee of Detail).

151 2 id. at 133.

152 Compare 2 id. at 183 (Committee of Detail draft, vesting treaty-making power in Senate) with id. at 540 (vesting treaty-making power in President, with advice and consent of Senate).

153 See 1 id. at 106 (Bedford); id. at 109 (same).

154 For discussion of the evolution of the constitutional provisions on presidential selection, see RAKOVE, supra note 19 at 259-60, 264.

155 2 FARRAND, supra note 1, at 52.

156 Id.
therefore ought to be so constituted as to be the great protector of the Mass of the people.\textsuperscript{157}

Morris and Wilson argued against congressional selection of the President because it would undermine presidential independence. Each pushed initially for popular vote.\textsuperscript{158} When that failed, Morris proposed the germ of what became the electoral college.\textsuperscript{159} When the Brearley Committee (on which Morris served) presented a complete version of the electoral college, Morris was the principal defender of the plan.\textsuperscript{160} Morris wanted an absolute presidential veto and initially opposed impeachment of the President (though he ultimately changed his mind). He opposed presidential term limits and argued for either, lifetime tenure or unlimited eligibility for reelection. He wanted the President alone to appoint judges and “ministerial officers for the administration of public affairs.”\textsuperscript{161}

Morris articulated an expansive conception of presidential power. He contended that the President should be responsible for “the discharge of military duties.” His vision of domestic presidential powers was unrivaled among delegates. He envisioned a cabinet—his term was “Council of State”—that would “assist the President in conducting the Public Affairs.”\textsuperscript{162} It would include secretaries of commerce and finance, foreign affairs, war, marine, and 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.\textsuperscript{163}

While Morris, more than any delegate, was responsible for the fact that the President had as much power as he did before the Committee of Style began its work,\textsuperscript{164} that power was, nonetheless, limited. 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

\textsuperscript{157} Id.; see also id. at 33 (voicing support for Madison statement about the importance of a strong presidency, saying “[h]e concurred in the opinion that the way to keep out monarchial Govt. was to establish such a Repub. Govt. as wd. make the people happy and prevent a desire of change.”).

\textsuperscript{158} See 2 id. at 29-30 (Morris arguing for popular election of the President); id. at 30 (Wilson arguing for same); id. at 56 (Wilson arguing for popular election).

\textsuperscript{159} See id. at 404. On Morris’s plans for selection of the President, see ADAMS, supra note 38, at 156; STEWART, supra note 19, at 213.

\textsuperscript{160} 2 FARRAND, supra note 1, at 500.

\textsuperscript{161} Id. at 52.

\textsuperscript{162} Id. at 342.

\textsuperscript{163} The description of each department reflect 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.” The Secretary of Commerce and Finance . . . [would] recommend such things as in his judgment [would] promote the commercial interests of the U.S.” Most capaciously, 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 343.

\textsuperscript{164} 2 FARRAND, supra note 1, at 53.

\textsuperscript{165} See RAPHAEL, supra note 147150, at 53, 74, 92-120 (discussing Morris’s contributions to evolving design of the presidency).
those specifically enumerated. It read: “The Executive power of the United States shall be vested in a single person.” 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 “The Executive power of the United States.”

2. Impeachment

Yet, at the same time as Morris was a champion of a strong presidency, he also came to believe that the possibility of impeachment was an important check.

The critical debate in the evolution of Morris’s position occurred on July 20. Morris began by arguing against impeachment for the President because “it will render the Executive dependent on those who will impeach.” But, then, after listening to Mason and Franklin’s arguments for impeachment, he decided impeachment was appropriate under certain circumstances: “[C]orruption & some other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated & defined.”

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 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.

Thus, Morris had come to believe that the President should be “impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment.” Similarly, he proposed that cabinet members should be impeachable “for neglect of duty malversion, or corruption.” 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

166 2 FARRAND, supra note 1, at 572.
167 Id. at 65.
168 Id. at 65.
169 Id. at 68-69.
170 Id. at 344.
Mason proposed on September 8 that the President also be impeachable for “maladministration.” Madison argued against the term—“So vague a term will be equivalent to a tenure during the pleasure of the Senate.” 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.”

Morris’s statement, as recorded by Madison, is not a model of clarity. It appears, however, that Morris was supporting 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 State Constitution of 1777, of which Morris was a principal drafter. Article 33 of that Constitution provided that officers could be impeached “for mal and corrupt conduct.” It is also consistent with his proposal that other officers be impeachable for “malversion.”

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 read: “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.”

C. The Judiciary

Morris was one of the principal advocates at the convention of 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. John Rutledge, supported by Roger Sherman, countered that lower federal courts would be an infringement on state authority, and

171 Id. at 172.
172 Id. at 550.
173 Id.
174 Id.
175 N.Y. CONST. OF 1777, art. 33.
176 2 FARRAND, supra note 1, at 344.
177 See 1 FARRAND, supra note 1, at 21 (“9. Resd. that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behavior . . .”).
178 Id. at 124.
the Rutledge-Sherman proposal providing that the Supreme Court would be the only federal courts was narrowly adopted. 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.” This proposal—which has come to be known in both the scholarly literature and the caselaw as the “Madisonian Compromise”—was adopted, eight delegations in favor, two opposed, and one divided.

Although Morris did not speak in this initial debate, he spoke to oppose 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.” 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.” Morris’s brief statement echoed Randolph’s position. The delegates reaffirmed the Madisonian compromise, with no delegation voting against it.

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 had been a handful of state court cases invalidating statutes, although in a number of these cases the exercise of the power had been controversial. The Virginia Plan did not mention judicial review. 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 both expressed his belief that federal courts would be able to hold both state statutes and congressional 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. Wilson spoke about judicial review twice; the other six delegates who mentioned judicial review did so only once.  

Morris’s first statement about judicial review was made in a speech opposing the grant to Congress of a power to invalidate state legislation. He said that a negative was unnecessary because of judicial review: “A law that ought to be negative will be set aside in the Judiciary departmt.”  

He later invoked judicial review when he argued 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. Finally, in the context of the debate over an absolute executive veto that could not be overridden, Morris asserted that a veto and judicial review were necessary checks on Congress.  

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

D. 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 the protection of private property. “Life and liberty were generally said to be of more value, than property,” he observed, but he rejected that  

186 See Treanor, supra note 184, at 469-70 (discussing statements).  
187 See 2 FARRAND, supra note 1, at 28.  
188 Id. at 92.  
189 Id. at 299 (“He could not agree that the Judiciary which was part of the Executive, should not be bound to say that a direct violation of the Constitution was law.”); see also Letter from Gouverneur Morris to Lewis R. Morris (December 10, 1803) in 3 SPARKS, supra note 38, 192, 195 (“[T]he judges would, it was forseen [at the convention], resist assaults on the Constitution by acts of legislation.”).  
190 See Treanor, supra note 184, at 469-70.  
191 1 FARRAND, supra note 1, at 533.
view. “An accurate view of the matter,” he declared, “would nonetheless prove that property was the main object of the State."\(^{192}\)

Morris, Madison wrote with more than a hint of sarcasm, did not “incline to the democratic side.”\(^{193}\) 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.”\(^{194}\) 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 wealthy, having acquired a level of resources sufficient to satisfy their own interests, would support the common good.\(^{195}\) Morris believed that rich and poor alike were motivated by economic self-interest, and that the constitution should be constructed to protect against mis-rule by the wealthy, as well as by those without property.\(^{196}\)

Reflecting this concern about giving the wealth too much power, Morris fought for a strong President in part because he envisioned 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.”\(^{197}\)

Most of his 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 will sell [their vote] to the rich who will be able to buy them.”\(^{198}\) He contended that the House and Senate should be able to establish property requirements for service in Congress, along with other conditions.\(^{199}\) He proposed that Senators should serve for life, not be paid, and represent property interests.\(^{200}\) He argued that representation in Congress should be based on the value of property as well as the number of people.\(^{201}\) Finally, he wanted a ban on states’ ability to issue paper money,\(^{202}\) reflecting support for the interests of creditors over the interest of debtors, who favored an inflationary money supply.

\[^{192}\text{Id. For a comparison of the diverging views of Morris, Madison, and Wilson on the protection of property and the fact that Morris was more protective of property than the other two, see NEDELSKY, supra note 128, at 68-75.}\]
\[^{193}\text{Letter from James Madison to Jared Sparks (April 8, 1831) in 3 FARRAND, supra note 1, at 499.}\]
\[^{194}\text{Id.}\]
\[^{195}\text{See NEDELSKY, supra note 128, at 50-52; Eisgruber, Property and the Unwritten Constitution, 66 N.Y.U. L. REV. 1233, 1237 (1991) (reviewing NEDELSKY).}\]
\[^{196}\text{See NEDELSKY, supra note 128, at 68-95.}\]
\[^{197}\text{2 FARRAND, supra note 1, at 52.}\]
\[^{198}\text{Id. at 202.}\]
\[^{199}\text{Id. at 250.}\]
\[^{200}\text{1 id. at 513-14.}\]
\[^{201}\text{Id. at 533-34; id. at 581-83.}\]
\[^{202}\text{2 id. at 76.}\]
With the exception of the ban on paper money, all of Morris’s proposals described above were rejected. His unsuccessful contention that the House and Senate should have the power to establish property and other qualifications for membership is particularly noteworthy since Morris’s position on qualifications was discussed by the Supreme Court in *Powell v. McCormack.*\(^{203}\) Morris wanted “to leave the Legislature entirely at large”\(^{204}\) in choosing whether to add requirements for service, but he was the only delegate to favor giving Congress this power.

### 2. The Contract Clause

In addition to these proposals championed by Morris, the contract clause was the other major proposal concerning property rights that the convention considered. Morris’s position here is complicated. At the convention, Morris made conflicting statements about the desirability of a contract clause—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 protect against state interference with contracts, and the Committee of Style’s last-minute resurrection of the contract clause reflected his unwavering adherence to safeguarding property rights.

In July, Morris gave a speech that seems to call for a constitutional bar on interference with contract rights:

> He concurred in thinking the public liberty in greater danger from Legislative usurpations than from any other source. . . . 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.\(^{205}\)

He is arguing here for a strong check on legislation that provides for “a remission of debts.” This speech would appear to be a call for a contract clause. Moreover, in 1814, reflecting on his role at the convention, Morris remembered that “[p]ropositions to countenance the issuance of paper money, and the subsequent violation of contracts, must have met with all the opposition I could make.”\(^{206}\) Again, this statement suggests that he favored a contract clause.

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

According to Madison’s notes, on August 28, as the Convention debated the provisions restricting state governments, “Mr King moved to add, in the words used in the Ordinance of

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\(^{203}\) 395 U.S. 486 (1969). For discussion, *see infra* Section III.C.

\(^{204}\) 2 FARRAND, supra note 1, at 250.

\(^{205}\) Id. at 76.

\(^{206}\) 3 id. at 419-20.
Congs establishing new States, a prohibition on the States to interfere in private contracts.” 207 King was apparently referring to the contract clause of the Northwest Ordinance, which provided:

And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed. 208

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 within the State itself a majority must rule, whatever may be the mischief done among themselves. 209

While Wilson and Madison spoke on behalf of King’s contract clause proposal, Mason voiced opposition, echoing Morris, with the observation that “[t]his is carrying the restraint too far” 210 and suggesting that states should have the freedom to alter statutes of limitations. 211

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. 212 Rutledge’s motion passed with seven states in favor and three opposed. The contract clause, once rejected, was not discussed on the floor of the convention again until the Committee of Style submitted its draft and the contract clause somehow reemerged. 213

While it has often been argued that Morris’s speech reflected opposition to a contract clause, 214 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 arguing, instead, 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

207 2 id. at 439.
208 NORTHWEST ORDINANCE, art. II.
209 2 FARRAND, supra note 1, at 439.
210 Id. at 440.
211 Id.
212 Id.
213 For discussion of the Committee of Style’s contract clause, see infra Section III.E.
214 MCDONALD, supra note 16, at 292; ROSSITER, supra note 52, at 228.
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.”

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

The context of his suggestion was his argument to the Pennsylvania Assembly when it was considering repealing the statute incorporating the Bank of North America. The Bank was the brainchild of Robert and Gouverneur Morris. It was privately funded (and Gouverneur Morris was a stockholder) but created pursuant to statutes of the Continental Congress and the Pennsylvania legislature. It was, in effect, the first national bank, and its notes circulated as currency. It was also controversial, and in 1785, the Pennsylvania Assembly moved to repeal that statute of incorporation. Wilson and Morris worked together to defend the bank. Reflecting his belief in the sanctity of corporate charters, in his address to the legislature Morris argued that the repeal of the charter was unconstitutional because “rights acquired by law can [not] be destroyed by law.”

Thus, Morris’s floor opposition to King’s proposed contract clause does not show he opposed the concept broadly. Although Morris thought King’s proposed contract clause went “too far” by affecting statutes of limitation, he was more generally in favor of protection of contracts from state interference. Importantly, he also wanted that protection to include contracts where 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

215 2 FARRAND, supra note 1, at 448 (emphasis added).
216 Id. at 439.
217 NORTHWEST ORDINANCE, art. II. For the full text of the provision, see TAN 206.
218 RAPPELEYE, supra note 37, at 236-67.
219 KIRSCHKE, supra note 29, at 137.
220 3 SPARKS, supra note 29, at 437.
221 ADAMS, supra note 38, at 132-33.
222 On Wilson’s arguments in favor of the Bank, see James Wilson, Considerations on the Bank of North America (1785), in 1 COLLECTED WORKS OF JAMES WILSON 60 (Kermit L. Hall and Mark David Hall eds., 2007).
223 3 SPARKS, supra note 38, at 438-39.
principal voices urging limits to the political power of new states. The two positions were linked. Although one reason Morris was concerned about giving new states equality with the original states was his elitism, he was also concerned that the new states would predominantly be slave states and shift the balance of national power in favor of slavery.

1. Slavery

An opponent of slavery throughout his career, at the convention, Morris was unquestionably the most forceful critic of slavery, with only a handful of others (primarily Luther Martin and Rufus King) expressing opposition to slavery.

“[D]omestic slavery,” he declared, “was a nefarious institution—It was the curse of heaven on the states where it prevailed.” He bitterly denounced the three-fifths clause, which dramatically increased representation in the House of states where there were a large number of enslaved people. He said he could not accept the clause, even if the failure to include it the Constitution would lead the southern states to leave the convention. Madison reports Morris declaring 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.”

In addition to attacking the three-fifths clause, Morris tried to diminish the representation in the House of slave states 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,” Morris moved that the word “free” be inserted before “inhabitants.” 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 & dams 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.

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.

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224 See ADAMS, supra note 38, at 81-82, 84 (discussing Morris’s unsuccessful efforts to secure a provision in the New York Constitution ending slavery in the state).
225 2 FARRAND, supra note 1, at 221.
226 1 id. at 588.
227 2 id. at 219, n.8.
228 2 id. at 221.
229 Id. at 222.
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.”230 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.”231 The fugitive slave clause referred to “any Person to service or labor in any of the United States.”232

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 odds at with basic moral and political principles.233 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.”234 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 decision not to use the word slavery in the Constitution. “[S]ome of the States . . . had scruples against admitting the term ‘Slaves’ into the Instrument,”235 he wrote in 1819. Regardless of whether the decision not to use the word “slave” reflected the concerns of supporters of slavery like Madison or opponents of slavery, 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.”236 As historian Sean Willentz has recently written:

To describe a person’s claim as just could also imply that the state laws establishing such a claim were just. To say that the person may or may not be due the fugitive’s service or labor avoided that implication while it conveyed uncertainty about the justice of the state law or laws in question.237

230 Proceedings of the Convention Referred to the Committee of Style and Arrangement, art. VII, sec. 3, in id. at 571.
231 Proceedings of the Convention Referred to the Committee of Style and Arrangement, art. VII, sec. 4, in id. at 571.
232 Proceedings of the Convention Referred to the Committee of Style and Arrangement, art. XV, in id. at 577.
234 2 FARRAND, supra note 1, at 417.
235 3 id. at 436.
236 Id. (emphasis added).
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. “He [Morris] thought the rule of representation ought to be so fixed as to secure to Atlantic States a prevalence in the National Councils.” Morris feared that “in time the Western people wd. outnumber the Atlantic States. He wished therefore to put it in the power of the latter to keep a majority of votes in their own hands.” When the convention considered the Committee of Detail’s proposal that “new States shall be admitted on the same terms with the original states,” Morris successfully urged that the language should be struck because “[h]e did not wish to bind down the Legislature to admit Western States on the terms here stated.”

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

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

If the Southn. States get the power into their hands, and be joined as they will be with the interior Country they will inevitably bring on a war with Spain for the Mississippi. . . The

238 1 id. at 533.
239 Id. at 534.
240 Id. at 571.
241 2 id. at 454.
242 Id.
243 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.
244 Id. at 584.
245 Id. at 604.
246 Id.
247 Id. at 604.
interior Country having no property nor interest exposed to the sea, will be little affected by such a war. He wished to know what security the Northn. & middle States will have agst. this danger.\textsuperscript{248}

The stakes of the new states’ issue were not only high for an opponent of slavery like Morris, but also for slavery’s defenders. The demographic change that Morris and his fellow delegates envisioned would severely frustrate Southern states’ ability to achieve political dominance over the North.

In the wake of the three-fifths clause and the Connecticut Compromise, while the North would have an advantage in both houses of Congress immediately after ratification, it was slight. At the outset of government under the Constitution, there would be seven northern states and six southern.\textsuperscript{249} The seven Northern states would have thirty-five delegates, and the Southern states thirty-one.\textsuperscript{250} Morris was unhappy with this allocation, which was the product of the three-fifths clause. “[T]he Southern States have by the report more than their share of representation.”\textsuperscript{251}

The North’s advantage in the House was not only small, it was understood to be temporary. It was generally thought that the Southern states would grow in population more rapidly than the Northern states and that population growth in the territories would also be more in the South than the North. As South Carolina’s Pierce Butler observed, “The people & strength of America are evidently bearing Southwardly & S. westwdly.”\textsuperscript{252} Morris’s unsuccessful arguments that majority of representation should remain in the original thirteen states had been a counter to these demographic trends.

One focal point of this debate was Randolph’s proposal for a census and a requirement that representation in the House be adjusted in accordance with its findings.\textsuperscript{253} Morris “opposed it as fettering the Legislature too much.”\textsuperscript{254} Morris “dwelt much on the danger of throwing such a preponderancy into the Western Scale, suggesting that in time the Western people wd. Outnumber the Atlantic States,” and he urged that Congress retain power to decide whether to “readjust the Representation.”\textsuperscript{255} Therefore, Morris’s proposal to retain majority representation with the original thirteen states and his aversion to population-based reapportionment reflected a desire to “keep a majority of votes in [the North’s] own hands.”\textsuperscript{256}

\vspace{1cm}

\textsuperscript{248} Id.
\textsuperscript{249} Id. at 605. See also Klarman, supra note 11, at 256 (discussing consensus about demographic trends).
\textsuperscript{250} See U.S. CONST. art. 1, § 2 (listing representatives from each state, prior to first census).
\textsuperscript{251} 1 Farrand, supra note 1, at 567.
\textsuperscript{252} 1 Farrand, supra note 1, at 571, 583-84.
\textsuperscript{253} Id. at 571.
\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
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. Strikingly, in the wake of adoption of the three-fifths clause, Morris, who had been one of the strongest critics of equal representation of the states, came to support the Connecticut Compromise, declaring “he shall be obliged to vote for ye. vicious principle of equality in the 2d. branch in order to provide some defence for the N. states.” The Senate would be the bulwark against the South—unless slave states were admitted in greater number than free states.

As previously discussed, with respect to the admission of new states, Morris had been able to achieve a significant victory 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 states. But, apart from the territories clause, as the Committee of Style began its work, the provisions that the convention had approved on slavery and the admission of new states reflected rejection of Morris’s positions.

Conclusion

This Part has surveyed Morris’s positions at the Constitutional Convention before the Committee of Style began its work on the areas of central importance to him. He was a champion of the power of the national government. He fought for a strong executive, but had a broad conception of grounds for impeachment. He believed in the necessity of judicial review and a strong federal judiciary with a congressional obligation to create lower federal courts. He saw the protection of private property as the fundamental reason for government’s existence. For that reason, Morris wanted Congress to have the power to establish property requirements for membership, and he wanted a prohibition on 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 in each critical dimension.

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 typically follow a pattern. Morris was reversing a loss he had suffered during the convention proceedings or, at the least, advancing a position that the prior draft of the Constitution had not reflected. Repeatedly, Morris’s changes reflected not only his vision of the Constitution, but provided textual support for positions that the Federalists would champion in the early republic. He was, in effect, creating a Federalist Constitution. At the same time, the changes were subtle, and those who held a competing view would not have seen the difference as

257 Id. at 604.
258 See supra TAN 63-64.
the Constitutional Convention drew rapidly to a close. Moreover, in the constitutional debates of the early republic, Republicans could offer an alternative reading 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 the ways in which his textual changes advanced Morris’s goals and how this language was construed in the early republic, this Part discusses modern interpretations of the clauses changed by Morris. Strikingly, for the most part, courts and modern originalist scholars have adopted the Republican readings.

Let me add a brief comment on how this Article was developed. I began by developing a chart (similar to that in the Appendix, but lengthier) pairing the text referred to the Committee of Style with the text drafted by the Committee. I then studied the two texts to see where there were changes worth scrutinizing (e.g., words added; words deleted; word substitutions; punctuation changes). I also read Morris’s speeches at the Convention, Convention histories, and Morris’s biographies to determine 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.

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 had tried to change the meaning of other clauses. Indeed, I have written a number of Articles arguing that at the time of the Founding, judges and political actors did not carefully parse constitutional text.259 Therefore, I was, frankly, surprised when I found, repeatedly, that the Committee’s subtle textual changes reflected goals Morris had unsuccessfully fought for on the Convention floor and that Morris’s text figured prominently in the major early constitutional debates. The fact that both Morris and those construing the Constitution focused on precise wording was, for me, an unanticipated discovery.

There are some changes made by the Morris and the Committee that 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 to have been, in fact, purely stylistic and without legal consequence or to reflect an attempt to be consistent in word choice.260 Moreover, the


260 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 Proceedings of the Convention Referred to the Committee of Style and Arrangement, art. X, sec. 2 (“he shall take care that the laws of the United States be duly and faithfully executed”) with Committee of Style Report, art. 2, sec. 3, 2 id. at 600 (“he shall take care that the laws be faithfully executed”). See Andrew Kent, Ethan J. Leib & Jed 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.” Compare Proceedings of the Convention Referred to the Committee of Style and Arrangement, art. X, in 2 FARRAND, supra note 1, at 573 (“empowering Congress to decide which “officer of the United States” shall be in the line of presidential succession) with Committee of Style Report, art. II, sec. 1, cl. e, in 2 id. at 599 (Congress shall decide which “officer” shall be in line of succession). For further discussion, see Section III.F., infra. It also deleted “other” from the Impeachment clause: the Committee changed “the Vice President and all other civil Officers” to “The President, Vice President and all civil officers.” Compare Proceedings of the Convention Referred to the Committee of Style and Arrangement, art. X, sec. 2, in 2 FARRAND, supra note 1, at 575 with Report of the Committee of Style and Arrangement, art. II, sec. 4, in 2 FARRAND, supra note 1, at 600. Finally, it slightly revised the language of the religious test clause, removing the words “the authority of.” Compare Proceedings of the Convention Referred to the Committee of Style and Arrangement, art. XX in 2 FARRAND, supra note 1, at 579 (no religious test for “any office or public trust under the authority of the United States”) with Report of the Committee of Style and Arrangement, art. V, in 2 FARRAND, supra note 1, at 603 (no religious test for “any office or public trust under the United States”).

In a series of articles, Professor Seth Tillman has explored the meaning of the various constitutional provisions using variants on the word “officer,” and the Committee of Style’s changes figures 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, sec. 6, cl. 2) does not apply to the President and, as a result, someone could be, for example, both a Senator and the President. See Seth Tillman, Why Our Next President May Keep or His or Her Senate Seat: A Conjecture on the Constitution’s Incompatibility Clause, 4 DUKE J. CONST. L. & PUBLIC POLICY 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 has also drawn 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, sec. 9, cl. 8. See id., The Foreign Emoluments Clause – Where the Bodies Are Buried: “Idiosyncratic Position, 59 S. TEX. L. REV. 237, 263 (2017). Tillman’s thesis has been the subject of academic challenge, see Victoria Nourse, Reclaiming the Constitutional Text from Originalism: The Case of Executive Power, 106 CALIF. L. REV. 1, 26-28 (2018), and resolution of this controversy is outside the scope of this article. This Article contends that Morris was smuggling into the Constitution a series of substantive changes involving significant areas where he had not been able to achieve his goal on the convention floor. Tillman’s thesis reflects, instead, 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 changes as made to advance Morris’s constitutional vision or because the change seems technical and non-controversial. An example of a technical, non-controversial change is the addition to the clause giving Congress the power to coin money the related power to “regulate the value thereof.” Compare 1 FARRAND, supra note 1, at 595 (coining clause proposed by the Committee of Style; providing that Congress shall have the power “[t]o coin money, regulate the value thereof, and of foreign coin . . .”) with id. at 569 (provisions referred to the Committee of Style, 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, which the Committee corrected. The power for Congress to regulate the value of coinage was not controversial. For example, even Jefferson believed that the Confederation Congress should have that power. See Thomas Jefferson, Propositions Respecting Coinage (May 13, 1785) reprinted in 3 FOUNDERS’ CONSTITUTION 7, 8 (Philip B. Kurland & Ralph Lerner eds., 1987) (discussing value to be assigned coins). The most significant example of a change made by the Committee that does not appear to have advanced some agenda of Morris’s is the change to the pardon clause,
presidential succession clause is an outlier in this 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 and Arrangement

Preamble: We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity.261

Report of Committee of Style

Preamble: We, the People of the United States, in order to form a more perfect union, to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish the Constitution for the United States of America.262

The Committee of Style’s changes to the Preamble reframed the Constitution, converting it from a document establishing a confederation without 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”263 or is, at most, a gloss on powers otherwise granted in the Constitution.264 However, Founding-era Federalists repeatedly relied on the Preamble as a grant of power over the objections of

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261 John W. Welch & James A. Heilpern, Recovering Our Forgotten Preamble, 91 S. CAL. L. REV. USC 1021, 1024 (2018). See also AKHIL AMAR, AMERICA’S CONSTITUTION – A BIOGRAPHY 471 (2005) (“[T]he modern Supreme Court has had almost nothing to say about the Preamble, and modern law students likewise skate past this text with Olympic speed.”)

262 Compare 2 FARRAND, supra note 1, at 575 (pardon clause referred to the Committee of Style) with id. at 599 (pardon clause with “offences against the United States” added). This addition was discussed by the Supreme Court in Ex Parte Grossman, 267 U.S. 87 (1925). Taking an approach like that the Court would adopt in Powell, 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. Id. at 113.

263 2 FARRAND, supra note 1, at 565.

264 Id. at 590.

265 See AMAR, supra note 263, at 21-39.
Republicans at the time. Courts’ failure to recognize the Federalist approach to interpreting the Preamble, guided by Morris’s changes to its text, has consequences of the greatest significance.

Strikingly, and surprisingly, the notes of the convention do not report any discussion about the Committee of Style’s revised Preamble. But Antifederalists bitterly attacked the phrase “We, the People” in the state ratifying conventions. Since the debates in Philadelphia were secret, non-participants did not know about the enumeration of states in the Committee of Detail’s Preamble, but they were aware of the opening provision of the Articles of Confederation, which declared the document to be the “Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.”265 The Constitution’s formulation was dramatically different. “What right had they to say, We, the people?” Patrick Henry angrily demanded. “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?”266

Scholars, have, however, repeatedly argued that, as Clinton Rossiter put it, “[w]e ought not attach too much significance to this change.”267 On August 31, shortly before the Committee of Style began its work, the Convention had decided that the new government would come into being if nine states ratified the Constitution. Rossiter writes, “Since no one could tell for certain which states would ratify and which would stall or even refuse flatly to join, the sensible course was to leave out any mention at all of New Hampshire and her twelve sisters.”268

As a matter of drafting, however, one can easily frame options other than “We the People of the United States” that account for the possibility that one or more states might not have ratified the document. For example, the essential formulation of the Committee of Detail’s Preamble could have been preserved by beginning the Constitution: “We the People of the States of the United States . . . “ The selection of “We the People of the United States,” rather than such a plausible alternative text suggests that Morris’s phrasing “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 had said at the convention, rather than being a representative of Pennsylvania, he was “a representative of America.”269 As he expressed his view of the framing in a speech in the Senate in 1802:

265 Articles of Confederation.
266 2 THE FOUNDRERS’ CONSTITUTION 10 (Philip B. Kurland & Ralph Lerner eds., 1987).
267 ROSSITER, supra note 52, at 229 (1966); accord McDONALD, supra note 16, at 281 & n.237; see also Henry Paul Monaghan, We the Peoples, Original Understanding and Constitutional Amendment, 96 COLUM. L. REV. 121, 166 (1996) (motivation unclear, but “the committee of style cleverly avoided the difficulty” posed by the older formulation of the preamble if a state did not ratify.
268 ROSSITER, supra note 52, at 229.
269 1 FARRAND, supra note 1, at 552.
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.270

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.”271

Morris’s preamble not only changed who the authors of the Constitution were, it announced their goals: “to form a more perfect union, to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” This listing was novel. The Committee of Detail’s preamble, in contrast, had not offered any statement of goals.272 The final three goals of Morris’s Preamble – “provide for the common defence, promote the general welfare, and secure 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 tranquility” - are not included in any of the predecessor documents. The New Jersey Plan also speaks of “union”, but the focus is dramatically different. The New Jersey Plan’s end is maintaining the current arrangement - the “preservation of the Union.” Morris’s goal is, very literally, reformulation: “to form a more perfect union.”

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. Thus, in National Federation of Independent Business v. Sebelius,273 Chief Justice Roberts, writing for the Court, 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,

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270 3 id. at 391.
271 Id.
272 See 2 id. at 177. The Articles of Confederation “proclaimed itself a firm league of friendship” entered into by the States for “their common defense, the security of their liberties, and their mutual and general welfare.” ARTICLES OF CONFED. 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.”3 FARRAND, supra note 1, at 593. The first article of the New Jersey Plan announced its goals to be “to render the federal Constitution adequate to the exigencies of Government, and the preservation of the Union.” Id. at 611. The third plan presented to the Constitution, Charles Pinckney’s, was like the Committee of Detail’s plan in not framing goals in its introductory article. See id. at 595.
the Constitution lists, or enumerates, the Federal Government's powers.” Similarly, in *Bond v. United States*, the Court relied on the Marshall Court decisions in *McCulloch v. Maryland* and *Cohens v. Virginia* for the proposition that the federal government lacked a “police power” and narrowly construed the Chemical Weapons Convention Implementation Act to avoid reaching local criminal conduct. The enumerated powers doctrine has also led to the invalidation of congressional legislation in such important recent cases as *United States v. Morrison*, *United States v. Lopez*, and *New York v. United States*.

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

The central authority for the proposition that the Constitution’s 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.

In 1905, the Supreme Court in *Jacobson v. Massachusetts*, citing Justice Story, held that the Preamble was not a grant of authority: “Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been

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274 Id. at 537 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819)).
276 19 U.S. 264 (1821).
278 See *Bond*, 572 U.S. at 854 (discussing enumerated powers doctrine and stating that “[f]or nearly two centuries it has been ‘clear’ that, lacking a police power, ‘Congress cannot punish felonies generally.’”) (quoting *Cohens*, 19 U.S. at 428).
282 *Juliana* v. United States, 947 F.3rd 1159 (9th Cir. 2020).
283 Id. at 1178 (Staton, J., dissenting).
284 *Joseph Story, Commentaries of the Constitution of the United States* § 462 (1833).
regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments."

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 Mikhail and Primus, and the older (widely-attacked and almost completely forgotten) work of Professor William Crosskey, academics have concluded that at the time of the Founding the Preamble was understood as either a rhetorical flourish or a gloss on other powers. But it is clear from Justice Story’s Commentaries itself that he was not setting forth a universally accepted position. He was taking a side in a debate. Admittedly, he asserts, “The preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments.” But the previous sentence is: “And, here, we must guard ourselves against an error, which is too often allowed to creep into discussions about this subject.” He is 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 Anti-Federalist writer, Melancton Smith, recognized the importance of the objects and decried the Preamble in the essays he wrote under the pseudonym Brutus. 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

286 Id. at 22.
290 See Peter Charles Hoffer, For Ourselves and Our Posterity: The Preamble to the Federal Constitution in American 83-109 (2012) (discussing uses of the Preamble in the early republic); Welch & Heilpern, supra note 263, 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 vision the Preamble has weight as a gloss on other grants of power, rather than as an independent source of power. See Amar, supra note 263, at 21-39, 471 (2005).
291 Story, supra note 284, at § 462.
any government.”

In writing his Federalist essays, Hamilton was, as a general matter, very attentive to Brutus’s arguments and to countering them. He did not, however, rebut this argument, although he described the Preamble as responsive to the Anti-Federalist concern about the need for a Bill of Right. He wrote: “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 . . . “

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

The following year, Benjamin Franklin (Morris’s fellow Pennsylvania delegate) wrote to Congress on behalf of the Pennsylvania Abolition Society and appealed to the Preamble as granting Congress the power to fight slavery. Invoking the language of the Preamble, Franklin stated, “They have observed with great satisfaction, that many important & salutary Powers are vested in you for promoting the Welfare & securing the blessings of liberty to the People of the

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293 SMITH, supra note 292, Essays of Brutus XI, at 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 ends of state government, and to embrace every object to which any government extends.”). See also George Clinton, Remarks Against Ratifying the Constitution, 11 July 1788, in 22 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2146 (Merrill Jensen et al eds. 1976-7) (“The objects of [the Preamble] include every object for which government was established among men.”).


295 THE FEDERALIST NO. 84 (Hamilton), supra note 97, at 558-59.


297 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 909 (Linda Grant DePauw et al eds., 1972-2017) [hereinafter DHFFC].

298 Id.
Having portrayed the Preamble as “vest[ing] . . . Powers . . . for promoting the Welfare & securing the blessings of liberty,” he urged Congress “to countenance the Restoration of liberty to those unhappy men, who alone, in this land of Freedom, are degraded into perpetual Bondage.” Congress should “Step to the very verge of the Powers vested in you for discouraging every Species of Traffick in the Persons of our fellow Men.”

The Preamble is a grant of power that Congress can 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 Congressman who spoke in favor of the bill and its constitutionality invoked the Preamble.

Thus, Congressman Elbridge Gerry argued 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 defenseless community, neglect of the public welfare, and danger to our liberties. These are known to be the causes not only by the preamble of the Constitution, but also from our own knowledge of the history of the times that preceded the establishment of it. If these weighty causes produced the Constitution, and it not only gives power for removing them, but also authorizes Congress to make all laws necessary and proper for carrying these powers into effect, shall we listen to the assertions that these words have no meaning, and that this Constitution shall have no more energy than the old.

Gerry thus linked the Preamble and the necessary and proper clause in arguing for the Bank’s constitutionality. Congress has the power under the necessary and proper clause for “carrying these powers [the powers specified in the Preamble] into effect.”

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

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300 Id.

301 Id. at 1950.

302 Id.

303 Federal Gazette (February 15, 1791), quoted in CROSSKEY, supra note 289, at 1313 n.30. See also 2 ANNALS OF CONGRESS 1909 (“The preamble to the Constitution warrants this remark, that a bank is not repugnant to the spirit and essential objects of that instrument.”) (Rep. Ames).
The Annals of Congress report that Congressman Laurence (who had appealed to the Preamble in the removal debate) declared: “The great objects of this Government are contained in the context of the Constitution. He recapitulated these objects and inferred that every power necessary to secure these objects must necessarily follow. . . .”\textsuperscript{304}

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

Mr. B. then took up the Constitution, to see if this simple power [the power to incorporate a bank] was not fairly to be drawn by necessary implication from those vested by this instrument in the legislative authority of the United States. It sets out in the preamble with declaring the general purposes for which it was formed: “the insurance of domestic tranquility, provision for the common defence, and promotion of the general welfare.” These are the prominent features of this instrument, and are confirmed and enlarged by the specific grants in the body of it.\textsuperscript{305}

Opponents of the Bank denounced this reliance on the Preamble. Madison’s attack was forceful: “The preamble to the Constitution, said he, has produced a new mine of power; but this is the first instance he had heard of, in which the preamble had been adduced for such a purpose. In his opinion, the preamble only states the objects of the Confederation.”\textsuperscript{306}

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

To establish the affirmative of this proposition, arguments have been drawn from several parts of the Constitution; the context has been resorted to. “We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity,” &c. It has been remarked, that here the ends for which the government was established are clearly pointed out; the means to produce the ends are left to the choice of the Legislature, and that the incorporation of a bank is one necessary means to produce these general ends. It may be observed, in reply, that the context contemplates every general object of Government whatever.\textsuperscript{307}

\textsuperscript{304} \textit{2 Annals of Congress} 1914-15. While Laurence does not specifically mention the Preamble, it is clear from the context and his reference to the “objects” of government that he is referencing the Preamble. \textit{See} Crosskey, \textit{supra} note 289, at 200. Moreover, Congressman Jackson, the next speaker, in responding to Lawrence’s argument, made explicit that Lawrence had been discussing the Preamble: “He adverted to the preamble and context of the Constitution, and asserted that this context is to be interpreted by the general powers contained in the instrument. . . . The ‘general welfare’ are the two words that to involve and justify the assumption of every power. But what is this general welfare? It is the welfare of Philadelphia, New York, and Boston; for as to the States of Georgia and New Hampshire, they may as well be out of the Union for any advantages they will receive from the institution.” \textit{2 Annals of Congress} 1918.

\textsuperscript{305} \textit{Id.} at 1921.

\textsuperscript{306} \textit{Id.} at 1957.

\textsuperscript{307} \textit{Id.} at 1939.
Congressman Stone crisply made the same point, “I would ask if there is any power under Heaven which could not be exercised within the extensive limits of this preamble.”

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

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

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

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

The congressional debates in 1798 about the constitutionality of the Alien and Sedition Acts echoed the debates in the Bank controversy: The Federalists relied on the Preamble and Republicans criticized that reliance.

Thus, after Congressman Gallatin argued that Congress lacked authority to pass the Sedition Act, Congressman Sewell responded that “Congress had the power of making the

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308 Id. at 1931.
309 Edmund Randolph, Opinion on the Constitutionality of the Bank (February 12, 1791) [available in Founders online at: https://founders.archives.gov/documents/Washington/05-07-02-0200-0002]
310 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 as a reservation of “popular rights” that made a Bill of Rights unnecessary. See supra text accompanying note 275.

The closest Hamilton came to reading the Preamble as a grant of authority came in his 1791 Report on Manufactures, where he justified the use of the taxing authority to provide funding for bounties for manufacturers. In discussing the use of “general welfare” in Article I, section 8’s grant to Congress of a taxing and spending authority, Hamilton wrote: “The phrase ['General Welfare'] is as comprehensive as any that could be used; because it was not fit that the constitutional authority of the Union, to appropriate its revenue shou’d have been restricted within narrower limits than the ‘General Welfare’ and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.” Alexander Hamilton, Report on the Subject of Manufactures in 10 THE PAPERS OF ALEXANDER HAMILTON 230, 303 (Harold C. Syrett et al. eds., 1966). Peter Charles Hoffer has argued that, in making this argument, Hamilton was seeking to read Article I’s “general welfare” clause expansively, in light of the Preamble. HOFFER, supra note 240, at 95. Even, here, however, Hamilton is not reading the Preamble as a separate grant of authority. Rather, it is serving as a gloss on the way the phrase “general welfare” is used elsewhere in the document.
proposed regulation. And the first thing he referred to was the general nature of the Constitution itself, which he drew from the preamble.”311 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.”312

Congressman Williams, an opponent of the Sedition Act, responded with a forceful rejection of Sewell’s view of the Preamble as a grant to Congress of broad powers. “If the 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 beside the preamble, as it may be inferred from that, that Congress has all power whatever.”313

The debate about the Preamble occurred again when Jeffersonian Republicans acted to repeal the Judiciary Act of 1801, which had established circuit courts. Morris, now a Senator from New York, argued that the proposed legislation was unconstitutional. His argument began with an invocation of the Preamble. “To form, therefore, a more perfect union, and to ensure domestic 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 tranquility be disturbed.”314 In addition to the preamble, Morris relied on the judicial powers clause (which he had also re-written when on the Committee of Style)315 as he made the case that Congress had a constitutional obligation to establish lower federal courts. Morris contended that federal courts strengthened union and promoted tranquility, and the elimination of courts that had been established was unconstitutional. He closed his argument by invoking Framers’ intent and implicitly invoking the goal of “ensur[ing] domestic tranquility.”

The Convention contemplated the very act you now attempt. They knew also the jealousy and power of the States; and they established for your and for their protection this most important department. I beg gentlemen to hear and remember what I say: It is this department alone, and it is the independence of this department, which can save you from civil war.316

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

Arguing for repeal, Congressman Baldwin dismissed Morris’s reliance on the Preamble:

311 8 ANNALS OF CONGRESS 1957.
312 Id.
313 Id. at 1962.
314 3 FARRAND, supra note 1, at 391.
315 See infra Section III.H.1.
316 3 FARRAND, supra note 1, at 393.
It had been contended in the early years of the Government, repeatedly, and with much earnestness, that the preamble of the Constitution was a grant of powers, and when a measure was proposed, if it could be shown to have a tendency ‘to form a more perfect union, establish justice, and insure domestic tranquillity, &c., it was Constitutional. 317

“Many questions of this kind have already been so far settled by practice on our Constitution that they have rarely been stirred of late,” Baldwin asserted. He continued, “It was some reward. . . for the trouble they had on similar occasions, that the greater part appeared now to have been settled, as such instances occurred much less frequently than formerly,” concluding that “a result as proper and satisfactory would take place on this, as on former occasions.” 318

The other notable use of the Preamble in the early republic was in Chisholm v. Georgia. Both Justice Wilson and Chief Justice Jay relied on the Preamble as justifying the Court’s holding that it had jurisdiction over Georgia.

Chief Justice Jay grounded the Court’s jurisdiction over Georgia grounded in the Preamble’s assertion that the federal government was created by “the PEOPLE of the United States” “to establish justice.” 319

Wilson construed the Preamble at length:

Fair and conclusive deduction, then, evinces that the people of the United States did vest this Court with jurisdiction over the State of Georgia. The same truth may be deduced from the declared objects, and the general texture of the Constitution of the United States. One of its declared objects is, to form an union more perfect, than, before that time, had been formed. . . . Another declared object is, "to establish justice." This points, in a particular manner, to the Judicial authority. . . . 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. 320

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

Wilson’s involvement with the work of the Committee of Style 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 New York Constitution of 1777. Thus, apart from simply their reading of the text, their understanding of the

317 11 ANNALS OF CONGRESS 105.  
318 Id.  
319 Chisholm v. Georgia, 2 U.S. 419, 475 (1793).  
320 Id. at 465 (Wilson, J.)
Preamble may have grown out of work on the Committee (Wilson) or discussion with Morris (Jay).

Thus, the early history of the Republic show that the Preamble was not only a powerful statement of nationhood, but for the Federalists it was a provision of substantive legal consequence.

B. Three Articles for Three Branches and Three Vesting Clauses

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

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

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

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

Article XI: The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.\(^{321}\)

Report of Committee of Style:

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

Article II, section 1: The executive power shall be vested in a president of the United States of America.

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.\(^{322}\)

Alongside the changes to the Preamble, the most obvious change made by the Committee of Style is its restructuring of the provisions concerning the branches into three parallel articles, conveying a sense of coequal branches of government. In addition to this structural change, the Committee modified the vesting clauses for each branch of government. Its alteration of the vesting clauses of Articles I and II has become one of its most legally consequential changes, with politicians, judges, and scholars closely parsing Morris’s language to make their case for

\(^{321}\) 2 FARRAND, supra note 1, at 565, 572, 575.

\(^{322}\) Id. at 590, 597, 600.
their competing views on the scope of legislative and executive power. But the modern participants in these debates, while giving great weight to the vesting clauses’ phrasing, have largely failed to recognize that the vesting clauses were significantly changed at the last minute and the changes were not debated on the Convention floor; where advocates of the competing views of the vesting clauses have recognized that the Committee made textual changes, they have failed to grasp that the textual changes were substantive.323

One of the most familiar aspects of the Constitution is its treatment of the three branches in three parallel articles: Article I (Congress), Article II (the Executive), and Article III (the Federal Judiciary). As comparison of the provisions that were submitted to the Committee with the provisions produced by the Committee shows, that division is wholly the work of the Committee of Style. None of the state constitutions had that framework, nor did any of the various plans presented to the Convention (the Virginia Plan, the New Jersey Plan, 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 it with a separation of powers article that was Article II (reprinted above), then wended its way through the powers of Congress in a long series of articles (Article III through IX), before treating the Executive in Article X and the Judiciary in Article XI.

The parallel structuring of the three articles connotes parallel stature and authority. While that idea may strike us today as a commonplace of the United States constitutional system, it was not orthodoxy at the time of the founding. The first state constitutions had placed overwhelming authority in the legislatures, and the revolutionary era document of national governance—the Articles of Confederation—was a document of legislative governance (without a separate judiciary or executive). Moreover, the idea of the judiciary as a separate branch was contested: in British constitutional theory, the judiciary was part of the executive, and that position had adherents in the United States (including John Adams).324 While the arc of constitutional development during the revolutionary era had been towards greater authority for the executive and the judiciary than they had in the first state constitutions, the notion that the other two branches were co-equal with the legislature was controversial. The Committee of Detail’s structuring—with eight articles about the Congress appearing before the article and the executive and the article on the judiciary—accords with the view that Congress was preeminent and the other branches almost an afterthought.

While there is certainly a stylistic element to the simplification of ten articles into three, it also reflected Morris’s vision of elevating the Presidency and the federal courts. The re-

323 See infra TAN 341-53 and accompanying notes.
324 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 (1969). Treanor, supra note 290, 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, THE SECOND TREATISE OF GOVERNMENT in TWO TREATISES OF GOVERNMENT §§ 143-48, at 382-84 (Peter Laslett ed., 1960). On John Adams, see John Adams, Clarendon, no. 3 (January 27, 1766), reprinted in 1 THE FOUNDERs’ CONSTITUTION 630-32.
structuring supports the view that the three branches are co-equal and independent of each other. The textual change conveys a powerful vision.

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

First, he dramatically, if subtly, reworked the executive branch vesting clause. The version referred to the Committee read:

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

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

The Committee of Style’s version shifts focus, and in shifting focus, it shifts meaning. As it emerges from the Committee, the clause has become: “The executive power shall be vested in a president of the United States of America.” The clause reads now, not as a definition of who the executive is, but as a grant of executive power to the President. The “president of the United States of America” has “[t]he executive power.” The provision as revised has been read since the early republic by advocates of presidential power as reflecting a broad grant.325 It would have been much harder, as a textual matter, to read the earlier version as a broad grant of power.326

Second, Morris changed “[t]he Executive power of the United States” to “[t]he executive power.” Reference to the “United States” was dropped. This permitted supporters of a powerful President to appeal to the British model—and to the King’s authority—as defining the executive in a way that they could not have under the earlier text.327

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325 See supra text accompanying notes 294-308
326 At the same time as the Committee of Style’s changes increased executive power beyond the Committee of Detail draft, the Committee of Detail draft itself, through the addition of a vesting clause, represented an expansion of executive power beyond the short list of enumerated powers that had been approved before the Committee of Detail began its work. See Michael McConnell, James Wilson’s Contributions to the Construction of Article II, 17 Geo. L.J. & Pub. Policy 23, 40-41 (2019).
Third, Morris qualified the grant of authority to the Congress in a way that he did not qualify the grant of authority to the President. The vesting provisions for the legislature and the executive sent to the Committee of Style are parallel: “The legislative power shall be vested in a Congress . . .”; “The Executive power of the United States shall be vested in a single person . . . .” But the vesting clauses produced by the Committee are not parallel. While “ALL legislative power herein granted” is vested in Congress, “The executive power” is vested in the president. Congress receives the legislative powers “herein granted”; the President receives executive powers without this limitation.328

The argument that the revised text of the Article II vesting clause gives the President all executive powers (other than those that the Constitution specifically limited or delegated elsewhere) made its appearance in the 1789 debate in the House about whether the President had a constitutional right to remove executive officers, even though the Constitution did not explicitly provide that right. As with the Preamble, Congressman Fisher Ames invoked Morris’s text to support an outcome that Morris would have favored. Arguing that the President had the removal power, Ames observed that the Constitution declares "that the executive power shall be vested in the president" and added that "under these terms all the powers properly belonging to the executive department of the government are given, and such only taken away as are expressly excepted."329

John Vining of Delaware similarly declared that "there was a strong presumption that [the President] was invested with [the removal power]; because, it was declared, that all executive power should be vested in him, except in cases where it is otherwise qualified."330 George Clymer of Pennsylvania argued that "the power of removal was an executive power, and as such belonged to the president alone, by the express words of the constitution, 'the executive power shall be vested in a president of the United States of America.'"331

While he believed that the President had the removal power, Madison did not, initially, embrace the vesting clause argument to support his position. Instead, he at first advanced functional arguments.332 A requirement of senatorial advice and consent for removal "would be found very inconvenient in practice" and would "tend[] to lessen [the] responsibility" of the President over his subordinates,"333 he asserted. He, ultimately, however, advanced the vesting

328 One qualification should be noted: Despite the framing of the Article II vesting clause, 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), so even proponents in the early republic 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 327, at 1181-83 (discussing “royal residuum theory” of executive power); Carlos Vazquez, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, 122 HARV. L. REV. 599, 613-16 (2008) (discussing Constitution’s departure from British precedent in treaty-making).
329 11 DHFFC, supra note 297, at 979.
330 10 id. at 728.
331 Id. at 738.
332 See Bradley and Flaherty, supra note 327, at 549.
333 10 DHFFC, supra note 297, at 735.
clause argument, after others had previously made it. He first advanced the vesting clause argument on June 17, a month into the debate and a month after he first argued that the President had the removal power under the Constitution, when he referred to the vesting clause and contended that the requirement of senatorial advice and consent for appointments was "an exception to this general principle; and exceptions to general rules are ever taken strictly."\textsuperscript{334}

At the same time, several Congressman explicitly rejected the vesting clause argument. Congressman William Smith said that the Vesting Clause argument "proves too much, and therefore proves nothing; because it implies that powers which are expressly given by the constitution would have been in the president without the express grant."\textsuperscript{335} Alexander White contended that "the [only] executive powers [that are] vested, are those enumerated in the constitution."\textsuperscript{336} James Jackson argued, even if removal were an executive function "it does not follow that it vests in the president alone because [the President] alone does not possess all executive powers."\textsuperscript{337}

The disagreement about the meaning of the vesting clause was also central to the first great debate about the President’s foreign affairs powers: the 1793 debate between Hamilton and Madison about the constitutionality of the Neutrality Proclamation.

Hamilton, writing as Pacificus, appealed to the text of the Article II vesting clause to justify President Washington’s issuance of the Neutrality Proclamation. Like the adherents in 1789 of the view that there was a presidential power to remove officers, he argued that the vesting clause gave the President all executive powers, except where specific constitutional provisions took that power away.\textsuperscript{338} In his first Pacificus letter, he began by quoting the vesting clause and then the Constitution’s enumeration of executive powers. He argued that, under standard principles of construction, the enumeration did not imply that the President was not fully vested with the executive power: “It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications . . .”\textsuperscript{339} Thus, the only limits on the President’s possession of executive powers were the specific limitations specified in the document (such as with the making of treaties).

Hamilton then advanced a second vesting clause argument (one not advanced in the removal debate):

“\textquote{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

\textsuperscript{334} 11 id. at 896; see also 11 id. at 922 (invoking the Vesting Clause).
\textsuperscript{335} Id. at 936-37.
\textsuperscript{336} Id. at 872.
\textsuperscript{337} Id. at 912.
\textsuperscript{339} Id.
grants the legislative powers of the Govern't. the expressions are—“All Legislative powers herein granted shall be vested in a Congress of the UStates”; in that which grants the Executive Power the expressions are, as already quoted “The Executive Po<wer> shall be vested in a President of the UStates of America.”

Hamilton is here relying on the difference between the Article I and Article II vesting clauses as a basis for reading the President’s power broadly. Morris’s phrasing—and, to be specific, his insertion of “herein granted” into the Article I vesting clause—became the basis of Hamilton’s argument for a broad understanding of the President’s powers, a constitutional goal that both Hamilton and Morris shared. Congress only has enumerated powers because it only has powers “herein granted,” but the absence of “herein granted” in Article II means that the President has all executive powers, except where those powers are expressly limited.

Madison’s response as Helvidius reflects a different view of the vesting clause and the scope of executive power than that reflected by Pacificus (Hamilton). Madison observes that Pacificus’s vision of executive power accords with the views of Locke and Montesquieu, but dismisses them and the English precedent, declaring, “Both of them [Locke and Montesquieu] too are evidently warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry.” Madison argues that the power to proclaim neutrality falls within the legislative sphere because it follows from the power to make war and to make treaties, both legislative powers.

There is a tension between Madison’s broad conception of the scope of executive power in the removal debates and the narrow view in his Helvidius essays. At the same time, Madison as Helvidius explicitly embraces his earlier position in the removal debate. He argues that removal is an executive power, but that neutrality is not.

The Helvidius-Pacificus debate thus involves two different views of the meaning of the scope of the grant in the vesting clause, rather than a debate between a proponent who reads it to be a grant of power and one who does not. Morris’s language vesting the executive power in the President governs the interpretation of both sides of this debate – with Hamilton and Madison disagreeing about the scope of executive powers. Hamilton also relies on the difference between the two vesting clauses – Morris’s inserting of “herein granted” into the vesting clause of Article I. Madison does not address that textual argument. At the same time, it would be a mistake to see Hamilton’s argument as reflecting a standard approach at the time of the founding. I have not

340 Id.
342 Id. at 58, 59-64.
343 See Steven G. Calabresi and Christopher S. Yoo, The Unitary Executive During the First Half-Century, 47 Cas. W. Res. 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.”).
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 vesting clauses of Article I and II was consequential and played a critical role in the first two great debates about the scope of executive power. His language provided the basis for a broad reading of the executive power in the removal debate and by Hamilton (as Pacificus) 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 a disagreement about whether the Article II vesting clause provided the President with powers greater than those in the specific enumerated grants, and the Helvidius-Pacificus debate shows that, while both Hamilton and Madison 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. In finding that the President’s removal power could not be limited by Congress, Chief Justice Taft read the executive vesting clause broadly 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 more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations. . . .”345 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.”346

Taft’s approach has a range of modern analogues. Justice Scalia’s dissent in Morrison v. Olson347 observes at the outset “[t]he principle of separation of powers is expressed in our Constitution in the first section of each of the first three articles,”348 and he then highlights the fact Congress has only legislative powers “herein granted,” while the President has all executive powers.349 The OLC torture memo of 2003,350 the substantial body of unitary executive scholarship (under which the President has all executive powers except those expressly limited

346 Id.
348 Id. at 697 (Scalia, J., dissenting).
349 Id. at 697-98.
and executive powers are broadly understood), and Justice Thomas’s recent opinion concerning the presidential recognition power in Zivotofsky v. Kerry place similar reliance on the language of the Article II vesting clause and the fact that Article I’s vesting clause has the language “herein granted” while the Article II vesting clause does not.

As they parse the text, advocates of the unitary executive theory have generally not acknowledged that the “herein granted” language was added at the last minute by the Committee of Style and never debated. Professors Calabresi and Prakash, leading proponents of this position, are an exception. They have, however, argued 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. “Presumably,” Professors Calabresi and Prakash have written, “the change induced no debate or discussion precisely because it so thoroughly conformed to the Convention’s understanding about the difference between the Article I and the Article II and III Vesting Clauses.”

Professor Prakash’s important 2015 study of the original understanding of the presidency, Imperial from the Beginning: The Constitution of the Original Executive, is to the same effect. Prakash provides 454 pages of history, but devotes only one short paragraph to the Committee of Style. He observes that “[t]he Committee of Style, charged with ‘revising the style’ of the Constitution, added a phrase to the Legislative Power Clause.” That phrase – “herein granted” – “did nothing more than clarify the legislative power.” “No such limitations were added to Article II,” Prakash concludes.

Critics of the unitary executive theory have advanced a position that mirrors (i.e., has the same view, but in reverse) the position of the 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 have said “the Vesting Clause . . . says who has the executive power; not what that power is . . . .”

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352 135 U.S. 2076, 2101 (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’ 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 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).

353 Calabresi & Prakash, supra note 351, at 565.

354 PRAKASH, supra note 351, at 81.

Champions of the limited view of executive power have repeatedly dismissed the phrase “herein granted” as without substantive meaning. 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 that this radically changed what had already been agreed upon.”

“[T]he addition of herein granted . . . was made at the last moment by the Committee on [sic] Style,” Professors Sunstein and Lessig have stated, “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.”

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.”

Commenting on the Committee of Style’s addition of “herein granted,” Professor Monahan observed, “[T]he ‘legislative history’ of the difference in language . . . provides no basis for ascribing any importance to this difference.”

“The difference may well have been accidental,” Professor David Currie has suggested.

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.

C. The Qualifications Clause

*Report of the Committee on Detail:*

Article IV, Section 2: Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of the United States for at least three years before his election; and shall be, at the time of this election, a resident of the State in which he shall be chosen.”

Article VI, Section 2: The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient.

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

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361 2 FARRAND, *supra* note 1, at 178-79.
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.\textsuperscript{362}

Report of Committee of Style:

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.\textsuperscript{363}

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 and advancing his larger project at the Convention of protecting private property.\textsuperscript{364}

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\textsuperscript{365} and Franklin\textsuperscript{366} argued against giving Congress the power to establish such property requirements. Morris took a diametrically opposite position. He “moved to strike out ‘with regard to property’ in order to leave the Legislature entirely at large.”\textsuperscript{367} Morris would have given Congress the power to add whatever limitations it wanted: “The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House as to the said Legislature shall seem expedient.” Morris’s proposal was rejected,\textsuperscript{368} and the convention then voted to remove the Committee of Detail’s provision giving Congress the power to impose property qualifications for membership.\textsuperscript{369} 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.\textsuperscript{370}

\textsuperscript{362} Id. at 565.
\textsuperscript{363} Id. at 565.
\textsuperscript{364} On Morris’s attempts to protect property rights, see supra text accompanying note 189-221.
\textsuperscript{365} 2 FARRAND, supra note 1, at 249.
\textsuperscript{366} Id.
\textsuperscript{367} Id. at 250.
\textsuperscript{368} Id. 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. at 250*.
\textsuperscript{369} Id. at 251.
\textsuperscript{370} Id. at 216.
On the Committee of Style, Morris changed the qualifications clause, although in a subtle way. The Committee of Style converted a series of positive requirements (“Every Member of the House of Representatives shall be …”) into a series of disqualifying attributes (“No person shall be a representative who shall not …”).

Nearly two centuries later, the House of Representatives argued in *Powell v. McCormack* that this negative formulation enabled it to add requirements for service to the House beyond citizenship and age. Writing for the Court, Chief Justice Warren dismissed this contention:

Respondents’ 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. The Committee . . . had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so; and certainly the Convention had no belief . . . that any important change was, in fact, made in the provisions as to qualifications adopted by it on August 10.371

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 notes that only one delegate “voiced his opposition” to taking from Congress the ability to add additional requirements for membership: Morris.372 Warren dismisses Morris as the outlier, failing to recognize that Morris was the one who wrote the final text.

In 1995, the Supreme Court reaffirmed this interpretation of the qualifications clause and the *Powell* approach in *United States Term Limits v. Thornton*.373 *Thornton* presented the question whether Arkansas could impose term limits on members of the United States House of Representatives. As the House did in *Powell*, in *Thornton* the state argued that the negative phrasing of the qualifications clause “suggests that they were not meant to be exclusive.”374 The *Thornton* Court reviewed the *Powell* Court’s examination of the drafting history, including the Convention’s rejection of Morris’s proposal that the House be able to add qualifications.375 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.”376 With respect to the negative phrasing issue, the Court cited the segment of the *Powell* opinion on the Committee of Style and stated, “This argument [the negative phrasing argument] was firmly rejected in *Powell* . . . and we see no need to revisit it now.”377

372 Id. at 536. For further discussion, see infra Section IV.B.
374 Id. at 815, n.27.
375 Id. at 791.
376 Id. at 792-93.
377 Id. at 815, n.27. For further discussion, see infra Section IV.B.
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 use of the 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. And 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 the Convention Referred to the Committee of Style and Arrangement:*

Article VII, sec. 3: The proportions of direct taxation [and representation] 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.\(^{378}\)

*Report of Committee of Style:*

Article I, Sec. 2, cl. 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 number 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. . . .\(^{379}\)

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, and we have no direct evidence of why Morris added it. However, at the convention, he had unsuccessfully opposed both the constitutional requirement that representation in the House be revised in accordance with population changes and the requirement of a census.\(^{380}\) While he was unsuccessful in these efforts, the “actual enumeration” language advanced the same underlying

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\(^{378}\) 2 FARRAND, supra note 1, at 571.

\(^{379}\) Id. at 590-91.

\(^{380}\) See text accompanying notes 242-02; 1 FARRAND, supra note 1, at 571.
goals at the core of his constitutional vision: limiting the power of new states and avoiding strengthening the power of 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.381

During the constitutional convention, without a census to rely on, delegates had assigned the initial number of seats each state would have in the House based on their estimates of population. It was a contentious process, particularly because the decision effected 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.382 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).383

Those numbers were revised after the Census of 1790. After the first census was conducted, Washington wrote to Morris bemoaning that it “is certain our real numbers will exceed, greatly, the official returns of them.”384 But, while Washington was disturbed by this result, Morris would not have been.

Given the general consensus among the founders that population growth would be to the South and West,385 the passage of three years between drafting and the first census would suggest there should have been at least some increased representation of the South and particularly of the deep South (South Carolina and Georgia) (although only a limited increase, since only three years had passed). 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. Most notably, although the overall number of representatives increased by almost 50%, Georgia lost a seat.386 Thus, Morris’s addition of the “actual enumeration” requirement advanced his goals: the difference between the delegates’ estimate of representation and the actual census indicate that “actual enumeration” lead to undercounting of population in the frontier areas in the South and the West whose political power he wished to diminish.

382 3 FARRAND, supra note 1, at 157.
383 See U.S. CONST. art. I, sec. 2, cl. 3 (listing number of Representatives by state).
385 See supra text accompanying note 241.
While the goals that Morris fought for at the convention would suggest he was seeking to make a substantive change when he added the phrase “actual enumeration,” the Supreme Court took the opposite interpretive approach in *Utah v Evans*, assuming consistency, not change. *Evans* was the Court’s most recent encounter with the question whether to follow the Committee of Style’s 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.” In holding that sampling was permissible, Justice Breyer stressed the fact that the words “actual enumeration” were added by the Committee on Style:

The 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. Powell v. McCormack, 395 U.S. 486, 538-539 (1969). 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.

Breyer is employing a strong presumption that the words used by the Committee of Style do not alter the meaning of the words used by the Committee of Detail (“this strongly suggests a similar meaning”). The result is that the Committee of Style’s text, rather than being closely parsed by the Court, is understood as not changing the meaning of the Committee of Detail’s text. (“Hence, the Framers would have intended the current phrase, ‘the actual Enumeration shall be made . . . in such Manner as [Congress] . . . shall by Law direct,’ as the substantive equivalent of the draft phrase, ‘which number [of inhabitants] shall . . . be taken in such manner as [Congress] shall direct.’”)

Justice Thomas, in dissent, attacked the idea that 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.

Justice Thomas is alone in the Court in taking this approach. The Court has either disregarded the Committee of Style’s language (as in *Powell*) or had the strong presumption that

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388 *Id.* at 474. Justice Breyer also had another ground of decision, holding that sampling was “actual enumeration.” *See id.* at 475-76.
389 *Id.* at 495-96 (Thomas, J., dissenting) (citations omitted).
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 presumed was not happening: he wanted to change the clause’s meaning.

E. The Contract Clause

*Northwest Ordinance* (1787):

Article II: . . . And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed.\(^390\)

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

Article XII: No State shall coin money; nor emit bills of credit, nor make anything but gold or silver coin a tender in payment of debts; nor pass any bill of attainder or ex post facto laws; nor grant letters of marque and reprisal, nor enter into any treaty, alliance, or confederation; nor grant any title of nobility.\(^391\)

*Report of Committee of Style*

Article I, Sect. 10: No state shall coin money, nor emit bills of credit, nor make any thing but gold or silver coin a tender in payment of debts, nor pass any bill of attainder, nor ex post facto law, nor laws altering or impairing the obligation of contracts; nor grant letters of marque and reprisal, nor enter into any treaty, alliance, or confederation, nor grant any title of nobility.\(^392\)

Of all the clauses in the Committee of Style draft, the contract clause may be the most puzzling.

During the Convention debates before the Committee of Style began its work, Morris had been the preeminent defender of the rights of property, and (although on the Committee he attempted to reverse one of his defeats as he rewrote the qualifications clause\(^393\)), he had suffered a series of defeats in floor votes. The Convention had rejected his attempts to limit the franchise to property owners, to empower Congress to establish property qualifications for membership in the House and Senate, and to bar compensation for Senators.\(^394\) But, as has been discussed, his

\(^390\) *Northwest Ordinance* of 1787 art. II.
\(^391\) 2 *Farrand*, *supra* note 1, at 577.
\(^392\) *Id.* at 596-97.
\(^393\) *See supra* Part III.c.
\(^394\) *See supra* text accompanying note 189-202.
position on the contract clause (unlike his position on other protections of private property) was complicated. While, before the Convention, he had argued to the Pennsylvania state legislature that it was unconstitutional for government to alter the terms of contracts it had entered into, at the convention, on the floor of the convention, he had stood in opposition to Rufus King’s proposal that a clause modeled on the Northwest Ordinance’s contracts clause be added to the Constitution. Moreover, the history of the contract clause is unique. 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 (before the Committee of Style began its work) it was voted down. Nonetheless, the clause reemerged and appeared in a modified form in the Committee proposal.

Trying to make sense of this turn of events, historians and legal scholars have made two arguments. First, they posit that one of Morris’s fellow committee members (King or Hamilton or de facto committee member Wilson) must have convinced him to change his mind and include the contract clause. Second, they have argued that the Committee acted deceitfully. Indeed, in standard accounts, this is the one instance in which the Committee dishonestly changed the Constitution’s substance.

Neither argument, however, withstands close scrutiny. Scholars have overlooked Morris’s argument to the Pennsylvania legislature when it was considering ending the Bank of North America’s charter; that argument shows that he was actually in favor of constitutional prohibition of states interfering with contracts, including public contracts. 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 other delegates would have missed the Committee’s addition of a clause that they rejected. While Morris made many changes to the constitutional text, they were all subtle (with the exception of the revisions to the Preamble) and each of them (including the changes to the Preamble) was not of obvious substantive import. Significantly, the day after the convention’s rejection of the contract clause, John Dickinson took the floor and announced that he had reviewed Blackstone’s Commentaries and the term ex post facto only applied to criminal cases. As a result, “some further provision” would be necessary “to restrain the States from retrospective laws in civil cases.”

In other words, Dickinson was informing the delegates that a contract clause was necessary because the ban on ex post facto legislation did not cover interference with contracts. While Madison reports no further discussion of the contract clause prior to the work of the Committee of Style, in the wake of Dickinson’s speech, there was almost certainly both such discussion (either not recorded by Madison or taking place off the convention floor) and an agreement on a contract clause.

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395 See supra Section II.D.
396 See, e.g., McDonald, supra note 16, at 292; Rossiter, supra note 52, at 228-29. See also Needsky, supra note 212, at 299 n.41 (suggesting Wilson “likely inserted the clause”).
397 See supra text accompanying notes 197-203
398 2 Farrand, supra note 1, at 449.
But even if those unrecorded discussions had produced agreement on the need for a contract clause, the Committee of Style’s draft departed in three ways from King’s proposal to follow the Northwest Ordinance’s contract clause.

First, in one way, it is narrower in its scope: “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 action — limitations of actions & which affect contracts.” The removal of the phrase “in any manner whatever” and the substitution of “altering or impairing” for “interfere with or affect” both 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.” “[P]rivate” has disappeared. The change would appear intentional: it supported the clause’s application 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.

Third, the Northwest Ordinance by its terms applies only to “previously formed” contracts; the contract clause does not have text limiting it to previously formed contracts. This change was to be consequential when the Supreme Court in *Ogden v. Saunders* where Chief Justice Marshall argued (although unsuccessfully) that the contact clause had prospective applications (such as with respect to bankruptcy legislation). While there is no evidence directly bearing on whether Morris would have wanted the clause to have prospective application, given his concern with the protection of property rights, its seems likely that he would have viewed the question as the Chief Justice did and that the omission of “previously formed” was intentional.

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. 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

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399 *Id.* at 439.
401 See supra text accompanying notes 173-75.
403 *Id.* at 333 (Marshall, C.J., dissenting).
404 Compare 2 FARRAND, *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 *id.* at 597 (version of the contract clause reported by the Committee of Style).
the following day, they moved on to other topics. That is only record we have of the Convention’s consideration of the Committee of Style’s proposal. 405

There was also little discussion of the clause during the ratification debates. Anti-Federalists Patrick Henry of Virginia 406 and James Galloway of South Carolina 407 suggested that the clause might reach contracts between the states and private individuals. In general, when Federalists discussed the clause, they spoke of its application to private contracts. Statements by Antifederalist delegates Mason and Martin are to the same effect; they did not, however, explicitly address whether the cause applied to public contracts. 408 Convention delegate William Davie was the only Federalist to state clearly that the clause did not apply to public contracts, observing, “The clause refers merely to contracts between individuals.” 409

Nonetheless, in the years following the convention, two Committee of Style members stated that the clause reached public contracts. In Chisholm, Justice Wilson opined that the contract clause applied to public contracts:

What good purpose could this Constitutional provision secure, if a State might pass a law impairing the obligation of its own contracts; and be amenable, for such a violation of right, to no controuling judiciary power? We have seen, that on the principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages. 410

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

405 See id. at 619.
406 3 Jonathan Elliot, Debates in the State Ratifying Conventions 474 (1827) (“The expression includes public contracts, as well as private contracts between individuals.”).
407 4 id. at 190-91 (“That clause of the Constitution may compel us to make good the value of these [public] securities.”).
408 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 Benjamin Wright, The Contract Clause 12-16 (1938) (statements reflect understanding that the clause was limited to private contracts with James W. Ely, The Contract Clause: A Constitutional History 20 (2016) (statements “cast [no] light on the subject”).
409 3 Farrand, supra note 1, at 350.
410 Chisholm v. Georgia, 2 U.S. 419, 465 (1793) (Wilson, J.).
Georgia may justly be considered as contrary to the Constitution of the United States, and, therefore null. 411

Similarly, in his jury charge in the case of Van Horne’s Lessee v. Dorrance, 412 Supreme Court Justice (and former convention delegate) William Paterson declared that a state statute repealing a land grant “impairs the obligation of a contract, and is therefore void.” 413

When Chief Justice Marshall in Fletcher v. Peck 414 applied the contracts clause to a land grant (a public contract), his opinion was consistent with the opinions of Hamilton, Wilson, and Paterson. Focusing on the absence of the word “private” in the contract clause, Douglas Kmiec and John McGinnis 415 have argued that Fletcher is consistent with the original understanding of the clause. 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. 416

This is, however, a minority view. In his classic study, The Contract Clause of the Constitution, Benjamin Wright argued that the original understanding of the contracts clause was that it applied only to private contracts, and his argument rested on the view that the Constitution’s language was modeled on the Northwest Ordinance. 417 In his influential study, Original Intent and the Framers’ Constitution, Pulitzer-Prize winning historian Leonard Levy declares that in Fletcher, the Court “transmogrified” the contract clause because it departed from the clearly established original understanding that the contract clause applied only to private contracts. 418 That view continues to hold sway. Thus, Professor Bradford Clark recently wrote in the Harvard Law Review that “the clause was generally understood to apply only to private contracts between individuals, not to a state’s own contracts,” 419 and it “was modeled on the Northwest Ordinance of 1787.” 420

The contract clause, then, fits into the pattern we have seen previously: The Committee of Style’s draft departed from prior language (the Northwest Ordinance Clause’s contract clause) in

411 ALEXANDER HAMILTON, 4 THE LAW PRACTICE OF ALEXANDER HAMILTON 382 (Julius Goebel, Jr., & Joseph H. Smith eds., 1980).
412 2 U.S. 304 (1795).
413 Id. at 320.
414 10 U.S. 87 (1810).
416 ELY, supra note 408, at 19 (“I wish to challenge this conventional wisdom and to propose . . . that the contract clause could fairly be construed to safeguard both public and private contracts from state abridgement . . .”).
417 See WRIGHT, supra note 408, at 4-5, 27-34. See also ELY, supra note 408, 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.”).
ways that reflected Morris’s views. In the years after ratification, members of the Committee (and, once again, Wilson and Hamilton) drew on the language of the clause as adopted to advance views that they shared with Morris. Nonetheless, leading academic commentators have read the clause by focusing on the convention debates before the Committee began its work, rather than 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 and Arrangement:

Article X, sec. 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.\textsuperscript{421}

Report of Committee of Style:

Article II, sec. 1, cl. e: . . . the Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or the period for chusing another president arrive.\textsuperscript{422}

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 have received the most scholarly attention (although, once again, the fact that Morris was the author of the change has been ignored).\textsuperscript{423} That attention reflects in part the significance of the text. Depending on how the clause is read, the statute\textsuperscript{424} that places the Speaker of the House second in the line of presidential succession, after the Vice President, may be unconstitutional. 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 and the first Congress’s reading of the succession clause and the text of the succession clause, as read in light of other constitutional provisions, point in another direction.

\textsuperscript{421} 2 FARRAND, supra note 1, at 573.
\textsuperscript{422} Id. at 588-89.

Until late in the proceedings, the Constitution did not provide for a Vice President. As of the end of August, the draft Constitution provided that the President was to be succeeded by the President of the Senate. 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. 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. 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.” The delegates deferred resolving the issue.

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. 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” will serve “until the time of electing a President shall arrive.” Madison objected that the language “would prevent the supply of a vacancy by an intermediate election.” He proposed the substitute language “until such disability be removed, or a President shall be elected.” Morris seconded the proposal, which passed, but narrowly – 6 states to 4, with one state divided – and one ground for objection was that Congress should not be limited to selecting only “officer[s] of the United States” to fill the vacancy. “They wished it to be at liberty to appoint others than such,” Madison observes in his notes. 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." The standard reading is that because of the incompatibility clause, members of Congress are not “officers of the United States.” Thus, if

425 2 FARRAND, supra note 1, at 427.
426 Id.
427 Id. at 535.
428 Id.
429 Id.
430 Id.
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,” Morris observed in a debate concerning who would preside over the Senate that “[i]f there should be no vice president, the President of the Senate would be temporary successor.” 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.

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. 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.” Congressman 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.” Congressman Giles agreed. “The characters referred to he did not think were officers.” Madison had the same view of the presidential succession clause, observing in a letter that Congress “certainly erred” and “[i]t may be questioned whether these [the Speaker and President Pro Tem of the Senate] are officers, in the constitutional sense.”

Madison and the other Republicans seem to be reading “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 were imposing 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. Congressman White “observed that the Constitution says the vacancy shall be filled by an officer of the United States. The President pro temporare of the Senate is not an officer of the United States.” Similarly, in contending that the Secretary of State should be first in the line

432 2 FARRAND, supra note 1, at 537.
433 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 as meaning that, if the Vice President died, the President of the Senate would be next in the line of succession).
434 Presidential Election and Succession Act of 1792, ch.8, 1 Stat. 239.
435 3 ANNALS OF CONGRESS 281.
436 Id.
438 See 2 ANNALS OF CONGRESS 1902 (Congressman White).
of succession, Congressman Smith noted that “by the Constitution, the vacancy is to be filled by an officer of the United States. This narrows the discussion very much.” 439 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 President pro tempore of the Senate were “officers” within the meaning of the Constitution and thus could be placed in the line of succession. Congressman 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,” 440 Congressman Sedgwick declared that 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.” 441

Originalist scholars have disagreed about how to read the clause. Professor Akhil Amar and Dean Victor 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 the United States.’” 442 They note the Committee of Style change, but dismiss it as irrelevant: “A later style committee deleted the words ‘of the United States,’ but no evidence suggests that this style change was meant to change meaning.” 443

In support of the competing view that members of Congress can be placed in the line of succession, Dean Manning has countered that the language of the Committee of Style 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. The relevant fact is that the Ratifiers acted on the text submitted to the States, not on the sequence of ‘secret deliberations’ of the Constitutional Convention. . . . [T]he natural import of the text submitted to the States would be . . . that the unrestricted term ‘Officers’ is broader than the phrase ‘Officers of the United States.’ Thus, the drafting history does not provide a convincing textual argument for reading the Succession Clause to exclude members of Congress from the line of succession. 444

The change that Morris made here is unlike all the other changes surveyed in this Article. All the others clearly advanced a goal 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

439 2 id. at 1901.
440 3 ANNALS OF CONGRESS 281 (emphasis in the original).
441 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).
442 Amar & Amar, supra note 431, at 116.
443 Id.
444 Manning, supra note 431, at 144-45.
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 weighed in favor of 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 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.

Madison had a reason for keeping members of Congress out of the line of succession that remained relevant after the creation of the vice presidency: he did not want a member of Congress serving as Acting President because he worried that that person would delay a new election. Madison’s opposition to the Succession Act of 1792 reflected his consistent position, even it is not easily squared with the text.

In contrast, 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 – whether he was doing so through his Preamble or his qualifications clause, which gave the Houses power to establish requirement for membership – and that position would suggest 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 constitutional text (even before the Committee of Style began its work) as permitting congressional officers 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 of the clause that he already gave it.

Alternately, 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.

It is also noteworthy that, in the debates about the Presidential Succession Act, the Federalist Congressmen read “officer” to mean “officer,” where Republicans read “officer” as meaning “officer of the United States” (and sometimes erroneously asserted that the constitutional language was “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. But this is not a convincing explanation: the Federalists could have advanced their partisan interests by fighting to place the Secretary of Treasury (Hamilton)

in the line of succession after the Vice President. The fight over succession is, however, consistent with a larger difference in constitutional interpretation: In this instance, as in others, the Federalists were carefully parsing constitutional text, whereas Republicans were 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.\textsuperscript{446} 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 had not prevailed in the floor debates about the scope of impeachment, he had prevailed over strong opposition in securing the decision that the trial of the impeached official would be 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 (eliminating the possibility that there would be other possible fora for trial).

1. **High Crimes and Misdemeanors**

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

Article X, sec. 2: He [the President] shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason or bribery or other high crimes and misdemeanors against the United States. . . . \textsuperscript{447}

*Report of Committee of Style:*

Article II, sec. 4: The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.\textsuperscript{448}

Morris dropped the phrase “against the United States.” “[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, and it has been raised more recently with respect to

\textsuperscript{446} See Part II.b.2, supra.
\textsuperscript{447} 2 FARRAND, supra note 1, at 575.
\textsuperscript{448} Id. at 600.
President Trump (although it was not at issue in his impeachment trial). The issue is whether the language of the Constitution makes impeachable activity that is criminal (or wrong, although not criminal, in some significant way) but that is not related to the President’s performance in office. Thus, scholars have debated whether lying to a grand jury about an affair or financial crimes related to business activities would be impeachable.449

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 of Style 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 the grounds of redundancy.”450 Professor Jack Rakove, another leading adherent of this view, has observed 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.451 This approach, which has been called the “executive function” approach, contends that, despite the change in language, the President can only be impeached for acts related to the exercise of his office, not to personal acts.452 Like Rakove, Professor Jonathan Turley, the leading voice on the other side of the originalist debate during the Clinton impeachment (although the leading academic advocate against the impeachment of President Trump), has acknowledged that Morris “represented the original extreme wing on impeachment, opposing any impeachment for the chief executive.”453 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.454

What these accounts both miss is that, as discussed above,455 Morris changed his mind about impeachment. He initially opposed it, but ultimately was one of the delegates who favored a broad conception of impeachable offenses:


450 SUNSTEIN, supra note 449, at 78.
451 Rakove, supra note 449, at 687 n.25.
452 The term “executive function” is Professor Jonathan Turley’s (although he is a critic of this approach). Turley, The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythology, supra note 449.
453 Id. at 1814.
454 Id. at 1813-14.
455 See supra Section II.B.
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 against it by displacing him. . . . He ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment. 456

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 misdemeanours 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. 457 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 “high crimes and misdemeanors” as a narrowing substitute. 458 The problem with this account is that, according to Blackstone, maladministration is one example of “high crimes and misdemeanors.” 459 Thus, under one view, Mason “snookered” 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, rather than relying on British precedent. While maladministration might be impeachable in Great Britain, the House and Senate might determine that it was not a “high crimes and misdemeanors against the United States.” In contrast, Morris deletion of “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 only impeachment of the Federalist era and the first

456 2 FARRAND, supra note 1, at 68-69.
457 He spoke on behalf of Mason’s proposal that “maladministration” be grounds for impeachment. 2 FARRAND, 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 State Constitution of 1777 (of which he was one of the principal drafters) made “mal and corrupt administration” impeachable. N.Y. CONST. OF 1777, ART. XXXIII.
458 Rakove, supra note 449, at 687.
459 BLACKSTONE, supra note 324, at *121.
impeachment under the Constitution, 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. 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 officers were alone contemplated . . .” House Manager Congressman Bayard, a Federalist, responded with an appeal to text, “There is not a syllable in the constitution that confines impeachment to official acts. . . .” The Senate ultimately acquitted Blount, holding that it lacked jurisdiction. 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. 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 reflecting a determination that a Senator is not impeachable. Moreover, even as Blount was acquitted, there had been significant support for conviction, with a majority of Federalist Senators voting against Blount. The critical point is that there were competing readings of the text, and, once again, the Federalist position was to parse the text closely: “There is not,” as Congressman Bayard said, “a syllable in the constitution that confines impeachment to official acts. . . .”

2. Trial by the Senate

Proceedings of the Convention Referred to the Committee of Style and Arrangement: Article IX, sec. 1: The Senate of the United States shall have power to try all impeachments . . .

Report of Committee of Style: Article I, sec. 3, cl. e: The Senate shall have the sole power to try all impeachments. . .

461 See Buckner F. Melton, Jr., The First Impeachment 156 (1990).
462 8 Annals of Congress 2269 (1799).
463 Id. at 2261.
464 The competing positions on whether the result in the Blount impeachment case means that members of Congress cannot be impeached were recently presented in the Quinnipiac Law Review. See Benjamin Cassady, “You’ve Got Your Crook, I’ve Got Mine”: Why the Disqualifications Clause Doesn’t Always Disqualify, 32 Quinnipiac L. Rev. 209, 220 (2014) (members of Congress are not impeachable); Buckner F. Melton, Jr., Let Me Blunt: In Blount, the Senate Never Said that Senators Are Not Impeachable, 33 Quinnipiac L. Rev. 33, 35 (2014) (rejecting this view); Seth Barrett Tillman, Originalism and the Constitution’s Disqualifications Clause, 33 Quinnipiac L. Rev. 59, 71 (2014) (finding the view that Senators are not impeachable “reasonable”).
465 Melton, supra note 461, at 36.
466 8 Annals of Congress 2261 (1799).
467 2 Farrand, supra note 1, at 572.
468 Id. at 592.
Morris added the word “sole.” Unlike other changes, this is not an instance in which he is trying to alter the result of a vote. Rather, he is consolidating his 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.” Pinckney agreed with Madison and was also concerned that trial in the Senate would “render[] the President too dependent on the Legislature.” Morris countered that “[t]he Supreme Court were too few in number and might be warped or corrupted.” Morris prevailed by a vote of nine to two.

This clause was at issue in United States v. Nixon. Judge Nixon argued that the Supreme Court could review his Senate trial despite the impeachment judgment trial’s provision making the Senate the “sole” trial authority. According to Nixon, the Committee of Style’s addition of the word “sole” was a “cosmetic edit” without substance. The opinion found against the judge on several grounds. Significantly, it relied on the Powell Court’s holding that “the Committee of Style had no authority from the Convention to alter the meaning of the Clause,” but, at the same time, held that “we must presume that the Committee’s reorganization or rephrasing accurately captured what the Framers meant in their unadorned language.” The Court is assuming that the two versions of the clause have the same meaning, and this approach will be discussed in more detail below. It is, however, the one instance among all the changes Morris made 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.

The addition of “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.” 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

469 Id. at 551.
470 Id.
471 Id.
472 Id.
474 Id. at 231.
475 Id. (quoting Powell v. McCormack, 395 U.S. 486, 538-39 (1969)).
476 Id.
477 See Section IV.B, infra.
478 2 Farrand, supra note 1, at 551.
the Senate). Morris is here revising the constitutional language so that his victory on the floor will 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 its treatment of the judiciary (although he did not specify what exactly he had done). During the floor debates, Morris had been a fierce advocate of a strong federal judiciary, and 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); the text did not give federal courts the power of judicial review. 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 and Arrangement*

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

*Report of Committee of Style*

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.

Morris’s crafting of three parallel articles with three (largely) parallel vesting clauses has already been discussed. It moved forward his desire to elevate the judiciary (and the executive) to equal stature with Congress. 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

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479 3 id. at 420 (“On that subject [the judiciary], conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, not shock their self-love). For discussion, see text accompanying note 74.
480 See Part II. C.
481 2 FARRAND, supra note 1, at 575.
482 Id. at 600.
483 See text accompanying notes 262-64.
be empowered to institute inferior tribunals.” In explaining this language, Wilson and Madison said it gave Congress “discretion . . . to establish or not establish” lower federal courts. The Committee of Detail then wrote the language quoted above, which also reflected the Madisonian Compromise’s vesting of discretion in Congress to create (or not create) lower federal courts. On the Committee of Style, Morris wrote text to reverse this decision. Consistent with his commitment to a strong judiciary, national power, and his support of a requirement that Congress create lower federal courts, he devised language best read to mandate the creation of lower federal courts. 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 (consistent with the Madisonian Compromise) contended that the Constitution permitted Congress to empower state courts to act as federal courts (although he also argued that this was unwise). But Morris had drafted text that was repeatedly invoked as mandating the congressional obligation to create lower federal courts. Congressman William Smith, the “primary spokesperson for the federalists” argued that the word “shall” and the text as a whole mandated creation of lower federal courts:

The words, 'shall be vested,' have great energy, they are words of command; they leave no discretion to Congress to parcel out the Judicial powers of the Union to State judicatures . . . . Does not, then, the constitution, in the plainest and most unequivocal language, preclude us from allocating any part of the Judicial authority of the Union to the State Judicature.

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

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484 1 FARRAND, supra note 1, at 124. For prior discussion of the Madisonian Compromise, see text accompanying notes 136-42.
485 1 FARRAND, supra note 1, at 124.
486 See 2 id. at 575 (quoted at text accompanying note 409).
487 See supra text accompanying notes 136-42.
489 Fletcher, supra note 488, at 941.
490 1 ANNALS OF CONGRESS 850.
491 Id. at 835.
492 Id. at 860.
His [Ames’s] wish was to establish this conclusion, that offences against statutes of the United States, and actions, the cognizance whereof is created de novo, are exclusively of Federal jurisdiction . . . . These, with the admiralty jurisdiction, which it is agreed must be provided for, constitute the principal powers of the district courts.493

Most probatively, Morris read his own text to require establishment of lower federal courts. In 1802, when he was a Senator, during the debate over the repeal of the Judiciary Act of 1801, he read the Article III vesting clause and then stated:

This, therefore, amounts to a declaration, that the inferior courts shall exist. . . . In declaring then that these tribunals shall exist, it equally declares that the Congress shall ordain and establish them. I say they shall; this is the evident intention, if not the express words, of the Constitution. The Convention in framing, the American people in adopting, that compact, did not, could not presume, that the Congress would omit to do what they were thus bound to do.494

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 the creation of 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, “[T]he Committee of Style robbed Congress of discretion whether or not to create inferior federal courts and left only discretion as to what courts were to be set up and make changes.”495 Focusing on the constitutional text, he observed:

The effect of eliminating the words "as shall, when necessary" was to deprive Congress of power to decide upon the need for inferior courts and so to give full imperative effect to the declaration that "The judicial power . . . shall be vested in one supreme court, and in such inferior courts . . . ." That the Committee intended to convey the sense of an imperative is apparent from the choice of the most forceful words in the contemporary constitutional vocabulary—"ordain and establish"—to direct what Congress was to do.496

493 Id. at 808.
494 11 id. at 79. For discussion, see Michael Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 WISC. L. REV. 39, 63.
495 JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNING TO 1801 at 243, n.228 (1971).
496 Id. at 247.
More recently, Professor James Pfander advanced a similar reading of the text. “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.” Although he does not focus on drafting history, under Pfander’s reading of the clause, Morris has converted language of discretion to language mandating “the creation of a distinctive set of lower federal courts.”

Goebel’s argument that Congress had a constitutional obligation to create lower federal courts under the judicial powers clause has been the subject of overwhelming criticism. Some scholars have disagreed with Goebel because they read the text of the clause differently. “[I]t remains to be seen that the words 'ordain and establish' are significantly more imperative than the phrasing of the original draft,” Professors Redish and Woods have contended. But the principal criticism of the Goebel reading is that it is inconsistent with the Madisonian Compromise. For example, Professor Robert Clinton has written, “Goebel's claim seems insupportable insofar as it suggests the tacit adoption by the Committee of a mandatory obligation by Congress to establish inferior federal courts. Such a conclusion is contradicted by the almost unquestioned adherence of the Convention to the Madisonian compromise and the limited charge of the Committee of Style “to revise the style of and arrange the articles agreed to by the House.” Professor David Engdahl has argued that “Goebel's attribution of deft sleight-

Two well-known arguments that appear similar to Goebel’s, but that are in fact dissimilar should be noted. Justice Story in Martin v. Hunter’s Lessee finds a constitutional mandate to establish lower federal courts, but Story does not base his position on the language Goebel (“may from time to time”) is construing. 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.” Martin v. Hunter’s Lessee, 14 U.S. 304, 330 (1816).

Similarly, Professor Amar in his classic, A Neo-Federalist View of Article III, 65 B.U. L. Rev. 205 (1985), argues for a broad range of cases in which federal jurisdiction is mandated, but, unlike Goebel, he argues that there is no mandate for Congress to create lower federal courts. Id. at 206 (“Thus, following Hart, I seek to establish that the Framers did not intend to require the creation of lower federal courts; but, following Story, I shall show that they did require that some federal court -- supreme or inferior -- be open, at trial or on appeal, to hear and resolve finally any given federal question, admiralty, or public ambassador case.”).


of-hand to subvert the June 5th compromise dishonors the Style Committee members and supposes the other delegates fools."500

Like these academic commentators, the Supreme Court, in opinions by its leading originalists, has also assumed the text of the Constitution’s vesting clause embodies the Madisonian Compromise. Thus, 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.”501 In 2018, in Patchak v. Zinke,502 Justice Thomas, writing for a plurality of the Court in upholding a jurisdiction stripping statute, found that congressional statutes stripping federal courts of jurisdiction were constitutional because of the Madisonian Compromise. “The so-called Madisonian Compromise,” he stated, “resolved the Framers’ disagreement about creating lower federal courts by leaving that decision to Congress.”503

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. Indeed, even Goebel, in arguing that the clause was inconsistent with the Convention’s prior decision, fails to even mention Morris or to recognize that it is part of a larger pattern of revision by Morris.

2. Law of the Land Clause

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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.504

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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

503 Id. at 906.
504 2 FARRAND, supra note 1, at 575.
be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.\textsuperscript{505}

The Constitution does not have a textual provision that states explicitly that federal courts have the power to invalidate federal statutes. As a result, 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 \textit{Marbury}. As Bickel declared, “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 decision in the case of \textit{Marbury v. Madison.”}\textsuperscript{506}

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 exercises of judicial review and popular governance gives rise to the “countermajoritarian difficulty.”\textsuperscript{507} As Professor Barry Friedman has observed, “The ‘countermajoritarian difficulty’ has been the central obsession of modern constitutional scholarship.”\textsuperscript{508}

This account overlooks a great deal. There was a significant body of judicial review caselaw before the federal Constitutional Convention, the overwhelming 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 \textit{Marbury}.\textsuperscript{509} Even if the view outside academia is that \textit{Marbury} established judicial review, because of all of these factors, the conventional view among academics is that judicial review was established before \textit{Marbury}.\textsuperscript{510}

But 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.\textsuperscript{511} This standard understanding, however, overlooks a critical part of the Constitution—the law of the land language, which Morris added to the Constitution. As a handful of scholars have recently

\begin{footnotesize}
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  \item \textsuperscript{505} \textit{Id.} at 603.
  \item \textsuperscript{506} \textsc{Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics} 1 (1962).
  \item \textsuperscript{507} \textit{See id.} at 16 (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”).
  \item \textsuperscript{509} \textit{See Treanor, supra} note 184 (discussing origins of judicial review).
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recognized in challenging the conventional wisdom, the law of the land provision authorizes federal court review of federal statutes for constitutionality. 512

The pattern with respect to the history of the language providing the basis for judicial review should be familiar by now. Morris (and others who would be on the Committee of Style) had supported judicial review on the Convention floor, but the text referred to the Committee did not explicitly provide for judicial review. 513 Morris and the Committee revised the text in a way that advanced their ends (adding the “law of the land” formulation). Committee members (Hamilton and Wilson) subsequently drew on this language in contending that the Constitution provided for judicial review.

The relevant clause in the Committee of Detail’s draft had mandated that state courts be governed by the federal constitution: “This 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.” The exclusive focus is on the states and their courts. The Constitution is “the supreme law of the several States.” By providing that “[t]his constitution . . . shall be the supreme law of the land,” the Committee of Style dramatically altered the sentence’s import. Federal, as well as state, judges are now required to review statutes for consistency with the federal constitution, which is “the supreme law of the land.”

The provision was soon used as the basis for judicial review, with Committee of Style members playing a crucial role. 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.” 514 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," the Committee of Style dramatically altered the sentence’s import. Federal, as well as state, judges are now required to review statutes for consistency with the federal constitution, which is “the supreme law of the land.”

In his lectures on the law, James Wilson also invoked the “law of the land” provision as the basis for judicial review. He stated that, when a congressional statute was "manifestly repugnant to some part of the constitution," a federal court would have "the right and . . . the duty" to invalidate it because the "supreme power in the United States has given one rule: a


513 See text accompanying note 432.


515 THE FEDERALIST NO. 33 (Hamilton), supra note 97, at 201-02 (emphasis in original). While Hamilton in Federalist 33 does not explicitly invoke judicial review to invalidate unconstitutional statutes, it is implicit, particularly in light of his embrace of judicial review of congressional statutes in Federalist 78. See Bradford Clark, The Constitutional Origins of Judicial Review: Unitary Judicial Review, 72 GEO. WASH. L. REV. 319, 331 & n.84 (2003).

516 THE FEDERALIST NO. 33 (Hamilton), supra note 97, at 202.
subordinate power in the United States has given a contradictory rule: the former is the law of the land: as a necessary consequence, the latter is void, and has no operation.”

As a Supreme Court justice, Wilson deployed this same line of argument. In 1792, the Supreme Court first confronted the question of whether to enforce an unconstitutional statute in *Hayburn’s Case*. When riding Circuit, Wilson, along with Justice Blair and Judge Peters, invoked the law of the land provision as support for their decision to refuse to follow the Invalid Pensioners Act.

Although no committee member was involved, the “law of land” provision also was critical to another important pre-*Marbury* judicial review case, *Van Horne’s Lessee v. Dorrance*. Justice Paterson, a former convention delegate, told the jury that:

[T]he form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established … . It contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature … . If a legislative act oppugns a constitutional principle … in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void.

Similarly, although it does not play a central role in the decision, Chief Justice Marshall invoked the law of provision as his final argument in *Marbury*:

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

Once again, conventional wisdom among academic fails to recognize either that Morris changed the meaning of the text or the way in which the text was read in the founding.

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518 See *Hayburn’s Case*, 2 U.S. 409, 410 n.2 (1792) (“This Constitution is ‘the Supreme Law of the Land.’ This supreme law ‘all judicial officers of the United States are bound, by oath or affirmation, or support.’”). For discussion of Justice Wilson’s opinion in *Hayburn’s Case*, see Maeva Marcus and Robert Teir, Hayburn’s Case: A Misinterpretation of Precedent, 1988 Wis. L. Rev. 527, 533-34; Treanor, supra note 184, at 533-38.


generation. While the conventional wisdom among academics is that the text of the Constitution does not provide a basis for judicial review of federal statutes by federal courts, Morris, a champion of judicial review, changed the law of the land clause in a way that provided a basis for the exercise of judicial review and committee member Hamilton, convention delegates James Wilson and William Paterson, and Chief Justice Marshall all read the law of the land language as justifying judicial review.

I. Slavery and New States

The most vocal opponent of slavery during the convention debates, Morris’s had bitterly and unsuccessfully opposed the three-fifths clause\(^\text{521}\); at the same time, without anyone noticing, he had succeeded in slyly inserting language in the territories clause that could be used to keep potential slave states in permanent territorial status.\(^\text{522}\) On the Committee, he moved against slavery in ways that similarly reflected his fight against increasing the power of slave states in Congress, his bitter opposition to slavery’s morality, and his drafting skill. He altered the language of the Fugitive Slave clause to removed the Constitution’s one textual endorsement of slavery as moral. As he did with the territories clause, he subtly changed the language of the new states clause in 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 and Arrangement*

Article XV: . . . . If any Person bound to service or labor in any of the United States shall escape into another State, He or She shall not be discharged from such service or labor in consequence of any regulations subsisting in the State to which they escape; but shall be delivered up to the person justly claiming their service or labor.\(^\text{523}\)

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Article IV, Sect. 2 . . . : No person legally held to service or labour in one state, escaping into another, shall in consequence of regulations subsisting therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labour may be due.\(^\text{524}\)

While no delegate at the convention had expressed opposition to slavery more forcibly than Morris,\(^\text{525}\) he had little room to edit in confronting the clauses of the Constitution which

\(^{521}\) See supra Part II.E.1.

\(^{522}\) See supra Part II.E.2.

\(^{523}\) 2 FARRAND, *supra* note 1, at 577.

\(^{524}\) *Id.* at 601-02.

\(^{525}\) For discussion of Morris’s opposition to slavery at the convention, see *supra* text accompanying notes 177-84.
concerned slavery because the provisions concerning slavery were the subject of fierce scrutiny by pro-slavery delegates. However, he did make one subtle, but significant change.

As has been discussed, the fugitive slave clause, like the three-fifths clause and the slave trade clause, did not use the word “slave.” The fugitive slave clause referred to “any Person to service or labor in any of the United States.” The failure to use the word slave reflected a conscious choice. As Madison later wrote, “[S]ome of the States . . . had scruples against admitting the terms ‘slaves’ into the instrument,” and during the convention he said that he “thought it wrong to admit in the Constitution the idea that there could be property in men.”

Yet, while the drafters chose not to use the word “slave,” as the fugitive slave clause emerged from the Committee of Detail, it provided that the captured slave “shall be delivered up to the person justly claiming their service or labor.” The use of the word “justly” implied that the ownership of an enslaved person was “just.” This was the only point in the text of the entire Constitution that referred to slavery as just or moral.

Morris, the opponent of slavery, eliminated that reference. As it emerged from the Committee of Style, the clause provided that the captured slave “shall be delivered up on claim of the party to whom such service or labour may be due.” Morris had eliminated the word “justly.” The change was profound. As historian Sean Willentz has recently written, “The committee’s revision . . . removed the possible implication that there was justice in slavery.”

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 favoring the idea that slavery was legal in a moral view,” and, as a result the phrase “under the laws thereof” was substituted for the word “legally.”

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526 See supra text accompanying notes 230-32.
527 Proceedings of the Convention Referred to the Committee of Style and Arrangement, art. XV, in id. at 577.
528 See 3 FARRAND, supra note 1, at 436 (Madison’s statement that the word “slave” did not appear in the Constitution because “some of the States . . . had scruples against admitting the terms ‘slaves’ into the instrument”).
529 2 FARRAND, supra note 1, at 417.
530 WILLENTZ, supra note 237, at 111,
531 Id.
532 2 FARRAND, supra note 1, at 628. 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, sec. 2, cl. 3
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 delgates’ argument against “legally” – that it should be removed because it suggested that “slavery was legal in a moral view” – means that because of Morris’s removal of “justly” and the convention’s removal of word “legally” the two words suggesting slavery’s morality were removed from the Constitution.

These changes were to prove consequential. During the antebellum period, while some abolitionists such as William Garrison attacked the Constitution as a pro-slavery document, others abolitionists argued that the Constitution did not sanction slavery. It was, according to Frederick Douglas, “A GLORIOUS LIBERTY DOCUMENT.” By removing the Fugitive Slaves clause implicit linkage of slavery and morality, Morris’s elimination of the word “justly” made that argument possible.

**J. New States Clause**

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

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

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

Morris did not want to have 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 the addition of new states would tip the balance of national power in favor of slavery. During the course of the convention debates, Morris successfully revised the Territories Clause with the goal of barring

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534 Id. at 227 (quoting Douglas).  
535 Id. at 603.  
536 2 FARRAND, supra note 1, at 578.  
537 See supra text accompanying notes 186-206.
the creation of new states from territories, but he had written it in such a way that the others framers had not realized the clause’s meaning when they adopted it.\footnote{538 See id. at TAN 63-64.}

On the Committee of Style, he revised the new states clause to advance these same ends by prohibiting the creation of new states from current states. The previously adopted version of the new states clause—which reflected a Committee of Detail proposal as modified by Morris—permitted new states to be created within the territory of existing states if the State legislature and Congress approved.\footnote{539 For the relevant debate, see 2 FARRAND, supra note 1, at 455.} Working on the Committee of Style, 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.

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” becomes the independent clause “no new state shall be formed or erected within the jurisdiction of any other state.” The provision about formation of new states through legislative and congressional consent now only applies to the formation of new states “formed by the junction of two or more states, or parts of states.” As with the general welfare clause, Morris has converted a comma into a semicolon to change constitutional meaning.\footnote{540 In the late eighteenth and early nineteenth century, the distinction between the comma and the semicolon was the same as it is today, with a semicolon signaling a sharper break than a comma. See, e.g., WILLIAM CHAUNCEY FOWLER, ENGLISH GRAMMAR 743 (1855) (“The comma (,) denotes the smallest division in 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.”); LINDLEY MURRAY, ENGLISH GRAMMAR SIMPLIFIED 154 174 (1846; 1st ed. 1795) (“When a longer pause than a comma is required, and yet the sense is incomplete, a semicolon may be used . . . .”); James E. Pfander, Marbury, Original Jurisdiction and the Supreme Court’s Supervisory Power, 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 caselaw was inconsistent on whether punctuation should be considered part of a statute. Compare Black v. Scott, 3 F. Cas. 507, 510 (C.C.D. Va. 1828) (No. 1464) (Marshall, Circuit Justice) (“In the printed code, the comma is placed 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) (observing that “[p]unctuation is a most fallible standard by which to interpret a writing,” but adding that “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, Preemption, 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. Gallatin’s charge that Morris had dishonestly changed the punctuation of the general welfare clause and that Sherman had uncovered the trick, and Madison’s careful effort to show that the correct punctuation was a comma reflect the recognition that this was a consequential matter. See supra text accompanying notes 71-77.}

The provision about formation of new states through legislative and congressional consent now only applies to the formation of new states “formed by the junction of two or more states, or parts of states.” As with the general welfare clause, Morris has converted a comma into a semicolon to change constitutional meaning.\footnote{540 In the late eighteenth and early nineteenth century, the distinction between the comma and the semicolon was the same as it is today, with a semicolon signaling a sharper break than a comma. See, e.g., WILLIAM CHAUNCEY FOWLER, ENGLISH GRAMMAR 743 (1855) (“The comma (,) denotes the smallest division in 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.”); LINDLEY MURRAY, ENGLISH GRAMMAR SIMPLIFIED 154 174 (1846; 1st ed. 1795) (“When a longer pause than a comma is required, and yet the sense is incomplete, a semicolon may be used . . . .”); James E. Pfander, Marbury, Original Jurisdiction and the Supreme Court’s Supervisory Power, 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 caselaw was inconsistent on whether punctuation should be considered part of a statute. Compare Black v. Scott, 3 F. Cas. 507, 510 (C.C.D. Va. 1828) (No. 1464) (Marshall, Circuit Justice) (“In the printed code, the comma is placed 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) (observing that “[p]unctuation is a most fallible standard by which to interpret a writing,” but adding that “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, Preemption, 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. Gallatin’s charge that Morris had dishonestly changed the punctuation of the general welfare clause and that Sherman had uncovered the trick, and Madison’s careful effort to show that the correct punctuation was a comma reflect the recognition that this was a consequential matter. See supra text accompanying notes 71-77.}
A literal reading of his text would have barred the admission of the slave state of Kentucky (which would be formed out of Virginia) and Tennessee (which would be 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. Kentucky and Tennessee, but not Vermont, were “within the jurisdiction of any other state.” The balance of free states would increase by one, rather than decrease by one. It was remarkably elegant.

At the same time, this reading is subtle, and there is little evidence from the early republic bearing on how to read the clause. Madison in Federalist 43 briefly noted that states could be created through partition. Antifederalist Luther Martin read the provision as Madison did. 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. 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 Madison’s readings of the constitutional text were repeatedly inconsistent with readings 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 the second clause of Article IV, Section 3, and President Washington urged Kentucky’s admission. The records of the congressional discussions of Kentucky’s admission indicate that no one raised the constitutional issue, one way or the other. Thus, Kentucky became a state through partition, and no one objected.

But Tennessee’s admission followed a different path and may reflect a view that the Kentucky path was constitutionally problematic. Rather than authorizing the creation of the new state of Tennessee 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.

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541 My reading is that Vermont was admitted pursuant to the first clause of Article IV, sec. 3 (and, as a result, 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, sec. 3. See Vermont v. New Hampshire, 289 U.S. 593, 607 (1933).

542 THE FEDERALIST NO. 43, supra note 97, at 281 (James Madison) (Madison referred to “[t]he particular precaution against the erection of new States, by the partition of a State without its consent”).


544 See Kesavan & Paulsen, supra note 8, at 253-58.

545 1 Stat. 189 (Feb. 4, 1791).


547 Kesavan & Paulsen, supra note 8, at 378.
Tennessee was finally admitted as a state in 1796. According to Kesavan and Paulsen in their 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.”

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). 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.

The issue does, however, have modern significance. The congressional statute admitting Texas gives it the right to divide into four states. After Kesavan and Paulsen wrote a law review article noting this power and suggesting that Texas seize upon it, the issue has received playful attention, with Nate Silver offering a political analysis of the political consequences of partition and Malcolm Gladwell devoting a podcast to the legal research. 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, although the California Supreme Court blocked the initiative for procedural reason.

The limited scholarly literature on the partition question follows familiar lines. Kesavan and Paulsen have concluded that partition is constitutionally permissible because they see the text as ambiguous, because the drafting history supports partition, and because the Supreme Court’s decision in Nixon holds that the Committee of Style had no power to change constitutional meaning. Similarly, Dean McGreal has written: “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.”

548 Id.
549 Id. at 380.
550 Id. at 297, 363.
551 Joint Resolution for Annexing Texas to the United States, J. Res. 8, 28th Cong, 5 Stat. 797, 798 (1845).
554 Malcolm Gladwell, Divide and Conquer, REVISIONIST HISTORY (Episode 1, Season 3) (May 17, 2018).
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, and it would bar partition.

K. Engagements Clause

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

Article VII, Sect. I . . . All debts contracted and engagements entered into, by or under the authority of Congress shall be as valid against the United States under this constitution as under the confederation.558

Report of Committee of Style

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.559

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 & fulfil the engagements <of the United States>.”560 While his motion was successful, the Convention soon backtracked. Mason objected to the provision’s imposition of an obligation to repay all debts: “The use of the term shall will beget speculations and increase the pestilential practice of stock-jobbing.”561 Supporting Mason, Randolph proposed the language noted above. (“All debts contracted and engagements entered into, by or under the authority of Congress shall be as valid against the United States under this constitution as under the confederation.”). 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.562

Morris’s language for the Committee did not overturn the Convention’s decision that repayment was not mandatory. He did, however, neatly expand the scope of the clause in an important way. The previously adopted language authorized assumption only of debts incurred “by or under the authority of Congress.” Implicitly, that language did not allow assumption of state debts that had not been authorized by Congress. However, the Committee of Style’s

558 2 FARRAND, supra note 1, at 571.
559 Id. at 601.
560 Id. at 377.
561 Id. at 413 (emphasis in original).
562 Id. at 414.
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. As Secretary of Treasury, Alexander Hamilton used this power to assume state revolutionary war debts, regardless of whether they had been authorized by Congress, and Federalist members of Congress agreed that the Constitution gave the national government this power.

L. Conclusion

While the mandate of the Committee of Style was limited to style, as drafter for the Committee Gouverneur Morris covertly challenged the results of the convention’s prior proceedings and revised a striking number of fundamentally important constitutional provisions in order to advance his constitutional agenda. He wrote text that 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, could have blocked the admission of the slave states of Kentucky and North Carolina, enabled Congress to add prerequisites for service in Congress, required “actual enumeration” of people when the census was conducted, and remove 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 in the Constitution language that Federalists (including Alexander Hamilton and James Wilson) repeatedly relied on in the great constitutional debates of the early republic. At the same time, Republicans also made textualist arguments that interpreted Morris’s text. Apart from his revival of the previously rejected contract clause, Morris did not write text that clearly 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 reading 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

Recognition of Morris’s changes has important consequences for modern constitutional law.

563 See Pfander, supra note 8, at 1291-93.
564 See 2 ANNALS OF CONGRESS 1363 (Clymer) (“assumption of the state debts appeared to him a matter of a federal complexion”); id. at 1365 (Sherman) (assumption is constitutional because state debts “are to be looked at as the absolute debts of the Union”); id. at 1371 (Gerry) (arguing for the constitutionality of assumption of the state debts).
First, it provides important support for a central critique of traditional originalism by revealing a new problem with the search for collective intent: the drafter, rather than crafting text that reflected the convention’s decisions, was writing 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, in recent cases involving Committee of Style language, the Supreme Court has repeatedly erred by either dismissing the ratified constitutional text or by assuming that the Committee of Style’s language had the same meaning as the language previously adopted by the convention. Leading academics have repeatedly adopted the latter approach. Of the members of the Court, 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 so that a public meaning originalist should reject the mainstream view among courts and academics that the Republican readings reflect the best original understanding of the constitutional text; indeed, repeatedly, 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*[^565] Justice Rehnquist’s *The Notion of a Living Constitution*,[^566] and Professor Raoul Berger’s book *Government by Judiciary*,[^567] original understanding was conceived of as *framers*’ intent with a principle focus on *drafters*’ intent – what the delegates to the Philadelphia convention meant when they wrote the constitutional text.[^568] While these writings offered a critique of the Warren Court jurisprudence and an alternative constitutional methodology to that jurisprudence, 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*[^569] and *Powell v. McCormack*[^570] the Court looked to drafters’ intent as a basis for interpreting constitutional text.

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[^568]: For a good history of the 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 556, at 1134-48.
[^569]: 272 U.S. 52, 109-10 (1926).
Indeed, in *Powell*, the Court appealed to drafters’ intent as a basis for dismissing the significance of the changes made by the Committee of Style.\(^ {571} \)

Drafters’ intent originalism has been subject to forceful critiques. Some critiques went to the legitimacy of originalism as an interpretive methodology. \(^ {572} \) 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. They have also argued the methodology is inappropriate because of the frequent sparseness of the historical record, the failure of originalism to recognize reliance interests and established practices, the bad results it can produce, and the fact that the founders often did not confront issues of contemporary importance.

But two critiques have been addressed, not to the originalist enterprise as a whole, but to drafters’ intent specifically. These critiques reflect internal critiques in which drafters’ intent is challenged as inconsistent with the premises of originalism. In *The Original Understanding of Original Intent*, Professor Jefferson Powell argued that the original interpretive understanding was that drafters’ intent was not controlling. The second critique, associated with Professor Paul Brest, 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 indeterminate intent” with respect to the clause’s meaning. \(^ {575} \) In other words, there was no shared understanding of what the words meant.

These critiques have won wide acceptance among originalists and led to “new originalism,” 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. \(^ {577} \) 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

\(^{571}\) For discussion, see supra text accompanying notes 285-86, 311-12.


\(^{575}\) Id. at 214.

\(^{576}\) Two prominent champions of the new originalism are Professor Randy Barnett, see, e.g., RANDBARNETT, *RESTORING THE LOST CONSTITUTION* (2004) and Keith Whittington, see, e.g., KEITH WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999). See also JACK BALKIN, *LIVING ORIGINALISM* (2011) (advancing a conception of new originalism and portraying it as consistent with living originalism).

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."578 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” did not adopt either the intent of drafter or ratifiers; they 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 the general point that Brest and others have identified, which is that the legislative process, with its focus on compromise, need to mask disagreement, and limited ability to anticipate future issues, does not lead to collective understanding. Rather, the problem is that, in a series of critical cases, the person who wrote this text was consciously seeking 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 was seeking to reverse those decisions.

My point here is not that the constitution should be interpreted in accordance with the drafter’s intent (i.e., 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 was doing – 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 did not grasp 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 addition, in one of the most salient constitutional law cases of recent years, Printz v. United States,579 Justice Scalia, writing for the Court, assumed that the Constitution reflects the Madisonian Compromise (even though Morris’s text departed from it),580 and, similarly, Justice Thomas in Patchak v. Zinke,581 writing for a

580 Id.
plurality of the Court, made the same assumption. 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 posited 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.

B. Relevance of the Committee of Style’s Text to current controversies

This article has revealed a series of readings of constitutional text that reflect Morris’s goals and that were employed by Federalists in early constitutional controversies. It has uncovered the Federalist Constitution. But these readings are consistently at odds with the mainstream academic view about what the original understanding of the text was. 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 view among academics is 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 impeachment clause does not extend to acts that are not official 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 indicate a state like California or 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.

In addition to the clauses where the Republican view has been accepted by modern originalists as reflecting the original understanding, 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) scholars (and 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 as they argue for a broad reading of executive power. At the same time, however, numerous other prominent scholars have dismissed the significance of this phrase, treating it as simply stylistic and crediting it with no substantive significance. A similar point can be made about the word “officer” in the presidential succession clause: some scholars have (following Madison and the Republicans) read the phrase as if it were still “officer of the United States” (as it was before the Committee of Style).

582 The following two paragraphs summarize the conclusions of Section III, supra. 583 Myers v. United States, 272 U.S. 52, 138 (1926); Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel of the Dep't of Def., Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003). A separate question is how broadly the “executive power” was understood to be at the time of the Founding. See supra Part III.b.
Style began its work), while others have (like the Federalists) argued that “officer” means “officer.”

The question then becomes what relevance this history has for the resolution of current controversies.

The first part of this section looks at the approach the Court and commentators have employed when the Committee’s language departed from previously adopted text. The final part discusses what approach courts should take.

1. Supreme Court Caselaw and Academic Commentators on the Committee of Style

In the past half century, the Supreme Court has had 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. It agreed in each case, although the cases reflect 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 change meaning. 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 focuses, appropriately, on the text of the Constitution. Even though no Justice has agreed with him, Thomas’s approach is the one that reflects the central tenet of public meaning originalism, which is that the role of courts is to apply the text that We the People adopted.

The lead Supreme Court case reflecting the first approach - disregarding the Committee of Style’s revisions - is the 1969 decision Powell v. McCormack. Writing for the Court, Chief Justice Warren disregarded the Committee of Style’s text, holding 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.” Similarly, in the 1995 decision in United States Term Limits 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.”

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, not generally considered an originalist, although Powell was not the only opinion in which Warren drew on original understanding. In light of the widespread acceptance (even among

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584 395 U.S. 486 (1969). For discussion, see supra text accompanying notes 312-13. An early case that, like Powell, dismissed the Committee of Style’s changes was Ex Parte Grossman. See 267 U.S. 87, 113 (1925) (dismissing idea that the intended sub silentio” to change the clause’s meaning). .
585 Id. at 538-39 (citation omitted).
587 Id. at 815, n.27.
588 See Trop v. Dulles, 356 U.S. 86, 99-100 (1958) (plurality opinion) (discussion of original
originalists) of the Brest and Powell critiques by 1995, however, it is more surprising that Justice Stevens relied on this approach in *Thornton* in 1995.

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 were adopting the text before them – not the secret drafting history that would not become public until Madison’s notes were published in 1840. For a public meaning originalist, the dismissal of the Constitution’s text in *Powell* and *Thornton* is 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 that same as the text referred to the Committee. In *Nixon*, the Court found that the addition of the word “sole” to the impeachment clause did not alter the clause’s meaning. 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. See *Powell v. McCormack*, 395 U.S. at 538-539. That is, we must presume that the Committee did its job. This presumption is buttressed by the fact that the Constitutional Convention voted on, and accepted, the Committee of Style's linguistic version. 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.\footnote{Id. at 231-32.}

There is a significant shift in focus here from *Powell*. In *Powell*, the Court treated the language sent to the Committee of Style as dispositive. In *Nixon*, in contrast, the Court parses the Committee of Style’s text (which had been adopted by the convention) and rejects the idea “that the second to last draft would govern in every instance where the Committee of Style added an arguably substantive word.”\footnote{Id.} Rather than disregarding the Constitution’s text, the Court embraces the presumption that the text sent to the committee and the committee’s proposal have the same meaning.

\footnote{Id. at 231-32.}

\footnote{Id.}

\footnote{Id.}

In *Utah v. Evans*, the Court’s most recent confrontation with the Committee of Style, the Court again adopted the presumption approach. The question before the Court was whether the Census Bureau’s use of sampling violated the “actual enumeration” requirement of the Census Clause. Justice Breyer held:

The 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. *Powell v. McCormack*, 395 U.S. 486, 538-539. 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.

Here, again, the Court is embracing a presumption. The fact that the Committee was not empowered to change the Constitution’s meaning “strongly suggests” that that Committee’s text has “a similar meaning” to the previously adopted text. There is “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, he repeatedly used the drafting history of the convention as evidence of what the words of the Constitution meant at the time of ratification. Indeed, Justice Scalia joined the majority opinions in *Nixon* and *Thornton*.

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592 Id. at 475.
595 Justice Scalia did not join the majority in *Evans*. He wrote a separate dissent, arguing that the plaintiff lacked standing. See 526 U.S. at 513.
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*. Thus, Cass Sunstein applied it, finding the Committee’s deletion of the phrase “against the United States” from the impeachment clause as without legal significance, and he and Professor Lessig have taken a similar approach to the concluding that the addition of “herein granted” to the Article I vesting clause did not expand executive power. Professor Amar and Dean Amar read the Presidential Succession Clause as if the words “of the United States” had not been deleted.

Professor Michael Paulsen and Vasan Kesavan have offered the most sustained treatment of this presumption as a guide to interpretation. They contend that:

[T]he 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.

As Kesavan and Paulsen have written, under this approach, the drafting history serves as “an extratextual dictionary of constitutional meaning.”

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 was not seeing to simply “put the finishing touches on the Constitution.” He was not seeking to “accurately capture[] what the Framers meant in their unadorned language,” *(Nixon)* or to fashion “the substantive equivalent of the draft phrase” *(Evans)*. He was selecting

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596 Sunstein, *supra* note 431, at 78. (“As its name suggests, the Committee of Style 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 the grounds of redundancy.”)

597 Lessig & Sunstein, *supra* note 355, at 48-49

598 Amar & Amar, *supra* note 431, 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.”).

599 Kesavan & Paulsen, *supra* note 556, at 1208.

600 *Id.* at 1208-09.

601 *Id.* at 1198.

602 KLARMAN, *supra* note 11, at 256.


words that changed the Constitution’s meaning. Assuming continuity of meaning is a mistake. 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 the Article I 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 was trying to change the meaning of these clauses. Morris made possible new textualist arguments about what the Constitution meant, and 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 this project of comparing the Committee of Style text to previously approved text, I have repeatedly discovered that changes that at first appeared to me to be cosmetic 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 much academic argument. I believe it is likely that further research will reveal that Morris changed other clauses to advance his constitutional goals. 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. In particular, 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. At the same time, he was a drafter with remarkable awareness of how words would be construed. This Article reveals a series of clauses where an original meaning of the text has been wholly or largely lost. Focus on Morris helps us uncover readings at the time of ratification and the early republic that have disappeared from our consciousness.

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

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605 For a discussion of some of the other clauses where Morris changed text, see note 210. Although I have not found any of these clauses to reflect intentional changes of meaning, further research may produce a different result.
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.”

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.”

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,” 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 the core principle of the public original meaning school approach because its focus is on the interpretation of the words adopted by the ratifiers as “We the People” would have understood them. Thus, from the vantage point of the public meaning originalist, the Thomas-Manning approach is the correct one.

At the same time, much of the text that Morris wrote did not have a clear meaning. It was ambiguous (in order to avoid provoking a fight by the majority of the delegates who held a competing view and who had adopted the text Morris was changing.) Thus, the question becomes how to interpret text that can be read in different ways, and that topic that is the subject of the next part.

i. The Text, the Construction Zone, and the Federalist Constitution

Recovering original public meaning of Committee of Style text at the distance of more than two hundred years is complicated. It requires recognition of three points. First, the drafter of the Committee had a project of systematically changing constitutional meaning to advance his own constitutional vision. Second, the constitutional text he drafted was capable of competing interpretations (one he favored and one he opposed). Third, in general, the constitutional text fits the reading he favored better than the reading he opposed.

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,” “[I]t

606 Evans, 536 U.S. at 495-96 (Thomas, J., dissenting).
607 Manning, supra note 431, at 144.
608 Evans, 536 U.S. at 496 (Thomas, J., dissenting).
609 3 FARRAND, supra note 1, at 404. For discussion, see text accompanying note 64.
became necessary to select phrases which expressing my own opinions would not alarm others."

Implicit in these statements, however, is not only the idea that the text he crafted was opaque, but the idea that, when they were carefully read, this text supported his constitutional vision better than the alternative vision held by other delegates. “I went so far as circumstances would permit to establish the exclusion.” He “select[ed] phrases, which express[ed] my own notions.” 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.”

Morris’s changes were subtle (like adding the words “herein granted” to the Article I vesting clause or dropping the word “private” from the contracts” or changing “the law of the several states” to “the law of the land”). 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 the Article III 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, in cases where Republicans did not engage with text, they also do 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 as authorization for 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 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.” If the answer is no, the originalist moves to the “construction zone.” In the construction zone, ones looks to sources.
beyond the text – like structure, constitutional values, or precedent – to resolve controversies pitting two plausible originalist readings against each other.

The Federalist readings of the clauses discussed here are sufficiently complete explications of the text so that, for an originalist, these clauses are either 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” and Federalists such as Hamilton and Chief Justice Marshall as “loose constructionists.” 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; Republicans treated it as stylistic. Madison, in his Helvidius essay, ignored Hamilton’s argument about the “herein granted” text. 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 the Article III vesting clause are best read as words of obligation, as the Federalists read them when arguing

614 For classic treatments of the loose construction/strict construction divide, see LANCE BANNING, THE JEFFERSONIAN PERSUASION 293–333 (1978); RAUL BERGER, FEDERALISM: THE FOUNDERS’ DESIGN 66-76 (1987); Powell, supra note 586, 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 GIEAPP, 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, 131 YALE L.J. (forthcoming coming 2020). Professor Peterson makes a strong argument that the Federalist approach to constitutional interpretation was grounded in public legislation model and the Republican model was based on an analogy to private legislation).

This Article does not challenge the Peterson focus on the public legislation/private legislation model. Rather, it flips the dichotomy which 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, with respect at least to Morris’s text, the Federalists closely parsed the constitutional language, while Republicans were less attentive to specific word choice.

615 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 connote 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 Ramsey and Prakash, supra note 327 (advancing the vesting clause thesis of broad executive power) with Mortenson, supra note 327, at 1169 (executive power “limited to implementation of legal norms created by some other authority”).
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 where the Republican and Federalist readings are equally plausible. The new states clause, the territories clauses, the qualifications clause fall into this category. In the clauses listed in the previous paragraph, the Federalist readings are more consistent with the words themselves of the Constitution 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. As he crafted text over three days, Morris advanced his constitutional vision with extraordinary skill. He was, in the words of fellow Committee of Style members Madison and Hamilton, a “genius,”616 and the project he was pursuing was of the most fundamental importance. He was drafting the Federalist Constitution.

Conclusion

In 1798, Congressman Gallatin charged on the floor of the House that Gouverneur Morris, the drafter for the Committee of Style, had tried to revise the general welfare clause in order to expand the powers of Congress, but that a fellow delegate had caught the “trick” and restored the original constitutional text. Despite the fact that this charge was made more than two hundred years ago and despite Morris’s reputation as lacking integrity, no previous work of scholarship has compared the constitutional provisions referred to the Committee of Style with the Committee of Style’s proposals in order to assess whether he altered text in order to advance his constitutional vision.

This article undertakes that comparison. It shows that Morris, a committed nationalist who favored a strong executive and judiciary and strong protection for private property, who opposed slavery and the grant of political power to the West, subtly revised the text of a breathtaking range of clauses in order to advance his constitutional vision, repeatedly seeking to gain victory in crucial areas where he had been unable to obtain the result he desired during earlier convention debates. He wrote text that 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 (Article III vesting clause), provide a textual basis for judicial review (the law of the land clause), elevate the constitutional position of both the

616 Letter from Alexander Hamilton to Gouverneur Morris (February 29, 1802), Founders Online, http://founders.archives.gov/documents/Hamilton (Hamilton describing Morris as a “genius”); Letter from James Madison to Jared Sparks (April 8, 1831) in 3 FARRAND, supra note 1, 499, 500 (Madison describing Morris as a “genius”). See also 3 FARRAND, supra note 1, at 92 (Pierce describing Morris as a “genius”); supra text accompanying notes 31-32.
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 to the Union of the slave states of Kentucky and Tennessee while permitting the admission of the free state of Vermont (new states clause), include members of Congress in the line of succession to the presidency (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 (impeachment clause). Morris also removed constitutional text suggesting that slavery was “just[]” (the fugitive slaves clause). It is a remarkable list of some of the fundamentally important parts of the Constitution.

Morris’s text provided Hamiltonian Federalists with language that they repeatedly relied on in the major constitutional debates of the early republic, as they argued for presidential power to remove executive branch officers, the presidential ability to issue a Neutrality Proclamation, Congress’s power to create the Bank of the United States and to enact the Sedition Act, federal courts’ right to hold congressional and state statutes unconstitutional, 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’ obligation to create lower federal courts. It 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. At the same time, Morris’s changes were subtle. Rather than creating clear constitutional meaning, he created text that was the subject of controversy. In the great debates of the early republic, Jeffersonian 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 the presumption 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 reading 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 and careful attention to the text leads to a revival of Morris’s and the Federalists’ readings of the Constitution, and these revived readings challenge the conventional wisdom about the original understanding of many of the most fundamental questions of 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. On the Committee of Style, he covertly re-wrote 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

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<thead>
<tr>
<th>Constitutional Provision</th>
<th>Text Referred to Committee of Style</th>
<th>Committee of Style Text</th>
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<tr>
<td>The Preamble</td>
<td>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.</td>
<td>We, the People of the United States, in order to form a more perfect union, to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish the Constitution for the United States of America.</td>
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<tr>
<td>The Vesting Clauses for Article I, Article II, Article III</td>
<td>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: 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.” . . .</td>
<td>Article I, section 1: ALL legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. Article II, section 1: The executive power shall be vested in a president of the United States of America. . . . 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. . . .</td>
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<td>Article XI: The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.</td>
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| The Qualifications Clause, Article I, Section 2, Clause A |

| Article IV, Section 2: “Every member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen of the United States for at least three years before his election; and shall be, at the time of this election, a resident of the State in which he shall be chosen.” |

| Article VI, section 2: “The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient.” |

| Enumeration Clause |

| Article VII, sec. 2: The proportions of direct taxation [and representation] 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 |

| Article I, Sec. 2, cl. 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 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.

of free persons, including those bound to servitude for a number 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.

**The Contract Clause**

| **Article I, Sect. 10:** No state shall coin money, nor emit bills of credit, nor make any thing but gold or silver coin a tender in payment of debts, nor pass any bill of attainder, nor ex post facto law, nor laws altering or impairing the obligation of contracts; nor grant letters of marque and reprisal, nor enter into any treaty, alliance, or confederation, nor grant any title of nobility. |

| **Article X, sec. 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 |

| **Article II, sec. 1, cl. e:** . . . the Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or the period for chusing another president arrive. |

**Presidential Succession Clause**

**Impeachment Clauses**
| **High Crimes and Misdemeanors** | Article X, sec. 2: “He [the President] shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason or bribery or other high crimes and misdemeanors against the United States. . . .” | Article III, sec. 4: “The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.” |
| **Trial by the Senate** | Article IX, sec. 1: “The Senate of the United States shall have power to try all impeachments . . . .” | Article I, sec. 3, cl. e: The Senate shall have the sole power to try all impeachments. . . .” |

**The Federal Judiciary**

<p>| <strong>Judicial Vesting Clause</strong> | Article XI: The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States. | 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. . . . |
| <strong>Law of the Land Clause</strong> | 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 | 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. |</p>
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<th>Topic</th>
<th>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.</th>
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<td>Slavery</td>
<td>Article IV, Sect. 2 . . . : No person legally held to service or labour in one state, escaping into another, shall in consequence of regulations subsisting therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labour may be due.</td>
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<td>New States Clause</td>
<td>Article XVII: New States may be admitted by the Legislature into this Union: but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States, without the consent of the Legislature or such State as well as of the general Legislature. Nor shall any State be formed by the junction of two or more States or parts thereof without the consent of the Legislatures of such States as well as of the Legislature of the United States.</td>
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<td>Article IV, Sect. 3: New states may be admitted by the Congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures concerned as well as of Congress.</td>
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<td>Engagements Clause</td>
<td>Article VII, Sect. I . . . All debts contracted and engagements entered into, by or under the authority of Congress shall be as valid against the United States under this constitution as under the confederation.</td>
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<td>Article VI. All debates contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the confederation.</td>
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