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## The Committee of Style and the Federalist Constitution

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## The Committee of Style and the Federalist Constitution

DAVID S. SCHWARTZ†

### ABSTRACT

*The conventional interpretation of the Constitution assumes that the Committee of Style, which created the final draft of the Constitution, lacked authority to engage with substance; therefore, any arguably substantive changes it purportedly made should be disregarded in favor of earlier draft language found in the records of the Constitutional Convention. This “Style doctrine” has been embraced by the Supreme Court and several leading constitutional scholars. This Article argues that the Style doctrine is historically unfounded and obscures the Constitution’s original meaning. The Committee of Style was not prohibited from proposing substantive changes. In any case, most of the revisions proposed by the Committee of Style clarified or reinforced Federalist positions rather than suggesting substantive changes. Ultimately, the Style doctrine is an artifact of post-ratification developments tending to disregard elements of the*

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*more nationalistic constitutional vision of the Federalist Framers.*

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## INTRODUCTION

In the waning days of the Constitutional Convention, a five-member ad hoc committee produced the near-final draft of the Constitution. Formed on September 8, 1787, this committee was directed to “revise the style of and arrange the articles agreed to” by the full Convention.<sup>1</sup> Most of the final wording of the Constitution and all of its organizational structure were crafted by this committee, which is uniformly referred to simply (and as I will argue, misleadingly) as “the Committee of Style.” On Saturday, September 15, after three days of debate, the Convention voted unanimously to approve the Committee of Style draft with only a handful of minor or very specific changes.<sup>2</sup> Between Saturday evening and Monday morning, an “engrosser” hand-copied the final document on four handsomely calligraphed parchment pages, which the delegates signed on Monday, September 17.<sup>3</sup>

Despite the Convention’s unanimous approval of virtually all of the Committee of Style’s language,<sup>4</sup> a doctrine has emerged that the final language of the Constitution should be disregarded if it can be traced to the Committee of

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1. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 547 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (Journal). Citations to *Farrand’s Records* in this Article will identify the source of the document by the name of the delegate whose private notes are cited (e.g., “Madison,” “McHenry”) or, where applicable, the official Convention “Journal.” This practice is advisable in light of the research of Professor Mary Bilder, who has shown that the Journal is more reliable, and Madison’s notes are less reliable, than traditionally believed. See Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620 *passim* (2012).

2. See 2 FARRAND’S RECORDS, *supra* note 1, at 621–22 (Journal); *id.* at 633 (Madison).

3. Leonard Rapport, *Printing the Constitution: The Convention and Newspaper Imprints, August–November 1787*, PROLOGUE, Fall 1970, at 69, 70–74; Denys P. Myers, *History of the Printed Archetype of the Constitution of the United States of America*, 11 GREEN BAG 2D 217, 217 (2008).

4. See 2 FARRAND’S RECORDS, *supra* note 1, at 633 (Madison); see *infra* Section I.A.

Style and shown to differ in substance from wordings found in Convention floor motions and committee reports prior to the Committee of Style draft. I call this “the Style doctrine.” The Supreme Court, as well as “a veritable who’s who of leading constitutional scholars,” have all at various points deployed the Style doctrine—in effect giving draft language priority over the Constitution’s final language.<sup>5</sup> The reason invariably given is that the Committee of Style had “no authority” to make substantive revisions to any provisions previously agreed on by the Convention.<sup>6</sup> Therefore, this reasoning goes, where constitutional text raising an interpretive problem is known to have been crafted by the Committee of Style, the prior draft language—rather than the Constitution’s final language—is controlling.

This is at best a curious approach to constitutional interpretation, and seems hard to square with textualism in any form, including originalist textualism. But the Style doctrine’s potential for mischief runs deeper. At a minimum it distorts our understanding of the Constitution’s history. As ably demonstrated by Dean William Treanor in a recent article, the Committee of Style revisions leaned in a nationalist direction and reinforced the constitutional vision of the Federalists, who predominated at the Constitutional Convention.<sup>7</sup> A doctrine inviting us to disregard those

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5. See William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 107 (2021). Standing alone against this “who’s who,” Professor Mary Sarah Bilder is the only constitutional scholar I have found to dispute the contention that the Committee of Style was formally limited to stylistic revision. In an evocative paragraph, she questions whether the name “Committee of Style” provides a sufficient basis to presume a limit on the committee’s “jurisdiction” and points out that the official Convention journal referred to it at times as the “Committee of Revision.” Bilder, *supra* note 1, at 1648; see, e.g., 2 FARRAND’S RECORDS, *supra* note 1, at 581, 610 (Journal).

6. See *infra* Section I.B.

7. See Treanor, *supra* note 5, at 8; see also David S. Schwartz, *Framing the Framers: A Commentary on Treanor’s Gouverneur Morris as “Dishonest Scrivener,”* 120 MICH. L. REV. ONLINE (forthcoming 2022) [hereinafter Schwartz, *Framing the Framers*].

revisions furthers the historical myopia that exaggerates how much the preferred views of the Jeffersonian-Madisonian Republicans, which became ascendant only after the election of 1800, were embedded as the Constitution's "original meaning."<sup>8</sup>

Further, the Style doctrine opens a potential Pandora's box of arguments to disregard the Constitution's final language—even its plain, unambiguous language—if there is an arguably substantive difference between the Committee of Style draft and some earlier draft provision. While the majority of the Committee's revisions did not change substantive meaning, at least three provisions have surfaced where the Style doctrine could do significant interpretive mischief—and there may be others.<sup>9</sup>

In this Article, I argue that whatever reasons there might be to depart from the *prima facie* meaning of constitutional text, the Committee of Style's supposed lack of substantive authority should not be one of them. The prevailing tendency to treat the Committee of Style's textual revisions as illegitimate whenever they are arguably substantive rests on a distortion of the Convention's history.

In Part I of this Article, I describe the Committee of Style's work and the manner in which it is factored into constitutional interpretation. The prevailing Style doctrine

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8. In this Article, I use the terms "Federalist" and "Republican," as extremely useful shorthands. It should be noted that, applied to the Constitutional Convention, these labels are anachronistic. The term "Federalist"—along with "Anti-Federalist"—emerged shortly *after* the close of the Philadelphia Convention to label the supporters and opponents of ratification. See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at xiv–xv, 92–95 (2010). Only in the 1790s did "Federalist" become the label for the party of Washington, Hamilton, and Adams. The opposition, led by Jefferson and Madison, coalesced into a party that named itself "Republican." See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 53, 161–62 (2009). The major line of division relevant to the current discussion is that Federalists leaned toward a strong national government, while Republicans favored states' rights and a narrow construction of national powers. See Treanor, *supra* note 5, *passim* (using the same terminology).

9. See *infra* Section I.D.

is applied ambiguously by the Supreme Court and constitutional scholars, in one of two different ways, to disregard the substantive work of the Committee of Style. On one view, the Committee of Style is conclusively presumed to have *followed* its supposed instructions to refrain from substantive editing; because it by definition made only stylistic changes, we can consult earlier draft language and construe the final language to be synonymous. On the other view, the Committee of Style *flouted* its supposed instructions; but because it was authorized only to make stylistic changes, any arguably substantive changes it may have made can be disregarded in favor of the prior draft language. Either way, the prior language is controlling. To show what is at stake in the use of the Style doctrine, I then briefly summarize the arguably substantive changes made by the Committee of Style.

In Part II, I question the conventional view that the Committee of Style lacked authority to engage with substance. There is scant evidence that the Committee of Style was in fact formally restricted or informally expected to confine itself to a narrowly constrained definition of “stylistic” editing. On the contrary, the Framers appear not to have been sticklers about committee “jurisdiction,” at least by the late summer, and the Committee of Style’s purported instructions closely paralleled those given to the Committee of Detail, which courts and commentators have always taken to be substantive. Moreover, the understanding of “style” imposed by later courts and commentators is itself unduly formalistic and narrow, and fails to take realistic account of the daunting editorial task facing the Committee of Style. Finally, any claim that the Committee of Style’s work can be disregarded as *ultra vires* fails to account for the fact that the full Convention ratified the Committee’s work by approving its draft.

In Part III, I address Dean William Treanor’s important revisionist account of the Committee of Style. Treanor argues persuasively that any textualist argument that prioritizes

pre-Committee of Style draft language over the final language of the Constitution is misguided. Yet he frames his article as an accusation that Gouverneur Morris—presumably the Committee’s principal draftsman—dishonestly smuggled substantive changes into the Committee of Style draft to subvert the will of the Convention on several matters.<sup>10</sup> This framing is curious, since it undercuts his argument against relying on pre-Committee of Style draft language. I argue further that it is based on weak circumstantial evidence that is contradicted by more plausible evidence and inferences in the historical record.

Finally, in Part IV, I address the interpretive implications of the historically enriched understanding of the Committee of Style’s work.

## I. DISREGARDING THE COMMITTEE OF STYLE

### A. *Background: The Work of the Committee of Style*

On September 8, 1787, the Constitutional Convention delegates decided “to appoint a Committee of five to revise the style of and arrange the articles agreed to” by the Convention.<sup>11</sup> This committee has come to be known as the “Committee of Style and Arrangement,” or “Committee of Style,” for short. This was the tenth of eleven ad hoc committees appointed by the Constitutional Convention between its May 25 start date and its final adjournment on September 17, and the last one to issue a report.<sup>12</sup> The

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10. See Treanor, *supra* note 5, *passim*.

11. 2 FARRAND’S RECORDS, *supra* note 1, at 547 (Journal).

12. See John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147, 174 (2006). The last committee to be appointed was a five-man committee to consider George Mason’s pet proposal to authorize Congress to enact sumptuary laws, on September 13. That committee never reported a proposal, and may not even have met. *See id.* at 173; *see also infra* note 96.

Convention named five delegates to this committee: Rufus King of Massachusetts, Gouverneur Morris of Pennsylvania, Alexander Hamilton of New York, James Madison of Virginia, and, as chair, William Johnson of Connecticut. On September 12, the Committee reported a revised draft of the Constitution. The next morning, printed broadsides of the Committee's text were distributed to the delegates.<sup>13</sup> Over the next three days, the Convention examined this draft, and at the end of the day on September 15, the Convention unanimously approved the Committee of Style draft having made only a small handful of changes.<sup>14</sup> Thus, the final version of the Constitution signed on September 17 closely resembles the Committee of Style draft in wording and substance.<sup>15</sup>

"The articles agreed to," revised by the Committee of Style, consisted of the Committee of Detail draft circulated to the delegates on August 6 as amended by the dozens of changes and additions made by the Convention between August 7 and September 8.<sup>16</sup> The Committee of Style most

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13. 2 FARRAND'S RECORDS, *supra* note 1, at 582 (Journal, Sept. 12) ("Ordered that the Members be furnished with printed copies thereof."); *id.* at 609 (McHenry, Sept. 13) ("Recd. read and compared the new printed report . . .").

14. See *infra* text accompanying notes 215–217. Voting at the Convention was by state, rather than "per capita" by delegate. See 1 FARRAND'S RECORDS, *supra* note 1, at 8 (Journal) ("A House, to do business, shall consist of the Deputies of not less than seven States; and all questions shall be decided by the greater number of these [i.e., states] which shall be fully represented . . ."). The final vote *by state* was unanimous, but we do not know whether any individual delegates voted no. 2 *id.* at 633 (Madison). We do know that three delegates—George Mason, Edmund Randolph, and Elbridge Gerry—refused to sign the Constitution. *Id.* at 631–32 (Madison).

15. Numerous changes to punctuation and capitalization were made in the process of printing and engrossing (producing a handwritten "fair copy" of) the Constitution between the final vote of approval on September 15 and the signing on the 17th. Unresolvable questions remain as to whether some or all of these changes were directed by the Committee of Style, or other Convention delegates, or were instead made at the discretion of the printer and engrosser. See David S. Schwartz & Nicholas Brock Enger, *The Dot That Nearly Destroyed Federalism: Erroneously Parsing Punctuation in the Constitution* 16 (April 1, 2022) (unpublished manuscript) (on file with author).

16. See *infra* Section II.B.2.

famously rearranged the twenty-three articles of the Committee of Detail draft into the far more elegant seven articles we find in the final version of the Constitution, and rewrote the Preamble from “We the people of the States,” followed by a list of states, to “We, the People of the United States,” followed by a list of government purposes.<sup>17</sup>

Very little is known with certainty about how the Committee of Style performed its task. Historians agree that Gouverneur Morris was the draftsman for the Committee.<sup>18</sup> As will be discussed below, the evidence for this is somewhat thin, and more importantly, some historians have jumped to the conclusion—probably false—that Morris acted largely on his own.<sup>19</sup> Other confident assertions by historians about the Committee are based entirely on speculation or surmise. For example, it has been stated confidently—but without any supporting evidence—that the Committee of Style supervised the printing and engrossing (hand-copying) of the final version of the Constitution.<sup>20</sup> And central to the

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17. Compare 2 FARRAND’S RECORDS, *supra* note 1, at 590 (Committee of Style’s proposed preamble), with *id.* at 177 (Committee of Detail’s proposed preamble). The comma after “We” was deleted in the final engrossed version.

18. See, e.g., MAX FARRAND, FRAMING OF THE CONSTITUTION OF THE UNITED STATES 181 (1913) [hereinafter FARRAND, FRAMING]; RICHARD BROOKHISER, GENTLEMAN REVOLUTIONARY: GOUVERNEUR MORRIS—THE RAKE WHO WROTE THE CONSTITUTION 87 (2003); RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 346 (2009); Treanor, *supra* note 5, at 1.

19. See, e.g., FARRAND, FRAMING, *supra* note 18, at 181; BROOKHISER, *supra* note 18, at 87–89; Treanor, *supra* note 5, at 18. But see *infra* Section III.B.

20. See Myers, *supra* note 3, at 220 (“The Committee of Style and Arrangement, which met daily through September 15 when the Convention completed its approval, was still responsible for any question respecting the text. Both engrossment and printing were under its direction.”). There is no evidence that the Committee of Style was placed in charge of supervising the final transcription of the Constitution. After the vote unanimously approving it, the draft Constitution was “[o]rdered to be engrossed and 500 copies struck.” 2 FARRAND’S RECORDS, *supra* note 1, at 634 (McHenry); see *id.* at 633 (Madison) (“The Constitution was then ordered to be engrossed.”); Diary Entry of George Washington (Sept. 15, 1787), in 3 FARRAND’S RECORDS, *supra* note 1, at 81 (“[A]djourned ’till Monday that the Constitution . . . might be engrossed—and a number of copies struck off.”). Note the lack of any reference back to the Committee of Style. Referrals to committees were invariably by motion, not by

argument of this Article, it has been assumed that the Committee of Style lacked authority to offer any changes that might be deemed substantive.

B. *The Conventional Approach: The Style Doctrine*

An accepted technique of interpreting statutes is to look to legislative history to resolve ambiguities in the statutory text. This technique is routinely imported into constitutional interpretation, even by textualists.<sup>21</sup> Draft language adopted by the Convention prior to the Committee of Style draft can be viewed as a form of legislative history. Consistent with standard interpretive practice, such draft language can be, and often is, referred to in the hope of clarifying ambiguities in the final language.<sup>22</sup>

There is a subtle but important difference between this standard practice and the Style doctrine. The standard

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the significant word “order.” It is at least as likely that such an “order” meant a command issued by Washington in the President’s chair to Convention Secretary William Jackson to see to the printing and engrossing. Also suggestive is the fact that no handwritten copy of the Committee of Style report has been found—for example, among the papers of Convention President Washington who took charge of all the official Convention papers, or Gouverneur Morris who presumably wrote the draft, or Committee of Style chair William Johnson who presented the report to the Convention. This suggests that the handwritten report was given to Jackson, who then burned it along with all the other “loose scraps of paper which belong to the Convention.” See Letter from William Jackson to General Washington (Sept. 17, 1787), in 3 FARRAND’S RECORDS, *supra* note 1, at 82.

21. See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1204 (2003) [hereinafter Kesavan & Paulsen, *Secret Drafting History*] (Originalist textualists “may infer original meaning by examining how [a] clause was affirmatively changed from its inception to final form at the Philadelphia Convention.”).

22. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 520–24 (1997) (comparison of prior with final draft of Fourteenth Amendment “confirms” Court’s interpretation); *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) (“[T]he evolution of the draft version of the Constitution[] seem[s] to us to lend considerable support to our reading of the language of the Appointments Clause itself.”); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 47 (2018) (We consult the drafting history and intentions of the Framers because the Framers “might have special insight into the machine that they designed.”).

practice is triggered only by textual ambiguity. But the Style doctrine can apply irrespective of ambiguity: it is triggered by an arguable substantive difference with prior text, even where the final version is unambiguous. Moreover, under the Style doctrine, the penultimate language—the wording of pre-Committee of Style drafts—takes on a stronger significance than it has under standard practice. Rather than viewed as one indicator of the drafters’ intent among others, such as debates and extrinsic evidence, it is viewed as authoritative text. In short, whereas a legislative history approach involves a disagreement over the meaning of an agreed text, the Style doctrine generates a dispute over which of two texts—the wording of the final Constitution or some earlier draft provision—is authoritative.

Since the Supreme Court first announced the Style doctrine in *Powell v. McCormack* (1969),<sup>23</sup> the Court has applied the doctrine infrequently, half-heartedly, and ambiguously. Constitutional scholars, on the other hand, have embraced it with greater enthusiasm, making arguments to prioritize earlier draft language over equally clear or clearer language in the final Constitution.

### 1. The Supreme Court

*Powell v. McCormack* (1969)<sup>24</sup> is the leading case for the dismissive approach to the Committee of Style language. *Powell* involved a constitutional challenge to a decision by the House of Representatives to exclude one of its members, Adam Clayton Powell, Jr., an outspoken and controversial Democratic congressman representing the Harlem section of New York City.<sup>25</sup> Powell sued various House members and officials to regain his House seat and backpay.<sup>26</sup> The House Defendants based one of their arguments on the

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23. See 395 U.S. 486, 538–39 (1969).

24. *Id.*

25. See *id.* at 489.

26. *Id.* at 493–94.

Qualifications Clause in Article I, Section 2, Clause 2: “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.”<sup>27</sup> According to the House Defendants, the negative framing of this Clause meant that the stated qualifications were non-exhaustive, and therefore allowed the House to add grounds to exclude an elected member on a case-by-case basis.<sup>28</sup> The Court apparently agreed, at least *arguendo*, that the negative framing was non-exhaustive, but nevertheless rejected the House Defendants’ argument, in part on the ground that the negative framing was an editorial change by the Committee of Style.<sup>29</sup> The previous draft of this Clause by the Committee of Detail had framed the qualifications in affirmative terms: “Every Member of the House of Representatives shall be” at least twenty-five years old, a United States citizen of seven years, and a resident of the state electing him.<sup>30</sup> According to the Court, the Committee of Detail’s original draft affirmatively listing the qualifications was controlling, because the Committee of Style “had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so.”<sup>31</sup> Either the two framings were synonymous—i.e., the change was merely stylistic—or, if substantively different, the Committee of Style version had to be disregarded.

The Court had no need to resort to this interpretive move. Because there is no grammatical reason to assume that a negatively framed list is non-exhaustive, the

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27. *See id.* at 537; *see also* U.S. CONST. art. I, § 2, cl. 2.

28. *Id.* at 538.

29. *Id.* at 538–41.

30. 2 FARRAND’S RECORDS, *supra* note 1, at 178 (Madison).

31. *Powell*, 395 U.S. at 539 (quoting CHARLES WARREN, THE MAKING OF THE CONSTITUTION 422 n.1 (1928)).

argument could have been dismissed on that basis. But the Court's almost offhand remark about the Committee of Style's lack of authority has morphed into an apparent doctrinal approach.<sup>32</sup> Thus, when the Court in *Nixon v. United States* (1993)<sup>33</sup> next confronted an apparent change by the Committee of Style, the majority "accept[ed] as we must the proposition that the Committee of Style had no authority from the Convention to alter the meaning of the [prior draft language]."<sup>34</sup>

In practice, this *prima facie* doctrine poses a double-ambiguity that offers no determinate guidance about how to resolve an interpretive dispute. *Powell* itself is ambiguous in its mandate that Committee of Style changes be disregarded: it directs either that the change is deemed purely stylistic and therefore synonymous with prior language, or that a substantive change must be rejected as *ultra vires*. Either way, the pre-Committee of Style language is deemed controlling.

But a second level of ambiguity is illustrated by *Nixon*. There, an impeached federal judge challenged the constitutionality of the Senate's practice of conducting impeachment trials for lower federal officials by committee rather than the full Senate.<sup>35</sup> The government argued, and the Court ultimately concluded, that the word "sole" in the Clause giving the Senate the "*sole* power to try all impeachments"<sup>36</sup> was a "textually demonstrable constitutional commitment" of the trial procedure to the discretion of the Senate, making the issue in controversy a

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32. The *Powell* Court rejected the House defendant's argument as "inherently weak," because it had already concluded that legislative bodies historically lacked power to judge member qualifications on a case-by-case basis. The argument about the Committee of Style's authority was tacked onto this point as a makeweight. See *Powell*, 395 U.S. at 538–39.

33. 506 U.S. 224 (1993).

34. *Id.* at 231; see also *Utah v. Evans*, 536 U.S. 452, 474 (2002).

35. *Nixon*, 506 U.S. at 226.

36. *Id.* at 231–34; see also U.S. CONST. art. I, § 3, cl. 6.

non-justiciable political question.<sup>37</sup> The petitioner Nixon had argued that the word “sole” was added by the Committee of Style: therefore, adhering to *Powell*, it could carry no substantive meaning.<sup>38</sup> The Court rejected Nixon’s argument,<sup>39</sup> and in so doing, showed how one could follow *Powell* and undermine it at the same time. After announcing that it was bound by *Powell* to agree that the Committee of Style “had no authority from the Convention to alter the meaning of the Clause,” the majority nevertheless concluded that the word “sole” was indeed a substantive change from the prior draft language, and not “a mere ‘cosmetic edit.’”<sup>40</sup> How to square this circle? “[W]e must presume,” the Court said, “that the Committee’s reorganization or rephrasing accurately captured what the Framers meant in their unadorned language. That is, we must presume that the Committee did its job.”<sup>41</sup> The Committee of Style, in other words, is presumed to have correctly discerned and conveyed the Convention’s prior intended meaning, notwithstanding any apparent or arguable substantive departure.

The *Powell* version of the Style doctrine assumes that the Committee of Style draft—which in most cases is the same as the final Constitution—must be read to conform to prior drafts. The *Nixon* version reverses this direction: the prior “unadorned language” must be read to have intended what was expressed in the Committee of Style’s “adorned” language.<sup>42</sup> “This presumption is buttressed by the fact that the Constitutional Convention voted on, and accepted, the Committee of Style’s linguistic version,” the Court reasoned.<sup>43</sup> To presume otherwise “would constrain us to say

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37. *Nixon*, 506 U.S. at 228–29, 237–38.

38. *Id.* at 231.

39. *Id.*

40. *Id.* at 231–32.

41. *Id.* at 231 (citing *Powell v. McCormack*, 395 U.S. 486, 538–39 (1969)).

42. *Nixon*, 506 U.S. at 231.

43. *Id.* (citing 2 FARRAND’S RECORDS, *supra* note 1, at 663–67 (recording the

that the *second to last draft* would govern in every instance where the Committee of Style added an arguably substantive word.”<sup>44</sup> This would conflict not only with the Convention’s approval of the Committee of Style language, but also “with the well-established rule that the plain language of the enacted text is the best indicator of intent.”<sup>45</sup>

While the *Nixon* Court’s underlying unwillingness to privilege the “second to last draft” over the Constitution’s final language is eminently sound, the Court regrettably failed to rid us of the faulty notion that the Framers’ intentions were all completely captured by the pre-Committee of Style draft language recorded in *Farrand’s Records*. Instead, the Court perpetuates the mistaken idea (the errors of which I will discuss in Part II) that the Committee of Style draft must always be harmonized in some fashion with prior draft language. Yet the *Nixon* Court’s rationale should have dispensed with the Style doctrine entirely. By arguing that the final language approved by the Convention “is the best indicator of intent,” it should not matter whether the Committee of Style made substantive departures from earlier language. Even if those changes were based on agreements made off the Convention floor that were never memorialized in prior floor votes or were new ideas proposed by the Committee of Style, the approval of the Committee of Style draft by the full Convention on September 15 offers a higher-priority signal of their intentions than previous draft language.

Moreover, the *Nixon* Court’s claim to be following *Powell* makes the Style doctrine hopelessly ambiguous and indeterminate. The two cases created *three* related versions of the Style doctrine. *Powell* treated the former text as authoritative, either by reading the Committee of Style version as automatically synonymous with earlier draft

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unanimous consent to the Committee of Style’s version on September 17, 1787)).

44. *Id.* at 231–32.

45. *Id.* at 232.

language, or by requiring that a substantive Committee of Style change be disregarded. *Nixon* treated the final language as authoritative by conclusively presuming that the former (“unadorned”) language must be read as synonymous with the final language. *Nixon* could have cleared this up by straightforwardly rejecting *Powell*’s suggestion that pre-Committee of Style language could ever supersede apparently inconsistent language in the final Constitution. But by leaving *Powell* standing on this point, the Court still seems committed to the proposition that the Committee of Style lacked authority to make substantive changes, and that this lack of authority has interpretive consequences. In the end, the Court in both *Powell* and *Nixon* refused to entertain the idea that the Committee of Style might have proposed substantive changes that were adopted by the full Convention.

The Court reverted to the *Powell* approach in *Utah v. Evans* (2002).<sup>46</sup> There, Utah challenged Census Bureau practice of using certain inferential statistical practices to fill information gaps in collecting census data that would ultimately be used to determine the number of House seats apportioned to a state.<sup>47</sup> Utah argued that the so called “imputation” practice violated the constitutional requirement that the census be based on an “actual Enumeration.”<sup>48</sup> According to Utah, this phrase “require[d] the Census Bureau to seek out each individual,” and precluded supplementing census-taking with any inferential or imputational methods.<sup>49</sup> The Court concluded that the plain meaning of the words “actual Enumeration” does not compel such a restriction, but went on unnecessarily to find confirmation in the fact that the phrase “actual

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46. 536 U.S. 452 (2002).

47. *See id.* at 459.

48. *Id.*; *see* U.S. CONST. art. I, § 2, cl. 3.

49. *Id.* at 473.

Enumeration” was added by the Committee of Style.<sup>50</sup> Citing *Powell* and *Nixon*, the Court determined that the Committee of Style’s change had to be “the substantive equivalent” of the Convention’s earlier draft language, which had provided only that the “number [of inhabitants] shall . . . be taken in such manner as [Congress] shall direct.”<sup>51</sup> The *Evans* majority thus returned to *Powell*’s supposition that the final Constitution’s text cannot mean something different than pre-Committee of Style draft language. In dissent, Justice Thomas argued that the Court must follow *Nixon* by asserting that “[w]hatever may be said of the earlier version, . . . ‘we must presume that the Committee’s reorganization or rephrasing accurately captured what the Framers meant in their unadorned language.’”<sup>52</sup> None of the justices deviated from the proposition that the Committee of Style was jurisdictionally limited to stylistic matters.

## 2. Constitutional Scholars

Given that the Style doctrine has been rendered ambiguous by the Supreme Court, it might be written off as a confusing but harmless ceremony that must be occasionally observed when interpreting disputed constitutional text. But constitutional scholars have made more of the Style doctrine than the Court has, expanding at least the possibility of interpretive mischief. As summarized by Dean Treanor, “a veritable who’s who of leading constitutional scholars” have at one time or another based a constitutional argument on prioritizing draft language over the Constitution’s final language.<sup>53</sup>

The Style doctrine appears to have originated with the bald assertion by eminent constitutional historian Charles

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50. *Evans*, 536 U.S. at 475.

51. *Id.* at 474–75 (alteration in original) (quoting 2 FARRAND’S RECORDS, *supra* note 1, at 183 (Madison)).

52. *Id.* at 495 (Thomas, J., concurring in part and dissenting in part) (quoting *Nixon v. United States*, 506 U.S. 224, 231 (1993)).

53. Treanor, *supra* note 5, at 107.

Warren in a footnote in *The Making of the Constitution* (1928). Warren asserted, in a sentence quoted and relied on by the *Powell* Court, “that the Committee of Style had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so.”<sup>54</sup> Warren cited no evidence for this assertion anywhere in his book; presumably, he was relying entirely on a negative inference that a committee charged with “style and arrangement” was implicitly debarred from engaging with substance. Notably, Warren contradicted the second part of his claim—“nor did it purport to do so”—elsewhere in the book.<sup>55</sup>

Numerous constitutional scholars in recent years have doubled down on Warren’s assertion.<sup>56</sup> For example, Professors Sunstein and Lessig have argued that because the Committee of Style was “without the authority to make substantive changes,” no significance should be given to the Committee’s addition of the words “herein granted” to the Legislative Vesting Clause.<sup>57</sup> Professor Sunstein, as well as

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

55. See, e.g., *id.* at 638 (“[T]he Committee of Style . . . ignored this vote and restored Randolph’s original proposal . . .”); *id.* at 686–87 (“[I]n a very few instances changes had been made in the votes of the Convention [by the Committee of Style] . . .”); see also *id.* at 650 (noting that the Committee of Style declined to make a substantive change to the President’s oath of office, implying that it could have tried to do so).

56. As persuasively argued by Treanor, “Cass Sunstein, Jack Rakove, Akhil and Vikram Amar, Martin Redish and Curtis Woods, David Currie, Saikrishna Prakash, Martin Flaherty, Michael Paulsen and Vasam Kesavan, Richard Fallon, and Larry Lessig have all misunderstood the Constitution’s text because they posit[ed] that changes made by the Committee of Style were either ultra vires or purely stylistic.” Treanor, *supra* note 5, at 107.

57. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47–48 (1994). I agree with their conclusion that “herein granted” is not substantively significant, but for textual reasons rather than because of the Style doctrine. See David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 592 (2017) [hereinafter Schwartz, *A Question Perpetually Arising*] (arguing that “herein granted” is merely a circular reference).

Professor Rakove, have both argued that impeachable offenses should be limited to “offenses against the United States,” because the phrase “against the United States” was dropped by the Committee of Style whose revision could not change a prior vote approving that language.<sup>58</sup> Professors Amar and Amar have argued that the Presidential Succession Clause prohibits placing the House speaker or other members of Congress in the presidential line of succession, relying on the Style doctrine to give priority to pre-Committee of Style language.<sup>59</sup> And some scholars have argued that the Judicial Vesting Clause must be read to implement the so-called “Madisonian Compromise”—giving Congress the discretion, not the obligation, to create lower federal courts—despite arguably mandatory language in the final Constitution, in significant part because of “the limited charge of the Committee of Style ‘to revise the style of and arrange the articles agreed to by the House.’”<sup>60</sup>

### C. *The Style Doctrine’s Internal Confusion*

Aside from the historical confusion at its core, the Style doctrine is internally confused in two key respects. First, it confuses “making” versus “proposing” substantive changes. Second, it conflates two related but different arguments about the subjective intentions of the drafters and the procedural regularity or lack thereof at the Convention.

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58. See CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* 48 (2017); Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 *GEO. WASH. L. REV.* 682, 687 (1999).

59. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 *STAN. L. REV.* 113, 115–16, 118–19 (1995); see also U.S. CONST. art. II, § 1, cl. 6.

60. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 *U. PA. L. REV.* 741, 794 n.169 (1984) (quoting 2 *FARRAND’S RECORDS*, *supra* note 1, at 547 (Madison)); see Treanor, *supra* note 5, at 92.

### 1. “Making” Versus “Proposing” Changes

The Style doctrine is surprisingly confused about the important—and obvious—distinction between a committee *making* and merely *proposing* substantive revisions. Warren stated that “the Committee of Style had no authority . . . to *make* alterations of substance in the Constitution.”<sup>61</sup> This may be literally true, for *no* committee at the Convention had authority to “make” binding substantive decisions of any kind. As discussed further below, all committee reports at the Convention were mere proposals. If the Committee of Style draft contained any substantive changes to prior agreed language, these would have been proposals, and such changes were only “made” by the full Convention voting to approve them. But the Style doctrine gains most of whatever force it has by drifting from “make” to “propose.” Warren’s seminal claim about the Committee’s lack of authority almost certainly drifted in this manner, and the same is true about the Supreme Court and the academics who have deployed the Style doctrine. The real claim underlying the Style doctrine can only be that the Committee of Style’s *proposed* substantive changes have to be rejected because the Committee lacked authority to *propose* any substantive revisions.

### 2. Subjective Intentions Versus Procedural Regularity

The Style doctrine is at bottom an intentionalist approach to constitutional interpretation. “[V]irtually all major interpretive approaches agree that the communicative intent of the Framers is relevant to the interpretation of an ambiguous constitutional provision and that the drafting (or ‘legislative’) history sheds important light on that intent.”<sup>62</sup>

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61. WARREN, *supra* note 54, at 422 n.1 (emphasis added).

62. David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857, 871 (2022) [hereinafter Schwartz, *Lost General Welfare Clause*]; see, e.g., Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1683 (2012) (noting that historical intent arguments are persuasive authority in U.S. constitutional culture). Original public meaning originalists

Where the meaning of a constitutional provision is in dispute, interpreters routinely ask what the Framers meant by that language. The Style doctrine purports to ask that routine question, but does so in an odd and confused way.

The Style doctrine has a highly formalistic aspect. To the extent that it purports to focus on the formal “authority” of the Committee of Style, the Style doctrine implies that procedural irregularities at the Convention could invalidate final constitutional language submitted by the Convention for ratification. Here, the supposed procedural irregularity is a committee exceeding its jurisdiction. Such an implication might have a superficial appeal to lawyers, who assume the virtues of procedural regularity as a matter of course. But a moment’s reflection shows the absurdity of an argument invalidating final constitutional language based on a purported procedural irregularity during the Convention.

There was historically no procedural law governing the manner in which the Convention was to create a draft to submit for ultimate ratification, and therefore no authoritative standard against which to judge the internal procedural “validity” of the Convention’s final work product. To be sure, the Convention adopted a set of familiar

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contend that the “public meaning” of the Constitution’s final language at the time of ratification is determinative; yet even they, too, find drafters’ intent, and therefore drafting history, to be relevant to interpretation. See Barnett & Bernick, *supra* note 22, at 47 (“[W]e consult [the drafting history and intentions of the Framers] because they might have special insight into the machine that they designed.” (quoting Randy E. Barnett, *The Relevance of the Framers’ Intent*, 19 HARV. J.L. & PUB. POL’Y 403, 408 (1996)); Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1897, 1900–22 (2008) (analyzing drafting history of Tenth Amendment as part of an inquiry into its original public meaning); Kesavan & Paulsen, *Secret Drafting History*, *supra* note 21, at 1204; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 279–87 (2001) (analyzing drafting history of Article II to establish original public meaning of executive powers). Other versions of originalism embrace the Framers’ intentions as directly controlling. See, e.g., John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 758–60 (2009) (arguing that drafters’ intent was the dominant interpretive principle in founding era).

legislative rules to govern its internal process.<sup>63</sup> But this was to keep internal order and stay on task. The Convention's procedural rules were manifestly not intended to create a basis for later external challenges to invalidate portions of its own work. After all, the Convention proceedings were held in secret, in part because the Framers feared that public disclosure of its drafting process might "furnish handles to the adversaries of the Result of the [Convention]." <sup>64</sup> Had the Convention on the first day voted to delegate the task of drafting a proposed constitution to the sole discretion of Gouverneur Morris, the document reported out by the Convention would have had the same legal status as the one actually reported on September 17: "nothing more than the draught of a plan," as James Madison put it.<sup>65</sup>

Indeed, the Convention as a whole was procedurally irregular. The delegates met in Philadelphia pursuant to authorizing resolutions from their respective state legislatures. These resolutions all substantially authorized their delegates only to amend the Articles of Confederation, to make them "adequate to the [e]xigencies of the Union."<sup>66</sup>

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63. See 1 FARRAND'S RECORDS, *supra* note 1, at 8–9 (Journal).

64. *Id.* at 10 (Madison) (statement of George Mason); see *id.* at 10 n.4 (Madison) (justifying secrecy of proceedings as well as individual votes "for reasons similar").

65. James Madison, Speech on Jay's Treaty (Apr. 6, 1796), in 16 THE PAPERS OF JAMES MADISON 290, 295–96 (J.C.A. Stagg et al. eds., 1989) ("But, after all, whatever veneration might be entertained for the body of men who formed our constitution, the sense of that body could never be regarded as the oracular guide in the expounding the constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions.").

66. 3 FARRAND'S RECORDS, *supra* note 1, at 560 (Virginia delegates' authorization). This phrasing was repeated in substance in all twelve authorizing resolutions from several state legislatures (Rhode Island, excepted). See *id.* at 563–86. That these resolutions reflected the state legislatures' expectation that the Convention would merely propose amendments to the Articles, rather than replace them. See, e.g., MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 52 (2015); MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE

But from the first week of the Convention, the delegates consciously chose to exceed their legal authorization: they determined to jettison the Articles rather than amend them, and to create a Constitution from scratch.<sup>67</sup> In this sense, the Convention as a whole was *ultra vires*. This was reflected in the premise that the Constitution was to be “ratified.” Ratification covers all sins by an agent, except fraud.

There is thus no force to any claim that departures from internal procedural regularity at the Convention might formally undermine particular constitutional provisions. The only plausible relevance of the *ultra vires* argument against the Committee of Style is the extent to which it reveals the drafters’ *intentions*. But it is equally implausible to argue that the Framers’ actual subjective intentions are to be conclusively presumed from some purported procedural rule about committee jurisdiction. One could argue for some concept of “constructive” intent, as might be used as a rule in interpreting legal instruments or statutes. But such a concept makes sense only where drafters’ intent is deemed legally dispositive, and therefore something that must be found one way or the other. It makes no sense where, as here, drafters’ intent is merely relevant evidence of meaning *if evidence of that subjective mental state is available*. No argument for “constructive Framers’ intent” has yet been offered, and it is difficult to imagine a persuasive one.

In contrast to the implausible, formal “*ultra vires*” argument, it might be argued that the Committee’s assignment “to revise the style of and arrange the articles agreed to” is merely some evidence of the subjective intentions and expectations of the Convention delegates in appointing the Committee of Style.<sup>68</sup> Importantly, this is an empirical argument about actual states of mind, rather than

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AMERICAN STATE 16–17 (2003); MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 140–44 (2016).

67. See, e.g., MAIER, *supra* note 8, at 29; KLARMAN, *supra* note 66, at 140–44; BEEMAN, *supra* note 18, at 294–95.

68. 2 FARRAND’S RECORDS, *supra* note 1, at 547 (Journal).

a formalistic argument that intentions will be conclusively presumed from a legal rule or procedure. This “softer” version of the ultra vires argument is at once more plausible and much weaker than the conclusive presumption made by the Style doctrine. It is easily rebutted by historical evidence of contrary intentions or changed minds. Even if the delegates initially intended or expected that the Committee of Style should refrain from suggesting substantive changes, there is no strong reason to presume that that intention would have remained unchanged when the delegates were subsequently presented with a draft that did propose substantive revisions. There is no evidence to suggest such an unchanged intention, to offset the inference that the Committee of Style’s changes were okay—an inference derived from the Convention’s overwhelming approval of the Committee of Style report.

The argument that follows in Part II addresses both the formalistic and evidence-of-intentions versions of the Style doctrine.

#### *D. The Potential Mischief of the Style Doctrine*

Does the Style doctrine create a potential for interpretive mischief? Or is it a harmless bit of silliness?

The more modest answer is that it obscures our constitutional history. There is little doubt, as Dean Treanor has persuasively shown, that the Committee of Style revisions leaned in a nationalist direction. Whether or not these were substantive changes, they strengthened Federalist interpretations. By minimizing or dismissing these revisions, the Style doctrine furthers the historical myopia that obscures the Federalist Constitution more generally and feeds the myth that the Constitution’s original meaning conforms to the preferred interpretations of the Jeffersonian-Madisonian Republican party.

This is particularly true in the case of the Preamble. The Committee of Detail draft opened with a preamble that

began, “We the people of the States,” followed by a list of the thirteen states. The Committee of Style famously changed this to “We, the People of the United States” followed by a broad list of national purposes of the government, which were entirely absent from the Committee of Detail draft.<sup>69</sup> Today we say the Preamble is a mere stylistic flourish, but that is based on trying to harmonize it with enumerationism—the doctrine of limited enumerated powers—and is not based on a serious analysis of the Framers’ intentions or understandings.<sup>70</sup> But recent scholarship has uncovered a richer history to the Preamble, one suggesting that the full scope of its meaning was contested, and that Federalists saw it as something far broader than a non-substantive throat-clearing introduction to the Constitution.<sup>71</sup> During the ratification campaign, Anti-Federalists anxiously read the preamble as a broad grant of powers.<sup>72</sup> Federalists played this down during ratification, but after ratification argued that the Preamble was indeed a

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69. Compare *id.* at 177 (Madison) (Committee of Detail preamble), with *id.* at 590 (Committee of Style preamble).

70. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) (“[The Preamble] has never been regarded as the source of any substantive power . . .”).

71. See, e.g., David S. Schwartz, *Reconsidering the Constitution’s Preamble: The Words That Made Us U.S.*, 37 CONST. COMMENT. 55 (2022); Treanor, *supra* note 5, at 48–59; Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. F. 183, 194–209 (2020).

72. See, e.g., Letter from Samuel Adams to Richard Henry Lee, (Dec. 3, 1787), in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 349 (John P. Kaminski et al. eds., 1997) [hereinafter DHRC] (“I confess, as I enter the Building I stumble at the Threshold. I meet with a National Government, instead of a foederal Union of Sovereign States . . . [.] the Powers of which shall extend to every Subject of Legislation . . . .”); *Brutus XII*, N.Y.J., Feb. 7, 1788, reprinted in 16 DHRC (John P. Kaminski et al. eds., 1986), *supra*, at 74 (“[T]he spirit of the constitution . . . if it is to be collected from the preamble, in which its end is declared, is to constitute a government which is to extend to every case for which any government is instituted, whether external or internal.”); John Smilie, Statement at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 DHRC (Merrill Jensen et al. eds., 1976), *supra*, at 407–08 (“[The Preamble’s] words have a plain and positive meaning . . . . Here, sir, we find the right of making laws for every purpose is invested in the future governors of America . . . .”).

source of federal governmental power. Federalists in Congress argued that legislative authority to charter the First Bank of the United States, as well as other laws, could be found in the Preamble.<sup>73</sup> This interpretation was buried under the weight of political success of the Jeffersonian-Madisonian Republican party in the early 1800s and was largely forgotten for almost two centuries.

The potential for more immediately practical interpretive mischief is harder to pin down. In the only extensive and systematic review of changes made by the Committee of Style, Dean Treanor documents some fifteen arguably substantive changes by the Committee to language adopted by prior votes of the Convention.<sup>74</sup> In theory, that creates a sizeable number of potential arguments to depart from the Constitution's final, ratified language in favor of some earlier draft version that can be found by combing through *Farrand's Records*. In fact, as I have argued elsewhere, most of the fifteen changes are stylistic or clarifying, rather than substantive departures.<sup>75</sup> But a few could be troublesome.

For example, the Committee of Style changed "officer of the United States" to "officer" in the Clause defining those whom Congress may place in the line of presidential succession.<sup>76</sup> An argument can be made that the latter expression, but not the former, includes members of Congress, who might be said to hold offices, but not offices "of the United States," if the latter is construed to mean only executive branch officers. A Style doctrine argument to revert to the earlier language could lead to a conclusion that the Speaker of the House cannot be in the line of presidential succession, leading to the potential unconstitutionality of the

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73. See Treanor, *supra* note 5, at 59; Gienapp, *supra* note 71, at 194–209.

74. See Treanor, *supra* note 5, at 113, 116.

75. See Schwartz, *Framing the Framer*, *supra* note 7.

76. See Treanor, *supra* note 5, at 81.

current presidential succession statute.<sup>77</sup>

Also, in Article II, the Committee of Style deleted “against the United States” from “other high crimes and misdemeanors”<sup>78</sup> in the Presidential Impeachment Clause, arguably broadening the impeachment catchall language to extend to state law crimes.<sup>79</sup> As noted above, some constitutional scholars have deployed the Style doctrine to this change to argue for a limitation on the grounds for impeachment.<sup>80</sup>

A further Committee of Style change involved a revision of the New States Clause that arguably places a flat prohibition on subdividing a state into two or more states.<sup>81</sup>

77. See 3 U.S.C. § 19 (2020); Amar & Amar, *supra* note 59, at 115–19. Further ambiguity is created by the Twentieth Amendment, which arguably supersedes this aspect of the Presidential Succession Clause.

78. Compare 2 FARRAND’S RECORDS, *supra* note 1, at 551–52 (Madison) (“against the United States” inserted), *with id.* at 600 (“against the United States” absent from Committee of Style draft).

79. Treanor, *supra* note 5, at 83–85.

80. See *supra* text accompanying note 58.

81. On August 30, the Convention had adopted this language:

New States may be admitted by the Legislature into this Union: but *no new State shall be hereafter formed or erected within the jurisdiction of any of the present States* without the consent of the Legislature of such State as well as of the general Legislature.

....

Nor shall any State be formed by the junction of two or more States or parts thereof without the consent of the Legislatures of such States as well as of the Legislature of the United States.

2 FARRAND’S RECORDS, *supra* note 1, at 458 (Journal) (emphasis added). And the Committee of Style changed it to this:

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

*Id.* at 602 (Madison’s copy of the Report of Committee of Style). The change is the switch from a comma to a semicolon after the otherwise-synonymous italicized

The alternative reading would permit such partitions with the consent of the involved state's legislature and Congress. While the flat-prohibition interpretation in my view requires improperly attributing meaning to a semicolon, the argument is available.<sup>82</sup>

There may be other such perplexities. Enterprising attorneys might find it advantageous to comb through *Farrand's Records* hoping to unearth differences between the Committee of Style draft and earlier approved motions and committee reports during the Convention. They might then gin these up into arguable substantive differences—thereby triggering the Style doctrine. The scope of this problem is difficult to assess. As Treanor observes, despite his effort to be comprehensive in finding fifteen differences, there are likely others.<sup>83</sup>

## II. DID THE COMMITTEE OF STYLE EXCEED ITS AUTHORITY?

No constitutional scholar that I am aware of has seriously investigated the question of the Committee of Style's "authority." Starting with Charles Warren's bald assertion that "the Committee of Style had no authority . . . to make alterations of substance in the Constitution as voted by the Convention,"<sup>84</sup> that conclusion has simply been assumed. No scholar has pointed to any evidence supporting the Committee of Style's lack of substantive authority apart from the negative inference from its nominal assignment. The conventional view based on Warren's conclusion is at odds with the evidence we have. It reflects a general confusion about how committees functioned in the Convention and how we should think about committee

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phrases in the two versions.

82. For an elaboration of the argument against attributing Framers' intentions to mid-sentence punctuation, see generally Schwartz & Enger, *supra* note 15.

83. See Treanor, *supra* note 5, at 6.

84. WARREN, *supra* note 54, at 422 n.1.

function in interpreting the Constitution.

A. *The Committee of Style's "Authority"*

Aside from meeting as a "Committee of the Whole House" from May 30 to June 19,<sup>85</sup> the Convention formed eleven committees during its deliberations.<sup>86</sup> All of these committees were ad hoc and were formed to deal with particular issues of widely varying specificity.<sup>87</sup> But nothing in the rules specified the limits of the substantive authority of committees. Only one delegate on one occasion during the entire Convention is recorded as having objected that a committee "exceeded their powers."<sup>88</sup> No one echoed this claim, or made such a claim as to other committee reports, strongly suggesting that "committee powers" were not a thing. The referral or commitment of specific issues to

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85. See 1 FARRAND'S RECORDS, *supra* note 1, at 29, 312 (Journal); Vile, *supra* note 12, at 153.

86. Professor Vile counts *twelve* committees plus the Committee of the Whole in his comprehensive and useful study of Convention committees. However, this count includes a supposed five-member committee to consider bankruptcy and "full faith" provisions. Vile, *supra* note 12, at 169; see also BILDER, *supra* note 66, at 143 (also identifying separate "bankruptcy and full faith" committee). But as I read the records, that five-member committee was actually the Committee of Detail, though not named as such by the Journal: its five members were the Committee of Detail Members Rutledge (the chair), Randolph, Wilson, and Gorham, with William Johnson of Connecticut substituting for his fellow Connecticut delegate Oliver Ellsworth, who had by then left the Convention. 2 FARRAND'S RECORDS, *supra* note 1, at 445 (Journal) (identifying the members); *id.* at 483 (Journal) (showing that Rutledge presented the report, indicating that he was the chairman); 3 *id.* at 587 (Attendance of Delegates) (noting absence of Oliver Ellsworth from Convention as of August 27).

87. On the more specific end of the spectrum, one committee was assigned to deal with the apportionment of House seats to each state. See 1 FARRAND'S RECORDS, *supra* note 1, at 540 (Madison). On the more general end of the spectrum, a committee was formed to deal with an unspecified set of "parts of the Constitution as have been postponed, and such parts of reports as have not been acted on." 2 *id.* at 473 (Journal).

88. This was James Wilson on July 5, objecting to the first committee effort to hammer out what would eventually become the "Great Compromise" between the large and small states. See 1 *id.* at 535 (Yates); Vile, *supra* note 12, at 156–60 (explaining committee's work).

committees probably functioned more as a focal point for committee members to stay on task than a hard-edged jurisdictional limit.

More importantly, no Committee—not even the famous Committee of Detail—had “authority” to “*make* alterations of substance in the constitution as voted by the Convention.” Committees issued “reports” to the Convention. Committee reports were understood as mere recommendations, just like motions to add or amend language. A proposed constitutional provision in a committee report had no impact on the draft unless and until it was adopted by a vote on the Convention floor.<sup>89</sup> Given this status of Convention committee reports, the assertion by Warren and others that the Committee of Style lacked authority to “make” changes to the draft Constitution is meaningless. The Style doctrine must instead be based on the claim—implied perhaps by Warren but never stated in such terms—that the Committee of Style lacked authority even to *propose* substantive changes.

The question then becomes whether there is any evidence to suggest that, unlike all the committees appointed by the Convention prior to September 8, the Committee of Style was uniquely and strictly forbidden to *suggest* any substantive changes. This seems implausible on its face, and requires an immoderate negative inference from the wording of the Committee’s nominal charge to “revise the style of and arrange the articles agreed to” by the Convention.

Moreover, formal norms regarding Convention committee procedures and jurisdiction, if indeed there were such norms, seem to have eroded by August, as evinced by

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89. It is not clear whether committee reports required a motion in order to be put to a vote. See 1 FARRAND’S RECORDS, *supra* note 1, at 9 (Journal) (“[T]he question shall be put upon” a writing—such as a committee report without mentioning any requirement of a motion.); 2 *id.* at 495 (Journal) (putting, without motion, “the question to agree to the first clause of the report”); *id.* at 499 (Madison) (Convention voted on portions of Committee of Postponed Parts report without motion). *But see* 1 *id.* at 353 (Journal) (“It was moved and seconded to agree to the second resolution reported from the Committee . . .”).

the Convention's reception of the work of the Committee of Detail. Comparing the Committee of Style to the Committee of Detail is instructive on the Convention's attitude toward committee "jurisdiction."

### 1. The Committee of Detail Compared

On July 23, Elbridge Gerry moved to form a committee "to prepare & report a constitution *conformable*" to "*the proceedings of the Convention*."<sup>90</sup> This was the Committee of Detail, and the "proceedings" to that point were the several dozen resolutions regarding the scope, structure, and powers of the proposed national government that had been adopted by the Convention since May 29. Many of these were modified versions of resolutions in the Virginia-Pennsylvania Plan, plus a handful of provisions from the New Jersey Plan.<sup>91</sup> Convention President George Washington's diary entry for July 27, the first day that the Convention adjourned to await the Committee of Detail's work, suggested that that this Committee was as constrained as the Committee of Style is conventionally said to be:

In Convention, which adjourned this day, to meet again on Monday the 6th. of August that a [committee] which had been appointed (consisting of 5 Members) might have time *to arrange, and draw into method & form the several matters which had been agreed to by the Convention*, as a Constitution for the United

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90. 2 *id.* at 95 (Madison) (emphasis added).

91. The so-called "Virginia Plan" was a collection of resolutions outlining broad-brush provisions for the new constitution that served as the de facto template for discussion from May 29 until July 26, when the Convention adjourned to await the Committee of Detail's draft. The moniker "Virginia Plan" understates the probably crucial role of the Pennsylvania delegation in formulating the plan. In a pre-publication draft of his article, Dean Treanor suggested that these proposals be "more accurately labelled the Virginia-Pennsylvania Plan" in light of the Pennsylvania delegation's probable substantial contribution. See William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution* 9 (Dec. 1, 2020) (unpublished SSRN draft manuscript) (on file with author) (For the published version, see Treanor, *supra* note 5.). I follow this excellent suggestion, though Treanor omitted it from his final published version. See Treanor, *supra* note 5.

States.<sup>92</sup>

This committee charge would appear to be limited to form rather than substance: note in particular Washington's use of "arrange," which would again be used to define the Committee of Style's assignment.<sup>93</sup> Likewise, delegate Hugh Williamson had anticipated the formation of the Committee of Detail, noting that "the principles and outlines" agreed upon by the Convention up to late July would "be referred to a small committee *to be properly dressed*."<sup>94</sup> "To arrange," "to draw into form," and "to dress" do not sound like an assignment to generate new substantive proposals. That the Committee of Detail was initially created to address form more than substance is further supported by the fact that only five members were appointed to it. The Convention referred most important substantive disputes to "grand" committees consisting of one member from each state in attendance.<sup>95</sup> The only smaller committee prior to the appointment of the Committee of Detail was the three-member rules committee at the start of the Convention.<sup>96</sup>

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92. Diary Entry of George Washington (July 27, 1787), in 3 FARRAND'S RECORDS, *supra* note 1, at 65 (emphasis added).

93. *Id.*

94. Letter from Hugh Williamson to James Iredell (July 22, 1787), in 3 FARRAND'S RECORDS, *supra* note 1, at 61 (emphasis added).

95. *See Vile, supra* note 12, at 174.

96. Only five committees were not represented by all states present. The Rules Committee (three members: George Wythe, Alexander Hamilton, and Charles Pinckney) was plainly procedural in nature. 1 FARRAND'S RECORDS, *supra* note 1, at 2 (Journal). A five member "special Committee" was appointed to consider the number of House seats to be apportioned to each state—plainly a substantive matter. *Id.* at 538 (Journal); *id.* at 542 (Madison). The Committee of Detail had five members, 2 *id.* at 97 (Journal), as did the Committee of Style, *id.* at 547 (Journal). *See generally Vile, supra* note 12 (addressing the role of committees throughout the Convention). As noted above, a supposed five-member committee to consider bankruptcy and "full faith" provisions was actually the Committee of Detail rather than a new committee. *See id.* at 169. Finally, the five-member committee on sumptuary laws, appointed on September 13, was probably nothing more than an unavailing effort to appease George Mason, who was obsessed with sumptuary laws. That committee never reported. *See id.* at 173.

Yet there is little question that the Committee of Detail offered changes and additions to the resolutions approved up to that point.<sup>97</sup> It reported out numerous provisions that had not been formalized in approved motions, or even in some cases—if Madison’s notes are to be credited—discussed. These included several of the prohibitions on states, the Full Faith and Credit Clause, the Treason Clause, a handful of enumerated legislative powers, and most of the enumerated executive powers.<sup>98</sup> The Committee of Detail also flouted its instruction from the Convention to include property qualifications for members of Congress.<sup>99</sup>

The most salient example of the Committee of Detail’s substantive revisions concerns the enumeration of legislative powers. The authorizing resolution adopted on July 17 provided that

the Legislature of the United States ought to possess the legislative rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by

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97. For example, it changed the wording of the Supremacy Clause from what had been approved by floor vote. *Compare* 2 FARRAND’S RECORDS, *supra* note 1, at 22 (Journal) (Federal laws “shall be the supreme law of the respective states as far as those acts or Treaties shall relate to the said States, or their Citizens and Inhabitants . . .”), *with id.* at 183 (Madison) (Federal laws “shall be the supreme law of the several states, and of their citizens and inhabitants.”).

98. The Committee of Detail’s limitations on state money powers—to issue bills of credit or paper money—had not been discussed at all. The prohibition on states coining money contradicted an express acknowledgement of that power in the Articles of Confederation. The Full Faith and Credit Clause was carried over from the Articles of Confederation, but the definition of treason was new. Of the executive powers, appointments and the veto had been approved as motions, and the war powers were arguably implicit. The rest of the enumerated executive powers were in effect proposed by the Committee of Detail. *See id.* at 185–86 (Madison).

99. *Compare id.* at 121, 124–25 (Madison) (convention vote approving property qualifications for members of the national legislature), *with id.* at 178–79 (Madison) (Committee of Detail report omitting any such property qualifications).

the Exercise of individual Legislation.<sup>100</sup>

This was Resolution 6 of the Virginia-Pennsylvania Plan as modified by Delaware delegate Gunning Bedford's resolution.<sup>101</sup> It remains a subject of controversy whether amended Resolution 6 was intended to be a general authorization to legislate on all national problems, and whether the enumeration produced by the Committee of Detail was meant to be exhaustive—that is, a limiting enumeration.<sup>102</sup> If the answer to both questions is “yes,” then the Committee of Detail made a major substantive change.

Either way, the Committee of Detail enumerated specific powers that had not been formally adopted in motions. The Virginia-Pennsylvania Plan had not mentioned any taxing power and no motion formalizing a taxing power was made.<sup>103</sup> There had been much discussion and several motions on apportioning the basis of direct taxation, though

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100. *Id.* at 131–32 (Committee of Detail papers).

101. *Id.* at 21 (Journal); *id.* at 26 (Madison). For this reason, the entire resolution is often referred to, somewhat inaccurately, as the Bedford Resolution. *See* 1 *id.* at 21 (Madison) (original version of Resolution 6).

102. The conventional view maintains that the Committee of Detail's enumeration was designed to supersede and indeed overrule the broad authorization of Resolution 6. *See, e.g.,* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 178 (1996); Kurt T. Lash, “Resolution VI”: The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8, 87 NOTRE DAME L. REV. 2123, 2126 (2012); Michael W. McConnell, The Federalist Soc’y, Panel IV: Resolved: The Federalists Designed a Constitution of Plenary Federal Power, YOUTUBE, at 44:22 (Mar. 4, 2022), <https://www.youtube.com/watch?v=PXKYLnYNxs0> (debate with John Mikhail) (“Instead of Resolution 6, let’s enumerate powers.”). For recent scholarship contesting that the enumeration made this change, see generally, for example, Schwartz, *Lost General Welfare Clause*, *supra* note 62. *See also* Richard Primus, *Reframing Article I, Section 8*, 89 FORDHAM L. REV. 2003, 2003–06, 2009–11, 2018 (2021); John Mikhail, *Fixing Implied Constitutional Powers in the Founding Era*, 34 CONST. COMMENT. 507, 510–13 (2019) (reviewing JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018)); Gienapp, *supra* note 71, at 183–89; Schwartz, *A Question Perpetually Arising*, *supra* note 57, at 575, 581–82; Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 27 (2005).

103. 1 FARRAND'S RECORDS, *supra* note 1, at 20–23 (Madison).

no motions about “duties, imposts, and excises.”<sup>104</sup> These vital powers, along with the power to regulate interstate commerce, were apparently simply assumed, and were added by the Committee of Detail without any apparent discussion or motion. The power to regulate naturalization was mentioned in the New Jersey Plan, but never voted on before the Committee of Detail met; and that of regulating bankruptcy was apparently introduced by the Committee of Detail. Even more significant, by assigning Congress the power to appoint a Treasurer, the Committee of Detail in effect proposed to make the Treasury an arm of the legislative branch. The Committee of Detail thereby took upon itself a major structural point about control over the management of national finances.<sup>105</sup> None of these latter issues had been the subject of prior discussions or motions.

The Committee of Detail issued its famous report on August 6, which was distributed to the delegates that day as a printed broadside.<sup>106</sup> For the next five weeks, the delegates presumably used this broadside as their textual reference in debates and tried to keep up with changes by making handwritten interlineations on their own copies.<sup>107</sup> Meanwhile, the Committee of Detail continued to meet as late as August 31, issuing its final report on September 1.<sup>108</sup> By that time, numerous substantive issues had been referred to it for resolution, and it reported out a handful of substantive proposals for consideration by the full

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104. 2 *id.* at 181–82 (Madison) (Committee of Detail enumeration of taxing power); *see, e.g.*, 1 *id.* at 589–94 (Journal) (taxation debate focusing on direct taxation rather than imposts, duties, and excises).

105. *See* 1 *id.* at 243 (Madison) (New Jersey plan); 2 *id.* at 181–82 (Madison) (Committee of Detail enumeration of powers).

106. 2 *id.* at 176 (Journal); *id.* at 177 n.3 (Journal) (comparing Madison’s handwritten transcription of the report in his notes with “the original printed report”).

107. *See, e.g.*, *Committee of Detail*, LIBR. OF CONG. (Aug. 6, 1787), <https://www.loc.gov/exhibits/creating-the-united-states/convention-and-ratification.html#obj5> (last visited Apr. 28, 2022).

108. 2 FARRAND’S RECORDS, *supra* note 1, at 483 (Journal).

Convention weeks after its well-known August 6 draft.<sup>109</sup>

None of this is to say that the Committee of Detail exceeded its authority by proposing its numerous substantive changes and additions. Rather, it is to say that the Convention did not adhere to finicky jurisdictional limitations on a committee purportedly assigned to matters of “form” and “arrangement.”

## 2. Late August Committee Referrals

In the last ten days of August, the Convention appointed three new committees on various issues. In addition, the Committee of Detail continued to receive referrals and meet.<sup>110</sup> In more than one instance, more than one committee appears to have been considering the same, or an overlapping, issue simultaneously. For example, the question of whether the national government could assume state Revolutionary War debts was apparently referred to both the five-member Committee of Detail and a separate eleven-member committee, both of which reported proposals on the issue.<sup>111</sup> The Committee on Postponed Parts, formed August 31, apparently considered a version of the General Welfare Clause proposed by the Committee of Detail, even though the Committee of Detail continued to meet.<sup>112</sup> Thus, the “subject matter jurisdiction” of the late August committees, if that term is even applicable, could hardly be

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109. *Id.* at 324–26, 334–37 (Madison) (additional referrals to Committee of Detail); *id.* at 366–68 (Journal) (Committee of Detail’s second report); *id.* at 382–83 (Journal) (Senate’s treaty power referred to Committee of Detail); *id.* at 394 (Madison) (also Senate’s treaty power referred to Committee of Detail); *id.* at 445 (Journal) (Full Faith and Credit and Bankruptcy Clauses referred to Committee of Detail); *id.* at 483 (Journal) (final Committee of Detail report).

110. For Committee of Detail referrals, see *supra* note 109. For other matters referred to committees, see BILDER, *supra* note 66, at 143. These additional committee referrals included slavery, tax duties, and the unspecified grab-bag of postponed matters.

111. See 2 FARRAND’S RECORDS, *supra* note 1, at 327 (Madison) (debt/taxing power issue referred both to Committee of Detail and new all-states committee); *id.* at 352, 366–67 (Journal) (dueling committee reports on issue).

112. See *id.* at 367, 473, 483 (Journal).

called strict.

### 3. Implications for the Committee of Style

The foregoing set of facts strongly suggests that by late August, the Convention was more interested in wrapping matters up than in being sticklers about committee jurisdiction. The Committee of Style members might well have felt that they were not barred from considering substantive points, and that the Committee of Detail was a precedent for them to make substantive changes.<sup>113</sup>

Despite its assignment “to arrange” the approved resolutions and “draw [them] into method and form,” the Committee of *Detail* made numerous and important substantive departures from and additions to the Convention’s agreements. Yet no scholar that I am aware of has argued that the Committee of Detail acted *ultra vires*, let alone that its draft should carry no interpretive weight. On the contrary, the conventional view is to assume that any apparent change proffered by the Committee of Detail was either ratified by the Convention or consistent with prior views. Thus, for example, in *Powell*, the Supreme Court treated the Committee of Detail’s flouting of the Convention’s resolution regarding property qualifications as

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113. One caveat should be noted. In forming all committees with substantive responsibilities prior to September 8, the Convention delegates had taken pains to ensure geographic representation; the eleven-member committees, of course, included a delegate from each state, while the five-man Committee of Detail had members from upper and lower New England, the middle states, and the upper and lower south. The states represented on the Committee of Detail were Massachusetts (Gorham), Connecticut (Ellsworth and later Johnson), Pennsylvania (Wilson), Virginia (Randolph), and South Carolina (Rutledge). *See id.* at 445 (Journal), 664. But with the Committee of Style, the Convention did not bother with this: King, Johnson, Hamilton and Morris represented Massachusetts, Connecticut, New York, and Pennsylvania, respectively. *Id.* at 547 (Madison). Madison was the only southern delegate. This could be construed as hinting at an intention that the Committee of Style refrain from substantive revisions. On the other hand, the Connecticut delegation had by September committed itself to furthering compromise by backing South Carolina’s positions on key slavery-related provisions, so additional representation of the deep south may have been deemed inessential.

a “proposal” rather than some sort of ultra vires act.<sup>114</sup> Similarly, this is how historians conventionally treat the Committee of Detail’s conversion of amended Resolution 6 (a/k/a “the Bedford Resolution”) into a detailed, purportedly limiting, enumeration of congressional powers.<sup>115</sup> To be sure, the Committee of Detail would doubtless have had more substantive elbow-room than the Committee of Style. But this difference in latitude is more a function of the state of proceedings at the relevant times than a distinction between form/arrangement/style on the one hand and substance on the other. The Convention had not drilled down to details on many points as of July 26; by September 8, it had. And many more disputed points had been resolved by September 8. Therefore, it would be natural to expect that any substantive revisions proposed by the Committee of Style would not open new subjects of debate or re-open debates on closed subjects. Both committees, as we have seen, were charged with “arrangement” of approved resolutions and motions. The difference between “detail” and “style” may be less a matter of substance-versus-style than of the level of detail involved. The Committee of Style had details to deal with, but they were more fine-grained than those confronting the Committee of Detail. But there is no persuasive reason to believe that the Committee of Style was therefore stripped of authority to make substantive proposals per se. Like the Committee of Detail’s substantive proposals, those made by the Committee of Style would be subject to approval by the full Convention.<sup>116</sup>

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114. See *Powell v. McCormack*, 395 U.S. 486, 533 (1969) (treating this substantive change by Committee of Detail as mere proposal); *supra* note 99 and accompanying text (Committee of Detail flouting this instruction).

115. See, e.g., BEEMAN, *supra* note 18, at 273–76; FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 238 (1985); RAKOVE, *supra* note 102, at 178.

116. Too much should not be made of the different names of the committees. The committees are today known by names given by legal historians, generally shortening the designations appearing in the Convention records. See Bilder, *supra* note 1, at 1648.

This point can be generalized to the Convention's approach to committees as such. Prior to the Committee of Style, every Convention committee made proposals to be submitted for approval by the Convention—as the *Powell* Court recognized as to the Committee of Detail. Viewed this way, the question becomes whether there was something different about the Committee of Style that would have precluded it from making proposals subject to Convention approval. There is no evidence of such a unique restriction.

### B. *The Committee of Style's Task*

The argument that the Committee of Style lacked “substantive” authority is made in support of an interpretive move: the Committee of Style's language can be overridden by prior, and presumably more authoritative text. This latter interpretive move begs three questions. First, is there a shared understanding of the style/substance distinction at all? Second, what is this more authoritative text that takes priority? Third, do the pre-Committee of Style Convention records provide a complete and reliable record of what was agreed to? The answers to these three questions cast serious doubt on the factual underpinning of the Style doctrine.

#### 1. The Exaggerated Style-Substance Distinction

The lack-of-authority argument presumes a sharp distinction between style and substance, and equates style with “merely cosmetic” changes. Under this view, the task “to revise the style of and arrange the articles” meant making the draft Constitution look pretty. The structural presentation would be better organized for logic and flow. Stylistic changes would consist of finding synonymous words and phrases of greater elegance or aesthetic appeal. As the *Nixon* Court put it, the Committee of Style's job was strictly to “accurately capture[] what the Framers meant in their unadorned language.”<sup>117</sup> Had the Committee stuck to such

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117. *Nixon v. United States*, 506 U.S. 224, 231 (1993).

style editing, it would have “simply put the finishing touches on the Constitution,” limiting itself to the “substantive equivalent” of prior draft language; whereas, otherwise, revisions by the Committee of Style would necessarily “change[] the Constitution’s meaning.”<sup>118</sup>

This definition of style editing—style as “adornment”—is unduly narrow and creates a false dichotomy. The task of stylistic editing certainly entails cosmetics, elegance, and tone, but often extends well beyond them. Writers who wish an editor to limit herself to “polish,” typically emphasize the limited delegation of authority—or would be well-advised to do so: advising the editor, “don’t change my meaning.”<sup>119</sup> But between style editing and substantive creation or wholesale substantive revision is a sizeable gray area. This gray area itself encompasses a spectrum of editing from style to substance. On the style end of the spectrum, we might find revisions that clarify vague or ambiguous language. In the middle of the spectrum, we might place changes that reinforce the meaning of the original language. Further toward the substance end of the spectrum, we might locate revisions that strengthen or weaken the original language’s emphasis, revisions that add express language to bring out implications, and revisions that delete express language to leave matters to implication. And at the substance end of the spectrum, we might find revisions that float ideas that the editor feels are within the spirit of authorial intentions. All of the kinds of changes in these gray areas fall within a reasonable definition of the Committee of Style’s jurisdiction, even if we were to believe that the Committee was understood to have a formal and limited jurisdiction at all.

Moreover, the Committee of Style *and Arrangement* was

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118. Treanor, *supra* note 5, at 112.

119. At least one delegate appeared to think that the Committee’s task was to give the Constitution “its last polish,” seen in the letter from Jonathan Dayton to Elias Dayton (Sept. 9, 1787), in 3 FARRAND’S RECORDS, *supra* note 1, at 80, but that was a clear understatement given the specified duty “to arrange” the articles.

also expected to “arrange” the articles. Present-day interpreters continue to find substantive meaning in the arrangement of the articles of the Constitution.<sup>120</sup> The Framers would have been no less able to foresee that a prospective rearrangement of the articles would have substantive implications.

## 2. The Lack of an Authoritative Text

Compare the situation of an editor directed to revise the style and arrangement of a single rough, but unified draft with that of an editor who is handed a sheaf of papers and asked to collate the emendations, additions, and deletions recorded by several different people. That latter editor might reasonably be given more latitude and discretion to determine what the underlying “text” actually says. Both the Supreme Court and constitutional scholars uniformly refer to a single draft that was given to the Committee of Style.<sup>121</sup> But that is not what happened.

Legal scholars and historians talk of “drafts” of the Constitution, as though there was an ongoing process of updating and distributing paper copies that would allow the delegates to see before them, in writing, what they were considering and what they had agreed to. In fact there were

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120. See, e.g., Treanor, *supra* note 5, at 6.

121. See, e.g., Utah v. Evans, 536 U.S. 452, 474 (2002) (“the Committee of Detail sent the draft to the Committee of Style”); David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 746 (2012) (Committee of Style “revised . . . an original draft.”); Kesavan & Paulsen, *Secret Drafting History*, *supra* note 21, at 1204 (“the draft of the Framers submitted to the Committee of Style and Arrangement”); Treanor, *supra* note 5, at 114 (“the iteration that was given to the . . . Committee of Style” (quoting *Evans*, 536 U.S. at 495 (Thomas, J., concurring in part and dissenting in part))); see also BEEMAN, *supra* note 18, at 345 (The Committee of Style “was working to provide the ‘last polish’ to *the document*.” (emphasis added)); *Creating a Constitution*, LIBR. OF CONG., <http://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/to-form-a-more-perfect-union/creating-a-constitution/> (last visited Apr. 28, 2022) (“After five weeks of debate over the committee of detail’s draft Constitution, the Constitutional Convention appointed a committee of style to prepare a final version . . .”).

only two writings distributed to the delegates over the nearly four months of the Philadelphia Convention: the Committee of Detail draft, and the Committee of Style draft.<sup>122</sup> Printed as broadsides by the Philadelphia printer Dunlap & Claypool,<sup>123</sup> these were handed out to the delegates on August 6 and September 13, respectively.<sup>124</sup> There were no other working drafts generally available to the delegates. Proposed constitutional provisions and amendments all took the form of motions or committee reports. Motions could be written or oral, and committee reports were typically written.<sup>125</sup> These writings were probably presented in handwritten form to the Convention secretary, Major William Jackson, and read aloud by him. According to the rules adopted on May 28,

[a] motion made and seconded, shall be repeated and, if written, as it shall be when any member shall so require, read aloud by the Secretary, before it shall be debated. . . .

. . . .

A Writing, which contains any matter brought on to be considered, shall be read once throughout, for information, then by paragraphs, to be debated, and again, with the amendments, if any, made on the second reading . . . .<sup>126</sup>

Most of the delegates did not even have access to copies of the Virginia-Pennsylvania Plan.<sup>127</sup> If the delegates were to have looked at words on a page before the Committee of Detail draft was distributed to them, they would have had to

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122. See Rapport, *supra* note 3, at 70–74.

123. *Id.* A broadside is an oversized sheet printed on one side only.

124. 2 FARRAND'S RECORDS, *supra* note 1, at 176 (Journal); *id.* at 582 (Journal) (on September 12, "[o]rdered that the Members be furnished with printed copies" of the Committee of Style draft); *id.* at 609 (McHenry) (noting on September 13, "Recd. Read and compared the new printed report with the first printed amended report.").

125. See, e.g., *id.* at 493 (Journal) (Committee report "delivered in at the Secretary's table . . .").

126. 1 *id.* at 8–9 (Journal).

127. See 3 *id.* at 593.

rely entirely on their own note-taking.<sup>128</sup> *Farrand's Records* provides all the surviving notes in addition to Madison's, by delegates Rufus King, James McHenry, and a few others. They are extremely fragmentary and, if typical, they indicate that few if any delegates other than Madison worked off of verbatim versions of proposed constitutional language before August 6.<sup>129</sup>

After August 6, many or most of the important agreements were reached in committees, off the Convention floor and unrecorded in Madison's notes. The committee reports typically consisted of draft language, and many such reports were adopted by floor votes. Like motions, these committee reports were handwritten documents handed in to the Convention secretary, who would read them aloud; sometimes the Committee chair would read the report aloud before handing it in to the secretary.<sup>130</sup> There was evidently a bit of scurrying around by a small number of delegates to make copies of the Virginia-Pennsylvania Plan or to look at this or that motion or speech by a colleague.<sup>131</sup> On occasion, the delegates voted to postpone consideration of a lengthy or complex committee report to give those who wanted to do so an opportunity to make a personal copy.<sup>132</sup> But these

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128. See BILDER, *supra* note 66, at 3, 23–25.

129. Compare, e.g., 1 FARRAND'S RECORDS, *supra* note 1, at 20–23 (Madison's notes of Virginia-Pennsylvania Plan), with *id.* at 27–28 (William Paterson's notes of same).

130. See, e.g., *id.* at 524 (Journal) (report “delivered in at the Secretary's table was read once throughout, and then by paragraphs”); 2 *id.* at 505 (Journal) (Committee chairman Brearley “read the report in his place—and the same being delivered in at the Secretary's table, was again read . . .”).

131. A handful of delegates transcribed personal copies of the plan. See 3 *id.* at 593; see, e.g., 1 *id.* at 24 (reference in Robert Yates's notes to obtained copy); *id.* at 27 (same in James McHenry's notes).

132. See 2 *id.* at 368 (Journal) (postponing consideration of Committee of Detail report of August 22 “in order that the Members may furnish themselves with copies”); *id.* at 496 (Journal) (postponing consideration of committee report on the presidency to allow “members [to] take copies”). On June 15, the Convention adjourned to enable all delegates to “tak[e] copies” of the New Jersey plan. See 1 *id.* at 242 (Madison).

practices hardly sufficed to produce a clear and comprehensive paper record for the delegates to look at. After August 6, many delegates must have followed the emerging constitutional text by making increasing numbers of interlineations and scratch-outs in their personal copies of the Committee of Detail broadside. After September 12, they did the same, interlineating the Committee of Style broadside. We know this because several interlineated copies of each still exist, from a handful of delegates.<sup>133</sup>

There is no surviving record of what exactly was given to the Committee of Style. So what exactly did the Committee of Style revise? Max Farrand, the early twentieth-century editor and compiler of the Convention records, presents what he calls “Proceedings of Convention Referred to the Committee of Style and Arrangement” as though it were a single organized document incorporating changes to the Committee of Detail draft.<sup>134</sup> This “document” extends over the next fifteen pages, under the running header “Committee of Style,” implying that this was a document given to the Committee of Style to revise. But in a tiny and easily-overlooked footnote, Farrand admits that his “Proceedings” are in fact “compiled by the editor from the proceedings of the Convention.”<sup>135</sup> That is to say, Farrand himself created a revised Committee of Detail document incorporating changes and additions approved by the various motions after August 6.

What Farrand fails to explain in presenting his “Proceedings” is that the Committee of Style would have been handed a stack of documents, not a single document. The Committee members would have had their personal interlineated Committee of Detail drafts plus several dozen

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133. See, e.g., *Creating the United States*, LIBR. OF CONG. <https://www.loc.gov/exhibits/creating-the-united-states/convention-and-ratification.html> (last visited Apr. 28, 2022) (Charles Pinckney’s interlineated copies of Committee of Detail and Committee of Style broadsheets).

134. 2 FARRAND’S RECORDS, *supra* note 1, at 565–580.

135. *Id.* 565 n.1.

handwritten motions and committee reports, and perhaps also the Convention journals handwritten by Major William Jackson, the Convention secretary.<sup>136</sup> It appears that Jackson attempted to keep track of the various changes made to the Committee of Detail draft in one place, by interlineating his own copy of the Committee of Detail broadside. This copy was apparently given to the Committee of Style, because it ultimately came into the possession of the Library of Congress among the papers of Committee of Style chairman William Johnson.<sup>137</sup> A draft marked up by the Convention secretary and given to the Committee of Style chairman could well be deemed the “official” single working draft.<sup>138</sup> But it was imperfect and incomplete, despite Jackson’s apparent efforts to be neat and thorough. For example, Jackson failed to include the most recent version of Article I, Section 8, Clause 1, a clause whose exact text would become a source of significant controversy (as will be discussed further below). Depending on how one counts, there are at least twelve other significant provisions that Jackson failed to record and that Farrand filled in.<sup>139</sup> Significantly, Farrand did not simply reproduce the Jackson-

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136. See Bilder, *supra* note 1, at 1621, 1625–26.

137. See William Jackson Copy of Committee of Style Report, in *William Samuel Johnson Papers, 1745–1936*, LIBR. OF CONG. [hereinafter Jackson Copy], <https://lccn.loc.gov/mm79027961>.

138. At least one scholar has made this claim. J.H. POWELL, *BOOKS OF A NEW NATION: UNITED STATES GOVERNMENT PUBLICATIONS, 1774–1814*, at 64 (1957).

139. Compare Jackson Copy, *supra* note 137, with 2 FARRAND’S RECORDS, *supra* note 1, at 565–80 (Proceedings of Convention Referred to the Committee of Style and Arrangement). Other omissions by Jackson, filled in by Farrand, include: the Indian Commerce Clause and the Letters of Marque Clause in the enumeration of powers, see 2 FARRAND’S RECORDS, *supra* note 1, at 569–70; the “port preference” and tax uniformity provisions tacked onto the end of the Migration and Importation Clause, see *id.* at 571; the deletion of Senate powers to make treaties, and appoint ambassadors and Supreme Court justices, and the insertion of the Impeachment Trial Clause, see *id.* at 571; a good deal of the presidential election provision, see *id.* at 572–73; the Presidential Qualifications Clause, the Vice President Clause, and the treaty and appointment powers shifted from the Senate, see *id.* at 574; the prohibitions on states’ monetary and war powers, see *id.* at 577; and the bulk of the Amendments Clause, see *id.* at 578.

Johnson copy in presenting his readers with the “proceedings” of the Convention given to the Committee of Style. He would necessarily have referred to other documents to make up these deficiencies. The Committee of Style would necessarily have done the same, though without any guarantee that its concordance would have matched what Farrand produced.

It would have been challenging to make a verbatim concordance of these papers in the three and a half days between the formation of the Committee of Style and its September 12 report. This task would likely have been complicated by variations in the delegates’ notes and recollections of the precise wording (let alone punctuation!) that had been agreed upon. Subtle changes would be inevitable even by a scrivener attempting merely to compile the agreed language.

Farrand also fails to disclose his own editorial suppositions in compiling his pre-September 8 cumulative text. Some proposals had not been acted upon: were they all meant by the Convention to be defunct and off the table, as Farrand implicitly supposes? Farrand also disregards the possibility that there were express proposals or understandings that were unrecorded by Madison—either because they were discussed (perhaps widely) off the Convention floor, or because Madison’s care in notetaking had significantly eroded by this point in the Convention.<sup>140</sup>

In short, what historians and Supreme Court justices call “the text referred to the Committee of Style”<sup>141</sup> is an editorial convenience created by Farrand. In reality, it was in no real sense “a text” but an unwieldy sheaf of mostly handwritten *texts*, probably filled with scratch-outs, interlineations, and ink-blots. Undoubtedly, Farrand took great pains to be accurate, and his editorial compilation

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140. For the unreliability of Madison’s notes after August 21, see BILDER, *supra* note 66, at 141–53.

141. Treanor, *supra* note 5, at 72; *see* sources cited *supra* note 121.

appears mostly accurate. But we should remember that the Committee of Style did not have Farrand's compilation. Under those circumstances, the delegates would not likely have expected the Committee of Style to refrain from exercising at least some editorial judgment and discretion with substantive implications.

### 3. Records Gaps and the Need for Gap-Filling

Third, and related, the ultra vires charge against the Committee of Style assumes that all "articles agreed to" were reflected in recorded votes as of September 8. But we know of at least one instance where that was apparently not the case: the Committee of Style's addition of the Contracts Clause.<sup>142</sup> There may have been others.

As the Convention progressed, it appears that agreements on some of the thorniest issues were resolved in committees, particularly in the Convention's final month.<sup>143</sup> The delegates, after all, lived within a few blocks of the Convention hall, either in their temporary lodgings or permanent residences, and frequently dined together. There was ample opportunity to conduct Convention business outside the full meetings.<sup>144</sup> While most of these resolutions

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142. See Treanor, *supra* note 5, at 39–41. Rufus King's proposed "prohibition on the States to interfere in private contracts" on August 28 was effectively tabled by a substitute motion regarding ex post facto laws. The delegates assumed they would have to revisit the issue after at least some of them became convinced that the prohibition of ex post facto laws would only apply to criminal cases. See 2 FARRAND'S RECORDS, *supra* note 1, at 439–40 (Madison).

143. See BILDER, *supra* note 66, at 142.

144. See, e.g., BEEMAN, *supra* note 18, at 34–35, 95. Furthermore, historians of the Convention must proceed with caution in relying on Madison's Convention notes, which make up the great bulk of *Farrand's Records*. Given both Madison's prodigious note-taking efforts and the mesmerizing window his notes provide into the personalities and debates at the Convention, it is incredibly tempting to treat the notes as a more or less complete and reliable transcript of proceedings. But doing so is no longer tenable in the wake of the pathbreaking scholarship of Mary Sarah Bilder. Her 2015 book, *Madison's Hand*, demonstrates that Madison was never trying to create a complete and unbiased record of proceedings; and of particular relevance here, she has shown that Madison's notes of proceedings from August 22 on are highly unreliable, as they were written at least two years

would have been reflected in floor votes, not all were. Several proposals were referred to committees which—according to both Madison’s notes and the Convention journals—never reported on them.<sup>145</sup> On August 31, an unspecified grab bag of unresolved proposals was referred to a new committee formed to consider “such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on,” generally referred to as the Committee on Postponed Parts.<sup>146</sup> That committee failed to report on all of those postponed parts.<sup>147</sup> It may have been understood that one or more of these orphan proposals would be addressed in the Committee of Style draft. These facts are not consistent with an expectation that the Committee of Style would necessarily confine itself to “adornment” of prior language.

### C. *The Interpretive Irrelevance of Committee Authority*

There is a nagging “emperor’s new clothes” quality to the seriously intoned argument that interpretive consequences should follow from the Committee of Style’s purported lack of substantive authority. That is because, on September 15, the Convention unanimously approved virtually all of the Committee of Style’s work, making only a small number of minor changes.<sup>148</sup>

In law, the concept of ratification recognizes the validity and bindingness of an after-the-fact authorization of an agent’s prior unauthorized acts.<sup>149</sup> That the Framers knew this concept need hardly be stated: it was the very theory on which they justified their decision to exceed their own

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after the events, in 1789 or later. See BILDER, *supra* note 66, at 141.

145. See, e.g., 2 FARRAND’S RECORDS, *supra* note 1, at 342–44 (Madison) (Gouverneur Morris’s proposals for cabinet departments which were referred to the Committee of Detail).

146. *Id.* at 473 (Journal).

147. See Schwartz, *Lost General Welfare Clause*, *supra* note 62, at 911–14.

148. See *infra* text accompanying notes 215–217.

149. RESTATEMENT (THIRD) OF AGENCY §§ 4.01–4.04 (AM. LAW INST. 2006).

limited authorization merely to tinker with the Articles of Confederation and instead propose a wholly new framework of government.<sup>150</sup> Under a straightforward application of the doctrine of ratification, the Convention's vote to approve the Committee of Style draft (with only limited emendations) should make the question of the Committee's authority irrelevant and end the matter.

### III. DID THE COMMITTEE OF STYLE ABUSE ITS TRUST?

On what basis, then, can the Convention's ratifying vote of September 15 be invalidated, even as to individual provisions? Fraud, perhaps.<sup>151</sup> The idea of "scriveners' fraud" on the part of the Committee of Style has been hinted at, but never developed into a coherent argument for disregarding the Committee of Style report, either in whole or in part. The germ of such an argument was first suggested over a century ago by Max Farrand, who insinuated that Gouverneur Morris may have been such a culprit.<sup>152</sup> But no scholar has made a serious effort to develop this insinuation into a full-blown charge until recently. Dean William Treanor, in an article entitled "The Case of the Dishonest Scrivener," argues that delegate Gouverneur Morris was a "dishonest scrivener"

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150. See *supra* text accompanying notes 66–67.

151. See RESTATEMENT (THIRD) OF AGENCY § 4.02(2)(a) (AM. LAW INST. 2006) (ratification of agent's act may be voided by agent's fraud in procuring ratification). Conceivably, unnoticed changes "smuggled into" the final draft Constitution could be questioned as "scrivener's error." See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 20 (1997); Yellin, *supra* note 121, at 747–48. Except for punctuation marks, which may have been left to the discretion of printers and engrossers, it is difficult to imagine proving scriveners' errors in the current official version of the Constitution. See Schwartz & Enger, *supra* note 15.

152. FARRAND, FRAMING, *supra* note 18, at 181–82. "[J]ust a little suspicion attaches to the work of Morris in preparing this last draft of the constitution. It is partly due to intimations that he himself gave," citing the 1803 letter discussed *infra* notes 158–162 and accompanying text, and "to stories that were whispered about in the years following the adoption of the new constitution," citing the semicolon story, discussed *infra* Section III.A.2, as "one illustration." FARRAND, FRAMING, *supra* note 18, at 182.

who misused his role as lead writer for the Committee of Style to covertly “reverse losses he suffered on the convention floor” and thus “write into the Constitution his vision of what the Constitution should entail.”<sup>153</sup> The argument coming from Treanor is curious, since he ultimately, and persuasively, concludes that constitutional interpreters should not disregard the work of the Committee of Style. Yet the only defensible basis for doing so would be if the Committee of Style indeed defrauded the Convention, at least as to some provisions, so as to void, in effect, the Convention’s ratification of parts of the Committee of Style draft.

This charge—that either Morris alone or the Committee members together somehow abused their trust—is not well-founded.<sup>154</sup>

#### A. *Framing Gouverneur Morris*

It is tempting to accuse Gouverneur Morris of being a dishonest scrivener. It offers an entertaining narrative centered around a lively character. It is harder to prove wrongdoing by an entire Committee—one that included James Madison, forsooth!—than by a rogue individual. And Morris had a somewhat roguish reputation, as Treanor summarizes in a vivid biographical sketch.<sup>155</sup> Add to that the fact that all of the (extremely thin) circumstantial evidence of manipulation by the Committee of Style revolves around

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153. Treanor, *supra* note 5, at 27.

154. In another article, I have gone through each of the fifteen Committee of Style revisions relied on by Treanor to show that none of them meet all four elements implied by a charge of “dishonest scrivener”: that the revision in question “(1) changed the substantive meaning of a prior draft provision, (2) ‘reversed a loss on the convention floor’ to implement Morris’s preference, (3) diverged from the majority will of the Convention, and (4) escaped the Convention’s notice.” Schwartz, *Framing the Framers*, *supra* note 7, at 15. Only four of the fifteen changes can be seen as substantive; of these, the preamble could not possibly have escaped notice, and the Contracts Clause was debated. The other two failed the second or third elements. *See id.*; *see also infra* note 214.

155. *See* Treanor, *supra* note 5, at 11–12.

Morris, and you have your suspect.

But there has never been enough evidence to proceed against Morris. Here is the entire case against him. (1) He was the primary draftsman of the Committee of Style report; (2) most of the fifteen Committee of Style revisions (identified by Treanor) advanced views that he held; (3) Morris supposedly had the character of a rogue; (4) he wrote a letter in 1803 claiming to have crafted subtle language to advance one of his policy goals; (5) he wrote a letter in 1814 boasting that he had carefully “select[ed] phrases” to advance his views on a clause in Article III; and (6) he was supposedly accused in 1798 of trying to substitute a semicolon for a comma to convert a harmless clause about taxing and spending into a broad general welfare legislative power. Here, I will focus on evidence items 3 through 6. I will address evidence items 1 and 2—his role as primary drafter and the conformity between Morris’s views and the Committee of Style report—in separate Sections below.

It is worth noting that elements 3 through 6 are all fundamentally “character evidence.”<sup>156</sup> As to his roguish character in general (element 3), suffice it to say that historians and biographers—Treanor included—have stopped well short of suggesting that Morris had a penchant for fraud. Morris is said to have been a bit of a rake in his private life, but there is no suggestion that he cheated clients or engaged in serious unethical behavior involving dishonesty in his professional or public life.<sup>157</sup> As to elements 4 through 6, one of the letters does not even involve a Committee of Style revision. While the other two do, the gist of all three items is to insinuate that Morris had a general behavioral propensity for sneaky drafting. But Farrand and Treanor make far more of this than is warranted.

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156. See FED. R. EVID. 404 (describing character evidence as both a generalization about a person’s character and specific acts offered to prove a character trait).

157. See Treanor, *supra* note 5, at 11–14.

### 1. The “Confessional” Letters

Deeming the two letters as anything approaching confessions of dishonest scrivening blows them way out of proportion. Both Farrand and Treanor cite Morris’s 1803 letter to Henry Livingston as an example of Morris’s penchant for trickery.<sup>158</sup> Discussing the Louisiana Purchase in this letter, Morris claimed that he worded Article IV, Section 3, Clause 2 of the Constitution to go “as far as circumstances would permit to establish the exclusion” of newly acquired territories from eligibility for statehood.<sup>159</sup> “Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made.”<sup>160</sup> Here, Morris refers not to anything he drafted for the Committee of Style during September 8–11, but to a motion he made on the Convention floor on August 30—which the Convention approved.<sup>161</sup> It thus offers no instance of sneaking substantive changes into the Committee of Style report. Moreover, Morris admits only to crafting strategically ambiguous language, not to deceiving the Convention. There is an important difference: the former is not fraud, but is merely garden-variety legislative drafting behavior to defer contentious interpretive questions to post-adoption applications. Moreover, the Clause in question does not in any obvious way accomplish Morris’s objective—that newly acquired territories would be “govern[ed] . . . as provinces” and have “no voice in our councils.”<sup>162</sup> The letter seems to be more a confession of Morris’s *failure* to win the point than a boast of his ability to manipulate the Convention.

Morris’s 1814 letter to Timothy Pickering at least refers

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158. See Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), in 3 FARRAND’S RECORDS, *supra* note 1, at 404; Treanor, *supra* note 5, at 14–15.

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

160. *Id.*

161. 2 FARRAND’S RECORDS, *supra* note 1, at 459 (Journal).

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

to a revision Morris made on the Committee of Style. After his famous assertion that the Constitution “was written by the fingers, which write this letter,”<sup>163</sup> Morris went on to say that, as to “a part of what relates to the judiciary” in the Constitution, “conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their selflove.”<sup>164</sup> One cannot fairly stretch this into something approaching an admission of dishonest scribbling, because it does not reflect an intention to smuggle language past an unsuspecting Convention. On the contrary, Morris assumed that his fellow delegates would read it carefully—hence, he had to “select” his words with care, at most interjecting an ambiguity that would leave space for his preferred interpretation. In any case, this was an isolated incident relating only to a single revision about the judiciary.<sup>165</sup> What’s more, the provision in question—most likely the Judicial Vesting Clause—barely, if at all, made a substantive change. The pre-Committee of Style version provided that the “judicial power” “shall be vested . . . in such Inferior Courts *as shall, when necessary*, from time to time, *be constituted by* the Legislature of the United States.” The Committee of Style changed the italicized language to “as the Congress may from time to time ordain and establish.”<sup>166</sup> The notion that this represents a change requires a superfine, if not totally strained, linguistic

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163. Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), in 3 FARRAND’S RECORDS, *supra* note 1, at 420. Given the fussiness about punctuation underlying the semicolon controversy, I cannot help but note that Morris’s use of the comma in this quotation violates today’s grammar rule against setting off a restrictive clause with a comma. *See infra* Section III.A.2.

164. Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), in 3 FARRAND’S RECORDS, *supra* note 1, at 420.

165. *See* Treanor, *supra* note 5, at 16. Although Treanor quotes this admission four times, he acknowledges that it is less than a full confession. *See id.* at 7, 16, 115.

166. *Compare* 2 FARRAND’S RECORDS, *supra* note 1, at 575 (Proceedings of Convention Referred to the Committee of Style and Arrangement), *with id.* at 600 (Report of Committee of Style).

parsing.<sup>167</sup>

## 2. The General Welfare Clause and the “Sinister Semicolon”

Treanor relies heavily on the probably apocryphal story that Morris tried to change the meaning of the General Welfare Clause in Article I, Section 8, Clause 1, by surreptitiously replacing the comma after “excises” with a semicolon.<sup>168</sup> That Clause in the final Constitution provides:

To lay and collect Taxes, Duties, Imposts and Excises, [comma] to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .<sup>169</sup>

The purported pre-September 8 draft of the enumeration of powers provided:

The Legislature shall have power to lay and collect taxes, duties, impostes and excises, [comma] to pay the debts and provide for the common defence and general welfare of the United States.<sup>170</sup>

The language after “excises” was *added to* the Committee of Detail draft by a proposal from the Committee on Postponed Parts, adopted on September 4.<sup>171</sup> The Committee of Style report “changed” this to:

The Congress . . . shall have power To lay and collect taxes, duties, impostes and excises; [semicolon] to pay the debts and provide for the common defence and general welfare of the United States.<sup>172</sup>

167. For a more detailed investigation of this trumped-up charge against Morris, see Schwartz, *Framing the Framers*, *supra* note 7.

168. Treanor cites this story early and often. See Treanor, *supra* note 5, at 5–6, 18, 22–24, 56, 118 n.663.

169. U.S. CONST. art I, § 8, cl. 1.

170. 2 FARRAND’S RECORDS, *supra* note 1, at 569 (Proceedings of Convention Referred to the Committee of Style and Arrangement).

171. *Id.* at 493, 495 (Journal).

172. 2 FARRAND’S RECORDS, *supra* note 1, at 594 (Report of Committee of Style); Treanor, *supra* note 5, at 20–24. Farrand reproduces Madison’s copy of the Committee of Style broadside, which contains an erroneous period following

Eleven years later, in a 1798 House debate over the proposed Alien and Sedition Acts, Republican Congressman Albert Gallatin argued that Congress lacked power to pass those unwise laws, because they fell outside the limited enumerated powers of Congress. Federalist proponents argued that they were authorized by Congress's power to legislate "for the common defense and general welfare," pursuant to Article I, Section 8, Clause 1.<sup>173</sup> To this, Gallatin rejoined that he was "well informed" that

those words had originally been inserted in the Constitution as a limitation to the power of laying taxes. After the limitation had been agreed to, and the Constitution was completed, a member of the Convention (he was one of the members who represented the State of Pennsylvania) being one of a committee of revisal and arrangement, attempted to throw these words into a distinct paragraph, so as to create not a limitation, but a distinct power. The trick, however, was discovered by a member from Connecticut, now deceased, and the words restored as they now stand.<sup>174</sup>

Over a century later, Max Farrand recounted this story, asserting that the Pennsylvania delegate was Morris, the Connecticut delegate was Roger Sherman, and the "trick" was the substitution of the semicolon for the comma. Treanor accepts this tale at face value, and one can understand the temptation. The story seems to prove "dishonest scrivener" by itself: an eleventh hour change so subtle that it would certainly escape notice—a mere dot put on top of a comma!—

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"shall have power" that does not appear on the other existing copies of the broadside. See, e.g., *Creating the United States*, *supra* note 133 (Charles Pinckney's interlineated copy of Committee of Style broadside); 2 FARRAND'S RECORDS, *supra* note 1, at 594 (Report of Committee of Style). The Madison copy also contains various interlineations by Madison, including lettering the enumerated powers as "((a)), ((b))" etc. which were not in the original broadside. See 2 FARRAND'S RECORDS, *supra* note 1, at 594 (Report of Committee of Style); *Creating the United States*, *supra* note 133.

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

174. Albert Gallatin in the House of Representatives, June 19, 1798, 8 ANNALS OF CONG. 1976–77 (1798), *reprinted in* 3 FARRAND'S RECORDS, *supra* note 1, at 379.

that would convert the Constitution from a moderate government of limited enumerated powers desired by the delegates into a consolidated national government with unlimited powers. What could be more sneaky and dastardly? The other fourteen changes identified by Treanor pale in comparison.

This “sinister semicolon” story is most likely a canard, originating as it does with a politically motivated congressman who was not present at the Constitutional Convention, and who claimed to be “well informed” by an unnamed source.<sup>175</sup> The only other evidence in addition to this anonymous hearsay informant was the apparent fact of the punctuation change itself.

Even if Gallatin’s story has any truth, it had to be misinterpreted by Farrand in order to make it apply to Morris and the semicolon. We can see that Farrand jumps to his conclusions, because Gallatin doesn’t actually say that the change was a punctuation mark. Instead, he cites an effort “to throw” the General Welfare Clause “into a distinct paragraph.” That implies a line break, not a change from a comma to a semicolon, because the Committee of Style draft put most distinct powers on separate lines, and used periods—not semicolons—to mark the end of each paragraph. Here, the story goes astray, because the Committee of Style broadside did not put the General Welfare Clause on a separate line or paragraph from the Taxing Clause. Nor is it clear that Gallatin was even referring to Morris, whom he doesn’t actually name. There is reason to believe that Gallatin’s supposed “culprit”—if there was a culprit—was James Wilson, whom some historians believe was kibbitzing the Committee of Style.<sup>176</sup>

Most importantly, the timing of Gallatin’s story makes no sense as applied to the Committee of Style’s insertion of

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175. *Id.*

176. See WARREN, *supra* note 54, at 687–88 (arguing that Wilson is “equally, if not more, entitled to the honor of making this final draft”).

the semicolon. Gallatin asserted that “the trick” occurred only “after” “the Constitution was completed.”<sup>177</sup> But Farrand and those who repeat his accusation assert that Morris’s alleged punctuation fraud occurred in the Committee of Style draft on September 12, *three days before* the Constitution was “completed”—approved, that is, by a final Convention vote. Farrand simply and incorrectly assumed that the accusation referred to Morris and the semicolon, and the story has gained legs from uncritical repetition.<sup>178</sup>

Scrutinizing Gallatin’s story carefully with these facts in mind, the stronger inference is that Morris was wholly innocent and the punctuation fraud, if any, was the (re)insertion of the comma. The delegates probably never approved the comma version as such: the September 4 committee report containing the comma was read aloud to the delegates, probably without punctuation marks being read. Instead, the first version the delegates would have read with punctuation was the Committee of Style broadside *with the semicolon*. This version was approved by the Convention on September 15. Whoever changed the semicolon to a comma did so without the knowledge of the delegates. The delegates first saw the engrossed (handwritten) parchment Constitution with the supposedly “restored” comma on September 17, when each signed the document. Would any delegate have taken the time, with others waiting behind him, to proofread the punctuation of the entire Constitution? Clearly not. So it was the semicolon, not the comma, that was approved by Convention vote.

In any case, the punctuation mark simply cannot bear the interpretive weight of determining whether Congress has only limited enumerated powers or instead has a broad

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177. Albert Gallatin in the House of Representatives, June 19, 1798, 8 ANNALS OF CONG. 1976–77 (1798), reprinted in 3 FARRAND’S RECORDS, *supra* note 1, at 379.

178. See, e.g., MCDONALD, *supra* note 115, at 265; Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 338–39 & n.151 (2002).

power to legislate for the general welfare. James Madison hated the General Welfare Clause, yet even he admitted that “taken literally,” the comma version of the Clause “convey[s] the comprehensive power” claimed by Federalists. To Madison, the punctuation argument did not deserve “the weight of a feather” in interpreting the General Welfare Clause.<sup>179</sup> That is because, as Professor William Crosskey observed, the comma version of the Clause “is still undeniably open to [the general welfare] interpretation as a mere matter of English,” so that the reinsertion of the comma as “the method chosen by the skilled lawyers of the Federal Convention” to negate that interpretation would have been “singularly inept and ineffective.”<sup>180</sup> Furthermore, it is apparent that the Framers did not follow the same syntax rules regarding commas and semicolons that we do today, and it is likely that they also delegated at least some discretion to printers and engrossers to insert or change punctuation marks.<sup>181</sup> It’s thus not even clear that the Committee of Style meant to put the semicolon there.<sup>182</sup>

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179. Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), in 9 THE WRITINGS OF JAMES MADISON 411, 417 (Gaillard Hunt ed., 1906); *id.* at 411 n.2 (“Memorandum not used in letter to Mr. Stevenson.”).

180. 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 394 (1953); *see also* Kesavan & Paulsen, *Is West Virginia Unconstitutional?*, *supra* note 178, at 339 n.151 (questioning interpretive relevance of semicolon); Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 286 n.25 (1987) (same).

181. *See* Schwartz & Enger, *supra* note 15.

182. There is a simple and completely innocent explanation for the apparent punctuation “switch.” The original version of the first enumerated power in the Committee of Detail report looked like this:

The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises;

To regulate commerce with foreign nations . . . .

2 FARRAND’S RECORDS, *supra* note 1, at 181 (Madison). Recall that the comma version of this Clause, with “to pay the debts and provide for the common defense and general welfare,” was contained in the handwritten Committee of Postponed Parts report of September. Significantly, Secretary Jackson failed to write in this alteration on his purportedly “official” copy of the Committee of Detail report. *See*

Even if the punctuation mark carries interpretive significance one way or the other—and I believe it does not—the semicolon did not reverse a Federalist loss on the Convention floor, as Treanor’s dishonest scrivener allegation contends. Most delegates probably agreed with Madison that the General Welfare Clause was more naturally read as authorizing a power to legislate for the general welfare.<sup>183</sup> The semicolon was either inconsequential, or at most, very slightly reinforced that reading, but would not have eliminated the ambiguity surrounding the Clause’s meaning. Contrary to Gallatin’s claim, and another indication of its unreliability, is the fact that the General Welfare Clause was *not* “inserted in the Constitution as a limitation to the power of laying taxes.”<sup>184</sup> That was Connecticut delegate Roger Sherman’s own highly tendentious interpretation of the language. Two weeks before the semicolon version was approved by the Convention, Sherman had proposed language expressly limiting the taxing power to federal purposes; his motion was overwhelmingly rejected, ten states to one.<sup>185</sup> In sum, if anything was snuck in, it was the comma. And if anyone attempted to reverse a loss on the Convention floor by changing a punctuation mark, it was Sherman—not Morris. Roger Sherman is a far more likely “dishonest scrivener” than Gouverneur Morris, at least in this episode.

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*supra* notes 138–139 and accompanying text. The “sinister semicolon” may have been nothing more than the addition of the new language—“to pay [etc.]”—to the semicolon that was already there after “excises;” in the Committee of Detail broadside version.

183. See Schwartz, *Lost General Welfare Clause*, *supra* note 62, at 925–27.

184. Albert Gallatin in the House of Representatives, June 19, 1798, 8 ANNALS OF CONG. 1976–77 (1798), reprinted in 3 FARRAND’S RECORDS, *supra* note 1, at 379.

185. See 2 FARRAND’S RECORDS, *supra* note 1, at 414 (Madison).

B. *Was Gouverneur Morris a “Lone Penman”?*

Emphasizing Morris as *the* “dishonest scrivener” encourages readers to believe that the Committee of Style’s apparent departures from a purely stylistic role were all the work of Morris. That assertion is highly conjectural and dubious: it assumes that because Morris *wrote out* the Committee draft, he must have personally conceived all the changes wrought by the Committee. If that assumption is wrong—if the Committee of Style draft were truly a committee product—then all the character evidence against Morris loses what little force it carries. Unless William Johnson, Rufus King, Alexander Hamilton, and James Madison were also either sneaks in cahoots with Morris, or shirkers who didn’t bother to read what Morris was writing, they would likely have corrected any—or at least most—dishonest scribbling before submitting their report to the Convention.

We can agree that Morris was the Committee scrivener and even its main stylist.<sup>186</sup> But it does not follow that he

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186. The historical consensus that Morris personally wrote out the Committee of Style Draft is probably correct, although the evidence of this is thinner than one might think. The Committee’s papers, if any, are lost to history, and there is no Committee draft constitution in Morris’s handwriting—in contrast to the draft transmittal letter to Congress, which *is* in Morris’s handwriting. See Treanor, *supra* note 5, at 4, 16, 29. The entirety of the evidence relied on by historians consists of assertions by two biased witnesses: Morris, in his 1814 letter to Timothy Pickering boasted that the Constitution “was written by the fingers, which write this letter,” Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), in 3 FARRAND’S RECORDS, *supra* note 1, at 420, and Madison, in his 1831 letter to Jared Sparks, asserted that “[t]he *finish* given to the style and arrangement of the Constitution fairly belongs to the pen of Mr. Morris,” Letter from James Madison to Jared Sparks (Apr. 8, 1831), in 3 FARRAND’S RECORDS, *supra* note 1, at 499. Morris had an interest in claiming to have written the draft, both as a matter of ego and to assert a claim to interpretive authority; note how he exaggerated by claiming to have written “[t]hat document”—the Constitution—rather than merely a stylistic arrangement on behalf of a committee. Madison, having devoted his post-ratification career to distancing himself from his one-time Federalist allies, had an interest in disclaiming responsibility for the pro-Federalist wordsmithing by the Committee of Style—of which Madison was a member.

generated all or even most of the purported substantive changes. The available circumstantial evidence is more consistent with the inference that Morris worked with significant input and supervision from the other Committee members.

Assuming that Morris did all the scrivening and styling, there was still ample opportunity for the other Committee members to influence his work. According to the diary of its chair, William Johnson, the Committee of Style met three times between September 8, when the Committee was appointed, and the morning of September 12, when it reported. The Committee first met in the evening on September 8.<sup>187</sup> While the Committee did not meet on Sunday September 9, it met again on September 10. On that day, it appears that Morris may have spent the day writing while the other Committee members had participated “[i]n Convention.”<sup>188</sup> The Committee then had ample time to

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Were this the only evidence, we might have reason to question Morris’s authorship. But there is further corroboration in the probable fact that Morris skipped the Convention floor debate on Monday, September 10, to work on the Committee of Style draft, while the other committee members attended the Convention. *See infra* note 188 and accompanying text.

187. *See* Diary of William Samuel Johnson, 1787 (Sept. 8, 1787), 3 FARRAND’S RECORDS, *supra* note 1, at 554. The Convention rules specified that “Committees do not sit whilst the House shall be or ought to be, sitting.” 1 FARRAND’S RECORDS, *supra* note 1, at 17 (Madison). Thus, for example, an all-states committee formed on August 18 to discuss the issue of federal debt assumption, reported its proposal on August 21, but several of its members spoke in floor debates on the intervening convention day, August 20, including Langdon, King, Sherman, Dickinson, and Mason, while McHenry took notes of the full Convention debate on that day. *See* 2 *id.* at 322 (Journal); *id.* at 344–50 (Madison); *id.* at 351 (McHenry); *id.* at 352 (Journal). It appears that Committees generally met before or after plenary sessions on Convention days, and possibly on Sundays, when the Convention did not meet. According to a September 6 letter to Jefferson, Madison indicated that he had been participating in committee meetings continually since August 22 “both before & after the hours of the House.” BILDER, *supra* note 66, at 142 (quoting Letter from James Madison to Thomas Jefferson (Sept. 6, 1787)). The full House met from Monday through Saturday each week, usually from 10:00 or 11:00 in the morning until 3:00, 4:00, or 5:00 in the afternoon. *See* 1 FARRAND’S RECORDS, *supra* note 1, at 2; 2 *id.* at 328 (Madison); 3 *id.* at 73, 75; BEEMAN, *supra* note 18, at 290.

188. *See* Diary of William Samuel Johnson, 1787 (Sept. 10, 1787), *in*

meet, and did meet, on September 11.<sup>189</sup> That morning, as soon as the delegates were called to order, the Convention immediately adjourned for the day, “the Committee of revision not having reported, and there being no business before the Convention.”<sup>190</sup>

This timeline is fully consistent with the likelihood that the Committee members gave input to Morris as he began the writing work. Morris had Sunday and Monday, September 9 and 10, to work on his own. The Committee probably reviewed Morris’s work and gave further input after the Convention adjourned on Monday, September 10, and again on Tuesday, September 11—why else would they have met? Moreover, the September 11 morning adjournment would have given the Committee members all

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3 FARRAND’S RECORDS, *supra* note 1, at 554. The Committee of Style was appointed near the end of the session on Saturday, September 8. 2 FARRAND’S RECORDS, *supra* note 1, at 547 (Madison). On Monday, September 10 (the Convention never met on Sundays), Madison’s notes record no participation by the usually loquacious Morris. *Id.* at 557–64 (Madison). Counts of recorded speeches in Madison’s notes show that Morris spoke more frequently than all but one other delegate, despite the fact that he was absent from the Convention for all of June. See *Delegates’ Speeches, Motions, and Committee Assignments in the Constitutional Convention*, CTR. FOR THE STUDY OF THE AM. CONST., <https://csac.history.wisc.edu/document-collections/the-constitutional-convention/delegates-speeches-motions-and-committee-assignments-in-the-constitutional-convention/> (last visited Apr. 28, 2022); 3 FARRAND’S RECORDS, *supra* note 1, at 589 (Attendance of Delegates). Madison’s notes for September 10 do account for speeches, motions, or seconds by three of the five members of the Committee of Style: Madison, Hamilton, and King. 2 *id.* at 558–64 (Madison) (Madison’s participation); *id.* at 558–62 (Hamilton’s); *id.* at 562, 563 (King’s). Johnson, the Committee Chair, did not speak, but was in attendance. We can infer this because Connecticut is recorded as casting votes on motions, *id.* at 557 (Journal), and the rules required the presence of two delegates for a state to cast a vote. By September 8, Roger Sherman was the only other Connecticut delegate still attending the Convention. 3 *id.* at 587, 588, 590 (Attendance of Delegates) (noting absence of Oliver Ellsworth from Convention as of August 27). All this raises a strong (if not quite ironclad) inference that the only member of the Committee of Style absent from the proceedings on September 10 was Morris, which is consistent with the notion that he was at home busily writing the Committee of Style Draft.

189. Diary of William Samuel Johnson, 1787 (Sept. 11, 1787), in 3 FARRAND’S RECORDS, *supra* note 1, at 554.

190. 2 FARRAND’S RECORDS, *supra* note 1, at 581 (Journal).

day to work together on the report. The speculation that Morris worked entirely or mostly on his own is no more plausible—and probably less plausible—than the speculation that Committee members sat in the same room as Morris throughout the day on September 11 and discussed or even dictated revisions.

There was no demand that the Convention resume on September 12 if the Committee of Style was not ready. So, there is no basis to infer that Morris crammed down a set of revisions of his own by giving the Committee no time to review them. The suggestion that Morris went rogue and prepared the Committee draft without its input, supervision, or approval is not just purely conjectural and inconsistent with the fact of the three Committee meetings: it is flatly implausible. The strong-mindedness of Hamilton and King and their Federalist ideas need no elaboration here.<sup>191</sup> Madison, by this point in the Convention, had shown an aptitude for wordsmithing to finesse disagreements.<sup>192</sup> We can attribute the style and arrangement to Morris's "fingers," and even speculate that he was "first among equals" on the Committee without conceiving the Committee of Style draft as Morris's own work and crediting him with (or blaming him for) any and all substantive changes.<sup>193</sup>

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191. For King's speeches reflecting his nationalist views, see, for example, 1 *id.* at 323 (Madison) ("The States were not 'sovereigns,'" and "[a] Union of the States is a union of the men composing them, from whence a *national* character results to the whole. Cong[re]ss can act alone without the States . . ."); *id.* at 492 (Madison) ("King was for preserving the States in a subordinate degree . . ."); 2 *id.* at 220 (Madison) (King had been willing to make concessions to slave states "to strengthen the Genl. Govt.").

192. See BILDER, *supra* note 66, at 141.

193. For many years, many historians and legal scholars have assumed that Madison played an outsized role in crafting the Constitution. His role has been grossly exaggerated, and more recent scholarship has emphasized the large contributions of other delegates, especially Morris, James Wilson, and the Convention President and leading man of the nation, George Washington. Emphasizing the individual contributions of these figures is an important corrective to the Madison myth, but in busting that myth, scholars should avoid falling into their own "great man theory" of the Framing. There is no doubt that Morris was a leader of the Federalist faction at the Convention and wielded great

The likelihood that Committee of Style report was a committee product, rather than Morris's individual one, significantly weakens the "dishonest scrivener" narrative. That narrative relies heavily on the character evidence against Morris. It is much more difficult to make the case that an entire committee was engaged in a covert project to "smuggle in" Federalist readings of the Constitution, at least several of which Madison disagreed with.<sup>194</sup>

There is no doubt, as Treanor ably shows, that the overall thrust of the Committee of Style edits was to emphasize or reinforce Federalist interpretations of various elements of the Constitution.<sup>195</sup> But as Treanor also ably shows—though at times loses sight of—these were *Federalist* interpretations, and not personal pet projects of Morris.<sup>196</sup> It is one thing to chart Morris's influence, but quite another to infer that the rest of the Committee of Style passively rubber-stamped his work. For example, the Preamble—whose nationalist turn worked the most striking substantive departure from prior language—comports with statements made, not only by Morris, but also Committee of Style members Rufus King and Alexander Hamilton to the effect that the United States was (or should be) a consolidated nation rather than a league of states.<sup>197</sup> Treanor successfully

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influence. But acknowledging that is not the same thing as saying that he acted on his own.

194. Madison could not have been entirely pleased with the Preamble, which can be read as supportive of broad national powers. In his post-mortem Convention letter to Jefferson, Madison insisted that the Convention had opted for limited enumerated powers. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 FARRAND'S RECORDS, *supra* note 1, at 133–34. In Federalist 41, Madison for the first time expressed his long-running aversion to the General Welfare Clause, which echoes the Preamble's "general welfare" language. THE FEDERALIST NO. 41 (James Madison).

195. See Treanor, *supra* note 5, at 46.

196. See *id.* at 48–104 (sections discussing of fifteen Committee of Style revisions).

197. See *id.* at 28–30 (Morris's nationalism); 1 FARRAND'S RECORDS, *supra* note 1, at 287 (Madison) (Hamilton's statement advocating that national government power "must swallow up the State powers"); *supra* note 191 (King's nationalism).

demonstrates that most of the Committee of Style changes reflected Federalist ideas. But the available evidence does not show that Morris was the creator of those ideas or even the moving force for inserting them into the Committee of Style draft.

*C. Did Committee of Style Changes Diverge from Convention Majority Views?*

This last point leads naturally into the next one: the Committee of Style revisions were consistent with the views of a majority of Convention delegates. This should hardly be a surprise, given that the Convention unanimously approved the Committee of Style report with only a few changes. Nevertheless, Treanor suggests that many or most of the changes made by the Committee diverged from majority votes on the Convention floor.<sup>198</sup> This in turn creates a potentially misleading impression—surely not intended by Treanor—that “the Federalist Constitution” was a distinctly minority viewpoint at the Convention. The focus on Morris as “lone penman” furthers this misapprehension, perhaps even suggesting that the Federalist views were somewhat idiosyncratic to Morris.

Treanor insightfully discusses the specific issues of constitutional politics raised by the various Committee of Style revisions. But a comprehensive assessment of the political leanings of the Convention delegates on these issues presents a huge and challenging undertaking. Such an assessment remains to be done and may never be done because of limitations of the documentary record.<sup>199</sup>

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Even Madison suggested that the states could be reduced to the status of counties. *Id.* at 449 (Madison).

198. See Treanor, *supra* note 5, at 46.

199. Three factors complicate the inquiry into any delegate-by-delegate assessment of Convention politics. First, many delegates spoke infrequently or not at all, though they may nevertheless have been influential. See generally *Delegates' Speeches, Motions, and Committee Assignments in the Constitutional Convention*, *supra* note 188 (counting delegate speeches). For example, George

Nevertheless, constitutional scholars and historians broadly agree that the Convention leaned nationalist compared to the overall political views of the state legislatures and the nation at large.<sup>200</sup> Those state legislatures had authorized a Convention to consider amendments to render the Articles of Confederation “adequate to the Exigencies of the Union.”<sup>201</sup> Despite the views of a vocal minority who preferred merely tweaking the Articles and who claimed that the Convention lacked authority to do more, the great majority of delegates endorsed or agreed with the overhaul-from-scratch approach.<sup>202</sup> The nationalism of a new government that could tax and regulate the people directly and function without dependence on the states cannot be minimized. It should also be noted that only about one-third of the fifty-five Convention delegates at one time or another joined the

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Washington is recorded as having spoken just once, *see id.*, yet he was probably hugely influential. *See, e.g.*, AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840*, at 212–17 (2021) (making case for Washington’s influence). Second, votes are recorded by states, not by individual delegate counts, *see, for example*, 1 FARRAND’S RECORDS, *supra* note 1, *passim*, reducing individual votes in many cases to inference or guesswork. Third, Madison’s notes may be incomplete or inaccurate in particular instances. *See BILDER, supra* note 66, at 4–5, 226–28.

Constitutional scholars and historians have generally gone as far as broad collective assessments of Convention politics and appraisals of the views of the handful of delegates with robust evidentiary records. This would include delegates whose paper trails are sufficient to support substantial biographies and those recorded by Madison as having spoken with sufficient frequency and clarity on salient issues to support solid inferences about their views. This sensible approach to evidence-based history leads to emphasizing—and at times perhaps exaggerating the importance of—particular individuals, or to using particular individuals as proxies for more widely shared beliefs. When employing the latter approach, as Treanor does, it is important to keep in mind that the individual is *representative of a point of view*.

200. *See, e.g.*, BEEMAN, *supra* note 18, at 20–21; KLARMAN, *supra* note 66, at 8; MAIER, *supra* note 8, at 466; McDONALD, *supra* note 115, at 186–88, 199–202.

201. *See, e.g.*, 3 FARRAND’S RECORDS, *supra* note 1, at 574 (Delegates’ Credentials–Delaware). This language, quoted from the Delaware General Assembly resolution appointing delegates to the Philadelphia Convention, was typical of most of the state resolutions authorizing participation in the Convention. *See id.* at 559–86.

202. *See, e.g.*, KLARMAN, *supra* note 66, at 144.

Jeffersonian-Madisonian opposition or the Republican Party before 1800, and only three of the forty-two delegates present on September 17 refused to sign the Constitution.<sup>203</sup> The document reported out of the Convention contained ambiguities and reservations in favor of states' rights, to be sure, but it was unmistakably "Federalist" in Treanor's sense.

Treanor does not in fact claim that the Convention leaned Republican, but rather that Morris made most of the fifteen wording changes "to reverse losses he"—and, by implication, the Federalists—"suffered on the Convention floor."<sup>204</sup> This assertion can be misleading: it could mistakenly be read to imply that all Convention votes on individual provisions reflected majority preferences. Yet many provisions were included or rejected by the Convention to satisfy *minorities*, not majorities. The slave importation provision is a well-known example: only Georgia and South Carolina demanded a guarantee of protection of slave importation from abroad. But they persuaded enough other delegations that this was a deal-breaker that they were accommodated by a majority that preferred to ban slave importation. A slave-state minority likewise insisted on the Fugitive Slave Clause.<sup>205</sup> The eventual removal of the word "justly" from that Clause—one of the fifteen changes cited by Treanor—could hardly be characterized as a minority position simply because a provision with "justly" in it had previously been approved by a majority vote.<sup>206</sup> Most of the Committee of Style revisions are better characterized as clarifying majority views that might have been blurred by an earlier vote to accommodate a minority. Overall, in my

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203. This is my own analysis based on biographical data. See, e.g., *Meet the Framers of the Constitution*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers> (last visited Apr. 28, 2022).

204. See Treanor, *supra* note 5, at 27.

205. 2 FARRAND'S RECORDS, *supra* note 1, at 443 (Madison).

206. See Treanor, *supra* note 5, at 43; Schwartz, *Framing the Framers*, *supra* note 7.

review of the fifteen revisions cited by Treanor, I found none that could clearly be characterized as reversing a Federalist loss.<sup>207</sup>

D. *Did the Convention Fail to Read the Committee of Style Draft?*

Because the Style doctrine is at bottom an argument about Framers' subjective intentions, it is not sufficient to rely on conclusive presumptions either that the Framers carefully read, or did not carefully read, the Committee of Style draft. This, too, is an empirical question.

Treanor's dishonest scrivener narrative claims that the Committee of Style changes were snuck past an inattentive Convention, whose delegates missed their significance. Treanor's evidence supporting the global claim of inattentiveness is that the delegates by September 13 were "weary" and "quickly went through the document in order to bring the Convention to a close."<sup>208</sup> Therefore, they would have missed the "subtle" substantive changes wrought by Morris. (Presumably, the other Committee of Style members would have missed the changes for the same reason. For if they agreed to the changes, then perhaps the revisions were not contrary to the Convention's intent after all.) The assertion of the Convention's inattentiveness is troubling, because it suggests grounds for an argument that the Convention therefore did not truly ratify the Committee of Style changes. Treanor stops short of making this claim, which indeed would undermine his conclusion that the final language of the Constitution should have priority over previous draft language.

But the claim of the Convention's inattentiveness rests on dubious or implausible inferences. For starters, it grossly

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207. See generally Treanor, *supra* note 5; Schwartz, *Framing the Framers*, *supra* note 7.

208. Treanor, *supra* note 5, at 20.

exaggerates the difficulty of carefully reading a 4,500-word typeset document over the course of two and a half days. And it ignores the powerful incentives the delegates had to read the Committee of Style draft carefully. Consider that the delegates well knew that the document would propose a radically new plan of government. And consider further that the Committee of Style draft presented the first real opportunity for the delegates to see their work as a whole. As Professor Bilder has keenly observed, “the politics and process of drafting the document deferred comprehension of the Constitution as a unified text.”<sup>209</sup> As noted above, the delegates did not have the benefit of Farrand’s single pre-Committee of Style “draft”—a compilation created through the editorial judgment of a historian a century and a quarter after the fact. Instead, they each presumably had their own interlineated copy of the printed Committee of Detail broadside handed out to them on August 6. From then until September 10—the last day of debate before hearing the Committee of Style report read aloud—the Convention voted on over 270 motions, the great majority of which were proposed additions or amendments to the Committee of Detail draft. The delegates would have been hard-pressed to accurately mark up their Committee of Detail broadsides: they would have had to accurately record which motions were approved, rejected, and postponed or referred to committees; the wording of each; and, as some would have it, even perhaps the punctuation of each.<sup>210</sup> Again, these motions were read aloud and usually not circulated among the delegates on paper. Any delegate who missed a day here or there, or dozed off, or briefly spaced out, would have failed to register changes to the text on his draft. In addition, five committees met in this time frame, and each of those

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209. See BILDER, *supra* note 66, at 3.

210. . . . if punctuation was as critical as agitators over the two semicolon controversies would have it. See *supra* notes 81–82 and accompanying text (semicolons in New States Clause) and *supra* Section III.A.2 (semicolons in General Welfare Clause).

reported a substantive change or addition, also read aloud.<sup>211</sup> Delegates would have had some additional sheafs if they made personal copies of lengthy and complex committee reports. And of course, there may have been “postponed parts” that remained to be acted upon.<sup>212</sup>

No human beings, not even the “assembly of demigods” (in Jefferson’s famous phrase),<sup>213</sup> could keep all this stuff in their heads. How might the delegates have coped? It is reasonable to assume that each of the delegates focused on the issues of greatest import to himself, and figured that the remaining details would become clear when he received the next printed broadside cumulating all the changes. That printed broadside was, of course, the Committee of Style report. The Committee of Style draft was the first moment in the Convention since the Committee of Detail draft on August 6 that pulled everything to that point together. To be sure, the foregoing suggests that it would have been difficult for many delegates to compare prior agreed resolutions with the Committee of Style report. But that would be all the more reason to read the Committee of Style report with care to ferret out any objectionable terms. The most reasonable expectation was not that the delegates would sign it without reading, but that they would eagerly read the Committee of Style draft carefully to get their first holistic sense of what they had created.

Moreover, everyone present knew the wording of the what the Convention had agreed to by September 8 would be changed by the Committee of Style—that was its job—and there is no basis to attribute to the Convention’s collection of sophisticated lawyers, merchants, and legislators a belief that a purely “stylistic” editing job would not and could not change meaning. Even law students are not that naïve. Also,

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211. See Vile, *supra* note 12, at 166–71.

212. See *supra* text accompanying note 146.

213. Letter from Thomas Jefferson to John Adams (Aug. 30, 1787), in 3 FARRAND’S RECORDS, *supra* note 1, at 76.

consider the fact that there were forty-one delegates present other than Morris by this stage. If, as Treanor claims, Morris was single-handedly undermining the intentions of large numbers of delegates, it is not plausible that all of those delegates were asleep at the switch. It would only take one skeptical delegate to unearth any particular subtle-but-important change.<sup>214</sup>

The attribution of deceitful intent on the part of Morris (or the Committee of Style collectively) assumes that Morris (or the Committee) *believed* that the delegates would be inattentive readers. To assume that Morris or anyone else on the Committee of Style believed they could have their way with a tired and lazy group of delegates who would sign without reading is purely conjectural, and not plausible. Nor can we assume, based purely on hindsight, that the Convention was determined to break up on September 17 and therefore would have a pre-set and short time limit in which to review the document.

Finally, the Convention records point strongly against the generalized inference that the delegates were inattentive to subtleties in the Committee of Style draft. That draft was

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214. We can also evaluate the claim of the Convention's inattention by individually reviewing the fifteen Committee of Style revisions cited by Treanor. Doing so bears out the implausibility of the claim of inattentiveness to the Committee of Style changes. Three revisions—the Preamble, the Fugitive Slave Clause, and the Contracts Clause—can be discarded right away. It is not plausible that any delegate missed the change to the Preamble; the other two were in fact noticed and debated. The changes to the Legislative and Executive Vesting Clauses are too prominently placed to have gone unnoticed. The two “sinister semicolons”—in the General Welfare and New States Clauses—were subtle but the likelihood that they changed, and were intended to change meaning, is low. Of the remainder, only two changes are arguably both substantive and subtle: dropping “of the United States” from “officer” in the Presidential Succession Clause; and dropping “against the United States” from “high crimes and misdemeanors” in the Impeachment Clause. Perhaps none of Morris's forty-one colleagues noticed these deletions, but neither amounts to dishonest scrivenering. As Treanor observes, the former revision did not “clearly advance[ a goal] that Morris had unsuccessfully fought for.” See Treanor, *supra* note 5, at 82. The latter, I have argued, did not go against the will of the Convention and would probably not have raised an objection if it had been noticed. See Schwartz, *Framing the Framers*, *supra* note 7.

first read aloud on September 12. The next morning, the printed copies were distributed, and “[i]t was moved and seconded” and agreed “to proceed to the comparing of the report, from the Committee of revision, with the articles which were agreed to by the House.”<sup>215</sup> The Committee of Style draft was thereupon, over the next three days, “read by paragraphs, compared, and in some places corrected and amended.”<sup>216</sup> By September 14, the delegates had worked their way through Article I, Section 10. They completed their review at the end of the day on September 15. Over those last three days of debate, the delegates made (by my count) twenty-two changes to the Committee of Style draft.<sup>217</sup> None of these could be deemed a major change, and as significantly, none involved a repudiation of a substantive proposal of the Committee of Style. At the same time, the changes were numerous and detailed, attentive to subtleties, and well spread across Articles I through IV. This supports the inference that enough delegates were reading the Committee of Style draft with enough care to refute the implication of overall inattentiveness. To take just one example: on September 15, the delegates voted to drop the word “legally” from the draft Fugitive Slave Clause to avoid the subtle implication that slavery was either moral or

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215. 2 FARRAND'S RECORDS, *supra* note 1, at 605 (Journal).

216. *Id.* (Journal).

217. Nine changes were made on September 13 and 14: changing “servitude” to “service” in the Three-Fifths Clause, and deleting “to” before “establish justice” in the preamble, *id.* at 605 (Journal); adding “except as to the places of choosing Senators” in Article I, § 4, *id.* at 613 (Madison); deleting the enumerated congressional power to appoint a treasurer, adding the uniformity proviso at end of the taxing power, deleting “punish” before “offenses against the law of nations” in the Piracy Clause (on Morris’s own motion!), *id.* at 614–15 (Madison); replacing “annually” with “from time to time” in the journal publication requirement of Article I, Section 5, Clause 3, *id.* at 618–19 (Madison); adding “a regular statement and account of [etc.]” to the Appropriations Clause in Article I, Section 9, Clause 7, *id.* at 619 (Madison); and reordering the prohibitions on states in Article I, Section 10, Clause 1. *Id.* at 618–19 (Madison). The thirteen additional changes made on September 15 were similar in scope and importance. *See id.* at 621–22 (Journal).

conformable to law in the abstract.<sup>218</sup> The unanimous adoption of the Committee of Style report, as amended, is thus sufficient to overcome the fraud allegation or any other imputation that the Constitution as approved on September 15 was not wholly the Convention's work.

#### IV. INTERPRETIVE IMPLICATIONS

The Style doctrine should be eliminated from our panoply of accepted interpretive approaches to the Constitution. By giving interpretive priority to draft language, the Style doctrine goes against a basic interpretive norm that the final language of a legal text is authoritative. The purported historical grounds for the doctrine are based on nothing more than the name given to the committee in question—and a shorthand name at that. The weight of the evidence shows that the Committee of Style was not foreclosed—either as a matter of formal procedure or informal expectations—from proposing substantive revisions to the collection of approved motions and committee reports that comprised the “draft” constitution as of September 8, 1787. Nor is there any basis for the more recent charge that the Committee of Style somehow abused its trust.

On one level, eliminating the Style doctrine is completely straightforward. It simply removes one line of argument from constitutional debate. It does not require an embrace of any of the several versions of originalism, or of a strict version of textualism. To be clear, dispensing with the Style doctrine does not mean that prior drafts are irrelevant or impermissible references in the interpretive enterprise. The Style doctrine is different from the general principle that legislative history—including prior drafts—may be relevant evidence of drafters' intentions when the final language is vague or ambiguous. Unlike standard resort to legislative history, the Style doctrine can be invoked even when the

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218. *See id.* at 628 (Madison).

Constitution's final language is clear, and it treats the earlier draft as authoritative text rather than as evidence of Framers' intent.

Eliminating the Style doctrine carries broader, albeit less immediately practical, implications for our understanding of the Constitution's history and original meanings. The Committee of Style shaped the final version of the Constitution in a decidedly Federalist direction. Yet many subsequent interpretations of key constitutional provisions, particularly those emphasizing "dual sovereignty" and "limited enumerated powers," were those that were favored by Jeffersonian-Madisonian Republicans. Translated to present-day constitutional politics, these Republican interpretations are congenial to politically conservative originalists, and are assumed to reflect the Constitution's original meaning.<sup>219</sup> But it was not the original language of the Constitution that dictated these interpretations.

Consider the following narrative of the founding. In 1786 and 1787, a critical mass of key leaders concluded that the government under the Articles of Confederation was failing. The Confederation governmental system left the United States vulnerable to external threats and internal disunion and dissolution. They persuaded the state legislatures to send delegates to a national Convention for the stated purpose of proposing amendments to render the Articles of Confederation "adequate to the exigencies of the Union."<sup>220</sup> But a large majority of delegates had nationalist leanings stronger than those of the state legislatures that sent them,

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219. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 561 (2012) (Roberts, C.J.) (adopting Madison's narrow interpretation of implied powers); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 90 (2013) (describing narrow construction of commerce power as "a long-standing originalist interpretation of the Constitution"); Barnett & Bernick, *supra* note 22, at 42–43 (stating that New Deal commerce power cases were not "good faith" interpretation).

220. 3 FARRAND'S RECORDS, *supra* note 1, at 574 (Delegates' Credentials—Delaware). See *supra* note 201 and accompanying text.

and the Convention quickly agreed to scrap the Articles and reframe the government from scratch. Within this majority, a powerful bloc—including such delegates as George Washington, Alexander Hamilton, James Wilson, Gouverneur Morris, Robert Morris, and Rufus King—favored strongly nationalist provisions that would later become associated with the Federalist Party. Yet they were constrained by the need for consensus of all the state delegations at the Convention and the need for their proposed Constitution to be ratified by state conventions that leaned less nationalistic than themselves. As a result, several of their preferred positions were couched in strategically ambiguous language in the proposed Constitution reported out of the Philadelphia Convention on September 17, 1787. As the state ratifying conventions deliberated, these delegates and their Federalist allies repeatedly downplayed their preferred interpretations. But after winning ratification, the Federalists advanced these interpretations, including, for example, that Congress had the power to address all national problems, that the Preamble had operative legal significance, and that the government of the United States possessed the inherent powers of national governments.<sup>221</sup> These interpretations were contested throughout the 1790s by an emergent Republican opposition, led by Jefferson and Madison. With the continued electoral successes of the Republican Party (and its Jacksonian-Democrat successor) from 1800 onward, the Jeffersonian-Madisonian-preferred interpretations became entrenched. By the mid-twentieth century it became virtually impossible for constitutional interpreters—jurists and historians alike—to view the Jeffersonian-Madisonian Republican interpretations of the Constitution as anything

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221. See, e.g., Treanor, *supra* note 5, *passim*. For a detailed outline of specific positions and interpretations that comprise the Federalist Constitution, see generally David S. Schwartz, Jonathan Gienapp, John Mikhail & Richard Primus, *The Federalist Constitution: Foreword*, 89 *FORDHAM L. REV.* 1669 (2021), and the various articles in that symposium. Symposium, *The Federalist Constitution*, 89 *FORDHAM L. REV.* 1669 (2021).

other than its original meaning. The Federalist Constitution was effectively buried in our collective historical consciousness.<sup>222</sup>

The foregoing narrative of the lost Federalist Constitution combines both conventional and revisionist elements. The inadequacy of the Confederation system to the requirements of a true national government is well known and understood. So is the fact that the Convention delegates agreed at the outset to scrap the Articles of Confederation and start over. Less ingrained in our conventional founding story, but generally well understood by historians, is that the Convention delegates collectively leaned more nationalist than the state legislatures and the public at large.<sup>223</sup> But beyond these points, the conventional narrative becomes confused. The conventional narrative fails to explain how Republican and even Anti-Federalist views became constitutional orthodoxy, and simply confuses orthodoxy with “the original understanding.”<sup>224</sup> In contrast, a new wave of revisionist scholarship has begun seriously re-examining the conventional history that treats the Republican Constitution as synonymous with *the* original meaning of the Constitution. This scholarship shows, not that the Federalist Constitution should be taken as authoritative, but rather that constitutional meaning was contested from the outset; and therefore, as Dean Treanor has argued, the existence of Federalist interpretations alongside Republican ones at the founding “reveals a new reason why the search for collective constitutional meaning is illusory.”<sup>225</sup> Moreover, in several

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222. Schwartz et al., *supra* note 221, at 1670.

223. See *supra* note 200 and accompanying text.

224. I use the phrase “original understanding” rather than “original meaning,” because the latter term is associated so strongly with present-day originalism. But the confusion of orthodoxy with the original *understanding* of the Constitution extends beyond originalists to most interpreters. Virtually all constitutional interpreters consider historical understandings of the constitutional text and the intentions of its authors to be interpretively important, if not dispositive.

225. Treanor, *supra* note 5, at 107.

instances, “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.”<sup>226</sup>

Interpreters, past and present, who wish the Constitution to conform to Jeffersonian-Madisonian Republican constitutional politics must ignore or explain away constitutional text rather than hew closely to it.<sup>227</sup> They necessarily insist that the preamble is meaningless fluff, that the General Welfare Clause means something other than “what its literal words express” (as Madison put it), and that the Necessary and Proper Clause ends with “the foregoing powers,” ignoring the part that says “and all other powers.”<sup>228</sup> To deny the Federalist interpretations of these and other provisions, originalist-textualists today must resort to what Treanor aptly calls “loose construction.”<sup>229</sup> In this sense, the Style doctrine is part and parcel of a collective forgetting of the Federalist constitutional vision at the founding. Dropping the Style doctrine and its mistaken historical premises will help us better to see and understand the Constitution’s history.

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226. *Id.* at 104.

227. *See generally* Treanor, *supra* note 5.

228. Letter from James Madison to Andrew Stevenson, *supra* note 179, at 417; John Mikhail, *The Necessary and Proper Clauses*, 102 *GEO. L.J.* 1045, 1058–71 (2014) (tendency to ignore “all other powers” provision).

229. *See* Treanor, *supra* note 5, at 116 & n.660.