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The Deep South's Constitutional Con

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ARTICLE

THE DEEP SOUTH'S CONSTITUTIONAL CON

LYNN UZZELL*

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Was the Constitution an inherently pro-slavery document? Surprisingly, a full answer to that question depends, in part, on correctly understanding the mysterious Pinckney Plan. Charles Pinckney of South Carolina proposed a plan of government at the start of the Constitutional Convention, but no authentic copy of the original survives. Three decades later, Pinckney circulated a plan which he claimed was the one he offered in 1787. He also claimed that he was the author of most of the Constitution and that the Privileges and Immunities Clause he proposed was conceived with a racist and pro-slavery understanding. Most experts, beginning with James Madison, determined that the 1818 Plan was far too close to the final Constitution to be genuine, and for many years Pinckney's constitutional con was thoroughly discredited. But in 1903, John Franklin Jameson discovered a manuscript and wrongly identified it as an extract of the Lost Plan. That error sparked a surprising surge of credulity in Pinckney's fraudulent claims. Today, a vast accumulation of errors on the Pinckney Plan can be found throughout the scholarly and popular literature on the Constitution's formation. Today's Supreme Court wrongly attributes the Privileges and Immunities Clause to Pinckney. Getting the story right requires overturning more than a hundred years of faulty scholarship on the Pinckney Plan. The true story will cast some doubt on the thesis that the Constitution was conceived as a racist and pro-slavery document.

I. INTRODUCTION

In 2019, the *New York Times* published a special feature titled *The 1619 Project*. The series of essays not only sought to commemorate the 400-year anniversary of the first arrival of enslaved Africans to the shores of British North America; it also sought to reframe the American story by naming this date as the true founding of the nation. Nikole Hannah-Jones, who spearheaded the project and wrote the lead essay, argued that the more commonly cited Founding moments (whether 1776 or 1787) were merely continuations of the story of white Americans brutalizing and oppressing black Americans.¹ “Anti-black racism runs in the very DNA of this country,” she wrote;² in particular, the Framers of the Constitution “carefully constructed a document that preserved and protected slavery.”³

Her assertions were provocative but not novel. Arguments that the Constitution was designed either to promote or to undermine slavery are as old as the Constitution itself; interested parties have staked out claims on

1. See Nikole Hannah-Jones, *The Idea of America*, N.Y. TIMES MAG., Aug. 18, 2019, at 17–19 (illuminating the atrocities that were being committed against black Americans when the country was founded).

2. *Id.* at 21.

3. *Id.* at 18.

both sides of this question since the Constitution first made its public appearance. Nor will this question ever be definitively decided on one side or the other, since there are individual facts that weigh on both sides. Nevertheless, references found in several Supreme Court cases lend further support to the 1619 interpretation of the Constitution. In *Austin v. New Hampshire*,⁴ the Court attributes the final wording of the Constitution's Privileges and Immunities Clause (which differs from a similar clause in the Articles of Confederation) to Charles Pinckney of South Carolina.⁵ Other cases have followed *Austin's* lead.⁶ As Julian N. Eule neatly summarizes: Pinckney "is generally believed to have drafted the shorter version" of the Privileges and Immunities Clause.⁷

As evidence for the clause's origins, *Austin* cited a congressional speech Pinckney delivered in 1821.⁸ In that speech, the representative from South Carolina not only boasted that he authored the Privileges and Immunities Clause; he claimed exclusive right to interpret its true meaning.⁹ Its true meaning (if Pinckney's words can be trusted) foreshadowed Roger Taney's infamous ruling in *Dred Scott v. Sandford*.¹⁰ According to Pinckney in 1821, "at the time I drew that constitution, I perfectly knew that there did not then exist such a thing in the Union as a black or colored citizen, nor could I then have conceived it possible such a thing could ever have existed in it."¹¹

Charles Pinckney came from a notable family in South Carolina, and his political career spanned a lifetime, both in his home state and on the national stage. He owned hundreds of slaves throughout his life and was an unapologetic defender of the proposition that slavery was a positive good.¹² If his claims in 1821 (to say nothing of the Supreme Court's assumptions today) are accurate, then the fiercest critics of the Constitution have additional ammunition to add to their arsenal when they argue that racism

4. *Austin v. New Hampshire*, 420 U.S. 656 (1975).

5. *Id.* at 662 & n.6.

6. *Zobel v. Williams*, 457 U.S. 55, 79 (1982) (O'Connor, J., concurring); *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280 n.7 (1985).

7. Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 447 (1982).

8. *Austin*, 420 U.S. at 662 n.6.

9. Congressional Speech by Charles Pinckney (Feb. 13, 1821), in 37 ANNALS OF CONG. 1129, 1134 (1821) (Joseph Gales ed., Gales and Seaton 1855).

10. *See Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1857) (arguing the Framers did not intend for citizenship to be extended to non-whites).

11. Congressional Speech by Charles Pinckney (Feb. 13, 1821), in 37 ANNALS OF CONG. 1129, 1134 (1821) (Joseph Gales ed., Gales and Seaton 1855).

12. Marty D. Matthews, *Forgotten Founder: The Life and Times of Charles Pinckney* 79, 131–32, 134 (2004).

is an integral part of the Constitution and the nation's DNA. However, Charles Pinckney's claims in 1821 were not true; multiple sources the Supreme Court has relied on for understanding the Pinckney Plan are unreliable; and this 200-year-old tangle of falsehoods and errors forms what is probably the most intractable constitutional con in history.

Part I of this Article relates the long and complicated history of the Pinckney Plan (both the mysterious 1787 Plan, which disappeared after it was submitted at the Constitutional Convention, and the spurious 1818 Plan that Pinckney fabricated three decades later). This history begins with the numerous tributes to Pinckney's supposed importance as a constitutional Framers; it recounts the history of the Lost Plan; and it surveys the history of the scholarship on the Lost Plan (which in many instances deviates significantly from the actual history). Part II will scrutinize the manuscript that John Franklin Jameson identified as an extract of the Lost Plan in 1903. By examining the internal evidence of that manuscript, as well as comparing it to a more credible extract of the Lost Plan, we can see that Jameson was almost certainly mistaken in his identification. Correcting Jameson's error is crucial, because most of the faulty scholarship on the Pinckney Plan—more than a century's worth—sprang from this initial mistake. Finally, Part III will show the constitutional significance of getting this story wrong. Charles Pinckney, along with others in the South, made false claims about the Constitution's formation in order to demonstrate that the Privileges and Immunities Clause was formed with a racist understanding. But the drafting history of that clause tells a story that is almost the opposite of the one Pinckney told in 1821: this part of the Constitution was understood by the Framers as anti-racist and anti-slavery when it was formed. By uncovering this constitutional con, we can see that Charles Pinckney of South Carolina has hitherto received far more credit for the final content of the Constitution than was his due, and James Wilson of Pennsylvania deserves more than he has received.

II. HISTORICAL BACKGROUND

A. *Charles Pinckney's Admirers*

Although most Americans have probably never heard the name Charles Pinckney, there exists a cadre of devoted admirers who promote his legacy. Pinckney was the youngest of four South Carolina delegates at the

Constitutional Convention held in 1787.¹³ Because of his youth, Pinckney's education was humbler than that attained by some of his contemporaries. Tensions between England and the colonies in the years leading up to the War for Independence stymied his family's plans to educate him in London; instead, he read law at home in Charleston.¹⁴

But Pinckney's ambitions were formed early, and his youth and inexperience did not prevent him from proposing his own Plan of Government for consideration in the Convention's opening days. Apparently, the rest of the delegates ignored that Plan, and no one kept an authentic copy.¹⁵ However, three decades later Pinckney circulated a plan which he claimed was the one proposed at the outset of the Convention. The 1818 Plan was strikingly similar to the final Constitution adopted by the Convention. According to Pinckney's own (unsubstantiated) account in 1821, numerous senators and Supreme Court Justices told him that it was now widely recognized that his Plan formed the basis for most of the U.S. Constitution:

I had been not only the first but the only member [of the Constitutional Convention] that had ever submitted a complete Plan to the Convention, & as the Constitution as adopted was more than three-fourths of it in the very words of my plan . . . [I] ought to have more credit for the first thought & first plan & therefore the Constitution itself than any other man in America.¹⁶

At the time he wrote those lines, intellectual giants like John Marshall and Joseph Story were among the Supreme Court Justices, and they frequently wrote about the Constitution. But they left behind not a word which would substantiate Pinckney's claim that they believed the Constitutional text is primarily indebted to his Plan of Government.

In fact, the only contemporaneous corroboration of Pinckney's remarkable claims came from his friend and fellow South Carolinian,

13. William S. Elliott, *Art. V.—Honorable Charles Pinckney, LL.D., of South Carolina*, 34 DE BOW'S REV. 59, 63 (1864).

14. MATTHEWS, *supra* note 12, at 11–12.

15. *Plans of Government Proposed at the Convention*, CTR. FOR THE STUDY OF THE AM. CONST., <https://csac.history.wisc.edu/document-collections/the-constitutional-convention/the-plans-at-the-convention/> [https://perma.cc/8U43-PFK2].

16. Letter from Charles Pinckney to Robert Y. Hayne (Mar. 31, 1821) (on file with the New York Public Library), from the Charles Pinckney letters and financial documents, Manuscripts and Archives Division, The New York Public Library, Astor, Lenox, and Tilden Foundations. Profound thanks to Mary Hackett, who helped me decipher Pinckney's impenetrable scrawl.

Senator William Loughton Smith. Smith declared on the floor of the Senate that “it must be acknowledged that Mr. Charles Pinckney of South Carolina, had submitted propositions upon which almost all the important provisions of the Constitution were based.”¹⁷ By the mid-nineteenth century, another South Carolinian was also touting the importance of the Pinckney Plan. W. S. Elliott asserted that “the greater part” of Pinckney’s Plan of Government had been adopted into the Constitution; “so much so, that he has always been considered as entitled to the high and honorable designation of ‘THE FATHER OF THE CONSTITUTION.’”¹⁸ Elliott, the author of this eulogy, was Pinckney’s grandnephew.

In other words, throughout the nineteenth century, Pinckney’s most ardent admirers appeared to be confined to his immediate circle of friends and family. But the circle of enthusiasts who exaggerated the claims of the Pinckney Plan widened considerably beginning in the first decade of the twentieth century, and they remain stalwart to this day. These accolades of Pinckney’s 1787 Plan of Government mushroomed in spite of the fact that no authentic copy of the original survives—or rather, perhaps because of that fact. Charles C. Nott, writing in 1908, believed that the Constitution’s content, wording, and design were drawn almost entirely from that Lost Plan and that “there is no framer of the Constitution more entitled to be commemorated in bronze or marble than Charles Pinckney of South Carolina.”¹⁹ According to Hannis Taylor in 1911: “The only plan or ‘system’ actually presented to the Convention was that of Charles Pinckney, which, as the documentary evidence now available shows, was very largely used by the Committee of Detail in preparing their draft of the Constitution submitted to the Convention on August 6.”²⁰ In 1937, Andrew J. Bethea complained that, had Pinckney been born in one of the Northern states, he “would have long since been commemorated in bronze and marble and . . . been accorded his rightful place among the immortals of history.”²¹ In 1950, Joseph R. Bryson, a representative from South Carolina, took to the

17. William Loughton Smith, On the Report of the Committee on the Petition of Matthew Lyon, Address Before the United States Senate (Jan. 17, 1821), in 37 ANNALS OF CONG. 405, 410 (1821) (Joseph Gales ed., Gales and Seaton 1855).

18. Elliott, *supra* note 13, at 63.

19. Charles C. Nott, The Mystery of the Pinckney Draught 253–54, 256 (1908).

20. Hannis Taylor, The Origin and Growth of the American Constitution 36 (1911).

21. Andrew J. Bethea, The Contribution of Charles Pinckney to the Formation of the American Union 121 (1937). Bethea’s title was taken from the name of the competition of which his manuscript was the winning entry. The competition, designed to trumpet Pinckney’s contributions to the Constitution, was sponsored by the South Carolina Bar Association. *Id.* at v.

floor of Congress to praise his state's favorite son, since Pinckney "probably supplied more original work in making the Constitution than did any other individual."²²

In the first half of the twentieth century, the most fervent tributes to the Lost Pinckney Plan were still primarily confined to the scholarship and pseudo-scholarship coming out of South Carolina. However, by mid-century, Sydney Ulmer was responsible for bringing Pinckneyphilia to a wider audience. He wrote a pair of articles arguing that it was Pinckney, not James Madison, who deserves the title, "Father of the Constitution;" he also argued that Madison had managed to ruin Pinckney's posthumous reputation through envy.²³ Taking Ulmer's hint, numerous subsequent scholars have scoured Madison's Notes of the Constitutional Convention, searching for clues that would prove that Madison had attempted to suppress Pinckney's contributions at the Convention, and several historians believe they found what they were looking for.²⁴ In each case, however, the evidence they uncovered proved faulty, to say the least.²⁵ Yet Ulmer has had at least as much success in raising Pinckney's standing among constitutional scholars as he has had in lowering Madison's.

Brothers Christopher and James Lincoln Collier, who wrote a popular history of the Convention in the 1980s, took their bearings from Ulmer. They were not coy when announcing their intentions for the book; they were part of the larger project tending to "cast a small shadow over the reputation of James Madison," whom they regarded as "the darling of generations of scholars."²⁶ They believed that Madison's contributions to the Constitution were overrated, and they concluded that it was Pinckney's "viewpoint . . . that was finally adopted by the Convention, and eventually

22. Extension of Remarks of Hon. Joseph R. Bryson, in 96, Part 17 UNITED STATES CONGRESS, CONGRESSIONAL RECORD: PROCEEDINGS AND DEBATES OF THE 81ST CONGRESS, SECOND SESSION, at A6280, A6280 (U.S. Gov't Prtg. Off. 1950).

23. Sidney Ulmer, *Charles Pinckney: Father of the Constitution?*, 10 S.C. L.Q. 225, 225 (1958) [hereinafter Ulmer, *Charles Pinckney*]; Sidney Ulmer, *James Madison and the Pinckney Plan*, 9 S.C. L.Q. 415, 415, 426 (1957) [hereinafter Ulmer, *James Madison*].

24. Christopher Collier & James Lincoln Collier, *Decision in Philadelphia: The Constitutional Convention of 1787*, at 70 (1986); Richard R. Beeman, *Plain, Honest Men: The Making of the American Constitution 100–01* (2009); Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention 132* (2015).

25. Lynn Uzzell, *Madison's Notes: At Last, a New and Improved Look*, LAW & LIBERTY (Mar. 8, 2018), <https://lawliberty.org/madisons-notes-at-last-a-new-and-improved-look/> [https://perma.cc/8KUG-JRVQ].

26. Collier & Collier, *supra* note 24, at 64.

the country as a whole.”²⁷ Richard Beeman, author of another popular history written 20 years later, drew heavily from both Ulmer and the Colliers. He suggested that Pinckney may fairly lay claim “to making an important, if not *the* most important, contribution to the Constitution.”²⁸ And a recent textbook on executive power claims that a careful review of the historical records “seems to accord Pinckney a greater share of the credit for writing the Constitution than Madison and his partisans have allowed.”²⁹

This elevation of Pinckney’s stature among constitutional scholars has not been lost on the courts. Coinciding with the renewed appreciation of Charles Pinckney that began in the early twentieth century, the Supreme Court has increasingly built decisions on the presumed contents of Pinckney’s Plan. In 1901, *Missouri v. Illinois & Sanitary District of Chicago*³⁰ claimed that his Plan gave to the Senate “sole and exclusive power to declare war and to make treaties.”³¹ In 1908, the Pinckney Plan was cited by *Williamson v. United States*³² as the source of the constitutional clause guaranteeing “[f]reedom of speech and debate” in Congress.³³ In 1926, *Myers v. United States*³⁴ credited the Pinckney Plan with requiring “the concurrence of the Senate in appointments of executive officials.”³⁵ According to 1987’s *Tyler Pipe Industries v. Washington State Department of Revenue*,³⁶ the Pinckney Plan gave to Congress an *exclusive* power to regulate interstate commerce.³⁷ And finally, although it is well known that the Articles of Confederation contained a version of the “privileges and immunities” clause, the Supreme Court has on numerous occasions, beginning in 1975, credited Pinckney’s Plan for providing “the shorter version now found in Art. IV, § 2, cl. 1” of the Constitution.³⁸ If we expanded our survey to include district court decisions, we would find that the Pinckney Plan is also believed to be a major influence on the

27. *Id.*

28. Beeman, *supra* note 24, at 98.

29. Michael Nelson, *The Puzzle of the Pinckney Plan*, in GUIDE TO THE PRESIDENCY AND THE EXECUTIVE BRANCH 16, 16 (Michael Nelson ed., CQ Press 5th ed. 2013).

30. *Missouri v. Illinois*, 180 U.S. 208 (1901).

31. *Id.* at 221–22 (quoting Charles Pinckney) (internal quotation marks omitted).

32. *Williamson v. United States*, 207 U.S. 425 (1908).

33. *Id.* at 437.

34. *Myers v. United States*, 272 U.S. 52 (1926).

35. *Id.* at 85 n.86.

36. *Tyler Pipe Indus. v. Wash. Dep’t. of Revenue*, 483 U.S. 232 (1987).

37. *Id.* at 260–61 (Scalia, J., concurring in part).

38. *Austin v. New Hampshire*, 420 U.S. 656, 662 n.6 (1975); *Zobel v. Williams*, 457 U.S. 55, 79 (1982) (O’Connor, J., concurring); *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280 n.7 (1985).

Constitution's provisions for amendments³⁹ and on trying criminal offenses in the states where they were committed.⁴⁰

Given the growing and glowing tributes to Pinckney and his Plan in the last century, it is worthwhile to step back and remind ourselves of one crucial fact: no authentic copy of the Pinckney Plan survives.⁴¹ Therefore, we cannot know with certainty what was in it. Moreover, when surveying with a critical and disinterested eye the list of provisions that the Court has attributed to Pinckney's Plan, it seems that the likelihood that these clauses actually were found in the original Plan ranges from arguable (the exclusive power over interstate commerce)⁴² to highly unlikely (every other provision the courts have attributed to Pinckney's Plan).⁴³

How did we arrive at this point where the importance and presumed contents of the Lost Pinckney Plan have been inflated well beyond anything warranted by our most reliable evidence? There is no single answer to that question. Much of the problem rests with Charles Pinckney himself. He left to posterity no authentic version of his 1787 Plan of Government, but he did draft more than one spurious account of it.⁴⁴ Nevertheless, for a long time Pinckney was unable to convince anyone outside of Charleston, South Carolina, of the importance of his Plan.⁴⁵ The real problem began after two manuscripts were discovered in the first decade of the twentieth

39. *Dyer v. Blair*, 390 F. Supp. 1291, 1303 n.29 (N.D. Ill. 1975); *Idaho v. Freeman*, 529 F. Supp. 1107, 1129–30 (D. Idaho 1982).

40. *United States v. Parker*, 19 F. Supp. 450, 458 (D.N.J. 1937).

41. Plans of Government Proposed at the Convention, *supra* note 15.

42. Resolution 12 of Wilson's extract of the Plan included a provision giving to Congress the "exclusive Power of regulating Trade." *See infra* Appendix 2 (quoting the entire McLaughlin Manuscript). However, from the context, it might be argued that only international trade was in contemplation. Still, a good case could also be made that Pinckney intended to include interstate trade when he wrote Resolution 12 and that he meant it to be an exclusive power. Nevertheless, one stubborn fact that should not be overlooked is this: we cannot know Pinckney's intentions for this clause with certainty based on the documents that survive.

43. The reasons for skepticism regarding most of the other provisions should become clear over the course of this Article.

44. *See, e.g.*, Charles Pinckney, Observations on the Plan of Government, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 106, 106–23 (Max Farrand ed., 1911) [hereinafter Pinckney, "Observations"] [hereinafter 3 RECORDS] (writing an account of his Plan proposed in the Constitutional Convention).

45. *See, e.g.*, William Loughton Smith, On the Report of the Committee on the Petition of Matthew Lyon, Address Before the United States Senate (Jan. 17, 1821), *in* 37 ANNALS OF CONG. 405, 410 (1821) (Joseph Gales ed., Gales and Seaton 1855) (advocating, as a fellow South Carolinian, for the acknowledgment of Pinckney's contributions to the Constitutional Convention).

century.⁴⁶ Both manuscripts were in the handwriting of James Wilson⁴⁷ (presumably written while he served on the Committee of Detail), and both were identified as extracts of the Lost Plan.

The first discovery was made by John Franklin Jameson. He published a transcript of what he identified to be the Pinckney Plan in 1903,⁴⁸ and he provided a lengthier explication of the Lost Plan later that same year.⁴⁹ Andrew McLaughlin made the second discovery in 1904.⁵⁰ When these two manuscripts were combined, they gave the impression that Pinckney was the originator of numerous clauses within the Constitution. However, the first discovery, the one found by Jameson, appears to be a case of mistaken identity. Many of the clauses that have long been attributed to Pinckney should properly be credited to James Wilson, a delegate from Pennsylvania who was later a Supreme Court Justice and founder of the University of Pennsylvania Law School.⁵¹ Telling the true story requires dismantling more than a hundred years of faulty scholarship on Charles Pinckney and his contributions to the Constitution. It begins with questioning Jameson's claim to have found the first extract of the Lost Pinckney Plan.

B. *History of the Lost Plan*

Even the warmest admirers of Charles Pinckney rarely deny that he was vain and ambitious.⁵² At 29, Pinckney was among the youngest members

46. See generally John Franklin Jameson, *Portions of Charles Pinckney's Plan for a Constitution, 1787*, 8 AM. HIST. REV. 509, 509 (1903) [hereinafter Jameson, *Portions of Pinckney's Plan*] (discussing a transcript identified as the Pinckney Plan); Andrew C. McLaughlin, *Sketch of Charles Pinckney's Plan for a Constitution, 1787*, 9 AM. HIST. REV. 735, 735 (1904) [hereinafter McLaughlin, *Sketch of Pinckney's Plan*] (examining a manuscript of Pinckney's Plan).

47. Jameson, *Portions of Pinckney's Plan*, *supra* note 46; McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46.

48. Jameson, *Portions of Pinckney's Plan*, *supra* note 46, at 510–11. Jameson actually credits the first discovery of the manuscript to William M. Meigs. *Id.* at 509. However, since Meigs never published or even examined it carefully, it seems fitting to credit Jameson with the true discovery.

49. John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1902, at 87, 87 (1903) [hereinafter Jameson, *Studies*]. The portion devoted to the Pinckney Plan spans pages 111–132.

50. McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46.

51. *James Wilson*, PENN. UNIV. ARCHIVES AND RECS. CTR., <https://archives.upenn.edu/exhibits/penn-people/biography/james-wilson> [<https://perma.cc/Q35T-SHU7>].

52. Among Pinckney's greatest defenders, see NOTT, *supra* note 19, at 23 (stating Pinckney was "egotistical," just like "most men of great ability and prominence"); Mark D. Kaplanoff, *Charles Pinckney and the American Republican Tradition*, in INTELLECTUAL LIFE IN ANTEBELLUM CHARLESTON 85, 113 (Michael O'Brien & David Moltke-Hansen eds., 1986) ("[Pinckney] was known for his personal vanity

at the Constitutional Convention (although he evidently lied about his age to boast that he was the youngest member).⁵³ Despite his youth, the junior delegate from South Carolina was determined to distinguish himself at the momentous gathering which, before the summer was out, would propose a new Constitution for the fledgling United States. Pinckney arrived in Philadelphia early and lodged at Mary House's boarding house, in company with many of the delegates from Virginia. James Madison had likewise arrived early. Madison convinced his fellow Virginians that "some leading propositions at least would be expected from" their state; he therefore urged them to arrive promptly so they could devise a plan of government to guide the upcoming debates.⁵⁴ While Madison and his colleagues were engaged in composing what would later be known as "The Virginia Plan," Pinckney was drafting a Plan of his own. Madison later recalled that Pinckney "was fond of conversing on the subject" with his fellow lodgers during those tense days while they all waited for the required quorum to open business.⁵⁵ Pinckney's vanity and loquacity served posterity in one important respect, for it induced him to give a copy of his Plan to another boarder, George Read of Delaware. That copy has never been found, but Read subsequently described some of its contents in a letter he wrote a few days before the Convention opened.⁵⁶ This letter is important because it is the only contemporaneous account we possess of the Lost Plan that Pinckney presented just a week later. Nevertheless, it describes only a few details about the structure of the government Pinckney wanted, and it notes correctly that many of these structural details are similar to the Virginia Plan.

Although the Convention officially began on May 25, its first few days were occupied in seating the members, reading their credentials, and

and his persistent political ambition."); FRANCES LEIGH WILLIAMS, *A FOUNDING FAMILY: THE PINCKNEYS OF SOUTH CAROLINA* 361 (1978) ("[Pinckney] was considered by his admirers to have a scintillating brilliance. This induced a vanity that irked many older political leaders . . ."); MATTHEWS, *supra* note 12, at 24, 42, 48. *But cf. id.* at 141 (dismissing the charge of vanity as a smear concocted by his enemies, especially James Madison, but also acknowledging in his "Final Assessments" that Pinckney "was at times arrogant and vain").

53. William Pierce, *Character Sketches of Delegates to the Federal Convention*, in 3 RECORDS, *supra* note 44, at 87, 96 & n.1.

54. Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in *THE PAPERS OF JAMES MADISON DIGITAL EDITION*, <http://rotunda.upress.virginia.edu/founders/JSMN-01-09-02-0197> [<https://perma.cc/59BF-AQ2T>] (J.C.A. Stagg ed., University of Virginia Press, Rotunda 2010).

55. Letter from James Madison to Jared Sparks (Nov. 25, 1831), in 3 RECORDS, *supra* note 44, at 514, 515.

56. Letter from George Read to John Dickinson (May 21, 1787), in 3 RECORDS, *supra* note 44, at 24, 25.

devising the rules to govern them for the summer. The real business did not begin until May 29. Edmund Randolph, the Governor of Virginia, opened the discussions by describing their precarious condition under the present Articles of Confederation; he proposed the Virginia Plan as a viable remedy for what ailed them.⁵⁷ Undaunted, Pinckney followed Randolph's lead by submitting his own Plan as another alternative to the Articles, even though he "confessed that it was grounded on the same principle as of the above resolutions."⁵⁸ (In other words—actually, in the words of George Read—the Pinckney Plan was "nearly similar" to the Virginia Plan.)⁵⁹ Both of these plans were formally submitted to the Committee of the Whole which was formed on the next day.

It appears that no notice whatsoever was taken of the Pinckney Plan for the next several weeks. The Convention's debates were entirely based on the Virginia Plan, except for the few days in mid-June when the delegates considered the rival New Jersey Plan (read by William Paterson on June 15), which, along with the Virginia Plan and the Pinckney Plan was also formally submitted to the Committee of the Whole.⁶⁰ Hamilton spent an entire day on June 18 criticizing as inadequate both plans under discussion (Virginia's and New Jersey's). He recommended yet another Plan of his own devising (which he read aloud but never formally submitted to the Convention).⁶¹ In all, there were four plans read at the Constitutional Convention: three were formally submitted (the Virginia Plan, the Pinckney Plan, and the New Jersey Plan), and one was read but never actually proposed (the Hamilton Plan). The Committee voted to reject the New Jersey Plan on June 19,⁶² which made the Virginia Plan the only significant influence on the shape of the delegates' debates and proposals for the first two months of the Convention.

On July 26, the Convention appointed a five-member Committee of Detail tasked with writing the "first draft" of the Constitution based on the

57. Madison's Notes (May 29, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17, 18–23 (Max Farrand ed., 1911) [hereinafter 1 RECORDS]. All references to the debates in the Convention are from Madison's Notes, unless otherwise noted.

58. Yates' Notes (May 29, 1787), *in* 1 RECORDS, *supra* note 57, at 23, 24. For whatever reason, Madison's original notes for May 29 were exceedingly sparse, only a few lines. He later acquired Randolph's speech from its author and filled in the procedural details from the Journal. He was never able to acquire an authentic copy of Pinckney's Plan—the most significant lacuna in his Notes.

59. Letter from George Read to John Dickinson (May 21, 1787), *supra* note 56, at 25.

60. Madison's Notes (June 15, 1787), *in* 1 RECORDS, *supra* note 57, at 242, 242–45.

61. Madison's Notes (June 18, 1787), *in* 1 RECORDS, *supra* note 57, at 282, 282–93.

62. Madison's Notes (June 19, 1787), *in* 1 RECORDS, *supra* note 57, at 313, 322.

decisions the delegates had made up to that point. This body met for more than a week while the rest of the delegates took a break. Three documents were committed to their care: a list of twenty-three Resolutions to which the Convention had so far agreed (these Resolutions were drawn from, amended from, and at times added to the Virginia Plan), the New Jersey Plan, and the Pinckney Plan.⁶³ The mysterious Pinckney Plan thus became the property of the Committee of Detail from July 26 through August 6, when the members of the Committee made their report. From that point, the document trail ends. It is impossible to know what became of the original manuscript, and no authoritative copy has ever surfaced. No one denies that the Pinckney Plan had no measurable influence on the debates during the first two months of the Convention; however, several scholars have maintained that it had an enormous influence on the Committee of Detail Report. Many of the provisions devised by the Committee Report were original; these provisions shaped the debates for the remainder of the Convention; and many of them were adopted into the final Constitution. If the Committee drew from Pinckney's Plan as much as his defenders have argued, then the eulogies to Charles Pinckney have not been inflated—at least, not by much. However, the papers from that committee are sparse, and it is impossible to know for certain where the members were looking for inspiration.⁶⁴

The lack of any authentic copy of the Lost Plan is not the only problem researchers face when attempting to gauge its influence on the final Constitution; a greater problem surfaces because Pinckney supplied posterity with more than one spurious version of that Plan. Shortly after the Convention adjourned, Pinckney published a self-promoting pamphlet, "Observations on the Plan of Government Submitted to the Federal Convention . . . By Mr. Charles Pinckney" ("Observations").⁶⁵ The "Observations" did not include a copy of the Plan, but it described and defended the ostensible contents of the Plan in such detail that, if it could be trusted as a source, the reader would glean a fair grasp of its substance.

63. Madison's Notes (July 26, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 118, 128 (Max Farrand ed., 1911) [hereinafter 2 RECORDS].

64. The documents of the Committee of Detail are still waiting for a comprehensive analysis; thus far, the most thorough examinations have been done by University of Pennsylvania law professor, William Ewald. William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 201 (2012) [hereinafter Ewald, *The Committee of Detail*]; William Ewald & Lorianne Updike Toler, *Early Drafts of the U.S. Constitution*, 135 PENN. MAG. OF HIST. & BIOGRAPHY 227, 235–36 (July 2011).

65. Pinckney, "Observations", *supra* note 44, at 106–23.

However, no one, not even Pinckney's defenders, believes that the "Observations" is thoroughly trustworthy for ascertaining the contents of the Lost Plan. To state just one problem, it is impossible to reconcile with the 1818 Plan, so at least one of Pinckney's later versions must be wrong. Although the "Observations," like the 1818 Plan, undoubtedly contains many elements which were in the original, it also bears evidence of being "touched up" after the fact.⁶⁶

Pinckney self-published the "Observations" as a pamphlet, probably in the first half of October 1787.⁶⁷ It was also reprinted in South Carolina's *State Gazette* in installments from October 29 through November 29, 1787.⁶⁸ The following year, Pinckney also tried to get a copy printed in Matthew Carey's Philadelphia-based publication, *American Museum*; however, Carey indicated he was more interested in publishing the actual Plan. In reply, Pinckney said he no longer had a copy, since the original was "laid before the convention, & the copy I gave to a gentleman at the northward" (presumably referring to George Read); nevertheless, Pinckney could assure Carey that "the System" he proposed at the outset of the Convention "was very like the one afterwards adopted."⁶⁹ In other words, he wanted Carey to believe that his Plan was very like the final Constitution. Pinckney made another problematic claim to Carey. He said that the title

66. To see only the most obvious sign of Pinckney's retroactive editing of his Plan in the "Observations," see Pinckney, "Observations," *supra* note 44, at 116 (describing the sixth article of his Plan); Letter from George Read to John Dickinson (May 21, 1787), *supra* note 56, at 25; see *infra* Appendix 2 (proposing a three-fifths clause in Resolution 4). According to the two most authoritative sources for the Pinckney Plan (George Read's letter and the McLaughlin Draft), Pinckney's original Plan had used the ratio of three-fifths for counting slaves toward apportionment, but not for taxation. Applying that same ratio to taxation did not come up in the Convention until much later. According to Pinckney's "Observations," however, the Plan had used the three-fifths ratio for taxation but not for representation. The reason for the change is obvious. Although Pinckney seconded James Wilson's motion to adopt the three-fifths rule for apportionment, he subsequently changed his mind and argued for full representation of the enslaved population. The "Observations" expunges from the record that he had initially proposed the rule for apportionment and substitutes taxation; decades later (within the 1818 Plan and within a speech he delivered in 1820) Pinckney denied outright any involvement in the three-fifths compromise. See Charles Pinckney in the House of Representatives (Feb. 14, 1820), in 3 RECORDS, *supra* note 44, at 439, 440–42 (arguing that the three-fifths clause was forced upon the South); Max Farrand, Appendix D: The Pinckney Plan, in 3 RECORDS, *supra* note 44, at 595, 596, 599 (using "the whole number of inhabitants of every description" as a rule for both taxation and representation instead of the three-fifths ratio).

67. Pinckney, "Observations," *supra* note 44, at 106 n.1.

68. *Id.*

69. Letter from Charles Pinckney to Matthew Carey (Aug. 10, 1788), in SUPPLEMENT TO MAX FARRAND'S RECORDS OF THE FEDERAL CONVENTION OF 1787, at 296, 296 (James H. Hutson ed., 1987) [hereinafter SUPPLEMENT].

of the pamphlet, "Observations," was a mistake; it should have made clear that it was "a *speech at opening the system*."⁷⁰ Since nearly every scholar is in agreement that the "Observations" was not a speech delivered when Pinckney presented his Plan, this was clearly untrue.⁷¹ He went on to tell Carey that he was "sorry it is not in my power to procure [a copy of the Plan] for you."⁷² He told a very different story exactly three decades later.

In 1818, Secretary of State John Quincy Adams was preparing the first publication of the official Journal records of the Constitutional Convention. William Jackson, the Convention's secretary, had indicated that the Pinckney Plan was submitted on May 29, yet Jackson had failed to include a copy of it or, indeed, any of the plans of government submitted that summer. Adams had no difficulty acquiring copies of the Virginia and New Jersey Plans, but after his initial attempts to acquire a copy of the Pinckney Plan bore no fruit, he wrote to Pinckney asking if he could supply one. Pinckney responded immediately: "From an inspection of my old papers not long ago I know it was then easily in my power to have complied with your request."⁷³ When he was able to return to his papers two weeks later, he wrote again that he had found "several rough draughts of the Constitution I proposed to the Convention," though they differed somewhat in wording and arrangement; nevertheless, he repeatedly assured Adams that the differences were immaterial, since the drafts "were all substantially the same."⁷⁴ He sent to Adams "the one I believe was it."⁷⁵ Adams published the plan that Pinckney sent to him, along with the rest of the records, in December of the following year, and most people reading the Journal records in 1820 would have no reason to doubt its authenticity. But it would not be long before doubts were raised, especially in the mind

70. *Id.*

71. Cf. Dotan Oliar, *The (Constitutional) Convention on IP: A New Reading*, 57 UCLA L. REV. 421, 431 (2009) (claiming that the question about "the truth or falsity" of the "Observations" claim to represent the original Plan "can likely be put to rest," since Pinckney's title page states that the contents were delivered at different times during the Convention). As with so many of Pinckney's claims, few will put the question of truth or falsity finally to rest, since his claims changed so often over time.

72. Letter from Charles Pinckney to Matthew Carey (Aug. 10, 1788), *supra* note 69, at 296.

73. Letter from Charles Pinckney to John Quincy Adams (Dec. 12, 1818), in 3 THE WRITINGS OF JAMES MADISON: 1787, THE JOURNAL OF THE CONSTITUTIONAL CONVENTION 22, 22 n.2 (Gaillard Hunt ed., 1902).

74. Letter from Charles Pinckney to John Quincy Adams (Dec. 30, 1818), in 3 RECORDS, *supra* note 44, at 427, 427.

75. *Id.* at 428.

of the longest-living Framer of the Constitution and the keeper of the best records of the Convention, James Madison.

C. *History of the Scholarship on the Lost Plan*

In a private conversation with historian Jared Sparks in 1830, Madison confided that he was bewildered when he first saw Pinckney's 1818 Plan, since he knew it could not be the one submitted in 1787.⁷⁶ He claimed to Sparks that "he intended to write to Mr. Pinckney asking, and even requiring, an explanation; but Mr. Pinckney died, and the opportunity was lost."⁷⁷ Some scholars have found this explanation less than satisfactory.⁷⁸ Madison received two copies of the Journal in 1820; we know he started looking over the records that same year; and Pinckney's death was in 1824. Be that as it may, Madison never did confront Pinckney during his lifetime, so we have no way of knowing how Pinckney might have responded. Nevertheless, within the last few years before Madison's death in 1836, numerous correspondents began communicating to him their own doubts and suspicions about the authenticity of the Plan.⁷⁹ Since Madison spent

76. See Jared Sparks, Journal (Apr. 19, 1830), in 3 RECORDS, *supra* note 44, at 478, 479 ("Mr. Madison seems a good deal perplexed on the subject. . . . How it happened that it should contain such particulars as it does, Mr. Madison cannot tell; but he is perfectly confident that they could not have been contained in the original draft as presented by Mr. Pinckney, because some of them were the results of subsequent discussions.").

77. *Id.* at 480.

78. See Ulmer, *James Madison*, *supra* note 23, at 423 (hearing "a strange ring" in Madison's explanation for not confronting Pinckney). Ulmer's suspicions are likely overly harsh. Sparks reported in his Journal that Madison seemed very embarrassed by the whole subject, and that reaction seems only too natural—especially during a time when openly accusing a man of lying could lead to a duel. Jared Sparks, Journal (Apr. 19, 1830), *supra* note 76, at 480. Therefore, I count it as among history's misfortunes that Madison never followed through on his intention to confront Pinckney during his lifetime, but it seems to me neither surprising nor suspicious that he put off the awkward confrontation until it was too late.

79. See Letter from Jared Sparks to James Madison (May 5, 1830), in 3 RECORDS, *supra* note 44, at 482, 482 (reporting how John Quincy Adams told him that Massachusetts Framer Rufus King had also questioned the Plan before his death); Letter from Jared Sparks to James Madison (Nov. 14, 1831), in 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 372, 372–74 (1905) (saying Sparks' "mind has got into a new perplexity" regarding some additional suspicious features he noticed in "Pinckney's Draft of a Constitution") [hereinafter DOCUMENTARY HISTORY]; Thomas S. Grimké to James Madison, 25 March 1834, FOUNDERS ONLINE (Mar. 25, 1834), <http://founders.archives.gov/documents/Madison/99-02-02-2958> [https://perma.cc/TH6S-B2SB] (stating how the account of the Pinckney Plan Madison sent to Grimké "confirms the vehement suspicion I have always had" that it could not be genuine); William A. Duer to James Madison, 25 April 1835, FOUNDERS ONLINE (Apr. 25, 1835), <http://founders.archives.gov/documents/Madison/99-02-02-3119> [https://perma.cc/66TX-A8KC] (asking Madison to account for the strange discrepancy Duer had noticed: that the Pinckney Plan which

his last remaining years arranging for the posthumous publication of his own records of the Convention's debates, he was forced to decide how he would address the subject of the Lost Pinckney Plan of 1787 and the spurious 1818 Plan.

It is at this point that the history of the Pinckney Plan intersects with the history of the scholarship on the Pinckney Plan. Madison, who was one of the main actors in this little drama, also launched the first research project on the Lost Plan. He recollected that, shortly after the Constitutional Convention had concluded, Pinckney had sent him copies of his pamphlet, the "Observations" on his Plan, and Madison believed that a close comparison of Pinckney's 1787 account and his 1818 version might shed light on the subject.⁸⁰ However, when he checked his own papers, he found that the old copy he retained was "so defaced & mutilated" that it was unreadable.⁸¹ Since it had originally been printed in New York, he sought another copy from a friend living there, J. K. Paulding. Paulding located and sent him a copy, and Madison immediately set to work examining the 1818 Plan in minute detail. In seven manuscript pages divided into two columns, he noted numerous differences between the plan which Pinckney described in 1787 and the one he submitted to Adams in 1818.⁸² By the time he completed his research project, he had compared the content of the 1818 Plan to: (1) Pinckney's 1787 "Observations;" (2) his speeches during the Convention; and (3) even a letter Pinckney wrote to Madison in 1789. He noted several inconsistencies between the 1818 Plan and the opinions Pinckney had expressed during and immediately following the Convention, all tending to cast doubt on the authenticity of the 1818 Plan.

From Madison's replies to various correspondents, it is clear that he genuinely struggled with the question of what to do with his conclusions regarding the spurious 1818 Pinckney Plan. He repeatedly appealed to the

the Journal reported as being read on May 29 "was so full & extensive," yet in the records of the proceedings as reported by Robert Yates, it seemed the Plan was never "referred to in the subsequent debates").

80. Letter from James Madison to J. K. Paulding (Apr. 1831), in 3 RECORDS, *supra* note 44, at 501, 501.

81. *Id.*

82. Image 605 of James Madison Papers: Subseries 5e, James Madison's Original Notes on Debates at the Federal Constitutional Convention, 1787, LIB. OF CONG., <https://www.loc.gov/resource/mss31021a.01x01/?sp=605> [<https://perma.cc/FYQ4-FXV6>] (identifying the pages relating to Pinckney's plans, beginning on image 605 and continuing through 611). A transcript can be found in James Madison on the Pinckney Plan, in 3 RECORDS, *supra* note 44, at 504, 504–13.

“*delicacy*” of the topic, and he asked his correspondents to keep the information he provided them private, or at least not to name him as a source if they repeated any of it.⁸³ On the one hand, Madison had personal reasons for keeping Pinckney’s indiscretions a secret: “I knew Mr. P. well,” he wrote just two years before he died, “and was always on a footing of friendship with him;” on the other hand, Madison also believed that this personal “consideration ought not to weigh against justice to others, as well as against truth on a subject like that of the Constitution of the U. S.”⁸⁴ Shortly before his death he evidently made up his mind. He decided to reprint Pinckney’s 1818 Plan along with the rest of his records for May 29 within the Convention Debates that would be published posthumously. However, he drafted a short refutation to the Plan, which he indicated should be printed as an appendix. In it, he repeated only the most compelling discrepancies he had found when comparing the 1818 Plan and Pinckney’s earlier opinions. Madison never breathed even a hint of a suggestion that the 1818 Plan was an intentional fraud; instead, he explained how “considerable error had crept into the paper,” and he provided numerous excuses to account for the possibility of Pinckney’s “error”: the confusion of different drafts, subsequent “erasures and interlineations,” and a faulty memory “after a lapse of more than thirty years.”⁸⁵

For the most part, the appendix that Madison wrote on Pinckney’s 1818 Plan had its intended effect. At least, for the next sixty years after the publication of Madison’s writings in 1840, all subsequent allusions to Pinckney’s 1818 Plan fell into two categories: there were those who were apparently oblivious that Madison had written a refutation (and who therefore treated the 1818 Plan as genuine), and there were those who had read Madison’s refutation and were convinced by it (and who therefore

83. Letter from James Madison to J. K. Paulding (Apr. 1831), *supra* note 80, at 501; *see* Letter from James Madison to Jared Sparks (Nov. 25, 1831), *supra* note 55, at 514–15 (requesting of Sparks, “may it not be best to say nothing of this delicate topic relating to Mr. Pinckney, on which you cannot use all the lights that exist and that may be added?”); *see also* Letter from James Madison to Thomas S. Grimké (Jan. 6, 1834), *in* 3 RECORDS, *supra* note 44, at 531, 531–32 (writing to Grimké, “it is my wish that what is now said of it may be understood as yielded to your earnest request, and as entirely confined to yourself”); *James Madison to William A. Duer, 5 May 1835*, FOUNDERS ONLINE (May 5, 1835), <http://founders.archives.gov/documents/Madison/99-02-02-3123> [https://perma.cc/N3RA-LDXU].

84. Letter from James Madison to Thomas S. Grimké (Jan. 6, 1834), *supra* note 83, at 532.

85. James Madison, *Note of Mr. Madison to the Plan of Charles Pinckney, May 29, 1787*, *in* 3 THE PAPERS OF JAMES MADISON app. 2 at v, vi (Henry D. Gilpin ed., Langtree & O’Sullivan 1840).

discounted the authenticity of the 1818 Plan altogether).⁸⁶ Hence we find that, on the one hand, Chief Justice Fuller cited Pinckney's 1818 Plan as if it were an authoritative source in his 1895 decision in *Pollock v. Farmers' Loan & Trust Co.*⁸⁷ However, on the other hand, this decision was immediately followed by a sharply worded rebuke in *The Nation* from Paul Leicester Ford. Relying on Madison's analysis, Ford argued that the 1818 Plan, "instead of being quoted by our Supreme Court, should be relegated to the repository of historical lies."⁸⁸ Thus, the turn of the century would seem to have lain to rest all of Pinckney's latter-day professions to be the primary author of the Constitution.

The first few years of the twentieth century did not hold out much promise for resurrecting Pinckney's reputation; indeed, it seemed destined to sink still lower. Gaillard Hunt, the editor of the nine-volume *Writings of James Madison*, sought out the original 1818 correspondence between John Quincy Adams and Charles Pinckney. In 1902, he reported that the paper, ink, penmanship, and watermarks of the sheets on which Pinckney wrote his Plan of Government matched those of his 1818 letter to Adams.⁸⁹ The watermarks on all the sheets bore the date 1797.⁹⁰ Therefore, Pinckney could not have been telling the literal truth when he claimed that he was sending Adams one of several "draughts" in his possession from among his Convention papers; it was clear, at a minimum, that Pinckney had drafted a copy contemporaneously with his letter to Adams. Since the contents of that Plan already seemed doubtful to many, Hunt's discovery seemed to add additional fuel to the suspicion that Pinckney had manufactured, rather than merely copied, the plan he sent to Adams in 1818.

The following year, John Franklin Jameson published his monumental "Studies in the History of the Federal Convention of 1787,"⁹¹ twenty pages of which was entirely devoted to "The Text of the Pinckney Plan."⁹² It was the first scholarly treatment of the Lost Plan since Madison's appendix, published in 1840. After Jameson surveyed the history of the Pinckney Plan

86. Jameson, *Studies*, *supra* note 49, at 112–17 (providing a helpful survey of the nineteenth-century allusions to the Pinckney Draft).

87. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 562 (1895).

88. Paul Leicester Ford, *Pinckney's Draft of a Constitution*, 60 NATION 458, 458–59 (1895).

89. MADISON, *supra* note 73, at ix, xvi–xvii.

90. Gaillard Hunt, The Journals of the Constitutional Convention (Introduction), in 3 THE WRITINGS OF JAMES MADISON: 1787, THE JOURNAL OF THE CONSTITUTIONAL CONVENTION, *supra* note 73, at ix, xvi–xvii.

91. Jameson, *Studies*, *supra* note 49.

92. *Id.* at 111–32.

up to that point, he added additional reasons for discrediting the 1818 Plan. This aspect of his study is important, and unfortunately it has been largely forgotten today. In a cruel twist of fate, Jameson's best analysis (the definitive debunking of the 1818 Plan) was ignored by Pinckney's admirers, who later sought to resurrect the credibility of the spurious plan; yet his single important error (the misidentification of the Wilson manuscript) was accepted without scrutiny and would become the catalyst for numerous future errors.

Notably, Jameson believed that the 1818 Plan was already so thoroughly discredited that this contribution was unnecessary. "That the so-called 'Pinckney plan' is not authentic has been so publicly and so successfully demonstrated," he wrote, "that a writer who does not like to spend his time in slaying the slain might be excused if he took this for granted and passed on to cast what new light he could upon the problem of the real Pinckney plan."⁹³ Nevertheless, Jameson did have additional arguments to make, compelling ones, based on newly available papers from the Committee of Detail. Jameson demonstrated not only that the 1818 Plan was not a genuine copy of the original; he convincingly showed that the whole thing was largely plagiarized from the Committee of Detail Report.⁹⁴ These arguments were so convincing, in fact, that his five pages of closely-reasoned disemboweling of Pinckney's late-life professions seemed destined to pound the final nail into the coffin which was to forever inter the credibility of the 1818 Plan. The scholarship over the next hundred years would have surprised him.

Jameson's primary reason for writing about the Pinckney Plan, however, was not to bury the dead; rather, he was endeavoring, "by critical methods which he believes to be more rigid than those hitherto pursued, and in part novel, to reconstruct the actual text of that long-lost project."⁹⁵ In other words, his original intention was to provide his readers with a plausible recreation of a document that was no longer extant, drawn from everything that could be known about Pinckney's Plan from contemporaneous sources. What he actually provided, however, was far more exciting. Jameson described in dramatic fashion how, when his work "was nearly completed, chance brought forward an incomplete but contemporary text of the original document itself."⁹⁶ The entire manuscript was in James Wilson's

93. *Id.* at 112–13.

94. *Id.* at 123–28.

95. Jameson, *Portions of Pinckney's Plan*, *supra* note 46.

96. *Id.*

handwriting, and the first half was clearly an extract of the New Jersey Plan. Jameson “easily identified” the second half “as parts of the much-sought Pinckney plan.”⁹⁷ Although he was writing on numerous topics about the Federal Convention, Jameson believed that his examination of the Pinckney Plan, especially when joined with the new manuscript discovery, was “the most important” contribution he had to make.⁹⁸

Since Jameson published his findings, no one has ever questioned how it was that he “could see at the first glance” that the second half of this manuscript was from Pinckney’s Plan.⁹⁹ On the contrary, later scholars characterized Jameson’s identification of Pinckney’s extract as “a piece of brilliant criticism”¹⁰⁰ and “a fine piece of close textual analysis.”¹⁰¹ Yet, in reality, there are troubling aspects to Jameson’s hasty conclusion that this manuscript was drawn from the Lost Plan. According to his account, the manuscript he found perfectly matched his earlier predictions (before the discovery) of what it would contain. He described how he felt “like some watcher of the skies . . . before whose telescope appears an asteroid which pursues exactly the orbit that he had predicted.”¹⁰² That description is a little perplexing, however, since very little of what he had predicted would be in the Pinckney Plan is actually found in the manuscript he discovered, and very little of the provisions in the manuscript he discovered had been anticipated by Jameson before he found it. In his conclusion, he did little more than assert that his discovery was an extract of the Lost Plan.

In light of the new manuscript, Jameson concluded by offering a mild boost to Pinckney’s deflated reputation. He believed “that as a maker of the Constitution Charles Pinckney evidently deserve[d] to stand higher than he ha[d] stood of late years, and that he would have [had] a better chance of doing so if in his old age he had not claimed so much.”¹⁰³ Owing almost entirely to the renewed appreciation of the long-lost Pinckney Plan by so eminent a historian as John Franklin Jameson, Pinckney’s star was now on

97. Jameson, *Studies*, *supra* note 49, at 128.

98. *Id.* at 90.

99. Jameson, *Portions of Pinckney’s Plan*, *supra* note 46, at 510.

100. Max Farrand, Appendix D: The Pinckney Plan, *supra* note 66, at 604.

101. Ewald, *The Committee of Detail*, *supra* note 64, at 206. Despite Ewald’s evident endorsement of Jameson’s identification of the Pinckney Plan, it is important to note that he repeatedly states in the same article that the Plan “raises subtle issues,” yet he says that he will defer any discussion of those “issues” until a later time. *Id.* at 215, 220, 279.

102. Jameson, *Studies*, *supra* note 49, at 128.

103. *Id.* at 132.

the rise. And the reputations of both the man and his Plan would eventually reach a zenith that might have satisfied even Pinckney's overweening vanity.

Just one year after the 1903 discovery, Andrew McLaughlin turned up the heat on Jameson's tepid praise of Pinckney after he published what he believed to be a second extract that Wilson made of the same Plan. McLaughlin never doubted for a moment that Jameson might have been mistaken when identifying the first Wilson manuscript; indeed, he claimed that his finding "confirms the conclusion, if confirmation were needed," that Jameson's manuscript was simply another (probably later) extract of the same plan.¹⁰⁴ In retrospect, McLaughlin's judgment seems a little odd, since the two manuscripts actually have very little in common; consequently, his unexplained "confirmation" is far from self-explanatory.

When the two manuscripts were combined, the collective provisions now attributed to Pinckney's Plan represented a significant contribution to the U.S. Constitution. McLaughlin estimated that Pinckney's Plan was responsible for "some thirty-one or thirty-two provisions which were finally embodied in the Constitution."¹⁰⁵ But even that estimate did not seem to do Pinckney justice. McLaughlin believed that some of the annotations made by John Rutledge in the Committee of Detail papers might also owe their origin to the Pinckney Plan.¹⁰⁶ He also noted that, since the manuscript he discovered resembled in key places the "Observations" that Pinckney published shortly after the Convention, more credence should be given to that document.¹⁰⁷ (However, it should be remembered that no one ever doubted that Pinckney's 1787 "Observations," like his 1818 Plan, contained elements from the real Plan; the pesky question has always been: to what degree might Pinckney have embellished his Plan after the fact?) In short, McLaughlin concluded: "It must not be assumed that we know all that Pinckney thus contributed to the fabric of the Constitution. . . . [O]ther portions of the Constitution might be pointed to as coming from the ingenious and confident young statesman from South Carolina."¹⁰⁸

The first few years of the twentieth century were thus a series of momentous revelations about the Lost Pinckney Plan—revelations which at first threatened to plunge Pinckney's reputation into the nether regions before they reversed course and catapulted him into the stratospheric

104. McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46.

105. *Id.* at 741.

106. *Id.* at 739–40.

107. *Id.* at 736.

108. *Id.* at 741.

heights of our Founding heroes. Almost all subsequent scholarship on Pinckney's role in the Constitution's formation was transformed. Some of these developments were predictable, but others were surprising. The predictable developments include the rise in stature of Pinckney's presumed contributions to the Constitution. When Max Farrand attempted a reconstruction of the actual Pinckney Plan for his magisterial *Records of the Federal Convention of 1787*, he took his cue entirely from McLaughlin.¹⁰⁹ Not only did he draw from both Wilson manuscripts now attributed to Pinckney; he also included portions from Pinckney's "Observations," portions from some proposed amendments to the Articles of Confederation that Pinckney had drafted in 1786, and (somewhat more surprising) parts of the New York Constitution. Farrand's reconstruction of the Pinckney Plan was, in short, exceedingly generous to Pinckney; nevertheless, it has sometimes been cited as if it were one of the authoritative records from the 1787 Convention.¹¹⁰

Also unsurprising is the number of constitutional clauses which have subsequently been attributed to Pinckney: later tallies have generally followed McLaughlin's lead. Although his estimate that Pinckney's Plan contributed "some thirty-one or thirty-two provisions"¹¹¹ has fluctuated slightly over the years, most scholars have hovered around that number ever since. The writer of Pinckney's epitaph was being conservative when he attributed "at least twenty-five provisions" to Pinckney.¹¹² Sydney Ulmer found "thirty provisions of the Constitution contained in the Pinckney plan," and numerous histories have followed Ulmer's accounting method.¹¹³ Jared McClain was one such follower, but he inadvertently

109. Max Farrand, Appendix D: The Pinckney Plan, *supra* note 66, at 604–09.

110. See MICHAEL KAMMEN, *THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* 25–30 (1986) (reproducing Farrand's reconstruction as if it were part of the documentary history of the Constitution); MATTHEWS, *supra* note 12, at 44–45 (relying on Kammen's reproduction of Farrand's reconstruction when delineating the contents of Pinckney's Plan); *Tyler Pipe Indus. v. Wash. Dep't. of Revenue*, 483 U.S. 232, 261 (1987) (Scalia, J., concurring in part) (referencing a law review article by Albert S. Abel, who in turn is relying on Farrand's recreated plan (citing Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 434 & n.6 (1941))).

111. McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46, at 741.

112. THORNWELL JACOBS, *THE UNVEILING OF THE MEMORIAL LEDGER TO CHARLES PINCKNEY* 21 (1949). The grave marker was laid in St. Philips churchyard in downtown Charleston (142 Church Street) sometime in the middle of the last century. *Id.* at 7–8.

113. Ulmer, *Charles Pinckney*, *supra* note 23, at 244; *Drafting and Ratifying the Constitution in THE PAPERS OF THE REVOLUTIONARY ERA PINCKNEY STATESMEN DIGITAL EDITION* (Constance B. Schulz ed., Univ. of Va. Press, Rotunda 2016) <https://rotunda.upress.virginia.edu/founders/default.xq?keys=PNKY-print-01-01-01-0005-0003> [<https://perma.cc/YDX9-J7PP>] (relying entirely on Ulmer's analysis).

knocked off two from the final tally, wrongly stating that “Ulmer concluded that twenty-eight provisions in the Constitution originated in Pinckney’s draft.”¹¹⁴

Some authors have repeated the raw numbers given by McLaughlin or Ulmer, but they inadvertently inflated the importance of Pinckney’s Plan because they misunderstood what those numbers represented. When McLaughlin and Ulmer counted constitutional “provisions” which were ostensibly derived from Pinckney’s Plan, they were often referring to short clauses or even single words (such as crediting Pinckney’s Plan for naming the chief executive the “president”). Therefore, while the number might seem high, the proportion of constitutional text actually attributed to Pinckney was still quite small. Andrew Bethea and Theodore Jervey, however, divided the entire Constitution into paragraphs and claimed that Pinckney was the source for more than a third of them. Thus, we find Bethea attributing “thirty-one or thirty-two” out of the “eighty provisions” in the Constitution to Pinckney;¹¹⁵ and Jervey claiming “that of its eighty-four provisions [in the Constitution], no less than thirty-two, and probably more, were incorporated at his suggestion.”¹¹⁶ Richard Barry, employing an accounting method that he does not explain and which is by no means clear, finds that the Pinckney Plan can be found “[in] practically half of the final document.”¹¹⁷ None of these authors quite matched Pinckney’s own claim that “more than three-fourths” of the Constitution was “in the very words of my plan,”¹¹⁸ but they were edging ever closer to Pinckney’s own grandstanding.

Since reputable scholars now attributed both Wilson manuscripts to Pinckney, not to mention relying more on his “Observations,” it was not surprising that many subsequent scholars would begin hailing Pinckney as an unsung hero of the Constitutional Convention. What was surprising, however, was the way this scholarship resurrected the credibility of the 1818 Plan. The best-informed scholars on the records of the Federal Convention, such as McLaughlin and Farrand, believed that Jameson’s

114. Jared McClain, *An Analysis of Charles Pinckney’s Contributions at the Constitutional Convention of 1787*, 24 J. S. LEGAL HIST. 1, 7 (2016).

115. BETHEA, *supra* note 21, at 64.

116. Theodore D. Jervey, Robert Y. Hayne and His Times 2–3 (The MacMillan Co. 1909).

117. RICHARD BARRY, MR. RUTLEDGE OF SOUTH CAROLINA 314 (1942) (finding the Constitution “has sixty components,” of which “twenty-nine appeared in that first version as written by Charles Pinckney”).

118. Letter from Charles Pinckney to Robert Y. Hayne (Mar. 31, 1821), *supra* note 16.

arguments had demolished forever Pinckney's later embellishments. These three united as if with one voice to proclaim that the 1818 Draft was no better than a fraud.¹¹⁹ Nevertheless, that message was drowned out in the rush to bestow on Pinckney the accolades that had so long been denied.

Almost immediately after Jameson and McLaughlin brought their manuscript discoveries to light, a succession of books were published, all touting Pinckney's 1818 fabrication as if it were authentic, or at least nearly so.¹²⁰ Nott, a retired Chief Justice of the U.S. Court of Claims, even floated an imaginative theory purporting to explain the disappearance of the Lost Plan. The Committee of Detail, he speculated, had used Pinckney's Plan as a "printer's copy;" that is, after its members made a few minor changes directly onto the draft of Pinckney's Plan, they submitted this manuscript to the printers, who used it to typeset the broadsides which were distributed as the Committee of Detail Report.¹²¹ The printers, after they finished typesetting the (only slightly modified) Pinckney Plan, presumably discarded the original. Nott's account thus explained both the original Plan's disappearance and the uncanny resemblance between the 1818 Plan and the Committee's Report. Nott's speculations were strained to the breaking point, but Taylor would pay them the highest compliment possible: he would describe them as forming a united front with Jameson's painstaking analysis which, he claimed, both vindicated the 1818 Plan. According to Taylor, the united efforts of Jameson and Nott "have, in a luminous and convincing way, demonstrated the genuineness of the copy of that all-important plan furnished by Pinckney to the Secretary of State in 1818."¹²² Jameson, it should be remembered, believed he had definitively established that it could not be genuine.

The trio of books that came out in these early decades after the manuscript discoveries were all so obviously partisan that, if the mania had stopped there, they might have made no significant impact on subsequent scholarship. One unnamed reviewer of Nott's book declared that he remained "somewhat skeptical" that Judge Nott had made a convincing case for Pinckney; he reminded readers that Jameson had, only a few years earlier,

119. Jameson, *Studies*, *supra* note 49, at 124; McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46, at 736; ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 157–58 (D. Appleton-Century Co., Inc. 1935); Max Farrand, Appendix D: The Pinckney Plan, *supra* note 66, at 603–04.

120. NOTT, *supra* note 19; TAYLOR, *supra* note 20; BETHEA, *supra* note 21.

121. NOTT, *supra* note 19, at 111.

122. TAYLOR, *supra* note 20, at 9.

“confirmed” the opinion of leading lights that the 1818 Plan was not authentic.¹²³ But the tide turned definitively in the 1950s, when Sydney Ulmer wrote a pair of articles defending the 1818 Plan and accusing Madison of trying to discredit it through envy.¹²⁴ His methods of establishing its credibility were questionable, but even more dubious was his failure to engage with the most serious arguments that had been advanced to discredit it. Ulmer claimed that, since Madison published his appendix, “not a single critic has come up with a criticism” of the 1818 Plan.¹²⁵ Even more unaccountably, he accused Jameson of providing no reasons for doubting its integrity: “To make or imply the charge of fraud lacking conclusive evidence is a nadir to which even Madison never sank. But that is precisely what Jameson, Farrand and others do.”¹²⁶ Ulmer not only ignored Jameson’s five pages of original and closely reasoned textual analysis debunking the 1818 Plan; he flatly denied their existence. Ulmer’s charge, though disingenuous, was effective. Since his articles were published more than a half century ago, there has been a near-total amnesia among scholars that Jameson’s 1903 analysis had convincingly discredited Pinckney’s 1818 Plan.¹²⁷ Few of Pinckney’s admirers have even acknowledged Jameson’s arguments against the 1818 Plan; thus far, none have attempted to refute them. Ulmer’s interpretation of the Pinckney Plan reigns supreme in scholarship today.¹²⁸

By the twenty-first century, we thought we at least understood all that was mysterious about the Lost Pinckney Plan, but in 2016 Margie Burns discovered yet another mystery.¹²⁹ She found that the first edition of the *Documentary History of the Constitution of the United States of America (Documentary History)*, allegedly published in 1894, had actually been printed as two separate and distinct editions spaced at least eight years apart. Most

123. Who Drafted the Federal Constitution?, 22 GREEN BAG: AN ENTERTAINING MAG. L. 131, 131 (Feb. 1910).

124. Ulmer, *Charles Pinckney*, *supra* note 23, at 245; Ulmer, *James Madison*, *supra* note 23, at 426.

125. Ulmer, *Charles Pinckney*, *supra* note 23, at 237.

126. *Id.* at 246.

127. See McClain, *supra* note 114, at 17 (following Ulmer, likewise claiming that “little has since been added” after Madison’s criticism of the 1818 Plan).

128. See generally *Drafting and Ratifying the Constitution*, *supra* note 113 (following Sidney Ulmer’s interpretation of the 1818 Plan). This essay about Pinckney’s contributions to the Constitution relies entirely on Ulmer’s 1956 PhD dissertation, but the analysis of the Pinckney Plan found in that source is identical to Ulmer’s later articles. The Pinckney Statesmen editors make no mention of Jameson’s scholarship or the lingering controversy over the 1818 Plan.

129. Margie Burns, *The Mystery of Charles Pinckney’s Draft of the U.S. Constitution Revisited*, 117 S.C. HIST. MAG. 184, 184 (2016).

intriguing of all, the two editions both included a “Pinckney Plan,” yet the two versions of this “Plan” were notably different. Doing a “line-by-line comparison” of the two versions,¹³⁰ she discovered “hundreds of minuscule differences” between them.¹³¹ The second version was clearly an exact transcript of the 1818 Plan that Pinckney had enclosed in his letter to Adams. What, then, was the first? She indulges in “[t]he most attractive possibility,”¹³² to wit: the editors of the *Documentary History* had discovered among their papers an authentic copy of Pinckney’s 1787 Plan, which they had published in their first printing. For some inexplicable reason, the editors chose to replace the “1787 Pinckney manuscript”¹³³ with the less authentic 1818 Plan in their second printing, and that original 1787 manuscript—the one they had ostensibly relied on for their first version—has since disappeared. Burns concludes her article with numerous provocative speculations to explain what might have happened: “Did official evaluation of Pinckney change so much from 1894 to 1901 that archivists in effect suppressed the superior earlier text? Did they throw it away, by accident or intent?”¹³⁴ She notes that earlier historians were more under the influence of James Madison; however, “since the mid-twentieth century [they] have been far more willing to credit Pinckney in framing the U.S. Constitution.”¹³⁵ Never were truer words spoken.

For scholars who are knowledgeable about the documentary history of the Federal Convention, the mystery that Burns weaves is not actually mysterious at all. Even the internal evidence provided in her article is sufficient to explain what really happened. The most important clue was provided by the editors of the *Documentary History* themselves, who did not, as it happens, leave their readers to wonder why they had published a different version of the “Pinckney Draught” in their later printing. In a marginal notation at the outset of the Pinckney papers, they explained that they had only “recently found” the letter from Pinckney to Adams “and its accompanying draft of a Constitution;” therefore, they were printing a transcript from those documents; they went on to say that these texts would “replace *the copy of the draft* made by Mr. Adams’ direction,” which is what

130. *Id.* at 192.

131. *Id.* at 195.

132. *Id.* at 191.

133. *Id.*

134. *Id.* at 204.

135. *Id.*

they had originally printed in “the first edition of this volume.”¹³⁶ In other words, the only difference between the two versions was that the later one was a verbatim copy taken directly from Pinckney’s 1818 manuscript, whereas the first printing had reproduced Adams’ 1819 copyedited transcription of Pinckney’s 1818 Plan.

Every circumstance that Burns unearths from her meticulous research only serves to confirm that the editors of the *Documentary History* had given an accurate account of the two versions. Those “hundreds” of distinct discrepancies she found between the two plans amount to nothing more than the changes that any careful editor would perform when cleaning up an author’s sloppy manuscript. Adams had apparently normalized Pinckney’s erratic punctuation and capitalizations; he had corrected his misspellings and grammatical errors; he had spelled out scores of ampersands and abbreviations; he had integrated Pinckney’s marginal and superscripted insertions into the body of the text; and he had introduced regular indentation.¹³⁷ Other than these “hundreds” of trivial corrections to Pinckney’s original, there was no difference between the two drafts. After the editors of the *Documentary History* found the authentic manuscript of Pinckney’s 1818 Plan, they replaced Adams’s sanitized version and left all of Pinckney’s grammatical errors and idiosyncrasies scrupulously intact for their second printing.

Burns herself reveals one of the most important clues establishing that the difference between the two drafts was exactly what the editors had claimed it was. She observes that the first version they published matches exactly the “Pinckney Plan” that Adams published in 1819. Burns speculates, contrary to all evidence, that Adams had actually been in possession of a genuine copy of Pinckney’s 1787 Plan among the other State Department papers, and he had printed that authentic version in 1819.¹³⁸

136. Appendix, in 1 DOCUMENTARY HISTORY, *supra* note 79, at 309 (1894) (emphasis added); see also Burns, *supra* note 129, at 191 (reprinting the same marginal note by the editors, but emphasizing other sections of the text and ignoring what the editors said about the document they had included in the first printing).

137. Burns, *supra* note 129, at 192–93.

138. *Id.* at 186, 188, 191 (speculating that Pinckney may have turned his Plan over to the State Department at the same time that Washington deposited the Journal records there); *Id.* at 201–203, 203 n.52 (noting that the earliest publication of what she calls the “1787 Pinckney Draft” was in the Journal published by Adams, confirming that this draft is identical to the first version printed in the *Documentary History*, and indulging in a wild speculation about how the State Department possessed an authentic copy of the Pinckney Draft in 1819, but Adams “fear[ed]” Madison’s displeasure if he openly acknowledged his association with this project).

Yet that account is contradicted by Adams, who stated on multiple occasions throughout his life that the Pinckney Plan that was published along with the other Journal records was the one that Pinckney sent him in 1818.¹³⁹ Adams not only told Jared Sparks in 1830 that he had printed the plan that Pinckney sent to him; he also added “that he has never been able to hear of another copy.”¹⁴⁰ Once Burns had discovered that the first version published by the 1894 *Documentary History* was an exact replica of the version Adams had published in 1819, that discovery should have cleared up any vestiges of the mystery that yet remained. Every reference that Burns makes in her article to the so-called “1787 Pinckney manuscript,”¹⁴¹ or the “1787 version” of the Pinckney Plan¹⁴²—which she contends was a manuscript possessed by the Adams State Department in 1819 and later acquired by the editors of the *Documentary History* in 1894, before suspiciously disappearing—is pure fantasy. There are simply no grounds for supposing that the State Department ever possessed such a manuscript.

The most recent scholarship on the Pinckney Plan thus brings modern researchers full circle back to the condition that unsuspecting readers would have been placed 200 years ago: they would be led to believe that the Pinckney Plan published in 1819 with the rest of the Journal records was the very one that Pinckney had proposed to the Constitutional Convention in 1787. In reviewing the most recent accounts of the Pinckney Plan, it almost seems as if the most important and valid scholarship on the Pinckney Plan—which primarily took place between 1830 and 1903 (in the first century after the bogus 1818 Plan was published)—has vanished, and only

139. See John Quincy Adams, *Advertisement, in Journal, Acts and Proceedings of the Convention, Assembled at Philadelphia, Monday, May 14, and Dissolved Monday, September 17, 1787, Which Formed the Constitution of the United States* 5, 11 (John Quincy Adams ed., Thomas B. Wait 1819) (giving an account of where the documents contained in the volume were procured, and saying that “the plan of Mr. C. Pinckney . . . has been furnished by him”); John Quincy Adams, *Memoirs* (May 13, 1819), in 3 Records, *supra* note 44, at 430, 430–431 (noting that he had written to Pinckney “and obtained a copy” of his Plan, which, with the rest of the “papers suitably arranged, a correct and tolerably clear view of the proceedings of the Convention may be presented”); John Quincy Adams, *Memoirs* (May 4, 1830), in 3 Records, *supra* note 44, at 481, 482 (relating a conversation Adams had with Jared Sparks about the Pinckney Plan, and retelling what transpired in 1818 and 1819: “when I compiled the Journal of the Convention, Charles Pinckney himself sent me the plan now in the book”); Jared Sparks, *Journal* (May 4, 1830), in 3 Records, *supra* note 44, at 481, 481 (relating that same conversation with Adams, in which the latter told him about how he had written to Pinckney requesting a copy of his Plan, “and received from him the one that is printed”).

140. Letter from Jared Sparks to James Madison (May 5, 1830), *supra* note 79.

141. Burns, *supra* note 129, at 191.

142. *Id.* at 191–92.

the errors, misunderstandings, and Pinckney partisanship remain. Sometimes, developments in historical research are not the same thing as progress.

Since 1903, there have been numerous junctures where scholarship on the Lost Pinckney Plan took a wrong turn. Nevertheless, Jameson's twin articles in that year are the cornerstone upon which all subsequent castles in the air have been built. Ironically, scholars have largely ignored the most compelling part of Jameson's research on the Pinckney Plan while they have accepted uncritically his most questionable claims. Jameson's careful demolition of the 1818 Plan has never even been acknowledged by Pinckney's admirers, much less refuted. Meanwhile, the claim that was barely more than bare assertion—that he “could see at the first glance” that the manuscript he discovered was derived from the very Lost Plan he was then researching¹⁴³—has been accepted without scrutiny from the time it first appeared. It is long past due for a more critical examination of that claim, for it appears that Jameson's exciting discovery in 1903 was a case of mistaken identity. And what began as an innocent mistake by an otherwise careful historian eventually burgeoned into a dense thicket of errors and fallacious assumptions about Charles Pinckney and his Lost Plan.

III. CHALLENGING JAMESON'S IDENTIFICATION

A. *The Superior Claims of McLaughlin's Manuscript over Jameson's*

Jameson had undertaken such extensive and rigorous research on the Lost Pinckney Plan that it somehow seemed fitting and decorous that he should have been the one to discover a manuscript that was a consummation and even vindication of the subject he spent so much time investigating. After all, when he began his inquiries into the Plan, his scholarly approach was cautious and restrained, an approach in keeping with the entirety of his “Studies in the Federal Convention.” He initially warned that the only reliable way to reconstruct the contents of Pinckney's Plan was to examine statements made about the Plan, or its author's opinions on the proposed Constitution, which had been recorded either shortly before or within the first two weeks of the Convention.¹⁴⁴ Any of Pinckney's opinions expressed after about mid-June should be deemed less reliable as

143. Jameson, *Portions of Pinckney's Plan*, *supra* note 46, at 510.

144. Jameson, *Studies*, *supra* note 49, at 117–20.

a guide to the Plan he proposed on May 29.¹⁴⁵ Jameson regarded Pinckney's 1787 "Observations" and his 1818 Plan of little value and worthless, respectively, for ascertaining the contents of the authentic Plan.¹⁴⁶ However, this initial caution was thrown to the winds when, only a few paragraphs from completing this section in his examination, Jameson happened upon the fateful manuscript in Wilson's handwriting, and he "easily identified" the second half "as parts of the much-sought Pinckney plan."¹⁴⁷ This unabashed confidence seemed out of keeping with his prior restraint. Indeed, the powers Wilson listed in the second half of the manuscript that Jameson found bear little resemblance to the details of Pinckney's Plan as he had reconstructed them when adhering to his earlier narrow criteria.

Still, the discovery he made in 1903 might to this day be considered a strong contender for the Lost Plan were it not for McLaughlin's discovery the following year. Even if that discovery had never been made, an internal examination of Jameson's manuscript is sufficient to raise some doubts about its authenticity. But it is when comparing his manuscript to the Plan that McLaughlin found just a year later that Jameson's tenuous claims to have unearthed the real one seem to evaporate. McLaughlin's 1904 discovery demonstrates that the muse of history does not always reward the most deserving; for it would seem that Clio vouchsafed the real manuscript discovery to someone who wasn't searching for it and who had done less original research on Pinckney's Plan than Jameson.

Since the two manuscripts we are considering are both in James Wilson's handwriting, and since both have been identified as being extracts of Pinckney's Plan, they will here be distinguished from one another by the names of their discoverers (in keeping with Jameson's analogy of the astronomer discovering an asteroid). The "Jameson Manuscript" refers only to the second half of the Wilson document he found—the only part purportedly drawn from Pinckney's Plan. That portion is reproduced in Appendix 1, and to aid references and comparisons, bracketed numbers have been inserted before each clause. The "McLaughlin Manuscript" is reproduced in its entirety in Appendix 2.

Before launching into the reasons for doubting Jameson's identification of the manuscript he found, it is worthwhile to give a precise account of

145. *Id.*

146. Jameson, *Portions of Pinckney's Plan*, *supra* note 46.

147. Jameson, *Studies*, *supra* note 49, at 128.

what it is, as well as the best case that can be given for concluding that it really was drawn from Pinckney's Plan. This manuscript is a single sheet of paper, written on both sides in James Wilson's handwriting.¹⁴⁸ The first three-fourths of the first side is plainly an extract of the New Jersey Plan, but it is an extract that was constructed in a telltale way. Wilson was clearly extricating only the powers listed in the Plan, not the structural details; even more significant, he copied only those powers which he favored, and he expunged those he deemed unworthy of inclusion in the Committee Report. Although Wilson's draft is considerably abridged from the original, it is otherwise an almost perfect verbatim copy; there is no mistaking its origin.

After Wilson finished copying parts of the New Jersey Plan, there is a noticeable break in the written text. Wilson then began a second list of powers, and this list is continued on the back of the same page. It is this second list of powers that Jameson believed was derived from Pinckney's Plan. And certainly, it is not an unreasonable supposition that, after distilling what he considered to be the most desirable features to be found in one of the plans deposited with the Committee of Detail, Wilson would proceed to give Pinckney's Plan the same kind of treatment. In addition to that perfectly reasonable supposition, Jameson gave three reasons for believing that the second half of this manuscript was derived from Pinckney's Plan.¹⁴⁹ First, he argued that "we have here a body of material plainly derived from two documents."¹⁵⁰ However, he gave no reasons for believing why this claim ought to be so plain. The first half was indeed, without any room for doubt, taken from another document, the New Jersey Plan. We can draw this conclusion because it matches extant copies of that Plan so perfectly. But the second half could just as easily have been generated *ex nihilo* during the Committee of Detail, either by Wilson alone or by Wilson in conference with others, or it might have been compiled from several different sources. It is not at all obvious why one should simply assume at the outset that the second half was drawn from a single source in the same way that the first half was.

148. William Ewald & Lorianne Updike Toler, *Committee of Detail Documents*, 135 PA. MAG. HIST. & BIOGRAPHY 239, 307, 309 (July 2011). The Ewald & Updike Toler article includes reproductions of all the Committee of Detail manuscripts with facing transcriptions. Farrand transcribed the same manuscript in Committee of Detail, VII, in 2 RECORDS, *supra* note 63, at 157, 157–59.

149. Jameson, *Studies*, *supra* note 49, at 131.

150. *Id.*

Second, Jameson pointed out that the names given for the different branches of government match the ones that Pinckney used.¹⁵¹ This observation is probably the strongest reason Jameson gave for believing that this part of the manuscript was derived from Pinckney's Plan. From several sources, we can see that Pinckney named the chief executive the "president," the two branches of the legislature were denominated the "house of delegates" and the "senate," and the judiciary he called a "federal judicial Court."¹⁵² The second half of the Wilson manuscript employs all of those terms; therefore, if it was not drawn from the Pinckney Plan, we must acknowledge that it is at least a noteworthy coincidence that Wilson used precisely the same language that Pinckney did when describing the various branches of government. Of course, at least some of those terms may have been drawn from the constitution of Wilson's home state of Pennsylvania. There, we find that the head of the executive council was likewise named the "president," and its unicameral legislature, though named a "house of representatives," included members that the constitution called "delegates." Many delegates used the word "senate" to describe the upper chamber. If Wilson had employed only those terms, these names would provide scant reason for tracing this part of the document to Pinckney in particular. Nevertheless, the name "federal judicial Court" is more unusual; the usage of that term is the single most striking coincidence between the Jameson Draft and Pinckney's terminology. However, as we shall see when comparing this manuscript to McLaughlin's, the placement of these particular words, the most distinctively Pinckneyesque phrase within the Jameson Draft, is significant.

Jameson's third reason for believing that the list was drawn from Pinckney's Plan requires more critical scrutiny. He argued that, "out of some forty provisions" written in Wilson's handwriting, "not one is in conflict with what we otherwise know of Pinckney's real plan, developed according to the method established on previous pages."¹⁵³ While that statement is true, and may appear at first glance to be a weighty consideration, its value as verification of Pinckney's Plan is highly questionable. The features that Jameson had identified as properly

151. *Id.* Curiously, Jameson lists only "House of Delegates" as coming from Pinckney, which is not especially distinctive. *Id.* I am actually building a much stronger case than the one Jameson presents, taking into account Pinckney's use of "federal judicial court," a more unique phrase which Pinckney employs on several occasions, both before and after the Convention.

152. *Id.* at 130–31.

153. *Id.* at 131.

belonging to the Pinckney Plan consisted almost entirely of structural elements of government. Almost nothing was said about the powers granted to each branch, and nothing whatsoever was said about *denying* powers to these branches. Therefore, one could say about almost any list of powers, no matter how it was constructed or what it contained, that it did not conflict with Jameson's initial reconstruction of Pinckney's Plan. Indeed, it can be said with equal truth about the list of powers in the *first* half of the manuscript—that half which was indubitably drawn from the New Jersey Plan—that “not one is in conflict with what we otherwise know of Pinckney's real plan.”¹⁵⁴ But making that observation about the first half of the manuscript hardly constitutes proof that Charles Pinckney authored the New Jersey Plan. Making that declaration about the second half of the manuscript, then, is in reality of little worth in determining whether Pinckney might have been its author.

Reduced to brass tacks, the thrust of Jameson's argument really comes down to a negative claim: no one can definitively prove that this list of powers did *not* come from the Pinckney Plan. And it would have been far more difficult to find evidence tending to disprove the identity of Jameson's manuscript discovery if, just one year later, McLaughlin had not found another manuscript with far greater claims to being an extract of the Lost Plan. Before Jameson discovered the first Wilson manuscript, he had named a number of features he predicted would probably be found in the Pinckney Plan.¹⁵⁵ The manuscript that he later found contains only a few rather generic details which match those predicted features. They can be summed up in this single sentence: we should expect the Pinckney Plan to formulate a national government with a bicameral legislature, a single executive, and a judiciary.¹⁵⁶ However, since this basic structure of government mimics most of the state constitutions at the time, and matches the expectations of most delegates to the Convention and all the members of the Committee of Detail, these sparse features alone are very thin gruel for identifying a manuscript as coming from Charles Pinckney in particular. Furthermore, this generic structure of government can also be found in McLaughlin's manuscript discovery, and both documents employ Pinckney's distinctive

154. *Id.*

155. *Id.* at 118–19.

156. *See id.* at 118–19, 130–31 (showing Jameson's initial predictions, and the contents of the manuscript he later found).

names to describe each branch of government.¹⁵⁷ Thus, as far as this skimpy verification goes, each Plan has an equal claim.

However, whereas the Jameson manuscript contains only the most skeletal outline matching his expectations for Pinckney's Plan, the McLaughlin manuscript contains most of the notable features which Jameson predicted we would find in the Plan; and, indeed, we find some features that could have come from nowhere else. We know from more than one source that Pinckney's Plan shared several features with the Virginia Plan, and these shared features are all found in McLaughlin's extract.¹⁵⁸ The most distinctive of these features was a power lodged in the national legislature to veto state laws.¹⁵⁹ Pinckney also shared with the Virginians a wish to see that senators would be elected by members of the lower house and that the executive would be elected by the whole legislature.¹⁶⁰ All of the features we would expect to find in both the Pinckney and the Virginia Plan are present in the McLaughlin discovery.

Even more telling, however, were the features unique to Pinckney. Although both plans presented on May 29 contained a proposal to apportion representation to each state's population, only Pinckney proposed counting slaves according to a three-fifths ratio for the lower house.¹⁶¹ He also wanted to choose senators from four national districts, made up by grouping several states together, and to have senators serve for staggered four-year terms.¹⁶² The McLaughlin manuscript contains all of these features. Finally, while both the Virginia Plan and the Pinckney Plan

157. See *infra* Appendix 1, Appendix 2.

158. The Virginia Plan, in 1 RECORDS, *supra* note 57, at 20, 20–22.

159. *Id.*

160. Jameson, *Studies*, *supra* note 49, at 118–20. See Letter from George Read to John Dickinson (May 21, 1787), *supra* note 56, at 25 (“[S]enate, to be elected by the delegates so returned, either from themselves or the people at large, in four great districts, into which the United States are to be divided for the purpose of forming this senate”); Madison's Notes (May 31, 1787), in 1 RECORDS, *supra* note 57, at 47, 52 (describing Pinckney's motion on May 31); Madison's Notes (June 7, 1787), in 1 RECORDS, *supra* note 57, at 150, 155 (summarizing Pinckney's speech on June 7, 1787). Jameson actually says that the members of the senate “were to be elected either by the State legislatures or by the first branch, it is not certain which.” Jameson, *Studies*, *supra* note 49, at 119. Nonetheless, both Read's May 21 letter and Pinckney's May 31 motion suggest that Pinckney's first preference was for senators to be chosen by the lower house, and this earlier choice is confirmed by the McLaughlin manuscript. The opinion Pinckney later expressed, on June 7, that senators should be chosen instead by the state legislatures, appears to have reflected a change of opinion that took place only after the first week of debates.

161. Jameson, *Studies*, *supra* note 49, at 118–19.

162. *Id.* at 119–20. This provision appears to be closely modeled on the New York Constitution.

provided for a Council of Revision (an unusual institution at the time, whereby the veto power over Congress was lodged in a committee formed from the executive and a council), the one described in the McLaughlin manuscript was definitely Pinckney's.¹⁶³ The Council of Revision found in the Virginia Plan closely mimicked the one in the New York Constitution (the only existing model for such a council), whereby the executive would share the veto power with members of the Supreme Court.¹⁶⁴ Pinckney's Council altered the New York model by uniting the president with the heads of the several executive departments (similar to South Carolina's Privy Council, which advised the governor, though it did not—like the Council of Revision—share a veto power with him).¹⁶⁵ The Wilson extract found by McLaughlin contained all these provisions unique to Pinckney, which makes its claim to being drawn from the Pinckney Plan almost unassailable, even when confining its examination to Jameson's predictions alone. But to add to its authentication, McLaughlin also traced some of its provisions to a report that Pinckney wrote in 1786 when he chaired a congressional committee on amending the Articles of Confederation,¹⁶⁶ and he outlined some noteworthy similarities between the manuscript he found and Pinckney's "Observations."¹⁶⁷

There are additional features that Jameson had predicted would be in the Pinckney Plan but which are not found in the McLaughlin discovery. Taking each one individually, it is impossible to say for certain whether Wilson omitted them in his extract or whether they were never actually in the Plan at all. Since Jameson was reconstructing his Plan by drawing in part from Pinckney's opinions as they were expressed in speeches early in the Convention, we cannot be sure which of these opinions were really derived from the Plan he read on May 29 and which ones were generated *in situ* and perhaps in response to the debates. As a parallel example: although Madison is generally acknowledged as being the primary author of the Virginia Plan, he made several suggestions in the opening weeks of the Convention which were unrelated to anything found in that Plan, and a few of his proposals and opinions even contradicted provisions in that Plan. If we were trying to reconstruct the Virginia Plan based on Madison's

163. *Id.* at 119 (stating "Pinckney had provided for a council of revision" and describing its structure); see *infra* Appendix 2 (describing a council of revision's structure in Resolution 6).

164. The Virginia Plan, *supra* note 158, at 21; N.Y. CONST. art. III (1777).

165. My thanks to Donald L. Drakeman for pointing out this similarity.

166. McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46, at 738–39.

167. *Id.* at 737–38, 741–47.

statements before the Convention and in its first two weeks, we would be led astray in several points.¹⁶⁸ When attempting to reconstruct the Pinckney Plan, if we confine our expectations to those features described in the most reliable source we possess, George Read's snapshot picture of the Plan in his letter prior to the Convention, we find that only two of these features described there are not in the Wilson extract found by McLaughlin: that members of the lower house would be chosen by state legislatures and that the president would serve a seven-year term.¹⁶⁹

There is one and only one element in the McLaughlin manuscript that jars with our expectations. According to Resolution 5 of Wilson's extract, the president was to be chosen "annually" by Congress.¹⁷⁰ However, according to Read's description of the plan as well as Pinckney's early speeches in the Convention, he wanted a president with a seven-year term.¹⁷¹ Although it is just barely possible that Pinckney wavered on this question, McLaughlin is likely correct to suggest that Wilson made a copying error when jotting down the fifth Resolution.¹⁷² All of this is to say: although the McLaughlin Draft may not be a perfect extract of the Pinckney Plan, it cannot be denied that Wilson was copying Pinckney's Plan when he wrote it.

168. For examples of the variance between Madison's opinions in the opening weeks and the plan that the Virginia delegates presented, see King's Notes (June 1, 1787), in 1 RECORDS, *supra* note 57, at 70, 70–71 (recording a speech by Madison, stating "the best plan will be a single Executive"); Pierce's Notes (June 1, 1787), in 1 RECORDS, *supra* note 57, at 73, 74 ("Mr. Maddison was of opinion that an Executive formed of one Man would answer the purpose"). Whereas the Virginia Plan was silent as to the number of occupants filling the executive branch (probably in deference to Randolph and Mason, who both preferred a plurality in the executive), on June 1 Madison expressed his own preference for a unity in the executive. *Id.* Similarly, Resolution 6 of the Virginia Plan authorized Congress "to call forth the force of the Union [against]" delinquent states. The Virginia Plan, *supra* note 158, at 21. But when that provision was debated at the Convention just two days after the Plan was read, Madison demurred, observing "that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually." Madison's Notes (May 31, 1787), *supra* note 160, at 54. These examples illustrate the hazards one might encounter when reconstructing a Plan based on the author's subsequent opinions, even those expressed shortly after the Plan was presented.

169. Letter from George Read to John Dickinson (May 21, 1787), *supra* note 56, at 25.

170. McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46, at 742.

171. Madison's Notes (June 1, 1787), *supra* note 168, at 68 (describing Pinckney moving for a seven-year presidential term); Letter from George Read to John Dickinson (May 21, 1787), *supra* note 56, at 25 (discussing a federal system where a president has "only executive powers for seven years").

172. See McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46, at 742 n.4 (noting the mistake in using the term "annually" in the fourth footnote).

B. *An Alternative Theory to Explain the Jameson Draft: Examining the New Jersey Extract*

Before particularizing the various reasons for doubting Jameson's identification of the second half of the manuscript he discovered, it would be helpful at this stage to advance an alternative hypothesis to explain its contents. For, if we find that the evidence decisively weighs against the supposition that Wilson was simply copying from Pinckney in the second half of this manuscript, then what was he doing in this half, after he finished abridging the New Jersey Plan? To all appearances, it seems most likely that he was engaged in a brainstorming exercise—either alone or in consultation with some fellow committee members—adding those powers which he believed should belong to the branches of government as they occurred to him. It does appear that he consulted the Pinckney Plan during this process, but not until he was nearly finished. Out of 41 total clauses, we do not find any that look definitively like they owed their origin to Pinckney until Clause 36 (comparing the contents to the McLaughlin Draft), though Wilson probably began consulting the Plan at Clause 35. And even when examining these last six clauses, it would appear that Wilson was probably modifying Pinckney's provisions as he was drafting (which is noticeably different from his more faithful abridgement of the New Jersey Plan).

Drawing back a little and seeking the most probable explanation for the entirety of this manuscript Jameson found—combining both the New Jersey Plan extract and the second half—it seems to be a list of Wilson's preferred powers for the new government. Few of the powers he listed in either half are “original;” Wilson was indubitably drawing from other sources in this manuscript: not only the New Jersey Plan, but also the Pinckney Plan, the Articles of Confederation, and probably some state constitutions. Nevertheless, this manuscript is an important insight into *Wilson's* thinking at this stage of the deliberations, and his choices for which powers to accept and which to reject clearly had an important influence on the final Constitution. Wilson's efforts in this manuscript were performed in pursuance of the committee's task of creating a newly minted enumeration of powers for the government they were creating. Before the Committee of Detail met, the Convention had on several occasions debated the possibility of enumerating or specifying the powers belonging to the legislature and executive branches, but they had never done so. During these debates, Wilson was among those who expressed a preference for not

enumerating the powers for Congress.¹⁷³ However, either because he was outvoted on the Committee of Detail or because he voluntarily changed his mind by this stage, this manuscript—both the selectively abridged powers from the New Jersey Plan and the additional powers listed in the second half of the manuscript—demonstrates that he was actively engaged in the process of choosing which powers ought to belong to the respective branches of government.¹⁷⁴

The Committee of Detail Report was the first document considered by the Convention (with the exception of the rejected New Jersey Plan) which attempted anything like a comprehensive enumeration of powers. When the Report's list of powers was eventually debated by the entire Convention in August, several delegates proposed to remove, alter, or add to the individual powers the committee had enumerated. But no delegate ever questioned the committee's *proposal* to enumerate powers, nor did anyone challenge or criticize the committee members for their presumption in making out these lists absent any explicit directive. This silence suggests that there was at least a tacit expectation among the delegates that the Committee of Detail had been charged with this task, even though that was never made clear in any of the records. Some historians of the Convention have suggested that delegates who were not members of the committee may have informally made suggestions while the committee sat,¹⁷⁵ but we have no formal records of what transpired during their meetings. We must therefore reconstruct their thinking by piecing together just a few scraps of notes left by individual members, such as this manuscript in Wilson's handwriting found by Jameson.

When Wilson and his colleagues sat down to enumerate a set of powers for the new government, they would have found that the twenty-three

173. Pierce's Notes (May 31, 1787), *in* 1 RECORDS, *supra* note 57, at 57, 60 (explaining Wilson believed enumerating powers was impossible); Madison's Notes (July 17, 1787), *in* 2 RECORDS, *supra* note 63, at 25, 26 (showing that Wilson seconded a motion by Sherman, granting broad, generalized powers to Congress).

174. Cf. William Ewald, James Wilson and the Drafting of the Constitution, 10 U. PA. J. CONST. L. 901, 981 n.212, 986–89 (2008) [hereinafter Ewald, James Wilson and the Drafting of the Constitution] (doubting Wilson's active involvement in the Committee's enumeration of powers because of his prior objections to it).

175. See CLINTON ROSSITER, 1787: THE GRAND CONVENTION 200 (W. W. Norton & Co. 1966) (conjecturing that those delegates who stayed in Philadelphia while the Committee met may have spent their time, "when they could not resist the temptation, giving free advice to the committee"); THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § xxvi (Applewood Books 1801) ("Any member of the House may be present at any select committee, but cannot vote . . .").

Resolutions decided by the Convention up to that point—the revised Virginia Plan—would be of little help. On this question, the delegates had not significantly modified the original proposal of the Virginia Plan, which simply gave to Congress all legislative powers enjoyed by the old Confederation as well as this sweeping directive: “and moreover [the power] 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 the Exercise of individual Legislation.”¹⁷⁶ Therefore, if the Committee members intended to depart from the Convention’s decisions up to that point and to begin enumerating powers, they would need to turn to other sources for inspiration, including the other documents entrusted to them: the New Jersey and Pinckney Plans.

The first part of the Jameson document, then, is Wilson’s extract taken from the enumerated powers found in the New Jersey Plan, yet it clearly extracts only those powers that Wilson favored. Skipping over all the provisions relating to the structure of government, he copied only some of the powers the New Jerseyans had assigned to the three branches of government. In some cases, Wilson also abbreviated sentences for brevity, but he did not otherwise alter or add any words to the main body of the text. There is only one line that is even out of order when compared to the original. The fragment, “An Appeal for the Correction of all Errors both in Law and Fact,” was originally placed at the end of Article Two in the New Jersey Plan (relating to the appeal of judgments rendered by state courts), but Wilson placed that line at the top of the page.¹⁷⁷ Maybe he skipped over that line by accident when copying Article Two, or perhaps he changed his mind about its desirability after copying the rest of the document. Other than these major abridgements and that one minor alteration, the extract that Wilson copied is in all other respects recognizable as a faithful and verbatim copy of the New Jersey Plan.

It is important to note, however, that Wilson also added in the left-hand margin a few lines that were not in the New Jersey Plan but which he evidently believed to be desirable powers. For instance, after entirely expunging Article Three, which was a new proposal for requisitioning revenue from the states, Wilson added an alternative power in the left

176. Committee of Detail, I, in 2 RECORDS, *supra* note 63, at 129, 131–32.

177. Ewald & Toler, *supra* note 148.

margin: “to lay and collect Taxes.”¹⁷⁸ Constitutional scholars will immediately recognize that phrase as the opening line of Article I, Section 8 of our Constitution. The delegates by this time had already decisively rejected the requisition mode of raising money, which had proved so disastrous under the Articles of Confederation. The taxing phrase that ultimately found its way into the Constitution was apparently Wilson’s own brainchild, and it was evidently conceived while he was engaged in this exercise of mostly copying and slightly amending the New Jersey Plan.

Wilson’s thinking in the first half of the manuscript—while deciding which provisions in the New Jersey Plan he favored, and which he rejected—is therefore easy to reconstruct, because we have authoritative copies of the New Jersey Plan against which we may compare it. Only the second half presents us with puzzles to solve.

C. *The Alternative Theory, Tested by Internal Evidence*

When Jameson described the entirety of the manuscript he discovered, he declared that it was “a body of material plainly derived from two documents.”¹⁷⁹ However, even when examining the internal evidence found in this manuscript, that statement is questionable. The first half is clearly modeled after another form of government, not only because it matches exactly the arrangement of the New Jersey Plan, but also because it follows a logical structure. It begins with a paragraph listing powers for the legislature; it proceeds to a separate line about executive power (the New Jersey Plan had very little to say about executive power, and even less that Wilson chose to adopt); it then outlines a third section on the jurisdiction of the federal judiciary; and the final two sections relate, respectively, to federal authority to compel state infractions and a mandate for uniform rules of naturalization throughout the states. Even if we did not possess a copy of the New Jersey Plan for purposes of comparison, we could recognize in this half a logical arrangement of federal powers.

The second half, by contrast, not only fails to conform to what we can know about the order of Pinckney’s Plan (and more on this presumed order anon), but it does not appear to follow any order at all. If we examine this

178. *Id.* at 306, 307; Committee of Detail, VII, *supra* note 148, at 157. It is important to note that when Farrand transcribed the manuscript, he placed Wilson’s marginal notes in italics and integrated them into the rest of the text, which obscures the distinction between the verbatim transcription of the New Jersey Plan in the main body of the text and Wilson’s original marginalia placed to the left of the main body.

179. Jameson, *Studies*, *supra* note 49, at 131.

half (Appendix 1), we see that Clauses 1–6 describe the arrangement and internal rules governing the two Houses of Congress. Clauses 7–21 outline the powers of the President. After finishing with the presidential powers, Wilson returned to the subject of Congress, enumerating their exclusive powers in Clauses 22–34. Clauses 35–36 outline the jurisdiction of the courts. Clause 37 returns again to the legislature, granting it the power to establish admiralty courts in the states. Clauses 38–39 describe the impeachment power, which is shared between the legislature and the “foederal court.” And the last two clauses, 40–41, return again to the subject of exclusive powers lodged in the legislature. There is little discernable order to the list of powers supposedly drawn from Pinckney’s plan of government. The structure, if it can be called that, rather has the appearance of someone brainstorming; it seems as though Wilson were listing powers willy-nilly, as they occurred to him, rather than copying powers as they appeared in any preexisting plan of government.

Furthermore, in the manuscript half that is supposedly copied from the Pinckney Plan, there are emendations that would not ordinarily occur in a simple act of copying. By way of comparison, in the extract of the New Jersey Plan (the first half of the manuscript), there are no strikethroughs. Wilson’s only visible error when copying from this source was his choice to include one line out of order, found at the top of the manuscript.¹⁸⁰ In the second half, however, there are two strikethroughs, which together seem to indicate that Wilson was weighing different alternatives in the act of composition, but it does not seem as though he were merely copying the wording found in another source. For instance, in Clause 6, Wilson wrote that neither House in Congress should be able to adjourn for more than some unspecified number of “Days, without the ~~other~~ Consent of both.”¹⁸¹ This provision has no known origin (it certainly was not copied from any corresponding provision found in the McLaughlin manuscript), and it appears that Wilson was drafting an original provision, and changing his mind as to its composition, rather than copying the wording from another source. Further down, in Clause 36, Wilson started to write a line about the appellate power of the federal courts (a line that is similar in content and even wording to a line in the Pinckney Plan discovered by McLaughlin), but he crossed out the line before he was finished, leaving an incomplete

180. Ewald & Toler, *supra* note 148, at 306.

181. *Id.*

thought.¹⁸² Thus, even the structure and appearance of this half of this manuscript, when considered independently, raises questions about the likelihood that Wilson was simply copying from a second source after he finished his extract of the New Jersey Plan.

D. *The Alternative Theory, Confirmed by the McLaughlin Draft*

Thus far, we have seen that the McLaughlin manuscript has very strong claims to being an extract of the Pinckney Plan, but the authentications for the Jameson manuscript have always been quite weak, and in a couple of points are even problematic. Nevertheless, is it still possible to maintain the supposition that they were both extracts of the same Plan, simply that Wilson was making different kinds of extracts? It is here that McLaughlin's discovery poses embarrassments for Jameson's. For if both manuscripts were drawn from the same source, and drafted by the same person, then why do they share so little in common? To all appearances, the McLaughlin Draft is a faithful, albeit abridged, copy of the original, so we would expect any other extract to be comparable to it. Yet not only is the substance of the Jameson manuscript dissimilar, but so is its wording, arrangement, style, and even spelling. The reproduction of the Jameson Draft in Appendix 1 is formatted to highlight its notable lack of conformity to the McLaughlin Draft (Appendix 2), a lack of conformity that persists until the last few lines.

This failure of the Jameson manuscript to conform to what we know about the structure and wording of Pinckney's Plan appears especially suspect when we compare it to Wilson's extract of the New Jersey Plan, which immediately preceded the supposed Pinckney extract: it was nearly perfect as a verbatim copy, albeit an abridged one. If McLaughlin's manuscript was a faithful extract (and for reasons given below, that seems likely), then we must suppose that even on those few points where the two extracts are in agreement over substance, Wilson nevertheless lavishly reordered and reworded Pinckney's Plan in the second extract (in striking contrast with the New Jersey Plan extract found on the same page). We also must suppose that he omitted many details from both extracts, but on entirely different principles; that is, not only were the structural details of government omitted from the Jameson extract, but each manuscript included numerous powers and omitted others, but each one included and omitted different powers. The textual analysis necessary for this comparison is multifaceted (and unfortunately, it is at times tedious), yet

182. *Id.* at 309.

each nonconformity between the two documents must be examined to appreciate the cumulative improbability of Jameson's manuscript being drawn from the same source as McLaughlin's. First, a few words on ordering are in order.

There are several reasons to believe that the arrangement of the Pinckney extract found by McLaughlin is true to the original. In the first place, Wilson numbered the various articles, and it seems unlikely that he would have done so if he were reordering it according to his own fancy. Second, as McLaughlin points out, there is a "marked similarity in the succession of the articles" when comparing this manuscript to the plan described in Pinckney's "Observations."¹⁸³ They are not numbered the same, and Pinckney probably embellished and somewhat reordered his Plan when drafting this pamphlet, but he appears to have retained much of the order of the provisions that were indeed in his original. Finally, if the various provisions found in McLaughlin's extract of Pinckney's Plan were traced to their probable sources, its structure is recognizable: it is clearly both an abridgment and a modification of the Articles of Confederation, larded with various amendments that are drawn either from the Virginia Plan or are original to Pinckney. The ordering of Pinckney's Plan is not a perfect mirror of the Articles—a few provisions are rearranged—but its provisions track closely enough to make the underlying structure unmistakable. What we find in the McLaughlin manuscript, therefore, is an authentic extract of the Pinckney Plan, probably abridged in some places, but with its basic structure intact. The great unknown will always be to what extent Wilson might have abridged the original when writing it, but otherwise it appears to be a faithful copy.

However, if we lay the two Wilson manuscripts (both contenders for the Lost Pinckney Plan) side-by-side, we can see at a glance that, even if all the content of Jameson's manuscript really were drawn from Pinckney's Plan, at a minimum Wilson was following a very different procedure than the one that he had followed when making his extract of the New Jersey Plan. In the New Jersey extract, although Wilson had excised much of the content, he otherwise wrote sentences that tracked as a verbatim copy, word-for-word, line-by-line, and the provisions (with only one exception) were written in the exact same order as the original. This faithfulness to the original is not at all true of the second half. We don't even begin to find clauses in the Jameson document that bear a close resemblance to corresponding passages

183. McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46, at 737.

in the McLaughlin draft until midway through the document, beginning with the powers of the legislature (Clause 22 of 41). If we start at Clause 22 and try matching similar provisions in the two documents, we find that Pinckney's order, as represented in the McLaughlin draft, was completely rearranged in Jameson's manuscript. Several individual clauses from the Jameson Draft can be seen that match the content found in Resolutions 11, 12, 13, 15, 16, 18, and 19 of the McLaughlin Draft. But if we isolated all the corresponding clauses from Jameson's manuscript and placed them in the same order that we find in the original, they would look like this: Clause 22, 26, 29, 36, 37, 32, 33, 38, 39, and 40.

When McLaughlin compared his discovery to Jameson's, he gave this explanation for the disorder he likewise noticed in Jameson's manuscript: "In making the excerpts for his own purposes, Wilson did not exactly follow the order in which the subjects appeared in the plan."¹⁸⁴ This explanation would perhaps suffice, if Wilson were taking clauses out of their original order for the purpose of creating some other, perhaps more logical, order. But it's difficult to fathom why Wilson would be pulling apart Pinckney's order for the sake of disorder, yet disorder is precisely what we find in Jameson's manuscript. At least, we must believe that Wilson undertook this process of derangement if we insist that the entirety of the second half of this document really was drawn from Pinckney's Plan. Furthermore, interspersed among the few clauses that correspond between the two plans are numerous powers in each manuscript that are not found in the other. If the omissions could be seen only in one direction (i.e., if there were missing powers in Jameson's manuscript only), we could easily account for the missing powers by supposing that Wilson was once again excising those powers that he did not favor. But it is harder to explain why each manuscript contains numerous powers that the other one lacks if they were both drawn from the same Plan and copied by the same person.

Starting from the top of the manuscript, if we look for corresponding clauses within the *first half* of the supposed Pinckney Plan that Jameson found (Clauses 1–21 out of 41), we find that the only commonality between the two manuscripts relate to the names of the branches of government. Not a single clause in this first half (which organizes the internal rules of Congress and enumerates the powers of the president) is a close match. Indeed, in the third paragraph in particular, a lengthy one on the executive branch, we find notable differences between the two documents. In

184. *Id.* at 735.

Clause 14 of the Jameson manuscript, the president is given the power “to inspect” the executive departments. By contrast, Resolution 5 of the McLaughlin manuscript gives the president the power “to advise with” (not inspect) “the Heads of the different Departments as his Council.” Also, whereas Clause 16 of the Jameson manuscript gives the president authority to “commission all Officers,” Resolution 15 of the McLaughlin draft gives to *Congress* the power to “institute Offices and appoint Officers,” and it says nothing about commissioning officers. Even if neither variance is an outright contradiction, they both represent notable differences between the two manuscripts which are hard to reconcile.

On the other hand, it must be said in favor of Jameson’s document that two of the powers listed for the executive—[10] to correspond with the Executives of the several States, and [14] “to inspect” the Departments of foreign Affairs, War, Treasury, and Admiralty—can be found in Pinckney’s “Observations.”¹⁸⁵ If the “Observations” were a reliable source, the coincidence would mean more. But given Pinckney’s known penchant for altering records and borrowing from other people,¹⁸⁶ it seems just as likely that he was drawing from Wilson’s work on the Committee when he wrote the “Observations” as that Wilson was drawing from Pinckney’s Plan when he was working on the Committee’s Report.

The Jameson Draft’s lengthy paragraph on presidential powers (Clauses 7–21) is not only difficult to square with the McLaughlin extract; it is also difficult to reconcile with what we otherwise know about Pinckney’s approach to executive powers. According to Read’s description of the Plan, the president was to have “only executive powers”¹⁸⁷—that is, he was tasked with nothing more than executing the law. However, within the half of Wilson’s manuscript that was supposedly drawn from the Pinckney Plan, the list of executive powers is nearly as long as the cumulative powers enumerated for the legislature. It is difficult to imagine Read reading this

185. Pinckney, “Observations,” *supra* note 44, at 111; *see infra* Appendix 1.

186. 3 IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800, at 28–29 (Bobbs-Merrill Company, Inc. 1950) (giving some cogent reasons why Pinckney should be considered “a sponger and a plagiarist,” an accusation that Pinckney’s admirers have treated dismissively rather than addressing seriously or attempting to refute); *cf.* COLLIER & COLLIER, *supra* note 24, at 64 (rejecting Brant’s characterization of Pinckney outright); BEEMAN, *supra* note 24, at 93, 462 n.15; Nelson, *supra* note 29; MATTHEWS, *supra* note 12, at 43; JOHN RICHARD ALDEN, THE SOUTH IN THE REVOLUTION: 1763–1789, at 379 n.17 (4th prt. 1994); William Bole, *Pinckney’s Legacy: A Victim of His Disfavor With Other Founders*, 85 LIBERTY: A MAGAZINE OF RELIGIOUS FREEDOM, July–Aug. 1990, at 20, 20.

187. Letter from George Read to John Dickinson (May 21, 1787), *supra* note 56, at 25.

lengthy list of presidential powers and describing the office as having “only executive powers.” By contrast, the McLaughlin manuscript reserves the lengthy enumeration of powers for Congress alone; the executive branch is merely summed up in Resolution 5 in this way: “In the Presidt. the executive Authority of the U. S. shall be vested. — His Powers and Duties — He shall have a Right to advise with the Heads of the different Departments as his Council.”¹⁸⁸ This terse wording better conforms to Read’s description that, according to Pinckney’s Plan, the president had no more than executive powers.

Furthermore, this concise approach to describing executive powers also matches what Pinckney said about executive powers on June 1 in the Convention. He opposed adding a clause authorizing the executive “to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated,” because such powers were already included in the “power to carry into effect the national laws.”¹⁸⁹ Is it likely that someone who argued for a minimalist approach to delegating or naming executive powers on June 1 would have included a lengthy enumeration of executive powers in the Plan he read just three days earlier, on May 29? Yet that is what we must suppose if we insist that the entirety of the second half of the Jameson manuscript was drawn from Pinckney’s Plan. Indeed, most of the executive powers listed in the Jameson manuscript either have no known connection to Pinckney at any time, or they are powers claimed by Pinckney only after the Convention had adjourned. Hence, the first half of the Jameson extract—Clauses 1 through 21—contains nothing which convincingly suggests Pinckney was the author, and it contains some reasons for entertaining serious doubt.

Proceeding to the next paragraph in Jameson’s manuscript (Clauses 22–34), relating to the powers of Congress, we do find a few powers listed here that can likewise be found in McLaughlin’s manuscript. It is significant, however, that most of the provisions that are shared between these two manuscripts likewise share a common origin: they are almost all powers named in the Articles of Confederation. In particular, of the twelve powers named for Congress in this paragraph of Jameson’s manuscript, four are

188. See *infra* Appendix 2; McLaughlin, Sketch of Pinckney’s Plan, *supra* note 46, at 742.

189. Madison’s Notes (June 1, 1787), *supra* note 168, at 67 (providing a June 1, 1787 speech by Charles Pinckney concerning executive powers).

derived from the Articles and eight are newly created.¹⁹⁰ Of the four derived from the Articles (Clauses 29, 31, 32, and 33), three are likewise found in McLaughlin's Pinckney Plan. However, of the remaining eight that are original, only one ([26] "regulating trade") is found in both documents. Yet the power to regulate trade has little claim to being a distinctively Pincknian power. As McLaughlin has pointed out, "such ideas [as the need to add 'the power to regulate commerce' to the new government] were practically common property in 1787."¹⁹¹ If we set aside the powers of regulating interstate and international trade (counting them as two powers), the remaining new congressional powers within this paragraph of the Jameson manuscript—fully six powers—cannot be traced to corresponding resolutions in the McLaughlin draft, and we have little reason for assuming that Pinckney arrived at the Convention prepared to grant them to Congress.

Turning to McLaughlin's Pinckney Plan, we find sixteen distinct powers for Congress scattered throughout the various resolutions. Of these, seven were taken directly from the Articles or were only slightly modified by Pinckney,¹⁹² and nine powers were entirely new. As already mentioned, of the seven powers derived from the Articles, three can likewise be found within the main paragraph of Jameson's manuscript which delineates congressional powers. But of the nine new powers, only three can be found anywhere in Jameson's manuscript. The least distinctive, the power to regulate trade, is in Wilson's main paragraph on congressional powers. Yet the two truly unique new powers shared by the two manuscripts are not in that main paragraph; they are added at the bottom. In other words, if we were looking to match truly distinctive powers between the two documents—rather than familiar details that each man might have independently copied from the Articles—we find no notable correspondence between the two Wilson manuscripts throughout the first

190. In arriving at twelve powers in the fourth paragraph of Jameson's manuscript, regulating interstate and international trade are counted as two separate powers, but the power to levy duties on imports and exports is counted as one.

191. McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46, at 739.

192. As an example of slightly modified powers from the Articles of Confederation, Pinckney gives to Congress "the exclusive Right of instituting in each State a Court of Admiralty, and appointing the Judges." *Id.* at 745. In the Articles, Congress is given the right to institute such courts, though not in each state, and the power to appoint judges is merely implied but not stated. The Jameson manuscript copies the first power, to institute the courts, but not the second. Another example of a slightly modified power is that, while the Articles gives to Congress the power to coin money, both the McLaughlin and Jameson manuscripts make this an exclusive power.

34 of 41 clauses. Moreover, even when generic details within the first 34 clauses of the Jameson manuscript seem to agree in substance with McLaughlin's, they don't always align in their wording. For instance, Resolution 16 in the McLaughlin draft begins: "S[enate] & H[ouse of]. D[elegates]. in C[ongress]. ass[embled]. shall have the exclusive Right." This formulation (like so much of the Pinckney Plan) was clearly modeled on the wording found in the Articles of Confederation (in this case, Article IX).¹⁹³ By contrast, Clause 22 of the Jameson draft begins: "The Legislature of U. S. shall have the exclusive Power." Notably, when Pinckney described his Plan in the "Observations," he likewise referred in several places to the "exclusive rights" of Congress, not exclusive powers.¹⁹⁴ Such differences in wording between the two manuscripts, though trivial in themselves, become especially noteworthy when we recall, once again, that Wilson's extract of the New Jersey Plan, although abridged, did not alter any of the language.

Although the Jameson Draft does include two new congressional powers which seem distinctively drawn from Pinckney, the placement of those powers within this manuscript is revealing. They are not where we might expect to find them, in the main paragraph delineating congressional powers (Clauses 22–34). Setting aside the power to regulate trade, the two congressional powers which are not named in the Articles of Confederation but which are shared by both Wilson manuscripts—provisions for impeachment in Clauses 38 and 39, and a uniform discipline of the militia in 41—are separated by a list of judicial powers and added, almost as an afterthought, at the bottom of the manuscript. In other words, it does not appear that Wilson was drawing from the Pinckney Plan at all until the last few lines (Clause 35 or 36 through 40). And it was probably due to the correspondence of these last few lines, and only because of these last few lines, that McLaughlin rendered his otherwise inexplicable judgment that his own manuscript discovery "confirms the conclusion, if confirmation were needed," that Jameson's manuscript was yet another extract of the same plan.¹⁹⁵ It is also significant that it is only within these last few lines that we find Wilson employing the distinctive phrase, "federal judicial Court,"

193. Articles of Confederation of 1781, art. IX.

194. See, e.g., Pinckney, "Observations," *supra* note 44, at 116 ("The next article, proposes to invest a number of exclusive rights, delegated by the present Confederation . . .").

195. McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46, at 735.

which is the only name for the branches of government that looks definitively like Pinckney's wording.¹⁹⁶

Even more telling, there is one congressional power listed in Jameson's manuscript that is notably different from McLaughlin's Pinckney Plan, and it is unlikely to have come from Pinckney. In Resolution 12 of McLaughlin's extract of the Pinckney Plan, the legislature is given the power to raise money through "levying Imposts."¹⁹⁷ Pinckney's preference for an "impost" for raising revenue, as well as the particular meaning he attached to the word, is well documented both in a pamphlet he wrote four years before the Convention (his "Three Letters")¹⁹⁸ and in the pamphlet he wrote immediately after the Convention (his "Observations").¹⁹⁹ According to Fowler's Dictionary, an impost has a generic meaning; it is simply a synonym for a tax.²⁰⁰ However, in the 1783 and 1787 pamphlets, Pinckney urges the propriety of raising revenue through a modest import duty, which he consistently designates by the name *impost*.²⁰¹ Indeed, the 1783 pamphlet was a defense of the "Impost Act" passed by Congress two

196. See *infra* Appendix 1.

197. McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46, at 744.

198. Charles Pinckney, Three Letters Addressed to the Public, on the Following Subjects: I. The Nature of a Fœderal Union. . . II. The Civil and Military Powers. . . III. The Public Debt . . . 24–27 (Philadelphia, T. Bradford 1783).

199. See Pinckney, "Observations", *supra* note 44, at 116 (advocating for an impost system for the Federal Government); cf. U.S. Continental Cong. et al., *The Grand Committee, Consisting of Mr. Livermore, Mr. Dane, Mr. Manning, Mr. Johnson, Mr. Smith, Mr. Symmes, Mr. Pettit, Mr. Henry, Mr. Lee, Mr. Bloodworth, Mr. Pinckney and Mr. Houstoun, Appointed to Report Such Amendments to the Confederation, and Such Resolutions as It May Be Necessary to Recommend to the Several States, for the Purpose of Obtaining From Them Such Powers as Will Render the Federal Government Adequate to the Ends for Which It Was Instituted, Beg Leave to Submit the Following Report to the Consideration of Congress*, LIBR. OF CONG. 2, <https://www.loc.gov/item/90898174/> [<https://perma.cc/N77G-LL6R>] (displaying text of Article XIV). Although Pinckney's 1786 Report for amending the Articles of Confederation did include the proposal that Congress should have the power to levy "such imposts, and duties upon, imports and exports," as they thought necessary, that 1786 amendment came with this important qualification: that the revenue collected from these imposts would "accrue to the use of the state in which the same shall be payable." *Id.* In other words, this amendment was not a scheme for raising revenue for the central government; it was a proposal to ensure that all import and export duties would be uniform throughout the states (since this issue had been causing friction between New York and the interior states). But if this amendment had been passed, any revenue raised from export duties levied in South Carolina, for example, would accrue to the benefit of South Carolina. Clause 28 in the Jameson manuscript, by contrast, appears to be a scheme for raising revenue for the federal government through export taxes.

200. *Impost*, H. W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE: THE CLASSIC FIRST EDITION (1st ed. 2009).

201. See Pinckney, "Observations", *supra* note 44, at 116 (proposing an "impost" for the Federal Government); see also PINCKNEY, *supra* note 198, at 26 (arguing in favor of "imposts").

years earlier, proposing to amend the Articles of Confederation to authorize a five percent tariff on imported goods.²⁰² By contrast, in Jameson's extract, Clause 28 gives Congress the power "of levying Duties upon Imports and Exports."²⁰³ Not only can we find no indication from any Pinckney source that he wished the new Congress to possess the power to raise revenue through taxing exports; it is highly unlikely that he would have arrived in Philadelphia intending to propose such a scheme.

Most of the Southern delegates, and all of Pinckney's colleagues from South Carolina, were strenuously opposed to granting the new government any power to tax exports. Pinckney's older cousin, Charles Cotesworth Pinckney, said he was "alarmed" when he heard one of the delegates informally suggest in mid-July that exports might be taxed.²⁰⁴ The following week he warned the newly created Committee of Detail that they would need "to insert some security" against the possibility of export taxes in their report.²⁰⁵ If the informal suggestion of taxing exports was enough to surprise and alarm the elder Pinckney in mid-July, it seems most improbable that he had already heard his younger cousin formally propose that same power in the plan of government he read on May 29.

Within the Committee of Detail, South Carolina's John Rutledge made notations within Virginian Edmund Randolph's list of proposed powers for Congress, and together they satisfied the elder Pinckney's requirement of prohibiting all export taxes—whether levied by Congress or the states.²⁰⁶ Meanwhile, in Wilson's draft of proposed powers for Congress (the one supposedly drawn from Pinckney), he pointedly ignored the South Carolinian's request and instead granted to Congress the power to tax exports.²⁰⁷ This provision conforms to the known preference shared by Wilson and his fellow Pennsylvanian, Gouverneur Morris. The inclusion of this power in the Jameson Manuscript is one of the strongest reasons for doubting that any Southerner participated in its creation. In all likelihood, this manuscript was either drafted by Wilson alone or in consultation with

202. See generally PINCKNEY, *supra* note 198, at 18–28 (defending a national "impost Act").

203. See *infra* Appendix 1.

204. Madison's Notes (July 12, 1787), in 1 RECORDS, *supra* note 57, at 591, 592 (noting General Pinckney's concerns regarding the taxation of exports).

205. Madison's Notes (July 23, 1787), in 2 RECORDS, *supra* note 63, at 87, 95 (showing a speech by General Pinckney, including his warning to the Committee of Detail).

206. Committee of Detail, IV, in 2 RECORDS, *supra* note 63, at 137, 142–43.

207. Committee of Detail, VII, *supra* note 148, at 158–59.

the committee members from the North, but not in cooperation with the two Southern members.

Ultimately, however, the Report that was generated by the Committee of Detail bowed to the wishes of the South, forbidding Congress to lay export taxes. Nevertheless, this part of the Committee's Report was clearly reached over Wilson's objections, for it irked him long after they read their Report to the Convention. Twice in August Wilson expressed his opposition to the exclusion, at one point saying he was "decidedly" against the prohibition to tax exports.²⁰⁸ But another South Carolinian, Pierce Butler, was equally adamant on the other side, declaring "that he never would agree to the power of taxing exports."²⁰⁹

Hence, if Pinckney had arrived in Philadelphia with a plan to tax exports, that intention would have been a noticeable alteration from his known wishes (as he had expressed both before and after the Convention); it also would render him unusual as a Southerner and unique as a South Carolinian.²¹⁰ It is far more likely that Clause 28 in Jameson's manuscript owes its existence to Wilson alone, and its attribution to Pinckney has been an error.

There is one last small but revealing difference between the two manuscripts that makes it unlikely that the content we find in Jameson's manuscript was simply copied from the Pinckney Plan. Within the McLaughlin manuscript, the word *federal* appears twice, and it is spelled in the modern fashion. Judging by contemporaneous documents, Pinckney consistently spelled the word in the same way, "federal." In the manuscript

208. Madison's Notes (Aug. 16, 1787), in 2 RECORDS, *supra* note 63, at 304, 307 (providing Wilson's August 16, 1787 speech in which he opposed prohibiting export taxes); Madison's Notes (Aug. 21, 1787), in 2 RECORDS, *supra* note 63, at 355, 362 (describing Wilson's second August speech, including his sentiments that, "To deny this power is to take from the Common Govt. half the regulation of trade").

209. Madison's Notes (Aug. 22, 1787), in 2 RECORDS, *supra* note 63, at 369, 374 (including a speech by Pierce Butler regarding export taxes).

210. Speech by Charles Pinckney in the South Carolina Convention (May 17, 1788), in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION, <http://rotunda.upress.virginia.edu/founders/RNCN-02-27-02-0005-0008-0003> [<https://perma.cc/A9PW-D2TB>] (John P. Kaminski et al. eds., Univ. of Va. Press 2009) [hereinafter DOCUMENTARY HISTORY OF THE RATIFICATION]. One final reason for doubting that Pinckney intended to tax exports was his awareness and pride of the enormity of exports from his own state. During the ratifying debates, he asserted that exports were "a surer mode of determining the productive wealth of a country than any other," and he boasted that South Carolina "already exports more than any state in the union (except Virginia) and in a little time must exceed her." *Id.* That being his position, it seems unlikely that a federal tax on exports would have been his starting position a year earlier.

Jameson found, the same word appears four times (twice in the New Jersey extract and twice in the second half). However, Wilson gives the word its Latinized spelling, “fœderal,” all four times.²¹¹ Interestingly, although spelling was far from standardized at this time, Wilson generally spelled the word the same way that Pinckney did.²¹² It appears almost certain that whatever source Wilson was using when copying the New Jersey Plan (several copies survive, and probably even more existed in 1787 than survive today), the original writer spelled the word “fœderal.” Apparently, Wilson was making such a faithful extract in the first half that he even imitated that writer’s spelling. However, when he proceeded to the second half, even though he does not appear to be copying from any other source, he did not revert to Pinckney’s spelling, which we might have expected him to do if he really were copying from the Pinckney Plan. It is a small but telling discrepancy between the two manuscripts, once again calling into question Pinckney as the sole source for the second half of Jameson’s manuscript.

Nevertheless, despite the lackluster and at times even dubious claims of Pinckney’s authorship when examining the bulk of Wilson’s enumeration of powers, the last few clauses do appear to bear Pinckney’s fingerprints. As we have already seen, if we try matching all the possible corresponding clauses and placing them in their original order, we see that Wilson must have deranged Pinckney’s arrangement. However, if we suppose instead that Wilson did not consult Pinckney’s Plan until almost the end of his manuscript, probably at Clause 35 and almost certainly by Clause 36, an entirely different picture emerges. From there we find five consecutive clauses, all appearing to come from Pinckney’s Plan, and all in the same order we find in that source. Some of them are even worded similarly to the corresponding clauses in McLaughlin’s manuscript. Clause 35 is not found in the McLaughlin manuscript, but it is a faithful reproduction of one clause within Article XIX of Pinckney’s 1786 Report. Clause 36 begins by tracking Pinckney’s wording in Resolution 15 of the McLaughlin extract very closely, but before completing the clause Wilson broke off in mid-sentence and crossed it out. Clause 37 is the only one of the five that describes a power that Pinckney had modified from the Articles of Confederation, but Wilson clearly followed Pinckney’s wording rather than the power as it is expressed in the Articles. Clauses 38 and 39 follow the substance but not the wording of Resolution 18 in Pinckney’s Plan (and in

211. See *infra* Appendix 1.

212. My thanks to William Ewald for his help researching this question.

the latter clause we find a change to the spelling of “federal”). And Clause 40 again follows the substance of Pinckney’s Resolution 19, but Wilson not only alters the wording considerably but adds another clause—the last one, 41—which is not found in McLaughlin’s Pinckney Plan. Thus, even in the last few lines, it was clearly not Wilson’s intent to provide a faithful reproduction of Pinckney’s Draft; rather, he was copying only those Pinckney provisions which he favored, and he gave himself license to modify clauses at will.

If the McLaughlin manuscript had been found first, then it is unlikely that Jameson would have misidentified the second half of the manuscript he found as coming entirely from Pinckney. It is only because Jameson found his manuscript first, and immediately jumped to the conclusion that the entire second half was copied from the Lost Pinckney Plan, that we have not only overrated Pinckney’s influence on the final Constitution, but we have underrated the contributions of Wilson and the probable importance of the McLaughlin discovery. For more than a hundred years now, scholars have been relying on Jameson’s identification of the manuscript he found, even though that conclusion was based on little more than confident assertion.

In sum, if we try to suppose that the entirety of the second half of the Jameson Draft (everything following Wilson’s extract of the New Jersey Plan) was derived from Pinckney, we encounter numerous difficulties, improbabilities, and a notable lack of conformity with known Pinckney sources. However, if we suppose instead that Wilson did not consult the Pinckney Plan until Clause 35 or 36, then the overall structure of the second half of this manuscript makes more sense. It becomes easy to understand what Wilson was doing after he finished making an extract of the New Jersey Plan (one in which he reproduced only those provisions he favored and added his own original ideas in the margin). In the second half of this manuscript, it now becomes clear why Wilson has two separate sections for legislative powers interrupted by a short list of judicial powers. The first and more comprehensive list (Clauses 22 through 34) was generated by him alone (or possibly in consultation with the Northern delegates on the Committee), as was everything listed before that paragraph. However, when Wilson began drafting his recommendations for the judiciary, it was at that point that he began borrowing from the Pinckney Plan (at least Clause 36 and probably 35). After finishing his preferences for the judiciary, the second list of congressional powers (Clauses 37 through 41) is primarily comprised of provisions that were copied or modified from Pinckney.

Therefore, Jameson was not wholly wrong when he identified the second half of the manuscript as coming from Pinckney, but he almost certainly gave to Pinckney far more credit than was his due. He also unwittingly took from James Wilson the credit that belonged to him. Many of the constitutional provisions attributed to Pinckney over the years appear in reality to be the original contributions of Wilson. Although numerous modern historians have become convinced that Madison sought to diminish the importance of the Pinckney Plan because he was jealous of his “rivals’s” influence on the Constitution, it was never Madison’s reputation that was threatened by Pinckney’s 1818 exaggerations. Madison’s contributions to the Constitution are well documented and well understood. Even if the 1818 Plan were genuine, it would not dim his star in the least. Pinckney, in 1818, had stolen glory from the Committee of Detail, and from James Wilson’s contributions in particular.

Finally, once Jameson’s manuscript is properly identified, we can see that McLaughlin’s discovery was far more important than he or anyone else has hitherto appreciated. McLaughlin did not do justice to his own discovery because he believed that Jameson’s manuscript was another authentic extract of the same plan. Since Jameson’s manuscript included numerous details that his own discovery lacked, he was forced to conclude that the manuscript he found must be woefully incomplete. He even surmised that there may have been many more significant contributions by Pinckney that were not found in either manuscript. McLaughlin was evidently too generous to Pinckney and too modest about his own discovery.

If we disabuse ourselves of the fatal error made by Jameson—that he was the first to discover an extract of the Lost Plan—then an entirely new prospect opens before us. It is now firmly within the realm of possibility that the manuscript McLaughlin found is not only an authentic contemporaneous extract of Pinckney’s Plan, but it can credibly lay claim to being a fairly complete one as well.

There are undoubtedly some abbreviations made by Wilson. The most obvious abbreviations, however, are those clauses that appear to be copied directly from the Articles of Confederation.²¹³ Since Wilson knew the

213. For instance, Wilson wrote merely two words for Resolution 2 in Pinckney’s Plan: “The Stile.” See *infra* Appendix 2. Clearly, since so much of the Pinckney Plan tracked the Articles of Confederation, this was an abbreviation of its Article I: “The Stile of this confederacy shall be ‘The United States of America.’” ARTICLES OF CONFEDERATION of 1781, art. I.

Articles inside and out,²¹⁴ he evidently did not think it worthwhile to copy these familiar phrases in full when making his own copy of the Pinckney Plan. But other than a couple of trivial details, and Wilson's abbreviated clauses from the Articles, we have no compelling reason to believe that the original Pinckney Plan contained much more—that is, much more material that was both original and substantive—than what we find in the Wilson manuscript discovered by McLaughlin. And if the plan copied by Wilson truly is the totality of what Pinckney proposed to the Convention on May 29, 1787, then the impartial observer will conclude that its influence on the shape of the final Constitution is far less than Jameson believed, and it is drastically less than Pinckney professed or his admirers want to believe. If the Supreme Court wishes to continue its trend of attributing clauses to Pinckney, they would do well to confine their sources to the Wilson manuscript McLaughlin found and the George Read letter in 1787. No other source is credible.

IV. THE DEEP SOUTH'S CONSTITUTIONAL CON

Even if it is true that Pinckney contributed less and Wilson more to the Constitution than previously believed, it is fair to ask: why does it matter? In the first place, it matters because knowing the true origin of constitutional clauses is important to some originalists. In Jared McClain's words: "As long as constitutional theorists and federal jurists employ an originalist approach to interpretation, it remains valuable to attribute the document's provisions to the proper source."²¹⁵ Ironically, McClain was here faulting the decision in *NLRB v. Noel Canning*,²¹⁶ which failed to name Charles Pinckney as the originator of the constitutional clause that prohibits each house of Congress from adjourning "without the Consent of the other."²¹⁷ If my analysis is correct, then this clause by rights belongs to Wilson, not

214. See Ewald, *James Wilson and the Drafting of the Constitution*, *supra* note 174 (showing that Wilson was probably the ablest legal mind in the Convention; he had argued cases involving the Articles of Confederation as a lawyer; and he was, moreover, a member of the Continental Congress when the Articles had been drafted).

215. McClain, *supra* note 114, at 9.

216. *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

217. See *id.* at 536 (quoting U.S. CONST. art. I § 5 cl. 4) (internal quotation marks omitted) (relying on *The Federalist Papers* to understand the adjournment power of Congress and ignoring any source written by Charles Pinckney); see also McClain, *supra* note 114, at 9 ("Despite the relative certainty that the provision is attributable to Pinckney, both the Court of Appeals for the District of Columbia Circuit and amicus curiae on the case cited heavily to the Federalist papers, which, unlike the provision in question, were authored by James Madison.").

Pinckney. Admittedly, not all originalists are interested in the source of constitutional clauses, but for those who are, they need to be alerted to the long history of misattributing clauses to Pinckney.

But the importance of getting the facts right extends beyond originalist jurisprudence. Setting aside the legal interpretation of the Constitution, scholars have long sought the larger and deeper “meaning” of America by examining the real or supposed intentions of the men who framed our Founding documents. Rightly or wrongly, these documents are seen as embodying America’s principles and values; they are viewed as shaping our collective identity. Probably on no question has this search for America’s identity been more fraught than determining to what extent the Constitution’s Framers intended to promote or discourage the institution of slavery.

As we saw at the opening of this Article, the 1619 Project sought to establish an American narrative through its interpretation of America’s history: that racism and slavery are intrinsic to our essence. This particular framing of American history is intended to be taught in the classroom. In response, President Trump countered that schoolchildren need a “patriotic education,” and he established the 1776 Commission to draft a rival narrative of American history.²¹⁸ According to their 1776 Report, the Constitution’s compromises with slavery must be understood in light of the “unqualified proclamation of human equality” found in the Declaration of Independence; when rightly understood, it can be seen that both the Declaration and the Constitution’s compromises are anti-slavery, because they “set the stage for abolition.”²¹⁹

Neither of these rival interpretations of the Constitution is new. Both perspectives have existed in varying forms since the Founding generation, and we can expect that both will continue unabated for as long as people are interested in understanding (and shaping) the meaning of the U.S. Constitution. Nevertheless, it is important that serious scholars demand that, whatever slant might be given to constitutional history, interpreters must not be allowed to disseminate outright falsehoods. Both the 1619 Project and the 1776 Report have been criticized not only for being biased

218. Alana Wise, *Trump Announces ‘Patriotic Education’ Commission, A Largely Political Move*, NPR (Sept. 17, 2020 5:59 PM), <https://www.npr.org/2020/09/17/914127266/trump-announces-patriotic-education-commission-a-largely-political-move> [<https://perma.cc/QG5C-6CAG>].

219. The President’s Advisory 1776 Commission, *The 1776 Report* 11 (Jan. 2021).

in their rendering of history, but also because of alleged factual inaccuracies.²²⁰

The current Court's belief that Charles Pinckney authored the Privileges and Immunities Clause is one example of a factual error that feeds into the interpretation that the Constitution was framed according to the wishes and intent of the slaveholding interests in the Deep South. This was the same interpretation popularized by Roger Taney in the *Dred Scott* decision. Although Taney claimed that the Court's duty was to interpret the Constitution "according to its true intent and meaning when it was adopted,"²²¹ he made several claims that flew in the face of the historical evidence. Chief among these claims was that descendants from Africa "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."²²²

Although Taney gave no historical support for these assertions, later historians have trusted that his interpretation was an accurate reflection of the intentions of the Constitution's Framers. Herbert Storing acknowledged that Taney's decision was wrong in some details but nevertheless believed it was "right fundamentally;" in particular, Taney was right when he stated,

[T]he Southern states cannot be presumed to have agreed to a Constitution that would give any Northern state the power to make citizens of free blacks, who could then go to Southern states, claim there all of the privileges and immunities of citizens, and by their agitation and example disrupt the whole police system on which the maintenance of slavery, and the preservation of the white South, depended.²²³

220. See Leslie M. Harris, *I Helped Fact-Check the 1619 Project. The Times Ignored Me.*, POLITICO (Mar. 6, 2020, 5:10 AM), <https://www.politico.com/news/magazine/2020/03/06/1619-project-new-york-times-mistake-122248> [<https://perma.cc/27SW-TQTY>] (showing that the *New York Times*' own fact checker had urged them not to publish a significant inaccuracy in the 1619 Project, a warning which the editors ignored); Craig Bruce Smith, *How Biden Can Fix Trump's 1776 Disaster*, POLITICO (Jan. 22, 2021, 7:08 PM), <https://www.politico.com/news/magazine/2021/01/22/biden-trump-1776-commission-461483> [<https://perma.cc/5JNH-SU76>] (claiming numerous alleged inaccuracies in the 1776 Report).

221. *Dred Scott v. Sandford*, 60 U.S. 393, 405 (1857).

222. *Id.* at 404.

223. Herbert J. Storing, *Slavery and the Moral Foundations of the American Republic*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 313, 326, 327 (Robert H. Horwitz ed., Univ. Press of

Yet this scenario, which Storing says cannot be “presumed” to have happened, is in fact what happened, based on all available evidence. The Deep South objected to this clause for the very reasons Storing names. But the clause was nevertheless adopted first into the Articles of Confederation, then into the Constitution, and both times it was passed over the objections of the Deep South.

Justice Curtis’s dissent in *Dred Scott* was far more grounded in historical fact than Justice Taney’s decision. He went back to the drafting history of the clause as found in the Articles of Confederation, which read that “free inhabitants” of each state, with certain named exceptions, were “entitled to all the privileges and immunities of free citizens in the several States.”²²⁴ Curtis found that, in 1778, South Carolina delegates to the Confederation Congress tried to amend the language to restrict the clause to “free white inhabitants.”²²⁵ Their motion failed by a vote of 8–2, with one state divided; and although the congressional records fail to name which states voted against the motion, it is safe to assume that the two states voting in favor of the motion were the two southernmost states, since Georgia’s House of Assembly had likewise sought to insert the words “white inhabitants” into the same place within the clause.²²⁶ Evidently, the Privileges and Immunities Clause in the Articles passed despite the objections of South Carolina and Georgia. Justice Curtis therefore concluded: “it is clear, that under the Confederation, and at the time of the adoption of the Constitution, free colored persons of African descent might be, and, by reason of their citizenship in certain States, were entitled to the privileges and immunities of general citizenship of the United States.”²²⁷

The drafting history of the corresponding clause in the Constitution is likewise shrouded in some obscurity, but it’s clear that it was not drafted as

Va. 1990); *see also*, MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 3–4 (Cambridge Univ. Press 2006) (defending Taney’s account of constitutional history as plausible).

224. *Dred Scott*, 60 U.S. at 575 (Curtis, J., dissenting).

225. *Id.*

226. 11 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 652 (Worthington C. Ford ed., Gov’t Prtg. Off. 1908), <https://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=011/lljc011.db&recNum=238> [<https://perma.cc/RHK8-YNGY>]; Georgia House of Assembly Records (Feb. 26, 1778), *in* DOCUMENTARY HISTORY OF THE RATIFICATION, <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=RNCN-print-01-01-02-0003-0014&mode=deref> [<https://perma.cc/J7Q2-4Y5B>] (John P. Kaminski et al. eds., Univ. of Va. Press 2009). For an excellent discussion of the development of this clause in the Articles of Confederation, see David R. Upham, *Exploring “That Unexplored Clause of the Constitution”: The Meaning of the “Privileges and Immunities of Citizens” Before the Fourteenth Amendment* 82–88 (Univ. of Dall. 2002).

227. *Dred Scott*, 60 U.S. at 575–76 (Curtis, J., dissenting).

Charles Pinckney later recollected. As the youngest member of the South Carolina delegation, Charles Pinckney had not yet reached his twenty-first birthday (hence, was not yet of voting age) in 1778, when South Carolina attempted to alter the wording of the Privileges and Immunities Clause in the Articles of Confederation. In all likelihood, he was ignorant of that history when he chose to copy this portion of the Articles into his own 1787 Plan of Government. We know that he copied some version of this wording into his Plan, because in Resolution 3 of the McLaughlin Draft we find that Wilson wrote: “Mutual Intercourse — Community of Privileges — Surrender of Criminals — Faith to Proceedings &c.”²²⁸ These word scraps are a fair summary of the various comity clauses found in Article IV of the Articles of Confederation. If we had the original Pinckney Plan, we would probably find that Pinckney copied these clauses verbatim from the Articles.

Nevertheless, since Pinckney did evidently include some version of the Privileges and Immunities Clause in his 1787 Plan, how can we know whether or not his was the final wording adopted into the Constitution? We know because of one of the final drafts of the Committee of Detail papers, where the Privileges and Immunities Clause was actually hammered out. There are no records of the debates in the Committee, but they did leave behind various stages of their Report, from which their deliberations can be reconstructed. The members of the Committee added this marginal notation to one of their final drafts: “The free ~~Inhabs~~ of each State shall be intitled to all Privileges & Immunities of free Citizens in the sevl. States.”²²⁹ Clearly, this was the same wording, albeit abridged, as the corresponding clause in the Articles. But the word “Inhabs” was subsequently crossed out and the word “Citizens” written above it.²³⁰ In the final wording found in the Committee’s Report, the word “free” was also dropped (probably because a “free citizen,” unlike a “free inhabitant,” is redundant), and the final wording found in the Committee of Detail Report was adopted unchanged into the Constitution.²³¹

The addition of and changes to the Privileges and Immunities Clause were in the handwriting of South Carolina Delegate John Rutledge, and numerous scholars have speculated that Rutledge was responsible for the addition of

228. See *infra* Appendix 2; Committee of Detail, III, in 2 RECORDS, *supra* note 63, at 134, 135.

229. Ewald & Toler, *supra* note 148, at 360–61.

230. *Id.*

231. Madison’s Notes (Aug. 6, 1787), in 2 RECORDS, *supra* note 63, at 177, 187; U.S. CONST. art. IV, § 2.

this clause and its wording (and some further suggesting that Rutledge was copying from the Pinckney Plan when he did so).²³² Yet that interpretation is unlikely. This manuscript was formed at a late stage of the Committee's deliberations. Any changes to their Report could only be made after a majority of the five members had voted for them; and Rutledge, as chair of the Committee, was the likely candidate to record all their collective determinations, including any with which he may have personally disagreed.²³³ That is why we find most of the alterations in this document in his handwriting; it cannot be presumed that he was the author of all these changes. The possibility that Rutledge was here recording a change he personally opposed is supported by South Carolina's opposition to this clause when it was later taken up by the whole Convention.

Although we may never know for certain who proposed, altered, or voted for the final wording of the Privileges and Immunities Clause when it was drafted within the Committee of Detail, there is one thing we may conclude with relative certainty: it was not composed by Charles Pinckney. That his 1818 Plan contained the exact wording of the Privileges and Immunities Clause as it had been altered by the Committee of Detail is just one of the innumerable clues that prove that the 1818 Plan was a fraud.

The Committee's Privileges and Immunities Clause passed in the Convention with little fanfare, but every detail that was recorded marked South Carolina's displeasure with its passage. The younger Pinckney may have been too green to remember South Carolina's opposition to the similar clause in the Articles of Confederation, but the other members were not. When the delegates considered the question, Charles Cotesworth Pinckney remarked that he "was not satisfied with it. He seemed to wish some provision should be included in favor of property in slaves."²³⁴ In a replay of what happened nearly ten years earlier in the Confederation Congress,

232. See McLaughlin, *Sketch of Pinckney's Plan*, *supra* note 46, at 739–40 (crediting Rutledge as the source of the Privileges and Immunities Clause, one of "a number of other provisions, which Pinckney borrowed from the Articles of Confederation and which . . . found their way into the report of the committee" and later into the Constitution); Ewald, *The Committee of Detail*, *supra* note 64, at 275–76 (crediting Rutledge with inserting the Privileges and Immunities Clause and claiming the Pinckney Plan was the source of the clause); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1177–79 (2009) (attributing the Privileges and Immunities Clause to Rutledge).

233. See Ewald, *James Wilson and the Drafting of the Constitution*, *supra* note 174, at 991 (discussing Rutledge's duties as chairman of the Committee).

234. Madison's Notes (Aug. 28, 1787), in 2 RECORDS, *supra* note 63, at 437, 443 (recording a speech by General Pinckney).

South Carolina again recognized that the Privileges and Immunities Clause was a potential threat to their slave system; consequently, the state's delegates tried to get the wording changed. The two drafting histories also had nearly identical outcomes: the rest of the delegates were deaf to South Carolina's appeals; nine states voted in favor of the clause as it stood; South Carolina voted against it and Georgia was divided.²³⁵ Since South Carolina was represented by four delegates (John Rutledge, Charles Pinckney, Charles Cotesworth Pinckney, and Pierce Butler), their negative vote means that at least three of them—and possibly all four—voted to reject the Constitution's Privileges and Immunities Clause. Since this clause was adopted over South Carolina's objection both times it passed (in 1778 and 1787), the modern Court's assumption that South Carolina was responsible for the clause's final wording is deeply ironic, as well as erroneous.

Although the Deep South failed to get the Constitution they wanted in the eighteenth century, the constitutional con they pulled in the nineteenth—a con which continues to fool people to this day—managed to turn their defeat into a sordid sort of victory. They lost the battle over drafting the Privileges and Immunities Clause, but they won the war over interpretation.

The Missouri crisis of 1820–1821 was the first time that the Privileges and Immunities Clause came under close scrutiny. In Missouri's application for statehood, their legislature submitted a constitution that sought to bar free persons of color from entering the state. Northern members of Congress objected that this provision was unconstitutional, since it denied black citizens from other states all the privileges and immunities enjoyed by the citizens of Missouri. Many Southerners countered that only white Americans could be considered citizens, so Missouri's constitution did not run afoul of the U.S. Constitution.

The timing of this controversy could not have been more propitious for Charles Pinckney. His fraudulent 1818 Plan had been published within the official records of the Constitutional Convention just a year earlier. According to the publicly available records, then, it appeared as if Pinckney was the one who had proposed the exact wording of the constitutional clause that was just then on everyone's lips. Writing to his son-in-law, Pinckney portrayed himself as the hero of the hour during these debates: “& as it appeared from the Journal of the Convention that in my Plan of

235. *Id.* (providing the results of a vote taken immediately following General Pinckney's speech).

Government . . . I had first moved that article in the Convention, reference was had to me from all sides of the House as to what I meant when I moved it.”²³⁶ Actually, it does not appear from the records of the House debates that anyone noticed the Pinckney Plan other than Pinckney, but in that speech, he made the most of the notice he took. The putative author of the Privileges and Immunities Clause stated unequivocally that his understanding at the time that clause was drafted was that no Black American was then or could ever be a citizen of the United States.²³⁷

It is not known whether Roger Taney ever read Pinckney's 1821 speech, but he was certainly channeling its spirit when he drafted the opinion in *Dred Scott*. The constitutional con perpetrated by Pinckney in the first decades of the nineteenth century, and perpetuated by Taney a few decades later, has been consummated in recent scholarly works and Supreme Court decisions. The true story is that the Privileges and Immunities Clause was perceived as a potential threat to the Deep South's slavery interests both times it passed, but it passed anyway. This clause of the Constitution, at least, is demonstrably anti-racist. Pinckney's later claims that this clause was drafted by South Carolina and with their racist and pro-slavery understanding was a fraud. That today's Supreme Court continues to believe Pinckney's duplicitous assertion is a testament to how successful and intractable the Deep South's constitutional con has been. But the Court's many attributions to Pinckney's Plan have never been grounded in reliable sources.

In 1860, Frederick Douglass complained that slaveholders in America “have given the Constitution a slaveholding interpretation . . . But it does not follow that the Constitution is in favour of these wrongs because the slaveholders have given it that interpretation.”²³⁸ For the past fifty years, Douglass alleged, “the South has made the Constitution bend to the purposes of slavery.”²³⁹ The nineteenth-century problem Douglass castigated in 1860 has been made even worse today. Modern scholars and Supreme Court decisions have not only accepted the constitutional claims

236. Letter from Charles Pinckney to Robert Y. Hayne (Mar. 31, 1821), *supra* note 16.

237. Congressional Speech by Charles Pinckney (Feb. 13, 1821), *in* 37 ANNALS OF CONG. 1129, 1134 (1821) (Joseph Gales ed., Gales and Seaton 1855).

238. (1860) Frederick Douglass, “The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?”, BLACKPAST (Mar. 15, 2012), <https://www.blackpast.org/global-african-history/1860-frederick-douglass-constitution-united-states-it-pro-slavery-or-anti-slavery/> [https://perma.cc/W84Q-LDV5].

239. *Id.*

made by nineteenth-century Southern partisans; some have imported their interpretations backwards in time and wrongly superimposed them upon the Framers in 1787.

The concatenation of falsehoods and errors that have been published about the Pinckney Plan reminds us of a hard truth. Before anyone can answer the monumental, overarching, and fascinating questions of constitutional interpretation—for instance, is the Constitution an inherently pro-slavery or anti-slavery document?—it is first necessary to undertake the tedious slog of getting the seemingly trivial facts right.

V. CONCLUSION

No one can deny that Charles Pinckney is primarily to blame for many of the errors and misinformation regarding the Pinckney Plan and its role in shaping the Constitution. If he had not circulated so many self-serving falsehoods, later historians would not have been led so far astray. Nevertheless, many of the errors in our modern understanding of the Pinckney Plan are also owing to the misidentification of the Wilson manuscript that John Franklin Jameson found in 1903. Serious constitutional experts had already largely discredited the 1818 Plan before Jameson introduced the error that would revive Pinckney's reputation. Once we correct this error, several adjustments in our contemporary understanding of the Constitution's formation will necessarily follow. Here are some of the most obvious ones.

(1) Pinckney's 1787 Plan of Government was far less important to the Constitution's formation than either he or his admirers would have us believe. (2) The final shape of the Constitution owes more to James Wilson's original work on the Committee of Detail than has been hitherto appreciated. (3) When James Madison discredited the 1818 Plan, he did not "ruin" Pinckney's posthumous reputation through envy; he was stating the plain facts. (4) Andrew McLaughlin's 1904 discovery of Wilson's extract of the Lost Pinckney Plan was more significant than either he or anyone else has understood until now. And, finally, (5) the original formation of the Constitution was not as racist or pro-slavery as either the antebellum South or the modern critics of the Founding have wanted Americans to believe.

Jameson's misidentification of the Wilson manuscript introduced a significant error into the scholarship on the Pinckney Plan, but his innocent mistake cannot be blamed entirely for setting off the wave of Pinckney philia that engulfed the scholarly literature for generations to come. He never could have predicted, much less did he wish, that even Pinckney's spurious

1818 Plan—which he thought he had buried forever by his lethal demolition—would one day be disinterred, and its zombie corpse paraded before an unsuspecting readership as if it were the living truth.²⁴⁰ But errors, like zombies, have a way of proliferating when left unchecked.

240. See generally Burns, *supra* note 129, at 184.

APPENDIX 1

THE JAMESON MANUSCRIPT²⁴¹

John Franklin Jameson discovered this manuscript among James Wilson's papers at the Historical Society of Pennsylvania; it is in Wilson's own handwriting and believed to be generated from his days in the Committee of Detail. The first half of the manuscript (not reproduced below) was a list of powers clearly extracted from the New Jersey Plan. Only the second half of the manuscript, the part Jameson believed was an extract of Pinckney's Plan, is reproduced here. For ease of reference and comparison to the McLaughlin Draft, bracketed numbers have been added preceding each clause; **boldface indicates measures corresponding in content (not necessarily wording) to the extract of the Pinckney Plan found by McLaughlin**; and *italics indicate lines which are distinctly different from (though not necessarily in contradiction to) McLaughlin's Plan*. Strikethroughs were in the original.

[1] The Legislature shall consist of two distinct Branches — a Senate and a House of Delegates, [2] each of which shall have a Negative on the other, [3] and shall be styled the U. S. in Congress assembled.

[4] Each House shall appoint its own Speaker and other Officers, [5] and settle its own Rules of Proceeding; [6] but neither the Senate nor H. D. shall have the power to adjourn for more than Days, without the ~~other~~ Consent of both.

[7] There shall be a President, in which the Ex. Authority of the U. S. shall be vested. [8] It shall be his Duty to inform the Legislature of the Condition of U. S. so far as may respect his Department — [9] to recommend Matters to their Consideration — [10] to correspond with the Executives of the several States — [11] to attend to the Execution of the Laws of the U. S. — [12] to transact Affairs with the Officers of Government, civil and military — [13] to expedite all such Measures as may be resolved on by the Legislature — [14] to inspect the Departments of foreign Affairs — War — Treasury — Admiralty — [15] to reside where the Legislature shall sit — [16] to commission all Officers, [17] and keep the Great Seal of U. S. — [18] He shall,

241. Reproduced from Committee of Detail, VII, *supra* note 148, at 158–59, and the format slightly altered according to the images of the original manuscript, which can be seen in the Pennsylvania Magazine of History and Biography. *See generally* Ewald & Toler, *supra* note 148, at 305–09 (providing images and transcripts of “Excerpts from the New Jersey and Pinckney Plans”).

by Virtue of his Office, be Commander in chief of the Land Forces of U. S. and Admiral of their Navy — [19] He shall have Power to convene the Legislature on extraordinary Occasions — [20] to prorogue them, provided such Prorogation shall not exceed Days in the space of any — [21] He may suspend Officers, civil and military

[22] The Legislature of U. S. shall have the exclusive Power — [23] of raising a military Land Force — [24] of equipping a Navy — [25] of rating and causing public Taxes to be levied — **[26] of regulating the Trade** [27] of the several States as well with foreign Nations as with each other — [28] *of levying Duties upon Imports and Exports* — **[29] of establishing Post-Offices,** [30] and raising a Revenue from them — [31] of regulating Indian Affairs — **[32] of coining Money** — **[33] fixing the Standard of Weights and Measures** — [34] of determining in what Species of Money the public Treasury shall be supplied.

[35] The foederal judicial Court shall try Officers of the U. S. for all Crimes &C in their Offices²⁴² — ~~[36] and to this Court an Appeal shall be allowed from the Courts of~~²⁴³

[37] The Legislature of U. S. shall have the exclusive Right of instituting in each State a Court of Admiralty for hearing and determining maritime Causes.

242. Clause 35 is not in boldface, because it is not found in the McLaughlin Draft. However, there is a strong case to be made that Clause 35 was originally a part of the Pinckney Plan. In 1786, Pinckney, acting as head of a congressional committee, drafted a series of proposed amendments to the Articles of Confederation, and many of these provisions were clearly copied into the Plan he proposed at the Convention a year later. Article XIX from the 1786 Report states,

[Congress has] exclusive power of declaring what . . . shall be deemed treason, and . . . misprision of treason, . . . and power to institute a federal judicial court, *for trying and punishing all officers appointed by Congress, for all crimes, offences and misbehaviour in their offices,* and to which court an appeal shall be allowed from the judicial courts of the several states

U.S. Continental Cong. et al., *supra* note 199, at 5. All these provisions, with the notable exception of the italicized words, were copied in abbreviated form into Resolution 15 of the McLaughlin Draft: Congress “shall have the exclusive Power of declaring what shall be Treason & Misp. of Treason agt. U. S. — and of instituting a federal judicial Court, to which an Appeal shall be allowed from the judicial Courts of the several States.” See *infra* Appendix 2. The judiciary provisions that Wilson wrote into Clauses 35 and 36 of the Jameson Draft seem to track more closely to Pinckney’s 1786 Report than to the extract of the Plan found by McLaughlin: “[35] The foederal judicial Court shall try Officers of the U. S. for all Crimes &C in their Offices — ~~[36] and to this Court an Appeal shall be allowed from the Courts of.~~” Both clauses are close approximations of Pinckney’s 1786 Report, though Wilson changed his mind and crossed out Clause 36 before completing the thought. In sum, it seems irresistible that Clause 35 must have come from a Pinckney source: either Wilson had the 1786 Report in front of him or Pinckney’s Plan as he wrote Clauses 35 and 36. Some final confirmation that Pinckney’s original draft contained this clause is found in his pamphlet, the 1787 “Observations.” This source, in which Pinckney purports to describe the Plan he proposed the previous May, is untrustworthy as a guide to the Lost Plan when taken by itself; however, he does propose the clause which is confirmed by its similarities to both his 1786 Report and the transition point where Wilson turns to Pinckney’s Plan in Clause 35 of Jameson’s Draft. In the “Observations,” Pinckney proposes a “Federal Judicial Court, . . . capable of taking cognizance of [the Union’s] officers who shall misbehave in any of their departments.” Pinckney, “Observations”, *supra* note 44, at 117.

243. Clearly, Wilson was copying from Pinckney’s Plan at Clause 36, but he changed his mind and crossed it out before finishing the sentence. By crossing out this line, Wilson does not merely omit a provision found in the original Pinckney Plan; he changes the nature of the “federal judicial court” from Pinckney’s Plan (which is why Clause 36 is in both boldface and italics). Pinckney had given the Supreme Court appellate jurisdiction over decisions made by the state courts; the Committee of Detail followed the Convention’s wish to give the Court appellate jurisdiction over lower *federal* court decisions. Therefore, this crossed out clause (among others) demonstrates that whatever Wilson’s aim was in drafting the Jameson Draft, he was not attempting to write a faithful extract of the Pinckney Plan.

[38] The power of impeaching shall be vested in the H. D. — [39] The Senators and Judges of the foederal Court, be a Court for trying Impeachments.

[40] The Legislature of U. S. shall possess the exclusive Right of establishing the Government and **Discipline of the Militia of** — [41] and of ordering the Militia of any State to any Place within U. S.

APPENDIX 2

THE McLAUGHLIN MANUSCRIPT²⁴⁴

Andrew McLaughlin discovered this manuscript at the Pennsylvania Historical Society in 1904. It was originally written in James Wilson's handwriting, and it was presumably drafted while he was serving on the Committee of Detail.

1 A Confederation between the free and independent States of N. H. &c. is hereby solemnly made uniting them together under one general superintending Government for their common Benefit and for their Defense and Security against all Designs and Leagues that may be injurious to their Interests and against all Forc[e] [or "Foes"] and Attacks offered to or made upon them or any of them

2 The Stile

3 Mutual Intercourse — Community of Privileges — Surrender of Criminals — Faith to Proceedings &c.

4 Two Branches of the Legislature — Senate — House of Delegates — together the U. S. in Congress assembled

H. D. to consist of one Member for every thousand Inhabitants 3/5 of Blacks included

Senate to be elected from four Districts — to serve by Rotation of four Years — to be elected by the H. D. either from among themselves or the People at large

5 The Senate and H. D. shall by joint Ballot annually choose the Presidt. U. S. from among themselves or the People at large. — In the Presidt. the executive Authority of the U. S. shall be vested. — His Powers and Duties — He shall have a Right to advise with the Heads of the different Departments as his Council

6 Council of Revision, consisting of the Presidt. S. for. Affairs, S. of War, Heads of the Departments of Treasury and Admiralty or any two of them togr wt the Presidt.

244. Reproduced from Committee of Detail, III, *supra* note 228, at 134–37. Images and transcripts of the original manuscript may be seen in Ewald & Toler, *supra* note 148, at 249–61.

7 The Members of S. & H. D. shall each have one Vote, and shall be paid out of the common Treasury.

8 The Time of the Election of the Members of the H. D. and of the Meeting of U. S. in C. assembled.

9 No State to make Treaties — lay interfering Duties — keep a naval or land Force (Militia excepted to be disciplined &c according to the Regulations of the U. S.

10. Each State retains its Rights not expressly delegated — But no Bill of the Legislature of any State shall become a law till it shall have been laid before S. & H. D. in C. assembled and received their Approbation.

11. The exclusive Power of S & H. D. in C. Assembled

12. The S. & H. D. in C. ass. shall have the exclusive Power of regulating Trade and levying Imposts — Each State may lay Embargoes in Time of Scarcity

13 ——— of establishing Post-Offices

14. S. & H. D. in C. ass. shall be the last Resort on Appeal in Disputes between two or more States; which Authority shall be exercised in the following Manner &c

15. S. & H. D. in C. ass. shall institute Offices and appoint Officers for the Departments of for. Affairs, War, Treasury and Admiralty —

They shall have the exclusive Power of declaring what shall be Treason & Misp. of Treason agt. U. S. — and of instituting a federal judicial Court, to which an Appeal shall be allowed from the judicial Courts of the several States in all Causes wherein Questions shall arise on the Construction of Treaties made by U. S. — or on the Law of Nations — or on the Regulations of U. S. concerning Trade & Revenue — or wherein U. S. shall be a Party — The Court shall consist of Judges to be appointed during good Behaviour — S. & H. D. in C. ass shall have the exclusive Right of instituting in each State a Court of Admiralty, and appointing the Judges &c of the same for all maritime Causes which may arise therein respectively.

16. S & H. D. in C. ass. shall have the exclusive Right of coining Money — regulating its Alloy & Value — fixing the Standard of Weights and Measures throughout U. S.

17. Points in which the Assent of more than a bare Majority shall be necessary.

18 Impeachments shall be by the H. D. before the Senate and the judges of the federal judicial Court.

19. S. & H. D. in C. ass. shall regulate the Militia thro' the U. S.
20. Means of enforcing and compelling the Payment of the Quota of each State.
21. Manner and Conditions of admitting new States.
22. Power of dividing annexing and consolidating States, on the Consent and Petition of such States.
23. The assent of the Legislature of States shall be sufficient to invest future additional Powers in U. S. in C. ass. and shall bind the whole Confederacy.
24. The Articles of Confederation shall be inviolably observed,[×] and the Union shall be perpetual; [×]unless altered as before directed²⁴⁵
- 25 The said States of N. H. &c guarantee mutually each other and their Rights against all other Powers and against all Rebellions &c.

245. According to Farrand: "The crosses are evidently intended to indicate that the last two clauses should be reversed." Committee of Detail, III, *supra* note 228, at 136 n.5.