

3-2012

## **“Done In Convention”: The Attestation Clause and the Declaration of Independence**

Jesse M. Cross

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JESSE CROSS

## “Done in Convention”: The Attestation Clause and the Declaration of Independence

**ABSTRACT.** This Note offers a response to commentators who have argued that the Attestation Clause is best read as a straightforward attempt by the Founders to import the spirit and values of the Declaration of Independence into the Constitution. This argument distorts the Constitution more than it illuminates it, for this argument obscures the fact that the Attestation Clause reached out to a large set of domestic and international documents. In so doing, the Clause offered important assurances of continuity and cooperation in a time of national transformation, giving the Clause a distinctive spirit that only emerges when we read it in dialogue with the legal instruments and practices of the time. Such a contextual reading reveals that, while the Declaration signaled a dramatic break from the past, the Constitution’s Attestation Clause conveyed a much more nuanced and far less radical set of signals.

**AUTHOR.** Yale Law School, J.D. 2011; University of California, Irvine, M.A. 2006; Dartmouth College, B.A. 2004. I particularly wish to thank Professor Akhil Reed Amar, whose teaching and scholarship inspired this Note. I am grateful that this Note has given me the chance to learn from such a brilliant scholar and devoted teacher. I also am thankful to Will Moccia and to the rest of the staff of *The Yale Law Journal* for the helpful guidance and feedback they have provided throughout the editorial process.



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**INTRODUCTION**

At the close of the Constitution approved by the Constitutional Convention in 1787, there is a short clause indicating the date on which and the location where the Constitution was concluded and signed. Known as the Attestation Clause, it recorded the date of the Constitution's completion—and it did so in a fashion that has drawn increasing attention from lawyers and scholars over the past several decades.<sup>1</sup> In addition to dating the Constitution according to the year of grace (or the “Year of our Lord”), the Attestation Clause declares our nation's great founding document to have been executed “in the Year . . . of the Independance of the United States of America the Twelfth.”<sup>2</sup> Alluding to the drafting of the Declaration of Independence eleven years earlier, the Attestation Clause thus seems to establish a specific textual connection between the Constitution and the Declaration. The Founders went out of their way to insert the Declaration of Independence into this clause of the Constitution, it seems, encouraging us to read these two documents as engaged in unique dialogue with each other.

This is the argument that a variety of commentators have advanced, at least. It is an argument that has been made by several scholars, such as one who surmises, “No other conclusion logically can be reached since the Constitution directly attaches itself to the Declaration of Independence in Article VII . . . .”<sup>3</sup> It is an argument that has been advanced in the pages of this *Journal*, where it has been said that the reference to the Declaration reveals the Federalists' “efforts to highlight the [Constitution's] ties to the American

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1. The full Attestation Clause reads,

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names

U.S. CONST. art. VII, cl. 2. The word “done” is rendered in larger print than are the words surrounding it; “In witness” is also rendered in larger print, though not quite as large as that used for “done.” In both instances, the words are printed in bold, stylized block letters as opposed to the cursive that dominates the rest of the text. Unless otherwise noted, all references to the Constitution refer to the parchment version, an image of which is available at *Constitution of the United States*, NAT'L ARCHIVES, [http://www.archives.gov/exhibits/charters/constitution\\_zoom\\_4.html](http://www.archives.gov/exhibits/charters/constitution_zoom_4.html) (last visited Jan. 23, 2012).

2. U.S. CONST. art. VII, cl. 2.

3. David Barton, *A Death-Struggle Between Two Civilizations*, 13 REGENT U. L. REV. 297, 312 (2001); see also Harry V. Jaffa, *Graglia's Quarrel with God: Atheism and Nihilism Masquerading as Constitutional Argument*, 4 S. CAL. INTERDISC. L.J. 715, 728-29 (1995) (arguing that the reference to the Declaration is evidence that the Founders intended to incorporate the Declaration into the Constitution).

Revolution.”<sup>4</sup> It is a point that has been argued to the Supreme Court as recently as 2008, when it was suggested to the Court that the Attestation Clause “legally engrafts the Declaration of Independence into the Constitution as effectively as though it had said, ‘attached hereto and made a part hereof.’”<sup>5</sup> Even one current Justice has advanced a version of this argument, with Justice Thomas writing in the pages of the *Harvard Journal of Law and Public Policy* that “[o]ne should never lose sight of the fact that the last words of the original Constitution as written refer to the Declaration of Independence, written just eleven years earlier.”<sup>6</sup>

These commentators have tried to transform the Attestation Clause into a textual foundation for the idea that, as the Supreme Court put it in 1897, “it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.”<sup>7</sup> They have argued, in other words, that it is permissible to read the Constitution in the “spirit of the Declaration” because the Attestation Clause’s reference to the Declaration specifically imports that spirit into the Constitution. By making this argument, however, they have presumed that it is “safe” to read a reference to the Declaration as evidence of the Founders’ intent to import the spirit of that revolutionary document into the Constitution. In this Note, I attempt to show that it is not “safe” to do so. I hope to show that the Attestation Clause in fact was animated by its own, distinct spirit—a spirit that was in some ways contrary to that found in the Declaration.

In this Note, therefore, I will suggest that the argument advanced by Justice Thomas and others distorts the Constitution more than it illuminates it. Theirs is a misleading argument, I will contend, because it concludes from the plain language of the Attestation Clause that the Founders understood the Declaration to be the central text with which their Constitution was in dialogue. This argument obscures the fact that the Attestation Clause reached out to a large set of domestic and international documents, including the Articles of Confederation and a wealth of English treaties and charters. When we restore what would have been the eighteenth-century vision of the Attestation Clause, we can see that the Attestation Clause is defined by its

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4. Michael Coenen, Note, *The Significance of Signatures: Why the Framers Signed the Constitution and What They Meant by Doing So*, 119 *YALE L.J.* 966, 999 (2010).
  5. Brief for Faith and Action et al. as Amici Curiae Supporting Petitioners at 17-18, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (No. 07-665), 2008 WL 2550617, at \*17-18.
  6. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 *HARV. J.L. & PUB. POL’Y* 63, 65 (1989).
  7. *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 160 (1897). Many of the commentators who cite the Attestation Clause as grounds for a connection between the Constitution and the Declaration quote this passage from *Ellis*. See, e.g., Barton, *supra* note 3, at 312.

connections to a variety of domestic and international documents, the least of which is the Declaration of Independence.

The Attestation Clause's very act of appropriating language from these domestic and foreign documents reveals a set of values and commitments at work in the Clause—values that are distinct from (if not outright antithetical to) those found in the Declaration. The Attestation Clause's connections to these various legal documents reveal that the Clause is a relatively conservative portion of the Constitution, emphasizing continuity not only with the regime of the Articles of Confederation, but also with a variety of centuries-old English diplomatic practices. Placed in historical context, the Attestation Clause thus reminds us that the Founders were not one-dimensional revolutionaries continually reiterating the themes of rebellion and independence, but rather skilled politicians able to conjure assurances of continuity even in times of clear crisis and transformation.<sup>8</sup> In this sense, the Attestation Clause evinces a purpose very different from the one that animated the self-consciously revolutionary text of the Declaration of Independence, a text focused on “dissolv[ing] the political bands which ha[d] connected” colonial Americans to their prior sovereign.<sup>9</sup>

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8. In this sense, my Note intersects with broader discussions about the extent to which the Constitution was intended to be read as a self-consciously revolutionary document. Bruce Ackerman has famously argued that the Constitution of 1787 was strategically designed to highlight its break with preexisting law—that is to say, with the Articles of Confederation. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 173-75 (1991). In resorting to a “convention” that was associated with illegality and that proudly defied the rules of amendment set out in the Articles of Confederation, Ackerman argues, the Founders were highlighting their own illegality. *Id.* In so doing, the Founders were allegedly signaling to the nation an effort at “higher lawmaking” that spoke directly for the People in a way that government-as-usual never could. *Id.* at 165-86.

Sanford Levinson and Jack Balkin have similarly described the drafting of the Constitution as a crisis that “require[d] political leaders to admit publicly (and perhaps even proudly) that they [were] going outside the law to preserve the country.” Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 724, 727 (2009). Levinson and Balkin find this to be a rare moment in American history, as American leaders in subsequent constitutional crises resorted to secrecy and clever argumentation to defend the constitutionality of their actions, rather than brazenly embracing the illegality of their acts. *Id.* at 721-29. Levinson and Balkin thus see the Founders' proud embrace of illegality as the exception rather than the rule in moments of great American constitutional crisis or change. See *id.* They seem to agree with Ackerman, however, that the Founders were clearly and explicitly highlighting their act of constitutional composition as a rejection and a defiance of the Articles of Confederation and the political regime that the Articles had inaugurated. See *id.* at 727-29.

9. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). The purpose of the Declaration of Independence was not simply to embrace revolution and upheaval as values in their own right, of course. The Declaration sought to articulate a set of values that justified the

In order to develop this argument, it will be necessary to show that the Attestation Clause drew upon prior legal documents and diplomatic practices in ways that would have emphasized continuity with past exercises of sovereignty as well as compatibility with international practices of diplomacy. The majority of this Note, therefore, will be focused on revealing the legal instruments and international customs that lay behind the verbiage of the Attestation Clause and that already were well established in England and America. Cobbled out of phrases and formulations found in English treaties, charters, and compacts, the Attestation Clause’s component parts all would have been familiar to a person living in the eighteenth century and well versed in diplomatic practices. The resulting Clause would have looked laden with forms inherited from earlier British and American practice, and the way that these forms were deployed would have suggested the importation of a set of values distinct from those associated with the Declaration.

Since different phrases in the Attestation Clause drew upon different legal instruments and diplomatic customs, the subsequent analysis addresses the Clause’s various phrases separately, showing how each relevant phrase in the Attestation Clause was built upon a set of practices that would have imbued the phrase with meaning and value. Each of the first three Parts of this Note therefore begins by connecting a relevant phrase from the Attestation Clause to the practices upon which it drew, and each Part concludes by discussing the lessons to be gleaned from this historical context. Part I brings this analytic approach to the Attestation Clause’s labeling of the Constitution as “done in Convention,” tracing this phrase’s journey from its early use in English treaties and letters of credence, through its use in the Articles of Confederation and in a number of documents emerging from the early Continental Congress, and finally to its use in the Constitution. Part II explains the historical practice of regnal dating, a practice that dates back at least to Roman times and that underlay the dating of the Constitution “in the Year . . . of the Independence of the United States of America the Twelfth.” Part III explains the longstanding practice of drafters and ratifiers setting their names to documents such as treaties and charters in order to witness the execution of these documents. Part

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colonists’ act of rebellion, and it is this set of justificatory values to which Justice Thomas and others generally wish to direct our attention. *See, e.g., infra* notes 90-93 and accompanying text (discussing Justice Thomas’s interpretation of the “higher law” principles to be found in the Declaration). Nonetheless, because the colonists believed that revolution was necessary in order to realize that set of values, they crafted a Declaration that understandably evinced little interest in maintaining a spirit of continuity with past regimes or a spirit of cooperation with the international community. By contrast, I will argue, these were the defining features of the Attestation Clause—features that we overlook when we presume the Declaration to be the relevant text animating this portion of the Constitution.

IV then steps back and reflects on the implications of the textual and historical observations presented in the first three Parts. Through this analysis, I hope to show that each phrase in the Attestation Clause would have conjured associations with the Articles of Confederation and with English legal documents, and that in so doing these phrases all invested the Attestation Clause with a complex but coherent spirit—one that was very different from the “spirit of the Declaration of Independence.”

## I. DONE DEAL

*“done in Convention”*

– U.S. Constitution, Art. VII<sup>10</sup>

*“Done in Congress at Philadelphia”*

– Resolution of Congress, 1779<sup>11</sup>

*“Done at Westminster”*

– Treaty of Peace and Alliance Between England and Denmark, 1654<sup>12</sup>

The beginning of the Attestation Clause places the preceding Constitution in context, explaining where, when, and by whom the document was produced. In so doing, the Clause provides closure to the document; its past tense use of “done” announces the close of the great deed begun in the Preamble. This term “done” was given a prominent position in the text—in the version of the Constitution signed by the members of the Constitutional Convention, it began a new line and was rendered in larger type than was the surrounding text, allowing it to stand out.<sup>13</sup> In the printed version of the Constitution (which was likely seen by the Convention’s delegates and by the

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10. U.S. CONST. art. VII, cl. 2.

11. 13 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 62 (Worthington Chauncey Ford ed., 1909).

12. Treaty of Peace and Alliance, Den.-Eng., Sept. 15, 1654, reprinted in 1 A COLLECTION OF TREATIES BETWEEN GREAT BRITAIN AND OTHER POWERS 65, 73 (George Chalmers ed., London 1790). The original treaty was printed in Latin and uses the phrase “Actum Westmonasterii.” 3 Consol. T.S. 357, 364.

13. U.S. CONST. art. VII, cl. 2. The version of the Constitution engrossed by Jacob Shallus was the version that was signed by the members of the Convention. Denys P. Myers, *History of the Printed Archetype of the United States of America*, 11 GREEN BAG 2D 217, 220-21 (2008), available at [http://www.greenbag.org/v11n2/v11n2\\_myers.pdf](http://www.greenbag.org/v11n2/v11n2_myers.pdf).



states’ ratification committees<sup>14</sup>), the term was also highly visible, as it was one of only ten words prior to the list of states accompanying the signatures to be printed in all capital letters.<sup>15</sup>

In attaching to the Constitution a clause that declared where the composing of the document was “done,” the members of the Convention were drawing upon an established English practice regarding diplomatic correspondences and treaties. This practice was described in a late eighteenth-century treatise on the customs of European international law.<sup>16</sup> In its analysis of “letters of Council,” that treatise explained that, after the substance of the letter, “[t]hen follows, separated from the body of the letter, the date, mentioning the place, the day, the month, the year, and the reign.”<sup>17</sup>

Throughout the late 1770s, those in the Continental Congress were engaged in an ongoing process of bringing their actions into accord with this common diplomatic practice, routinely concluding letters of credence with a separate “done in [location]” or “done at [location]” phrase that was accompanied by the document’s date. As early as September 28, 1776, there are records of letters of credence from the Congress to foreign leaders that conclude with these “done” phrasings. The first such letter, which was officially dated September 30, was typical; its final paragraph opens with the phrase “Done in Congress, at Philadelphia.”<sup>18</sup> While the fledgling Congress did not have extensive opportunities to engage in diplomatic correspondences, it had approved at least five letters of credence with identical or extremely similar phrasings by the time signatures were first affixed to the Articles of

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14. Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 283-84 (1987).

15. The others were “We” in the Preamble, “All” in Article I, and “Article” in each of the seven article titles. The September 28, 1787, print of the Constitution is reproduced in a 1961 Senate Document. See S. DOC. NO. 87-49, at 1-18 (1961). In addition, the term “Constitution” was printed in small capitals in the Preamble, and each of the state names accompanying the signatures was printed in all capital letters. See *id.*

16. [GEORG FRIEDRICH VON] MARTENS, SUMMARY OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE; WITH A LIST OF THE PRINCIPAL TREATIES, CONCLUDED SINCE THE YEAR 1748 DOWN TO THE PRESENT TIME, INDICATING THE WORKS IN WHICH THEY ARE TO BE FOUND 190 (William Cobbett trans., Philadelphia, Thomas Bradford 1795).

17. *Id.* at 190.

18. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 11, at 833 (Worthington Chauncey Ford ed., 1906). The claim that this represents “the first such letter” is based on my own examination of the relevant documents.

Confederation in July 1778.<sup>19</sup> Clearly, the Congress was establishing a standard practice regarding the affixation of this verbiage to diplomatic letters.

This practice of affixing a clause separated from the main text in order to identify the place at which a diplomatic deed was “done” extended beyond correspondences. Throughout the eighteenth century, such a clause was invariably attached to treaties signed by England. A good example was the treaty that ended the French and Indian War, the Treaty of Paris of 1763, which concluded with the line, “Done at Paris the tenth day of February, 1763.”<sup>20</sup> While the precise phrasing of such a concluding line was not always uniform, the “done at [location]” formula certainly was the standard format for eighteenth-century English treaties.

We know that at least some prominent members of the Second Continental Congress were diligent in their efforts to master these English forms and translate them into an American context. A good example is John Adams, who drafted what has since been labeled “the Model Treaty,” which was designed to be a guide for Americans conducting foreign relations. Describing Adams’s approach in designing the Model Treaty, one scholar says:

In the preparation of his draft, [Adams] utilized three printed compilations of English treaties and commercial laws, one a volume lent him by Franklin containing the trade agreements concluded between France and England in 1713 following what Americans called Queen Anne’s War. Primarily, Adams relied on these references to assure the proper – or, at least, the customary European – form of treaty provisions.<sup>21</sup>

While the Model Treaty did not include a specific model for attestation clauses, it does speak to both deference to European international forms and diligence in making sure they were followed (and, indeed, by way of example, the treaty Adams concluded with the Netherlands in 1782 did bear a traditional “done at” attestation<sup>22</sup>). This type of diligence surely would have brought an augmented awareness of European forms to the Continental Congress, increasing

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19. See 5 *id.* at 833; 8 *id.* at 519, 522 n.1, 523 n.1 (Worthington Chauncey Ford ed., 1907); 11 *id.* at 547 (Worthington Chauncey Ford ed., 1908). The only differences among the relevant phrases are the locations named, reflecting the Congress’s relocations among Philadelphia, Baltimore, and Yorktown.

20. Definitive Treaty of Peace, Fr.-Gr. Brit.-Spain, Feb. 10, 1763, 42 Consol. T.S. 320, 334.

21. JOHN FERLING, JOHN ADAMS: A LIFE 189 (1992).

22. 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 11, at 78 (Gaillard Hunt ed., 1922).

familiarity with these forms and making their adoption in other realms of lawmaking all the more likely.

It is clear that the European practice of concluding treaties with the “done at [location]” verbiage was a practice that had been adopted in America by 1787. Twenty years after it signed the treaty ending the French and Indian War, for example, England found itself signing another Treaty of Paris, this time in order to end the War of American Independence. That treaty would similarly conclude, “Done at Paris, this third day of September in the year of our Lord one thousand seven hundred and eighty-three.”<sup>23</sup> By this time, the involvement of the British was not needed in order to assure the affixation of such a clause. The 1776 Treaty of Amity and Commerce between America and France had concluded, “Done at Paris, this sixth day of February, one thousand seven hundred and seventy-eight.”<sup>24</sup> The Treaty of Alliance with France, signed the same day, bore the same concluding phrase.<sup>25</sup> Notably, when Congress ratified these two treaties with France, it also appointed a three-person committee “to prepare the form of ratification” of the treaties; two of the committee members were Richard Henry Lee and Francis Dana.<sup>26</sup> These two men would become Gouverneur Morris’s coauthors for the attestation clause of the Articles of Confederation. The “form of ratification” Lee and Dana presented on May 5, 1778, read:

Done in Congress at York town, in the state of Pennsylvania, this 4th day of May, in the year of our Lord one thousand seven hundred and seventy eight.

In testimony whereof, the President, by order of the said Congress, hath hereunto subscribed his name and affixed his seal.<sup>27</sup>

This practice had also spilled over to at least one state constitution in the years prior to the drafting of the attestation clause for the Articles of Confederation. The Georgia state constitution of 1777 was the only state constitution in existence that similarly employed the phrase “done,” as its attestation clause began, “Done at Savannah, in convention . . . .”<sup>28</sup> Regardless

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23. Definitive Treaty of Peace, art. X, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

24. Treaty of Amity and Commerce, art. XXXI, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12.

25. Treaty of Alliance, art. XIII, U.S.-Fr., Feb. 6, 1778, 8 Stat. 6.

26. 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 11, at 458.

27. 11 *id.* at 463.

28. GA. CONST. of 1777, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 377, 383 (Ben: Perley Poore ed., Lawbook Exchange, Ltd. 2001) (2d ed. 1878) [hereinafter COLONIAL CHARTERS].

of whether any specific causal connections exist between the state constitution and the congressional documents that bore the same phrase, the use of this language in the Georgia constitution highlights the fact that this linguistic formulation was in circulation in America in the late 1770s.

When Gouverneur Morris, Richard Henry Lee, and Francis Dana were assigned to draft an attestation clause for the Articles of Confederation,<sup>29</sup> therefore, they had the option of drawing upon a common international diplomatic practice that the Continental Congress had assumed as its own by July 1778. Moreover, they had already once seen this practice translated into a constitutional document at the state level. Drawing upon this traditional approach to attestation, the authors opened their attestation clause by declaring the Articles “Done at Philadelphia in the state of Pennsylvania.”<sup>30</sup>

While we know that Morris, Lee, and Dana were together assigned to author the attestation clause for the Articles, incidentally, it is unclear who authored the relevant “done at” phrase. The draft of the attestation clause that Morris and his coauthors presented to the Continental Congress on June 26 was very similar to the language of the enacted Articles, but it was not identical. When the Articles were signed on July 9, 1778, one sentence was deleted from the paragraph preceding the attestation clause, and the specific dates were written into the spaces that Morris and his fellow drafters had by necessity left blank.<sup>31</sup> Between the June 26 draft and the completion of the Articles, only one other set of substantive changes would be made to the language presented by Morris and his coauthors, and its origins are not clear. The attestation clause proposed on June 26 read, “In witness whereof, we have hereunto set our hands, this [blank] day of [blank] in the year of our Lord 1778, and in the [blank] year of the independence of the United States of America.”<sup>32</sup> In the final version, by contrast, the first sentence of the attestation clause would read, “In Witness whereof we have hereunto set our hands in Congress,” while the remainder would state, “Done at Philadelphia in the state of Pennsylvania the ninth Day of July in the Year of our Lord one Thousand seven Hundred and Seventy-eight, and in the third year of the independence of America.”<sup>33</sup> The clause was divided in two, in other words, and a geographic

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29. See 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 11, at 656 (“Resolved, That a committee of three be appointed to prepare the form of a ratification of the articles of confederation: The members chosen, Mr. R[ichard] H[enry] Lee, Mr. G[ouverneur] Morris, and Mr. [Francis] Dana.”).

30. ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 2.

31. 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 11, at 677.

32. 11 *id.* at 658.

33. ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 2.

identifier, “Done at Philadelphia in the state of Pennsylvania,” was added as the opening phrase of the final clause.

In the nine years that would intervene between the signing of the Articles and the drafting of the Constitution, this practice would only be further entrenched in the Continental Congress, as attestation clauses bearing the “done in/at” structure would continue to be affixed to correspondences and treaties conducted by the Congress.<sup>34</sup> And when Gouverneur Morris in September of 1787 was again assigned the task of drafting an attestation clause (this time without the assistance of coauthors),<sup>35</sup> he produced a clause extremely similar to that which had been used for the Articles. Indeed, the parallels between the attestation clauses of the Constitution and the Articles of Confederation are striking. Only seven extant state constitutions had full attestation clauses;<sup>36</sup> both the Articles and the Constitution had them. Only one state constitution then in existence (Georgia’s) listed the date of signing both in the year of grace and in years since the signing of the Declaration;<sup>37</sup> both the Articles and the Constitution did so. None of the existing state constitutions was signed “In witness whereof”; both the Articles and the Constitution bore this phrasing. And only one state constitution (Georgia’s again, as discussed above<sup>38</sup>) employed the word “done”; both the Articles and the Constitution did so.<sup>39</sup>

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34. See, e.g., *Definitive Treaty of Peace*, *supra* note 23; 14 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 11, at 658 (Worthington Chauncey Ford ed., 1909).

35. The notes for Monday, September 17, 1787, explain that “[t]his ambiguous form [of the Attestation Clause] had been drawn up by Mr. G. M. . . . and put into the hands of Doctr. Franklin that it might have the better chance of success.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 643 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

36. See sources cited *infra* note 83.

37. GA. CONST. of 1777, *reprinted in* 1 COLONIAL CHARTERS, *supra* note 28, at 377, 383.

38. See *supra* text accompanying note 28.

39. The influence of state constitutions is more notable, incidentally, in the Constitution’s use of “in Convention” as a sort of geographic marker. Five state constitutions executed between 1776 and 1787 similarly asserted that they had been passed “in convention” or “in Convention.” GA. CONST. of 1777, *reprinted in* 1 COLONIAL CHARTERS, *supra* note 28, at 377, 383; MD. CONST. of 1776, *reprinted in* 1 COLONIAL CHARTERS, *supra* note 28, at 817, 820; N.H. CONST. of 1784, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1280, 1293; N.Y. CONST. of 1777, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1328, 1328; PA. CONST. of 1776, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1540, 1548. A sixth state constitution was done “By order of Convention.” VT. CONST. of 1786, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1866, 1875. The Articles of Confederation, by contrast, only noted that they were “Done at Philadelphia in the state of Pennsylvania.” ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 2. For a discussion of the significance of the “convention” in American constitutionalism, see ACKERMAN, *supra* note 8, at 173-75.

The language of these two attestation clauses is too similar to be coincidental, particularly in light of Gouverneur Morris's involvement in drafting both of them. Granted, Morris was only one of three coauthors of the attestation clause for the Articles, and the language proposed for the Articles was altered before it became final. Yet this does not change the fact that Morris had a particular reason to be aware of the attestation language in the Articles and to have tracked its development with special attention. It seems likely that this experience would have informed his act of authorship the second time around, and the text of the Attestation Clause bears out this hypothesis.

Regardless of Morris's specific sources of inspiration, however, it seems clear that the bold "done" that concluded the Constitution reached back historically to eighteenth-century practices of international law. The idea of having a separate clause that opens by identifying the location at which the document was composed, and which offers this location in the specific form of "done at [location]" or "done in [location]," is simply too great an overlap with past practice to be a coincidence. Moreover, the continuation of this practice in the Continental Congress, including but not limited to the Articles of Confederation, provides a clear bridge that connects its use in the Constitution to its use in the treaties and diplomatic correspondences of eighteenth-century England.

The Attestation Clause's phrase "done in Convention" thus reaches back to the Articles of Confederation, a founding document that itself reflected Congress's broad adoption of the rhetoric of international law. From these facts, we can draw some preliminary conclusions about the ways in which the Clause would have been understood by contemporary readers. First, we must recall that Morris was instructed to write the Attestation Clause such that it would garner votes from members of the Constitutional Convention.<sup>40</sup> Forty-four of the Constitutional Convention's delegates had served in the Continental Congress.<sup>41</sup> An Attestation Clause that made the Constitution resemble a body of documents already approved by the Congress would likely make the Constitution look more familiar to the delegates, enhancing the likelihood that they would sign. Similarly, echoes both of the Articles of Confederation and of prior documents of the Congress would perhaps emphasize to the larger public that this was a document to be understood as analogous to, rather than in contravention of, the Articles of Confederation and

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40. See 2 FARRAND'S RECORDS, *supra* note 35, at 643.

41. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 12 n.10 (1988).

the government established by those Articles.<sup>42</sup> In these senses, the “done in/at” phrasing likely would have emphasized continuity with the regime that the new Constitution was to replace, implicitly assuring two different (though overlapping) interpretive communities that this new Constitution did not constitute a violent departure from the preceding regime.

Moreover, the “done in/at” phrasing likely signaled to an international audience that, while this Constitution ushered in a new era of popular sovereignty, it did not change the nation’s intent to conform to international practices and norms. It must be recalled that it was as yet unknown how the United States would conduct itself as a member of the international community; America was a new nation operating out of a novel understanding of the relation between sovereign and subject.<sup>43</sup> The inclusion of rhetoric such as the “done in/at” formulation signaled that this new nation was aware of the basic practices of the international community and intended to abide by them. Thus, if the Declaration was focused on “dissolv[ing] the political bands” that connected the states to England as colonies,<sup>44</sup> the Attestation Clause seems to suggest an interest in preserving the diplomatic bands that connected the United States to England (and other nations) as a member of the global community.

In all of these senses, the opening phrase of the Attestation Clause offers an important qualification to the idea that the Attestation Clause serves to import the “spirit of the Declaration of Independence” into the Constitution. When the Attestation Clause is reduced to its reference to the Declaration of Independence, we lose sight of the complex ways in which the Founders were simultaneously reassuring the nation that this new Constitution was an intelligible continuation of life under the Articles. Moreover, an exclusive focus on the connection to the Declaration ignores the fact that the Attestation Clause provided subtle reassurances to the international community in ways that the Declaration did not. In both of these senses, the Attestation Clause does indeed manifest a distinctive spirit, but it is a spirit that differs in interesting and important ways from that found in the Declaration.

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42. This is not meant to suggest that the Constitution necessarily *was* in contravention of the Articles; this potential objection, whether correct or not, might still have been anticipated.

43. For a discussion of the novelty of America’s experiment with popular sovereignty, see AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 5-21 (2005).

44. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

## II. DOUBLE DATE

*“the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth”*

– U.S. Constitution, Art. VII<sup>45</sup>

*“the sixth day of August, Anno Domini, 1680, and in the two and thirtieth year of the reign of King Charles the Second”*

– Duke of York’s Grant for the Soil and Government of West New Jersey, 1680<sup>46</sup>

The Attestation Clause gives the date on which the Constitution was signed, and it does so in two forms, listing the year in the year of grace (or the “Year of our Lord”) as well as in the year “of the Independance of the United States of America.”<sup>47</sup> This dual dating strategy was nothing new at the time it was incorporated into the Constitution; providing parallel dates was an ancient dating practice with which many were already familiar in the late 1700s. As the late C. R. Cheney, a professor of medieval history at Cambridge, describes it:

From ancient up to modern times it has been a common practice to date official documents by the year of the rulers or magistrates from whom the documents emanated or within whose jurisdiction they were issued. Roman law demanded that certain classes of documents should bear the names of the consuls for the year; and, in the absence of exact information, dating by reference to past consuls was sometimes preferred . . . . In A.D. 537 Justinian provided that the years of the emperor’s reign should be added and thereafter the *post-consulatum* element, though it lingered on in various forms, ceased to be of practical importance. But the system which had been used by the consuls of the Roman people and the emperors was copied by popes, bishops, kings, dukes, and lesser men. . . . Sometimes the regnal year

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45. U.S. CONST. art. VII, cl. 2.

46. Duke of York’s Second Grant to William Penn, Gawn Lawry, Nicholas Lucas, John Eldridge, Edmund Warner, and Edward Byllynge, for the Soil and Government of West New Jersey (Aug. 6, 1680), reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2560, 2560 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

47. U.S. CONST. art. VII, cl. 2.



was used to the exclusion of the indiction or year of grace, sometimes it accompanied these elements.<sup>48</sup>

Cheney thus describes a longstanding practice of dating documents by reference to the year in which an overseeing sovereign had come to power, and he explains that this regnal year was, in many instances, accompanied by the year of grace. Notably, the regnal dating system was often used in English charters, as Cheney explains:

The regnal year is used in Anglo-Saxon royal charters early in the eighth century . . . . From 1189 onwards it has been the approved method of expressing the year-date in documents of the civil government in England. Moreover, English private charters, which until Edward I’s reign are usually undated, thereafter record the regnal year as a matter of course.<sup>49</sup>

An examination of the English commissions and charters for the Americas shows that this practice of regnal dating was alive and well in the seventeenth and eighteenth centuries and that it was common to give the regnal year alongside the year of grace.<sup>50</sup> This practice is particularly relevant because, as Donald Lutz has put it, “When Americans finally brought all the elements together in single documents in 1776, these constitutions derived their elements from . . . charters . . . .”<sup>51</sup>

Indeed, it would be surprising if the Founders did not turn to these documents. As Lutz points out, the Founders were trying to find ways to craft documents that would control “the placement of sovereignty, the definition of a regime, the distribution of power among offices and institutions, and some definition of limits on governmental power. During the colonial era, external documents—the charters, patents, and ordinances written in England for the

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48. HANDBOOK OF DATES FOR STUDENTS OF ENGLISH HISTORY 3 (C. R. Cheney ed., Cambridge Univ. Press 1995) (1945).

49. *Id.* at 12.

50. See, e.g., Commission to Sir Ferdinando Gorges as Governor of New England by Charles (July 23, 1637), available at [http://avalon.law.yale.edu/17th\\_century/charter\\_009.asp](http://avalon.law.yale.edu/17th_century/charter_009.asp); Grant of His Interest in New Hampshire by Sir Ferdinando Gorges to Captain John Mason (Sept. 17, 1635), available at [http://avalon.law.yale.edu/17th\\_century/charter\\_008.asp](http://avalon.law.yale.edu/17th_century/charter_008.asp); The Act of Surrender of the Great Charter of New England to His Majesty (June 7, 1635) [hereinafter Act of Surrender], reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 46, at 1860, 1861; Grant of the Province of New Hampshire to Mr. Mason, 22 April, 1635, by the Name of Masonia, reprinted in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 46, at 2441, 2443.

51. LUTZ, *supra* note 41, at 22.

colonists—dealt with those constitutional functions.”<sup>52</sup> Lutz thoroughly details how, as one would expect, the Founders did draw upon the rhetoric and content of preceding English charters. In fact, he points out, in Massachusetts, Connecticut, and Rhode Island, “each state’s colonial charter . . . served as the initial state constitution in 1776.”<sup>53</sup> Rather than seeing charters as outdated documents that needed to be wholly discarded, many members of the founding generation apparently saw them as models and templates upon which to build. It makes some sense, therefore, that they would conclude founding documents such as the Articles of Confederation and the Constitution with the dual dating system that they were used to seeing not only on a broad variety of legal documents, but specifically on the charters that often served as their templates.

The widespread acceptance of this dating practice in postrevolutionary America is particularly evinced by the variety of important American documents that had already incorporated it by the time the Articles of Confederation were drafted in 1778. The Georgia state constitution had employed the practice in 1777,<sup>54</sup> and at least one declaration by the Continental Congress had already utilized it as well.<sup>55</sup> A scholarly debate in the late 1800s over the possible existence of a Mecklenburg Declaration of Independence also catalogued the fact that this dating practice was well established in wills and deeds in 1777 and 1778, at least in North Carolina. As Alexander Graham and George Graham put it in 1895:

Some of these deeds are dated “in the reign of King George the III.” Patriots with strong local pride calculated “Our Independence” from the Mecklenburg Declaration, and others reckoned “American Independence” from July 4th, 1776. Deeds of the first sort are not to be found of a later date than 1777, but “Our Independence” and “American Independence” were both employed for computation . . . . Some of the deeds . . . read as follows:

“This indenture made this 13th day of February, 1779, and in the 4th year of our independence.” . . .

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52. *Id.* at 35.

53. *Id.* at 49.

54. The Georgia Constitution was dated “the fifth day of February, in the year of our Lord one thousand seven hundred and seventy-seven, and in the first year of the Independence of the United States of America.” GA. CONST. OF 1777, reprinted in 1 COLONIAL CHARTERS, *supra* note 28, at 377, 383.

55. 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 11, at 774 (“Done in Congress, at Philadelphia, this 11 day of August, in the year of our Lord 1778, and in the third year of the independence of America.”).

“This indenture made this 28th day of January, in the fifth year of our independence and the year of our Lord Christ 1780.” . . .

“This indenture made on the 19th day of May and in the year of our Lord 1783 and the eighth year of our independence.”<sup>56</sup>

While the actual existence of a Mecklenburg Declaration has been vigorously disputed,<sup>57</sup> the evidence mustered in the course of this debate reflects the ongoing practice of dual dating. Indeed, its use in North Carolina is confirmed by the credentials of appointment that the state’s delegates presented to the Continental Congress on June 2, 1777, which were dated “the 4th day of May, Anno Domini, 1777, and in the first year of the independence of this state.”<sup>58</sup> When Morris and his coauthors included this form of dating in the Articles of Confederation, therefore, they were utilizing a dating practice that had already taken firm root in various parts of the fledgling nation.

The Articles of Confederation further entrenched this dating practice. The Articles themselves were dated “the ninth Day of July in the Year of our Lord one Thousand seven Hundred and Seventy eight, and in the third year of the independence of America.”<sup>59</sup> Unlike the phrase “done in Convention,” which was not in the original draft of the attestation clause for the Articles, this parallel dating system was included in the draft submitted by Morris and his coauthors to the Continental Congress on June 26, 1778.<sup>60</sup> This only seems to enhance the likelihood that Morris was drawing on his experience with the Articles when he included a dual date in the Constitution.

When Morris did return to this dating device in September 1787, he did so against the backdrop of its continued use by the Congress in the years since he had drafted the clause for the Articles. Indeed, this dating practice continued to be employed by the Continental Congress in the late 1770s and early 1780s on declarations,<sup>61</sup> instructions to consuls,<sup>62</sup> and letters of credence.<sup>63</sup> To a

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56. GEORGE W. GRAHAM & ALEXANDER GRAHAM, WHY NORTH CAROLINIANS BELIEVE IN THE MECKLENBURG DECLARATION OF INDEPENDENCE OF MAY 20TH, 1775, at 21-22 (Charlotte, Queen City Printing & Paper Co., 2d ed. 1895) (footnote omitted) (citations omitted).

57. See MERRILL D. PETERSON, THE JEFFERSON IMAGE IN THE AMERICAN MIND 140-44 (1960) (explaining the history of this dispute before concluding that the historical evidence does not support the existence of a Mecklenburg Declaration).

58. 8 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 11, at 411.

59. ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 2.

60. 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 11, at 658.

61. See, e.g., 11 *id.* at 774.

62. See, e.g., 18 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 11, at 1136 (Gaillard Hunt ed., 1910).

Constitutional Convention comprised largely of former members of the Continental Congress, this parallel dating system in all likelihood would have recalled documents that many of the Convention's attendees had approved in the course of their prior lawmaking duties. The dating of the Constitution thus seems, once again, to suggest that the Attestation Clause was sending the Convention's attendees a more complex and ambivalent set of signals than simply a reminder or reiteration of the values found in the Declaration of Independence.

In fact, an awareness of the historical practice of parallel dating with regnal years complicates in several ways the basic idea that a date referencing "the Independence of the United States" is best understood as an attempt to link the Constitution to the Declaration of Independence. To those familiar with the Articles of Confederation, the dating method of the Attestation Clause equally would have suggested a connection to the governing document that the Constitution was replacing, echoing the Articles' language and structure and perhaps allaying fears that the new Constitution might be in violation of, rather than in the tradition of, the Articles. In this sense, emphasizing the connection to the Declaration while excluding mention of the precedent found in the Articles distorts by highlighting only the revolutionary aspects of the Attestation Clause.<sup>64</sup>

The broader tradition of regnal dating upon which the Attestation Clause drew offers the same lesson. Regardless of specific connections to the Articles, the Clause's use of regnal dating more generally undercuts the idea that giving the date in years since "the Independence of the United States of America" was a patriotic reminder of the nation's break with England. No doubt this language did in fact remind its readers that a far-off king no longer marked their time. Yet if the content of this dating system emphasized the nation's rupture with royal power, the form in which the date was given emphasized continuity, echoing not only the Articles but an ancient practice—and, closer to their own time, a British practice—of acknowledging the rule under which one lived. In a Constitution proposing a radical form of popular sovereignty, in

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63. See, e.g., 18 *id.* at 1188.

64. It could be argued, of course, that the Articles themselves had incorporated the Declaration of Independence and that the linkage of the Constitution to the Articles therefore produces no tension with the idea of a Constitution that incorporates the Declaration. As I explain, however, the attestation clause of the Articles of Confederation contains many of the same features found in the Attestation Clause of the Constitution—the very features that counsel against reading the Constitution as having incorporated the Declaration. This fact seems to counsel against the idea that the Articles incorporated the Declaration through their attestation clause, and I am not aware of any other arguments for such an incorporation.

other words, the regnal form of dating placed this novel sovereign within a traditional frame. It drew upon the legitimacy that readers were used to bestowing upon legal documents marked in regnal time. And it implicitly assured the reader that this new nation, even with its unique temporal marker of “Independance,” could be understood as analogous to nations grounded in more familiar forms of sovereign authority. At the most, this was a conventional way of being unconventional—an ambivalent assertion of continuity as well as of independence. Justice Thomas and others miss this more nuanced aspect of the Clause when they reduce it simply to a reminder of the Declaration.

While the emphasis that Justice Thomas and others have placed on the connection to the Declaration of Independence might be misleading, it is also understandable. The appropriation of an old form to new purposes often has unintended consequences, and the form of dual dating was no exception. The application of this dating practice in the American context destroyed a certain symmetry that dual dating had acquired under British practice. This symmetry can be observed particularly well in the 1635 Act of Surrender of the Great Charter of New England to His Majesty, which is dated “the seventh day of June in the eleventh year of the reign of *our Sovereign Lord* King Charles, and in the year of *our Lord God*, One thousand six hundred and thirty-five.”<sup>65</sup> Here, Christian theology conspired with monarchical theory to create symmetry in the text. A “Sovereign Lord” below was matched with a divine Lord above. This parallelism would be lost when regnal dating was transposed into a country that defined itself not by reference to a King’s reign, but in relation to an assertion of independence. The loss of this textual parallelism has combined with our contemporary unfamiliarity with regnal dating to make the Constitution’s dual dating look like a salient oddity—that is, like a formulation that calls attention to itself because of its unnaturalness. In the eighteenth century, by contrast, it likely would have harkened and alluded to a dating practice that was considered perfectly natural and common. If the dual date on the Constitution drew attention to itself in the 1700s, in other words, it would not have done so merely as a reminder of the nation’s newfound political independence. Rather, it also would have served to remind the reader of the nation’s lingering dependence on English forms.

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65. Act of Surrender, *supra* note 50, at 1861 (emphasis added).

### III. BEARING WITNESS

*“In witness whereof We have hereunto subscribed our Names”*  
– U.S. Constitution, Art. VII<sup>66</sup>

*“IN WITNESS whereof we have hereunto subscribed our names”*  
– Mayflower Compact, 1620<sup>67</sup>

*“In Witness whereof, We have caused these Our Letters to be made Patents.”*  
– Charter of Connecticut, 1662<sup>68</sup>

Under English (and early American) practice, a variety of binding documents were signed “In witness whereof.” In each instance, the signatories who were signing as witnesses were the individuals invested with the legal power to conduct the transactions described in those documents. Covenants, compacts, and charters – three types of eighteenth-century documents that the scholar Donald Lutz has identified as crucial precedents to the Constitution<sup>69</sup> – all typically contained acts of witnessing that were denoted by the documents being signed “In witness whereof.” Treaties were also typically signed “In witness whereof,” a fact that likely was known to many of the delegates to the Constitutional Convention, given the number of delegates who had served in the Continental Congress in the preceding years.<sup>70</sup>

At the same time, however, there were important differences in the ways that covenants and compacts employed the “witnessing” phrase, on the one hand, and the ways that treaties and charters employed them, on the other hand. The covenants and compacts of early colonial America were documents that served a specific function: their purpose, in large part, was to garner (and to document) the assent of a group of individuals who were uniting to form a new political community. Covenants and compacts served primarily to forge a group of individuals into a “civil Body Politick,” in the words of the Mayflower Compact.<sup>71</sup> Each covenant or compact was a ceremony whereby individuals combined themselves into a new entity and submitted themselves to the rules

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66. U.S. CONST. art. VII, cl. 2.

67. Agreement Between the Settlers at New Plymouth (1620) [hereinafter Mayflower Compact], reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 46, at 1841, 1841.

68. Charter of Connecticut (1662), reprinted in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 46, at 529, 536.

69. LUTZ, *supra* note 41.

70. See text accompanying note 41.

71. Mayflower Compact, *supra* note 67, at 1841.

of that entity. The Mayflower Compact therefore adopted the voice of a collective community, proclaiming, “We . . . Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid . . . .”<sup>72</sup>

Covenants and compacts such as the Mayflower Compact thus spoke on behalf of a collection of individuals who were ostensibly uniting in their mutual agreement to form a single political community. This meant that covenants and compacts dealt with matters that required the separate assent of each member of the community. Because documents were commonly witnessed by all the legal actors necessary to the document’s execution, covenants and compacts would require each of these persons to sign the document and to attest to his or her (though rarely “her”) individual consent. They would require, in other words, far more acts (and signatures) witnessing the document’s execution than were needed simply to attest to the validity of the document.

Consequently, we see an abundance of witness signatures when we look back on the compacts and charters of colonial America. Since the forging of colonial communities required the individual assent of all the members of those communities, early American covenants and compacts often were witnessed by large numbers of people. A good example of this is seen in “The Combination of the Inhabitants upon the Piscataqua River for Government,” a 1641 covenant that proclaims that the “Inhabitants upon the River of Piscataqua have voluntar[il]y agreed to combine ourselves into a body Politick” and that concludes by declaring, “In witness whereof Wee have hereunto set our hands . . . .”<sup>73</sup> This statement is followed by three signatures and the phrase “with 38 more,”<sup>74</sup> a large number that provides evidence that the inhabitants who agreed to combine into a “body Politick” and the “Wee” who “witness[ed]” this collective act were one and the same group of individuals.

This practice of witnessing, as it was used in covenants and compacts, may help explain the rhetoric of another portion of the Constitution: its great Preamble. Exposure to covenants and compacts would have meant that the Founders were familiar with documents that opened, as did the Mayflower Compact, in the voice of a “We” who spoke on behalf of the entire community that was being combined into a single political unit. In this sense, early

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72. *Id.*

73. The Combination of the Inhabitants upon the Piscataqua River for Government (1641), reprinted in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 46, at 2445, 2445.

74. *Id.*

covenants and compacts may have provided part of the backdrop and inspiration for the Preamble's bold willingness to speak on behalf of "We the People."

The act of witness found in the Attestation Clause does not resemble the practice of witnessing found in the nation's early compacts and covenants, however, as much as it resembles the practice of witnessing seen in the various treaties and charters that England issued throughout the fifteenth and sixteenth centuries. Treaties and charters, as documents executed by a king or queen (or by those specifically given power by the king or queen), often were signed by a "we" much smaller than the community that was bound by the document. If there was a power structure in place that gave one person formal authority to act unilaterally on a matter (such as the authority of a king or queen to execute a charter), the document might only bear an attesting signature plus the signature or seal of the person with formal authority over the matter. A good example of this is found in the Charter of Carolina from March 24, 1663. Done "Per Ipsum Regem,"<sup>75</sup> the power to issue this charter rested entirely with the King. Consequently, even though the Charter of Carolina would help govern a large community of individuals, the attestation on the charter begins with only one witness. It declares, "Witness the King, at Westminster, the four and twentieth day of March, in the fifteenth year of our reign . . . ."<sup>76</sup>

The conventions of treaties and charters therefore would have made it seem natural and commonplace for the Constitution—a document that its authors hoped would govern and bind a national populace—to end with an act of witnessing accomplished only by the thirty-nine individuals who "subscribed [their] Names" to the Constitution.<sup>77</sup> By signing the Constitution "In witness whereof," the drafters of the Attestation Clause drew upon a centuries-old tradition whereby a small number of politically significant actors would witness the creation of a new political arrangement or alignment.

Unlike the kings and queens who witnessed English treaties and charters, however, the signatories at Philadelphia were not witnessing the Constitution in pursuance of any actual authority that had vested in them. They had no power to bind the populace to whom they spoke and for whom they claimed to speak. After all, the Constitution was not, at the time the Attestation Clause was attached, an institutionally recognized or validated exercise of authority. It

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75. Charter of Carolina (1663), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 46, at 2743, 2753.

76. *Id.*

77. U.S. CONST. art. VII, cl. 2.



was a mere proposal, and a novel one at that. It was proposing a bold new definition of sovereign authority, not simply drawing upon a preexisting wellspring of power, so there was no need for this legal boilerplate. Yet this legalistic phrase was affixed to the Constitution. Why would this be?

Part of the answer grows out of the account of the Constitutional Convention found in Madison’s notes, where he points to the strategy that helped motivate the inclusion of an attestation clause in the Constitution in the first place. According to the notes, the Attestation Clause was drafted specifically so as to maximize the number of signatures that could be garnered from among the Convention’s delegates.<sup>78</sup> It therefore would make sense to have the Convention’s delegates sign “In witness” of the act of completing the Constitution, for this would obscure the fact that not all signatories wanted to vouch for the Constitution’s contents. This portion of the Attestation Clause appears to have been written to ensure that, technically, the signatories were merely witnessing the fact of the Constitution’s composition rather than displaying their individual support for the document.<sup>79</sup>

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78. 2 FARRAND’S RECORDS, *supra* note 35, at 643.

79. Michael Coenen has provided a thorough and lucid account of this narrative. Coenen, *supra* note 4. When considering the Constitution’s signatures in relation to the signatures on documents such as the Articles of Confederation or extant state constitutions, Coenen suggests that the relevant question is whether the Founders “wished to follow in the tradition of these documents.” *Id.* at 982. Coenen defines the “tradition” of such documents as including elements such as the timing and process of such signings, leading him to see a contrast between the Constitution and the Articles of Confederation. As Coenen puts it:

In short, had the Constitution’s signers—many of whom had been involved in the creation of the Articles and/or their respective state constitutions—wished to follow in the tradition of these documents, they would not have signed their names to the document on September 17, 1787. Rather, they would have waited for the ratification process, during which representatives of the ratifying states could have affixed signatures connoting legal validity, and perhaps also pledges to abide by the Constitution. But the delegates at Philadelphia did not take this route, which indicates that their decision to sign was driven by something other than tradition-based impulses.

*Id.* (footnote omitted).

Coenen confines his analysis to the signatures themselves, so his analysis never needs to grapple with the fact that the Constitution’s signatures, while affixed via the traditional process by which signatures were affixed to the Articles, were nonetheless presented to readers in nearly identical terms as were the Articles’ signatures. This raises a question that is beyond the scope of Coenen’s analysis: why would the Founders mimic the language of the Articles of Confederation even when their actions did not parallel those undertaken with regard to the Articles? The most plausible answer, I suggest, is that regardless of the manner in which the Founders signed the Constitution, their mimicking of the language of the Articles would create textual parallels that would make a strange document seem more familiar and that would make an extralegal Convention’s proposal seem more legitimate. In

At the same time, Gouverneur Morris did choose to accomplish his assigned task through the use of legal boilerplate that echoed a variety of other legal documents and that thereby suggested that the Constitution already carried some legal weight. The Constitution still had to be approved both by the Convention and by the larger public before it could become law, after all. By conjuring and alluding to familiar forms of exercising sovereign authority (namely, treaties and charters), the act of witnessing implicitly assured its various audiences (in the Convention, in the broader ratification debates, and in the global community) that this Constitution fit within familiar notions of sovereignty and carried the authority associated with those notions. In part because it was signed “In witness whereof,” the Constitution looked analogous to prior exercises of sovereign power. It sounded like law. And this may well have helped it become law.

In this sense, the signatures on the Constitution may have struck contemporary readers as being more closely linked to the signatures on treaties and charters than to the signatures on the Declaration. In a fascinating note in this *Journal*, Michael Coenen has suggested that the signatures on the Constitution were meant to provide “visual cues to suggest continuity with the Revolutionary cause.”<sup>80</sup> Yet in the Attestation Clause, the use of the phrase “In witness whereof” reveals an extralegal body using legal rhetoric to position its signatories as though they were acting on behalf of extant legal authority. Such an approach most likely would have reminded readers of those who actually *did* sign similar documents in pursuance of their legal authority. The Declaration was not such a document; in fact, it was in some ways the opposite of such a document. By signing the Declaration, after all, the Founders clearly were positioning themselves as proud outlaws. The composition of the Declaration amounted to an act of treason that was punishable by death. The signatures on the Declaration constituted a refusal to hide behind a veil of authorial anonymity, bringing to light the identities of a band of revolutionaries unafraid to stand behind their treasonous act.<sup>81</sup> The Declaration was documentation of an illegal action, in other words, and its signatures correspondingly positioned its signatories as bravely defiant of the law.

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this sense, when one includes the Attestation Clause within the scope of one’s analysis of the Constitution’s signatures, the similarities to the Articles are what become most salient and most interesting.

80. Coenen, *supra* note 4, at 999-1000.

81. For an excellent explication of this aspect of the Declaration’s signatures, an explication to which my own analysis is indebted, see AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (forthcoming 2012) (manuscript at 310-11) (on file with author).

By contrast, the rhetoric of witnessing in the Attestation Clause—a rhetoric absent from the Declaration—mimicked the signatures of those whose names carried legal authority. The Constitution emerging from the Convention was a proposal drafted by those invested with no legal authority of enactment, of course, but its signatories chose to witness its composition as though both the act of its completion and their personal acts of witnessing carried some significance. The Attestation Clause thus placed the Constitution’s signatories within a very different frame than did the Declaration, cloaking its signatories in the rhetoric of legality rather than branding them as outlaws. The result was likely that the act of witnessing found in the Attestation Clause echoed documents beyond the Declaration alone, reminding readers of the attestations found on treaties and charters, and perhaps bestowing the new Constitution with the appearance of authority and legality that had cloaked those diplomatic documents.

#### IV. IMPLICATIONS

With each phrase of the Attestation Clause, therefore, the Clause’s authors subtly gestured toward a long lineage of legal documents—a lineage that reached from the Roman Republic all the way to the Continental Congress. For audiences familiar with such legal documents, or at least familiar with the eighteenth-century British and American iterations of them, this Attestation Clause would have provided a familiar conclusion to an otherwise startlingly novel document. With each phrase of the Attestation Clause, I have argued, we can see the Clause’s drafters and ratifiers sending subtle messages of continuity and reassurance to a variety of different audiences.

In advancing this argument, I do not pretend to be able to peer into the minds of Gouverneur Morris and his fellow drafters in order to see whether these messages were clearly and consciously intended, or whether these messages merely had an intuitive appeal that was sufficient to warrant their inclusion. Yet I do believe that the textual and historical materials mustered here are sufficient to show that, at some level, Morris and the other drafters intended the signaling functions that I have identified. In the absence of definitive historical or biographical evidence to confirm this theory, however, it is subject to the possible criticism that the Founders intended nothing at all by the inclusion of these phrases in the Constitution. Is it possible that these phrases were seen by the Founders to be mere hollow boilerplate? Is it possible they intended nothing at all by the inclusion of these phrases?

This certainly is possible, and one must be careful not to overstate the level of deliberation afforded to this Clause at the Convention. For several reasons, however, I do not think that the boilerplate explanation of the Clause is the

most likely explanation, and I do believe that we can perceive some level of intent in the Founders' addition of this Clause to the Constitution. First and foremost is a reason already mentioned: these phrases were affixed pro forma to specific types of legal documents because they served obvious, needed purposes in those documents. With the Constitution, however, many of these purposes vanished. To say that these phrases were affixed to the Constitution as boilerplate is to say that the Founders failed to perceive this mismatch; either the Founders did not understand the reasons why these phrases were affixed to other documents, or they did not appreciate the novel characteristics of their own Constitution. While both of these are possible, I suspect it is more likely that the Founders felt such phrases served worthwhile rhetorical purposes that warranted their inclusion independent of any legalistic functions.

The idea that these phrases were not seen as mere boilerplate is further supported by the fact that attestation clauses were not affixed to constitutions pro forma in early America. Five of the sixteen state constitutions written between 1776 and 1787 had no attestation clause at all.<sup>82</sup> Of the eleven that did contain attestation language, seven had verbiage similar to that found in the Attestation Clause,<sup>83</sup> while four others had significantly shorter and less thorough attestation clauses.<sup>84</sup> Given this variation in state practice, it seems

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82. CONN. CONST. of 1776, *reprinted in* 1 COLONIAL CHARTERS, *supra* note 28, at 257; DEL. CONST. of 1776, *reprinted in* 1 COLONIAL CHARTERS, *supra* note 28, at 273; MASS. CONST. of 1780, *reprinted in* 1 COLONIAL CHARTERS, *supra* note 28, at 956; VT. CONST. of 1777, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1857; VA. CONST. of 1776, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1910. For purposes of this analysis, I have labeled as having “no attestation clause at all” any constitution lacking a clause that, at minimum, details the location and date of the constitution’s execution in a grammatical phrase.
83. GA. CONST. of 1777, *reprinted in* 1 COLONIAL CHARTERS, *supra* note 28, at 377, 383; MD. CONST. of 1776, *reprinted in* 1 COLONIAL CHARTERS, *supra* note 28, at 817, 820; N.H. CONST. of 1784, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1280, 1293; N.J. CONST. of 1776, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1310, 1314; N.Y. CONST. of 1777, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1328, 1328; N.C. CONST. of 1776, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1409, 1414; PA. CONST. of 1776, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1540, 1548.
84. N.H. CONST. of 1776, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1279, 1279; S.C. CONST. of 1778, *reprinted in* COLONIAL CHARTERS, *supra* note 28, at 1620, 1627; S.C. CONST. of 1776, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1615, 1620; VT. CONST. of 1786, *reprinted in* 2 COLONIAL CHARTERS, *supra* note 28, at 1866, 1875. I have labeled as “significantly shorter and less thorough” those attestation clauses that consist only of the location of attestation and of a date given in numerical form. I have labeled as clauses that “had verbiage similar to that found in the Attestation Clause” those that add some language or detail beyond the location and numerical date. This distinction, while admittedly somewhat arbitrary, aims to capture the fact that the former approach to attestation is so

insufficient to say that the Attestation Clause eluded scrutiny simply because it was pro forma.

The idea that the Attestation Clause was not affixed pro forma is further supported by the process by which it was attached to the Constitution—a process that notably differed from that seen in the drafting of English charters, which actually did have attestation clauses attached pro forma. When an English charter was drafted, the attestation (or “testing”) clause was added at a different time and was probably drafted by a different party than was the rest of the charter. According to one authority:

The business of preparing the Bill, called the “King’s Bill,” for his Majesty’s signature, [was] conducted in a permanent office called the “Patent Bill Office,” or, more commonly, the “Patent Office”; of which the chief officer, styled “Clerk of the Patents to the Attorney and Solicitor General,” [was] appointed by those officials. The King’s Bill contain[ed] the whole form and settled draft of the King’s charter, grant, or patent, in the words in which it [was] to pass the Great Seal, with the exceptions only of his Majesty’s style at the beginning and the testing clause at the end . . . .<sup>85</sup>

This division in the drafting process, whereby testing clauses on charters were attached in a process that was distinct from the composition of the charter’s substance, counsels against reading the testing clauses of such charters as organically integrated into the text of the charter. By contrast, the language of the Constitution’s Attestation Clause was drafted, proposed, and approved at the Constitutional Convention in a manner that did not distinguish it from other clauses in the Constitution. In this sense, it was not attached via a routine process that occurred out of the sight of the drafters. The Constitution was a unique document drafted and approved by an ad hoc convention that did not have established practices and divisions of labor upon which to fall back in the same way that the King did with his Patent Office. Consequently, the drafting process at the Constitutional Convention encourages us to read the

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terse that it seems misleading to consider its use as providing precedent that might have guided the drafting of the relatively elaborate Attestation Clause found in the Constitution.

85. CHARLES DEANE, *THE FORMS IN ISSUING LETTERS-PATENT BY THE CROWN OF ENGLAND: WITH SOME REMARKS ON THE MASSACHUSETTS CHARTER OF THE 4TH OF MARCH, 1628-9*, at 6 (Cambridge, Mass., John Wilson & Son 1870). The phrase “testing clause” generally was used in Scottish law, while “attestation clause” was used to refer to the same clause in English law. See BRYAN A. GARNER, *GARNER’S DICTIONARY OF LEGAL USAGE* 93 (3d ed. 2011). In the quoted passage, Deane ignores this distinction when he speaks of the “King’s Bill” as having contained a “testing clause.”

Constitution holistically, rather than by writing any of its language off as boilerplate.

Even if one accepts the idea that the Attestation Clause was more than mere boilerplate, however, it still is not immediately obvious that the references and meanings embedded in this Clause are relevant to the work of modern-day lawyers and scholars. Why should audiences today care about the ways these legal formalities would have sounded two centuries ago? In what ways does a historically informed view of the Attestation Clause offer lessons that might contribute to the scholarly conversations of today?

This view of the Attestation Clause is relevant in part because it challenges the idea that the Clause's reference to the Declaration of Independence constitutes an attempt to import the spirit and values of the Declaration into the Constitution. As such, it presents some difficulties for lawyers and scholars who wish to use this textual connection to the Declaration as a means of infusing the Constitution with any values or meanings perceived to exist in the Declaration of Independence.

In the past several decades, this importation-by-reference argument has appeared most consistently amongst those who have argued that the Constitution was designed to create a theistic, Christian nation.<sup>86</sup> Those looking to advocate a theistic vision of America inevitably must confront an interpretive difficulty: the Constitution makes little direct reference to God, a fact that sets it apart from many contemporaneous founding documents. Daniel Dreisbach explained this interpretive problem in a 1996 article in the *Baylor Law Review*, writing:

Given Christianity's pervasive cultural and legal influence, which was acknowledged by all in society, the architects of civil commonwealths both before and after the Constitutional Convention deemed it appropriate, indeed necessary, to recognize the God of the Bible in their public documents. However, the delegates who met in Philadelphia and crafted a new national charter, for whatever reasons, thought differently. . . . [W]hy did the constitutional framers break with this pious tradition?<sup>87</sup>

One response of scholars and lawyers who support a theistic interpretation of the Constitution has been to argue that the Framers did not, in fact, break with

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86. See, e.g., sources cited *supra* note 3.

87. Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 964 (1996).

the pious tradition at all. Rather, some commentators argue, the Framers wrote a Declaration of Independence that explicitly speaks of “Nature’s God” and of a “Creator [who endowed men] with certain unalienable Rights,”<sup>88</sup> and then they wrote a Constitution that incorporated the Declaration through the reference in the Attestation Clause. So long as the Declaration and the Constitution are viewed in tandem, these commentators suggest, the documents present a Founding-era vision of America as a theistic nation. In the Attestation Clause’s reference to the Declaration, these commentators see an argument in support of such a tandem reading—which is to say, they see textual evidence of an authorial intent to import the Creator of the Declaration into the fabric of the Constitution.<sup>89</sup>

Justice Thomas advocated a similar—though certainly not identical—argument in two separate pieces published shortly before his elevation to the Supreme Court.<sup>90</sup> Justice Thomas emphasized the Declaration as a document

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88. THE DECLARATION OF INDEPENDENCE paras. 1-2 (U.S. 1776).

89. As David Barton put it in a 2001 article in the *Regent University Law Review*:

The Framers . . . deliberately chose to incorporate into [our nation’s founding] documents . . . the belief in theistic origins over that of non-theistic origins.

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. . . While [a contrary] conclusion is illogical, it is nevertheless defended by asserting that the belief in a creator is incorporated into the Declaration of Independence rather than the Constitution and that the Declaration of Independence is a separate document from, and is not to affect the interpretation of, the Constitution.

This argument is of recent origin, however, because well into the twentieth century, the Declaration of Independence and the Constitution were viewed as interdependent rather than as independent documents. In fact, the United States Supreme Court declared, “[The Constitution] is but the body and the letter of which the [Declaration of Independence] is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.”

No other conclusion logically can be reached since the Constitution directly attaches itself to the Declaration of Independence in Article VII . . .

Barton, *supra* note 3, at 312 (third and fourth alterations in original) (footnote omitted) (quoting *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 160 (1897)). For another version of this argument, see Jaffa, *supra* note 3, at 728-29.

90. Thomas, *supra* note 6, at 65 (“One should never lose sight of the fact that the last words of the original Constitution as written refer to the Declaration of Independence, written just eleven years earlier.”); Clarence Thomas, *Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 *HOW. L.J.* 983, 986-87 (1987) (“Even a brief examination of the founding . . . provides ample evidence for [such an] interpretation. . . . First, the Constitution makes explicit reference to the Declaration of Independence in Article VII, stating that the Constitution is presented to the states for

that grounds the nation's political system in a "higher law background" that can serve as a guide in the face of interpretive ambiguities.<sup>91</sup> As one commentator has put it, it is Justice Thomas's view "that both a theory of justice and the best defense of limited government stem from the natural law principles embodied in the Declaration of Independence,"<sup>92</sup> a document that infuses our Constitution with the "moral underpinnings of classical liberalism."<sup>93</sup> For Justice Thomas, therefore, the Attestation Clause's allusion to the Declaration is a conscious attempt by the Founders to establish a connection between these two interdependent documents.

Once the Attestation Clause is seen in its historical context, however, these arguments become less compelling. When viewed in light of the diplomatic and legal practices that shaped the rhetoric of the Attestation Clause, that Clause is revealed to be one that alludes to—and draws upon—a great variety of legal and political documents. In so doing, the Clause acquires its own distinctive message and spirit. To some degree, the Attestation Clause is revealed to be a subtle advocate on behalf of continuity and legality, setting it in partial contrast to the Declaration's bold announcement of rupture with England.<sup>94</sup> This highlights an important fact about the Attestation Clause:

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ratification by the Convention 'the Seventeenth Day of September in the Year of our Lord one-thousand seven-hundred and eighty-seven of the Independence of the United States of America the Twelfth . . .").

91. Thomas, *supra* note 6, at 63. Justice Thomas specifically explains that this "higher law background" can aid interpretation by "giving body to open-ended constitutional provisions." *Id.* As Scott Gerber has noted, however, Justice Thomas distanced himself from these views in his confirmation hearings. See SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 207 n.15 (1995).
92. Adam J. Hunt, *The Liberal Justice Thomas: An Analysis of Justice Thomas's Articulation and Application of Classical Liberalism*, 4 N.Y.U. J.L. & LIBERTY 557, 558 (2009).
93. *Id.* at 570.
94. Throughout this Note, I have contrasted the Attestation Clause's signals of continuity with the Declaration's emphasis on political rupture and upheaval. It could be argued, however, that I overstate this contrast insofar as I exclusively emphasize the Declaration's radical traits. As Jedediah Purdy has put it:

[The Declaration also contained] ideas that were deeply conservative. The bill of particulars of the Declaration of Independence, the list of the king's abuses, is as traditional as the opening passages are radical. It draws insistently on precedent from seventeenth-century English struggles between Parliament and the Crown. Here, the Americans tied their vision of liberty to the personal rights and forms of government that they inherited from earlier generations of Englishmen. Indeed, even the colonists' decision to ascribe their list of abuses to the king was willful traditionalism: by the 1770s, most interference with colonial privileges came from acts of Parliament, but the familiar language of constitutional complaint asserted



through its many connections to historical texts and practices, the Clause acquires a meaning that is more complex than any one of those particular textual connections. When arguments focus exclusively on one of those connections, they offer a vision of the Clause that, while not inaccurate, is incomplete.

It should be noted that both the theistic argument and the higher-law argument have been leveraged in support of views aligned with right-wing politics in contemporary America, a fact that may seem to give the present analysis of the Attestation Clause a political valence. Yet the lesson of the Attestation Clause would apply regardless of political ideology; the critiques espoused here would apply no less to lawyers or scholars who sought to use the Attestation Clause to bring a liberal vision of the Declaration into the Constitution. Regardless of the ideology one perceives in the Declaration, in other words, the textual connection of the Attestation Clause ought not to be made to carry the burden of importing that ideology into the Constitution, for the textual evidence suggests that it was not designed simply to carry out this task. Rather, it appears that the Clause was designed to carry its own message—a message of reassurance, of continuity in a time of newfound independence.

Of course, this does not mean that there is no place in the constitutional canon for the Declaration of Independence. There are a variety of reasons why one might think that the words of the Declaration are relevant to the task of constitutional interpretation, and the Attestation Clause might have little to do with many of these arguments. There is evidence that James Madison himself thought the Declaration to be sufficiently relevant to the structure and principles of American government to warrant its inclusion in his proposed

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the rights of Englishmen against the prerogatives of the king, and the colonists hewed to the custom.

Even when the Americans voiced their “wild” and “obscure” ideas of liberty, then, they were not tradition-shattering fanatics. Instead, they were part of English traditions of personal and political freedom, which had grown more intense on the new continent. The Americans were creating a “sensation of freedom,” a vision of personal liberty and political legitimacy, out of inherited elements and new experience.

JEDEDIAH PURDY, *A TOLERABLE ANARCHY: REBELS, REACTIONARIES, AND THE MAKING OF AMERICAN FREEDOM* 11-12 (2009). Even when one takes account of this important corrective offered by Purdy, however, I believe that differences in emphasis stand out between the Declaration and the Attestation Clause that make the contrast between these two meaningful and significant.

curriculum for law students at the University of Virginia.<sup>95</sup> Many today might draw a similar conclusion, and their reasons for so doing often will have little to do with the Attestation Clause.

A good example of a scholar asserting alternative grounds for such a connection is found in Scott Douglas Gerber's 1995 book, *To Secure These Rights*. Like Justice Thomas, Gerber argues that "the Constitution must be interpreted in context. And . . . that context is the natural-rights political philosophy of the American Revolution."<sup>96</sup> Unlike Justice Thomas, however, Gerber does not invoke the Attestation Clause in order to argue that his theory has specific textual support in the Constitution. Rather, Gerber attempts only to use secondary historical documents to show that the Founders remained committed to the natural-rights principles of the Declaration through 1787, as well as to show that the Founders specifically wrote the Constitution in order to implement these natural-rights principles. For Gerber, the Declaration is helpful in that it provides a clear summary of "the Founders' background attitudes on the purpose of government,"<sup>97</sup> and this summary is important because "the particular provisions of the Constitution were written with the Founders' background attitudes in mind."<sup>98</sup>

Gerber's argument thus asserts a connection between the Declaration and the Constitution that in no way relies upon the Attestation Clause. As such, any study of the Attestation Clause has little to say to Gerber's analysis. Yet Gerber's study is illuminative here, if only because it reveals the difficult obstacles that face anyone advocating on behalf of the Declaration as a tool of constitutional interpretation once the textual argument of the Attestation Clause is removed. In the absence of this textual support, Gerber shows, the argument becomes much more complex—it forces one to delve into difficult questions of authorial intent and "background attitudes," and it requires one to show that secondary historical materials reveal these intentions and attitudes with sufficient clarity to guide constitutional interpretation. Gerber's work received some harsh criticism for its inadequacy on these grounds<sup>99</sup>—and, in

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95. Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), in 9 THE WRITINGS OF JAMES MADISON 218, 218-19 (Gaillard Hunt ed., 1910). For a discussion of Madison's proposed curriculum, see Dreisbach, *supra* note 87, at 969 n.193.

96. GERBER, *supra* note 91, at xiv.

97. *Id.* at 6.

98. *Id.* at 6-7.

99. As one book review rather scathingly put it, "Gerber's argument is crippled by the inadequacy of his historical scholarship and by his sometimes unrealistic view of the American political system today." Wendy Ann Semel, Book Note, *Defender of the Natural Rights Faith*, 105 YALE L.J. 1427, 1428 (1996).

the process, it highlighted the fact that, in the absence of easy arguments about the Attestation Clause, proving the legal connection between the Declaration and the Constitution can be a daunting task.

An awareness of the distinctive spirit of the Attestation Clause does not, in other words, definitively explain the relationship between the Declaration and the Constitution. Rather, it highlights the fact that the relationship between these two documents is more complex and fraught than many have made it out to be. In illustrating this point, the foregoing study of the Attestation Clause also highlights a broader interpretive point that has significance beyond any specific debates about the relationship of the Declaration to the Constitution. The broader point is this: when readers interpret a text, they often assimilate impressive amounts of information in order to make meaning out of that text. This information is not limited to the plain, denotative meanings of the words on the page. It includes everything from the resonances a term or phrase has with past usages, to the form and format in which those terms and phrases are set. Such information often provides the reader with valuable interpretive cues. Yet cues such as these are often the first aspects of a text to be left behind by the passage of time. Particularly when dealing with a document as old as the Constitution, there is a constant risk that these aspects will have receded into history. The plain meaning of a document from the eighteenth century will rarely be plain today, and a healthy dose of historical contextualization often is needed to understand even the seemingly most straightforward and *pro forma* aspects of the Constitution.

As I have attempted to show through the example of the Attestation Clause, an appreciation of the subtle interpretive cues embedded in the Constitution often can modify or enrich the seemingly obvious meaning of a constitutional clause—and can sometimes undermine such a meaning. On a theoretical level, the point is that nearly every word or phrase has a good deal of history lurking behind it—and this is true even of text as seemingly dry as the Attestation Clause. Particularly when dealing with a document as formally innovative as the American Constitution, interpreters ignore this historical backdrop at their peril—and, in the case of the Attestation Clause, to the legal community’s detriment.

## **CONCLUSION**

As with many clauses of the Constitution, the Attestation Clause was to some degree infused with the spirit and intent of a bold document committed to the radical ideals of independence and popular sovereignty. However, historical distance from the Founding has made us lose sight of the fact that the Attestation Clause ultimately placed this radical document within a

surprisingly traditional frame. In the eighteenth century, the Attestation Clause would not have looked like a clause with a lone textual reference pointing toward the Declaration of Independence. It would have looked alive with the forms and practices of English and European diplomacy, as well as with the emerging diplomatic practices of the Continental Congress. In this sense, the fact that the constitutional text of the Attestation Clause suggests continuity rather than rupture with the Articles of Confederation, as well as compatibility with longstanding English diplomatic practices, provides an important corrective to those who have focused exclusively upon the Attestation Clause as a vehicle for importing the “spirit of the Declaration of Independence.” It reminds us that the Founders were drawing on a variety of historical documents and practices in order to send the newborn nation a complex set of signals about the place of this Constitution—and, indeed, about the place of this nation—in the world that preceded it. A reminder of the Declaration of Independence, and of the national values embodied in that founding document, was undoubtedly one part of this set of signals. Yet to read the Attestation Clause as nothing more than a reference to the “spirit of the Declaration of Independence” is to distort a Clause that appears to have had its own distinct message, a message assuring a variety of audiences that the new Constitution represented continuity and cooperation as well as revolution and rebellion.