

# Benjamin Franklin, Prayer, and the Constitutional Convention: History as Narrative

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## I. Introduction

This is an article about history and false history and how both shape our laws and our cultural traditions. The article illustrates its point by focusing on a single event at the Constitutional Convention of 1787: a failed proposal by Benjamin Franklin that the Convention hire a chaplain and begin each day with a prayer.

The story of Franklin's proposal lives on in popular and political history. In a 1984 radio address to the nation, President Ronald Reagan called for a constitutional amendment to permit voluntary vocal prayer in public schools. In the address, Reagan invoked Benjamin Franklin's proposal for prayer at the Constitutional Convention:

When the Constitution was being debated at the Constitutional Convention, Benjamin Franklin rose to say: "The longer I live, the more convincing proofs I see that God governs in the affairs of men. Without His concurring aid, we shall succeed in this political building no better than the builders of Babel." He asked: "Have we now forgotten this powerful Friend? Or do we imagine we no longer need His assistance?" Franklin then asked the Convention to begin its daily deliberations by asking for the assistance of Almighty God.<sup>1</sup>

In a later interview, Reagan made clear his understanding of how the Convention responded to Franklin's appeal: "And the funny thing is, it was

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<sup>1</sup> Ronald Reagan, *Radio Address to the Nation on Prayer in Schools*, 1984 Pub. Papers 261, 262 (available at <http://www.reagan.utexas.edu/archives/speeches/1984/22584a.htm>).

Benjamin Franklin that uttered the statement in the Constitutional Convention that finally got them to open the meetings with prayer.”<sup>2</sup> Presumably Reagan found it intriguing that the call for prayer came from a noted deist.<sup>3</sup>

In a 2009 speech on the floor of the House of Representatives, Representative Louie Gohmert also told the story of Franklin’s speech. According to Gohmert, “His motion was seconded, and then Ben Franklin’s motion was adopted unanimously. And from that day to this day, we do not begin Congress in this body without a prayer to begin.”<sup>4</sup>

In a series of e-books and videos that are widely used in schools and in homeschooling, Bryan Hardesty presents this account:

With the Constitutional Convention at a stalemate, Franklin called the assembly to daily Christian prayer, requesting God’s guidance in their deliberations.

With each session beginning in prayer, a spirit of unity and cooperation emerged, and in July of 1787, the delegates arrived at the “Great Compromise,” also known as the Connecticut Compromise. It was decided that the legislative branch would contain two distinctive houses. First was the House of Representatives, providing representation based on population. Second was the Senate, allocating two representatives from each state.<sup>5</sup>

The narratives of President Reagan, Representative Gohmert, and Mr. Hardesty are correct in stating that Franklin proposed that the Convention hire a chaplain to begin each daily session with a prayer. However, they are incorrect in asserting that the Convention members accepted and implemented Franklin’s proposal. In fact, enthusiasm for Franklin’s proposal was

2 Ronald Regan, *Interview with Eleanor Clift, Jack Nelson, and Joel Havemann of the Los Angeles Times*, 1986 Pub. Papers 825, 830 (available at <http://www.reagan.utexas.edu/archives/speeches/1986/62386e.htm>).

3 Franklin’s religious views changed during the course of his life. In 1790, three years after the Convention and shortly before his death, Franklin delineated his credo for Ezra Stiles, the president of Yale College. He stated his belief in God and in the afterlife, his endorsement of Jesus’ system of morals and religion, but his doubts about Jesus’ divinity. See Ltr. from Benjamin Franklin to Ezra Stiles (March 9, 1790) (available at <http://www.franklinpapers.org/franklin/framedVolumes.jsp>). At the Convention, contrary to standard deist belief, he observed, “I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God governs in the affairs of men.” *The Records of the Federal Convention of 1787* vol. 1, 451 (Max Farrand ed., 1911) [hereinafter Farrand] (Madison’s notes). (In his manuscript, Franklin twice underscored God. See *id.* at n. 14.). For an analysis of Franklin’s religious beliefs, see Kerry Walters, *Franklin and the Question of Religion*, in *The Cambridge Companion to Benjamin Franklin* 91, 102 (Carla Mulford ed., 2008) (arguing that Franklin’s religious thinking was complex, because he was “trying to birth a religious perspective that would satisfy his heart as well as his head”).

4 Louie Gohmert, U.S. Rep., Speech, *House Floor Speech on the Religious Heritage of the United States* (D.C. Dec. 19, 2009) (transcript available at <http://www.americanrhetoric.com/speeches/louiegohmertfloorspeechreligiousheritage.htm>).

5 Bryan Hardesty, *The American Testimony, Book 2: Birth of the Independent Nation (1763–1790)*, [http://www.history2u.com/book2\\_independence.htm](http://www.history2u.com/book2_independence.htm) (2005).

so limited that his motion never came to a formal vote. Nonetheless, this mythical story has continued to enjoy a lengthy life of its own.

The story permits different interpretations. If the telling of the story omits the ending, it leaves itself open to at least three possible overlapping readings. First, by implication, the Convention deputies voted for Franklin's motion: prayer facilitated good feelings, and the proposal facilitated the adoption of the Great Compromise of proportional representation of the states in the House of Representatives and equal representation in the Senate. Second, Franklin's motion showed that dissension at the Convention had reached such an intensity that even a deist like Franklin called for prayer, if only to calm the heated debate. Third, even a deist like Franklin who reputedly had not always lived an exemplary life recognized the power of prayer. If the telling includes the mythical ending that Franklin's motion succeeded, the story still leaves itself open to these three readings. If the telling includes the factual ending that Franklin's motion failed, the second and third readings are still in play. All three tellings of the story correctly recount that Franklin made the proposal for prayer and permit recognizing a role for religion in America's history.

Examining the Franklin prayer narrative offers us the opportunity to examine its history and its rhetorical use in arguing for integrating religion into America's public life. This examination also offers us the opportunity to reflect on how advocates can use history to fashion a persuasive argument: the history of the narrative demonstrates how writers, government officials, lawyers, and judges have employed it to further their own purposes. The examination further shows how Benjamin Franklin and the archetype he personifies have played a critical role in making the narrative persuasive. And, as the use of the narrative shows, histories, both factual and mythical, can support persuasive narrative arguments.

## **II. The Narrative**

### **A. What Really Happened**

By June 28, 1787, the Constitutional Convention had been meeting for nearly one month. One issue had brought the deliberations to a virtual standstill: should a state's representation in the federal legislature be proportional or should it be equal; that is, should each state's population determine the number of representatives it has in either house of the federal legislature, or should each state have an equal number of representatives. The more-populous states and those states that expected to grow

in population favored proportional representation while the less populated states favored equal representation.<sup>6</sup>

Faced with a conflict that threatened to derail the Convention, Benjamin Franklin attempted to promote compromise by fostering a change in the attitudes of the deputies. Franklin began his speech by noting the degree of discord among the delegates and the inability of secular history and political science to suggest acceptable solutions:

The small progress we have made after 4 or five weeks close attendance & continual reasonings with each other—our different sentiments on almost every question, several of the last producing as many noes as ays, is methinks a melancholy proof of the imperfection of the Human Understanding. . . . We have gone back to ancient history for models of Government, and examined the different forms of those Republics which having been formed with the seeds of their own dissolution now no longer exist. And we have viewed Modern States all round Europe, but find none of their Constitutions suitable to our circumstances.<sup>7</sup>

Franklin then observed that the Convention had neglected to look to one source of wisdom: instead of “groping” in the dark of secular learning, the deputies should look to “the Father of lights,” an appellation taken from scripture.<sup>8</sup>

In this situation of this Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? . . . And have we now forgotten that powerful friend? or do we imagine

<sup>6</sup> According to the population estimates of one delegate, the three most populous states were Virginia (420,000, including 280,000 slaves, each of whom counted as three-fifths of a person for purposes of calculating the state’s representation in the federal U.S. House of Representatives), Massachusetts (360,000), and Pennsylvania (360,000). C.C. Pinckney, *Speech in South Carolina House of Representatives*, in Farrand, *supra* n. 3, at vol. 3, 253 (speech delivered in Jan. 1788). See also *id.* at vol. 1, 572–74 (providing the slightly different population estimates of two other deputies). Allied with the three most populated states were North Carolina, South Carolina, and Georgia. See *id.* at vol. 1, 491, 500 (Madison’s notes, reporting speeches by Gunning Bedford of Delaware).

<sup>7</sup> *Id.* at vol. 1, 450–51 (Madison’s notes).

<sup>8</sup> *Id.* at vol. 1, 451. “Every good gift and every perfect gift is from above, and cometh down from the Father of lights, with whom is no variableness, neither shadow of turning.” *James* 1:17 (King James). In his speech, Franklin made three other scriptural references: “And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid?” *Id.* (referencing *Matthew* 10:29 (King James)). “We have been assured, Sir, in the sacred writings, that ‘except the Lord build the House they labor in vain that build it.’” *Id.* (referencing *Psalms* 127:1 (King James)). “I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel: We shall be divided by our little partial local interests. . . .” *Id.* at 451–52 (referencing *Genesis* 11:1–9 (King James)). The biblical references would have added significantly to the persuasiveness of Franklin’s plea. According to a study of citation in public political literature written between 1760 and 1805, the most frequently cited book was the Bible, accounting for at least one-third of all citations. See Donald S. Lutz, *The Origins of American Constitutionalism* 140–41 (1988). The study demonstrates the importance of the Bible as a source of authority.

that we no longer need his assistance? I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that *God governs in the affairs of men.*<sup>9</sup>

Franklin concluded with his proposal that the Convention invite members of the local clergy to begin each daily session of the Convention with a prayer imploring the “assistance of Heaven” in this earthly quest:

I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service.<sup>10</sup>

Although Roger Sherman of Connecticut seconded the motion,<sup>11</sup> the other deputies failed to respond to Franklin’s proposal as he had hoped. Alexander Hamilton and others feared the effect that adoption would have on those who were not privy to the Convention’s deliberation. They “expressed their apprehensions that . . . it might at this late day, 1. bring on it some disagreeable animadversions. & 2. lead the public to believe that the embarrassments and dissensions within the convention, had suggested this measure.”<sup>12</sup>

Hugh Williamson of North Carolina, who had been a minister earlier in his life, made a practical observation. He “observed that the true cause of the omission could not be mistaken. The Convention had no funds.”<sup>13</sup> Edmund Randolph of Virginia offered an alternative: “that a sermon be preached at the request of the convention on 4th of July, the anniversary of Independence,—& thenceforward prayers be used in ye Convention every morning.”<sup>14</sup>

Franklin’s manuscript of the speech includes this note: “*The Convention except three or four Persons, thought Prayers unnecessary!!*”<sup>15</sup> In his notes on the Convention’s proceedings, James Madison reported

9 Farrand, *supra* n. 3, at vol. 1, 451 (Madison’s notes).

10 *Id.* at 452.

11 *See id.*

12 *Id.*

13 *Id.*

14 *Id.* Ltr. from Benjamin Franklin to Ezra Stiles (March 9, 1790) (available at <http://www.franklinpapers.org/franklin/framedVolumes.jsp>).

15 Benjamin Franklin, Speech, *Convention Speech Proposing Prayers* (June 28, 1787) (available at <http://www.franklinpapers.org/franklin/framedVolumes.jsp>). According to this most authoritative collection of Franklin’s papers, Franklin placed two exclamation points at the end of the sentence. *See also* Farrand, *supra* n. 3, at vol. 1, 452 n.15.

that the Convention adjourned for the day “without any vote on the matter.”<sup>16</sup> Years later, Madison confirmed the accuracy of Franklin’s notes and mentioned three considerations that may have contributed to the failure of Franklin’s motion: its deviation from the Quaker method of worship, the differing religious convictions of the delegates, and the differing convictions of the members of the Philadelphia clergy. “The Quaker usage, never discontinued in the State & the place where the Convention held its sittings, might not have been without an influence as might also, the discord of religious opinions within the Convention, as well as among the Clergy of the Spot.”<sup>17</sup> In his notes, not published until 1821,<sup>18</sup> Robert Yates, a deputy from New York, briefly summarized Franklin’s speech, but did not mention any consequent discussion or vote.<sup>19</sup> In his autobiography, not published until 1881,<sup>20</sup> William Few, a deputy from Georgia, confirmed these accounts:

After about three weeks['] deliberation and debating, the Convention had serious thoughts of adjourning without doing anything. All human efforts seemed to fail. Doctor Franklin proposed to appoint a chaplain and implore Divine assistance, but his motion did not prevail. It was an awful and critical moment. If the Convention had then adjourned, the dissolution of the union of the States seemed inevitable. This consideration no doubt had its weight in reconciling clashing opinions and interests.<sup>21</sup>

The Convention did not approve the Great Compromise until July 16, and only after heated debate. In the end, the vote of approval was close: five states to four states with one state divided.<sup>22</sup> According to the true narrative, then, Franklin proposed prayer when disagreement among the deputies was at its height. For a variety of reasons, the deputies failed to rally around the proposal, and it died aborning.

16 *Id.* at 452.

17 *Id.* at vol. 3, 531.

18 *See Id.* at vol. 1, xiv. After Madison’s notes, Yates’ notes are the most complete. Unfortunately, he was an opponent of the proposed Constitution and left the Convention in early July. *See id.* at 536.

19 *See id.* at 457–58. Yates’ notes were severely edited by the French diplomat Edmond Genet for his political purposes: to denigrate Madison. *See* James H. Hutson, *Introduction*, Supp. Farrand, *supra* n. 3, at xxv–vi. Madison found that Yates had “committed gross errors in his desultory notes.” Ltr. From James Madison to James Robertson (March 27, 1831), in Farrand, *supra* n. 3, at vol. 3, 497. There is no evidence extant that Genet altered Yates’ notes on Franklin’s proposal.

20 *See Autobiography of Col. William Few of Georgia*, 7 *The Mag. of Am. History* 343 (1881) (available at [http://books.google.com/books?id=hL5Xz5l5FHQC&pg=PA340-1A2&source=gbs\\_toc\\_r&cad=4#v=onepage&q&f=false](http://books.google.com/books?id=hL5Xz5l5FHQC&pg=PA340-1A2&source=gbs_toc_r&cad=4#v=onepage&q&f=false)). Few likely wrote his autobiography in 1816 at the age of 68. *See* Farrand, *supra* n. 3, at vol. 3, 423 n.1.

21 *Autobiography of Col. William Few of Georgia*, *supra* n. 20, at 353.

22 *See* Farrand, *supra* n. 3, at vol. 2, 15 (Madison’s notes).

## B. The myth

Twenty-eight years later, a competing narrative made its appearance, a story eloquently written and with a more inspirational ending. According to this fictional version, Franklin's proposal did not fail; rather, it inspired the deputies to settle their differences and adopt the Great Compromise.

In 1815, William Steele wrote a lengthy letter to his son Jonathan in which he reported a version of the story that he had heard from Jonathan Dayton, who had been a deputy to the Convention from New Jersey.<sup>23</sup> According to this version, Dayton recalled the acrimonious disagreement among the deputies over whether the states should enjoy equal representation in the Senate or whether their representation should depend on their respective populations. Franklin, compelled to reconcile the conflicting parties, then took the floor. With his reputation and persona, he commanded the attention of the deputies:

He was esteemed the *Mentor* of our body. To a mind naturally *strong* and *capacious*, enriched by much reading and the experience of many years, he added a manner of communicating his thoughts peculiarly his own—in which simplicity, beauty, and strength were equally conspicuous. As soon as the angry orators, who preceded him had left him an opening, the doctor rose, evidently impressed with the weight of the subject before them, and the difficulty of managing it successfully.<sup>24</sup>

Franklin acknowledged the strong difference of opinion and emphasized the need for the deputies to reach a harmonious resolution: “I am convinced that it is a subject which should be approached with *caution*, treated with *tenderness*, and decided on with *candor* and *liberality*.”<sup>25</sup> To encourage fruitful dialogue, he proposed that the Convention adjourn for three days so that passions could cool, the deputies could converse with one another, and in the end, determine “to form a constitution, if not such an one as we can individually, and in all respects, approve, yet the best, which, under existing circumstances, can be obtained.”<sup>26</sup>

Darkness then gave way to light. According to Dayton, “Here the countenance of Washington brightened, and a cheering ray seemed to break in upon the gloom which had recently covered our political horizon.”<sup>27</sup>

<sup>23</sup> See Ltr. from William Steele to Jonathan D. Steele (Sept. 1825), in Farrand, *supra* n. 3, at vol. 3, 467–73, 467 n.1 (published Aug. 26, 1826 and May 25, 1850).

<sup>24</sup> *Id.* at 470.

<sup>25</sup> *Id.* at 471.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Franklin, the mentor, then went further and proposed daily prayer, suggesting that prayer would lead to increased wisdom and a great triumph:

I will suggest, Mr. President, the propriety of nominating and appointing, before we separate, a *chaplain* to this Convention, whose duty it shall be uniformly to assemble with us, and introduce the business of each day by an *address to the Creator of the universe*, and the Governor of all nations, beseeching Him to preside in our council, enlighten our minds with a portion of heavenly wisdom, influence our hearts with a love of truth and justice, and crown our labors with complete and abundant success!<sup>28</sup>

According to Dayton, Washington and the other deputies responded enthusiastically. Franklin's speech apparently reminded them of their revered forebears in classical Rome.<sup>29</sup>

The doctor sat down, and never (said Gen. D.) did I behold a countenance at once so *dignified* and *delighted* as was that of Washington, at the close of this address! Nor were the members of the Convention, generally less affected. The words of the venerable Franklin fell upon our ears with a weight and authority, even greater than we may suppose an oracle to have had in a Roman senate!<sup>30</sup>

The response, however, was not entirely positive. According to Dayton, Hamilton arrogantly voiced his opposition.

Mr. H—, from—, . . . rose and said, with regard to the first motion of the honorable gentleman, for an *adjournment*, he would yield his assent; but he protested against the second motion, for the appointment of a chaplain. He then commenced a high-strained eulogium on the assemblage of *wisdom*, *talent*, and *experience*, which the Convention embraced; declared the high sense he entertained of the honor which his constituents had conferred upon *him*, in making him a member of that respectable body; said he was confidently of opinion that *they were competent* to transact the business which had been entrusted to their care—that they were equal to every exigence which might occur; and concluded by saying, that therefore he did not see the necessity of calling in *foreign aid*.<sup>31</sup>

28 *Id.*

29 See Louis J. Sirico, Jr., *The Federalist and the Lessons of Rome*, 75 *Miss. L.J.* 431 (2006) (demonstrating how attuned the Founders were to Roman history).

30 Farrand, *supra* n. 3, at vol. 3, 471.

31 *Id.* at 471–72.



According to Dayton, Hamilton's words elicited disapproval from the President of the Convention:

Washington fixed his eye upon the speaker, with a mixture of *surprise* and *indignation*, while he uttered this impertinent and impious speech, and then looked around to ascertain in what manner it affected others. They did not leave him a moment to *doubt*; no one deigned to *reply*, or take the smallest notice of the speaker . . .<sup>32</sup>

The Convention instantly approved Franklin's motion: "[T]he motion for appointing a chaplain was instantly seconded and carried; whether under the *silent disapprobation* of Mr. H—, or his *solitary negative*, I do not recollect. The motion for an adjournment was then put and carried unanimously, and the Convention adjourned accordingly."<sup>33</sup>

The Convention then spent three days in recess, and the delegates engaged in "a free and frank interchange of sentiments."<sup>34</sup> When the Convention reconvened, "every *unfriendly feeling* had been expelled; and a spirit of conciliation had been cultivated, which promised, at least, a *calm* and *dispassionate reconsideration* of the subject."<sup>35</sup> Under Franklin's guidance, the Convention adopted the Great Compromise:

As soon as the chaplain had closed his prayer, and the minutes of the last sitting were read, all eyes were turned to the doctor. He rose, and in a few words stated, that during the recess he had listened attentively to all the arguments pro and con, which had been urged by both sides of the house; that he had himself said much, and thought more on the subject; he saw difficulties and objections, which might be urged by individual states, against every scheme which had been proposed; and he was now, more than ever, convinced that the constitution which they were about to form, in order to be *just* and *equal*, must be formed on the basis of *compromise* and *mutual concession*. With such views and feelings, he would now move a *reconsideration* of the vote last taken on the organization of the Senate. The motion was seconded, the vote carried, the former vote rescinded, and by a successive motion and resolution, the Senate was organized on the present plan.<sup>36</sup>

The *New York Gazette* published William Steele's letter, and in 1826, the *National Intelligencer*, the leading political newspaper of its time, republished it. In 1850, *Littell's Living Age*, a popular weekly magazine,

32 *Id.* at 472.

35 *Id.*

33 *Id.*

36 *Id.*

34 *Id.*

published it again.<sup>37</sup> The publication of the myth in these widely read periodicals gave it a place in America's unofficial history.

### C. Response to the myth

Madison rejected Steele's account: "That the communication was erroneous is certain; whether from misapprehension or misrecollection, uncertain."<sup>38</sup> Since Madison's assessment, no one has offered a better explanation for the source of this mythical narrative. We know little of relevance about either William Steele or Jonathan Steele. We know that William Steele was a Revolutionary War veteran who was born in New York, lived in New Jersey, married Mary Dayton, possibly a relative of Jonathan Dayton, and moved to upstate New York. He was an active Presbyterian and often wrote poetry for his family. Jonathan D. Steele became a wealthy businessman and served as president of the Niagara Fire Insurance Company.<sup>39</sup> Nothing in the available historical record offers any insight into the genesis of the false narrative.

The disparaging reference to Hamilton, however, invites speculation. Dayton was a kinsman<sup>40</sup> and ally of Hamilton's enemy and eventual killer, Aaron Burr.<sup>41</sup> Dayton, then, may have had a motive for placing Hamilton in a bad light. Dayton and Burr had allegedly conspired together to establish a new nation in the southwest. Although Dayton was arrested on a charge of treason, he was never tried.<sup>42</sup> Dayton, moreover, lacked an exemplary reputation. The authoritative *American National Biography* states, "Because he had been perceived as placing his own personal interests above that of the country while in high office and having flirted

<sup>37</sup> See *id.* at 467 n.1 (supplying this information on the anecdote's publication and republication). See also Gerald J. Baldasty, *The Commercialization of News in the Nineteenth Century* (1992) (offering a history of journalism during these years); William E. Ames, *The National Intelligencer: Washington's Leading Political Newspaper* 66–68, Records of the Columbia Historical Society, Washington D.C. 71 (1969) (offering a history of the newspaper); Jane Range & Maris A. Vinovskis, *Images of Elderly in Popular Magazines: A Content Analysis of "Littell's Living Age," 1845–1882*, 5 Soc. Sci. History 123, 126–27 (1981) (comparing the magazine to the modern *Reader's Digest*).

<sup>38</sup> Ltr. from James Madison to Thomas S. Grimke (Jan. 6, 1834), in Farrand, *supra* n. 3, at vol. 3, 531.

<sup>39</sup> See Daniel Steele Durrie, *Steele Family—Genealogical History of John and George Steele*, <http://www.angelfire.com/wv/snr/jcdurrie.html> (1862); William Steele, *William Steele Poems*, (unpublished ms., circa 1850) (copy on file with the New York Public Library, available at <http://www.nysl.org/archives/47948>) (both providing the family history).

<sup>40</sup> See Roger G. Kennedy, *Burr, Hamilton, and Jefferson: A Study in Character* 185 (1999) (stating that Burr and Dayton were related).

<sup>41</sup> See Arnold A. Rogow, *A Fatal Friendship: Alexander Hamilton and Aaron Burr* 228–50 (1998) (detailing the feud and ultimate duel between Hamilton and Burr).

<sup>42</sup> See Harry M. Ward, *Jonathan Dayton*, <http://www.anb.org/articles/02/02-00109.html> (Feb. 2000) (discussing Dayton's involvement in this incident). Hamilton also worked to deprive Burr of the Presidency in the celebrated contest with Thomas Jefferson in 1800. See James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* 118–37 (2002) (giving an account of the election).

with treason, Dayton during his last years forfeited much of the esteem that he had once had from the public.”<sup>43</sup>

The prayer myth may have gained some staying power because, at that time, no authoritative report was available to contradict it. The Convention had taken place behind closed doors. Robert Yates’ notes were not published until 1821;<sup>44</sup> William Few’s autobiography was not published until 1881.<sup>45</sup> It is uncertain when the public first had access to Franklin’s note on the failure of his motion.<sup>46</sup> The note does appear in the 1840 collection of Franklin’s writings edited by Harvard professor (and later Harvard president) Jared Sparks.<sup>47</sup> Madison’s refutation of the myth appeared only in his private correspondence.<sup>48</sup> Although stories of the proceedings may have leaked out over the years, Madison’s detailed notes, our most authoritative account of the Convention, did not see print until 1840.<sup>49</sup> Even then, it is unclear how long it took his notes to become widely available. For the academically inclined, in 1911, an available source fully documented the true version of Franklin’s proposal when the Yale University Press published *The Records of the Federal Convention of 1787*, edited by Max Farrand. Along with its 1966 *Supplement*, these volumes continue to offer the fullest collection of documents concerning the Convention.<sup>50</sup> Thus, because accurate accounts of the narrative remained inaccessible for so long, the mythical account enjoyed the opportunity to establish itself as credible.

### III. Commentary on the Narrative

Over the centuries, commentary on the Franklin narrative has endorsed both the true narrative and the mythical version. As true accounts became available, historians increasingly accepted them. All

43 Ward, *supra* n. 42. While in Congress, Dayton had kept \$18,000 in government money for his own use. When called to accounts, he repaid it to the Treasury, but did not pay interest. *See id.*

44 See Farrand, *supra* n. 3, at vol. 1, xiv (explaining distortions in part of Yates’s notes).

45 See *supra* n. 20.

46 See *The Works of Benjamin Franklin* vol. 1, vi–xii (Jared Sparks ed., 1840); Richard D. Miles, *The American Image of Benjamin Franklin*, 9 Am. Q. 117, 121–23 (1957) (chronicling the delays and sloppiness in publishing Franklin’s papers in the years following his death).

47 See *The Works of Benjamin Franklin*, *supra* n. 46, at vol. 5, 153. According to Sparks, Franklin’s note had appeared in at least one earlier collection. *See id.* at vol. 10, 449 & 462 (the index indicating prior publication).

48 See Ltr. from James Madison to Thomas S. Grimke (Jan. 6, 1934), in Farrand, *supra* n. 3, at vol. 3, 531.

49 See *id.* at vol. 1, xv (noting that Madison decided that his notes should be published posthumously). Madison was the last survivor of the Convention. See James Madison, *Notes of Debates in the Federal Convention of 1787* xviii (Adrienne Koch ed., rev. ed., 1985) (introduction by Adrienne Koch).

50 See Farrand, *supra* n. 3.

accounts have spoken well of Franklin and his efforts to reconcile the clashing deputies. Writers on the religious right, however, have promoted the mythical account or interpreted the true account without fully discounting the mythical version. In the courts, both the true and mythical accounts of the Franklin narrative have received limited consideration, largely from a religiously accommodationist perspective. Still, through the years, the commentary has contributed to a story that celebrates a spirit of conciliation and compromise in American politics.

### A. The historians

Since the Convention, historians have related Franklin's prayer proposal in a way that has placed Franklin in a favorable light. In the nineteenth century, some historians recounted the correct version, while others put forth the mythical version. With the exception of some social conservatives, twentieth-century writers usually have reported the correct version, though some have added their own interpretations.

Nineteenth-century authors varied in their accounts of the event. In his 1836 book, *The Religious Opinions and Character of Washington*, E.C. M'Guire presented the mythical version.<sup>51</sup> In his 1864 book, *Christian Life and Character of the Civil Institutions of the United States*, B.F. Morris cited M'Guire's book and included the mythical narrative, stating that it was "authentic."<sup>52</sup> Today, neither book would pass academic muster. In the same year, in his *Life and Times of Benjamin Franklin*, James Parton provided the correct version, stating that the proposal met "with immediate and invincible opposition."<sup>53</sup> Parton attributed the proposal's failure to "the prevalence in the Convention of the French tone of feeling with regard to religious observances."<sup>54</sup> He added, "If so, it was the more remarkable to see the aged Franklin, who was a Deist at fifteen, and had just returned from France, coming back to the sentiments of his ancestors."<sup>55</sup>

In his significant 1882 work, *History of the Formation of the Constitution of the United States of America*, historian and statesman, George Bancroft related the correct version and stated that Franklin's aim was "[t]o restore calm."<sup>56</sup> He softened the ending of the narrative by

<sup>51</sup> See E.C. M'Guire, *The Religious Opinions and Character of Washington* 149–53 (1836) (quoting the Steele-Dayton letter at length).

<sup>52</sup> B.F. Morris, *Christian Life and Character of the Civil Institutions of the United States* 251–53 (1864).

<sup>53</sup> James Parton, *Life and Times of Benjamin Franklin* vol. 2, 574 (1864).

<sup>54</sup> *Id.* at 574–75. Parton's words and his citation to Madison's notes show that he had access to Madison's notes published in 1840 and to Franklin's manuscript of his speech.

<sup>55</sup> *Id.* at 575.

<sup>56</sup> George Bancroft, *History of the Formation of the Constitution of the United States of America* vol. 2, 58 (1882).

stating, “The concurring aid which Franklin invoked implied a purification from the dominion of selfish interests. In the next meeting the members were less absorbed by inferior motives.”<sup>57</sup>

A more recent historian followed Bancroft’s lead, stating, “Though the proposal was not adopted, tempers seemed to cool and a few days later, upon Franklin’s motion, the ‘great compromise’ was agreed upon: the states to be represented equally in the Senate and the people to be equal in the House.”<sup>58</sup>

Although opinions may vary, a reading of Madison’s notes strongly suggests that partisan feelings continued in the ensuing days.<sup>59</sup> Two days after Franklin’s proposal, Gunning Bedford of Delaware threatened that if the small states did not get their way, they might enter into a foreign alliance: “The Large States dare not dissolve the confederation. If they do the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice.”<sup>60</sup> Consider the impassioned rhetoric of Gouverneur Morris on July 5:

This Country must be united. If persuasion does not unite it, the sword will. . . . The scenes of horror attending civil commotion can not be described, and the conclusion of them will be worse than the term of their continuance. The stronger party will then make traytors of the weaker; and the Gallows & Halter will finish the work of the sword. How far foreign powers would be ready to take part in the confusions he would not say.<sup>61</sup>

The final vote on the Great Compromise did not take place until July 16.<sup>62</sup> Although Franklin was a member of the committee that proposed it,<sup>63</sup> his proposal was only a variant on the committee’s ultimate proposal;<sup>64</sup> the motion that the committee presented to the Convention

57 *Id.* at 59.

58 Ralph L. Ketcham, *Benjamin Franklin 188–89* (1965).

59 See e.g. Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* 181 (2009) (“Franklin’s call to prayer, alas, did not temper the discord among the delegates. For the next several days, the mood among them seemed only to grow more vitriolic.”); Carl Van Doren, *The Great Rehearsal* 102 (1948) (“This religious discussion may have cooled the debate for the time being, but the next day, the 29th, the conflict went on with little change of temper.”).

60 Farrand, *supra* n. 3, at vol. 1, 492 (Madison’s notes). On July 5, Bedford weakly apologized for his remarks and suggested “that some allowance ought to be made for the habits of his profession [law] in which warmth was natural & sometimes necessary.” *Id.* at 531.

61 *Id.* at 530 (Madison’s notes).

62 See Farrand, *supra* n. 3, at vol. 2, 15–16 (Madison’s notes).

63 See Farrand, *supra* n. 3, at vol. 1, 509 (Madison’s notes).

64 On June 30, Franklin proposed that (1) each state send an equal number of delegates to the Senate; (2) in the Senate, each state have an equal vote on measures that might affect the sovereignty of individual states, might diminish a state’s authority over its citizens, or might augment the authority of the central government within the states; (3) where the Senate participates in appointing civil officers of the central government, each state have an equal vote; (4) in fixing salaries, appropriating

was the work of the committee.<sup>65</sup> In recent books written for academics and sophisticated lay readers, authors have either omitted the prayer narrative<sup>66</sup> or presented an accurate account.<sup>67</sup> Some place little or no gloss on it.<sup>68</sup> Others have offered varied perspectives.<sup>69</sup>

Some authors point to Franklin's proposal as a demonstration that the Convention was on the verge of collapse. For example, in her 2002 book, *A Brilliant Solution: Inventing the American Constitution*, Carol Berkin writes, "When the country's oldest Deist issued an appeal for religious intervention, it was obvious the convention had entered its darkest hour."<sup>70</sup> In his 1982 book, *Separation of Church and State*, written from a strongly accommodationist viewpoint, Ralph Cord relates the true narrative, but states that the Convention failed to adopt Franklin's proposal only for the reason put forth by Hamilton: the "fear that people would think that the Convention's deliberations—which were kept secret while in progress—were fraught with dissension."<sup>71</sup>

Another recent historian has placed Franklin's proposal in a positive light: "Whether [he] spoke from a genuine faith in the efficacy of prayer or merely to shift attention from quarrelsome issues to more solemn

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funds, disposing of funds, and supplying funds to the treasury, each state's delegates have suffrage in proportion to the amount that the state actually contributes to the treasury. *See id.* at 488–89 (Madison's notes). According to Franklin's papers, he also proposed adjusting the voting rights of each state in proportion to the amount of commodities that a state imports, assuming that the central government imposes a duty on imports. States importing fewer commodities would gain an increase in suffrage, while states importing more would face a decrease in suffrage. *See id.* at 507–08 (Franklin's papers).

On July 5, the committee presented its proposal to the Convention. According to Madison, "This report was founded on a motion in the Committee made by Dr. Franklin." *Id.* at 526, n. \*. A similar proposal had been made in 1777 in debates on designing the Articles of Confederation. *See id.*

**65** *See id.* at 526 (Madison's notes) (stating the committee's proposal, which later underwent revision).

**66** *See e.g.* Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985).

**67** *See e.g.* Fred Barbash, *The Founding* 98–100 (1987); Beeman, *supra* n. 59, at 177–81; H.W. Brands, *The First American: The Life and Times of Benjamin Franklin 677–78* (2000); Ronald W. Clark, *Benjamin Franklin: A Biography* 409 (1983); Verner W. Crane, *Benjamin Franklin and a Rising People* 202 (1954); Walter Isaacson, *Benjamin Franklin: An American Life* 451–53 (2003); Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic, 1776–1790* 170 (1965); Carl Van Doren, *Benjamin Franklin 747–48* (1938); Carl Van Doren, *The Great Rehearsal* 100–02 (1948); Gordon S. Wood, *The Americanization of Benjamin Franklin* 220–21 (2004).

**68** *See e.g.* Barbash, *supra* n. 67; Brands, *supra* n. 67; Clark, *supra* n. 67; Crane, *supra* n. 67; McDonald, *E Pluribus Unum*, *supra* n. 67; Van Doren, *The Great Rehearsal*, *supra* n. 67.

**69** *See e.g.* Beeman, *supra* n. 59, at 181–89 (suggesting that Franklin was primarily trying to calm tempers, but also that he sincerely wanted the Convention to invoke divine guidance); Isaacson, *supra* n. 67, at 451 (suggesting that Franklin's goals were both to calm tempers and to invoke divine guidance); Wood, *supra* n. 67, at 220–21 (suggesting that Franklin's goal was to invoke divine guidance).

**70** Carol Berkin, *A Brilliant Solution: Inventing the American Constitution* 107 (2002); *see also* Isaacson, *supra* n. 67, at 450 ("As the days grew even hotter, so again did the dispute over representation."); Wood, *supra* n. 67, at 220 ("[Franklin] had come to realize that 'when you assemble a number of men, to have the advantage of their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views.'") (quoting Franklin's speech on the last day of the Convention: Farrand, *supra* n. 3, at vol. 2, 642 (Madison's notes)).

**71** Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 54 (1982).

**72** William G. Carr, *The Oldest Delegate: Franklin in the Constitutional Convention* 97 (1990).

reflections, his suggestion at the very least surely and forcefully reminded all delegates of the basic importance of their work.”<sup>72</sup>

Writers relating the accurate story have promoted a particular view of America’s founding: that of good-faith negotiation and compromise. The most commonly highlighted event of the Constitutional Convention is the Great Compromise in which the deputies accepted the vote to have a lower legislative house based on popular representation and an upper house providing the states with equal representation.<sup>73</sup> But other significant matters also confronted the deputies and demanded extensive discussion. The vote on the Great Compromise took place on July 16,<sup>74</sup> a full two months before the proceedings concluded on September 17; moreover, the vote was very close.<sup>75</sup> The real compromise took place on July 17, when the large states chose to forgo demanding a reconsideration of the prior day’s vote and permitted the Convention to take up other controversial issues.<sup>76</sup> Despite the remaining agenda, this compromise, the Great Compromise, defines the Convention’s popular story as that of good-faith negotiation leading to a successful resolution. The theme of negotiation and compromise, then, is the preferred story of the nation’s political founding.<sup>77</sup>

The Franklin prayer narrative fits this story. As is often the case in negotiation, the negotiators had hit a rough spot.<sup>78</sup> Franklin called for prayer, most likely in an effort to help the negotiations succeed.<sup>79</sup> For a variety of reasons, the deputies were not supportive. However, they remained polite and gave plausible reasons for turning down the proposal. Their reasons were plausible not just to Franklin and other delegates, but

<sup>73</sup> See e.g. Clinton Rossiter, *1787: The Grand Convention* 193 (1966) (“The Great Compromise, in sum, was the longest constitutional step ever taken in the process of creating a new kind of compound nation.”)

<sup>74</sup> See Farrand, *supra* n. 3, at vol. 2, 15 (Madison’s notes).

<sup>75</sup> See *id.* The vote was five states in favor—Connecticut, New Jersey, Delaware, Maryland, and North Carolina—four states against—Pennsylvania, Virginia, South Carolina, and Georgia—with Massachusetts divided. The New Hampshire delegation had yet to arrive, and Rhode Island boycotted the Convention.

<sup>76</sup> Early the next morning, a number of members from the large states met to decide what course of action to adopt. According to Madison, “The time was wasted in vague conversation on the subject, without any specific proposition or agreement.” *Id.* at 19–20.

<sup>77</sup> See Dana Lansky, *Proceeding to a Constitution: A Multi-Party Negotiation Analysis of the Constitutional Convention of 1787*, 5 Harv. Negot. L. Rev. 279 (2000) (analyzing the Convention as a complex negotiation); John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 Am. Political Sci. Rev. 799 (1961) (reprinted in *The Formation and Ratification of the Constitution: Major Historical Interpretations* 92 (Kermit L. Hall ed., 1987)) (portraying the Founders as participants in the art of democratic politics).

<sup>78</sup> An impasse is not unusual in a negotiation. See e.g. David A. Dilts & William J. Walsh, *Collective Bargaining and Impasse Resolution in the Public Sector* (1988) (offering an entire text on how to deal with an impasse).

<sup>79</sup> One strategy for dealing with a difficult stage in a negotiation is to take a “time-out.” See e.g. William Ury, *Getting Past No: Negotiating with Difficult People* 31–32 (1991) (suggesting this strategy); see also Lansky, *supra* n. 77, at 315–16 (viewing Franklin as acting as a “process trouble-shooter” in making his prayer proposal).

also to the audiences of the later biographers of Franklin and the Convention. At the conclusion of this episode, the Convention and the negotiations continued. The courtesy shown to Franklin reflected a mood of good faith deliberation as opposed to all-out warfare. The courtesy may have enhanced that positive mood. Although Franklin's motion did not bring negotiations to closure, it served its purpose by encouraging them to continue.

## B. The social conservatives

In recent years, extreme social conservatives, often termed the "religious right," have found both comfort and a resource for advocacy in the narrative. They have accepted the mythical Dayton narrative or have interpreted the true narrative to support their positions.

David Barton is perhaps the most prominent interpreter of American history for the religious right.<sup>80</sup> In his 1992 book, *The Myth of Separation*, he related the fictional narrative and added, "Notwithstanding, some clergy of the city, in response to the delegates' desire to convene with prayer—and having no desire for monetary remuneration—responded affirmatively to their request."<sup>81</sup> He concluded that the delegates were repentant for their neglect of God:

Franklin's admonition—and the delegates['] response to it—had been the turning point not only for the Convention, but also for the future of the nation. While neglecting God, their efforts had been characterized by frustration and selfishness. With their repentance came a desire to begin each morning of official government business with prayer and even to attend church *en masse*, as government officials, to hear a minister inspire and challenge them. After returning God to their deliberations, were they effective in their efforts to frame a new government?<sup>82</sup>

Barton assumed that this alleged repentance and return to God—a common Old Testament theme—resulted in a successful conclusion to the Convention's deliberations. He answered his question by quoting from a book by two socially conservative authors who have promoted a Christian version of American exceptionalism:

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<sup>80</sup> See Erik Eckholm, *Using History to Mold Ideas on the Right*, N.Y. Times A1 (May 4, 2011) (available at <http://www.nytimes.com/2011/05/05/us/politics/05barton.html>) (describing Barton as "a self-taught historian who is described by several conservative presidential aspirants as a valued adviser and a source of historical and biblical justification for their policies").

<sup>81</sup> David Barton, *The Myth of Separation: What Is the Correct Relationship between Church and State?* 109–10 (1992).

<sup>82</sup> *Id.* at 110.



“We, the people of the United States . . .” Thus begins what has become the oldest written constitution still in effect today. . . . The greatest legal minds of two centuries have continued to marvel at it as being almost beyond the scope and dimension of human wisdom. When one stops to consider the enormous problems the Constitution somehow anticipated and the challenges and testings it foresaw, that statement appears more understated than exaggerated. For not even the collective genius of the fledgling United States of America could claim credit for the fantastic strength, resilience, balance, and timelessness of the Constitution. And most of them knew it.<sup>83</sup>

Barton apparently learned of his factual error. In his subsequent book, *Original Intent*, he offered a variant version. He wrote that the Convention did not accept Franklin’s proposal because it lacked the funds to hire a chaplain.<sup>84</sup> He repeated his accurate statement in his earlier book<sup>85</sup> that Edmund Randolph suggested a sermon be preached on the fourth of July.<sup>86</sup> Barton then stated in response, however, that the Convention stood adjourned on July second, third, and fourth, with many delegates attending a special service on July fourth.<sup>87</sup>

The true narrative differs from Barton’s version. Although the Convention did stand adjourned during those three days, Madison reported that it did so for two reasons: first, to give a committee of eleven delegates the time to meet to devise a solution to the conflict between the large and small states and, second, to attend celebrations on the twelfth anniversary of the nation’s independence.<sup>88</sup> Washington and perhaps most deputies attended an oration at a German Lutheran Church.<sup>89</sup> In his diary, Washington stated that he had listened to an oration by a law student; he did not mention listening to a sermon that may have occurred at a subsequent church service that day. He also had other activities on his schedule, including visiting an anatomical museum of wax figures, dining

<sup>83</sup> *Id.* at 110–11 (quoting Peter Marshall & David Manuel, *The Light and the Glory* 343 (1977)).

<sup>84</sup> See David Barton, *Original Intent: The Courts, the Constitution, & Religion* 117 (5th ed., 2010).

<sup>85</sup> See Barton, *supra* n. 81, at 109.

<sup>86</sup> See Barton, *supra* n. 84, at 118.

<sup>87</sup> *Id.*

<sup>88</sup> See Farrand, *supra* n. 3, at vol. 1, 516 (“That time might be given to the Committee, and to such as chose to attend to the celebration on the anniversary of Independence, The Convention adjourned till Thursday.”).

<sup>89</sup> In his diary for July 4, Washington wrote, “Wednesday 4th. Visited Dr. Chuvats Anatomy. Heard at the Calvinist church, an Oration on the Anniversary of Independence. Dined afterwards with this State Society of Cincinnati and drank Tea at Mr. Powells.” *The Papers of George Washington Digital Edition*, <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=GEWN-print-01-05-02-0003-0004-0004&printable=yes> (Theodore J. Crackel ed., 2008). Washington apparently misremembered the church’s denomination. See Beeman, *supra* n. 59, at 180.

with the Society of Cincinnatus—an organization of former Revolutionary war officers—and having tea with a fellow Virginia deputy.<sup>90</sup>

Barton also wrote that “some accounts indicated that prayer did later occur as a result of Franklin’s request.”<sup>91</sup> He relies, however, on a very problematic source: a Thanksgiving Day speech given by a minister in 1850. In that speech, Rev. C.M. Butler stated that after Franklin offered his proposal, he “counseled an adjournment for some days, and recommended that when they again assembled, their deliberations should be opened with prayer.” Butler asserted, “It was done. The dissenting States, at the reopening of the Convention, agreed to the measure they had so strenuously resisted, rather than that the Union should not be formed.”<sup>92</sup> Butler’s version, of course, lacks any historical basis.

In another popular book, *America’s Providential History*,<sup>93</sup> Mark Beliles and Stephen McDowell, relied on B.F. Morris’s 1864 book<sup>94</sup> to repeat the mythical version. They added, “[The deputies] apparently were successful in obtaining clergymen to volunteer on some mornings, for Mr. Dayton refers to one opening the session on the first day after the three-day recess.”<sup>95</sup> They further wrote that Franklin’s speech marked a turning point in the Convention: “Breakthroughs followed shortly and within a year the Constitution was ratified by eleven states to establish the first Christian form of government in history.”<sup>96</sup>

Still another socially conservative author has suggested that the Convention subsequently obtained a chaplain. In his “encyclopedia of quotations,” *America’s God and Country*, William Federer related the mythical version and stated, “Of note is the fact that prayers have opened both houses of Congress ever since.”<sup>97</sup>

A slightly different twist on the narrative appears in *Teaching American History*, a project of Ashland University’s Ashbrook Center for Public Affairs and currently online, which offers many programs for middle and high-school teachers. It first tells the mythical story<sup>98</sup> and cites

90 See *Papers of George Washington*, *supra* n. 89.

91 Barton, *supra* n. 84, at 117–18.

92 C.M. Butler, Discourse, *Our Union—God’s Gift* (Trinity Church, Washington, D.C. Nov. 28, 1850), in *Addresses and Lectures on Public Men and Public Affairs* 157, 175 (1856) (available at <http://www.archive.org/details/addresseslecture00butl>).

93 Mark A. Beliles & Stephen K. McDowell, *America’s Providential History* 171–73 (1989).

94 *Id.* at 172–73, 280 (citing Morris, *supra* n. 52, at 52–53).

95 Beliles & McDowell, *supra* n. 93, at 173.

96 *Id.*

97 William J. Federer, *America’s God and Country* 249 (2000).

98 Ashbrook Center at Ashland University, *Teaching American History.org, Benjamin Franklin Court*, <http://teachingamericanhistory.org/convention/map/franklincourt.html> (accessed Mar. 13, 2013).

as its source, R.M. Devens's *Our First Century*, an 1876 history book of a decidedly nonacademic nature.<sup>99</sup> It then refers to Madison's account as "an equally wonderful account . . . indicating that a chaplain was not appointed because of a shortage of available funds."<sup>100</sup> It further states that "Washington encouraged . . . [Devens's] interpretation of events in his letters and speeches."<sup>101</sup> Because Washington died in 1799, long before the advent of the mythical version of the narrative, this statement cannot be correct. Beyond any possible ambiguity in the sentence, there is no evidence that Washington ever encouraged a misreading of the incident. The Ashbrook Center, then, relates the true account and the mythical account as equally plausible.

None of these efforts bears the mark of academic scholarship. It is difficult to determine whether the authors were intentionally misleading their audiences to further their thesis of Christian American exceptionalism or whether they simply lacked the sophistication to distinguish between reliable and questionable authorities.

### C. The courts

Despite the growing interest in the nation's founding and in Franklin studies, the academic legal community has paid only very modest attention to the Franklin prayer episode. A recent electronic search identifies only seventeen law review pieces that mention the episode.<sup>102</sup>

According to a recent electronic search, the narrative of Franklin's prayer proposal has occasionally surfaced in court cases and related documents, primarily those dealing with such issues as school prayer and the constitutionality of having a legislative chaplain.<sup>103</sup> Although with one possible exception, the references in the opinions accurately relate the story, they sometimes leave open the opportunity for the reader to misunderstand what actually happened. Yet, almost all the references refer to the story and its import in a positive way.

Only one United States Supreme Court opinion references Franklin's proposal. In *Marsh v. Chambers*, the Court held that when the Nebraska state legislature hired a chaplain to open its sessions with a prayer, it did not violate the Establishment Clause.<sup>104</sup> Writing for the majority, Chief

99 R. M. Devens, *Our First Century* 136–37 (1876).

100 Ashbrook Center, *supra* n. 98.

101 *Id.*

102 The search accessed law review pieces that contained either the words "Franklin" and "chaplain" within the same paragraph or the words "Franklin" and "prayer" within the same paragraph.

103 The search accessed cases that contained either the words "Franklin" and "chaplain" within the same paragraph or the words "Franklin" and "prayer" within the same paragraph.

104 *Marsh v. Chambers*, 463 U.S. 783 (1983).

Justice Warren Burger discussed the history of chaplains serving in national and state government since the country's founding.<sup>105</sup> He used the Franklin prayer episode in support of his historical justification for finding no constitutional violation.

Justice Burger noted that prayers were not offered at the Constitutional Convention.<sup>106</sup> He suggested, however, that this omission "may simply have been an oversight."<sup>107</sup> Burger stated that Franklin's proposal failed "not because the Convention was opposed to prayer, but because it was thought that a mid-stream adoption of the policy would highlight prior omissions and because '[t]he Convention had no funds."<sup>108</sup> He thus accepted one of the reasons put forth at the Convention for not hiring a chaplain, the most politically neutral of the reasons.

The Franklin proposal also surfaces in a federal district court opinion and in a federal circuit court opinion. In *Snyder v. Murray City Corporation*, the Tenth Circuit rejected the claim of a citizen disappointed that the city council had rejected his request to present his prayer at the beginning of its meeting.<sup>109</sup> The court held that the proposed prayer fell "well outside the genre of legislative prayers that the Supreme Court approved in [*Marsh v. Chambers*]."<sup>110</sup> The proposed prayer evidently was a satire on ceremonial prayers. The court cited a passage from Franklin's speech to argue that the traditional tone for legislative prayers was established "when Benjamin Franklin proposed that the convention begin each morning with 'prayers imploring the assistance of Heaven, and its blessings on our deliberations . . .'"<sup>111</sup>

In *Jaffree v. Board of School Commissioners*, a judge in the Southern District of Alabama upheld the practice of prayer in public schools with the surprising holding that the Constitution's Establishment Clause did not apply to the states.<sup>112</sup> Judge William Brevard Hand referred to Franklin's proposal in arguing that the Establishment Clause prohibited the federal government only from establishing a national religion, but otherwise left government free to promote religion.<sup>113</sup> He neglected to note that Franklin's proposal had failed.

105 *Id.* at 786–92.

106 *Id.* at 787.

107 *Id.* at 787 n. 6.

108 *Id.* (quoting Farrand, *supra* n. 3, at vol. 1, 452 (Madison's notes) (quoting deputy Hugh Williamson)).

109 *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir.1998).

110 *Id.* at 1235.

111 *Id.* at 1234 n.11 (quoting Farrand, *supra* n. 3, at vol. 1, 452 (Madison's notes) (quoting Franklin)).

112 *Jaffree v. Bd. of Sch. Comm'rs of Mobile Co.*, 554 F. Supp. 1104 (S.D. Ala. 1983), *aff'd in part and rev'd in part sub nom. Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *judgment of 11th Cir. aff'd*, 472 U.S. 38 (1985).

The Franklin proposal appears in four state court decisions; one dissenting opinion and one majority opinion failed to note that Franklin's proposal had failed, while two opinions noted the failure. In *Ex parte Laura Snider*, an Alabama Supreme Court case dealing with a family custody dispute, a dissenting Justice Tom Parker argued that the majority had excessively restricted the mother's religious rights in raising her child.<sup>114</sup> Justice Parker cited Franklin's proposal to support his position that the Founders intended to ground the nation on a religious base. In relating Franklin's proposal, Justice Parker stated that "[i]n the darkest days of the Constitutional Convention" Franklin had "brought [the delegates] together,"<sup>115</sup> thus implying that his proposal had proved successful.

In *Malyon v. Pierce County*, a Washington case challenging the constitutionality of a county sheriff's chaplaincy program, the intermediate appellate court compared the religious jurisprudence of the state and federal constitutions in the process and related that Franklin had "unsuccessfully" made his proposal, but that "the convention adjourned without voting on the matter."<sup>116</sup> The court reversed the trial court's holding dismissing the challenge and remanded the case for further factual findings.

In *Engel v. Vitale*, a New York trial court upheld requiring an official prayer in public schools as permissible under the Establishment Clause, provided that the school board take affirmative steps to protect the rights of those who choose not to say the prayer.<sup>117</sup> In a tour of history, the judge found no evidence that proscribed ceremonial school prayer in "the sense of the nation, the debates, nor the individual views of the framers."<sup>118</sup> As for Franklin's prayer proposal, the judge saw it as breaking the deadlock at the Convention and gave it less weight in his historical argument because, as he noted, the Convention had not adopted it.<sup>119</sup>

In *Wilkerson v. City of Rome*, a 1922 case, the Georgia Supreme Court upheld requiring Bible reading in public schools.<sup>120</sup> In developing a supporting historical argument, the court quoted from a law review article

113 *Id.* at 1115–16.

114 *Ex parte Laura Snyder*, 929 So.2d 447, 459 (Ala. 2005) (Parker, J., dissenting).

115 *Id.* at 464.

116 *Malyon v. Pierce Co.*, 903 P.2d 475, 485 (Wash. App. Div. 1995), *rev'd*, *trial court's dismissal aff'd*, 935 P.2d 1272 (Wash. 1997) (the Washington Supreme Court upholding the constitutionality of the chaplaincy program).

117 *Engel v. Vitale*, 191 N.Y.S.2d 453 (Sup. Ct. 1959), *aff'd*, 206 N.Y.S.2d 183 (App. Div. 1960), *aff'd*, 176 N.E.2d 579 (N.Y. 1961), *rev'd*, 370 U.S. 421 (1962).

118 *Id.* at 477.

119 *Id.* at 467.

120 *Wilkerson v. City of Rome*, 110 S.E. 895 (Ga. 1922).

that, in turn, quoted a passage from Franklin's speech, but failed to note the proposal's failure.<sup>121</sup>

The Franklin prayer story also appears in two briefs<sup>122</sup> and seven amicus briefs to the United States Supreme Court,<sup>123</sup> as well as in one pro se petition for certiorari,<sup>124</sup> all of them aggressively arguing an accommodationist view of the First Amendment.

These opinions and court documents offer little in the way of consistent themes. All argue that Franklin's proposal supports their positions and generally helps document the nation's religious roots. All display an obvious respect for Franklin. Most deal with the narrow issues of public prayer and public chaplains, both issues that are somewhat related to the factual context of the episode at the Convention. Of the judicial opinions, only Justice Parker's unusual dissent implies that the proposal proved successful.<sup>125</sup> Judge Hand's equally unusual opinion notes the proposal, but fails to note its failure.<sup>126</sup> The Tenth Circuit's opinion references Franklin's speech, but notes only its tone and not its substance.<sup>127</sup> The Franklin proposal, then, has garnered little attention in the judicial realm. If the true story of the proposal had left the outcome more ambiguous, however, it certainly would have made its way into more briefs and opinions, because it would more directly contribute to a culture that favors compromise and religious accommodation.

#### D. Summary

The story of Franklin's proposal is an integral part of America's popular understanding of its history. When the mythical version with its happy ending surfaced, it enjoyed considerable popularity. It offered a

121 *Id.* at 900 (quoting Edwin C. Goddard, *The Law in the United States in Its Relation to Religion*, 10 Mich. L. Rev. 161, 167 (1912)).

122 Br. for Appellee Bd. of Educ. of Borough of Hawthorne, *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 1951 WL 81927 at \*8–9; Br. for Appellee, *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 1947 WL 44298 at \*151 (electronically collected since 1930).

123 Br. of Amicus Curiae Ctr. for Const. Jur. in Support of Petr., *Christian Leg. Socy. Ch. of the U. of Cal., Hastings College of the Law v. Martinez*, 2010 WL 711181 at \*9–10; Br. of Amicus Curiae of Ctr. for Const. Jur. in Support of Petrs., *Ariz. Christian Sch. Tuition Org. v. Winn*, 2010 WL 3066227 at \*7–8; Br. Amicus Curiae of Wallbuilders, Inc. in Support of the Respt., *Van Orden v. Perry*, 2005 WL 273646 at \*27; Br. for the U.S. Sen. as Amicus Curiae Supporting Petrs., *Elk Grove Unified Sch. Dist. v. Newdow*, 2003 WL 22988873 at \*6; Br. Amici Curiae for Marian Ward and Other Students and Parents of Santa Fe Indep. Sch. Dist. in Support of Petitioner, *Santa Fe Indep. Sch. Dist. v. Doe*, 1999 WL 1269303 at \*8 n. 23; Br. of Amicus Curiae in Support of Respondent, *Reno v. Condon*, 1999 WL 688448 at \*5 & n. 2; Br. of St. Council of the Junior Or. of United Am. Mech. of the St. of N.J. as Amicus Curiae, *Doremus v. Bd. of Educ. of the Borough of Hawthorne*, 1952 W.L. 81994 at \*26 n. 58 (Briefs electronically collected since 1930).

124 Petition for a Writ of Certiorari, *Ostospides v. Glimp*, 2006 WL 4040189 at \*5.

125 *Snyder*, 929 So.2d at 459 (Parker, J., dissenting).

126 *Jaffree*, 554 F. Supp. at 1115–16.

127 *Snyder*, 159 F.3d at 1234–35 n.11.

story of religion's role in the Founding and of a consensus and a successful compromise that established a central element of our government's structure. Even authors who remained true to the accurate version related that version in a positive light that attested to the nation's religious roots and Franklin's respect for religion, despite his largely deist preferences.

Today, the story of Franklin's proposal retains vitality, particularly in certain socially conservative circles. In those circles, the conclusion of the mythical version supports the goal of integrating religion into public life. Perhaps as a result, in the writings of social conservatives, the mythical conclusion often appears explicitly or by implication. The true story, however, still contributes to the accommodationist rhetoric, albeit in a less dramatic way than the mythical version. Yet the story has made relatively few appearances in judicial opinions, perhaps because the court can draw on so many other historical examples that more directly demonstrate government endorsement and accommodation of religion, especially in formal government conduct: for example, presidential and congressional proclamations of days of thanksgiving, congressional appointment of chaplains, and government funding of sectarian schools for native Americans.<sup>128</sup>

#### IV. The Importance of Franklin to the Narrative's Longevity

The figure of Franklin contributes greatly to the narrative's staying power. If a less prominent delegate had put forth the proposal, the story probably would have drifted into an obscure corner of the historical record. Franklin, however, assumes the role of the wise old man and offers a rhetorical argument and an archetypal authority that greatly add to the significance of the narrative.

Consider how many of Franklin's personas can be employed to contextualize the story. A legendary figure in American history plays the central role in the anecdote. A deist, a scientist, a sometimes-irreverent individual, and a champion of the Enlightenment calls for supernatural intervention. A trustworthy, wise old man points the way to solving a controversy. William Steele reported that Jonathan Dayton referred to Franklin as "the *Mentor* of our [Convention]."<sup>129</sup>

128 See e.g. Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 20–47 (1982) (chronicling this history from an accommodationist viewpoint and providing the historical argument in Chief Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91–104 (1985)).

129 Ltr. from William Steele to Jonathan D. Steele (Sept. 1825), in Farrand, *supra* n. 3, at vol. 3, 470.

For the nineteenth century American, Franklin's only popular rival could be Washington. Yet Washington lacked Franklin's personality. Historian Henry Steele Commager wrote,

[Washington] was clearly first in war and first in peace, yet too remote and formidable to be first in the hearts of his countrymen. That place in the affections of Americans was long held rather by Benjamin Franklin, who was recalled more familiarly munching his loaf of bread, trundling his wheelbarrow through the streets of Philadelphia, flying his kite, compiling the homely aphorisms that adorned a hundred readers, and flaunting his fur cap at the Court of Versailles.<sup>130</sup>

In the past century, Franklin has largely enjoyed a popular public image.<sup>131</sup> In recent times, he has served as the subject of a number of complimentary biographies.<sup>132</sup> In the popular imagination, the musical *1776* portrays him as wise, witty, and politically savvy.<sup>133</sup> We see him singing, dancing, and attempting to help starchy John Adams improve his interpersonal skills. In the children's book<sup>134</sup> and Disney Movie<sup>135</sup> *Ben and Me*, a needy Franklin depends of the ingenuity of Amos the mouse.

The titles of three recent biographies characterize Franklin as decidedly American: *The First American: The Life and Times of Benjamin Franklin*,<sup>136</sup> *Benjamin Franklin: An American Life*,<sup>137</sup> and *The Americanization of Benjamin Franklin*.<sup>138</sup> In 1926, biographer Phillips Russell denominated him "the first civilized American"<sup>139</sup> and offered this portrait: "[A]t an American period eminent for narrowness, superstition,

130 Henry Steele Commager, *The American Mind* 32 (1950).

131 Excellent discussions of how Americans have perceived Franklin include Nian-Sheng Huang & Carla Mulford, *Benjamin Franklin and the American Dream*, in *The Cambridge Companion to Benjamin Franklin*, 145, 145–58 (Carla Mulford ed., 2008); Miles, *supra* n. 46, at 117 et seq.; Carla Mulford, *Figuring Benjamin Franklin in American Cultural Memory*, 72 *New Eng. Q.* 415 (1999). Professor Mulford's thesis on Franklin's role in the nineteenth century could still apply persuasively in the following years: "Clearly, the body and life of Franklin were serving as the figural body of the nation, where the qualities of the individual man and the accumulated merits demonstrated in his philosophical and scientific expertise became identifiable and emulable qualities that entered the discourse of the nationhood of 'America.'" *Id.* at 423. Professor Nian-Sheng Huang sees the perception of Franklin changing during three eras of American history: 1790–1860 (Franklin's character as the representative American), 1870–1938 (Franklin's personality with masterful talent in many fields), 1945–1990 (Franklin as a complex psychological puzzle). See Nian-Sheng Huang, *Benjamin Franklin in American Thought and Culture: 1790–1990* (1994).

132 See *supra* n. 67.

133 *1776*, Motion Picture (Columbia Pictures 1972).

134 Robert Lawson, *Ben and Me* (1988).

135 *Ben and Me*, Motion Picture (Walt Disney Productions 1953).

136 Brands, *supra* n. 67.

137 Walter Isaacson (2003).

138 Gordon S. Wood (2004).

139 Phillips Russell, *Benjamin Franklin: The First Civilized American* (2005).



and bleak beliefs he was mirthful, generous, open-minded, learned, tolerant, and human-loving. . . . [H]e was the First American man of the world in the sense that he was the First American world-man.”<sup>140</sup> In the same vein, a modern biographer described him as “witty, salty, candid, and razor-sharp.”<sup>141</sup>

Yet, in the past, Franklin encountered enemies and critics.<sup>142</sup> To be sure, they were always in the minority.<sup>143</sup> During his lifetime, the mercurial John Adams was his most severe critic, particularly after their diplomatic service in France during the Revolution. There, Franklin followed the traditional route of tactful diplomacy that required building social relationships while Adams took a far more direct and sometimes abrasive approach.<sup>144</sup> Upon returning to Massachusetts, Adams penned his critical assessment of Franklin in the strongest terms:

Franklin is a Wit and a Humourist, I know. He may be a Philosopher, for what I know, but he is not a sufficient Statesman, he knows too little of American Affairs or the Politicks of Europe, and takes too little Pains to inform himself of Either. He is too old, too infirm too indolent and dissipated, to be sufficient for the Discharge of all the important Duties of Ambassador, Secretary, Admiral, Commercial Agent, Board of War, Board of Treasury, Commissary of Prisoners, &c. &c. &c. as he is at present in that Department, besides an immense Correspondence, and Acquaintance, each of which would be enough for the whole Time of the most active Man in the Vigour of Youth.<sup>145</sup>

140 *Id.* at 1.

141 Esmond Wright, *Franklin of Philadelphia* 357 (1986). Similar insightful descriptions of Franklin abound. See e.g. Jonathan R. Dull, *Benjamin Franklin and the American Revolution* 122 (2010) (discussing “his capacity for anger, his pragmatism, and his political skill”); Thomas Fleming, *The Man Who Dared the Lightning: A New Look at Benjamin Franklin* 492 (1971) (describing his patrimony to Americans as “this questing experimental freedom as the central value of their nationhood”); J. A. Leo Lemay, *Benjamin Franklin, Universal Genius*, in J.A. Leo Lemay & G.S.Rousseau, *The Renaissance Man in the Eighteenth Century* 21, 23 (1978) (describing the theme of Franklin’s autobiography as “the rise from impotence to importance, from dependence to independence, from helplessness to power”). According to the biographer of George Bancroft, the eminent nineteenth-century historian portrayed Franklin as “a shrewd Yankee Machiavelli, matching wits with the Britishers and the clever French statesmen.” Russel B. Nye, *George Bancroft: Brahmin Rebel* 200 (1945).

142 See e.g. Robert Middlekauff, *Benjamin Franklin and His Enemies* (1996) (focusing on Franklin’s interactions with his enemies during his lifetime); Gurdip Panesar, *Benjamin Franklin: The Critical Reception*, in *Critical Insights: Benjamin Franklin* 44 (Jack Lynch ed., 2009) (available at [http://salempress.com/store/pdfs/franklin\\_critical\\_insights.pdf](http://salempress.com/store/pdfs/franklin_critical_insights.pdf)) (reviewing positive and negative criticisms of Franklin’s writings); Miles, *supra* n. 46, at 117 et seq. (tracing Franklin’s reputation throughout American history).

143 See Miles, *supra* n. 46, at 118, 123 & 140 (emphasizing that critics at various times in history were in the minority).

144 See Middlekauff, *supra* n. 142, at 171–202; William B. Evans, *John Adams’ Opinion of Benjamin Franklin*, 92 *Pa. Mag. of History & Biography* 220 (1968).

145 Ltr. from John Adams to Thomas McKean (Sept. 20, 1779), in *The Adams Papers, Digital Edition* (C. James Taylor ed.), <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=ADMS-chron-1770-1779-09-20-2> (2008).

Jealousy of Franklin had to play a role in Adams's enmity toward him. Days before Franklin's death, Adams composed this satirical observation in a letter to Benjamin Rush:

The history of our Revolution will be one continued lie from one end to the other. The essence of the whole will be that Dr. Franklin's electrical rod smote the Earth and out sprung General Washington. That Franklin electrified him with his rod, and thence forward these two conducted all the policy, negotiations, legislatures and war.<sup>146</sup>

Because of the mishandling and delay in publishing Franklin's papers posthumously,<sup>147</sup> early commentators relied heavily on his autobiography, which they read as telling the story of a man striving for material success.<sup>148</sup> Particularly in the era of literary romantics, this tale did not play well. For example, Ralph Waldo Emerson wrote, "Franklin's man is a frugal, inoffensive, thrifty citizen, but savors of nothing heroic."<sup>149</sup> In the twentieth century, writer D. H. Lawrence wrote a biting characterization of Franklin that seemed to place him among the inhabitants of Sinclair Lewis's novel *Babbitt*.<sup>150</sup>

I admire him. I admire his sturdy courage first of all, then his sagacity, then his glimpsing into the thunders of electricity, then his common-sense humour. All the qualities of a great man, and never more than a great citizen. Middle-sized, sturdy, snuff-coloured Doctor Franklin, one of the soundest citizens that ever trod or "used venery."

I do not like him.

...

I am a moral animal. But I am not a moral machine. I don't work with a little set of handles or levers. The Temperance-silence-order-resolution-frugality-industry-sincerity-justice-moderation-cleanliness-tranquillity-chastity-humility keyboard is not going to get me going. I'm really not just an automatic piano with a moral Benjamin getting tunes out of me.<sup>151</sup>

**146** Ltr. from John Adams to Benjamin Rush (Apr. 4, 1790) (quoted in Brands, *supra* n. 67, at 548. Future generations of the Adams family continued to disparage Franklin's contributions. See Miles, *supra* n. 46, at 119.

**147** See *supra* n. 46 (providing sources describing the unfortunate history of Franklin's papers).

**148** See Miles, *supra* n. 46, at 23–24 (making this observation).

**149** Isaacson, *supra* n. 67, at 480 (providing this quotation).

**150** "Babbitt" has been defined as a "narrow-minded, self-satisfied person with an unthinking attachment to middle-class values and materialism." *The American Heritage Dictionary of the English Language* (4th ed., 2003) (available at <http://www.thefreedictionary.com/Babbitt>).

**151** D.H. Lawrence, *Benjamin Franklin*, in *Studies in Classic American Literature* 20, 24–26 (Ezra Greenspan, Lindeth Vasey, & John Worthen eds., 2003).

By the middle of the past century, these criticisms all but died out. Perhaps beginning with Carl Van Doren's exhaustive and Pulitzer Prize-winning biography of Franklin,<sup>152</sup> the biographers have enjoyed access to more of the documented history. Being more informed about Franklin's extensive accomplishments, they have acclaimed him, but also have realized how complex he was.<sup>153</sup> Because the Franklin prayer story tells us about Franklin's statesmanship and personal feelings, it complements this informed understanding of Franklin.

The prayer narrative, then, contributes to our understanding of Franklin, and in turn, Franklin's stature contributes to the prominence of the prayer narrative. Still, there must be more to explain the significance of Franklin's role here. Our appreciation of this complex man and our twenty-first century openness to psychological theory invites this proposition: Franklin's contribution to the power of our narrative is best understood if we view him as the Jungian archetype of the sage, or wise old man.

For Carl Jung,<sup>154</sup> archetypes are primordial images that give definite form to certain psychic content that exists in our collective unconscious.<sup>155</sup> He describes the collective unconscious as a "psychic system of a collective, universal, and impersonal nature which is identical in all individuals. This collective unconscious does not develop individually but is inherited."<sup>156</sup> Some examples of archetypes are the child hero,<sup>157</sup> the mother,<sup>158</sup> and the trickster.<sup>159</sup> Jung finds heirs in such intellectuals as Joseph Campbell,<sup>160</sup> popularizers as Carol Pearson,<sup>161</sup> and movie consultants as Christopher Vogler.<sup>162</sup>

Without making a strong commitment to Jungian psychology, we can employ its concepts relatively loosely to consider Franklin's role in our story. Jung's typical central character is a hero on a quest who often

152 See Van Doren, *supra* n. 67.

153 See Carla Mulford, *Introduction*, in *The Cambridge Companion to Benjamin Franklin*, 1, 1–10 (Carla Mulford ed., 2008) (making this observation).

154 For a short but clear understanding of the basics of Jungian psychology, see Timothy R. O'Neill, *The Individuated Hobbit: Jung, Tolkien, and the Archetypes of Middle-Earth* 17–41 (1979).

155 See C.J. Jung, *The Concept of the Collective Unconscious*, in *The Archetypes and the Collective Unconscious* 42, 43 (R.F.C. Hull trans., 2d ed., 1969).

156 *Id.*

157 See C.J. Jung, *The Psychology of the Child Archetype*, in *The Archetypes and the Collective Unconscious* 151, 165–67 (R.F.C. Hull trans., 2d ed., 1969).

158 See C.J. Jung, *The Mother Archetype*, in *The Archetypes and the Collective Unconscious* 81, 81–110 (R.F.C. Hull trans., 2d ed., 1969).

159 See C.J. Jung, *On the Psychology of the Trickster-Figure*, in *The Archetypes and the Collective Unconscious* 255, 255–72 (R.F.C. Hull trans., 2d ed., 1969).

160 See Joseph Campbell, *The Hero With a Thousand Faces* (3d ed., 2008) (analyzing the archetype and narrative of the hero).

161 See Carol S. Pearson, *Awakening the Heroes Within* (1991) (explaining how to employ archetypes for self-analysis and personal growth).

162 See Christopher Vogler, *The Writer's Journey: Mythic Structure for Writers* (3d ed., 2007) (applying Jungian theory and Joseph Campbell's analysis of the hero to writing screenplays).

receives guidance from a wise old man.<sup>163</sup> We can identify the Convention collectively as the hero<sup>164</sup> on its quest to construct a Constitution that would last for the ages.<sup>165</sup> With regard to the wise old man in the narrative of the hero, Jung provides four characteristics that describe Franklin's participation in our story.

First, according to Jung, "when the hero is in a hopeless and desperate situation from which only profound reflection or a lucky idea . . . can extricate him,"<sup>166</sup> he may gain assistance from a "sagacious and helpful old man."<sup>167</sup> The man represents knowledge and other moral qualities, and himself possesses notable moral qualities. One of Jung's examples of a wise old man is Jethro, the father-in-law of Moses.<sup>168</sup> In popular culture, examples of the wise old man include Obi-Wan Kenobi and Yoda in the *Star Wars* movies,<sup>169</sup> Dumbledore in the *Harry Potter* series,<sup>170</sup> and Gandalf in the *Lord of the Rings* trilogy.<sup>171</sup> In our story, Franklin fits this archetype.

**163** See C.J. Jung, *The Phenomenology of the Spirit in Fairytales*, in *The Archetypes and the Collective Unconscious* 207, 217–18 (R.F.C. Hull trans., 2d ed. 1969).

**164** Carol Pearson has identified twelve hero archetypes: warrior, creator, caregiver, every person/orphan, outlaw/destroyer, sage, explorer/wanderer/seeker, magician, ruler, lover, jester/fool, innocent. See Pearson, *supra* n. 161, at 10–11. In this taxonomy, I would classify the Convention as a creator, at least on the Convention's productive days. In an insightful article, Ruth Anne Robbins employs this taxonomy to encourage lawyers to portray a client as one of these archetypes in order to persuade a court to favor the client. Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767 (2006).

**165** See Farrand, *supra* n. 3, at vol. 1, 422 (Madison: "In framing a system which we wish to last for ages, we shd. not lose sight of the changes which ages will produce.") (Madison's notes).

**166** Jung, *supra* n. 163, at 217.

**167** *Id.* at 218.

**168** See C.J. Jung, *Gnostic Symbols of the Self*, in *Aion* 210 (2d ed., 1978) (calling Jethro "the archetype of the wise old man"). Jethro served as a mentor to Moses. See *Exodus* 1–24.

**169** In this movie series, Obi Wan Kenobi is an exiled Jedi knight who teaches protagonist Luke Skywalker how to use the energy field known as the force. Yoda is also a Jedi Master who trains Luke Skywalker. *The Phantom Menace* (1999), *Attack of the Clones* (2002), *Revenge of the Sith* (2005), *A New Hope* (1977), *The Empire Strikes Back* (1980), and *Return of the Jedi* (1983) (all produced by Lucasfilm) (in the chronological order of the story line).

**170** In this series of books by J.K. Rowling, Dumbledore is headmaster of Hogwarts School of Witchcraft and Wizardry and the mentor of protagonist Harry Potter. See *Harry Potter and the Sorcerer's Stone* (1998), *Harry Potter and the Chamber of Secrets* (1999), *Harry Potter and the Prisoner of Azkaban* (1999), *Harry Potter and the Goblet of Fire* (2000), *Harry Potter and the Order of the Phoenix* (2003), *Harry Potter and the Half-Blood Prince* (2005), and *Harry Potter and the Deathly Hallows* (2007). Warner Brothers produced movie versions of the books in 2001, 2002, 2004, 2005, 2007, 2009, 2010 (part 1) and 2011 (part 2), respectively.

**171** Gandalf is an angelic entity, a member of the Istari order whose members take on the bodies of men. These wizards were primarily sent to "train, advise, instruct, arouse the hearts and minds of those threatened by Sauron [the evil force] to a resistance with their own strengths; and not just to do the job for them." Ltr. from J.R.R. Tolkien to Robert Murray, S.J. (draft) (Nov. 4, 1954), in *The Letters of J.R.R. Tolkien* 202 (Humphrey Carpenter ed., 1981); see also J.R.R. Tolkien, *The Istari*, in *Unfinished Tales of Numenor and Middle Earth* 389 (Christopher Tolkien ed., 1980) (giving a similar description). The Lord of the Rings books consist of *The Fellowship of the Ring* (1954), *The Two Towers* (1954), and *The Return of the King* (1955). The most famous movie versions of the books were released in 2001, 2002, and 2003 respectively (New Line Cinema). See also Robbins, *supra* n. 164, at 782 (listing as additional mentors Merlin in the Arthurian legends, Cinderella's Fairy Godmother, and Dorothy's Glinda in the Wizard of Oz).

Second, according to Jung, the wise old man often has some negative aspect, such as a physical handicap.<sup>172</sup> For example, Obi-Wan Kenobi, Yoda, and Dumbledore are elderly;<sup>173</sup> Yoda is physically very small. At the time of the Convention, Franklin was eighty-one years old, had kidney stones, and was in poor health.<sup>174</sup> To reach the State house, on at least some days, he was carried in a sedan chair.<sup>175</sup> On at least some occasions, his Pennsylvania colleague James Wilson read his speeches for him.<sup>176</sup>

Third, the wise old man often asks questions to induce the hero to engage in self-reflection and mobilize moral forces.<sup>177</sup> He also is notable for his moral qualities.<sup>178</sup> In Franklin's speech, he observed, "we indeed seem to feel our own want of political wisdom, since we have been running about in search of it."<sup>179</sup> Franklin asked the pointed question, "In this situation of this Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings?"<sup>180</sup> The relevance of the archetypal story to Franklin's words is readily apparent.

Fourth, the wise old man often gives the hero information to help on the journey. To illustrate, Jung relates this folk story:

To the prince who has gone in search of the kingdom of heaven the old hermit says: "I have lived here for three hundred years, but never yet has anybody asked me about the kingdom of heaven. I cannot tell you myself; but up there, on another floor of the house, live all kinds of birds, and they can surely tell you."<sup>181</sup>

There is great similarity with this passage from Franklin's speech:

In this situation of this Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to

172 See Jung, *supra* n. 163, at 226–27.

173 Yoda lived to be 900 years old. See *Return of the Jedi*, *supra* n. 169. According to J.K. Rowling, Dumbledore was 150 years old when he died. Interview on Scholastic.com of J.K. Rowling (Oct. 16, 2000) (transcript available at <http://web.archive.org/web/20110423233509/http://www.accio-quote.org/articles/2000/1000-scholastic-chat.htm>). Gandalf was ancient, but immortal. See Ltr. from J.R.R. Tolkien, *supra* n.171.

174 See Isaacson, *supra* n. 67, at 446.

175 See *id.*

176 See Farrand, *supra* n. 3, at vol. 1, 81 & 197; Farrand, *supra* n. 3, at vol. 2, 641 (Madison's notes).

177 See Jung, *supra* n. 163, at 220.

178 See *id.* at 225.

179 Farrand, *supra* n. 3, at vol. 1, 451.

180 *Id.*

181 Jung, *supra* n. 163, at 221. The story is from the brothers Grimm. See *id.* at 221 n.19.

us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? . . . And have we now forgotten that powerful friend? or do we imagine that we no longer need his assistance? I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that *God governs in the affairs of men*.<sup>182</sup>

Archetypal theory, cognitive theory, and narrative theory thus intersect here. All three theories explain the significance of Franklin's role in this story. As Richard Delgado has observed, "Every well-told story is virtually an archetype—it rings true in light of the hearer's stock of preexisting stories."<sup>183</sup> From an archetypal perspective, this narrative tells us the "stock story"<sup>184</sup> of seeking divine guidance to escape crisis. Moreover, Franklin, a central archetypal figure, dominates in this story and thus contributes to its power. From a cognitive perspective, this episode comes in a narrative form, which cognitive research finds to be a fundamental way that we structure and understand human experience.<sup>185</sup> From the perspective of narrative, the Franklin prayer story is an extremely influential argument for giving religion a pervasive role in American law and tradition.

As the "wise old man" archetype, Franklin may be unique in our history. Washington's image is too impersonal and remote. Even Parson Weems' story of Washington chopping down the cherry tree has not proven sufficient to humanize him.<sup>186</sup> Although Lincoln possessed some of the archetypal characteristics, particularly his homely sayings and anecdotes that point to proper courses of action, he has his own unique tragic story. To some extent, we might look to today's senior political

<sup>182</sup> Farrand, *supra* n. 3, at vol. 1, 451.

<sup>183</sup> Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2416 n.25 (1988). Delgado also noted, "But stories may *expand* that empathic range if artfully crafted and told; that is their main virtue." *Id.*

<sup>184</sup> See J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Leg. Writing 53, 66–69 (2008) (explaining that stock stories are cultural archetypes that offer a frame of reference for the story's significance); Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 Tenn. L. Rev. 883, 891 (2010) ("[W]e are programmed with mythological plots and characters, and we are inclined to see both events and ideas as fitting into these archetypal stories."). This particular stock story harkens back to such biblical antecedents as the Israelites seeking food and water in the desert (*Exodus* 16:1–16 & *Exodus* 17) and Mary asking Jesus to supply wine at the wedding at Cana (*John* 2).

<sup>185</sup> See Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. Cal. Interdisc. L.J. 259, 266–69 (2009); Rideout, *supra* n. 184, at 55; Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left By Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 Willamette L. Rev. 255, 257 (2009) (discussing narrative in terms of cognitive theory).

<sup>186</sup> See Mason Locke Weems, *A History of the Life and Death, Virtues and Exploits of General George Washington* 15–28 (1918) (Google) (available at [http://books.google.com/books?id=kQEJhFWnyLUC&source=gbs\\_navlinks\\_s](http://books.google.com/books?id=kQEJhFWnyLUC&source=gbs_navlinks_s)). The story of the cherry tree did not appear in the book until the 5th edition. See also *supra* n. 130 and accompanying text (distinguishing Washington's persona from Franklin's).

leaders like former President Jimmy Carter<sup>187</sup> and former Senate Majority Leader George Mitchell,<sup>188</sup> who have traveled abroad to resolve crises and assist their home country. Yet even these distinguished Americans do not fully share Franklin's persona.

In Aristotelian terms, Franklin's role in the story contributes to the power of both the actual and mythical versions. Aristotle identified three modes of persuasion: ethos, logos, and pathos—each of which is necessary for effective argument.<sup>189</sup> Ethos refers to the appeal of the speaker's credibility, showing intelligence, character, and good will.<sup>190</sup> Franklin's persona surely confirms his credibility. Logos refers to the appeal of logic and reason.<sup>191</sup> Here, Franklin offered a deductive argument: empirically, the Convention has failed to produce a successful result; therefore, some critical element was missing—invoking the “Father of lights.”<sup>192</sup> Pathos refers to an appeal to emotion.<sup>193</sup> By calling for divine intervention and invoking biblical metaphorical allusions,<sup>194</sup> Franklin made an argument appealing to the emotions and perhaps made an appeal to logos as well.

In the actual event, this powerful appeal failed to win over the deputies. However, the presence of these three methods of persuasion must contribute to the story's longevity and particularly to the appeal of the mythical story for those with an investment in the story's religious dimension.<sup>195</sup>

Franklin, then, is more than a historical figure pointing to a solution to a vexing problem. He touches something in our collective psyche that amplifies the significance of the prayer story.

187 See Steven H. Hochman, *The Carter Center, Jimmy Carter—39th President of the United States and Founder of The Carter Center*, [http://www.cartercenter.org/news/experts/jimmy\\_carter.html](http://www.cartercenter.org/news/experts/jimmy_carter.html) (revised June 4, 2012) (biography).

188 See DLA Piper, *Our People, George J. Mitchell*, [http://www.dlapiper.com/george\\_mitchell](http://www.dlapiper.com/george_mitchell) (accessed Mar. 19, 2013) (biography).

189 See Aristotle, *The Rhetoric of Aristotle* 8 (Lane Cooper trans., 1932). This translation does not use the words “logos” and “pathos” to describe the two respective methods.

190 See *id.*; see also Michael Frost, *Ethos, Pathos & Legal Audience*, 99 Dick. L. Rev. 85, 100–104 (1994) (describing Greco-Roman thought on ethos).

191 See Aristotle, *supra* n. 189, at 8, 9 (stating that “persuasion is effected by the arguments, when we demonstrate the truth, real or apparent, by such means as inhere in particular cases”).

192 Farrand, *supra* n. 3, at 451 (Madison's notes).

193 See Aristotle, *supra* n. 189, at 8, 9 (stating that “persuasion is effected through the audience, when they are brought by the speech into a state of emotion”); see also Frost, *supra* n. 190, at 89–100 (describing Greco-Roman thought on pathos).

194 See *supra* n. 8 and accompanying text (identifying the biblical allusions).

195 See Sheppard, *supra* n. 185, at 257–58 (arguing that because of the impact that narrative has on cognition, it appeals to all three of Aristotle's method of persuasion).

## V. The Role of History as Narrative

Popular history offers a number of stories about our nation's founders that shape our understanding of our history. These stories illustrate how one generation looks to history, real or fictional, to give it guidance and to confirm its preconceived notions about American law and civilization. Here are three examples:

1. According to an anecdote attributed to James McHenry, a deputy from Maryland, "A lady asked Dr. Franklin Well Doctor what have we got a republic or a monarchy—A republic replied the Doctor if you can keep it."<sup>196</sup> As a casual search on the Internet reveals, political conservatives often quote this story approvingly as documenting that the Founders established a nation based on laws and not on the whims of the populace, the executive, or courts.<sup>197</sup> Some social conservatives might say that government should be based not on democratic decision making, but on biblical principles.<sup>198</sup> They sometimes criticize the common misstatement that Franklin said "A democracy if you can keep it."<sup>199</sup> The latter, of course, rings more favorably in modern ears.
2. According to the belief of many, young George Washington kept a prayer journal entitled *Daily Sacrifice*.<sup>200</sup> The journal would prove that Washington was not a deist, but a Christian and thus refute considerable evidence to the contrary. Yet, experts have long since established that the handwriting in the journal is not that of Washington.<sup>201</sup>

196 Farrand, *supra* n. 3, at vol. 3, 85.

197 See e.g. Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?* 34 Harv. J.L. & Pub. Policy 73, 87–88 (2011) (invoking Franklin's reply to refute judicial activism); Scott N. Bradley, *A Republic, If You Can Keep It*, [http://utahlinks.org/learn/docs/Bradley\\_Republic.pdf](http://utahlinks.org/learn/docs/Bradley_Republic.pdf) (accessed Mar. 20, 2013) (explaining the advantages of a republic); Jim Pontillo, *Human Events, A Nation of Laws and Guns*, <http://www.humanevents.com/article.php?id=37699> (June 29, 2010, 3:01 a.m.) (arguing that government acts without regard for law); Frank Salvato, *Family Security Matters, A Republic, If You Can Keep It*, [http://familysecuritymatters.org/publications/id.8885/pub\\_detail.asp](http://familysecuritymatters.org/publications/id.8885/pub_detail.asp) (Mar. 4, 2011) (stating that America is a republic and not a democracy); *but see* David Souter, *Remark*, 99 Geo. L.J. 157, 160–61 (2010) (invoking Franklin's words to justify judicial independence).

198 See Barton, *supra* n. 84, at 342–43 (favoring biblical principles).

199 See e.g. John F. McManus, *Our Republic, A Republic, if You Can Keep It*, <http://www.ourrepubliconline.com/OurRepublic/Article/13> (Jan. 2001) (arguing that the Framers condemned democracy); Chip Wood, *Personal Liberty Digest, A Republic—If You Can Keep It*, <http://www.personalliberty.com/conservative-politics/liberty/a-republic-if-you-can-keep-it> (June 18, 2010) (refuting the assertion that Franklin's words endorsed "a democratic republic").

200 See Peter Marshall & David Manuel, *The Light and the Glory* 284–85 (1977) (making this assertion).

201 See Frank E. Grizzard, Jr., *The Ways of Providence: Religion and George Washington* 51–55 (2005) (dispelling the myth and including handwriting samples of young George Washington and the prayer book).



3. A popular book is Washington's *Rules of Civility and Decent Behavior in Company and Conversation*, which he wrote out as a young boy.<sup>202</sup> Not everyone seems to know that Washington copied these maxims, which originated with sixteenth century Jesuits who composed them to train young gentlemen.<sup>203</sup> In any case, these rules are sometimes used to add to the reputation of Washington as a respectful and polite gentleman, and perhaps as a model to future Americans.

These stories, like the Franklin prayer story, show prominent Founders as civilized, religious, reflective gentlemen—just the sort of individuals that most Americans would want as part of their national history. History thus serves as a persuasive tool for molding law and cultural tradition, and likewise, our desires for a certain type of law and culture helps us create a history that supports our aspirations. From another perspective, the advocate can invoke history to argue that a desired decision would align with past law and tradition.

### A. The persuasive power of history and false history

History would seem to provide a later generation with a source of certainty. Historical events happen. Because they are factual and are not subject to change, we can rely on them as we attempt to shape a future that learns from the past. In defending the British soldiers after the Boston Massacre of 1770, John Adams noted, "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence . . ." <sup>204</sup> Still, as the Franklin prayer narrative demonstrates, we may encounter variant versions of history that may lead us to accept inaccurate interpretations of the past that influence how we create our future.

And even accurate narratives may contain inherent ambiguities that invite a variety of interpretations capable of suiting the goals of whoever wishes to employ them in a given argument. For example, the individual responses of various deputies to Franklin's proposal enable us to construct various interpretations of the entire Convention's reaction, even though each response is that of only a single deputy. Historian Hayden White would argue that the creation of a narrative stems from "a desire to have

<sup>202</sup> See e.g. Steven Michael Selzer, *By George! Mr. Washington's Guide to Civility Today 2* (2000) (including the Rules of Civility with commentary and assuming that Washington had created these rules).

<sup>203</sup> See John E. Ferling, *The First of Men: A Life of George Washington* 6 (1988).

<sup>204</sup> John Adams, *Legal Papers of John Adams* vol. 3, 98, 269 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary.”<sup>205</sup> However, without fully gainsaying White’s postmodern insight, we must acknowledge that actual historical events place limits on the variety of stories that the historian or advocate can tell. In any case, as we have seen in the Franklin narratives, both history that is widely accepted as true and history that is widely viewed as false can exert a persuasive power.

## B. History as a shaper of law and tradition

A historical event like Franklin’s prayer proposal gives deep roots to a legal rule or cultural tradition. For example, this narrative helps advocates legitimize the employment of chaplains in public institutions as well as public monuments and activities that include a religious dimension. In the same way, the mythical version of the narrative enhances the claim to legitimacy by strengthening the message that some wish to derive from it. From the point of view of narrative and of the advocate, that version is the more attractive one. Debunking the mythic version possibly may weaken the legitimizing power of the authentic narrative by linking that narrative with false history in the popular mind.<sup>206</sup> And the mythic narrative may weaken the authentic narrative more than would have been the case if the mythic version had never arisen.

Unlike typical legislative history, stories like this one are not employed to determine the intent of textual provisions. Rather, advocates employ these stories to legitimize laws and conduct by showing that they have a purpose that history validates. Here, the use of history to validate public chaplains in *Marsh v. Chambers*<sup>207</sup> is the best example. Yet history of this nature lends itself to supporting broad generalities. Can we use the Franklin prayer narrative and the early use of chaplains to justify not just chaplains, but also an extensive role for religion in American public life?

The variety of historical interpretations, however, is not boundless. Historical facts set the boundaries. The mythical version of the Franklin prayer narrative has died out except in circles where the proponents are reckless with facts or purposefully deceitful. Yet it is easy to understand why they would favor a version that offers a satisfying ending and supports

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<sup>205</sup> Hayden White, *The Value of Narrativity in the Representation of Reality*, 7 *Critical Inquiry* 5, 27 (1980).

<sup>206</sup> Amalia Kessler has argued that history serves “to legitimize legal rules or institutions by anchoring them within a particular tradition”; she further argues, however, that historians also use history to debunk traditions by detecting “the strategic maneuvers underlying the construction of a particular legal tradition—the ways in which certain facts are given particular emphasis, while others are subtly occluded or ruthlessly cast aside.” *The Making and Debunking of Legal Tradition*, 16 *Roger Williams U. L. Rev.* 129, 129, 131 (2011). Here, I make an additional observation: debunking fictional history may weaken the legitimizing function of the authentic history.

<sup>207</sup> 463 U.S. 783 (1983).

their convictions. In mainstream circles, the accurate narrative has prevailed, presumably because it is so well documented.

Still, the interpretations vary as to why the proposal failed. On the one hand, an important Founder seeks divine intervention. On the other, many Founders reject his proposal, but do so politely in harmony with the story that the Constitution was the product of good-faith negotiation. Thus the reactions to the proposal affect its import, but still permit certain interpretations. However, the limited number of reactions—a limitation imposed by the factual record—narrows the range of possible interpretations of the incident that is available to the historian and the advocate.

Any historical event is open to a variety of interpretations. Even here, where the accurate story is unmistakably documented to the point of certainty, its meaning can range from a genuine call for divine assistance to a futile effort to calm heated tempers. The interpretation of the proposal's failure can range from a fear that acceptance would suggest that the Convention was failing to the reality that the Convention could not afford to hire a chaplain. Thus even though the facts of a narrative limit the number of possible interpretations, the interpreter still gives meaning to history and determines its role in shaping law and our understanding of tradition.

## VI. Conclusion

Historical narrative and legal advocacy are engaged in a complex relationship. Historians look to facts and employ them to create one of the several narratives that the facts permit. They know, however, that historical circumstances limit how applicable any lessons are to today's world. By contrast, the advocate seeks to find applicable precedents and lessons in the historical record.<sup>208</sup>

For historians, the factual story of Franklin's proposal is well settled. Yet it lends itself to several readings. For the advocate, the question is whether those readings are of value to today's decisionmakers. For example, can the advocate successfully argue that the story compels us to hold that government can hire chaplains? Or must the advocate invoke the story only as a broad affirmation that religion must enjoy a role in American life? In other words, to what extent should the advocate seek support from a past that is the peculiar product of historical circumstances?

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 208 I am adapting an argument made by historian Gordon Wood that distinguishes between the role of the political theorist and the historian. See Gordon S. Wood, *The Purpose of the Past: Reflections on the Uses of History* 162–63 (2008).

With respect to Franklin's proposal, advocates have invoked it both as a solvent for specific disputes and as support for a general accommodationist policy. Until the middle of the nineteenth century, the incompleteness of the historical record led many to accept the false history that Franklin had rescued the Constitutional Convention from collapse. Since then, although some writers have clung to that story, legitimate historians have endorsed an accurate story that most respected advocates have accepted and used to fashion their arguments. True history, then, has prevailed over false history. But false history continues to linger. In any event, the Franklin proposal demonstrates how history can prove a powerful force in effective advocacy. Whether accurate or mystical, stories of the past will continue to shape the present and the future.