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Closing Statement, The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout (2013)

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THE ORIGINAL PUBLIC MEANING OF THE FOREIGN EMOLUMENTS CLAUSE: A REPLY TO PROFESSOR ZEPHYR TEACHOUT

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I. THE DEBATE SO FAR

In her 2009 *Cornell Law Review* article, *The Anti-Corruption Principle*,[1] and in subsequent publications (including here on *Northwestern University Law Review Colloquy*[2]), Professor Teachout thoroughly analyzed the text of the Constitution and the records of its framing, primarily relying upon three clauses[3]: the Ineligibility Clause, the Incompatibility Clause, and the Foreign Emoluments Clause.[4] This last clause, the Foreign Emoluments Clause, proscribes (at least some) United States officials from accepting gifts from foreign governments absent congressional consent. Teachout's key insight was to analogize corporate contributions and spending in domestic elections to these proscribed foreign government gifts. Like foreign governments, domestic corporations do not owe a duty of loyalty to the United States. A domestic corporation's duty of loyalty is owed to its stockholders, not to our polity as a whole. On the strength of this analogy, the Foreign Emoluments Clause enjoyed pride of place in her analysis; or, at least, that is the way her paper was commonly understood.[5] Teachout observes that the purpose, if not the primary purpose, behind these three provisions (and that of many other constitutional provisions) was to prevent or limit corruption. On this basis, she suggests that the Constitution embodies a structural anti-corruption principle. At this very generic level of abstraction, Teachout and I agree.

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[*] Lecturer of Law, National University of Ireland Maynooth. Preferred Citation Format: Seth Barrett Tillman, Closing Statement, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013). A fair number of people suggested sources and sent me comments: I thank you. I also thank Professor Teachout for her scholarship and participation in our exchange. All errors remain mine.

[1] Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009) (link).

[2] Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30 (2012) (link).

[3] Teachout, *supra* note 1, at 359 ("Ultimately, three of the biggest protections created by the Framers were the Ineligibility Clause, the Emoluments Clause, and the Foreign Gifts Clause.").

[4] U.S. CONST. art. I, § 9, cl. 8 (Foreign Emoluments Clause) (link); U.S. CONST. art. I, § 6, cl. 2 (Ineligibility Clause and Incompatibility Clause) (link).

[5] *See* Teachout, *supra* note 1, at 393 n.245 (cited by Justice Stevens in Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 948 n.51 (2010) (Stevens, J., concurring in part and dissenting in part) (link)).

But then we turn to brass tacks, including the scope of the Constitution's anti-corruption principle: here Teachout and I disagree. Teachout's position is that because election-related "corruption" connected to corporate campaign contributions and spending was unknown to the Framers and their era, it would be unreasonable to expect the Framers' text to deal with this specific type of corruption. Thus it is no surprise that Congress lacks an express Article I power over election-related contributions and spending, corporate or otherwise. After all, "it is a constitution we are expounding,"[6] not a prolix document dealing with cases and situations wholly unknown and unforeseen by those who created it. So recognizing that the text of the Constitution is a somewhat incomplete agreement, Teachout turns to higher level principles. She argues that because the primary purpose of many constitutional provisions was to prevent corruption, the Constitution implicitly permits Congress to enact legislation regulating federal (and, perhaps, state) corporate campaign contributions and spending. In so doing, we moderns would be furthering the Framers' eighteenth-century purposes.

There are three primary reasons why Teachout's interpretive strategy does not work. First, Teachout misstates the scope of the constitutional provisions on which her analysis relies. Some of these provisions use *Office* language in any of several cognate forms. The particular *Office* language used varies from constitutional provision to provision. Other provisions refer expressly to elected federal officials, with the precise scope of each clause—what office or offices the clause applies to—varying from clause to clause. In her *Cornell Law Review* article, Teachout implied that the Foreign Emoluments Clause's proscription against foreign government gift-giving and its *Office . . . under the United States* language, reaches all elected federal officials. Here, on *Northwestern University Law Review Colloquy*, she has defended that interpretation; indeed, she has expanded on it by expressly arguing that the Foreign Emoluments Clause's *Office . . . under the United States* language reaches both elected federal positions, including members of Congress, and also elected state officials. Teachout's position is sui generis. The prevailing view is that the Constitution embraces a global officer–member distinction. So Teachout's position has profound implications for both the Foreign Emoluments Clause (and Teachout's anti-corruption principle) and for every other constitutional provision using *Office* language.

I believe Teachout is wrong about the scope of the Foreign Emoluments Clause and its *Office . . . under the United States* language. As I will explain, my position is that *Office . . . under the United States* reaches only holders of *appointed* federal *statutory* offices, not *elected* or

[6] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis omitted) (link).

constitutionally created positions. If my analysis is correct, then the force of Teachout's key analogy falls. If, as I have argued, the Framers extended the proscription against foreign government gift giving to appointed officers and chose language which did not reach elected officials (although such language was readily at hand), then the scope of Teachout's anti-corruption principle—to the extent it is reliant on the Foreign Emoluments Clause—would be similarly limited.

Second, the varying *Office* language throughout the Constitution poses other difficulties for Teachout's analysis. Let us imagine the Constitution had thirty provisions directed against "corruption." If each of the thirty provisions used language reaching all elected federal officials, then we might have reason to conclude that the Constitution embraced a nontextual or implicit structural anti-corruption principle. And if in the fullness of time a form of corruption came about which was unknown to the Framers, then even if such a form of corruption was not squarely addressed by any express constitutional provision, we might have reason to conclude that the Framers' anti-corruption principle would function like an express Article I enumerated power. Moreover, the scope of that power would permit congressional regulation in regard to every elected federal office. Why? Because each constitutional provision which gave rise to the anti-corruption principle reached every elected official.

Now, let us again imagine the Constitution had thirty provisions directed against "corruption." Five provisions relate to House members; five provisions relate to Senate members; five provisions relate to the presidency (and vice presidency). A further five provisions relate to the House and Senate; five more relate to the Senate and President; the last five relate to federal electors and state elected officials commanding federal powers. Here the situation is more complex. In these circumstances, if in the fullness of time we discover a form of corruption unknown to the Framers, although we might agree that the Framers were against corruption as an abstract matter, and although we might agree that the Constitution embraces some sort of nontextual or implicit anti-corruption principle, we have no clear way to identify the precise scope of that principle. To whom or what institutions would it apply? Representatives, senators, the President, the Vice President?

Our Constitution is much more like the one described in the latter hypothetical, as opposed to the former. Indeed, even when referring to *Officers*, the Constitution embraces much diverse language. So the precise scope of the anti-corruption principle—in the context of corporate campaign contributions and spending—is something Teachout has to explain and defend. She cannot argue that every provision of the actual Constitution covers every elected official. She could turn to the best analogical clause, but that would be the Foreign Emoluments Clause, which

does not refer to any elected officials. So what is left? She could take a center-of-gravity approach: most of the most important anti-corruption provisions embrace most elected officials, at least, in most circumstances. Such an approach would face many difficult conceptual problems; it would require the interpreters' weighing or summing lawmakers' original intent or purposes across multiple constitutional provisions. Teachout never gives us an analysis along these lines. And this is not surprising. The final language of most (if not all) of the Constitution's anti-corruption provisions was the product of debate and compromise. Indeed, the varying *Office* language across constitutional provisions is itself some indication that the Framers actively considered the scope of these provisions. Why vary the language unless one intended to vary the scope?[7] In other words, preventing or limiting corruption was a goal of the Framers, but it competed with other principles and policy goals. With regard to each anti-corruption provision, different compromises were struck and different offices and positions were encompassed by the scope of each clause. That poses a substantial problem for Teachout's analysis. Teachout can argue that the Framers would have addressed, in some fashion, this issue had they experienced the form of corruption that interests us here: corporate campaign contributions and expenditures. But given that minimizing corruption competed with other principles and policy goals, it is difficult to see how Teachout could predict what compromise the Framers would have struck had they considered a problem with which they had no experience. If there is no neutral way to translate the anti-corruption principle into our modern context and at the same time to translate the other principles and policy goals with which it competed, then we are adrift without compass, map, or star to guide us. All we have is an abstract anti-corruption principle, but we have no way to determine if it encompassed or should encompass any particular (much less all) elected positions.

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[7] Indeed, in regard to some anti-corruption provisions, the Framers had language from the Articles of Confederation at hand. But they changed that language. Under the Articles of Confederation, delegates were not "capable of holding any office under the United States, *for which he, or another for his benefit*, receives any salary, fees, or emolument of any kind." ARTICLES OF CONFEDERATION of 1781, art. V, para. 2 (emphasis added) (link). The Incompatibility Clause of the Constitution of 1787 has no comparable language. *See* U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."). This illustrates that the anti-corruption principle played a lesser role in drafting the Constitution of 1787 than it did in regard to drafting the Articles of Confederation. It also illustrates that the Framers were interested in the specific scope of such provisions. *See generally* Martin H. Redish & Elana Nightingale Dawson, *"Worse than the Disease": The Anti-Corruption Principle, Free Expression, and the Democratic Process*, 20 WM. & MARY BILL RTS. J. 1053 (2012) (explaining the prominent role played by special interests, adversary democracy, and faction both at the Philadelphia Convention and within the intellectual framework of the Framers and their era).

Finally, Teachout argues that the anti-corruption principle is akin to separation of powers or federalism principles, long embraced by the courts and the public. She argues that the anti-corruption principle does not rise or fall with any one or more clauses because the anti-corruption principle inheres in the Constitution's structure itself. Even if this is correct, this position suffers from the same defects as the ones described above. Analogizing the anti-corruption principle to separation of powers or federalism only tells us that the anti-corruption principle exists, but it does not tell us the scope of the principle: does it reach elected federal and state officials, all or none, or some, and if some, which? Such analogies (at most) teach us that it is permissible to discover atextual interpretive principles in the Constitution, but such interpretive strategies do not furnish us with any guidance as to the scope of the anti-corruption principle itself. More importantly, unlike federalism, the argument for the existence of the anti-corruption principle flows from the individual clauses which Teachout has so meticulously collected, catalogued, and described. If the scope of those clauses is not consistently uniform, how can we divine the scope of the anti-corruption principle in the modern context of corporate campaign contributions and spending? And if we cannot, then Teachout's anti-corruption principle cannot contribute to our First Amendment or election law jurisprudence.

Again, Teachout and I agree that the Constitution's text embraces an anti-corruption principle of constitutional dimension. We disagree in regard to its scope. I believe the scope of that principle extends only to appointed federal officers; Teachout believes it reaches elected officials. Indeed, last spring on *Northwestern University Law Review Colloquy*, Teachout put forward a maximalist defense of her position on all fronts.[8] Interestingly, Teachout's arguments for her maximalist position are largely clause-bound; she offers no intratextual or global assessment for her position. Teachout argues that the Foreign Emoluments Clause's *Office . . . under the United States* language encompasses federal and state elected positions, but she never discusses how this understanding of constitutional text would destabilize our understanding of the many coordinate constitutional provisions making use of the same or similar *Office* language. In this sense, Teachout's position remains woefully undertheorized. Still I am not surprised that Teachout takes this clause-bound approach. If Teachout is correct (even in regard to elected federal officials), if the Foreign Emoluments Clause's *Office* language reaches elected officials, then identifying the scope of the anti-corruption principle would no longer be particularly problematic. Her powerful analogy between domestic corporations and foreign governments would largely succeed on originalist

[8] *See* Teachout, *supra* note 2.

grounds, and the scope of the anti-corruption principle would be readily determinable. And that is why—despite some protestations to the contrary on her part—her defense of her position and this debate remain largely about the constitutional text and history, to which I now turn.

II. THE FOREIGN EMOLUMENTS CLAUSE AND ELECTED FEDERAL OFFICIALS

> No Title of Nobility shall be granted by the United States: And no Person holding any *Office of Profit or Trust under them*, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or *foreign* State.[9]

The Foreign Emoluments Clause and other anti-corruption provisions in the Constitution's text make use of the phrase *Office . . . under the United States* or other similar language. In her 2009 *Cornell Law Review* article, Teachout implied that state and federal elected offices are encompassed by this language. But she did not demonstrate why this must be true. This *Office . . . under the United States* language appears in the Foreign Emoluments Clause as well as in the Constitution's other primary anti-corruption provisions.[10] I have argued that the scope of this terminology does not reach state or federal *elected* officials. If I am correct that *Office . . . under the United States* extends only to those holding federal *appointed* or *statutory* offices, then her analogy cannot smuggle any *elected* officials back into the scope of the Foreign Emoluments Clause or the other primary anti-corruption provisions.

Why? Even if the Framers were unfamiliar with the contours of the modern corporate form, the Framers did know what elected "offices" were and they knew exactly what corruption was—after all, Teachout's whole point is that the world of 1787 was corruption-"obsessed"[11] and the primary "offices" at issue here were created by the Framers themselves. In other words, if the core purpose of the Foreign Emoluments Clause was to ensure the loyalty of those holding federal appointed or statutory offices, then even if corporate election contributions and spending are akin to gifts from foreign states, it follows that the Foreign Emoluments Clause cannot

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[9] U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

[10] *See supra* note 3.

[11] *See* Teachout, *supra* note 1, at 348 ("The Framers were obsessed with corruption."); *accord* Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61, 70 (2012) ("And most relevant to the conception of 'dependence corruption' that I have advanced here: the Framers banned members from receiving 'any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State' without the consent of Congress." (footnote omitted)) (link).

provide the constitutional or textual hook Teachout so desperately needs.[12] If (federal and state) elected officials are not *Officers . . . under the United States*, the Foreign Emoluments Clause cannot provide a textual foundation to uphold statutes regulating political activity directed at elections and election-related conduct. It is that simple.

Last spring, in her 2012 *Northwestern University Law Review Colloquy* essay, Teachout argued in express terms what she only had implied in her 2009 *Cornell Law Review* article. In the remainder of this Essay, I will elaborate why I do not find her arguments and evidence convincing on the merits: why (notwithstanding her objections) I believe *Office . . . under the United States* extends only to appointed or statutory federal officers.

In assessing which position is better supported by the evidence, Teachout's position or mine, I frankly admit that there is some evidence on her side. I do not deny that she has met her burden of production. My goal, then, is to show that, all things considered, my view is better supported by the totality of the most relevant textual and historical evidence: evidence that was roughly contemporaneous with the ratification of the Constitution. It is not clear to me if this is Teachout's methodological position. It appears to me that Teachout believes if her anti-corruption principle is supported by any credible evidence, even if it is not the better (or best reading) of the totality of the most relevant evidence, then the anti-corruption principle becomes a legitimate interpretive vehicle, structural principle, or canon of construction, etc. As a normative matter, this position seems wrong. The fact that a position is historically conceivable or grammatically possible does not make it a probable or likely[13] public understanding of disputed constitutional text. And, it certainly does not make it the better (or best) understanding of that text. It would seem to me that that is our goal.

A. The Hamilton List

In 1792, during George Washington's first administration, Secretary of the Treasury Alexander Hamilton was directed by the Senate of the Second Congress to produce a list of "*every* person holding *any* civil office or employment under the United States, (except the judges) . . . ."[14] *Every* not

[12] Teachout's analogy might have some force where corporate political activity is directed towards influencing a person holding a federal appointed or statutory office. Still, for a strict textualist, Teachout's argument is a non-starter. Generally speaking, domestic corporations are not "foreign States," and as such, any Foreign Emoluments Clause-based argument simply fails at the outset.

[13] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3072 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("When interpreting constitutional text, the goal is to discern the *most likely* public understanding of a particular provision at the time it was adopted." (emphasis added)) (link).

[14] 1 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 441 (Washington, Gales & Seaton 1820) (May 7, 1792 entry) (emphasis added).

some; *any* not *some*. Nine months later, Hamilton returned a ninety-page document that included all those holding federal appointed or statutory office in every branch, but no elected officials in any branch.[15] Not surprisingly, no state officials were included. These events are roughly contemporaneous with the enactment of the Constitution and involved an actor who played a prominent role in drafting and ratifying it. Hamilton's response was an official communication from the Treasury to the Senate: his actions here represent an official Executive Branch construction of (what is now) contested language.

Teachout has responded with several arguments. Her first theory—that the salaries of the President and Vice President were widely known and therefore not deemed to be necessary to include in the report—simply does not cohere with the known facts.[16] Yes, the President's and Vice President's annual salaries were known. They were both set by statute during the First Congress. But congressional statutes from the First Congress also set the salaries for cabinet officials.[17] Those cabinet salaries were also known. Yet Hamilton included cabinet members' salaries, but not the President's and Vice President's salaries. As for Representatives and Senators, they were paid a per diem, not an annual salary. Their salary—in the sense of what was actually paid—was not well-known. The only way to know what they were paid was to research it and report it. Yet Hamilton omitted reporting any such information—even though he did report what Senate and House administrative officers were paid.

Teachout's argument that the phrase "office under the United States" may have been ambiguous also does not help her cause. If the phrase was reasonably subject to different understandings, then Hamilton should have included close cases. After all, functionally speaking, the document's intended purpose was to aid congressional oversight and budgeting. Thus, if there were some doubt or ambiguity whether federal elected positions were *Offices . . . under the United States*, such positions should have been included, but they were not. Teachout could retreat by suggesting that the phrase was ambiguous, but the ambiguity—although known to her—was unknown to Hamilton, who acted on a more narrow understanding of the

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[15] The list included: all cabinet members and other appointed Executive Branch officers, but not the President or Vice President; clerks of the federal courts, but not the judges (which Hamilton was expressly asked to omit); the Secretary of the Senate and the Secretary's staff, the Clerk of the House and the Clerk's staff, but not the members of the Senate or House or the presiding officers. *See* Seth Barrett Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1, 14–15 (2012), http://www.law.northwestern.edu/lawreview/colloquy/2012/7/LRColl2012n7Tillman.pdf, *reprinted in* 107 NW. U. L. REV. 399 (link).

[16] *See* Teachout, *supra* note 2, at 41.

[17] *See* Act of Sept. 23, 1789, ch. 19, § 1, 1 Stat. 72 (setting the President's and Vice President's compensation); Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67, 67–68 (setting salaries for the Cabinet and others).

scope of the phrase. Such a linguistically specific defense requires *some* evidence illustrating Hamilton's limited grasp of what appears to be common words and a phrase repeatedly appearing in the Constitution itself. Teachout offers no such defense. Moreover, even if she is right and this ambiguity existed but was unknown to Hamilton, why precisely does Teachout believe her preferred meaning is better than Hamilton's (except that it accommodates a maximalist view of her anti-corruption principle)?

Each of the two remaining arguments Teachout puts forward in her *Northwestern University Law Review Colloquy* essay—that there were other prudential or political reasons that Hamilton did not include those salaries or that the context in which the question was asked led Hamilton to think that it was not intended to cover the President or Vice President—is conceivable. But, the fact that a position is conceivable does not make it likely. To shift from the conceivable to the probable, from the possible to the likely requires evidence. Teachout puts forward none.

B. George Washington's French Gifts

While President, George Washington received two gifts from foreign government functionaries: Lafayette gave Washington the key to the Bastille,[18] and the French ambassador gave Washington a picture frame and full-length portrait of Louis XVI.[19] Washington accepted and kept both without asking for or receiving congressional consent.[20] The public knew about the gift of the key: it was widely reported.[21] Many must have known about the gift of the portrait: it was on display in Washington's anteroom, beyond which he entertained official visitors.[22] The French coat of arms and

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[18] *See* ANDRÉ MAUROIS, ADRIENNE: THE LIFE OF THE MARQUISE DE LA FAYETTE 160 (Gerard Hopkins trans., 1961) (noting Lafayette's 1789 appointment as Vice President of the National Assembly); *id.* at 162–63 (noting Lafayette's 1789 appointment (by the King) and subsequent election (by the Paris electorate) as commander of the National Guard, formerly known as the bourgeois militia); THE LETTERS OF LAFAYETTE TO WASHINGTON 1777–1799, at 347–48 (Louis Gottschalk ed., 1976) (reproducing March 17, 1790 letter from Lafayette to Washington giving the key to the Bastille).

[19] *See* Letter from Ambassador Ternant to George Washington (Dec. 22, 1791), *in* 9 THE PAPERS OF GEORGE WASHINGTON 306, 306 n.1 (Mark A. Mastromarino & Jack D. Warren, Jr. eds., 2000).

[20] *See* 8 ANNALS OF CONG. 1589 (1798) (statement of Rep. Williamson) (reporting May 4, 1798 debate—more than a year after Washington left office—as the first congressional debate on the Foreign Emoluments Clause) (link); *id.* at 1582 (statement of Rep. McDowell) (noting that this was a "new subject" for Congress) (link).

[21] *See, e.g.*, *Philadelphia, 12 August*, FED. GAZETTE & PHILA. DAILY ADVERTISER, Aug. 12, 1790, at 2 ("Last week the key of the Bastille, accompanied with a fine drawing of that famous building, was presented to the President of the United States, by John Rutledge, jun. Esq. to whose care they were committed by the illustrious patriot the Marquis de la Fayette . . . ."); *New-York, August 10*, PA. PACKET, & DAILY ADVERTISER, Aug. 13, 1790, at 2 (same); *see also* STEPHEN DECATUR, JR., PRIVATE AFFAIRS OF GEORGE WASHINGTON 144 (1933) (noting that key was on display in a public levee).

[22] *See, e.g.*, Letter from Edward Thornton to James Burges (Mar. 5, 1793), *in* S.W. Jackman, Notes and Documents, *A Young Englishman Reports of the New Nation: Edward Thornton to James Bland Burges, 1791–1793*, 18 WM. & MARY Q. (3d ser.) 85, 121 (1961) (writing from Philadelphia: "I don't

the King's initials appeared above Washington's family crest and Washington's initials![23] This is extraordinary probative evidence in regard to establishing the original public meaning of the Foreign Emoluments Clause.[24]

Teachout responds by proposing multiple explanations for President Washington's conduct, suggesting alternatively that Washington did not wish to subject himself to Congress's oversight and actively chose to evade the rule; that Washington's diplomatic role for the young nation prevented his refusal; that the portrait was not a "present" under then-current diplomatic conventions; that Washington believed the portrait was a personal rather than official gift; that Washington uniquely could ignore the Constitution where others could not; and that the value of the portrait was de minimis.[25] Finally, Teachout suggests: "I am not willing to take a strong stand on what Washington was thinking when he accepted the print, but it strikes me as entirely plausible that Washington acted without consideration of whether the clause applied to him, not based on a thoughtful reading of the clause."[26]

Not one of Teachout's alternative theories carries any indicia of support. Some of these theories are evidence-reliant, such as her claim that portraits were different, i.e., not encompassed by the public domestic

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know whether I mentioned to you formerly that the key of the Bastil[l]e, given to a certain Great Man here by La Fayette is hung up in a glass frame in the principal room of the Great Man's house *with an engraving of Louis XVI* . . . ." (emphasis added)).

[23] William B. Adair, *A Masterpiece of Artisanship*, PICTURE FRAMING MAGAZINE, Aug. 2010, at 28 (describing the print and frame as "an official diplomatic gift").

[24] Evidence arising in connection with the Washington administration is generally considered superior to that of later administrations. First, Washington's administration was contemporaneous with the Constitution's ratification. Second, the President was a Framer and his cabinet contained other Framers and ratifiers. Third, the President saw himself above party or faction; indeed, active partisan federal electoral politics did not arise until after Washington decided not to run for a third term. Fourth, Washington understood that his personal and his administration's conduct were precedent-setting even in regard to what might appear to be minor events and conduct. Fifth, Washington both valued his reputation for probity and acted under the assumption that his conduct was closely monitored by political opponents and opportunists. *See, e.g.*, Letter from George Washington to Bushrod Washington (July 27, 1789), *in* 30 THE WRITINGS OF GEORGE WASHINGTON 366 (John C. Fitzpatrick ed., 1939) ("You cannot doubt my wishes to see you appointed to any office of honor or emolument in the new government . . . . My political conduct in nominations . . . must be exceedingly circumspect and proof against just criticism, for the Eyes of Argus are upon me, and no slip will pass unnoticed that can be improved into a supposed partiality for friends or relatives."). Finally, at the time the Foreign Emoluments Clause was drafted, this internal corruption motivation "was largely not a jingoistic fear—the United States was too young, in part, but the countries that threatened were countries that many of the Framers had strong and direct ties to, even affection for—France, most prominently." Teachout, *supra* note 1, at 361.

[25] *See* Teachout, *supra* note 2, 41–42 (footnote to Tillman omitted).

[26] *Id.* at 42. *But see* Robert Ralph Davis, Jr., *Diplomatic Gifts and Emoluments: The Early National Experience*, 32 HISTORIAN 376, 389–90 (1970) (noting that in 1790, Jefferson consulted Washington in regard to setting policy involving American gifts for foreign diplomats).

meaning of "present" or, perhaps, not considered "presents" under customary international law. No evidence is put forward for this or her other views.

All her remaining theories to account for Washington's conduct all go to Washington's subjective motivation. Teachout's analysis errs here. No one should be interested in Washington's motivation as a thing in itself. One is only interested in Washington's conduct as evidence of public meaning. The question is not (merely) why Washington did what he did, but why Teachout is unable to point to any evidence in Congress, or the press, or even private letters complaining in regard to Washington's conduct.

There is a better, simpler view that accounts for the evidence we have without relying on evidence we have yet to discover. Washington did nothing wrong within the confines of the Constitution as it was understood in 1790 (when he accepted the key), or 1791 (when he accepted the ambassador's frame and print), or 1792 (when the Senate directed Hamilton to produce his list). We lack records voicing complaint in regard to Washington's conduct because the public had no basis to object to his conduct. Teachout is unwilling to take "a stand on what Washington was thinking." That's good—because she does not have to.

C. Teachout's Precedents

Teachout relies upon post-Washington era materials, including state materials, without explaining why this evidence is more persuasive than the Washington-era evidence.

Executive Branch Practice. Teachout correctly cites post-Washington Executive Branch practice where presidents, such as Van Buren and Tyler in the 1830s and 1840s, sought congressional consent upon receipt of gifts from foreign governments.[27] Likewise, Andrew Jackson received a gold medal from the South American revolutionary Simón Bolívar, President of Columbia. In 1830, Jackson submitted it to congressional control.[28]

Nowhere does Teachout put forward any principled argument for believing that the Jackson–Tyler-era precedents better comport with original public meaning than the Washington–Hamilton-era precedents.

State Case Law. Teachout also turns to a variety of cases arising in state courts involving state constitutional provisions and state statutes using language roughly comparable to the Foreign Emoluments Clause. I will not

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[27] *See* Teachout, *supra* note 2, at 42.

[28] *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TO THE TWO HOUSES OF CONGRESS AT THE COMMENCEMENT OF THE FIRST SESSION OF THE TWENTY-THIRD CONGRESS 258–59 (Washington, Gales & Seaton 1833) (reproducing Jan. 22, 1834 letter from the Secretary of State to the President explaining, in summary fashion, the history of the Jackson medal and how it came into the possession of the State Department) (link).

dwell on this evidence. These citations to post-bellum evidence, in my view, are almost entirely irrelevant to establishing the original public meaning of the Foreign Emoluments Clause's *Office . . . under the United States* language.[29]

She also cites a Pennsylvania case from 1846 adjudicating a statute from 1839, tested under the Pennsylvania constitution of 1838.[30] This is a half century after 1789. Teachout must explain why these state law materials discussing analogous state law language are probative or should be considered in light of competing federal materials from the 1790s.

Like the presidential material which Teachout cites, the state law evidence she puts forward meets her burden of production. It is interesting, and it could be used to build a non-originalist argument for how we should interpret the Foreign Emoluments Clause, given who the American people are today and how the Republic has evolved. But many have been attracted to Teachout's work because of her repeated claim that her research and analysis is connected both to 1787–1789 and to the Framers' *corruption*-obsessed worldview. So, these later materials, in my view, do not make her case.

The South Carolina Statute of 1787. The South Carolina Incompatibility Act of 1787 states: "no *officer* heretofore *elected*, or hereafter to be elected, to any pecuniary office in this State . . . shall hold any *other office* of emolument under this or the United States."[31] She argues, as a matter of grammar, that it is reasonable to infer from the Act's use of "other" that the "office[s] of emolument under this or the United States" are elected, just as is the initial "officer" described by the Act. From this Teachout reasons that "office . . . under this . . . [State]" and "office . . . under . . . the United States" are not attached strictly to appointed or statutory offices. If these terms reach *elected* offices, then the Foreign Emoluments Clause might embrace elected state and federal officials. Teachout's argument might have bite if I had argued that *office under the United States* was universally understood as a matter of eighteenth-century legislative drafting. My position was and is that *Office . . . under the United States* and *officers . . . of the United States* are terms of art as used in the Constitution of 1787.[32] This South Carolina

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[29] Teachout, *supra* note 2, at 44 (citing State v. Buttz, 9 S.C. 156 (1877)); *id.* at 47 n.69 (discussing State *ex rel.* Rosenheim v. Hoyt, 2 Or. 246 (1867)); *id.* at 46 n.66 (discussing twentieth-century case law).

[30] *Id.* at 45 (discussing Commonwealth *ex rel.* Owine v. Ford, 5 Pa. 67 (1846)).

[31] *See id.* at 46 & n.67 (quoting Act No. 1368 of 1787, *reprinted in* 5 STAT. AT LARGE OF SOUTH CAROLINA 21 (T. Cooper ed., 1839)) (emphasis added).

[32] Of course, I am not saying that the Framers acted on a clean slate. Usage similar to that embraced by the Federal Convention can be found elsewhere, including in prior British statutes. *See* Tillman,

statute preceded the Constitution of 1787. In these circumstances, the fact that its usage may be inconsistent with the Constitution is hardly surprising. Rather, it would be remarkable if it were precisely consistent at the level of detail Teachout is trying to impose.

The Pennsylvania Constitution of 1790. Teachout also cites Article II, Section 8 of the Pennsylvania constitution of 1790,[33] which she argues seems to distinguish *offices under the United States* from *appointments under the United States*.[34] If the two are different, and not redundant, one might argue that one of the two categories embraces *elected* positions. In other words, one might conclude that *office* embraces *elected* positions because *appointed* positions are already accounted for. And it might follow that the similar *Office* language in the Foreign Emoluments Clause would also embrace elected positions. Teachout's position comes without any extrinsic support and without fully considering alternatives and the implications of her own position.

Both categories—*offices under the United States* and *appointments under the United States*—may refer exclusively to statutory officers. The difference may be one of timing: an *appointment under the United States* may refer to a person who has received his appointment, but has not taken his oath of office, at which time he holds an *office under the United States*. The distinction may be between those who take office by operation of law (i.e., succession) and so hold an *office under the United States*, and those who receive a presidential appointment, i.e., an *appointment under the United States* under the Appointments Clause. This interpretation is supported by the fact that this provision—in two places—distinguishes "holders" of office from those who merely "exercise" office.[35]

More importantly, if Teachout is going to make this sort of fine grammatical argument, if the text of this provision distinguishes *offices under the United States* from *appointments under the United States*, then it would appear that this text also distinguishes *members of Congress* from *office of trust or profit under the United States*. If that is the case, then the Foreign Emoluments Clause does *not* apply to congressional elections (and, by implication, to any state positions).

The Blount Impeachment. Finally, the most significant early American material discussed by Teachout is the *Blount* case. In 1797, the House impeached Senator Blount. House managers brought articles of impeachment before the Senate and trial proceedings followed. In 1799, the

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supra note 15, at 12 & nn.35–36 (2012) (citing ANNE TWOMEY, THE CONSTITUTION OF NEW SOUTH WALES 438 (2004)).

[33] PA. CONST. of 1790, art. II, § 8 (emphasis added) (link).

[34] *See* Teachout, *supra* note 2, at 46–47.

[35] PA. CONST. of 1790, art. II, § 8.

Senate dismissed the case.[36] The modern consensus view—with some support in the ambiguous Senate materials—is that *Blount* stands for the proposition that members of Congress cannot be impeached. The problem with the consensus view is that even if one assumes (which is hardly clear) that the Senate dismissed the case because it determined that members of the legislature are not within the scope of the House's impeachment power, one has equal reason to assume that the House brought its charges because it believed that members of Congress were within its scope. I think this is a fair conclusion, and I see no good reason to believe that the Senate is better authority than the House.

Teachout takes this analysis one step further. The Impeachment Clause states: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[37] Teachout's position is that for the House to have impeached, its members must have believed that Senators were "Officers of the United States" within the scope of the Impeachment Clause, and if so, Senators are likely to be *Officers . . . under the United States* under the Foreign Emoluments Clause. The problem for Teachout is that the House records are almost as ambiguous as the Senate records. We know a majority of the House supported this impeachment, and we can presume they thought their actions constitutional. But we do not know why they thought it was constitutional. It is likely that some thought Senators were *officers of the United States* (at least for the purposes of the Impeachment Clause). But it is equally possible that the House members read the Impeachment Clause as an automatic removal provision, not a statement as to the scope of the House's impeachment power.[38] In other words, House members could support impeaching a senator, even if they believed senators were not *officers of the United States*.

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[36] *See* 8 ANNALS OF CONG. 2319 (1799) (recording Senate adoption of a resolution to the effect that: "this Court ought not to hold jurisdiction") (link); 2 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, *supra* note 14, at 392 (recording Senate adoption of a resolution on July 8, 1797 to expel Blount) (link); 3 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA 72–73 (Washington, Gales & Seaton 1826) (recording July 7, 1797 resolution of the House to impeach Blount) (link).

[37] U.S. CONST. art. II, § 4 (link).

[38] *See* TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 436 (Boston, Little, Brown, & Co. 3d ed. rev. 1872) ("The general power of impeachment and trial may extend to others besides civil officers, as military or naval officers, or even persons not in office, and to other offences than those expressly requiring a judgment of removal from office . . . .") (link); Charles Pergler, Note, *Trial of Good Behavior of Federal Judges*, 29 VA. L. REV. 876, 879 (1943) ("[W]e are dealing with a mandatory requirement, prescribing removal if a civil officer is impeached and convicted of the offenses . . . ."); *see also* Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 66 & n.49, 98 & n.207 (1999) (link).

There is good reason to believe that the latter view played a significant role in the House's *Blount* proceedings, even if some individual House members believed that members of Congress were *officers of the United States*. If one examines the House's articles of impeachment, the document describes Senator Blount as having acted contrary to "his trust and station as a Senator,"[39] not in the language of *officer of the United States*.[40] If there had been widespread agreement in the House for the proposition that Senators were *officers of the United States*, one would think that that position would have been clearly voiced in the House's articles of impeachment, just as any prosecutor would make clear jurisdictional allegations in his or her indictment.

In fairness to Teachout, I must point out that a majority of (the handful of) Framers who spoke of the impeachability of Senators took Teachout's position. For example, Edmund Randolph argued that the House's impeachment power extended to senators.[41] Apparently, Randolph thought the President was an *officer of* and *under the United States* and subject both to the Impeachment Clause and the Foreign Emoluments Clause.[42] Among the Framers, the only exception seems to be James Monroe, who argued that members are not impeachable.[43] None of the Framers, however, left us a clear reasoned basis for their views. Here and elsewhere, Teachout's position has implications for constitutional law (e.g., the scope of the House's impeachment power), quite apart from its First Amendment implications. Yet, Teachout fails to embrace the task of clarifying to the reader what aspects of public law will be destabilized by adopting her anti-corruption principle.

In short, *Blount* will remain an enigma. Teachout cannot rely on it to support her position that members of Congress are *officers of the United States*. It may very well have been the case that several House and Senate members believed that senators were *officers of the United States* and subject to impeachment. But we do not know why they (apart from some of the House managers who acted as prosecutors) believed it. Without knowing if and why members believed it, we have no means to assess if

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[39] 7 ANNALS OF CONG. 948–51 (1798) (reproducing *Blount* Articles of Impeachment) (link).

[40] *See* CONG. GLOBE, 38th Cong., 1st Sess. 37 app. (1864) (statement of Sen. Bayard) (explaining that the House's articles of impeachment nowhere referred to Blount in the language of *officer*) (link).

[41] *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 202 (Jonathan Elliot ed., Washington, 2d ed. 1836) [hereinafter DEBATES] (reproducing Randolph's statement at the Virginia ratifying convention).

[42] *Id.* at 485–86.

[43] *See* JAMES MONROE, *NOM DE PLUME* A NATIVE OF VIRGINIA, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT (Petersburg, Hunter & Prentis 1788), *reprinted in* 1 THE WRITINGS OF JAMES MONROE 347, 361 (Stanislaus Murray Hamilton ed., N.Y.C., G.P. Putnam's Sons 1898) (link).

their (purported) view was a reasonable one, much less the best view of the Constitution's text as a matter of original public meaning.

III. TEACHOUT AND STATE OFFICIALS

Teachout suggests that *Office of Profit or Trust under them*, the key language in the Foreign Emoluments Clause, arguably extends to state officials, including state elected officials.[44] The Foreign Emoluments Clause is itself joined to the prior Titles of Nobility Clause, which states:

> No Title of Nobility shall be granted by the United States: And no Person holding any *Office of Profit or Trust under them*, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.[45]

Teachout's position has some grammatical support. In a federal system, *under the federal entity* language might be a term of art reaching the federal entity and its officials, or it might reach both the officials of the federal entity and its component states, provinces, and territories, and their officials.[46] That said, her position is against the weight of the evidence; indeed, it is entirely idiosyncratic. She points to no persuasive authority suggesting that anyone ever embraced this point of view (until she did so in 2009).

A. The Text of the Articles of Confederation and the Text of the Constitution of 1787

As a textual matter, the drafters of the Articles of Confederation were aware of this ambiguity. When they referred to the federal entity, the new national government, they used *United States* language,[47] when they

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[44] *See* Teachout, *supra* note 2, at 36–39. Teachout believes that my position relies on the fact that the Framers here chose "*them*" rather than "*it*" in the Foreign Emoluments Clause. *Id.* That is not my position. My position is simply that "*them*" relates back to the Titles of Nobility Clause's prior use of "*the United States*." As far as I know, the universal understanding of "*the United States*" (as expressly and implicitly used in this clause) is that it refers exclusively to federal, not state, positions. Teachout may be the first to argue otherwise.

[45] U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

[46] *See* Luke Beck, *The Constitutional Prohibition on Religious Tests*, 35 MELB. U. L. REV. 323, 352 (2011) ("The root of the problem lies in the word 'under' [as in 'under the Commonwealth of Australia']. Does it mean 'of' such that the prohibition is limited to Commonwealth offices and public trusts? Or does it mean 'within' such that the prohibition applies to state offices and public trusts as well?") (link).

[47] *See, e.g.*, ARTICLES OF CONFEDERATION of 1781, art. XI ("Canada acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to,

referred to states they used *States* language,[48] and when they meant both, they used express language accommodating both. The Articles did not rely on generic *United States* language or the word *them* when referring to the States as individual entities *unless* there was some specific referent or preposition which put the reader on express notice. To cite just a few examples:

> Article IV, Paragraph 1 discussing the "property of the United States, or *either of* them;"
>
> Article VI, Paragraph 1 precluding "the United States in Congress assembled, or *any of* them, grant[ing] any title of nobility;"
>
> Article VI, Paragraph 2 mandating that "[n]o two or more states shall enter into any treaty, confederation, or alliance whatever *between* them . . . ."[49]

The drafters of the Constitution of 1787 followed similar (but not identical) drafting conventions. Where the Articles conflated national and state proscriptions into a single clause, the Constitution of 1787 created two clauses. For example:

> Article 1, Section 9, Clause 8: "No title of nobility shall be granted by the United States;" and,
>
> Article 1, Section 10, Clause 1: "No State shall . . . grant any Title of Nobility."[50]

Simply put, the drafters of the Constitution of 1787 did not rely on arguably ambiguous usage to embrace state officials.

B. Scholarly and Judicial Authority on the Applicability of the Constitution's Office-Laden Terminology to State Office

It appears that the earliest scholarly authority to have examined whether the Foreign Emoluments Clause reaches state officials is Moore's

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all the advantages of this union; but no other colony shall be admitted into the same unless such admission be agreed to by nine states.").

[48] *See, e.g., id.* at art. VI, para. 1 ("No State, without the consent of the United States in Congress assembled, shall send any embassy . . . .").

[49] *Id.* at art. IV, para. 1 (emphasis added); *id.* at art. VI, para. 1 (emphasis added); *id.* at art. VI, para. 2 (emphasis added).

[50] U.S. CONST. art. I, § 9, cl. 8; *id.* at art. I, § 10, cl. 1 (link).

Digest, a source which Teachout relies on throughout her *Northwestern University Law Review Colloquy* essay. Moore's states that the State Department, in 1872, took the position that state officials are outside the ambit of this clause.[51] More recent commentators, such as Professor Rosenkranz, agree: federal constitutional provisions do not reach states or state officials by implication; only express language will do.[52]

Teachout urges the reader to expand the reach of the Constitution's arguably ambiguous *Office* language to include state office, in part, because:

> My own experience with politics suggests that complete awareness of grammar and its implications comes only when there are particularly highly interested parties (and there is no reason to think that there was an interested group of state officials who were aspiring to be foreign gift recipients), or debate, or a great deal more time and effort that was spent on th[e] Constitution.[53]

First, there is good early American, English, and other foreign authority suggesting that fine linguistic distinctions relating to *office* and *officer* were once readily comprehended.[54]

More importantly, how much time is a "great deal" of time? The Framers took four full calendar months: from May 14, 1787 until September 17, 1787. To me, that seems like a "great deal" of time to adopt standard usage to be applied to the federal entity and coordinate standard usage to be applied to the States. And I too can refer to personal experience: draftsmen-lawyers are loath to repudiate extant language and settled linguistic conventions. The Articles of Confederation had problems, but I

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[51] *See* 4 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 651, at 577 (1906) ("The provisions of the Constitution 'neither prevent nor authorize persons who may hold office under any one of the States from accepting an appointment under a foreign government.'" (quoting State Department correspondence from 1872)) (link).

[52] *See* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1013 (2011) (link).

[53] Teachout, *supra* note 2, at 37 n.34.

[54] *See* 2 DEBATES, *supra* note 41, at 449–50 (quoting James Wilson: "The great source of corruption, in that country, is, that persons may hold offices *under* the crown, and *seats in the legislature* at the same time." (emphasis added)) (link); *see also* GERARD CARNEY, MEMBERS OF PARLIAMENT: LAW & ETHICS 67 (2000) (reporting judicial authority distinguishing office of profit "*from* the crown" from office of profit "*under* the crown" (emphasis added) (internal quotation marks omitted)); John Waugh, *Disqualification of Members of Parliament in Victoria*, 31 MONASH U. L. REV. 288, 297 (2005) (noting that English law distinguished "office of profit *from* the crown" from "office of profit *under* the crown" (internal quotation marks omitted)) (link); *cf.* Beck, *supra* note 46, at 351 ("[T]he Australian Constitution distinguishes between [officers] 'of the Commonwealth' and 'under the Commonwealth'." (emphasis omitted)).

have never heard any complaint in regard to its having left textually unclear which obligations applied to the states and which to the national government.

And if Professor Rosenkranz (writing in the twenty-first century) and Professor Moore (writing in the twentieth century) seem insufficient, we can resolve the historical question by going back to a unanimous Supreme Court in *Barron v. Baltimore*,[55] where Chief Justice Marshall, himself a ratifier, explained:

> If the original constitution, in the ninth and tenth sections of the first article [e.g., the Foreign Emoluments Clause], draws this *plain* and *marked* line of discrimination between the limitations it imposes on the powers of the general government, and on those of the state; if in every inhibition intended to act on state power, words are employed which *directly* express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.
>
> We search in vain for that reason.[56]

Of course, it is conceivable that Teachout is correct, as a matter of the original public meaning of the Foreign Emoluments Clause, and Marshall was wrong (along with Hamilton and Washington). Teachout's analysis is not defeated by the Supreme Court's nineteenth-century ruling. Rather, the greater difficulty for Teachout is her inability to show that the voice of the nation—or *any* significant part thereof, or *anyone* at all—rose up to speak against this aspect of Marshall's opinion.

Teachout wants us to adopt her theory, not on the grounds that it is correct, but merely because she has shown that it is conceivable, i.e., grammatically *Office . . . under the United States* could reach state elected officials, including members of the state legislatures. But for the Marshall Court and those who came thereafter, this language has not been thusly understood. So it would seem that Teachout should not be able to rest her case on purported grammar-based ambiguity alone. All she has established is that her position is conceivable, not that it is the best understanding of the language of 1789.

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[55] 32 U.S. (7 Pet.) 243 (1833) (link).

[56] *Id.* at 249 (emphasis added).

C. Contemporaneous Practice

Teachout has argued that the *Office of Trust or Profit under the United States* language in the Foreign Emoluments Clause applies to the President, members of Congress, and to state officials (apparently including members of the legislature and other elected state officials). The Incompatibility Clause uses similarly expansive *Office* language, stating: "[N]o Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office."[57] If we apply Teachout's premises, it would appear that the Incompatibility Clause precludes members of Congress from holding state positions—appointed or elected—in any branch of state government.

Teachout's position is contradicted by *The Federalist*[58] and scholarly authority.[59] More importantly, the Incompatibility Clause did not bar Charles Carroll of Carrollton from simultaneously sitting in the Maryland senate and the United States Senate between 1789 and 1792.[60] Apparently, he and his contemporaries did not believe that joint service was either barred by the federal Incompatibility Clause or by its state analogue.[61]

Subsequently, Maryland amended its constitution to bar joint state–federal legislative service.[62] The proposed amendment passed the state legislature in 1791; it went into force in 1792.[63] This state constitutional amendment, which was passed after the Constitution of 1787 was made public by the Federal Convention, followed the drafting conventions adhered to in the Federal Constitution. It expressly distinguished federal

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[57] U.S. CONST. art. I, § 6, cl. 2 (emphasis added).

[58] THE FEDERALIST NO. 56, at 64 (James Madison) (John P. Kaminski & Richard Leffler eds., 1998) ("The representatives of each state . . . will probably in all cases have been members, *and may even at the very time be members of the state legislature* . . . ." (emphasis added)) (link).

[59] *See, e.g.*, Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1047 (1994) ("The Framers barred Members of Congress from holding federal executive or judicial offices, but the text they wrote allows joint office holding between: 1) the Executive and Judicial Departments, 2) the House of Representatives and the Senate, and 3) the federal government and the states." (footnotes omitted)) (link); *id.* at 1050 ("Proposals to constitutionalize executive-judicial and federal-state incompatibility were made at the Constitutional Convention and were not approved."). *But see id.* at 1047 ("[*T*]*oday* we largely understand the separation of powers to include a one person, one office *codicil*." (emphasis added)). Teachout might latch on to that modern codicil, but that post-1789 view was not part of the corruption-obsessed world of the Framers.

[60] JAN ONOFRIO, MARYLAND BIOGRAPHICAL DICTIONARY 116 (1999) (link).

[61] *Cf.* MD. CONST. of 1776, art. XXVII ("[N]o person, who holds any office of profit in the gift of Congress, shall be eligible to sit in Congress; but if appointed to any such office, his seat shall be thereby vacated.") (link).

[62] *See id.* at art. LXXX (link).

[63] *Constitutional Amendments*, ARCHIVES OF MD. ONLINE, http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000380/html/am380p--1.html (last visited Mar. 18, 2013) (listing ratification dates of Maryland's constitutional amendments) (link).

from state positions; it distinguished *offices under the United States* from *members* of the legislature:

> That no member of congress, or person holding an *office of trust or profit under the United States*, shall be capable of having a seat in the general assembly [i.e., the state legislature], or being an elector of the [state] senate, or holding any office of trust or profit under this state . . . .[64]

After this amendment went into effect, Charles Carroll resigned from Congress. He retained his state senate seat.[65]

Charles Carroll was not alone. The First Congress had several members who concurrently held state legislative seats.[66] Likewise, the First Congress had several members who concurrently held state executive and judicial office. For example, in 1790, Senator Philip John Schuyler, a U.S. senator, concurrently sat on the New York Council of Appointment.[67]

In 1789, the Incompatibility Clause's *Office under the United States* language did not bar members of Congress from holding state positions, *elected* or *appointed*. And that is good warrant for believing that the similar language in the Ineligibility Clause and the Foreign Emoluments Clause did not reach state officeholders. Of course, these three clauses are the primary constitutional provisions Teachout relies on. If these constitutional provisions do not extend to state office, then it seems reasonable to conclude that her anti-corruption principle—whatever its scope—cannot extend to state office, elected or appointed.

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[64] MD. CONST. of 1776, art. LXXX (emphasis added).

[65] ONOFRIO, *supra* note 60, at 116; 19 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1070 (Charlene Bangs Bickford et al. eds., 2012) [hereinafter 19 DHFFC] (noting Senator Charles Carroll of Carrollton (Md.) concurrently held a state senate seat).

[66] *See, e.g.*, 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 774–75 (William C. di Giacomantonio et al. eds., 1996) [hereinafter 14 DHFFC] (noting Congressman Clymer (Pa.) was a member of the state assembly); *id.* at 706 (noting Senator Schuyler (N.Y.) concurrently held a state senate seat); 19 DHFFC, *supra* note 65, at 1070 (noting Congressman Fitzsimons (Pa.) was a member of the state legislature); *id.* at 1070 (noting Congressman Huntington (Conn.) was a member of the state legislative council). *But cf. id.* at 1069 (noting that the New York state senate declared Congressman Hathorn, Congressman Laurance, and Senator Schuyler's state senate seats vacant, and that the New York state house declared Senator King's state house seat vacant); *id.* at 1070–82 (collecting primary documents suggesting that the New York legislative houses acted under state constitutional law). There is no example of a house of the First Federal Congress (or a contemporaneous court, federal or state) declaring joint federal–state legislative service incompatible under the Incompatibility Clause or under the authority of the U.S. Constitution.

[67] *See* 14 DHFFC, *supra* note 66, at 706, 709 (discussing Schuyler); *id.* at 842 (noting Congressman Burke (S.C.) was a state court judge, "on leave of absence without [judicial] pay during his [c]ongressional term"); *id.* at 630–31 (noting Congressman Leonard (Mass.) was a judge on the state Court of Common Pleas); 19 DHFFC, *supra* note 65, at 1069 (same); *id.* at 1069 (noting Congressman Partridge (Mass.) was a county sheriff).

D. Teachout and The Framers' Corruption-Speak

Can Teachout make the argument that, apart from the constitutional text, the more nebulous corruption-speak or worldview of the Framers and ratifiers is a sufficient basis for expanding the scope of the federal anti-corruption principle to state office? That is an interesting question. My own view is "no." The expectations, hopes, aspirations, intent, and worldview of the founders cannot be imposed as "law," much less constitutional law, if those mental states were not meaningfully embodied in the formal constitutional text. If the Framers wanted the primary anti-corruption provisions in the Constitution to reach state officials, they had ready language at their fingertips to achieve that end. But they did not make use of any such language. The better view is that the absence of such language is some indication that the era of the Framers lacked strong or meaningful consensus in regard to extending the anti-corruption principle beyond zones expressly embraced by the constitutional text and circumstances about which the Framers had first-hand experience during the colonial period and under the Articles.

But even if I am wrong about this interpretive question, Teachout's 2009 article was understood as an interpretation of the Constitution's text, not as a meta-historical period study. For example, Justice Stevens, in his *Citizens United* dissent, cited Teachout immediately before and after citing to the Foreign Emoluments Clause.[68] Why? Because he (and everyone else, except perhaps Teachout herself) understood her 2009 article to be an interpretation of the Foreign Emoluments Clause and related constitutional provisions. The original public meaning of Teachout's prior scholarship was that she was interpreting the Constitution's text through the prism of *corruption*-speak. If now she takes the position that the anti-corruption principle is supported only by the Founders' general intent or purposes or expectations, then it is unlikely that many who originally embraced her position will remain supporters.

E. Does It Matter if the Foreign Emoluments Clause Extends to State Offices?

Teachout argues in the alternative that the anti-corruption principle remains viable even if the Foreign Emoluments Clause does not reach state positions:

> In short, even if states were intentionally excluded, [this] does not constitute an intentional grant of greater power to

[68] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 948 n.51, 963–64 (2010) (Stevens, J., concurring in part and dissenting in part) (link).

> state officials to accept foreign gifts when representing the country, simply because they *cannot* represent the country. Without this intention, even if the "Constitution of 1787 liberalized the foreign government gift-giving regime in regard to state offices," this liberalization does not reflect a lack of concern about corruption.[69]

Teachout's historical claim seems dubious. State government and state officials could use their powers (rightly or wrongly) to check the federal government and its policies. That is virtually the whole of the fabric of American history from the Articles of Confederation to 1787–1789, and then until the Civil War (and some might say into Reconstruction and the Civil Rights Movement and beyond). Is it really controversial to affirm that the Framers were aware that the national government being established was (much like its predecessor) dependent on the goodwill of state government and state officials? For example, President George Washington consistently sought the aid of state governors. He did so during the Whiskey Rebellion and he asked for assistance in enforcing his Neutrality Proclamation.[70]

Again, prior to the Seventeenth Amendment, state governors could fill Senate vacancies with temporary appointees.[71] If a foreign power bribed a state governor, the foreign policy implications—for war, peace, and treaty-making—are plain, notwithstanding that the governor is not conducting "foreign policy."

So, contrary to Teachout, even if a state official was not conducting "foreign policy" per se, a foreign power's bribing such a state official could have serious implications for the peace of the Republic. And such disloyalty was not beyond the Framers' imagination: Benedict Arnold, Ethan Allen,[72] Blount, and Burr. Today, the foundations of the Republic seem so secure, and these men occupy only footnotes in our history. But, it was not always so. There was a time when these men and others like them threatened the existence of our country.

If one concedes that the Foreign Emoluments Clause does not reach state office, then it seems unreasonable to assert either that the world of the Framers was corruption-obsessed or that the scope of Teachout's anti-corruption principle reaches state officials. In 1787, corruption played its part, to be sure, but other principles and policies also played a role, which

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[69] Teachout, *supra* note 2, at 37–38 (quoting Tillman) (footnote omitted).

[70] *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 49 (2008).

[71] *See* U.S. CONST. art. I, § 3, cl. 2 (link).

[72] *See* Seth Barrett Tillman, *Blushing Our Way Past Historical Fact and Fiction: A Response to Professor Geoffrey R. Stone's Melville B. Nimmer Memorial Lecture and Essay*, 114 PENN ST. L. REV. 391, 403 & n.29 (2009) (discussing Ethan Allen) (link).

sometimes trumped corruption concerns.[73] Article VI of the Articles of Confederation reached state officers; its successor, the Foreign Emoluments Clause, does not. To me, at least, this seems clear.

What might have motivated the Framers to exempt state officials from the reach of the Foreign Emoluments Clause? I frankly admit that I do not know. Perhaps it was nothing more than the simple prudential concern of getting the state legislatures to call state conventions to ratify the proposed federal constitution. Federal monitoring of state officials, per an Articles of Confederation Article VI analogue, may have been perceived—by both state officials and the public—as a source of friction and discord. It is one thing to put state officials under the thumb of independent U.S. Constitution Article III courts; it is quite another to put them under the thumb of Congress. A Foreign Emoluments Clause extending only to some federal positions risked some corruption at the state level, but it may have made the possibility of ratification all the more likely.

Why did the Framers exempt federal elected officials from the Foreign Emoluments Clause? Again, I frankly admit that I do not know. Perhaps because they left the issue to future congressional rulemaking (for members) and to statutes (for members and other elected government positions)? Perhaps because they relied on both disclosure (i.e., Washington putting the key to the Bastille and the Louis XVI portrait on display) and elections? In other words, they relied on elected officials to act like fiduciaries. That is one answer.

Still, I think the answer may be somewhat simpler. It is not uncommon to treat those at the apex of authority somewhat differently from others—even to exempt them from burdens which apply to others. Sometimes this is a reflection of insiders protecting their own. But, it is also frequently a reflection of deep wisdom: the kind that comes with practical experience in the world and its affairs. For example, the federal Code of Judicial Conduct applies to all Article III judges—except members of the Supreme Court of the United States. Is that because Supreme Court justices do not need ethics? No. Is it because they are better human beings, citizens, and jurists than their lower court colleagues? No. Consider recusal when judicial bias is asserted. Each justice must decide to recuse on his or her own. If an appeal to the full Court were permitted, then the minority's ability to exercise the judicial power of the United States would exist only at the sufferance of the majority. If an appeal were permitted to non-members, then you will have effectively transferred responsibility from the Supreme Court to their minders.

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[73] *See supra* note 7 (quoting the Incompatibility Clause of the Articles of Confederation and of the Constitution of 1787).

George Washington was not subject to the Foreign Emoluments Clause. When receiving a gift from a foreign government, his behavior was public and transparent. Secretary of State Jefferson[74] was subject to the Foreign Emoluments Clause, and he acted in secret. Perhaps the final language of the Foreign Emoluments Clause reflects the victory of transparency concerns over corruption fears, at least when it comes to elected officials at the apex of political responsibility.

IV. TEACHOUT'S ORIGINALISM: ORIGINAL INTENT OR ORIGINAL PUBLIC MEANING?

As explained, Article VI of the Articles of Confederation flatly prohibited officers under the United States and officers under any state from accepting foreign government gifts. The Constitution of 1787's Foreign Emoluments Clause expressly permitted federal officers to accept such gifts if Congress consented.

I concluded that the "modern" clause represents a "reform and a significant relaxation [from] the strictures of the older clause."[75] Teachout has argued that I have "misread" the clause and that the new language represents a codification of "the accepted interpretation of what the [Article VI provision] required previously."[76] She points to two occasions, after the Articles went into force in 1781, where the Articles Congress approved officers' receiving such gifts. On March 3, 1786, the Articles Congress permitted John Jay to accept a horse from the King of Spain and also permitted Franklin to accept a jewel-studded snuffbox from Louis XVI.[77]

I have doubts that these two decisions taken by the Articles Congress on a single day establish the "accepted interpretation" of Article VI. It is possible that the Articles Congress erred or simply believed it had the power to set the provision aside under a unanimity rule.[78] But, it does not

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[74] Teachout recounts the story of how Louis XVI gave an expensive gift to Thomas Jefferson, the former United States minister to France, and the then current Secretary of State under President Washington. Jefferson's conduct was secretive; he used intermediaries; he actively hid his behavior from public and congressional scrutiny; he had the gift destroyed. He did so because he knew the Foreign Emoluments Clause applied to his conduct, even if as a matter of diplomatic necessity he (arguably) had grounds not to comply. *See* Teachout, *supra* note 2, 38–39. Washington's conduct was completely different. Upon receiving the gift, he immediately sent a letter in writing thanking the French ambassador. And, afterwards, he put the portrait on display in his anteroom. *See supra* Part II.B.

[75] Tillman, *supra* note 15, at 5.

[76] Teachout, *supra* note 2, at 36. *But cf.* Davis, *supra* note 26, at 381 (explaining that the Foreign Emoluments Clause "negated and superseded" the confederation-era practice).

[77] *See* 30 JOURNALS OF THE CONTINENTAL CONGRESS 95 (1934) (link).

[78] This is not a stretch. Consider: the Articles of Confederation expressly demanded unanimous consent of the States to substantively modify the Articles. ARTICLES OF CONFEDERATION of 1781, art. XIII. Yet, based on a mere unanimous vote of the Articles Congress, the Articles Congress sent the Constitution of 1787 to the States for ratification. But, the Constitution of 1787 was to go into effect

matter. Our task here is not to discover what the Articles Congress thought was the public meaning of Article VI in 1781 (when the Articles came into effect). Such evidence, at best, goes to the original intent of the Framers in 1787. Rather, our task is to understand what the American public thought the meaning of Article VI was between 1787 and 1790, the time period during which the original thirteen states ratified the Constitution, and, concomitantly, if the public thought that meaning was different from its successor: the Foreign Emoluments Clause in the Constitution of 1787.

And what did the public think?

As explained, the Foreign Emoluments Clause states: "[N]o Person holding any Office of Profit or Trust under them, shall, *without the Consent of the Congress*, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[79] Between 1788 and 1790, four state ratifying conventions independently sought to strip out the italicized language.[80] In other words, with regard to the specific issue of congressional authorization, they were attempting to bring the language of the Foreign Emoluments Clause back to the extant language in Article VI. What possible reason could they have had except for the fact that the people, during ratification, thought Article VI's language was mandatory, and not subject to congressional waiver? Why else would these four state conventions, and later members of the House and Senate in the First Congress proposing constitutional amendments,[81] have sought such a change? In short, the Foreign Emoluments Clause represented—in the minds of (some of) the people—a relaxation of the strictures imposed by its Article VI predecessor.

These people opposed that relaxation: they wanted the Foreign Emoluments Clause to be as demanding as its Article VI predecessor. They did not get the constitutional amendment they sought. But, they did give us a good idea of what was the original public meaning of the Foreign Emoluments Clause and its Article VI predecessor (as understood during ratification).

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when as few as nine states—not thirteen states—ratified the new instrument of government. *See* U.S. CONST. art. VII (link).

[79] U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

[80] *See* 1 DEBATES, *supra* note 41, at 331 (New York ratifying convention proposing a constitutional amendment expressly "expung[ing]" the Foreign Emolument Clause's "consent" language); *id.* at 336 (Rhode Island ratifying convention doing the same); *see also id.* at 323 (Massachusetts ratifying convention proposing a free-standing amendment denying Congress the power to consent); *id.* at 326 (New Hampshire ratifying convention doing the same).

[81] *See* 1 ANNALS OF CONG. 761–62 (1789) (Joseph Gales ed., 1834) (Representative Tucker seeking to amend the Constitution by "[s]trik[ing] out the words '[w]ithout the consent of Congress'"); *see also id.* at 778 (Representative Gerry proposing a free-standing amendment denying Congress the power to consent).

The Foreign Emoluments Clause was firmly rooted in corruption concerns, but the public meaning of the text of the clause shows that other concerns trumped corruption. Teachout puts forward a maximalist interpretation of the Foreign Emoluments Clause and the Constitution's *Office* language: she argues that this clause extends to state officials and to all elected federal ones. Likewise, she argues that the change in language from the Articles to the Constitution did not effect a substantive change. This is not surprising. Once one accepts *any* of these textual and historical limitations on the scope of the Foreign Emoluments Clause, one can no longer embrace a formless, seamless, free-standing anti-corruption principle. At most, one will have a textually limited anti-corruption principle: where the scope of each constitutional provision is limited to the particular wrongs that were known to the Framers or to the particular wrongs reached by each provision's text. In that situation, the anti-corruption principle would have very little independent bite, much less the ability to compete with the First Amendment (i.e., to authorize Congress to regulate federal election processes).

V. TEACHOUT AND CORRUPTION

Teachout and I disagree whether the Constitution's primary anti-corruption provisions reach state and federal elected officials. If they do, then Teachout's *domestic-corporation-as-foreign-government* analogy has weight, and her anti-corruption principle has independent bite which, potentially, could compete against the First Amendment. But, if the *Office* language of those provisions—the object of these provisions—does not reach elected office, then a reasonable person might also conclude that our inquiry is over. The anti-corruption principle cannot overcome the textual limitations which inhere in the very constitutional provisions giving rise to the principle.

Teachout does not agree. Rather, she argues that even if the text does not *directly* reach elected positions, the principle reaches them—"directly" and "explicitly."[82] But how can any principle which arises by inference work "explicitly"? What does she mean?

I think I know.

For Teachout, the Constitution is not the text; it does not even start with the text. The real Constitution—the anti-corruption Constitution—is the great background consensus: the anti-corruption worldview which formed the prism through which all other ideas and ideals passed.

Teachout never expressly develops any normative framework which could transmute this free-standing atextual background consensus or

[82] Teachout, *supra* note 2, at 51.

worldview into "law." So let's talk about that. If such a normative framework exists, what would it look like?

I suppose it would have to be a consent-based theory. There is no contradiction here. To the extent our "soft" originalist inquiry is text-engaged, we can inform our textual understanding based on the public's worldview—and yes, the Framers are part of that public. There is no moral imperative that anyone consented to that worldview for the purpose of understanding the text because the text itself carries sufficient indicia of public consent.

But if the worldview itself is set up as creating independent constitutional norms untethered to the Constitution's text, then that worldview must be one that the public engaged and chose. Teachout writes that "Tillman wants to drag me into a debate about the various uses of the word 'office[]' in the Constitution . . . ."[83] That's not quite right, although perhaps I have not been as clear as I could have been. The language of *office* and *officer* was coextensive with the language of *corruption* in the minds of our eighteenth-century forbears. A person holding an office was a fiduciary. Such an officeholder owed his principals a duty of care,[84] loyalty,[85] and good faith[86]: the very duties private law still imposes on trustees, directors, executors, and other agents. But a conflicted or faithless officeholder would be described as corrupt, or, if holding a public office, as corrupt and/or tyrannical.[87] This was the eighteenth century's vocabulary or discourse of *office*. The Framers did not choose it; they inherited it from the English yeomanry, the Whigs, and from the constitutional settlement arising out of the ashes of the two English civil wars. Teachout emphasizes that the Framers' discussion of *corruption* bleeds across the pages of the Philadelphia Convention's record. It would have been surprising if it did not: any provision discussing *office* would have naturally engendered *corruption*-speak.

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[83] Teachout, *supra* note 2, at 39.

[84] *See, e.g.*, U.S. CONST. art. II, § 3 (Take Care Clause) ("[The President] shall take *Care* that the Laws be *faithfully* executed . . . ." (emphasis added)) (link); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1142–45 (2004) (discussing the duty of care as applicable to holders of public office) (link).

[85] *See, e.g.*, U.S. CONST. art. VI, cl. 3 (Oaths and Affirmations Clause) (link); Natelson, *supra* note 84, at 1146–50 (discussing duty of loyalty as applicable to holders of public office).

[86] *See, e.g.*, *supra* note 84 (quoting Take Care Clause); U.S. CONST. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will *faithfully* execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'" (emphasis added)) (link).

[87] *See, e.g.*, CONAL CONDREN, ARGUMENT AND AUTHORITY IN EARLY MODERN ENGLAND 94–95 (2006); Conal Condren, *Public, Private and the Idea of the 'Public Sphere' in Early–Modern England*, 19 INTELL. HIST. REV. 15, 26 (2009).

I think Teachout is correct: *corruption*-speak dominated the worldview of the Framers, and of the ratifiers, and of the public of 1787–1789 (and of our people for a long time thereafter). But if *corruption*-speak was the only prism through which they could understand and communicate about the language of *office* and *officer*—if it was not a discourse they consented to, not one they actively chose, but a linguistic necessity which chose them[88]—then I do not see how Teachout's anti-corruption principle, standing apart from the Constitution's text, can have a normative claim on Americans of today.

[88] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 144 (London, J. Dodsley 1790) ("It is the first and supreme necessity only, *a necessity that is not chosen but chooses*, a necessity paramount to deliberation, that admits no discussion, and demands no evidence, which alone can justify a resort to anarchy." (emphasis added)) (link).