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Legislative Officer Succession: Part I and Part II

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Legislative Officer Succession to the Presidency

by Seth Barrett Tillman*

> To be surprised, to wonder, is to begin to understand. Everything in the world is strange and marvelous to well-open eyes. Hence it was that the ancients gave Minerva her owl, the bird with ever-dazzled eyes.
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> JOSÉ ORTEGA Y GASSET, THE REVOLT OF THE MASSES 12 (1957) (trans. anon.).

I. Introduction

A trilogy of highly influential and frequently cited articles written by Professors Akhil Reed Amar, Vikram David Amar, John F. Manning, and Steven G. Calabresi appearing in the *Stanford Law Review* in 1995 generally took the position, with varying degrees of confidence, that as a matter of original public meaning, the Constitution precludes members of Congress and legislative officers from succeeding to the presidency under the Succession Clause.[1] The Succession Clause provides:

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[1] *See* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114 (1995) ("[W]e conclude that the best reading of the Constitution's text, history, and structure excludes federal legislators from the line of presidential succession."); John F. Manning, Response: *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 153 (1995) ("There is reason to doubt both sides of the proposition that Congress may constitutionally designate legislative 'Officers' to act as President."); Steven G. Calabresi, Response: *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 157 (1995) ("Amars are probably right that the current statute should at some point be repealed for both constitutional and public policy reasons."). I hereinafter refer to these three articles collectively as the *Stanford Trilogy* and the four authors as the *Stanford Trilogists*. *See also* Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 464 (1949) ("Since neither members of Congress nor the presiding legislative officers are 'officers of the United States' in the constitutional sense, they are ineligible for designation to act as President [through statutory succession].").

> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.[2]

In other words, the Succession Clause permits Congress to enact a statute (or statutory framework) controlling succession in the event of a double vacancy, *i.e.*, when both the President and Vice President's offices go vacant. But the Succession Clause limits congressional discretion. Only an "Officer" may succeed to the presidency under the aegis of this clause. The Amars ask whether the Speaker of the House and the Senate President pro tempore are officers "within the meaning of the Succession Clause."[3] They answer the question in the negative. Looking to constitutional text, structure, and history, they argue that legislative officer succession is not permitted under the rubric of the Succession Clause.[4]

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[2] U.S. CONST. art. II, § 1, cl. 6.

[3] Amar & Amar, *supra* note 1, at 114.

[4] The literature touching upon the Succession Clause and the Succession Statute (and its history) is quite extensive. *See* ALLAN P. SINDLER, UNCHOSEN PRESIDENTS: THE VICE-PRESIDENT AND OTHER FRUSTRATIONS OF PRESIDENTIAL SUCCESSION (1976); JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION (1965); Richard Albert, *The Evolving Vice Presidency*, 78 TEMPLE L. REV. 811, 820 nn.48 & 51 (2005); Symposium, *The Continuity of Government: Opening Remarks*, 53 CATH. U. L. REV. 943 (2004) (Lloyd N. Cutler); Norman J. Ornstein, *The Continuity of Government: Introduction*, 53 CATH. U. L. REV. 945 (2004); John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993 (2004); James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of the Ongoing Debate in Congress*, 53 CATH. U. L. REV. 1049 (2004); Symposium Colloquy, 53 CATH. U. L. REV. 1073 (2004); Howard W. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281 (2003); Howard W. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345 (2001); Eric A. Richardson, *Of Presumed Presidential Quality: Who Should Succeed to the Presidency when the President and Vice President are Gone?*, 30 WAKE FOREST L. REV. 617 (1995); Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215 (1994); Americo R. Cinquegrana, *Presidential Succession Under* 3 U.S.C. § 19 *and the Separation of Powers: "If at First you don't Succeed, Try, Try Again"*, 20 HASTINGS CONST. L.Q. 105 (1992); William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: 'The Emperor has no Clones'*, 75 GEO. L.J. 1389 (1987). For my preliminary and (intentionally) comically presented attempt at taking (Continued)

Although the *Stanford Trilogy* and the *Stanford Trilogists* too are now some thirteen years older,[5] there are two very good reasons to be interested in this trio of articles. First, the underlying question is still of great import as Congress has chosen to put both the aforementioned legislative officers at the head of the line of succession.[6] In other words, our current succession law calls for the presidency to devolve on persons who, at least according to prominent commentators, are flatly ineligible as a matter of constitutional law. And, in our post 9/11 world, succession questions are, arguably, more important now than they were when the *Stanford Trilogy* was first published in 1995.[7]

There is a second reason to be interested in the *Stanford Trilogy*. The *Stanford Trilogy* is the very exemplar of modern originalism. It is widely cited. But it is more than that. It is warmly praised and widely admired. It is admired as principled professionally-presented text-centered, structure-oriented, and historically-competent originalism by both right-of-center (including libertarian) commentators and left-of-center (including communitarian) commentators. Indeed, it is more than admired, it has passed out of time itself into the very stuff

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up related issues, see Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 607-611 & nn.29-33 (2003).

[5] Professor Akhil Amar revisited the issue of legislative officer succession in his recently published AMERICA'S CONSTITUTION: A BIOGRAPHY (Random House 2005). His views regarding the unconstitutionality of legislative officer succession have remained unchanged since his 1995 joint publication. *See id*. at 170-73, 340-41, 452-53, 556-57, 598, and 625. Indeed, his 2005 publication was not the only time he has revisited the issue since he first addressed it in 1995. *See, e.g.*, Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1660 (1997). The same can be said of Professor Vikram Amar; he too has revisited this issue. *See, e.g.*, Vikram David Amar, Essay: *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CALIF. L. REV. 927, 944 (2004). His views have remained equally unchanged.

[6] *See generally* 3 U.S.C. § 19. At the head of the line of succession is the Speaker of the House. *Id*. § 19(a). Next is the Senate President pro tempore. *Id*. § 19(b). These legislative officers are followed by cabinet officers. *Id*. § 19(d).

[7] *See infra* note 58 (citing Levinson-Tillman exchange on congressional continuity).

of legend[8] so much so that when a post-1995 commentator restates the particular position for which the *Stanford Trilogy* stands, *i.e.*, that legislative officer succession is unconstitutional, it is no longer necessary even to cite the articles from which the commentator drew his view.[9] And why should he? Among educated originalists, it is *de rigeur*.

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[8] *See, e.g.*, Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1633-34 n.771 (2006) ("For my *all-time favorite* example of recovering the Constitution's original meaning, see Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995) (arguing that legislative succession to the Presidency, though adopted by statute in 1792, is unconstitutional) . . . .") (emphasis added); Kevin Jon Heller, Comment: *The Rhetoric of Necessity (Or, Sanford Levinson's Pinteresque Conversation)*, 40 GA. L. REV. 779, 786 n.37 (2006) (noting "that the Amars have *famously* questioned the constitutionality of the statute") (emphasis added); Sanford Levinson, Symposium: *Transitions*, 108 YALE L.J. 2215, 2233 (1999) (finding the Amars' paper a "*brilliant* demonstration that the Presidential Succession Act of 1947 is unconstitutional") (emphasis added); Scott E. Gant & Bruce G. Peabody, *Musings on a Constitutional Mystery: Missing Presidents and 'Headless Monsters'?*, 14 CONST. COMMENT. 83, 88 n.16 (1997) ("A *compelling* argument has been made [by the Amars] that the succession statute is unconstitutional.") (emphasis added); *see also generally* Sanford Levinson, *An Opportunity for Genuine (and Selfless) Leadership by Nancy Pelosi and Robert Byrd*, *in* THE NEW REPUBLIC ONLINE -- OPEN UNIVERSITY (Nov. 20, 2006), *available at* http://www.tnr.com/blog/openuniversity?pid=59024; John Harrison, Essay: *Time, Change, and the Constitution*, 90 VA. L. REV. 1601, 1611 n.28 (2004); M. Miller Baker, The Federalist Society National Security White Paper: *Fools, Drunkards, & Presidential Succession*, at n.5 (2003), *available at* http://www.fed-soc.org/Publications/Terrorism/presidentialsuccession.htm (last visited Dec. 9, 2007); James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 580 n.24 (2000).

Interestingly, Professor Michael Stokes Paulsen once appears to have expressed some tentative doubts about the *Stanford Trilogy*. *See* Paulsen, *But cf: Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217 (1996):

> There is at least some question of whether the presidential succession statute is itself unconstitutional. *See* Akhil Reed Amar and Vikram Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995). The brothers Amar make a clever, even strong, argument (and one they *apparently intend to be taken seriously*) that Congress' constitutional power to prescribe which 'Officer' shall serve as President in the event both the President and Vice President die, resign, or are impeached does not permit them to designate a member of Congress to become President.

Id. at 221 n.10 (emphasis added). But Professor Paulsen eventually came round to the majority view, perhaps under the influence of his frequent co-author. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1170 n.252 (2003) ("For a strong and persuasive claim that [the legislative officer] mode of Presidential succession is unconstitutional, see Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 124-25 (1995).").

[9] *See, e.g.*, Norman Ornstein, *A Better Way on Presidential Succession*, WASH. POST, Mar. 3, 2007, at A15 ("The Constitution says Congress can create a line of succession from among 'Officers' of

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Here, in this Article, I too intend to focus on text, structure, and history[10] -- but mostly on text. I do not defend Congress' statutory craftsmanship in toto, and I recognize that Congress' Succession Statute, 3 U.S.C. § 19, suffers from a variety of defects both from a normative or policy perspective and several possible constitutional infirmities.[11] Nevertheless, in the

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the United States, *clearly* meaning executive [but not judicial?] branch officials.") (emphasis added), *available at* http:/www.washingtonpost.com/wp-dyn/content/article/2007/03/02/AR2007030201141.html; Jack Balkin, *Time to Amend the Presidential Succession Act*, *in* Balkinization (Mar. 3, 2007) ("Norman Ornstein outlines the reasons why our Presidential Succession Act is unconstitutional. The succession should flow to officers of the United States, -- in this case, executive branch officials -- and not to members of Congress, who may often be members of the opposite party from the President."), *available at* http://balkin.blogspot.com/2007/03/time-to-amend-presidential-succession.html; Mike Rappaport, *Fixing Presidential Succession*, *in* THE RIGHT COAST: THOUGHTS FROM SAN DIEGO ON LAW, POLITICS, AND CULTURE (Nov. 23, 2006) ("I don't usually agree with Sandy Levinson, but his post on this important subject is an exception. After the Vice President, the next in line for the presidency should be the cabinet, not congressional officials. The Constitution *requires* this, as does good policy.") (emphasis added), *available at* http://rightcoast.typepad.com/rightcoast/2006/11/fixing_presiden.html. My guess is that all these commentators were relying on the *Stanford Trilogy*, although it is conceivable that any number of them came to their own independent views of the matter.

[10] Not all commentators agree that text, structure, and history should be the focus of our common efforts at constitutional interpretation. *See, e.g.*, James E. Fleming, Symposium: *Fidelity in Constitutional Theory: Fidelity as Integrity: Fidelity to our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1345 (1997) (advocating a moral reading over originalism); *see also, e.g.*, SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (2007) (suggesting a refined or clarified Dworkinian approach). I take no position in this article on these methodological questions.

[11] The chief policy objection to 3 U.S.C. § 19 is that by placing presiding legislative officers ahead of cabinet officers, the Succession Statute permits impeachers, assassins, and accident to effectuate a radical change of party and policy, whereas cabinet succession would make for continuity of policy and party, notwithstanding the loss of both elected office holders. The strength of this objection is entirely coextensive with a hidden empirical assumption: *viz.*, that impeachments, assassinations, and accidents are equally distributed across and within presidential terms, without respect to the timing of presidential elections. If, on the other hand, the threat of assassination is heightened during the period between a popular presidential election and the swearing in of a new administration, then the current policy mix is quite sensible.

For example, had President-elect Reagan (R) and Vice President-elect Bush, Sr. (R) been assassinated prior to taking office in 1980, then – under strict cabinet succession -- the presidency would have fallen to the Secretary of State of (outgoing) President Carter (D), notwithstanding that Carter and his party had been trounced at the polls. Likewise, had President-elect Bush (R) and Vice President-elect Cheney (R) been assassinated before President Clinton's term ended, then (then-outgoing) President Clinton could have chosen his own successor by removing the incumbent Secretary of State and filling that office with a nominee of his choice, who would thereafter succeed to the presidency. (I note that under the current statute only cabinet officers who have gone through Senate advice and consent are eligible to succeed to

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remainder of this Article, I will take a position *contra* the authors of the *Stanford Trilogy*, and argue that legislative officer succession, standing alone, is not among the statute's constitutional defects. I intend to put forward a very different view than that put forward by the Amars and the other *Stanford Trilogists*. And, although I find this alternative view compelling, I acknowledge that not all readers will. But if you too find this alternative view compelling, you might also wonder why the *Stanford Trilogy* went largely unchallenged for thirteen long years and what that says about mainstream American constitutional scholarship, particularly originalism. I will have some comments on that too at the end of this Article. Of course, nonoriginalists -- sitting ringside -- might enjoy the show.

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the Presidency. *See* 3 U.S.C. § 19(e).) Indeed, under a strict cabinet succession regime, President Clinton could have appointed himself to the office of Secretary of State, and had the Senate given its advice and consent, he could have succeeded to a third term! *See* U.S. CONST. amend. XXII (barring a two term president from being "elected" to a third term, but not barring a third term that otherwise arises by operation of law, *i.e.*, a third term arising under the Succession Statute).

In term of constitutional infirmities, beyond legislative officer succession itself, the subject of this paper, critics of the current Succession Statute object to the current statute's bumping provision: permitting the Speaker (or the Pro Tem) to pass on the presidency in the event of a double vacancy, allowing a cabinet officer to succeed as acting President, but thereafter permitting the Speaker (or the Pro Tem) to lay claim to the presidency, *i.e.*, bumping the acting President out of office. This paper does not pretend to be a general defense of the current statutory regime, and I express no view on the constitutionality of this particular aspect of the Succession Statute, although I do note that where a Speaker or a Pro Tem lays claim to the presidency in the first instance, the bumping aspect of the statute does not come into play. *See generally* 3 U.S.C. § 19(d)(2).

Another infirmity ascribed to the current Succession Statute relates to the fact that it requires office holders (Speakers, Pro Tems, and cabinet members) to resign from their current office (Speaker and Member of the House for Speakers, Pro Tem and Member of the Senate for Pro Tems, and cabinet office for cabinet officers) before acting as President. *See generally* 3 U.S.C. § 19(a)(1) (application to Speaker), (b) (application to Pro Tem), (d)(3) (mandating (constructive) cabinet officer resignation). My own view is that although this objection is not frivolous, it is not well-informed. I hope to return to this issue in a subsequent publication (circa 2009).

II. The Amars' Textualism

The Amars note that the Constitution, textually and structurally, distinguishes "Members of Congress" from "officers of the United States." I do not take issue with this distinction. In fact, I (almost entirely) agree with it.[12] However, as explained, they proceed to argue:

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[12] Although the Amars put forward several textual arguments in support of "the officer of the United States" versus "member of Congress" dichotomy, they miss (what I believe to be) the strongest functional and textual arguments. The chief functional difference between officers and members of a legislature is that the power of members to legislate can only be expressed collectively, generally through majority action, at duly noticed meetings with a quorum (actually or presumptively) present, as opposed to officers who customarily have individualized discretion able to create binding legal relations. *Cf.* 2 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 271, at 35 (rev. ed. 1998) ("[A] director [on a multi-member board] has no individual power of action as does an officer . . . ."). Textually, officers of the United States are never elected, and Members of Congress are never appointed, absent a vacancy. *See, e.g.*, U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was *elected* . . . .") (emphasis added); *id*. art. I, § 3, cl. 2 (describing "[e]lection" of Senators); *id*. (conferring power, when a Senate seats go vacant, on the Executive of a State to "make [a] temporary [a]ppointment[] until the next Meeting of the Legislature"), *amended by id*. amend. XVII (maintaining election versus appointment distinction). This point is developed further in Part III, *infra*.

Like Members of Congress, the President and the Vice President are elected, not appointed, absent a vacancy. *Cf.* U.S. CONST. amend. XXV, § 2 (providing for presidential nomination and congressional confirmation in the event of a vice presidential vacancy); Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. LAW & POL. 13, 19 n.17 (2001) ("Throughout this article, the term 'civil officers' will be used as a catch-all including not just federal civil officers but also the President and Vice President. Technically this may be incorrect, as the Constitution distinguishes the President and Vice President from civil officers. Article II, [Section] 4 does not say 'all other civil officers,' after all. The distinction appears to be that the President and Vice President are elected . . . ."). This is just another example of careful eighteenth century constitutional draftsmanship: *viz*., *The President has "Office,"* see Article II, *but he is nowhere described as an "officer of the United States."* That is after all precisely what the Constitution says, and, that is why Presidents and Vice Presidents have never received presidential commissions, as do all "officers of the United States." *But see* Calabresi, *supra* note 1, at 159 n.24 ("Article II, [§] 3 specifies that the President 'shall Commission *all* the Officers of the United States.' U.S. CONST. art. II, [§] 3 (emphasis added). The best reading is that the President and the Vice President are the 'Officers of the United States' contemplated by this language in the Appointments Clause. The failure to commission [each and every] President and the Vice President [since and including President George Washington and Vice President John Adams] would on this reading be deemed an oversight.") [check cite in original]; *id*. at 161 n.34 ("Presidential practice with respect to issuing commissions is highly unreliable for purposes of determining who qualifies as an 'Officer of the United States.' To paraphrase the Book of Common Prayer, the President has commissioned those whom he ought not to have commissioned and has left uncommissioned those whom he ought to have commissioned."). Professor Calabresi's deep structural precommitment is at odds with both: (1) the *text* of the Constitution, (Continued)

> To answer th[e] question [whether the Speaker and the Senate President pro tempore are officers for the purpose of the Succession Clause], we begin of course with the constitutional text itself. The Constitution employs the concepts of offices and officers in many different provisions. At various points the document refers to "Officers of the United States," to "civil Officers of the United States," to "civil Office under the Authority of the United States," to "Office under the United States," and to "Office of Trust or Profit under the United

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and (2) unbroken Executive Branch *practice* since 1789. One does wonder what evidence Professor Calabresi would allow to falsify his conclusion. *See also infra* note 56 (discussing in greater detail problems with Calabresi's position).

My position, *contra* the *Stanford Trilogists*, is that the text of the Constitution does not so much distinguish between Members of Congress and officers, but rather, the animating policy illustrated by the Constitution's text is one that distinguishes *elected* holders of office (*e.g.*, Members of Congress, the President, and the Vice President, *i.e.*, constitutional officers or persons holding office) from those officers *appointed* under the aeggis of the Appointments Clause. Generally, "office" or "officer" standing alone capaciously refers either to elected officials generally or encompasses both elected officials and appointed officers (and perhaps those exercising authority under the United States although not appointed under the aegis of the Appointments Clause). On this view, if the Speaker and Senate President pro tempore are constitutional officers, then they fall within the ambit of the Succession Clause. This point is further developed in Part III, *infra*.

The elected official/appointed officer dichotomy is the same found in private law, the significance of which I shall return to later in this paper. *See* 2 FLETCHER, FLETCHER CYCLOPEDIA, *supra*, § 271, at 35 (rev. ed. 1998) ("The Revised Model Business Corporation Act clearly distinguishes between directors and officers by consistently referring to the 'appointment' of officers, as distinguished from the 'election' of directors."); *see also generally* John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025 (2006) (citing corporate law conventions with regard to understanding the Constitution's meeting and quorum requirements and suggesting that the former are analogous to those which apply to public legislative bodies); *cf.* Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004). The search for original public meaning has been made difficult by the fact that the English (*i.e.*, the American-English) language has changed a great deal over the course of the last several hundred years. *See, e.g.*, AKHIL R. AMAR, AMERICA'S CONSTITUTION, *supra* note 5, at 171 (referring to "*members* of the executive and judicial branches") (emphasis added); *see also, e.g.*, Jennifer Newstead, moderator, *Federalism & Separation of Powers: Is the Presidency Better off Now than Eight Years Ago?*, 2 ENGAGE 57, 57 (2001) (Steven Calabresi: "I approach this topic . . . as a former *member* of the Reagan and Bush Administrations . . . .") (emphasis added); Calabresi, *supra* note 1, at 160 ("The Constitution does not contemplate a weird [*!*] distinction between 'Officers of the United States' [as used in the Appointments Clause] and 'Officers of the Government of the United States' [as used in the Necessary and Proper Clause]."). My view, *contra* Professor Calabresi, *supra*, is that absent the Necessary and Proper Clause's use of "Government," the clause would not extend to the President and to the Vice President (and, by implication, to federal electors and to members of a state-called Article V national conventions). *See infra* notes 15 (objecting to Akhil Amar's attempt to linguistically distinguish "what officer" from "which officer"), 48-49 (discussing federal electors and federal conventioneers). *But see infra* note 48 (noting Supreme Court opinion rejecting this view).

> States." *As a textual matter*, each of these five formulations *seemingly* describes the same stations (apart from the civil/military distinction) – *the modifying terms "of," "under," and "under the Authority of" are essentially synonymous.* And if the term "Officer" in the Succession Clause is merely shorthand for any of these five longer formulations, then federal legislators are constitutionally ineligible for succession.[13]

The Amars reasoning is syllogistic. Only officers may succeed to the presidency per statute under the aegis of the Succession Clause. "Officers" and "officers of the United States" "seem" to be the same thing. Officers of the United States and Members of Congress are mutually exclusive categories. Therefore, Members of Congress are not proper officers for Succession Clause purposes, and any statute purporting to place them in the line of succession is constitutionally suspect, if not invalid.

But syllogistic reasoning is only as valid as each link in the chain of reasoning might be defended. With regard to one link in their chain of reasoning, the Amars offer no substantial textual defense.[14] And yet this assumption is critical to their analysis. Rather, they merely put forward their personal (legal) intuition[15] that the Constitution's varying (eighteenth century)

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[13] Amar & Amar, *supra* note 1, at 114-15 (footnotes omitted) (emphasis added). Prepositions have not always been so unloved. *See, e.g.*, Joseph Hall, Sermon VII: *The Righteous Mammon* 106 (1628) ("RICH IN THIS WORLD, not Of it.") (underscores added, font in the original) *in* V THE WORKS OF THE RT. REV. JOSEPH HALL (London 1808); Bob Dorough, *Busy Prepositions*, *in* GRAMMAR ROCK (1973) ("Prepositions give specific information.").

[14] In Barron v. Baltimore, 32 U.S. 243, 248 (1833), Chief Justice Marshall took the position that where the Constitution is meant to restrict state powers, it uses express language. Professor Calabresi cites this case in order to illustrate that the Constitution's use of "officer" cannot extend to mere state officers. This is the primary textual argument made by the *Stanford Trilogists* in defense of their position. *See generally* Calabresi, *supra* note 1, at 161; *cf.* Amar & Amar, *supra* note 1, at 117 n.26 ("It might be argued that an intermediate reading of the Succession Clause is possible -- one that insists that a successor be a federal, rather than state, Officer, without requiring the successor to be an 'Officer of the United States.' Though analytically possible, this superfine distinction lacks strong textual support, and runs up against important historical and structural objections."). In my view, the *Stanford Trilogists*, have failed to fully consider all the alternatives. *See, e.g.*, *infra* notes 18 to 52 and accompanying text.

[15] *See generally infra* notes 55-56. For a textbook example of (what I believe to be) unsupported intuitionism see AKHIL REED AMAR, AMERICA'S CONSTITUTION, *supra* note 5, at 172 ("Madison (Continued)

phraseology regarding "office" and "officers" is without content. They do this notwithstanding the long enduring canon of interpretation mandating that changes in wording among clauses of a legal instrument (contract, statute, or constitution) are not held to be without effect if any nonfrivolous distinction could be put forth accounting for the change in terminology.[16]

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buttressed this argument [against legislative officer succession] by stressing Articles II's slightly stilted syntax, which authorized Congress to declare '*what* officer,' as opposed to '*which* officer' . . . .") (quoting Letter from James Madison to Edmund Pendleton (Feb. 21 1792), *in* 14 THE PAPERS OF JAMES MADISON 235, 236 (1983)) (underscore added, italics as *mis*reported by Akhil Amar). Although Madison italicized the words "*what officers*" in his letter to Pendleton, the judgment that the language of the Constitution is "stilted" is not Madison's, but Akhil Amar's. *Id*. at 556-57 n.109.

Although the Constitution's use of "what" as a relative pronoun is uncommon today, the question that should interest us is how would it have sounded to eighteenth century ears, not our own. Professor Amar offers no evidence to support his intuition. *Compare* U.S. CONST. art. II, § 1, cl. 6 ("Congress may . . . declar[e] *what* Officer shall then act as President . . . .") (emphasis added), *with* 1 ROBERT BURNS, THE WORKS OF ROBERT BURNS 112 (Liverpool, M'Creery 1800) ("[A]nd who can chuse *what* book he shall read . . . .") (emphasis added), *with* EDWARD YOUNG, NIGHT THOUGHTS 230 (London, C. Whittingham 1798) ("[D]ost thou chuse *what* ends are well begun . . . .") (emphasis added), *with* THOMAS FINCH, PRECEDENTS IN CHANCERY 578 (London, T. Payne & Son 2d ed. 1786) ("[T]hey must take *what* part they think fit . . . .") (emphasis added) (quoting *Bowaman v. Reeve*, 24 Eng. Rep. 259 (Ct. Ch. 1721)), *with* JOHN DICKINSON, AN ESSAY ON THE CONSTITUTIONAL POWER OF GREAT-BRITAIN OVER THE COLONIES IN AMERICA 391 n.‡ (Philadelphia 1774) ("Every man's children being by nature as free as himself . . . may . . . choose *what* society they will join themselves to . . . [and] *what* commonwealth they will put themselves under . . . .") (emphasis added) (quoting John Locke). For an example of usage, from a modern master of the Anglo-English language, see 6 J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE (2005):

> "Magic?" [Tom Riddle] repeated in a whisper.
> "That's right," said Dumbledore.
> "It's . . . it's magic, *what* I can do?" [said Riddle]
> "What is it that you can do?" [said Dumbledore]

Id. at 271 (emphasis added); *cf. infra* note 57 (noting that Rowling's use of "shall" and "will" is consistent with the Constitution's). Modern Americans do not generally use "what" in this fashion. *But cf., e.g.*, Seth Barrett Tillman, Reply, *Overruling* INS v. Chadha*: Advice on Choreography*, 4 PIERCE L. REV. 207, 213 (2006) ("The Constitution limits *what* substantive matters might be subject to unicameral action.") (emphasis added). Whether the Constitution's language was stilted depends on whether its original audience was more like Rowling's or more like the readership of the *Stanford Law Review*. *Cf*. EVELYN WAUGH, BRIDESHEAD REVISITED 21 (1945) ("In [Oxford's] spacious and quiet streets men walked and spoke as they had done in Newman's day . . . .").

[16] *See, e.g.*, Knowlton v. Moore, 178 U.S. 41, 87 (1900) (White, J.) (noting "elementary canon of construction which requires effect be given to each word of the Constitution"); *see also, e.g.*, CHESTER JAMES ANTIEAU, CONSTITUTIONAL CONSTRUCTION § 2.06, at 18-20 & nn.1-21 (1982) (noting canon of construction to the effect that "[e]very word, phrase, clause and sentence is to be given effect"); *cf., e.g.*, 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 193-94 (2000) (noting (Continued)

I confess myself disappointed with the Amars' analysis.[17] The Amars, not being able to prove that which they must prove (that the term "officer" is coextensive with "officer of the United States"), spend page after page establishing something about which no one would, could, or should disagree: that officers are distinguished from Members of Congress. Here, I offer but one example (of many to come) of a possible nonfrivolous distinction among the various types "officers" enumerated by the Constitution. I start by distinguishing "officers under the authority of the United States" from other categories.

Taking an intratextual[18] approach, I note that the word "authority" is used in both Article III and Article VI. Article III extends the judicial power to "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their *Authority* . . . ."[19] Article VI's Supremacy Clause mandates that the "Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made, under the *Authority* of the United States, shall be the supreme Law of the Land . . . ."[20] No one doubts that the Constitution's odd usage here, with regard to "authority," was intended to

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that "the courts do not construe different terms within a statute to embody the same meaning"). *But see, e.g.*, *infra* notes 55-56 (pointing out that the Amars make historical and structural arguments, and critiquing some of the structural arguments).

[17] [cite to 4 J.K.R. 648.]

[18] *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (expounding upon "intratextualism," a method which "tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase"). As explained in the text above, intratextualism falls under its own weight here. If the interpreter argues that "office" and "officer of the United States" and "officer under the authority of the United States" are synonymous, then he must reject applying methodological intratextualism to the word "authority" and vice versa.

[19] *See* U.S. CONST. art. III, § 2 (emphasis added).

[20] *See* U.S. CONST. art. VI, cl. 2 (emphasis added).

regularize going forward post-1789 treaties agreed to by the Congress of the (outgoing) Articles of Confederation.[21]

By a parity of reasoning "officers under the authority of the United States" would include both statutory officers created post-1789 under the Appointments Clause[22] and pre-1789 officers of the national government created by the ordinances of the Congress of the Articles of Confederation.[23] I suggest that the point of the broad "authority" language was to regularize such "offices" and "officers" going forward post-1789, at least until Congress passed a proper statute.[24] Arguably, absent the constitutional text's use of the term "authority," Congress could have attempted to engage in self-dealing: raising the salary of a territorial office created initially by the Articles Congress, and then allowing the President to appoint one of Congress' own members into that office.[25] But that tack is expressly blocked by the drafters' (arguably deliberate) use of the expansive term "authority."[26]

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[21] *See, e.g.*, ANTHONY D'AMATO, INTERNATIONAL LAW COURSEBOOK 263 (2006) ("When the framers drafted the new Constitution, they wanted to be sure that no negative inference could be drawn as to the validity of the treaties . . . previously made by the United States."), *available at* antony.damato.law.northwestern.edu/ILC-2001/INTLAW11-2001-edited.pdf; Gary Lawson, *Supremacy Clause*, *in* EDWIN MEESE III ET AL., THE HERITAGE GUIDE TO THE CONSTITUTION 293 (2005) ("This language ensured that treaties entered into by the United States prior to ratification of the Constitution . . . took precedence over conflicting state laws.").

[22] *See* U.S. CONST. art. II, § 2, cl. 2.

[23] *See, e.g.*, The Northwest Ordinance (July 13, 1787) (creating, by ordinance of the Congress of the Articles of Confederation, posts of territorial secretary and governor).

[24] *See, e.g.*, An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, 52-53, § 1 (Aug. 7, 1789) (placing, by statute of the Congress of the United States, territorial officers under the control of the President of the United States).

[25] *See, e.g.*, U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time . . . .").

[26] My argument here assumes that offices and officers created by the Articles Congress, not having been nominated by the President, confirmed by the Senate, and not having a presidential commission are not officers of the United States. *See* U.S. CONST. art. II, § 2, cls. 2 (setting forth process for nominating, confirming, and appointing federal officers), 3 (setting forth President's power to (Continued)

Although such a general approach with regard to the meaning of "authority" has little direct impact on today's legal controversies, if only because all offices of the former Articles government (which were retained post-1789) were regularized (or terminated) by proper congressional statutes (or, congressional inaction) long ago, it does suggest that careful usage and fine distinctions were (at least possibly) of concern in 1787,[27] even if the need for those distinctions is not always apparent to modern commentators -- whose worldviews are so narrowly focused on purported "structural" arguments that the text itself is nearly eclipsed. If this conclusion is correct, then we are compelled to ask further questions. The Amars told us that the various cognate[28] forms of "office" and "officer" found in the Constitution "seem" to be without distinction, purpose, or effect. Is it really so obvious that the Amars were correct?

We need not stop with pre-1789 officers. The text of the Constitution describes other persons who may be fairly described as "officers under the authority of the United States." For

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commission all federal officers). More to the point, the Articles Congress created offices by "ordinance," not "by law," *i.e*., by statute. *See supra* note 23; *see also* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3*, 83 TEX. L. REV. 1265, 1328 n.129 (2005) (arguing that the Constitution's use of "by law" is coextensive with "by statute"). Are these distinctions overly formalistic? Perhaps. But the question the *Stanford Trilogists* were addressing relates to the Constitution's original public meaning. So the question becomes would the position taken in the text of this paper appear super-formalistic to eighteenth century ears, as opposed to our own.

[27] I am suggesting here, as I have in other publications, that the founders and their generation might have been much more English, than American (as we, today, experience American-English), at least with regard to usage and meaning. *See, e.g*., *infra* note 57 (suggesting that the Framers' generation distinguished (the Anglo-English) *shall* from *will*, as opposed to our modern (American-English) *shall* and *may*); *see also* RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES 168 (1948) ("Actually stable laws require a stable vocabulary . . . . Thus the magistrates of a state have a duty to see that names are not irresponsibly changed.").

[28] *See, e.g*., Buckley v. Valeo, 424 U.S. 1, 124 (1976) (per curiam) (referring to the Appointments Clause and other "cognate" provisions using variant on "office" or "officer"). The Court realized that there was an unsettled open textual issue here. Rather than boxing itself in, the Court took the highly appropriate course of leaving its options open for future litigation. There is much to be said for this cautious case-by-case approach.

example, officers of the state militias are appointed by the States, not the President.[29] They are categorically speaking state officers, not federal officers. Such officers are generally responsible to their appointing power: state governors. However, during emergencies, crises, invasions, and insurrections,[30] the President may displace the state governors and transfer (any number or all of) the state militia(s) to his command.[31] This effectively nationalizes the state militias. This change in the chain of command does not work a formal coordinate change in status,[32] at least none is worked absent supplementary statutory authority. To put it another way, although state militia officers exercise federal powers under federal command when in the service of the national government, these state officers do not thereby become federal officers.[33] Each such

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[29] *See* U.S. CONST. art. I, § 8, cl. 16 ("The Congress shall have Power . . . [t]o provide for organizing, arming, and disciplining, the Militia . . . reserving for the States respectively, the Appointment of Officers, and the Authority of training the Militia . . . .").

[30] *See* U.S. CONST. art. I, § 8, cl. 15 ("The Congress shall have Power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions.").

[31] *See* U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief . . . of the Militia of the several States, when called into actual Service of the United States . . . .").

[32] *See, e.g.*, Email from Professor Jerry M. Cooper to Seth Barrett Tillman (Jan. 4, 2006) (noting with regard to eighteenth century practice, "[i]f the [President] called [forth the] state militia to fulfill one of the three constitutional purposes, enforcing federal law, suppressing insurrection, or repelling invasion, then militia officers remained in state service but under federal *authority*, at least legally") (emphasis added); *see generally* David F. Forte, *Commander of Militia*, *in* MEESE, *supra* note 21, at 200.

[33] The contrary position would require that every such state-militia-officer-transmuted-into-a-federal-officer become amenable to the Commissions Clause. *But* see *supra* note 12 (describing Professor Calabresi's a-textual, and arguably, a-historical, view of the Commissions Clause), *infra* note 56 (critiquing Calabresi's views). Additionally, in my view, every such officer would become amenable to the Appointments Clause. *See* U.S. CONST. art. II, § 2, cls. 2, 3. With regard to all such officers, Congress would have to enact a statute creating the federal office, following statutory creation of the office, the officer would have to be nominated or appointed to the office by the President or a department head (or, in theory, by a court). Furthermore, non-inferior officers would be subject both (1) to Senate advice and consent, and (2) thereafter to presidential appointment following Senate advice and consent. It goes without saying that this was not the practice in the early Republic.

Modern practice, on the other hand, has escaped these constitutional strictures by statutory dual appointments. Today, in the National Guard (the largest of the successors to the state militias of the early Republic), each officer is part of two organizations: the National Guard of the Several States and Territories, and the National Guard of the United States. The latter component is a reserve of the United States Army and the United States Air Force. Officers now hold dual commissions, take dual oaths, and (Continued)

state officer is an "officer under the authority of the United States," but not one is an "officer of the United States."

Another example of an "officer under the authority of the United States" might be a ship's captain granted a letter of marque and reprisal.[34] Such a person is known as a "privateer." Although such a person is not in the United States military,[35] and therefore not an officer of the United States, such a person is nevertheless authorized to take actions under the authority of the United States.[36]

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are thereby directly subject to presidential authority even absent statutory authorization under the Militia Clause. In other words, the militia need no longer be called forth (under the Militia Clause) because all National Guard personnel are already in the regular United States armed forces. *See* The National Defense Act, 1933, 48 Stat. 153-62 (June 15, 1933); *Perpich v. Dep't of Defense*, 496 U.S. 334, 343 & 345-46 (1990) (Stevens, J.) (noting dual oath requirement as of 1916, and dual enlistment system since 1933); *see also* JOHN WHITECLAY CHAMBERS II, TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA 117 (1987) (noting that effect of National Defense Act of May 13, 1916 was "[t]o guarantee the national government's supremacy over this reserve, each Guardsman would be required, for the first time, to take a dual oath of allegiance to both the state and national governments, with the call of the commander-in-chief deemed supreme"); RUSSELL R. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 401-02 (1967) ("In 1933 Congress responded to the wishes of the National Guard Association by amending the National Defense Act of 1916 to give the Guard a new kind of dual status: the Guard units would henceforth be both militia of the states, under the militia clauses of the Constitution, and a permanent reserve component of the United States Army, under the army clause of the Constitution."). I believe Professor Vladeck has taken a similar position. *See* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 169 n.86 (2004) (discussing, *Perpich*, *supra*).

[34] *See* U.S. CONST. art. I, § 8, cl. 11.

[35] *Compare* John Yoo & James C. Ho, *Marque and Reprisal*, *in* MEESE, *supra* note 21, at 130-31 ("The *only* serious debate over the meaning of the Marque and Reprisal Clause is whether it extends only to authorizing private parties . . . to engage in reprisals for private, commercial gain, or whether it also gives Congress the power to authorize reprisals by the armed forces of the United States for public purposes.") (emphasis added), *with* Paul R. Verkuil, *The Nondelegable Duty to Govern*, 31 ADMIN. & REG. L. NEWS 4, *5-11 (Spring 2006) ("[W]ithout congressional authorization all combat military actions involving the use of force would arguably be nondelegable actions by the President.").

[36] *Cf., e.g.*, Miller v. The Ship Resolution, 2 Dall. 1, 3 (Fed. Ct. App. 1781) ("The act of the subject can never be the act of the sovereign; unless the subject has been commissioned by the sovereign to do it . . . ."); *infra* note 37 (quoting Abraham Lincoln's First Inaugural Address).

State judges[37] and some territorial judges[38] adjudicating federal law or engaged in ministerial duties created by federal law are also, arguably, civil officers under the authority of the United States.[39] Although all state officers, judicial and non-judicial alike, can be compelled

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[37] *Compare* Testa v. Katt, 330 U.S. 386 (1947) (permitting federal commandeering of state judicial resources and mandating that state courts hear federal causes of action, if state courts have jurisdiction over analogous state causes of action), *with* Printz v. United States, 521 U.S. 898 (1997) (finding unconstitutional federal statute commandeering state executive officials). If, as I think likely, that the Appointments Clause embodies separation of powers purposes, but not federalism concerns, then the view put forward here in regard to state judicial officers and state courts does not contravene a narrow reading of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). *See, e.g.*, *id.* at 426-27 ("If all persons who can be said to hold *an office under the government about to be established under the Constitution* were intended to be included within one or the other of these modes of appointment, it is difficult to see how the members of the Commission may escape inclusion.") (emphasis added, quotation marks and citation omitted). Of course, state courts and state judicial officers predated the Constitution of 1787 (and even the Articles of Confederation government, and the prior Articles of Association). *Cf.* Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861) ("The Union is much older than the Constitution. It was formed in fact, by the Articles of Association in 1774.").

[38] My claim here would extend, at the very least, to territorial judges elected by the public, or chosen by an elected territorial legislature, or chosen, elected, or appointed by any mechanism not consistent with the Appointments Clause. On the other hand, a territorial judge nominated by the President and appointed by the President after Senate advice and consent is an officer of the United States in every sense of the term.

[39] *See, e.g.*, THE FEDERALIST NO. 81, at 431 (Alexander Hamilton) (J.R. Pole ed., 2005) ("To confer the power of determining such causes [as arising under federal law] upon the existing courts of the several States, would perhaps be as much 'to constitute tribunals,' as to create new courts with the like power."); THE FEDERALIST NO. 82, at 439 (Alexander Hamilton) ("The courts of the [States] will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions."). I am not pressing the point that Alexander Hamilton intended or his readers subjectively believed that state judges adjudicating federal law were civil officers under the authority of the United States. Perhaps no one attending either the Philadelphia Convention in 1787 or the subsequent state ratification conventions considered that precise question. It is enough for me to establish that it is a possibility which Hamilton and his contemporaries would have *understood* had they considered the question as framed here.

Obviously, foreign courts frequently adjudicate our federal law, and it would be strange indeed to suggest that such foreign judicial officers are "civil officers under the authority of the United States." *See infra* note 43 (quoting Professors Calabresi & Lawson). But if the Supreme Court of the United States (or any other federal court) can issue a (valid) mandamus compelling action by state courts and judges, then it seems one must conclude that such state judicial officers – unlike their foreign counterparts – are civil officers under the authority of the United States, although not officers of the United States. *Cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 362 (1816) (Story, J.) ("We have not thought it incumbent on us to give any opinion upon the question, whether this Court have authority to issue a writ of mandamus to the [Virginia] Court of Appeals to enforce the former judgments, as we do not think it necessarily

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to obey federal law by a federal (or state) court in a proper case or controversy, I suggest that non-judicial state officers are not officers under the authority of the United States -- even if they may be compelled to obey a federal judicial order, and even if they are subject to the United States Constitution under the Supremacy Clause.[40] Undoubtedly, state non-judicial officers are subject to the United States Constitution under the Supremacy Clause.

Nevertheless, there is some reason to believe that state judicial and non-judicial officers are distinguishable.[41] When non-judicial state officers are compelled to obey a federal judicial order, it is because the State or its officers were parties to a litigation before a federal court. *I.e.*, the compulsion arises from their *party* status. In other words, absent joinder as a party with notice and an opportunity to be heard, *i.e.*, the traditional indicia of Anglo-American judicial due process, state non-judicial officers are not compellable in federal court proceedings, at least not compellable absent special circumstances. On the other hand, when a federal court orders a state court or state judicial officer to obey a federal judicial order, the order takes effect without regard to whether the state court or state judicial officer was a party to the federal litigation or even without regard to whether the state court or state judicial officer had notice and an opportunity to be heard.[42] In short, state judicial officers are subject to federal *authority* in a way other state

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involved in the decision of this cause."); *compare also* All Writs Act, 28 U.S.C. § 1651 (with progenitor language of the now in-force Act appearing in the Judiciary Act of 1789), *with infra* note 42 (discussing extent of federal authority under the All Writs Act).

[40] *See* U.S. CONST. art. VI, cl. 2.

[41] The distinction argued for in the main text, *i.e.*, distinguishing state judicial from non-judicial officers, has been adopted by the Supreme Court, albeit on other (largely non-textual) grounds. *See supra* note 37 (distinguishing *Testa* from *Printz*).

[42] *See, e.g.*, Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773, 778 (2000) ("Under appropriate circumstances, the [All Writs] Act empowers federal courts to issue anti-suit injunctions directed to either federal or *state courts or the parties thereto*, unless those injunctions are elsewhere prohibited.") (emphasis added).

officers are not. It is not clear to me if this result arises by operation of *Our Federalism's* structure writ large, or, by operation of the express text of the Tribunals Clause.[43]

Perhaps the most important and long enduring class of "officers under the authority of the United States" who are not "officers of the United States" are *ad hoc* presidential appointments to international, multi-national, and bi-national institutions, including courts and arbitrations. "At least where these entities are created on an ad hoc or temporary basis, there is a long historical pedigree for the argument that even the United States representatives need not be appointed in accordance with Article II."[44]

> The traditional view of the Attorneys General has been that the members of international commissions hold an office or employment emanating from the

[43] *See* U.S. CONST. art. I, § 8, cl. 9 ("The Congress shall have Power to . . . constitute Tribunals inferior to the supreme court . . . ."); *cf*. Steven G. Calabresi & Gary S. Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007):

> The constitutional effect of a congressional designation of a state court as a "Tribunal[ ] inferior to the supreme Court," however, is to give the Supreme Court hierarchical *authority over that state tribunal*. Even without any congressional designation, state courts are generally free to decide federal issues that arise in the normal course of their jurisdiction. When acting purely as state courts, however, they are not, from a federal constitutional standpoint, "Tribunals inferior to the supreme Court" any more than would be a court of Mexico or Denmark that happened to decide an issue of [U.S.] federal law in the course of its duties. State courts, unlike foreign courts, have a duty to give [U.S.] federal law precedence in any conflict-of-laws situation, but there is nothing in the Supremacy Clause [standing alone and apart from other constitutional provisions] that subjects state courts to oversight by the Supreme Court [of the United States].

Id. at 1029-30 (emphasis added). Admittedly, I am unsure whether or not the mere statutory designation of a state court as an inferior tribunal under the Tribunals Clause puts that state court under the supervisory authority of the Supreme Court of the United States, absent supplementary federal statutory authority. The alternative view is that congressional designation of a state court as an inferior tribunal merely makes the final judgments, orders, and decrees of that state court amenable to appellate review by the Supreme Court, thereby putting the *parties*, as opposed to *the courts or the state the judicial officers*, under federal authority.

[44] *See* Constitutional Limitations on Federal Government Participation in Binding Arbitration, 19 U.S. OP. OFF. LEGAL COUNSEL 208, n.15 & n.59, 1995 WL 917140 (September 7, 1995) (Walter Dellinger, Ass't A.G.).

> general treaty-making power, and created by it and the foreign nation(s) involved and that members are not constitutional officers.[45]

Arguably, this was also the view of Alexander Hamilton.[46] As to more modern authorities, the "James Madison" of the modern Japanese constitution took a similar view with regard to this particular and somewhat peculiar aspect of the United States Constitution.[47]

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[45] *Id*. at n.15. Modern authorities are divided on the propriety of this practice. Those supporting it include: Dames & Moore v. Regan, 435 U.S. 654 (1981) (Rehnquist, J.); Harold H. Bruff, *Can Buckley Clear Customs?*, 49 WASH. & LEE L. REV. 1309 (1992); William J. Davey, *The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict*, 49 WASH. & LEE L. REV. 1315 (1992). Those opposed include: Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1299 (1992); Jim C. Chen, *Appointments With Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455 (1992).

[46] *See, e.g.*, Alexander Hamilton, THE DEFENCE NO. 37 (Jan. 6, 1796), *reprinted in* XX THE PAPERS OF ALEXANDER HAMILTON 13, 20 (Harold C. Syrett ed., 1974) ("As to what respects the Commissioners agreed to be appointed [under the Jay Treaty with Great Britain], they are not in a strict sense OFFICERS. The are *arbitrators* between the two Countries. Though in the Constitutions, both of the U[nited] States and of most of the Individual states, a particular mode of appointing officers is designated, yet in practice it has not been deemed a violation of the provision to appoint Commissioners or special Agents for special purposes in a different mode.") (fonts in the original).

[47] *See, e.g.*, DAVID MCCULLOUGH, TRUMAN 837 (1992) ("[General MacArthur's March 24, 1951 communiqué for which he was later removed] was a most extraordinary statement for a *military commander of the United Nations* to issue on his own responsibility.") (quoting President Truman's *Memoirs*) (emphasis added); MICHAEL SCHALLER, THE AMERICAN OCCUPATION OF JAPAN: THE ORIGINS OF THE COLD WAR IN ASIA 167 (1985) (noting that as early as 1949, "[o]nce again, the Supreme Commander [General MacArthur] asserted [to State Department officials] that his special 'international status' exempted him from normal control by Washington"); WILLIAM MANCHESTER, AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964, at 549, 552 (1978) ("In the prevailing Washington view, MacArthur was an American official, and subject to all the requirements of such a position. . . . [MacArthur] expressed the opinion that [Supreme Commander of Allied Powers] was an international officer. He could be called to account, MacArthur said, only in consequence of an agreed Allied position.") (quoting William J. Sebald, United States Ambassador to Japan); RICHARD H. ROVERE & ARTHUR M. SCHLESINGER, JR., THE GENERAL AND THE PRESIDENT: AND THE FUTURE OF AMERICAN FOREIGN POLICY 173 (1951) ("[M]y duty . . . [is] to replace you as Supreme Commander, Allied Powers; Commander-in-Chief, United Nations command; Commander-in-Chief, Far East; *and* Commanding General, U.S. Army, Far East.") (quoting Truman's removal order) (emphasis added).

MacArthur's legal position was something akin to that which would occur should the United Nations General Assembly elect or the Security Counsel choose an active duty United States military officer to be Secretary General, with the consent of the President but absent formal removal from the domestic chain of military command. Arguably, international treaties (assuming at least one of which was ratified by the United States) would clothe the officer with independence, at least with regard to United Nations responsibilities, notwithstanding his (possibly) remaining amenable to presidential orders otherwise. (Continued)

Rightly or wrongly, MacArthur believed his appointments to international offices, Supreme Commander of Allied Powers and Commander in Chief, U.N. command, clothed him with some sort of independence from the President.

Is it surprising that MacArthur believed this during the Korean War? MacArthur's view was broadly consistent with the "traditional view" of the Executive Branch. *See supra* notes 44-45 (explaining that international offices are created in conjunction with "foreign nation(s)"). Furthermore, our courts had already held, *i.e.*, prior to Truman's removing MacArthur, that they (the federal courts) had no jurisdiction to inquire as to the lawfulness of detentions instituted by MacArthur in his capacity as an international officer. *See* Hirota v. General of the Army MacArthur, 338 U.S. 197 (1948) (per curiam):

> We are satisfied that the [international] tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.
>
> Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of habeas corpus are denied.

Id. at 197-98. Justice Douglas disagreed:

> I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action, one of *our* Generals holds a prisoner in his custody, the writ of habeas corpus can effect a release from that custody. It is the historic function of the writ to examine into the cause of restraint of liberty. We should not allow that inquiry to be thwarted merely because the jailer acts not only for the United States but for other nations as well.

Id. at 204 (Douglas, J., concurring) (emphasis added). Exactly how did Justice Douglas imagine the legality of a detention could be tested absent some "review [of] the judgment" of the international tribunal? Moreover, Justice Douglas was assuming that MacArthur, at that time, was one of "our" generals. That position may very well have surprised Whitehall, Canberra, Wellington, Delhi, our other allies on the Allied Council for Japan, on the Far Eastern Commission, on the International Military Tribunals in Manila and in Tokyo, not to mention the countless families of war dead and injured veterans among our allies who fought under the overall leadership of American theatre commanders. Admittedly, that is not a precise legal argument, originalist or otherwise. It is just a moral intuition. *See* MacArthur's Speech on the U.S.S. Missouri (Sept. 2, 1945) ("*As supreme Commander for the Allied Powers*, I announce it my firm purpose, in the tradition of the *countries I represent*, to proceed in the discharge of my responsibilities with justice and tolerance, while taking all necessary dispositions to ensure that the terms of surrender are fully, promptly, and faithfully complied with.") (emphasis added); II SIR PAUL HASLUCK, THE GOVERNMENT AND THE PEOPLE 1942-1945, at 110 (Canberra 1970) (noting that the Australian Government nominated MacArthur to "Supreme Commander of all Allied Forces in the South-West Pacific"); *see also supra* note 15 and accompanying text, *infra* notes 55-56 and accompanying text (criticizing the Amars and Manning for intuitionism).

I might push the boundaries of interpretation by noting that Article II electors,[48] members of an Article V national convention called by the States,[49] *qui tam* plaintiffs bringing claims for private gain in the name of the United States,[50] and even officers of federally chartered corporations[51] also fit (albeit unevenly) into the category of "officers under the authority of the

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[48] *Cf.* Burroughs v. United States, 290 U.S. 534, 545 (1934) (Sutherland, J.) ("While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of *authority* conferred by, the Constitution of the United States.") (emphasis added) (citation omitted). For an extensive and able analysis of why Article II electors are not "officers of the United States," see Vasan Kesavan, *The Very Faithless Elector*, 104 W. VA. L. REV. 123 (2001).

Kesavan also states that in 1800 Senator Charles Pinckney, who had been a member of the Federal Convention of 1787, expressed views similar to those of the Amars. *Id*. at 129 n.28. This information about Pinckney is highly interesting, but not particularly useful. If we are to identify "officers of the United States" with other variant formulations, then at some point Pinckney, Kesavan, and the Amars must tell us precisely who is an "officer of the United States." For example, does it include the President and the Vice President? Simply put, telling readers that "A" = "B" is only helpful if the reader is also told either what "A" means or what "B" means. Here, Pinckney has not done that, nor have his intellectual heirs. *But see supra* note 12 (explaining that Professor Calabresi identified the President of the United States as an officer of the United States, notwithstanding textual and historical objections), *infra* note 56 (critiquing Calabresi's views).

[49] *See* Charles L. Black, Jr. *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 964 (1963) ("Since Congress is to call the convention, and since no specifications are given, and since no convention can be called without specifications of constituency, mode of election, mandate, majority necessary to 'propose,' and so on, then Congress obviously may and must specify on these and other necessary matters as its wisdom guides it. It may be noted that continuing control by Congress of the whole amendment process must have been contemplated, for Congress is given, under article V, the option between modes of ratification, no matter what the method of proposal.") (parentheses omitted). *But cf.* Amar & Amar, *supra* note 1, at 113 n.* (dedicating their opening paper of the *Stanford Trilogy* to Professor Black); 67 C.J.S. § 33, at 186 (citing state court authority to the effect that a "[d]elegate to a [state] constitutional convention [does] not hold[] 'office'" for the purpose of state disqualification clause applying to members of the legislature) (citing *Bd. of Supervisors of Elections for Anne Arundel County v. Attorney General*, 246 Md. 417 (1967)).

[50] *But compare* Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765 (2000) (Scalia, J.) (permitting private parties in civil litigation to assert *qui tam* claims on behalf of the United States), *with* Morrison v. Olson, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("[This Court] should [have ruled] here that the President's constitutionally assigned duties include complete control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States."), *with* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 1701, 1709 n.37 (2005) (arguing that "[w]henever a government official or a private party sues on behalf of the United States, the Constitution grants the president control of that suit").

[51] *But see* AKHIL R. AMAR, AMERICA'S CONSTITUTION, *supra* note 5, at 171 (asking rhetorically if Congress "could . . . pick . . . the president of a private cricket club" for Succession Clause purposes).
(Continued)

United States," although not "officers of the United States."[52] To recapitulate: (pre-1789) officers created by the ordinances of the Congress of the Articles of Confederation, and (post-1789) state militia officers called into service of the national government, privateers, state judges and some territorial judges taking cognizance of federal law or ministerial duties created by federal law, American delegates to assorted international, multi-national and bi-national bodies,

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Is the problem here really as simple as stated by Professor Amar? For example, could a Representative or a Senator be appointed President of the First Bank of the United States during the term to which the member had been elected? *See* U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any *civil Office under the Authority of the United States*, which shall have been created, or the Emoluments whereof shall have been increased during such time . . . ."). The phraseology of the Emoluments Clause may be no accident. The clause prohibits self-dealing by congressmen, whether or not they are subsequently under the thumb of the President – as they would *not* be in a federally chartered stockholder-controlled corporation. *But cf*. Osborn v. Bank of the United States, 22 U.S. 738 (1824) (Marshall, C.J.):

> The appellants rely greatly on the distinction between the Bank and the public institutions, such as the mint or the post office. The agents in those offices are, it is said, officers of government, and are excluded from a seat in Congress. Not so the directors of the Bank. The connexion [sic] of the government with the Bank, is likened to that with contractors. It will not be contended, that the directors, or other officers of the Bank, are officers of government.

Id. at 866-67. Neither Bank directors nor Bank officers were officers of the government of the United States, but they exercised their authority under a federal charter. Arguably, they were officers under the authority of the United States. *Cf*. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518, 712 (1819) (Story, J.) (concurring) ("[I]t is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons without its assent is a violation of the obligations of that charter. If the legislature mean[s] to claim such an *authority*, it must be reserved in the grant.") (emphasis added). *But cf*. David P. Currie, *Centennial Tribute Essay: The Smithsonian*, 70 U. CHI. L. REV. 65, 70 (2003) ("More pertinent, perhaps, is the fact that the [Smithsonian] Institution's functions were proprietary rather than governmental; as an original matter one might argue that the separation-of-powers provisions with which we are concerned, like certain intergovernmental immunities, apply only to the business of governing, not to government-run business.").

[52] Admittedly, there is a line of authority that generally identifies the Constitution's use of "office" with holders of public office. This approach might very well exclude holders of letter of marque and reprisal, *qui tam* plaintiffs, officers of federally chartered corporations, and thus even presidents of Akhil Amar's hypothetical private (federally chartered?) cricket clubs. *See* APPLICATION OF THE EMOLUMENTS CLAUSE TO A MEMBER OF THE PRESIDENT'S COUNCIL ON BIOETHICS, 29 OPINIONS OFF. LEGAL COUNS. U.S. DEP'T JUST., at *5-6 (March 9, 2005) (collecting only post-1814 authorities taking the position that "office of profit or trust" must be a public "office"); *see* AMAR, *supra* note 51 (discussing presidents of private cricket clubs).

federal electors, members of a state-called Article V national convention, *qui tam* plaintiffs, and officers of federally chartered corporations all arguably fall within that category.

In short, there is no shortage of likely candidates to fill the role of "officer under the authority of the United States," although not an officer of the United States. Indeed, there is an embarrassment of riches.

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It is not necessary that the reader agree with my analysis with respect to *each* type of civil or military officer discussed above. My argument is successfully made out if you, the reasonable reader, agree that any *one* of these officers is *best*[53] construed as an "officer under the authority of the United States," although not an actual "officer of the United States." Why? Because at that point we have significantly dented the Amars' intellectual defenses. They wrote: "*as a textual matter*, each of these five formulations *seemingly* describes the same stations (apart from the civil/military distinction) – the modifying terms 'of,' 'under,' and 'under the Authority of' are essentially synonymous." Are the Amars correct? Does the varying phraseology *seem* to describe the same stations? Even based just on the discussion so far, there is certainly some reason to doubt their intuition.[54]

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[53] *See* Amar & Amar, *supra* note 1, at 136 n.143 ("The Constitution must mean something – the *best* reading of the document either permits or bars legislative succession.") (emphasis added); *compare generally* Gary S. Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992), *with* Larry Alexander, *Proving the Law: Not Proven*, 86 NW. U. L. REV. 905 (1992). For the purpose of critiquing the *Stanford Trilogy*, I will follow the Amars' lead and assume the "best" reading should focus on American-English usage and the meaning of the Constitution's terms as they would have been understood by a hypothetical fair minded, well-informed American circa 1787-89, with the caveat that usage and meaning of terms were not wholly uniform across (or within) American jurisdictions. *See* Symposium, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1, 1 (1989) (Antonin Scalia) ("The unwritten Constitution encompasses a whole history of meaning in the words contained in the Constitution, without which the Constitution itself is meaningless.").

[54] *See supra* note 15; *infra* notes 55-56 and accompanying text.

The reader should understand the Amars' interpretive maneuver for what it really is. They opine that constitutional interpretation must begin with the text. But they do not actually examine the relevant text in any meaningful way. They do not actually propose, consider, and reject hypothetical alternative views, and test those alternatives against the Constitution's text.[55] They do quote the text, but it is abandoned largely in favor of structural arguments and intuitionistic conjectures.[56]

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[55] They do, as more fully explained below, examine alternative views to their own to see if those views harmonize with constitutional structure and with American history, or at least with some strands of the dominant narrative of that history. *But see* Manning, *supra* note 1, at 143 (permitting legislative officer succession because "we could confine the relevant class to all federal 'Officers' identified in the Constitution, a set that would exclude ordinary legislators but include the 'Officers' of both Houses of Congress."); *infra* note 56 (noting similar position entertained, but rejected by the Amars). Professor Manning suggested this as merely one of three possibilities, and I will argue in the remainder of this paper that this position is nearly congruent with the original public meaning of the relevant constitutional text. However, when Professor Manning developed this view, *i.e.*, distinguishing "officer" from "officer of the United States," he (again, much like the Amars) conflated "officer" with "officer *under* the United States." Manning, *supra* note 1, at 146 ("The Presidency is surely an 'Office *under* the United States' . . . .") (emphasis added). Like the Amars' position which he rejected, Manning has offered us no more than his intuition here. *Cf.* Amar & Amar, *supra* note 1, at 114 (taking the position that "officer" and "officer of the United States" "seem" to be the same thing). In short, although Manning was open to the correct resolution of part of the textual conundrum, he put forward no coherent position accounting for the Constitution's varying phraseology. It goes without saying that the varying phraseology is the very core of the dispute, and, as explained in greater detail below, has many interesting (and perhaps important) implications for other areas of constitutional law and legal history.

[56] For example, the Amars state:

> It might be argued that an intermediate reading of the Succession Clause is possible -- one that insists that a successor be a federal, rather than state, Officer, without requiring the successor to be an 'Officer of the United States.' Though analytically possible, this superfine distinction lacks strong textual support, and runs up against important historical and structural objections.

Amar & Amar, *supra* note 1, at 117 n.26. The Amars put forward no textual response to the position they reject: they merely put forward a few (post-ratification) historical arguments and some structural arguments. *Id.*; *see also supra* note 12 (describing Professor Calabresi's similar position). Later in their paper, in a misplaced rhetorical gambit, the Amars ask:

> If an acting President, wielding the full and awesome executive power of the United States, is not an "Officer of the United States," what is he? And if he does not "hold[] an[] Office under the United States," U.S. CONST. art. I, 6, cl. 2 (Incompatibility Clause), it's hard to see why he must (or even can) take the Presidential oath of office, *id*. art. II,

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> [§] 1, cl. 8 (Presidential Oath Clause), or how he could be "removed from Office" via the impeachment process, *id*. art. II, [§] 4 (Impeachment Clause).

Amar & Amar, *supra* note 1, at 136 n.143. These arguments appear to be textual, but they are, in fact, structural. In either event, they do deserve an answer.

The Impeachment Clause: "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." Article II, Section 4 (emphasis added). The Amars' argument is that if a person, other than an officer of the United States, could succeed under the Succession Clause, then that person could not be reached by the Impeachment Clause, and that this *structurally bad* result is an argument in support of an identity between "officer" (in the Succession Clause) and "officer of the United States" (in the Impeachment Clause). Even assuming, as the Amars implicitly do, that acting Presidents are not Presidents for the purpose of the Impeachment Clause, the Amars (in my view) have stumbled here. Assuming, as the Amars suggest, that "officer" equals "officer of the United States," then *military* officers in the regular United States armed forces (but not the state militias) are within the eligible class of persons which might be statutorily designated to succeed the President and the Vice President under the Succession Clause. *See* Amar & Amar, *supra* note 1, at 114-115 (recognizing the validity of the military-civilian distinction in regard to "officers"). But *military* officers of the United States are *exempted* from the reach of the Impeachment Clause. *Id*.; *cf*. WAUGH, BRIDESHEAD, *supra* note 15, at 9 ("The history they taught [Hooper] had few battles in it but, instead, a profusion of detail about humane legislation . . . ."). So the disharmony between the two clauses might be normatively *bad* in some abstract modern structural sense, but it is a result that the plain text (*i.e*., the actual structure) of the Constitution clearly allows for, if not commands (should Congress choose to designate United States military officers under the Succession Clause). Thus, the Impeachment Clause supplies no support for the thesis that "officer" equals "officer of the United States."

Indeed, the text of the Impeachment Clause also undermines Professor Calabresi's position. *See supra* note 12. Professor Calabresi took the position that the President and the Vice President are "officers of the United States." Calabresi, *supra* note 1, at 159 n.24, 161 n.34. But if that were true, then the Impeachment Clause should have been drafted as: "The President, Vice-President and all *other* Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The fact that "other" was not used immediately prior to "officers of the United States," in my view, indicates that the President and the Vice President are not officers of the United States. Admittedly, I am premising my position on a dog-didn't-bite type of argument, but such a position is reasonably appropriate where, as here, the "missing" text, *i.e*., the word "other," was known to the Founders, and it appears frequently throughout the Constitution and, even, in another place in the Impeachment Clause itself. *See* U.S. CONST. art. II, § 4 ("*other* high Crimes and Misdemeanors"); Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. LAW & POL. 13, 19 n.17 (2001) ("Throughout this article, the term 'civil officers' will be used as a catch-all including not just federal civil officers but also the President and Vice President. Technically this may be incorrect, as the Constitution distinguishes the President and Vice President from civil officers. Article II, [Section] 4 does not say "all other civil officers,' after all. The distinction appears to be that the President and Vice President are elected . . . ."); *see also* Part III, *infra*.

The Presidential Oath Clause: "Before he [the President or President-elect] enter on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solemnly swear . . . .'" Article II, Section 1, Clause 8. It is unclear (as a matter of original public meaning) if this clause reaches acting Presidents under the Succession Clause. But there is nothing in either the Succession Clause or the Presidential Oath

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I do not doubt that the Amars and many other reasonable readers might not be taken with the analysis above. After all, even if the category of "officers under the authority of the United States" is distinguishable from other categories, the key issue here, for Succession Clause purposes, is the slightly more nuanced question of whether or not the Constitution distinguishes between "officer" and "officer of the United States." It is a subtle question, a fine distinction; it is lamentable[57] (in my view) that the Amars do not think the question worth examining. And if

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Clause suggesting that the answer to this question, that is whether acting Presidents take the Presidential Oath, hinges on whether an acting President is an "officer of the United States," a phrase absent from both the Succession Clause and the Presidential Oath Clause. All that the Amars have shown is that the Presidential Oath Clause *may* be poorly drafted or underinclusive in regard to acting Presidents. Of course, this does nothing to bolster their position. There is nothing here illustrating any identity between "officer" and "officer of the United States." To put it another way, if an acting President *is* President (even if just while acting), then he takes the presidential oath whether or not he is an officer of the United States. And if an acting President *is not* a President, then he does not take the presidential oath even if he is an officer of the United States.

[57] [cite to 5 J.K.R. 530 (2003).] *See supra* notes 27, 55-56. I am suggesting that the American-English of the founding generation was a more capacious language than that we know today and that which came into being post-Webster's first dictionary (and grade school primer). *But see* Legal Theory Blog, Blogging from APSA: The New Originalism, http://lsolum.typepad.com/legaltheory/2007/09/blogging-from-a.html (Sept. 3, 2007) ("[Professor Randy E.] Barnett notes that he agrees with [Professor] Barber that words have not, for the most part, changed meaning. Most of the meanings [of the words of the Constitution] have not been changed."). As I explain more fully below, where a word once had multiple meanings, but only one variant is now remembered and understood, we might be seriously mistaken when we ascribe near certainty to our understanding of how a constitutional term was used.

For example, legal discussions frequently focus on the alleged distinction between the Constitution's use of (the mandatory) "shall" and (the permissive) "may." But this distinction may very well be a victim of presentism. Prevailing eighteenth century American usage, distinguished "shall" (indicating futurity) from "will" (indicating the emphatic tense), as it is still spoken in Anglo-English. Whereas today, we Americans conjugate *will* as "I *will*, you *will*, he *will*," and *shall* as "I *shall*, you *shall*, he *shall*," in the eighteenth century, the dominant American usage (following southern English standards) was *will* (I *will*, you *shall*, he *shall*) and *shall* (I *shall*, you *will*, he *will*). In other words, the Constitution's use of *shall* in the third person sometimes expresses the use of the verb *will*, as opposed to the modern American *shall*.

Indeed, in the one clause of the Constitution using the first person, "will" is used, not "shall," and certainly not "may"*!* *See, e.g.*, U.S. CONST. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, he *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,
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the Amars were wrong about the first question, and I think they were, might not that give you, the reasonable (and perhaps all too trusting) reader considerable pause before rejecting out of hand the *possibility* that such a fine distinction might have been understood in 1789, although it is lost upon twentieth and twenty-first century legal commentators?

I now turn to that more difficult, highly interesting, and regrettably timely question.[58] I maintain that the Constitution's varying usage, sometimes using "officer" and at other times using "officer of the United States," is not a distinction without a difference; that the Speaker of the House and the Senate President pro tempore are "officers" – as that term is used in the Constitution – although not "officers of the United States," and thus, the statutory placement of those officers in the line of presidential succession is a perfectly valid expression of Congress'

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protect and defend the Constitution of the United States.'") (emphasis added); An Act to regulate the Time and Manner of administering certain Oaths, 1 Stat. 23-24, § 1 (June 1, 1789) ("That the oath or affirmation required by the sixth article of the Constitution of the United States, *shall* be administered in the form following, to wit: 'I, A. B. do solemnly swear or affirm (as the case may be) that I *will* support the Constitution of the United States.'") (emphasis added); *id*. at § 5 (using *shall* and *will* in the same fashion in regard to the separate oath taken by the Secretary of the Senate and Clerk of the House); *see also* THOMAS PYLES & JOHN ALGEO, THE ORIGINS AND DEVELOPMENT OF THE ENGLISH LANGUAGE 205 (4th ed. 1993) (distinguishing *shall* from *will*); JOHN WALLIS, GRAMMATICA LINGUAE ANGLICANAE (1653) (popularizing, if not originating, the Anglo-English *shall* and *will* distinction); *cf*. 4 J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE 645 (2000) ("'It is back,' he said softly, 'they *will* all have noticed it . . . and now, we *shall* see . . . now we *shall* know . . .'") (emphasis added) (ellipses in the original); *see supra* note 15 (noting Rowling's use of "what" as a relative pronoun).

Scots-English and other Celtic forms of English generally invert the Anglo-English standard. *See, e.g*., SIR ERNEST GOWERS, THE COMPLETE PLAIN WORDS 160-61 (1954) ("The story is a *very old one* of the drowning Scot who was misunderstood by English onlookers and left to his fate because he cried, 'I will drown and nobody shall save me'.") (emphasis added). My own view is that the dominant, but by no means universal, usage at the Federal Convention was Anglo-English. *See generally* Tillman & Tillman, *A Fragment on* Shall *and* May, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029001 (last visited Dec. 10, 2007) (discussing implications of Scottish influences on Madison); *cf*. ERIC STOCKDALE & RANDY J. HOLLAND, MIDDLE TEMPLE LAWYERS AND THE AMERICAN REVOLUTION (2007).

[58] *See, e.g*., Sanford Levinson, Comment, *Assuring Continuity of Government*, 4 PIERCE L. REV. 201, 202 (2006) (explaining congressional continuity policy in terms of United Airlines Flight 93); Seth Barrett Tillman, Reply, *Overruling* INS v. Chadha*: Advice on Choreography*, 4 PIERCE L. REV. 207, 211 (Continued)

constitutional power, notwithstanding that reasonable people might disagree with the choice as a matter of policy.

(2006) (arguing that congressional continuity policy must squarely confront 9-11 possibilities of unknown and unpredictable magnitude and dimensions).

OUTLINE FOR PART III

Officer as contested concept with multiple conceptions
Professor Sharfman's Department of the Senate lecture touching on "executive power"
Delaware Constitution of 1776: officer / magistrate distinction
Delaware decisions: corporate/trust/partnership law versus tax/employment law
Chancery jurisdiction versus jurisdiction at law
Internal view versus the external view
Why G. Morris, acting for the Committee of Detail, and without express authority, changed "officer of the United States" to "officer" as it reads in the Succession Clause
Cite to 18th century translations of: (Athens) Thucydides, *The Melian Dialogue*; and (Jerusalem) *Deuteronomy* 16:18 (*Rashi* and Boswell's *Life of Johnson*); and de Sola Pool (Prayer for the Welfare of the Government)
The Appointments Clause -- the *inferential* reading versus the *appositional* reading
U.S. Supreme Court and other federal cases: *Germaine*, etc.
How the *Stanford Trilogists* have misunderstood (Madison and) Madison's letter to Pendleton
Venn diagrams

OUTLINE FOR PART IV

The remaining constitutional clauses (with supporting case law)
Article VI's Oaths and Affirmations Clause and Congress' first statute
Further Venn diagrams

OUTLINE FOR PART V

Problems with the Appositional conjecture
It seems odd to modern sensibilities
The Vice President is not a good fit, but the VP does not fit well into any coherency-seeking theory
Use of "officer" in the Inferior Officers Clause
Cite to Burke's "To make us love our country, our country ought to be lovely" and the aesthetics of constitutional drafting: *i.e.*, symmetry: why Article I speaks of the "Chief Justice," but Article II speaks of the "judges of the Supreme Court": *surprise, not a drafting error!*

CONCLUSION

Flanders Fields
Swinton's *A Sense of Proportion*
The way forward

Opportunities to present the full paper at a faculty colloquium are welcomed, as well as offers to publish.