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August 23, 2013

Interpreting Precise Constitutional Text: The  
Argument for a “New” Interpretation of the  
Incompatibility Clause, the Removal &  
Disqualification Clause, and the Religious Test  
Clause—A Response to Professor Josh Chafetz’s  
Impeachment & Assassination (2013)

Seth Barrett Tillman, *National University of Ireland, Maynooth*



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**INTERPRETING PRECISE CONSTITUTIONAL  
TEXT: THE ARGUMENT FOR A “NEW”  
INTERPRETATION OF THE INCOMPATIBILITY  
CLAUSE, THE REMOVAL & DISQUALIFICATION  
CLAUSE, AND THE RELIGIOUS TEST CLAUSE—A  
RESPONSE TO PROFESSOR JOSH CHAFETZ’S  
*IMPEACHMENT & ASSASSINATION***

SETH BARRETT TILLMAN\*

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The language of political death is, of course, metaphorical—and, like all metaphors, the vehicle does not perfectly fit the tenor. An impeached, convicted, and disqualified officeholder can still hold state

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office. . . . Indeed, an impeached, convicted, and disqualified officeholder can be elected to Congress. . . . Still, it is the central contention of this Article that the vehicle (assassination, death) can shed significant light on the tenor (impeachment).

—Josh Chafetz’s *Impeachment and Assassination* (2010)<sup>1</sup>

#### I. THE METAPHOR IS THE MESSAGE<sup>2</sup>

In an article in another journal, Professor Josh Chafetz wrote: “[I]mpeachment maintains the link between removal and death, but attenuates it. . . . Impeachment is . . . a *political* death—a President who is impeached and convicted is deprived of his continued existence *as a political officeholder*. And, like death, impeachment and conviction may be permanent.”<sup>3</sup> In this response, it is my purpose to show that Chafetz’s proposed metaphor does not work and, indeed, that inferences drawn from this metaphor lead Chafetz far afield from the Constitution’s original public meaning. But before doing so, I think it might be helpful to focus on the mechanics of House impeachment and Senate trial proceedings as settled by the Constitution’s text and long-standing practice.<sup>4</sup>

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<sup>1</sup> Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 351 n.23 (2010); see also Jay S. Bybee, *Who Executes the Executioner? Impeachment, Indictment and Other Alternatives to Assassination*, 2 NEXUS 53 *passim* (1997); Clifford J. Durr, *Hugo L. Black: A Personal Appraisal*, 6 GA. L. REV. 1, 11 (1971) (“[T]he objective now was impeachment [of Black]; the viciousness of some of the attacks seemed a clear incitement to assassination.”); Frederick B. Karl & Marguerite Davis, *Impeachment in Florida*, 6 FLA. ST. U. L. REV. 2, 2 (1978) (explaining that “[i]mpeachment is the civilized alternative to assassination . . . .”); cf. Steven G. Calabresi, Response, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 155 (1995) (“[Presidential succession] rules should minimize any incentive to cause a double vacancy by assassination, impeachment, or other illegitimate means.”); James M. Shellow, Comment, *The Limits of Cross-Examination*, 34 SETON HALL L. REV. 317, 388 (2003) (“The examples illustrate the consequences of drawing so narrow a circle that meaningful challenges to methodology are impossible and *impeachment* devolves into character *assassination*.” (emphasis added)). This Article is largely a response to Professor Chafetz’s *Minnesota Law Review* publication. See Chafetz, *supra passim*. But it also responds to several recent publications by Professors Steven G. Calabresi and Saikrishna B. Prakash, and to a student note by David J. Shaw. See, e.g., *infra* notes 10 (citing Calabresi’s publication in *PENumbra*), 45 (citing Prakash’s publication in the *Duke Journal of Constitutional Law and Public Policy*), 102 (citing Shaw’s student note in the *Georgetown Law Journal*).

<sup>2</sup> Cf. MARSHALL McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964) (opining that “[t]he medium is the message”).

<sup>3</sup> Chafetz, *supra* note 1, at 351.

<sup>4</sup> Here and elsewhere I report the consensus (but by no means universal) view. This simply means that there is no settled Supreme Court or other federal jurisprudence on-point, and I instead report the consensus arising from actual practice, or in the absence of practice, within academia. See THE FEDERALIST NO. 69, at 372 n.\* (Alexander Hamilton) (J.R. Pole ed., 2005) (“[I]t is always justifiable to reason from the practice of government till its propriety has been constitutionally questioned.”). Any colloquy between Professor Chafetz and me requires our taking some (if not most) areas of doctrine as noncontroverted: in each such case, as far as I know, Professor Chafetz’s views fall within the consensus.

In analyzing impeachment, there are four constitutional provisions that are of primary interest.

*The House Impeachment Clause.* The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.<sup>5</sup>

*The Senate Trial Clause.* The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.<sup>6</sup>

*The Removal and Disqualification Clause.* Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.<sup>7</sup>

*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.<sup>8</sup>

The consensus view<sup>9</sup> of the Impeachment Clause is that it imposes a textual limit on impeachment; that is, only Presidents, Vice Presidents, and *civil Officers of the*

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<sup>5</sup> U.S. CONST. art. I, § 2, cl. 5.

<sup>6</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>7</sup> U.S. CONST. art. I, § 3, cl. 7. I call the disqualification component of this clause the Disqualification Clause.

<sup>8</sup> U.S. CONST. art. II, § 4. Other impeachment related provisions include: U.S. CONST. art. II, § 2, cl. 1 (“The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”); U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”).

<sup>9</sup> See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 202 (2005) (affirming that in “America *only* federal ‘Officers’ would be subject to impeachment” (emphasis added)); *id.* at 199 n.\* (excluding members of Congress from the reach of the impeachment power); James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1227 n.2 (2007) (“Article II *specifies* the officers subject to impeachment as including the ‘President, Vice President and all civil Officers of the United States’ . . .” (emphasis added)); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 83 n.31 (2006) (asserting that Article II Section 4 “*lists* the officers subject to impeachment” (emphasis added)); *id.* at 82 (“The language in Article I relating to removal itself is instructive—it reads as a limitation rather than a grant of power to the Senate . . .”). Compare *id.* at 84 (“A *close* examination of the text suggests that members of Congress are not the sorts of ‘civil Officers’ to which Article II’s impeachment provision applies at all . . .” (emphasis added)), with *id.* at 84 n.38 (noting that “Article I does recognize that the branches of Congress will have their own ‘Officers,’ such as the Speaker of the House” but failing to explain why that does not put member-presiding officers in the scope of the Impeachment Clause). By contrast, Professor Isenbergh, reading the Impeachment Clause (perhaps even more) closely, argues that it merely mandates removal in each case where a listed officeholder (President, Vice President, or civil officer of the United States) is

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impeached and convicted, but that it does not restrict the impeachment power to the named officeholders. In his view, military officers are also impeachable. See Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 66 & n.49, 98 & n.207 (1999); see also TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 436 (Boston, Little, Brown, and Company 3d ed. rev. 1872) ("The general power of impeachment and trial may extend to others besides civil officers, as military or naval officers, or even persons not in office, and to other offences than those expressly requiring a judgment of removal from office . . ."); Charles Pergler, Note, *Trial of Good Behavior of Federal Judges*, 29 VA. L. REV. 876, 879 (1943) ("[W]e are dealing with a mandatory requirement, prescribing removal if a civil officer is impeached and convicted of the offenses . . ."); cf. AMAR, *supra* at 198-99 (noting that the House could impeach the President or "any other executive or judicial 'Officer[]'"—but failing to note that, in the consensus view, impeachment does not apply to military officers (emphasis added)); Prakash & Smith, *supra* at 80 n.20 ("It is hard to fathom [Tillman adding—*is it?*] why the Constitution would implicitly grant military officers more secure tenure than their civilian counterparts."). Although I am sympathetic to (which is not to say I agree with) Isenbergh's (old Whig unreconstructed textualist) reading, one does wonder if Isenbergh understands impeachment to extend to (current and former) members of Congress or to citizens and private persons who never took either an oath of (federal or state) office or an oath to uphold the Constitution? Cf. *infra* note 42 (collecting authority suggesting that members of Congress are subject to impeachment and, by implication, to disqualification). For example, Senator Blount was impeached by the House one day prior to his expulsion by the Senate. See *id.* (collecting primary House and Senate documents). But see DAVID E. KYVIG, *THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960*, at 22 (2008) ("The House of Representatives, not satisfied [with Blount's expulsion by the Senate], impeached the ex-senator to disqualify him from further office holding."). The propriety of the House's action was, arguably, rejected by the Senate. However, the Senate materials are not absent ambiguity. See RICHARD D. HUPMAN, *SENATE ELECTION, EXPULSION AND CENSURE CASES FROM 1789 TO 1960*, S. DOC. NO. 87-71, at 3 (2d Sess. 1962) ("It is not clear whether . . . [the Senate's] refusal to take jurisdiction is to be construed to mean (1) a Senator is not an officer within the meaning of Art. II, § 4 of the Constitution or (2) that a man who has ceased to hold a 'civil office' is no longer subject to impeachment."); HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 314 n.7 (2006) ("Following th[e] [Blount] case, it became the consensus within Congress that its members were not officers for purposes of impeachment; rather the expulsion power applied to them."); JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* 144 (1965) ("The Senate dismissed the [Blount] case, giving no reason for its decision."); JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND EARLIEST APPLICATIONS* 40 n.5 (1976) ("[Blount's] lawyers pleaded lack of [Senate] jurisdiction on the ground, among others, that a senator was not a civil officer and thus not subject to impeachment. The Senate dismissed the case, giving no reason for its decision. Since Blount had been expelled [by the Senate] before the dismissal [of the impeachment proceeding], another interpretation is that a member of Congress loses his status as a civil officer, and therefore may not be impeached, after he is expelled from Congress." (emphasis added)); WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 214 (Philadelphia, Philip H. Nicklin 2d ed. 1829) ("Their deliberations, after the arguments of counsel, being held in private, we can *only infer* from those arguments, that the term *officers of the United States*, as used in the Constitution, was held by a majority of the senate, not to include members of the senate, and on the same principle, members of the house of representatives would also be excluded from this jurisdiction." (emphasis added)); RUTH C. SILVA, *PRESIDENTIAL SUCCESSION* 134 (2d ed. 1968) ("The upper House ascribed no reason for its decision."); 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 793, at 559 (Boston, Little, Brown, and Co. 1873) ("The reasoning, by which [the Senate's decision in *Blount*] was sustained in the senate, does not appear, their deliberations

having been private.”); Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 1003 n.140 (2007) (“I recognize that the proposition that members of Congress are not subject to impeachment has not always been completely free from doubt. Early in the nation’s history the House impeached Senator William Blount, but the Senate dismissed the articles of impeachment. Although the Senate’s action did not necessarily reflect the view that legislators are not impeachable officers, the incident has come to stand for that view . . . .”); Neil Kinkopf, *The Scope of “High Crimes and Misdemeanors” After the Impeachment of President Clinton*, 63 LAW & CONTEMP. PROBS. 201, 216 (2000) (“Because the[] [Senate] deliberated in closed session, there is no record to establish the grounds on which the Senate granted the dismissal [in *Blount*].”); Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 399 (1994) (“The Senate deliberated in closed session before deciding that it lacked jurisdiction over the Blount impeachment, and thus the basis for its decision is unclear.” (footnote omitted)); Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 461 (1949) (noting that “[t]he Senate ascribed no reason for its decision”); H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 369 (1998) (reviewing DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* (1997)) (explaining that Currie argued that “the conclusion that members of Congress are not ‘officers of the United States’ within the meaning of the impeachment provisions may well be right, but it cannot be proven”). *But see* ELIZABETH B. BAZAN, CONG. RESEARCH SERV., 98-186A, IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE CRS-22 (1998) (“The Senate concluded that [Blount] was not [a civil officer subject to impeachment] and that it lacked jurisdiction over him for impeachment purposes.”); AMAR, *supra* at 568 n.53 (“Structurally, the Constitution provided for expulsion, *not impeachment*, of rotten federal lawmakers. And in the impeachment of Senator William Blount in the late 1790s, a majority of the Senate sitting as a high court of impeachment read the Constitution in just this way . . . .” (emphasis added)); MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 164 (2004) (“Senator Blount was acquitted when the Senate decided that *sitting* Senators did not represent ‘civil officers’ subject to impeachment proceedings.” (emphasis added)); WILLIAM MCKAY & CHARLES W. JOHNSON, PARLIAMENT & CONGRESS: REPRESENTATION & SCRUTINY IN THE TWENTY-FIRST CENTURY 507 (2010) (“[Blount’s] impeachment was subsequently determined inappropriate by the Senate—Senate removal by expulsion being the only available remedy, as a Senator is not a civil officer . . . .”); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 523 n.7 (1998) (“Blount was acquitted on the ground that as a senator he was not a ‘civil officer’ within the meaning of the impeachment provision of the Constitution.”); Letter from Akhil Reed Amar to Stuart Taylor, Jr. (Feb. 4, 1999), in Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 323 (1999) (apparently finding the *Blount* proceedings free of ambiguity, and explaining that “that [the Senate] decided that Sen. William Blount could not be impeached because, technically, he was not an executive or judicial ‘officer’ within the meaning of Article II, Section 4,” but failing to cite any authority or primary documents in support of this view); *id.* at 327 (same); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 115 & n.13 (1995) (“In the William Blount impeachment case in 1798, the Senate *correctly* rejected the idea that its members were ‘civil Officers’ within the meaning of the Constitution, and thus subject to impeachment.” (emphasis added) (citing Silva, *supra passim*)). Notably, the Amars never explain why the Senate (which acquitted Blount) is better authority than the House (which impeached Blount) for the proposition that members of Congress are outside of the scope of the impeachment power. *See also* Paolo O. Celeridad, Note, *Convention vs. Coherence: An Alternative Perspective on Philippine Presidential Succession*, 84 PHILIPPINE L.J. 1077, 1085 (2010) (“[C]learly impeachment cannot apply to legislators.” (citing Amar & Amar, *supra passim*)).

*United States*<sup>10</sup> may be impeached by the House (by a mere majority of those voting, not counting abstentions, a quorum being present).

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Admittedly, I have some doubts as to using Silva as a source. See, e.g., Silva, *supra* at 452 (“If [President Andrew] Johnson had been removed, [Senator and President pro tem] Ben Wade would have succeeded [Johnson, as no Vice President was in office]; yet Wade was himself concerned in the *conspiracy* to impeach Johnson and voted for the removal.” (emphasis added)); see also SILVA, *supra* at 117 (describing—roughly twenty years after publishing her *Michigan Law Review* article—the movement to impeach and remove President Johnson as merely an “*alleged* Republican conspiracy” (emphasis added)); cf. 3 GIDEON WELLES, DIARY OF GIDEON WELLES: SECRETARY OF THE NAVY UNDER LINCOLN AND JOHNSON 510 (1911) (using language of “conspiracy” in regard to efforts to convict Johnson); Ron Smith, *Compelled Cost Disclosure of Grass Roots Lobbying Expenses: Necessary Government Voyeurism or Chilled Political Speech?*, 6 KAN. J.L. & PUB. POL’Y 115, 123 n.37 (1996) (also using language of “conspiracy” in the context of the Johnson impeachment). More recent scholarship has suggested that certain Senators voted to acquit Johnson for less than wholesome, if not illegal, reasons. See, e.g., *id.* at n.37 (arguing that although Kansas Senator Edmund G. Ross—celebrated in John F. Kennedy’s *Profiles in Courage* (1956)—“may have favored impeachment of Johnson [he] changed his mind at the last minute when he discovered the other Kansas Senator, Samuel Pomeroy, a Wade supporter, was conspiring so when Wade became President, *all of Ross’ appointees would be fired*” (emphasis added)); see also, e.g., DAVID O. STEWART, IMPEACHED: THE TRIAL OF PRESIDENT ANDREW JOHNSON AND THE FIGHT FOR LINCOLN’S LEGACY 294-99 (2009) (concluding that it is “more likely than not” that some Republican Senators who voted to acquit Johnson had been bribed).

<sup>10</sup> The phrase “Officers of the United States” as used in the Impeachment Clause appears to be coextensive with the identical phrase which appears in the Appointments Clause and Inferior Office Appointments Clause. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” (emphasis added)). This phrase is understood to refer generally to officers *appointed* to statutory offices in the Executive Branch and in the Judicial Branch. Thus, it would appear that neither the President nor Vice President fall within the category of *officers of the United States*. See, e.g., *United States v. Germaine*, 99 U.S. 508, 510 (1878) (Miller, J.) (“That all persons who can be said to hold an office under the government about to be established under the Constitution [of 1787] were intended to be included within one or the other of these modes of appointment [i.e., Appointments Clause or Inferior Office Appointments Clause] there can be but little doubt . . . It is therefore not to be supposed that Congress, when enacting a criminal law for the punishment of *officers of the United States*, intended to punish anyone not appointed in one of those modes.” (emphasis added)); *United States v. Mouat*, 124 U.S. 303, 307 (1888) (Miller, J.) (“Unless a person in the service of the Government, therefore holds his place by virtue of an *appointment* by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not strictly speaking, an officer of the United States.” (emphasis added)); see also, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (Roberts, C.J.) (“The diffusion of power carries with it a diffusion of accountability. The people do not vote for the ‘Officers of the United States.’ Art. II, § 2, cl. 2. They instead look to the President [Tillman adding—who is *elected*] to guide the ‘assistants or deputies . . . subject to his superintendence.’ The Federalist No. 72, p.487 (J. Cooke ed. 1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot ‘determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.’ *Id.*, No. 70, at 476 (same). That is why the Framers sought to ensure that

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“those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade [officers], and the *highest* [officers], will depend, as they ought, on the President, and the *President on the community*.” 1 Annals of Cong., at 499 (J. Madison).” (emphasis added)); FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 225 (Law Book Exch., Ltd., photo. reprint 2003) (1905) (“[T]he United States Supreme Court has held that no one can be an officer of the United States government *unless* he be appointed as the constitution provides, *viz.*, by the President and Senate, the President alone, one of the United States courts, or the head of an executive department.” (emphasis added)); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 7.12(a), at 314 (8th ed. 2010) (“The U.S. Constitution specifically authorizes the President to appoint ‘all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .’” (quoting the Appointments Clause)); SILVA, *supra* note 9, at 135 (“The courts have been especially careful not to enlarge the meaning of the term ‘officer’ as used in the Constitution. They have defined an officer of the United States as a person appointed by the President and the Senate, by the President alone, by the courts of law, or by a department head.” (collecting case law)); RUTH C. SILVA, PRESIDENTIAL SUCCESSION 149 (1951) (“‘Officers of the United States’ are not appointed by electoral colleges. They are appointed by the President and Senate, by the President alone, by the department heads, or by the courts of law.”); J. Todd Applegate, *Chapter 19 of the NAFTA: Are Binational Panels Constitutional?*, 3 NAFTA: LAW & BUS. REV. OF THE AMERICAS 129, 140 (1997) (“Exactly who is an ‘Officer’ of the United States is a question that was addressed by the U.S. Supreme Court in a 1976 case, *Buckley v. Valeo*. The Supreme Court in *Buckley v. Valeo* interpreted the Appointments Clause to mean that individuals who exercise ‘significant authority pursuant to the law of the United States’ must be appointed by the President, with the confirmation of the Senate [Tillman adding—*which would seem to exclude the President*].” (footnote omitted)); Victoria Nourse & John P. Figura, *Toward a Representational Theory of the Executive*, 91 B.U. L. REV. 273, 302 (2011) (reviewing STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008)) (“We should read [Chief] Justice Roberts’s reference to ‘the community’ [in *Free Enter. Fund*, 130 S. Ct. at 3155] as a reminder that what really matters in any inquiry of executive power is the power of the people—for it is only through the Constitution’s *connection of executive power to the power of the electorate* that the President has any power at all.” (emphasis added)); Silva, *supra* note 9, at 462 (“The courts have been especially careful not to enlarge the meaning of the term <sup>[1]</sup>‘officer<sup>[1]</sup>’ as used in the Constitution. They have defined an officer of the United States as a person appointed by the President and the Senate, by the President alone, by the courts, or by a department head, and commissioned by the President.” (collecting case law)); *id.* at 475 (“[T]he *only* election by presidential electors known in the Constitution is the election of the President and Vice President. ‘Officers of the United States’ are *appointed* by the President and the Senate, by the President alone, by the department heads, or by the courts.” (emphasis added)); *cf.*, e.g., Michael R. Keefe, Note, *The Constitutionality of the Double For-Cause Removal Restriction: Free Enterprise Fund v. Public Company Accounting Board*, 537 F.3D 667 (D.C. Cir. 2008), 77 U. CIN. L. REV. 1653, 1656-57 (2009) (“[A]ll officers—whether principal or inferior—must be appointed by the president, the courts, or the heads of department.”). *But see* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 26 (Jonathan Elliot ed., Washington, no publisher 1836) [hereinafter ELLIOT’S DEBATES] (“Some other gentlemen said . . . that the Vice-President was not a member of the Senate, but an *officer of the United States*, and yet had a legislative power . . . .” (reporting July 24, 1788 meeting of the North Carolina ratifying convention) (emphasis added)); *but cf.* BAZAN, *supra* note 9, at CRS-22 (“The term [‘civil Officers of the United States’] is not defined in the Constitution.”); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 64 (2d ed. 2000) (“The text does not define ‘officers of the United States.’”); Gary Lawson, *The*



The Removal and Disqualification Clause provides for two distinct punishments in consequence of Senate conviction. If an impeached office-holder is convicted by the Senate (by a vote of two thirds of the Senators present, a quorum being present), he is automatically removed from office.<sup>11</sup> If the Senate convicts, the Senate *may*,<sup>12</sup>

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“Principal” Reason Why the PCAOB is Unconstitutional, 62 VAND. L. REV. EN BANC 73, 77 n.13 (2009) (“I do not address the *thorny question* whether congressional officers are ‘Officers of the United States’ under the Appointments Clause or *for other purposes*.” (emphasis added)).

Nevertheless, modern scholars in the academic consensus would also include the President and Vice President in the category of *officer of the United States*. See, e.g., Calabresi, Response, *Political Question*, *supra* note 1, at 159 n.24 (“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.”); *id.* at 165-66 (suggesting that a “normal” President, unlike an “Acting President,” is an “Officer of the United States”); see also, e.g., Amar & Amar, *supra* note 9, at 136 n.143 (“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?”); cf. 3 ANNALS OF CONG. 281 (1791) (Congressman Gerry: “[I]f [the Speaker] is not an officer [for Succession Clause purposes], what is he?”) (published 1849); 29 ANNALS OF CONG. 947 (1816) (quoting John Randolph of Roanoke’s asking rhetorically “[i]f the appointment in question [to a treaty-created office] be not an office, he said he should like to know what an office is.”) (published 1854). Compare U.S. CONST. art. VI, cl. 3 (“[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”), with Stephen G. Calabresi, Rebuttal, *Does the Incompatibility Clause Apply to the President?*, in Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 143-44 (2008) (“Thus when the Oath Clause of Article VI requires that all federal and state executive and judicial officers take oaths to uphold the Constitution the Clause is clearly referring to the President, the Vice President and to state governors as well as to all federal and state judges.”). As explained, the position of the modern scholars within the academic consensus has been rejected by the Supreme Court of the United States. *But those in the consensus have made no effort to explain how the Supreme Court’s long enduring view on this subject errs.* Whether or not the President and Vice President fall within the category of *Officers of the United States* (or, the related category of *Officers under the United States*), is, as I hope to show, no mere infructuous quodlibet. See, e.g., *infra* notes 13 (discussing *Officers . . . under the United States*), 48 (distinguishing *officers of the United States* from *Officers . . . under the United States*), 67 (summarizing argument and evidence tending to establish that the President and Vice President are neither *officers of the United States* nor *Officers . . . under the United States*).

<sup>11</sup> This understanding (arguably) arises directly from the text. See *supra* note 8; see also *supra* notes 5-7; GOLD, *supra* note 9, at 163 (quoting Congressional Research Service report stating that “[t]he precedents in impeachment suggest that removal can flow automatically from conviction”); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 209 n.2 (1993) (“As interpreted by the Senate, this provision requires removal from office as an automatic consequence of conviction, but disqualification from office requires a separate vote.”). However, historically, Senate practice on this point has been uneven, and, on occasion, the Senate has taken a separate vote in regard to removal after having voted to convict. See, e.g., *The United States vs. West H. Humphreys*, in 54 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 895, 897-904 (Washington, Government Printing Office 1861) (reporting separate Senate conviction, removal, and disqualification votes taken on June 26, 1862); GERHARDT, *supra* note 10, at 187 (noting that in “earlier impeachment trials . . . the Senate took separate votes

on guilt and removal”). Compare, e.g., Robert H. Bork, *Read the Constitution: It’s Removal or Nothing*, WALL ST. J., Feb. 1, 1999, at 21A (asserting that “[t]he sole historical example of two votes in the Senate was the 1804 conviction and removal from office of district court judge John Pickering. . . . What is significant, however, is that . . . there have never been separate votes on conviction and removal since.”), with Robert H. Bork, Letter to the Editor, *Desperate Action in 1804 Impeachment*, WALL ST. J., Feb. 10, 1999, at 23A (retreating from his February 1, 1999 position, *supra*, and stating, instead, “I know of no **instance**, whether on one vote or two, in which conviction did not result in removal from office, as the Constitution states it must”).

<sup>12</sup> See THE FEDERALIST NO. 65 (Alexander Hamilton), *supra* note 4, at 351 (“The punishment, which *may* [Tillman adding—as a matter of discretion] be the consequence of conviction upon impeachment [Tillman adding—which appears to refer to disqualification], is not to terminate the chastisement of the offender. After having been sentenced to a *perpetual ostracism* [Tillman adding—again in apparent reference to disqualification] from the esteem and confidence, and honors and emoluments of his country; he will still be liable to prosecution and punishment in the ordinary course of law.” (emphasis added)); THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 4, at 420 (“[Article III judges] are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, *may be dismissed from office and disqualified* for holding any other.” (emphasis added)). But see *Ingram v. Shumway*, 164 Ariz. 514, 518 (1990) (Feldman, V.C.J.) (“Hamilton’s dissertations [in *Federalist Nos. 65 & 66*] are far from clear on the precise question before us, though it can certainly be *inferred* that he may have considered disqualification to automatically follow impeachment and removal. . . . We are left with the conclusion that Hamilton may have thought disqualification was automatic [in the case of conviction], but no record exists that he ever stated this in so many words.”); but cf. *Nixon v. United States*, 938 F.2d 239, 252 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in the judgment) (suggesting that like removal, disqualification is mandatory upon conviction by noting that “[t]he injury [Judge] Nixon alleges as a result of his removal [by the Senate] goes far beyond the loss of his salary. It includes not only removal from the federal bench, but permanent disqualification from holding Government office.” (citing Article I, Section 3, Clause 7)), *aff’d*, 506 U.S. 224 (1993).

Over the course of American history, the Senate has disqualified all of *three* officers: West Hughes Humphreys, a federal district court judge, was impeached, convicted, and disqualified in 1862 for taking a confederate judgeship (without having resigned from his federal judicial position); Robert Wodrow Archbald, a federal circuit court judge, was impeached, convicted, and disqualified in 1913 for corruption in office; and, on December 8, 2010, Judge Thomas Porteous, a federal district court judge, was impeached, convicted, and disqualified for corruption. See *The United States vs. West H. Humphreys*, in 54 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, *supra* note 11, at 904 (reporting a June 26, 1862 unanimous Senate vote disqualifying Humphreys); Henry J. Abraham, *The Pillars and Politics of Judicial Independence in the United States*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 27 (Peter H. Russell & David M. O’Brien eds., 2001) (noting that in 1913 Judge Archbald was disqualified by a 39-to-35 vote); GERHARDT, *supra* note 10, at 60 (noting in a 2000 publication that the only officers ever disqualified by the Senate were Judges Archbald and Humphreys); KYVIG, *supra* note 9, at 25 (explaining the Humphreys proceedings); *U.S. Senate Roll Call Votes 111th Congress—2nd Session*, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=2&vote=00265](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00265) (last visited Dec. 29, 2010) (noting that Judge Porteous was disqualified in a 94 to 2 Senate vote). Notably, Archbald was disqualified by a simple majority, not a two-thirds, vote. See *Waggoner v. Hastings*, 816 F. Supp. 716, 719-20 (S.D. Fla. 1993) (Roettger, J.) (citing the Senate Archbald disqualification proceedings approvingly). It seems somewhat odd that the (arguably) greater punishment of disqualification may be imposed by a smaller majority (i.e., a simple majority vote) than the (arguably) lesser sentence and punishment of conviction with

in its discretion, by simple majority vote (again, a quorum being present), also impose an additional punishment: disqualification from holding any *Office of honor, Trust or Profit under the United States*.<sup>13</sup>

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concomitant removal, requiring a two-thirds vote. See, e.g., Joel B. Grossman & David A. Yalof, *The Day After: Do We Need a "Twenty-Eighth Amendment?"*, 17 CONST. COMM. 7, 12 (2000) ("[Disqualification by the Senate] is now routinely [! & ?] done by majority vote; we would require a two-thirds vote."); see also *State v. Hill*, 55 N.W. 794, 796 (Neb. 1893) (Norval, J.) (stating that "[a]ll will concede that disqualification to hold office is a punishment much greater than removal"); cf. Michael Abramowicz, *Impeaching Judges at the Fringe*, 106 YALE L.J. 2293, 2297-98 (1997) (reviewing MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (1996)) (arguing that "[i]f a statute may effectively disqualify judges automatically upon criminal conviction, it should be able to remove judges as well" which suggests that disqualification is a greater punishment than removal). *But see* *Chandler v. Judicial Council of 10th Cir. of the U.S.*, 398 U.S. 74, 141-42 (1970) (Black, J., dissenting) ("While judges, like other people, can be tried, convicted, and punished for crimes, no word, phrase, clause, sentence, or even the Constitution taken as a whole, gives any indication that any judge was ever to be partly *disqualified* or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by *two-thirds* of the Senate." (emphasis added)); GERHARDT, *supra* note 10, at 94-95 (noting that "one of the specific safeguards set forth in the Constitution for the disqualification of federal judges is that at least two-thirds of senators must agree on the propriety of a conviction and the imposition of such a penalty"—leaving unclear if "penalty" refers to second-in-time "disqualification" or mere first-in-time "conviction"); *but cf.* AMAR, *supra* note 9, at 567 n.52 (asserting, in 2005, prior to the 2010 Porteous disqualification, that "[t]wice in American history, the Senate has imposed disqualification . . . by a simple majority vote . . ." (citing GERHARDT, *supra* note 10, at 77-79)). Professor Amar does not appear to be correct: although Judge Archbald was disqualified by a narrow majority, Judge Humphreys was disqualified by an unanimous vote. See Abraham, *supra* at 27 (reporting conviction and disqualification votes for Archbald and Humphreys).

<sup>13</sup> The phrase "Office of honor, Trust or Profit under the United States" within the Removal and Disqualification Clause is textually distinguishable from "Office[] of the United States" within the Appointments Clause and Impeachment Clause. See Application of the [Foreign] Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156, 157 (1982) (Shanks, Dep'y Asst. Att'y Gen.) ("It is not clear, however, that the words 'any Office of Profit or Trust [under the United States],' as used in [Article I, Section 9, Clause 8] the [Foreign] Emoluments Clause, should be limited to persons considered 'Officers' under [Article II, Section 2, Clause 2] the Appointments Clause. Both the *language* and the *purpose* of the two provisions are *significantly* different." (emphasis added)). See generally *Sykes v. Cleary* (1992) 176 CLR 77, 95 (Austl.) (Mason, C.J., Toohey & McHugh, JJ.) ("The meaning of the expression 'office of profit under the Crown' is obscure."); 3 CYCLOPEDIA OF AMERICAN GOVERNMENT 8 (Andrew C. McLaughlin & Albert Bushnell Hart eds., N.Y., Peter Smith 1963) (1914) ("The question of what is an *office of trust or profit under the United States*, has never been completely settled." (emphasis added)); MICHAEL J. GLENNON, *WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION* 23 (1992) ("What constitutes an office of trust or profit is not clear."); RAWLE, *supra* note 9, at 217 ("The judgment [of the Senate] is of a limited and *peculiar* nature—it extends no further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States." (emphasis added)); Gerald S. Schatz, Note, *Federal Advisory Committees, Foreign Conflicts of Interest, the Constitution, and Dr. Franklin's Snuff Box*, 2 D.C. L. REV. 141, 158 (1993) ("The Supreme Court never has ruled on the question of what constitutes an 'Office of Profit or

*A. Must Senate Conviction Upon Impeachment Effectuate Removal (Chafetz's "Political Death")?*

No. Senate conviction (founded on a prior House impeachment), standing apart from a subsequent Senate disqualification vote, works a removal from office *only* if the party convicted is still in office at the time the Senate votes to convict. And like most within the modern academic consensus, Professor Chafetz takes the view that so-called "late impeachment" (of former officers)—that is, the House impeachment, Senate trial, conviction, and possible disqualification of former officers based upon their conduct while in office—is constitutional.<sup>14</sup> If House impeachment or Senate

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Trust' under th[e] [Emoluments] [C]lause."). Notwithstanding the Constitution's textual distinction, and the lack of consensus among prior commentators, Professor Chafetz, like Professor Akhil Amar and many other scholars within the (anti-textual) modern academic consensus, appears to believe that the two phrases are coextensive. See JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 168 & n.68, 280-81 (2007); see also GOLD, *supra* note 9, at 163 (assuming an identity between *Offices of honor, trust, or profit under the United States* and *offices of public trust under the United States*—notwithstanding that the latter phrase nowhere appears in the Constitution). My position is that the Constitution makes use of textually distinct *office*-laden language because a different meaning was intended and was so understood by contemporaries during and in the aftermath of ratification. See *supra* note 10 (discussing *officers of the United States*), *infra* notes 48 (distinguishing *officers of the United States* from *Officers . . . under the United States*), 67 (summarizing argument and evidence tending to establish that the President and Vice President are neither *officers of the United States* nor *Officers . . . under the United States*).

<sup>14</sup> See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1152 (2009) ("Even former executive branch officials may be impeached . . ."). Admittedly, the "late impeachment" scenario (that is, the House impeachment, Senate trial, conviction, removal, and possible disqualification of former officers based upon their conduct while in office) is somewhat theoretical: although the House has impeached a *former* cabinet member, Secretary of War William Belknap, the Senate has never purported to convict a former officeholder. As a result, there is *no* settled federal practice or jurisprudence on this point, but the academic consensus—including Professor Chafetz—appears to support so-called "late impeachment." See *id.*; BRIAN C. KALT, *CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES* 110 n.\*, 113, 122, 126-29, 168 n.\* (2012) (discussing late-impeachment concept, and Belknap's impeachment by the House, which occurred after he had left office); *id.* at 106-32 (dedicating an entire chapter to discussing pro's and con's of late impeachment); 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. L. & POL. 13 (2001); see also Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMM. 479, 490 (1998) ("Scholars today generally agree that in principle former officials are subject to impeachment."). But see Laurent Sacharoff, *Former Presidents and Executive Privilege*, 88 TEX. L. REV. 301, 315 (2009) ("[Congress] cannot impeach a former President . . ."); but cf. RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* 101 n.21 (1999) ("[I]t is unclear whether resignation moots an impeachment proceeding . . .").

Professor Akhil Amar appears to be in the camp supporting the permissibility of late impeachment. See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 573 n.5 (2012) (explaining that "former officers are also arguably subject to impeachment"); AMAR, *supra* note 9, at 568 n.53 ("Perhaps impeachment could properly extend to *former* officers who should be disqualified from future officeholding . . ." (emphasis in the original)); Akhil Reed

trial proceedings start after the Chief Magistrate or Vice President or officer has already left office or if the office-holder resigns during House impeachment or Senate trial proceedings but prior to conviction, then conviction (standing alone and apart from disqualification) does not (and, indeed, cannot) work a removal, and, at most, may result in the loss of the statutory perquisites that accrue to former office-holders (e.g., pensions, etc.).<sup>15</sup>

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Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 214 n.36 (1996) ("Even after he left office, Richard Nixon was probably subject to impeachment and disqualification from future officeholding . . ."); cf. *Hearing Before the Task Force on Judicial Impeachment of the [H.] Comm. on the Judiciary: To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part IV)*, 111th Cong. 17 (Dec. 15, 2009) (testimony of Akhil Amar: "[I]t is a gross mistake to believe that [f]ederal officers may be impeached only for misconduct committed while in office or, even more strictly, for misconduct that they committed in their capacity as [f]ederal officers."); *id.* at 21 (reproducing Professor Amar's prepared statement where he argued that "treason and bribery . . . can be committed by someone prior to taking office," yet remain "impeachable offenses"). Professor Amar's position here is quite puzzling. If impeachment extends to former officers (notwithstanding the *office*-laden language of the Impeachment Clause), then why are not former officers proper candidates for statutory succession under the Presidential Succession Clause (another clause using the language of *office* and *officer*)? See U.S. CONST. art. II, § 1, cl. 6 ("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." (emphasis added)). Professor Amar has expressly rejected this possibility. See AMAR, *supra* note 9, at 171 ("Yet once [the Senate President pro tem or Speaker] resigned [guided by separation of powers concerns], the ex-legislative leader would no longer even be a congressional 'officer.'"); AMAR & AMAR, *supra* note 9, at 120 ("[T]he moment an officer resigns, he becomes a mere citizen and is thus ineligible to succeed to or remain in the Oval Office [under any succession statute]."); cf. Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1660 (1997) ("If Newt Gingrich is an officer because he is Speaker of the House, were he to take up the presidency, he would have to step down from the speakership. But then he would no longer be the officer that was the basis for his ascension."). What accounts for the distinction Professor Amar would have us make? What is the difference between current and former officers for the purposes of the Succession Clause and the Impeachment Clause? Both clauses speak to *officers*.

<sup>15</sup> I suggest that removal may "at most" result in the loss of statutory perquisites of office. There is, however, some doubt on this point. Some commentators point out that the loss of such perquisites appears to be in tension with the Removal and Disqualification Clause, which provides that "Judgment in Cases of Impeachment shall not extend *further* than to *removal* from Office, and *disqualification* to hold and enjoy any Office of honor, Trust or Profit under the United States." U.S. CONST. art. I, § 3, cl. 7 (emphasis added). Authorities noting this tension include Professors Gerhardt, Kalt, Samahon, etc. See, e.g., GERHARDT, *supra* note 10, at 99 (noting possible loss of pension); Hugh Brown, *A Plague on Both Your Houses: Challenges to the Role of the Independent Counsel in a Presidential Impeachment*, 34 TULSA L.J. 579, 586 (1999) ("A removed President can lose not only the office of the presidency and the right to hold future political positions, but also pension benefits and Secret Service protection."); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 72 (1989) ("Removal results in the permanent loss of the judge's power to decide cases or controversies and the forfeiture of any pension, benefits, and opportunity to serve on judicially related panels such as the Judicial Council."); Kalt, *supra*

The bottom line is that impeachment, even of Presidents, may, but need not, result in removal. That is some reason to believe that Chafetz's metaphor does not meaningfully explain or account for the constitutional processes relating to impeachment.

This is no mere minor point at the theoretical boundary of the law. The core of Professor Chafetz's normative position is that the substantive standard for impeachment of Presidents is connected to the paradigmatic cases of historically justified assassinations as understood by Benjamin Franklin, the Framers and Ratifiers, and their generation.<sup>16</sup> Such cases include Charles I<sup>17</sup> and Julius Caesar<sup>18</sup>—men who undermined their (relatively) free domestic political institutions

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note 14, at 124 (“It was assumed by some of these same commentators that an impeachment conviction would allow Congress to strip [President] Nixon of his pension, but it now seems that this would have violated the constitutional limitation on judgments to removal and disqualification. In retrospect, Congress could have taken steps to allow late impeachment to strip an ex-officer of his pension, but it was probably too late to apply such a law to Nixon.” (footnotes omitted)); *id.* at 129-30 (collecting authorities); Tuan Samahon, *Impeachment as Judicial Selection?*, 18 WM. & MARY BILL RTS. J. 595, 643 n.315 (2010) (citing GERHARDT, *supra* note 12, at 99, approvingly); Alexa J. Smith, *Federal Judicial Impeachment: Defining Process Due*, 46 HASTINGS L.J. 639, 657 n.121 (1995) (“An impeachment conviction results in expulsion from the judiciary and the subsequent loss of salary, pensions, and other benefits ordinarily due.”). *See generally* KALT, *supra* note 14, at 110-11 (“[Senator] Specter indicated that if convicted, Clinton could lose things like his pension and his government-provided security. Specter was not quite right; [a] federal . . . [statute] provides that a president who is impeached and convicted loses his pension and other benefits, but only if he is impeached *while in office*. Congress could always change that law, though. In doing so, it would protect the country from malfasant officers who commit their offenses shortly before leaving office, and it would add teeth to late impeachment, thereby making it more likely to be a worthwhile exercise.”); *id.* at 111 n.7 (“One could argue that making the punishment on conviction include such a severe financial penalty would violate the constitutional provision that ‘Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.’ If this is true, however, it makes the current presidential benefits . . . [statute] unconstitutional as well. But the benefits law operates independently of the impeachment process—loss of the pension would be based on the operation of the pension law, not on the ‘judgment’ of the Senate in the impeachment case.”).

Some academic discussion relating to pensions relates merely to the loss of the *opportunity to vest* in a pension in connection with continuing service, as opposed to the forfeiture of a pension which has already accrued to the claimant. Furthermore, where the statutory provision for the loss of perquisites in connection with conviction in impeachment proceedings is enacted *after* the close of impeachment proceedings, or *after* the pension or other statutory right has vested in the claimant, or *after* the accused wrongdoer commits the alleged wrong, there may be implications arising under the Due Process Clause, the Ex Post Facto Clause, and/or the Bill of Attainder Clause. *See* U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

<sup>16</sup> *See, e.g.*, Chafetz, *supra* note 1, at 352.

<sup>17</sup> *See id.* at 367-88. Charles I was not actually assassinated; rather, he was tried, convicted, and executed by an irregular court. *Id.*

<sup>18</sup> *See id.* at 353-67.

in an effort to entrench<sup>19</sup> and aggrandize<sup>20</sup> their personal power. *But men who allow themselves to be turned out of office or who peaceably resign never deserve to be assassinated, particularly under any aggrandizement or entrenchment rationale.* Again, Chafetz affirms, as a matter of original public meaning, that late impeachment is constitutional; he also affirms that the substantive standard for impeachment is the commission of an assassinate offense (as historically understood at the time of ratification). Is it not fair to say that these two positions are (at the very least) in deep tension?

*B. Is it Reasonable to Characterize Removal in Consequence of Conviction a “Political Death”?*

No. When the Senate votes to convict an impeached office-holder, the legal effect of Senate conviction, automatic removal from office, if in office,<sup>21</sup> is indistinguishable from removals achieved by other means. Examples are readily at hand. When a President’s second term ends, or when the public fails to reelect a first term President, he can no longer exercise the powers and duties of office (its *trust*); he can no longer enjoy its perquisites (its *profits*); he is no longer saluted as the Chief Magistrate (its *honors*). The end of the period for which he is elected is *legally* and *functionally* indistinguishable from removal in consequence of conviction—indistinguishable in all respects, except for the timing.

Likewise, the result of a Senate conviction vote is no different from removal of Executive Branch officers effectuated by the President under his historical Article II powers. Similarly, an officer may sometimes be removed by another officer (or commission) acting under a statutory or regulatory grant of authority. Furthermore,

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<sup>19</sup> See *id.* at 422 (noting anti-entrenchment rationale for impeachment).

<sup>20</sup> See *id.* at 353 (tying assassination to the aggrandizement rationale).

<sup>21</sup> Even if in office, it seems to me that an impeached and convicted office-holder must be in an office that is itself subject to impeachment in order to be seized by automatic removal at the time of conviction. For example, a civil officer (e.g., a cabinet member) might be appointed to high military office. If while in military office he is impeached and convicted for his prior conduct committed while in civilian office, would that work a removal from military office? I think not. The effect of House impeachment and Senate conviction would be limited to its moral opprobrium and to the loss of collateral *statutory* benefits accruing to former office-holders subsequently convicted by the Senate. Cf. 3 U.S.C. § 19 (2006) (removing impeached officers from the line of succession, even if *not* yet convicted). After all, the Impeachment Clause does not expressly reach Representatives, Senators, and military officers. See Chafetz, *supra* note 1, at 351 n.23. *But cf. infra* note 42 (collecting sources indicating that members of Congress are impeachable). Thus, it is difficult to see why conviction should work a removal from such offices. On the other hand, if the House votes to impeach, and the Senate votes to convict, remove, and disqualify, based on conduct in a formerly held office subject to impeachment, then disqualification would extend to military office, but not to Senate or House membership. In other words, although a simple conviction would not effectuate a removal from military office, disqualification, quite possibly, may do so, assuming that disqualification reaches offices *currently* held, and not merely would-be attempts at *future* (i.e., post-Senate-conviction) office-holding. If Professor Chafetz agrees with my textual analysis (which is, I believe, consistent with his writings), he might well consider whether the complexity of our legal system forbids the adoption of his beautiful Benjamin-Franklinesque simplicity: *impeachment-as-assassination*. See Chafetz, *supra* note 1 *passim*.

an office created by statute can be terminated by Congress via statute, which, although it does not formally *remove* an officer from office, effectively *terminates* an officer from government service by terminating the office held.<sup>22</sup> Finally, conviction of certain crimes in the course of judicial proceedings sometimes works an automatic removal or disqualification from office as determined by statute.<sup>23</sup>

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<sup>22</sup> *Termination* and *removal* are not coextensive. A *removal* leaves an office vacant, with the possibility of a subsequent appointment. A *termination*, by contrast, leaves the appointing officer (or commission) with no office to fill. The full extent of Congress's power to terminate statutory offices has been and is controverted. Compare Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 101 NW. U. L. REV. COLLOQUY 82 (2007) (arguing that the Senate can terminate a presidential recess appointment by reconvening and terminating its session), and Seth Barrett Tillman, *Terminating Presidential Recess Appointments: A Reply to Professor Brian C. Kalt*, 101 NW. U. L. REV. COLLOQUY 94 (2007) (same), with Brian C. Kalt, Response, *Keeping Recess Appointments in Their Place*, 101 NW. U. L. REV. COLLOQUY 88 (2007) (putting forward constitutional and practical objections to the proposed procedure), and Brian C. Kalt, *Keeping Tillman Adjournments in Their Place: A Rejoinder to Seth Barrett Tillman*, 101 NW. U. L. REV. COLLOQUY 108 (2007) (same). Does Congress's power to terminate statutory offices extend to Article III judges and Justices and other officers with good behavior tenure? Apparently so. Compare *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803) (Paterson, J.) (approving, by implication, congressional termination of judicial office), with *Bowsher v. Synar*, 478 U.S. 714, 725-27 (1986) (Burger, C.J.) (denying, in dicta, propriety of congressional removals). Some have suggested that Congress has no power to terminate and instantly recreate a terminated office. See Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1786 (2006) ("In other words, [according to this view] though Congress may terminate an office and thereby oust the incumbent, it cannot enact a simple removal statute. Nor can Congress terminate an office and recreate an identical office, for that would be, in substance, a simple removal statute. [This] nuanced position presumably remains the view of the executive branch." (collecting presidential statements and other Executive Branch authority)).

<sup>23</sup> See, e.g., *De Veau v. Braisted*, 363 U.S. 144, 158-59 (1960) (Frankfurter, J., plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas. Federal law has frequently and of old utilized this type of disqualification. . . . In addition, a large group of federal statutes disqualify persons 'from holding any office of honor, trust, or profit under the United States' because of their conviction of certain crimes, generally involving official misconduct."); see also, e.g., *supra* note 21 and accompanying text; *infra* notes 55-65 and accompanying text. Statutory removal frequently works a statutory disqualification in regard to holding appointed or statutory offices. But this disqualification arises as a statutory, not as a constitutional restriction against future office-holding. Likewise, to the extent that these statutes purport to create a disqualification against holding federal elective positions—Representative, Senator, Vice President, or President—these statutes would appear to be unconstitutional. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Stevens, J.) (holding that states may not add to the textually express qualifications in the Constitution for Representatives and Senators); *Powell v. McCormack*, 395 U.S. 486, 550 (1969) (Warren, C.J.) (suggesting that Congress may not add to the textually express qualifications in the Constitution for Representatives and Senators); THE FEDERALIST NO. 60 (Alexander Hamilton), *supra* note 4, at 326 (noting that the qualifications for membership in Congress are "defined and fixed in the constitution, and are unalterable by the [national] legislature"); CHAFETZ, *supra* note 13, at 171 (same). But see P. Allan Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. PUB. L. 103, 108 n.16, 111, 116-21 (1968) (arguing that Congress may add statutory qualifications to congressional membership); John C. Eastman, *Open to Merit of Every Description? An Historical Assessment of the Constitution's Qualifications Clauses*, 73 DENV. U. L. REV. 89, 136 (1995) (concluding that "the arguments



Thus, outside of the impeachment context, removal can be effectuated by action of each of the three branches of the federal government.<sup>24</sup> The *legal* effect of removal—achieved by any of these means, including the mere passage of time in regard to elected officials—is indistinguishable from that achieved by a Senate conviction vote in the impeachment context.

What is that effect? A person removed in consequence of Senate conviction loses his current statutory office<sup>25</sup> or the presidency (a constitutional office) or vice presidency (another constitutional office). That is all. Such a person is perfectly free to seek any other elected position—state or federal—and any appointing official, officer, or commission may choose that person for a vacant statutory office (absent a statutory limitation).

In short, if a person convicted by the Senate has suffered, per Chafetz, a *political death*, then it is a death with very little sting, for many individuals who have been removed or suffered loss of office have come back another day and held (elective or appointed) positions once again. Just think of Grover Cleveland's two non-consecutive presidential terms. A temporary interlude in the political wilderness may be a personal or party setback, but it is not a *death*, metaphorically or otherwise.

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against the exclusive interpretation of the Qualifications Clauses, and in favor of the power of states to superadd to the qualifications listed in them, are stronger and more consistent, both logically and with the historical record and the nature of the American regime"). See generally Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97, 113 n.59 (1991).

<sup>24</sup> *But cf.* Gerhardt, *supra* note 15, at 49 ("It would have been illogical for the framers to have given Congress two separate methods to expel its own members."); Jason J. Vicente, *Impeachment, A Constitutional Primer*, 3 TEX. REV. L. & POL. 117, 133 (1998) ("Providing two methods for removing a legislator seems redundant and illogical." (citing Gerhardt, *supra*)). It is unclear to me what the basis for this intuition is. In regard to the removal of officers, for example, few doubt that the President's power to remove (even high ranking) Executive Branch officers is not exclusive. Such a result does not appear, to me at least, "illogical" or "redundant." See *supra* notes 21-23 and accompanying text.

Perhaps, an alternative reason to doubt that Congress may impeach, try, remove, and disqualify its own members is that such processes would seem to trespass on the (apparent) norm of intracameral autonomy. Compare Bruhl, *supra* note 9, at 996-1007 (affirming the existence of a constitutional intracameral autonomy norm), with BERGER, *infra* note 42 (discussing the Foreign Emoluments Clause and implying that the ability of a member of Congress to accept a gift from a foreign state hinges on the member's receiving *consent* from both houses of Congress to accept the gift), and Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 361-62, 364, 366, 410 n.302 (2009) (same); compare AMAR, *supra* note 9, at 568 n.53 ("Structurally, the Constitution provided for expulsion, *not impeachment*, of rotten federal lawmakers. And in the impeachment of Senator William Blount in the late 1790s, a majority of the Senate sitting as a high court of impeachment read the Constitution in just this way . . ." (emphasis added)), with *supra* note 9 (collecting contrary authority). Of course, finding a norm of intracameral autonomy assumes that we already know that impeachment does not reach members of Congress. If, as a matter of original meaning, impeachment *does* reach members of Congress, then no such norm exists, or, at best, it only may be said to exist (weakly) in other contexts outside of impeachment.

<sup>25</sup> See *supra* note 8; see also *supra* notes 5-7. Compare KYVIG, *supra* note 9, at 308 ("[I]mpeachment and conviction imposed no mandatory punishment other than the loss of office . . ."), with GERHARDT, *supra* note 10, at 187 (noting that in "earlier impeachment trials . . . the Senate took separate votes on guilt and removal").

Professor Chafetz might argue my position is too cramped: conviction and removal carry with them a sort of moral opprobrium beyond the pure legal consequences of removal. Perhaps the Framers expected that the judgment of the Senate (founded on House charges) would carry serious weight with the public in this regard. But that expectation—that the public would give due weight to the sense of the Senate<sup>26</sup>—was not embodied in the four corners of the national charter in any meaningful way, and, more importantly, that expectation (if it existed at all) has turned out to be dead wrong. Examples of the public’s disregard for removals effectuated by political officeholders (i.e., Senators and others) are not difficult to come by. Senator William Blount was expelled from the Senate in 1797 by a two-thirds vote, in a process akin to a Senate conviction in impeachment proceedings. He returned to his native Tennessee to be elected to the state senate, and then was chosen as that body’s president.<sup>27</sup> Likewise, during the Civil War several senators were expelled for aiding the Confederacy, but nevertheless held significant state and federal positions after the war ended in 1865. For example, Virginia Senator Robert M.T. Hunter was expelled in 1861; from 1874 to 1880, he held the office of state treasurer, and from 1885 to 1887, he was collector of the Port of Tappahannock, Virginia—a federal office.<sup>28</sup> North Dakota Governor William Langer, after being convicted in federal court of a felony, was removed from state office in 1934 by his

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<sup>26</sup> A successor Senate will not always give due weight to the sense of a prior Senate. The Twenty-Third Senate entered a resolution censuring President Jackson for his decision to remove government funds from the Bank of the United States absent express statutory authority. After the next election, the successor Senate expunged the resolution from the Senate’s *Journal*. Compare 23 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 197 (Washington, Duff Green 1833) (recording March 28, 1834 resolution censuring President Jackson), with 26 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 123-24 (Washington, Gales & Seaton 1836) (recording January 16, 1837 resolution expunging the Jackson censure from the *Journal*). See generally 1 ROBERT C. BYRD, THE SENATE, 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 127-41 (Mary Sharon Hall ed., 1988). But see generally KYVIG, *supra* note 9, at 308 (noting that Alcee Hastings “proved unable to escape the stigma of impeachment altogether” when, for example, his “party regained control of the House” and he was denied a chairmanship).

<sup>27</sup> See CHAFETZ, *supra* note 13 *passim*. See generally BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, bioguide.congress.gov (last visited Dec. 7, 2010) (entries for Blount, Bright, Hastings, Hunter, Andrew Johnson, Waldo Johnson, Langer, Nicholson, and Powell).

<sup>28</sup> There are several other such examples. Tennessee Senator Alfred O. P. Nicholson was expelled in 1861; from 1870 to 1876, he served as Chief Justice of the Tennessee Supreme Court. Missouri Senator Waldo P. Johnson was expelled in 1862; in 1875, he was chosen president of his state’s constitutional convention. Indiana Senator Jesse D. Bright was expelled in 1862; from 1867 to 1871, Bright was a member of the Kentucky House of Representatives. Albeit, the Civil War and Reconstruction were arguably *sui generis*. See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *supra* note 27. See generally U.S. CONST. amend. XIV, § 3 (“No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.”).

state's supreme court. He was subsequently reelected to the governor's post in 1937, and in 1941, he was elected to the United States Senate. He was reelected to the Senate in the three subsequent elections.<sup>29</sup> Congressman Adam Clayton Powell was excluded from membership by the House in 1967; he was reelected in a special election caused by his exclusion, and, thereafter, reelected to the next Congress.<sup>30</sup>

Judge Alcee Hastings, an *Article III* judge, was impeached by the House in 1988 and convicted by the Senate in 1989. Subsequently, he ran for and won a House seat in 1992. A position he holds to this day.<sup>31</sup> *Political death?*

C. *Is Senate Disqualification a "Political Death Without Possibility of Resurrection"?*<sup>32</sup>

As Professor Chafetz recognizes, disqualification by the Senate, a punishment it may impose, in addition to conviction (and consequent automatic removal), leaves the former office-holder free to pursue state office.<sup>33</sup> This is no small thing. Under the original Constitution, state legislatures chose United States senators and also had the power to choose presidential electors themselves, without the intervention of any

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<sup>29</sup> See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *supra* note 27; JAMES E. LEAHY, THE NORTH DAKOTA STATE CONSTITUTION: A REFERENCE GUIDE 61, 98 (2003). During his term as Governor of North Dakota, William Langer was convicted of a felony in a federal district court. After he was convicted, but before the conclusion of federal appellate review, Langer was removed from his position as governor by his state's supreme court in, what was in effect, a collateral proceeding. See *id.* After he was removed from office, his conviction was overturned on appeal, and he was subsequently reelected governor. See *The Expulsion Case of William Langer of North Dakota (1942)*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/expulsion\\_cases/123WilliamLanger\\_expulsion.htm](http://www.senate.gov/artandhistory/history/common/expulsion_cases/123WilliamLanger_expulsion.htm) (last visited Feb. 14, 2011). According to the consensus view, even if Langer's felony conviction had been affirmed on appeal, he, nonetheless, remained "qualified" to hold a Senate seat as a matter of federal constitutional law. See *supra* note 23.

<sup>30</sup> See *supra* note 27; see also *supra* note 23 (citing *Powell v. McCormack*, 395 U.S. 486 (1969) (Warren, C.J.)).

<sup>31</sup> Judge Hastings has been continuously reelected since 1992, and he has been reelected as recently as Tuesday, November 6, 2012. See KYVIG, *supra* note 9, at 309 ("[Hastings's] repeated elections to the House of Representatives signaled his *constituents' indifference* to his impeachment . . ." (emphasis added)); see also *id.* at 307 (explaining that post-1992, "[t]he *resurrection* of Alcee Hastings steadily continued" (emphasis added)); *id.* at 306 (using *resurrection*-language to describe Hastings's career); *id.* at 308 ("Alcee Hastings dented the notion of impeachment as the ultimate political disgrace . . ."). It is again worth noting that even had Judge Hastings been disqualified by the Senate, according to the consensus view, he would have been eligible to serve in Congress. See *infra* notes 70-72 and accompanying text. *But cf.* KYVIG, *supra* note 9, at 309 ("Until the 1990s no federal official impeached and convicted had ever resumed a public career.").

Likewise, President Andrew Johnson was impeached by the House and escaped Senate conviction by a single vote. He was subsequently elected to the Senate for a term starting in 1875 by his home state's (that is Tennessee's) legislature. See *supra* note 27.

<sup>32</sup> Chafetz, *supra* note 1, at 421 (capitalization added).

<sup>33</sup> *Id.* at 351 n.23.

popular election.<sup>34</sup> Even today, state officers hold a variety of powers intimately affecting the *federal* government. State governors may, in certain circumstances, make appointments to fill vacancies in the United States Senate.<sup>35</sup> State legislatures or state conventions ratify proposed federal constitutional amendments.<sup>36</sup> State legislatures make calls for Article V national conventions to amend the federal constitution.<sup>37</sup> State statutes determine voter qualifications for elected federal office<sup>38</sup> (subject to federal constitutional limitations<sup>39</sup>), and state statutes control

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<sup>34</sup> See U.S. CONST. art. I, § 3, cl. 1 (1789) (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”), *amended by* U.S. CONST. amend. XVII (1913) (mandating popular election of Senators); U.S. CONST. art. II, § 1, cl. 1 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .”). Arguably, state legislatures have retained this power, notwithstanding the advent of popular election. See, e.g., *Bush v. Gore*, 531 U.S. 98, 113-15 (2000) (Rehnquist, C.J., concurring).

<sup>35</sup> See U.S. CONST. amend. XVII, § 2 (“When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.”), *amending* U.S. CONST. art. I, § 3, cl. 2 (“[I]f Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.”); Michael Stern, *I’m Not Dead . . . I’m Just in Congress*, POINT OF ORDER: A DISCUSSION OF CONGRESSIONAL LEGAL ISSUES (Jan. 6, 2011, 4:59 AM), <http://pointoforder.com/> (same).

<sup>36</sup> See U.S. CONST. art. V; see also U.S. CONST. amend. XXI (ratifying amendment by state convention process).

<sup>37</sup> See U.S. CONST. art. V. Although state legislatures have made such calls from time to time, no Article V convention has ever been convened. It is a matter of debate amongst academics whether a sufficient number of states have made valid calls for a national convention. Compare Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 684 & n.15 (1993) (suggesting the “somewhat startling conclusion that Congress is currently obliged by Article V to call a constitutional convention, unlimited in the subjects it may consider for proposed amendments”), with Sara R. Ellis et al., Note, *Article V Constitutional Conventions: A Primer*, 78 TENN. L. REV. 663, 668 (2011) (noting that “Congress’s duty to call a convention may not have been triggered” because the state “applications covered a multitude of subjects rather than a single specific topic”), *id.* at 668 n.28 (“[I]t is reasonable to assume that at least thirty-four [of fifty states, i.e., two-thirds of the states] specific applications [for an Article V convention] must share the same subject area.”), and Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL’Y 837, 855-58 (2011) (explaining that rescissions since 1993 leave only 33 valid state conventions calls, and 34 are necessary to trigger an Article V convention).

<sup>38</sup> Cf., e.g., U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); U.S. CONST. amend. XVII, § 1 (“The electors [for the Senate] in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.”).

election procedures to such offices<sup>40</sup> (although Congress has an express power to override such state statutes<sup>41</sup>). Likewise, Professor Chafetz takes the position that disqualified former officers can also be elected to Congress.<sup>42</sup> This is nothing like a

<sup>39</sup> See, e.g., U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); cf. U.S. CONST. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”).

<sup>40</sup> See, e.g., U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.”); *Shelby County v. Holder*, No. 12-96, 570 U.S. \_\_\_, 2013 U.S. LEXIS 4917, at \*23 (June 25, 2013) (Roberts, C.J.) (“[T]he Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. But States have broad powers to determine the conditions under which the right of suffrage may be exercised.” (citations and quotation marks omitted)); THE FEDERALIST NO. 44 (James Madison), *supra* note 4, at 248 (“And the election of the house of representatives, will equally depend [on the state legislatures] in the first instance; and will probably, for ever be conducted by the officers and according to the laws of the states.”).

<sup>41</sup> See *supra* note 40 (quoting U.S. CONST. art. I, § 4, cl. 1).

<sup>42</sup> See Chafetz, *supra* note 1, at 351 n.23; see also Amar & Amar, *supra* note 9, at 115 n.14 (same); Michael Stern, *Is Former Judge Porteous Eligible to Serve in Congress?*, POINT OF ORDER: A DISCUSSION OF CONGRESSIONAL LEGAL ISSUES (Dec. 29, 2010, 4:25 AM), <http://pointoforder.com/> (same). Here too, there is *no* settled federal practice or jurisprudence on this point. See Amar & Amar, *supra* note 9, at 115 n.14 (noting that this issue was left open in *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (Warren, C.J.)). As indicated in the main text, Professor Chafetz takes the position that disqualified former officers may be subsequently elected to Congress. His position appears to be the majority view in legal academia today. (For what it is worth, I will venture to affirm that I share Chafetz’s view on this *contested* point.) But it must be admitted that this opinion is not, and, perhaps, has not been universally held. See THE FEDERALIST NO. 65 (Alexander Hamilton), *supra* note 4, at 351 (“The punishment, which *may* be the consequence of conviction upon impeachment [Tillman adding—*which appears to refer to disqualification*], is not to terminate the chastisement of the offender. After having been sentenced to a *perpetual ostracism* [Tillman adding—*again in apparent reference to disqualification*] from the esteem and confidence, and honors and emoluments of his country [Tillman adding—*which might be thought to include election to Congress*]; he will still be liable to prosecution and punishment in the ordinary course of law.” (emphasis added)). The modern academic consensus—permitting a disqualified officer to serve in Congress—does not command universal assent among modern judges and commentators. See *Waggoner v. Hastings*, 816 F. Supp. 716, 719-20 (S.D. Fla. 1993) (Roettger, J.) (noting that impeached and convicted federal judge Alcee Hastings had not been disqualified by the Senate and his apparent eligibility to sit in the House thereafter; leaving the implication that had he been disqualified, his eligibility to sit in the House was in question); RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 225 n.10 (1974) (arguing that the Constitution’s use of *office* and *officer* embraces Senators and Representatives else “a judge impeached, convicted, and disqualified ‘to hold any office’ could yet be elected to the Congress, for a member of Congress would not be a ‘person holding an office.’”); GERHARDT, *supra* note 10, at 60-61 (implying that a disqualified officer cannot hold congressional office); MCKAY & JOHNSON, *supra* note 9, at 515 n.43 (implying that a disqualified officer cannot hold congressional office); NOWAK & ROTUNDA, *supra* note 10, at 153 n.9 (“[W]hen the Senate impeaches someone, it can impose a disqualification for U.S. Representative and Senator, as well as any *other office of trust under the United*

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*States.*” (emphasis added)); Grossman & Yalof, *supra* note 12, at 12 n.8 (implying that a disqualified officer cannot hold congressional office); Samahon, *supra* note 15, at 613 n.113 (implying that a disqualified officer cannot hold congressional office); J. Peter Pham & Michael I. Krauss, *Speaker Pelosi’s Impending Intelligence Failure*, TCS DAILY (Nov. 9, 2006, 12:00 A.M.), [http://www.ideasinactiontv.com/tcs\\_daily/2006/11/speaker-pelosis-impending-intelligence-failure.html](http://www.ideasinactiontv.com/tcs_daily/2006/11/speaker-pelosis-impending-intelligence-failure.html) (same).

A related controverted question is whether members of Congress are subject to impeachment (as opposed to whether prior conviction and disqualification precludes such a person from taking a seat in Congress). The modern consensus is that members are not subject to impeachment. *See, e.g., supra* note 9 (quoting positions of Professors Akhil Amar, Pfander, Prakash, and Smith); Vikram Amar, *High Crimes and Misdemeanors: The Case Against Bill Clinton*, 16 CONST. COMM. 403, 406 n.7 (1999) (reviewing ANN COULTER, *HIGH CRIMES AND MISDEMEANORS* (1998)) (“[L]et me set the record straight on a non-truth [!] Ms. Coulter asserts about the impeachability of Congresspersons. Notwithstanding her suggestions . . . House members and Senators are not ‘officers’ within the meaning of the impeachment clauses of the Constitution and are thus not impeachable.” (citing, somewhat unhelpfully, Amar & Amar, *supra* note 9, at 115-16)); Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 1020 (2010) (asserting that “legislative leaders,” such as the Senate President pro tem and Speaker of the House, “cannot be impeached”); *cf., e.g.,* Letter from Akhil Reed Amar to Stuart Taylor Jr. (Feb. 8, 1999), in Akhil Reed Amar, *On Impeaching Presidents*, *supra* note 9, at 327 (asserting, without explanation, that *Federalist No. 65* is “dramatic [!] historical evidence” against the proposition that private persons are impeachable). I know of only a single Founding era source in clear agreement with the modern consensus. Compare JAMES MONROE (*nom de plume* A NATIVE OF VIRGINIA), *Observations Upon the Proposed Plan of Federal Government* (Petersburg, Hunter & Prentis 1788), in 1 THE WRITINGS OF JAMES MONROE 1778-1794, at 347, 361 (Elibron Classics 2005) (Stanislaus Murray Hamilton ed., N.Y., G.P. Putnam’s Sons 1898) (“I conceive that the Senators are not impeachable, and therefore Governor Randolph’s objection falls to the ground.”), *id.* at 359 (same with regard to Members of Congress generally), *id.* (“[B]y no construction can [Senators] be considered as civil officers of State.”), and *id.* at 398 (noting that “at first [I] conceived that the Senators were liable to impeachment” but later changed positions), with 3 ELLIOT’S DEBATES, *supra* note 10, at 202 (“Who are your senators? They are chosen by the legislatures, and a third of them go out of the Senate at the end of every second year. They may also be impeached. There are no better checks upon earth.” (quoting Edmund Randolph’s June 10, 1788 speech at the Virginia ratifying convention)). But again, this view—that Members of Congress are beyond the scope of the impeachment power—is not and has not been universally held. *See supra* note 9 (describing Professor Isenbergh’s position); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 716 (1988) (“Thus, judges, as well as all *legislators* and all executive officials, whether in the highest or the lowest departments of the national government, are subject to impeachment.” (emphasis added) (internal quotation marks omitted)); Letter from Stuart Taylor Jr. to Akhil Reed Amar (Feb. 5, 1999), in Akhil Reed Amar, *On Impeaching Presidents*, *supra* note 9, at 325 (“Similarly, ‘civil officers’ is most naturally (and structurally) read as a limitation of this mandatory sentencing provision to executive branch officials. I therefore doubt the correctness of the conventional wisdom that the words ‘civil officers’ were stuck into Article II, Section 4 to denote a grab-bag category of all impeachable persons—a grab-bag that somehow has been read for 200 years or so to include Article III judges, but not Article I senators!”). Many early sources support Isenbergh, Rotunda, and Taylor’s position: i.e., that office-holders other than those listed in the Impeachment Clause are subject to impeachment. *See, e.g.,* THE FEDERALIST NO. 66 (Alexander Hamilton), *supra* note 4, at 357 (“A *fourth* objection to the senate, in the capacity of a court of impeachments, is derived from their union with the executive in the power of making treaties. This, it has been said, would constitute the

senators their own judges, in every case of a corrupt or perfidious execution of that trust. After having combined with the executive in betraying the interests of the nation in a ruinous treaty, what prospect, it is asked, would there be of their being made to suffer the punishment, they would deserve, when they were themselves to decide upon the accusation brought against them for the treachery of which they had been guilty?”. My reading of Hamilton’s position in *Federalist No. 66*, although not universal, is not idiosyncratic. See, e.g., BUCKNER F. MELTON, JR., *THE FIRST IMPEACHMENT: THE CONSTITUTION’S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT* 49 & n.105 (1998) (citing *Federalist No. 66* for the proposition that Hamilton believed that legislators were amenable to impeachment, and noting that Hamilton’s view was “widespread”); see also PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 157 (1984) (noting that Hamilton took the position that Senators were impeachable). But see GERHARDT, *supra* note 10, at 15 & 199 n.21 (asserting that Hamilton took the position that “members of Congress could not be impeached” (citing *Federalist No. 66*)). Hamilton was not the only early authority who asserted that members of Congress were within the scope of the impeachment power. See, e.g., HOFFER & HULL, *supra* at 157 (noting that “Wilson, Hamilton, Mason, and others” took the view that members of the upper house were impeachable). Compare, e.g., BERGER, *supra* at 224-33 (collecting early authorities suggesting that Senators and Representatives are subject to impeachment), with AMAR, *supra* note 9, at 568 n.53 (“Berger’s argument on this point made a *hash* of constitutional text, structure, and precedent.” (emphasis added)), and Amar & Amar, *supra* note 9, at 115 (dropping the ellipses and *misquoting* James Iredell as stating: “[W]ho ever heard of impeaching a member of the legislature?” when, in fact, Iredell stated: “[W]ho ever heard of impeaching a member of the legislature for *any legislative misconduct*?” (emphasis added) (quoting 4 ELLIOT’S DEBATES, *supra* note 10, at 127)); compare, e.g., AMAR, *supra* note 9, at 568 n.53 (“[I]n England even *private persons* were impeachable; and the Constitution *plainly* broke with this aspect of English law. . . . Textually *only* ‘Officers of the United States’ are impeachable.” (emphasis added)), with U.S. CONST. art. I, § 3, cl. 6. (extending the reach of the Senate Trial Clause to “person[s],” not “Officers of the United States”), and U.S. CONST. art. I, § 3, cl. 7 (describing the reach of the Removal and Disqualification Clause in terms of any “Party convicted,” not “Officers of the United States”). The use of “person[s]” or “party,” rather than “Officers” or “Officers of the United States” may mean the scope of the impeachment power extends beyond “Officers” to former officers and/or to Members of Congress (or even to former members) and/or to private persons. See Goldstein, *supra* at 1023 (“‘Person’ is, of course, broader than ‘Officer of the United States’ or even ‘Officer’ . . .”). Compare, e.g., 2 ELLIOT’S DEBATES, *supra* note 10, at 477 (James Wilson: “I admit the force of the observation made by the gentleman from Fayette, (Mr. Smilie,) that, when two thirds of the Senate concur to forming a bad treaty, it will be hard to procure a vote of two thirds against [the Senators], if they [the Senators] should be impeached [!]. I think such a thing is not to be expected [Tillman adding—as a *practical matter*]; and so far they [the Senators] are without that *immediate* degree of responsibility which I think requisite to make this part of the work perfect.” (emphasis in the original)), with AMAR, *supra* note 9, at 299 (suggesting that “[a]t the Founding,” Madison and Wilson were “the two deepest Federalist thinkers”), and *id.* at 467 n.\* (stating that “Wilson was far more fluent in law” than Madison). Likewise, the decision of the House on July 7, 1797 to impeach Senator Blount was dependent on the majority’s believing that Senators were subject to impeachment, notwithstanding the fact that a majority of the Senate arguably rejected that position on January 14, 1799. See 3 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA 72-73 (Washington, Gales & Seaton 1826) (recording July 7, 1797 resolution of the House to impeach Blount); 2 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 392 (Washington, Gales & Seaton 1820) (recording Senate adoption of a resolution to expel Blount on July 8, 1797); 8 ANNALS OF CONG. 2319 (Washington, Gales & Seaton 1851) (recording Senate adoption of a resolution on January 11, 1799 to the effect that: “this Court ought not to hold jurisdiction”). Modern authorities continue to disagree as to the meaning of the Senate’s opaque resolution affirming that the Senate “ought not to hold

political death, much less a political death without chance of a return to highly significant public office, including positions within the federal government<sup>43</sup> and

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jurisdiction.” See *supra* note 9 (collecting authority). Compare, e.g., KYVIG, *supra* note 9, at 22 (“The outcome of the Blount case left unresolved most questions about impeachment, including whether legislators fell within the category of ‘civil officers’ of the United States eligible for impeachment.”), and EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT* 88 (1999) (“It is not clear whether the decision [by the Senate to terminate the *Blount* proceedings] was based on Blount’s argument that senators were not government officers or on his argument that he was not an officer because he had been expelled.”), with HUPMAN, *supra* note 9, at 3 (“[The Senate] decided that a Senator who has been expelled from his seat is not after such expulsion subject to impeachment.”), AMAR, *supra* note 9, at 199 n.\* (affirming that the Senate “decided” in *Blount* that Senators were not impeachable because they were not “Officers”), William F. Swindler, *High Court of Congress: Impeachment Trials, 1797-1936*, 60 A.B.A. J. 420, 421 (1974) (suggesting that the Senate held in *Blount* that a former Senator having been expelled by the Senate, as opposed to having resigned, is outside the scope of the impeachment power), and Horatius, *The Presidential Knot*, THE PHILADELPHIA GAZETTE & DAILY ADVERTISER, Jan. 10, 1801, at 1 (“Upon the impeachment of William Blount, a distinction was taken between an officer and a Member of Congress; and it was held that a Senator was not an officer of the United States, and therefore was not liable to impeachment. Upon this ground, the majority of the Senate would not hold cognizance of that impeachment.”) (reprinting January 6, 1801 article from the *Washington Advertiser*). Some believe Horatius was John Marshall, then Chief Justice. See ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 541 n.2 (Standard Library ed. 1916) (taking the position that Marshall’s “authorship would appear to be reasonably certain”); see also BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 45 (2005) (“[T]here is substantial reason to believe that the brilliant author of the Horatius essay was none other than John Marshall himself.”); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1781 n.273 (2002) (noting that “Professor [Bruce] Ackerman believes that ‘Horatius’ is John Marshall . . .”).

Moreover, to the extent that the House and Senate are considered coordinate authorities, the Blount impeachment (by the House) and acquittal (by the Senate) are ambiguous evidence for the position that members of Congress are outside of the scope of the impeachment power. See generally *Blount, William (1749-1800)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000570> (last visited Nov. 17, 2010).

<sup>43</sup> Other positions which a disqualified officer might hold include: advisors to the President, even those situated in the White House, who lack individualized legal discretion or power to affect binding legal relations; an office created by state compact; federal elector; member of a state convention convened to act on a proposed amendment to the federal constitution; member of an Article V national convention called by two-thirds of the states; *qui tam* plaintiff in a federal cause of action; an American-sponsored nominee or appointee to office in an *ad hoc* or permanent international, multinational, or binational institution or commission (e.g., a treaty-created office); a holder of a letter of marque and reprisal; a director, trustee, member, officer, or employee of a federally chartered corporation, etc. The list is, if not endless, quite substantial. See Aaron Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2598 (2011) (concluding that so-called “czars” situated in the White House are not “officers of the United States” per the Appointments Clause, but are, rather, at-will employees of the President); cf. Officers of the United States Within the Meaning of the Appointments Clause, 2007 WL 1405459, at \*24 n.13 (Apr. 16, 2007) (Bradbury, Acting Asst. Att’y Gen.) (taking no position in regard to whether or not an office of the United States, per the Appointments Clause, may



state offices of every description, including those that deeply influence the operation of the federal government.<sup>44</sup>

## II. BUT IS THE PRESIDENCY DIFFERENT?

Professor Chafetz might argue that his article was not about impeachment and disqualification generally, but about the impeachment and disqualification of Presidents. But here too, I hope to show that his position is not on firm ground. If a President or Vice President or officer is impeached by the House, and convicted, removed, and disqualified by the Senate, he is barred from holding “any Office of

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be validly created by treaty, as opposed to by statute); ALEXANDER HAMILTON, THE DEFENCE NO. 37 (Jan. 6, 1796), *reprinted in* 20 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. They 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.” (font in the original)). *But see* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1061 n.67 (1988) (“[I]t should be noted that if [Article V] delegates can be considered ‘officers of the United States’—and it is not implausible to view them as such . . .”). Modern authorities are divided on the propriety of the practice of the appointment of American members to international arbitrations outside of the confines of the Appointments Clause. *Compare* Harold H. Bruff, *Can Buckley Clear Customs?*, 49 WASH. & LEE L. REV. 1309 (1992) (supporting the validity of such appointments), *with* 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) (opposing).

<sup>44</sup> Historically, this has certainly been the case. *See, e.g.*, THE FEDERALIST NO. 45 (James Madison), *supra* note 4, at 252 (“Without the intervention of the state legislatures [which determine the process by which electors are chosen or elected], the president of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps in most cases of themselves determine it.”); *cf., e.g.*, THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 4, at 189 (“In other cases [involving the potential for both federal and state taxation], the probability is, that the United States will either wholly abstain from the objects pre-occupied for local purposes, or will make use of the state officers and state regulations, for collecting the additional [federal] imposition.”). *Compare, e.g.*, THE FEDERALIST NO. 44 (James Madison), *supra* note 4, at 248 (“The election of the . . . senate, will depend in all cases, on the legislatures of the several states.”), *with* U.S. CONST. amend. XVII (providing for popular election of senators). In modern times, some state Secretaries of State prepare certificates of election or credentials for Representatives-elect and Senators-elect. *See, e.g.*, N.J. STAT. ANN. § 19:22-7 (West 1999); *cf., e.g.*, Scott Conroy, *Secretary Of The Senate Explains Why Burriss Wasn’t Seated*, POLITICAL HOTSHEET (Jan. 6, 2009, 5:17 PM), [http://www.cbsnews.com/8301-503544\\_162-4702877-503544.html](http://www.cbsnews.com/8301-503544_162-4702877-503544.html) (explaining that the Secretary of the United States Senate “refused to seat Burriss, who was appointed to the seat by embattled Illinois Governor Rod Blagojevich, because [Burriss] lacked the necessary signature of the Illinois Secretary of State, Jesse White, and the state seal of Illinois”). Likewise, governors certify the votes of electors for President and Vice President. *See* Act of Feb. 3, 1887 (the Electoral Count Act), ch. 90, § 15, 1524 Stat. 373 (codified as amended at 3 U.S.C. §§ 5-6, 15-18 (2000)) (“But if the two Houses shall disagree in respect of the counting of such votes [of competing slates of electors], then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.”).

honor, Trust or Profit under the United States.”<sup>45</sup> Professor Chafetz affirms that this bar does not extend to congressional office. But, does the bar preclude a disqualified

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<sup>45</sup> U.S. CONST. art. I, § 3, cl. 7. The view that the presidency is an *Office . . . of or under the United States* amounts to little more than free-floating legal intuition. See, e.g., Applicability of the [Foreign] Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize, 2009 WL 6365082, at \*3 (Dec. 7, 2009) (Barron, Acting Asst. Att’y Gen.) (announcing in *ipse dixit* that “[t]he President surely ‘hold[s] an[] Office of Profit or Trust[] [under the United States]’ . . . .” (emphasis added) (quoting U.S. CONST. art. I, § 9, cl. 8)); Steven G. Calabresi, Rebuttal, *Does the Incompatibility Clause Apply to the President?*, in Tillman & Calabresi, *supra* note 10, at 143 (stating that “the President is most *certainly* an officer under the United States” (emphasis added)); Saikrishna Bangalore Prakash, Response, *Why the Incompatibility Clause Applies to the Office of President*, 4 DUKE J. CONST. L. & PUB. POL’Y 143, 143 (2009), 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 35, 35 (2008) (asserting, without citation to *any* authority, that “[t]he President occupies an ‘Office *under* the United States’” and denominating that position the “conventional wisdom” (emphasis added)); Josh Chafetz, *20th Amendment Trivia*, CONLAWPROF (Nov. 10, 2008, 12:17:44 PST), <http://lists.ucla.edu/pipermail/conlawprof/2008-November/033299.html> (“I happen to think that the President is an *officer under the United States*, but some think otherwise.” (emphasis added)); see also, e.g., AMAR, *supra* note 9, at 171 (“The instant such a [legislative leader] became acting president [under a succession statute], he would thereby ‘hold[]’ an ‘Office *under* the United States’ . . . .” (emphasis added)); cf., e.g., Memorandum for the Vice President, from Nicholas deB. Katzenbach, Asst. Att’y Gen., Office of Legal Counsel, Re: Constitutionality of the Vice President’s Services as Chairman of the National Aeronautics and Space Council, at \*3 n.1 (Apr. 18, 1961), available at [http://works.bepress.com/seth\\_barrett\\_tillman/164/](http://works.bepress.com/seth_barrett_tillman/164/) (click “April 1961 Katzenbach Memo”) (affirming, without citation to any authority, that “the Vice President holds ‘an Office under the United States[]’” (quoting the Incompatibility Clause)); Memorandum for the Vice President, from Nicholas deB. Katzenbach, Asst. Att’y Gen., Office of Legal Counsel, Re: Participation by the Vice President in the Affairs of the Executive Branch, at \*10 n.10 (Mar. 9, 1961), available at [http://works.bepress.com/seth\\_barrett\\_tillman/164/](http://works.bepress.com/seth_barrett_tillman/164/) (click “March 1961 Katzenbach Memo”) (same); Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1720 n.72 (1988) (arguing that the vice presidency is an “Office *under* the United States” (emphasis added)); John W. Whelan, *The Law of Public Administration: Need for Legal Study*, 53 GEO. L.J. 953, 972 n.67 (1965) (asserting that the “Vice President . . . holds an office under the United States”). Compare John F. Manning, Response, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 146 (1995) (asserting, without analysis, that “[t]he Presidency is *surely* an ‘Office *under* the United States[]’” (emphasis added)), with John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2003 (2011) (“In the end, the special committee on postponed matters struck a compromise, vesting the authority over appointments of *all* officers in the President of the United States, subject to the advice and consent of the Senate.” (emphasis added)). Has Manning changed his position? Or, is he positing a difference between *officers of* and *under the United States*?

As stated, the view—that the President is an *Officer under the United States*—is an intuition. To the extent that this intuition relies on separation of powers norms, it is ahistorical. See Oliver P. Field, *The Vice-Presidency of the United States*, 56 AM. L. REV. 365, 382 (1922) (“Whether the president and vice-president are officers of the United States is a subject on which conflicting opinions are held. It is not possible to deal here at length with . . . that question . . . .” (footnote omitted)); *infra* note 67 (collecting authority based on the Constitution’s text supporting the contrary position, i.e., that the President is *not* an *officer of the United States*); *infra* notes 77-79 (collecting American and British authority supporting the position that the President is *not* an *officer of the United States*).

former officer from holding the presidency? Professor Chafetz seems to think so. After all, what else could he mean by “death” without possibility of “resurrection” except that a removed and disqualified President is unable to hold his prior office, that is, the presidency?<sup>46</sup>

But what is the basis for that view: that the presidency is an *Office . . . under the United States*, i.e., an office within the scope of the Disqualification Clause?<sup>47</sup> If

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<sup>46</sup> See, e.g., Chafetz, *supra* note 1, at 351 (“[L]ike death, impeachment and conviction may be permanent.”); Vaidotas A. Vaicaitis, *Lithuania*, in CONSTITUTIONAL LAW OF 10 EU MEMBER STATES: THE 2004 ENLARGEMENT VI-31 & n.31 (Constantijn Kortmann et al. eds., 2006) (noting that the Constitutional Court held that removal of a president by impeachment precludes his later standing in presidential or parliamentary elections, and precludes his holding ministerial office, and citing the coordinate provision of the United States Constitution); see also, e.g., Josh Chafetz, *20th Amendment Trivia*, CONLAWPROF (Nov. 10, 2008, 12:17:44 PST), <http://lists.ucla.edu/pipermail/conlawprof/2008-November/033299.html> (“If you think that the President is an *officer under the United States*, then a President-elect could fail to qualify by having been impeached and disqualified . . . . I happen to think that the President is an *officer under the United States*, but some think otherwise.” (emphasis added)); cf. Michael Stern, *Could Judge Porteous Become President?*, POINT OF ORDER: A DISCUSSION OF CONG. LEGAL ISSUES (Feb. 2, 2011, 8:30 AM), <http://pointoforder.com/> (same).

<sup>47</sup> See *supra* notes 7 & 45; *infra* note 67; see also AMAR, *supra* note 9, at 171 (“The instant such a [legislative leader] became acting president [under a succession statute], he would thereby ‘hold[]’ an ‘Office under the United States’ . . . .” (emphasis added)); *id.* at 625 n.38; Calabresi, Response, *Political Question*, *supra* note 1, at 159 n.24 (“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.” (emphasis added)); *id.* at 165-66 (suggesting that a “normal” President, unlike an “Acting President,” is an “Officer of the United States”); Friedman, *supra* note 45, at 1720 (arguing that the vice presidency is an “Office under the United States,” and supporting that position with an argument to the effect that the Vice President is an “officer of the United States” (emphasis added)); cf. John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 660 (1999) (“[The Disqualification Clause] shows that the Framers recognized that officials who should be impeached and convicted may not only remain popular in the face of serious charges, but even after conviction. This provision is consistent with the Framers’ understanding that popularity alone is not the only qualification for office . . . .”). Compare Amar & Amar, *supra* note 9, at 119 n.34 (“A quibbler [!] might try to argue that the President does not, strictly speaking, ‘hold[] . . . Office under the United States,’ and is instead a *sui generis* figure.” (emphasis added)), with *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (Powell, J.) (“The President occupies a *unique* position in the constitutional scheme.” (emphasis added)), *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att’y. Gen. 74, 79 (1861) (Bates, Att’y Gen.) (“The President is a *department* [Tillman adding—*not an ‘officer’*] of the government; and . . . the *only* department which consists of a single man . . . .” (emphasis added)), KALT, *supra* note 14, at 17 (“[T]he president can argue that he is the *only* person in the government for whom the *personal* and the *official* are linked so inextricably.” (emphasis added)), *id.* at 16 (“The answer is that the president really is *uniquely* indispensable.” (emphasis added)), Akhil Reed Amar, *On Prosecuting Presidents*, 27 HOFSTRA L. REV. 671, 673 (1999) (“But the Presidency is constitutionally unique—in the President the entirety of the power of a branch of government is vested.”), Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 11 & *passim* (1997) (noting that “[t]he [p]resident [i]s [u]nique”), Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 702 (1995) (noting the president’s “unique constitutional role”), and Chafetz, *supra* note 1, at 350 n.13 (noting “the constitutional *uniqueness* of the presidency” (emphasis added)). Quibble?

there is none, then surely Professor Chafetz's metaphor fails. To put it another way, if an impeached, convicted, removed, and disqualified former President is constitutionally eligible to hold the presidency again, then "resurrection" is quite possible.

In papers and publications over the past several years, I have repeatedly made the claim that the President and Vice President are neither *officers of the United States*, nor *officers under the United States*.<sup>48</sup> In support of my position, I noted that the

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One early commentator seems to have suggested that disqualification extends only to appointed office. See WILLIAM ALEXANDER DUER, *OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES* 94 (N.Y., Collins & Hannay 1833) (noting that if convicted "an appointment made by the Executive authority is superseded" and if disqualified "the party is rendered incapable of re-appointment to any office").

<sup>48</sup> I am not arguing that these two phrases (*officers of the United States* and *officers under the United States*) have identical meaning, but only that they are related terms of art. My view is that *officers of the United States* extends exclusively to officers chosen under the aegis of the Appointments Clause, the Inferior Office Appointments Clause, and the Recess Appointments Clause. *Officers under the United States* is a superset of the former, and also includes non-member non-presiding legislative officers holding statutory offices (e.g., the Clerk of the House, the Secretary of the Senate—offices receiving statutory emoluments although outside the scope of the Appointments Clause). See also Peter W. Johnston, *The Legal Personality of the Western Australia Parliament*, 20 U.W. AUSTL. L. REV. 323, 336 (1990) ("[T]he Clerks and the Parliamentary staff are in an ambiguous situation. Their status is somewhat unique."); cf. G.J. Craven, *A Few Fragments of State Constitutional Law*, 20 U.W. AUSTL. L. REV. 353, 355 (1990) ("To whom are [state parliamentary officers] answerable?"). There are some substantial materials contemporaneous with ratification supporting this position, including debate from the Philadelphia Convention. Under this view, neither *officers of the United States* nor *officers under the United States* includes either the presidency or vice presidency. See Tillman, *Why Our Next President*, *infra* note 50, at 114 n.17 (noting that Edmund Randolph at the Philadelphia Convention used *office . . . under the authority of the United States* in a way that embraced legislative officers, and that Luther Martin reported Randolph's language to the Maryland legislature); see also *supra* notes 10 (discussing *officers of the United States*), 13 (discussing *Officers . . . under the United States*), *infra* note 67 (summarizing argument and evidence tending to establish that the President and Vice President are neither *officers of the United States* nor *Officers . . . under the United States*). But see Vasani Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 129 n.28 (2001) (citing nineteenth century materials for the position that "The textual argument is incredibly [!] straightforward: A 'Person holding an Office of Trust or Profit under the United States' holds an 'Office . . . under the United States' and is therefore an 'Officer of the United States.'" (emphasis added)). But compare U.S. CONST. art. I, § 8, cl. 18 (distinguishing, in the Necessary and Proper Clause, "department[s]" from "officer[s]"), with Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y. Gen. 74, 79 (Bates, Att'y Gen.) ("The President is a *department* of the government; and, although the only department which consists of a single man, he is charged with a greater range and variety of powers and duties than any other department. He is a *civil magistrate . . .*" (emphasis added)). Interestingly, Professor Prakash has characterized Bates's opinion as "remarkable," and as embracing "a curious distinction," and finally he quotes approvingly another scholar's conclusion to the effect that Bates's opinion was "simply incomprehensible." Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV'T L. REV. 575, 581, 583 (2010) (quoting John P. Frank, *Edward Bates: Lincoln's Attorney General*, 10 AM. J. LEGAL HIST. 34, 43 (1966)). The inability of modern scholars to understand Bates's opinion may be a reflection of the world we (and I include myself) have lost. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE

L.J. 541, 638 n.428 (1994) (“Our first President was not involved only in vital administrative affairs, however, as he intimately involved himself in *seemingly trivial matters* as well. White insists that ‘no collector of customs, *captain of a cutter, keeper of a lighthouse, or surveyor of revenue* was appointed except after special consideration by the President.” (emphasis added) (quoting LEONARD D. WHITE, *THE FEDERALISTS* 106 (1948))). The loyalty and courage of a lighthouse keeper or cutter captain in the face of an enemy flotilla may have been the only means of advance warning of an invasion. When the United States was in diapers, perhaps, the selection of such personnel might have been substantially more important than the choice of and centralized control over United States Attorneys, i.e., high profile public positions of great interest to certain law professors and historians. See ROBERT A. CIUCEVICH, *TYBEE ISLAND: THE LONG BRANCH OF THE SOUTH* 19 (2005) (“[During the War of 1812] [t]here was, however, a system of early warning arranged with the keeper of Tybee lighthouse, who would warn of an approaching British fleet . . .”); *Portsmouth Harbor Light*, NEW ENGLAND LIGHTHOUSES: A VIRTUAL GUIDE, <http://lighthouse.cc/portsmouth/history.html> (last visited Dec. 29, 2010) (“It appears that the lighthouse was not lit from 1774 to 1784, although it did serve as a lookout post in the defense of Portsmouth [New Hampshire] during the Revolution. In 1784, the tower was renovated and relighted. The lighthouse was transferred to the federal government in 1791, and in 1793 President George Washington ordered that the light be maintained at all times, with a keeper living on site.”); E-mail from William Thiesen, Atlantic Area Historian, United States Coast Guard to Seth Barrett Tillman (Jan. 17, 2011) (“[D]uring the War of 1812, revenue *cutter captains* would report all movements of enemy units after they made sightings of [Royal Navy] vessels and returned to port.”); cf. Prakash, *supra* note 45, at 148 (affirming, in a 2008 publication, that the President is both an “officer *under* the United States” and an “officer *of* the United States,” and suggesting that the contrary position is “highly obscure” (emphasis added)). I submit that Prakash’s position is (once again) indicative of the world we have lost.

‘[C]ivil officers *of* the United States’ meant such, as derived their appointment from, and under the national government, and not those persons, who, though members of the government, derived their appointment from the states, or the people of the states. In this view, the enumeration of the president and vice president, as impeachable officers, was *indispensable*; for they derive, or may derive, their office from a source paramount to the national government. And the [Impeachment Clause] of the [C]onstitution . . . does not even affect to consider them officers *of* the United States. It says, ‘the president, vice-president, and all civil officers (not all *other* civil officers) shall be removed,’ &c. The language of the clause, therefore, would rather lead to the conclusion, that they were enumerated, as *contradistinguished* from, rather than as included in the description of, civil officers *of* the United States.

2 STORY, *COMMENTARIES*, *supra* note 9, § 791, at 260 (emphasis added); DAVID A. MCKNIGHT, *THE ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION, AND OF THE ACTS AND PROCEEDINGS OF THE CONGRESS ENFORCING IT* 346 (Philadelphia, J.B. Lippincott & Co. 1878) (noting that “[i]t is *obvious* that . . . the President is not regarded ‘as an officer *of*, or *under*, the United States,’ but as one branch of ‘the Government.’” (emphasis added)); *infra* note 67 (collecting authority). Compare AMAR, *supra* note 14, at 577 n.17 (suggesting that the President and Vice President are listed separately from “civil officers” in the Impeachment Clause “to blunt any argument that their role atop—or in the VP’s case, potentially atop—the military chain of command removes them from the category of ‘civil’ officers”), with *Burton v. United States*, 202 U.S. 344, 369-70 (1906) (Harlan, J.) (“[A]nyone convicted under [the statutory] provision[] shall be incapable of holding any *office of honor, trust, or profit* ‘under the government of the United States,’ refers only to offices created by, or existing under the direct authority of, the national government, as organized under the Constitution, and not to offices the appointments to which are made by the states, acting separately, albeit proceeding, in respect of such appointments, under the sanction of that instrument. While the Senate, as a

Commissions Clause mandates that the President commission “all”<sup>49</sup> *officers of the United States*, yet historically, Presidents and Vice Presidents (like members of Congress—who are also elected officials) have not received such commissions (as do, by contrast, cabinet members).<sup>50</sup> In response, Professor Saikrishna Prakash

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branch of the legislative department, owes its existence to the Constitution, and participates in passing laws that concern the entire country, its members are chosen by state legislatures, and cannot properly be said to hold their places ‘under the government of the United States.’” (emphasis added)). In my view, Prakash’s characterization of views with which he disagrees as “highly obscure” is hyperbole and free-floating intuitionism. His criticism is not analytic. It is not even consistent with *his* own prior writings. Indeed, this “highly obscure” view is one Professor Prakash used to actively espouse, at least until 2008. *See, e.g.*, Saikrishna Prakash, *How the Constitution Makes Subtraction Easy*, 92 VA. L. REV. 1871, 1871 (2006) (affirming that “Congress may remove, via statute, *all officers of the United States*, save for federal judges with good behavior tenure”—a conclusion, which quite obviously, Prakash did not intend to apply to the presidency and vice presidency (emphasis added)); Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 583 n.360 (2005) (“The Appointments Clause grants the president the power to appoint *all* officers of the United States, with the advice and consent of the Senate.” (emphasis added)); Saikrishna B. Prakash, *Branches Behaving Badly: The Predictable and Often Desirable Consequences of the Separation of Powers*, 12 CORNELL J.L. & PUB. POL’Y 543, 546 (2003) (noting that “the Constitution grants to the Senate the responsibility of confirming *all* non-inferior officers of the United States” (emphasis added)); Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 41 n.244 (1998) (noting that the Appointments Clause “establish[es] the requirement of senate confirmation for *all* officers, but permitting Congress, by law, to vest the appointment of inferior officers with the President, heads of departments, and courts” (emphasis added)); Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 244 n.154 (2005) (reviewing HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005)) (“I have argued elsewhere that the [Inferior Office Appointments Clause] was necessary as a means of circumventing the burdensome requirement that *all* officers of the United States be appointed by the President and confirmed by the Senate.” (emphasis added)). It is difficult to understand what Professor Prakash’s current position is. *See, e.g.*, Saikrishna Bangalore Prakash, *When an Appointment Vests* 19 (U. Va. School of Law Public Law & Legal Theory Working Paper Series 2012-16), available at [http://papers.ssrn.com/abstract\\_id=2008396](http://papers.ssrn.com/abstract_id=2008396) (“[T]he Appointments Clause provides that the President ‘shall nominate, and by and with the advice and consent of the Senate, appoint’ *all* officers of the United States. . . . [T]he President must commission *all* officers of the United States.” (emphasis added) (footnotes omitted)). Does not Professor Prakash’s 2012 language exclude the President and Vice President from the category of *officers of the United States*?

<sup>49</sup> U.S. CONST. art. II, § 3 (“[The President] . . . shall Commission *all* the Officers of the United States.” (emphasis added)); *see also* Raoul Berger, *Impeachment for “High Crimes and Misdemeanors,”* 44 S. CAL. L. REV. 395, 424 (1971) (“One who would make ‘all’ mean less than ‘all’ has the burden of proving why the ordinary meaning should not prevail.” (citing Henry M. Hart, Jr., *Book Review*, 67 HARV. L. REV. 1456, 1465 (1954))); *cf.* AMAR, *supra* note 9, at 236 (“In the Article III vesting clause and roster, ‘shall’ and ‘all’ meant what they said.”); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1792 (2002) (“The word ‘every’ . . . means every and not some.”).

<sup>50</sup> *See, e.g.*, Seth Barrett Tillman, Opening Statement, *Why President-Elect Obama May Keep His Senate Seat After Assuming the Presidency*, in Tillman & Calabresi, *supra* note 10, at 135-40; Seth Barrett Tillman, Closing Statement, *An “Utterly Implausible” Interpretation of the Constitution: A Reply to Professor Steven G. Calabresi*, in Tillman & Calabresi, *supra* note 10, at 146-53. Compare Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution’s Incompatibility Clause*, 4 DUKE J. CONST.

suggested that the validity of my position depends on whether I could produce evidence supporting my historical claim, i.e., that Presidents and Vice Presidents have not received presidential commissions.<sup>51</sup> I can. Indeed, there is an abundance of such evidence.<sup>52</sup> By contrast, Professor Steven Calabresi suggested that in order to determine the original public meaning of these related phrases (*officers of* and

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L. & PUB. POL'Y 107 (2009), 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1 (2008), with Prakash, *supra* note 45.

<sup>51</sup> See Prakash, *supra* note 45, at 147.

<sup>52</sup> See, e.g., CASE OF BRIGHAM H. ROBERTS, OF UTAH, H. REP. NO. 56-85, pt. 1, at 36 (1900) (“[T]he provision in the last paragraph of section 3, of article 2, relating to the duties of the President, that he shall commission all the officers of the United States, does not mean that he is to commission members of Congress, [and] he is himself an officer, and he does not commission himself, nor does he commission the Vice President . . .”); MORTON ROSENBERG, CONG. RESEARCH SERV., APPLICABILITY OF THE EMOLUMENTS CLAUSE (ARTICLE I, SECTION 6, CLAUSE 2) OF THE CONSTITUTION TO THE OFFICE OF VICE-PRESIDENT CRS-10 (1973), available at [http://works.bepress.com/seth\\_barrett\\_tillman/164/](http://works.bepress.com/seth_barrett_tillman/164/) (click “Rosenberg Memorandum”) (“Of course, the Vice-President is not commissioned by the President and it is significant that under the Twenty-Fifth Amendment, the nomination and confirmation of a new Vice-President by both Houses of Congress is not followed by a commissioning.”); Roy E. Brownell II, *Can the President Recess Appoint a Vice President?*, 42 PRESIDENTIAL STUD. Q. 622, 628 (2012) (“[T]he *unavoidable* conclusion to draw . . . is that the [vice president] is not an ‘Officer of the United States’ . . .”); see also, e.g., 3 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2316, at 671 (1907) (“It is provided that the President shall commission all officers, and that all civil officers shall be removed on impeachment and conviction; but the President does not commission himself and the Vice-President, and therefore as it was intended to affect them by the impeachment power, it became necessary to expressly name them.” (quoting Alexander H. Dallas’s speech on January 4, 1799 *for the defendant* at the Blount Impeachment trial before the Senate)); FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 268 (Philadelphia, Carey & Hart 1849) (“[The President] is an officer himself, and so expressly denominated throughout the 2d article, and yet he has no commission. It is equally clear that the Vice-President is an officer, and yet not commissioned.” (quoting Congressman James A. Bayard, Sr.’s speech on January 3, 1799 *for the House managers* at the Blount Impeachment trial before the Senate)); cf., e.g., FEERICK, *supra* note 9, at 195 n.† (suggesting that Vice Presidents nominated by the President and confirmed by Congress under the aegis of the Twenty-Fifth Amendment do not receive commissions); Steven G. Calabresi, Rebuttal, *Does the Incompatibility Clause Apply to the President?*, in Tillman & Calabresi, *supra* note 10, at 145 (affirming that historically presidents and vice presidents have not received commissions, and denominating such failure an “oversight”!). Generally, I would expect that Professor Calabresi is a particularly reliable source in regard to conventions surrounding the vice presidency, because he—unlike others who have taken contrary positions—worked for a sitting vice president. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1156 n.552 (1994) (“Technically, the Vice President also represents the same national constituency [as the President], but those of us who have worked for a U.S. Vice President know that, in many respects, they represent a constituency of one.” (emphasis added)). But cf. JACK MASKELL, CONG. RESEARCH SERV., R42662, GIFTS TO THE PRESIDENT OF THE UNITED STATES CRS-4 to CRS-5 (Aug. 16, 2012) (“The President and all federal officials are restricted by the Constitution, at Article I, Section 9, clause 8, from receiving any ‘presents’ from foreign governments, kings, or princes, without the consent of the Congress.” (emphasis added)).

*under the United States*), one should look to how Congress used these phrases in its early statutes.<sup>53</sup> Professor Chafetz appears to adhere to Calabresi's view.<sup>54</sup>

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<sup>53</sup> Steven G. Calabresi, Closing Statement, *A Term of Art or the Artful Reading of Terms?*, in Tillman & Calabresi, *supra* note 10, at 157-58 (looking to early congressional statutes to determine original public meaning of a constitutional term).

<sup>54</sup> See, e.g., CHAFETZ, *supra* note 13, at 281 n.86 (taking the position that the phrase "Office . . . under the United States," as used in 1 Stat. 112 (1790), an act of the First Congress, was used in the same sense as it is used in the Constitution).

Likewise, as opposed to early federal statutes, if one turns to early state constitutional materials, one arrives at a similar conclusion: *officer under this State*-language does not reach the office of governor, i.e., an official at the apex of governmental authority (within a branch of government). See, e.g., DEL. CONST. of 1792, art. III, § 5 ("No member of Congress, nor person holding any *office under the United States or this State*, shall exercise the *office of Governor*." (emphasis added)). This Delaware constitutional provision—enacted some three years after ratification of the Constitution—would seem to exclude the *office of governor* from the category of *office under . . . this State* (apparently referring to lesser offices). Such antebellum materials are quite common; they appear in each and every decade prior to the Civil War. See, e.g., PA. CONST. of 1790, art. II, § 5 ("No member of Congress, or person holding any *office under the United States, or this state*, shall exercise the *office of Governor*." (emphasis added)); KY. CONST. of 1792, art. II, § 5 ("No member of Congress, or person holding any *office under the United States or this State*, shall execute the *office of Governor*." (emphasis added)); N.H. CONST. of 1792, § 93 ("No *governor*, or judge of the supreme judicial court, shall hold any office or place *under the authority of this state*, except such as by this constitution they are admitted to hold . . ." (emphasis added)); OHIO CONST. of 1802, art. II, § 13 ("No member of Congress, or person holding any *office under the United States, or this State*, shall exercise the *office of Governor*." (emphasis added)); IND. CONST. of 1816, art. IV, § 5 ("No member of Congress, or person holding any *office under the [U]nited States, or this State*, shall exercise the *office of Governor, or Lieutenant Governor*." (emphasis added)); ME. CONST. of 1820, art. V, § 5 ("No person holding any office or place *under the United States, this State, or any other power*, shall exercise the *office of Governor*." (emphasis added)); MICH. CONST. of 1835, art. V, § 16 ("No member of congress, nor any other person holding *office under the United States, or this state*, shall execute the *office of Governor*." (emphasis added)); N.J. CONST. of 1844, art. V, § 8 ("No member of Congress, or person holding an *office under the United States, or this State*, shall exercise the *office of Governor . . .*" (emphasis added)); CAL. CONST. of 1849, art. V, § 12 ("No person shall, while holding any *office under the United States, or this State*, exercise the *office of Governor*, except as hereinafter expressly provided." (emphasis added)); OR. CONST. of 1857, art. V, § 3 ("No member of Congress, or person holding any *office under the United States, or under this State, or under any other power*, shall fill the *office of Governor*, except as may be otherwise provided in this Constitution." (emphasis added)); The State *ex rel.* Ragsdale v. Walker, 33 S.W. 813, 814 (Mo. 1896) (Macfarlane, J.) ("An *office under the state* must be one created by the laws of the state. The incumbent must be governed by state laws and *must exercise his powers and perform his duties in obedience to a statute of the state* [Tillman adding—which would seem to exclude the governor]." (emphasis added)). But, contrary authority also exists. See, e.g., PA. CONST. of 1790, art. IV, § 3 ("The Governor, and all *other civil officers, under this commonwealth*, shall be liable to impeachment for any misdemeanor in office . . ." (emphasis added)); OHIO CONST. of 1802, art. I, § 24 ("The Governor, and all *other civil officers under this State*, shall be liable to impeachment for any misdemeanor in office . . ." (emphasis added)); Willis v. Potts, 377 S.W.2d 622, 628 (Tex. 1964) (Hamilton & Steakley, JJ., dissenting) ("Without exception every jurisdiction has declared a municipal office not to be an *office under the state* unless it is one created by the *Constitution or statutes*, its powers and duties defined by statute, or an office created by some other authority such as a



In 1790, the First Congress enacted an anti-bribery statute. The statute stated:

That if any person shall, directly or indirectly, give any sum or sums of money, or any other bribe, present or reward, or any promise, contract, obligation or security, for the payment or deliver of any money, present or reward, or any other thing to obtain or procure the opinion, judgment or decree of any judge or judges of the United States, in any suit, controversy, matter or cause depending before him or them, and shall be thereof convicted . . . and the judge or judges who shall in any wise accept . . . shall be fined and imprisoned . . . and shall forever be disqualified to hold any *office of honor, trust or profit under the United States*.<sup>55</sup>

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municipality, but upon which there is imposed by statute certain state duties.” (emphasis added)); *cf.*, *e.g.*, S.C. CONST. of 1802, art. II, § 2, cl. 3 (“No person shall hold the office of governor and *any other office* or commission . . . either *in this State*, or under any State, or the United States . . . at one and the same time.” (emphasis added)).

<sup>55</sup> An Act for the Punishment of Certain Crimes against the United States, ch. 9, § 21, 1 Stat. 112, 117 (1790) (emphasis added). Professor Chafetz cites this very statute in his own publication. See CHAFETZ, *supra* note 13, at 281 n.86. Notice that the language of the statute is identical to that found in the Removal and Disqualification Clause—*office of honor, trust or profit under the United States*.

There is some dispute as to whether or not this statute works a *removal* or just a *disqualification* in regard to future office-holding. Compare, *e.g.*, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL, 152 F.R.D. 265, 289 (Aug. 2, 1993) (“Although it might seem that disqualification from office would include disqualification from the office one occupies at the time of conviction, Congress in 1790 apparently regarded disqualification and removal as distinct.”), ELIZABETH B. BAZAN, CONG. RESEARCH SERV., 92-905A, DISQUALIFICATION OF FEDERAL JUDGES CONVICTED OF BRIBERY—AN EXAMINATION OF THE ACT OF APRIL 30, 1790 AND RELATED ISSUES CRS-Summary (1992) (“However, the stronger arguments appear to militate against the use of the 1790 bribery statute’s disqualification provision as support for the constitutional sufficiency of statutory [removal] mechanisms [as an alternative to impeachment].”), *id.* at CRS-19 (“[I]t would seem, on reflection, that the stronger arguments militate against reliance upon the passage of the 1790 act as a foundation upon which to build an argument that statutory mechanisms for removal of federal judges, supplementary to the impeachment process, would pass constitutional muster.”), and Pfander, *supra* note 9, at 1233 (asserting that the statute only limits future office-holding), with AMAR, *supra* note 9, at 222-23 (asserting that the 1790 Act worked a removal), Laurence Claus, *Constitutional Guarantees of the Judiciary: Jurisdiction, Tenure, and Beyond*, 54 AM. J. COMP. L. 459, 478 n.92 (2006) (“The First Congress apparently sought to provide for automatic removal of judges convicted by a criminal jury of bribery, without individualized impeachment by the House and conviction by a super-majority of the Senate.”), Gerhardt, *supra* note 15, at 42-43 (“[The 1790 Act] suggests that at least under certain circumstances the First Congress did not regard impeachment as the sole means of removing federal judges.” (footnote omitted)), Prakash & Smith, *supra* note 9, at 122 (concluding “the Act contemplated that ordinary courts could remove judges from office for their misbehavior—in this case the taking of bribes”), Paul Taylor, *Congress’s Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today’s Congress and Courts*, 37 PEPP. L. REV. 847, 901 (2010) (“The terms ‘holding,’ as used in the Pennsylvania Constitution, and ‘hold,’ as used in the Crimes Act of 1790, would seem by their plain meaning to apply to offices contemporaneously held as well as future offices.” (footnote omitted)), and Maria Simon, Note, *Bribery and Other Not So “Good*

This statute works a statutory disqualification: any judicial officer convicted of the specified crimes is disqualified from holding any *office . . . under the United States*. Does the statute disqualify such persons from holding the positions of representative or senator? The consensus view, rooted in the text of the Constitution, is “no”: congresspersons are not officers.<sup>56</sup> So the disqualification does not go so

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*Behavior*”: *Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617, 1652 (1994) (taking the position that “the most sensible reading of these early statutes indicates that the penalty of disqualification necessarily included removal when applied to a sitting officer”). *But cf.* *Chandler v. Judicial Council of the 10th Cir. of the U.S.*, 398 U.S. 74, 141-42 (1970) (Black, J., dissenting) (“While judges, like other people, can be tried, convicted, and punished for crimes, no word, phrase, clause, sentence, or even the Constitution taken as a whole, gives any indication that any judge was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by two-thirds of the Senate. Such was the written guarantee in our Constitution of the independence of the judiciary, and such has always been the proud boast of our people.”); Shane, *supra* note 11, at 239 n.118 (“Moreover, if Professor Amar is correct in suggesting that [judicial] removal through criminal processes is permissible because of considerations unique to criminal law, then the Act of 1790—even under the Gerhardt interpretation—would not necessarily be probative as to the permissibility of removal through civil processes.”). Nothing in this Article turns on whether this statute effectuated a removal.

<sup>56</sup> See *infra* notes 89-90 (illustrating the modern consensus, through the positions of Professors Akhil Amar, Vikram Amar, and Josh Chafetz). *But see* Hills, *supra* note 23 (“The First Congress, for instance, seemed to believe that the qualifications in the Qualifications [C]ause did not exclude its power to add qualifications: it enacted a statute that barred from ‘any office of trust or profit’ any person who had been convicted of accepting or offering a bribe. Such a statute added a qualification for congressional seats (which are offices of trust or profit) not enumerated by the Qualifications clause.” (internal citation omitted)); *supra* note 42 (collecting authority suggesting that members of Congress are *officers*, at least in regard to certain constitutional provisions). *But see also* David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U. L. REV. 606, 624-25 (1996) (“Article I, Section 3 provides that judgment in impeachment cases may include disqualification from ‘any office of honor, trust or profit under the United States,’ Article I, Section 9 [provides] that no one holding such an office may accept gifts, emoluments, or titles from any foreign state without congressional consent. It is hard to find anything in the text or purpose of either of these provisions to justify construing them to apply only to executive and judicial officers. Thus, it is difficult to say that the Constitution adopts a single meaning of the term ‘office’ or ‘officer’; each clause employing these terms must be interpreted according to its own context, history, and purpose.” (footnotes omitted)). The reason that Representatives and Senators are not considered “officers” is rooted in the text of the Constitution. See U.S. CONST. art. 1, § 6, cl. 2 (Incompatibility Clause: “[N]o Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office.” (emphasis added)); U.S. CONST. art. II, § 1, cl. 2 (Electoral Incompatibility Clause: “[N]o Senator or Representative, or Person holding an *Office of Trust or Profit under the United States*, shall be appointed an Elector.” (emphasis added)). In neither case is the *office . . . under the United States*-language preceded by the word “other.” The consensus view is that the absence of the word “other” indicates that Members of Congress are not *Officers under the United States*. However, Professor Raoul Berger has expressly rejected this type of text-sensitive analysis. See BERGER, *supra* note 42. It is worth remarking that the Impeachment Clause states: “The President, Vice President and all *civil Officers of the United States*, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors . . . .” U.S. CONST. art. II, § 4. Here too, the word “other” does not precede *Officers of the United States*. This would seem to indicate, by

far. But what about the presidency and vice presidency? If the presidency and vice presidency are *officers . . . under the United States*, then this statute is deeply problematic because it purports to add, by *statute*, to the qualifications for *constitutionally* established elected federal offices. And, as Professor Chafetz has noted in his own publications, that result is unconstitutional: Congress has no such power.<sup>57</sup>

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a parity of logic, that the President and Vice President are not *Officers of the United States*. But those in the consensus have not adopted this position. What accounts for this strange inconsistency?

<sup>57</sup> See *supra* note 23 (citing *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) and *Powell v. McCormack*, 395 U.S. 486, 550 (1969), but also noting scholarly counter-authority); AMAR, *supra* note 9, at 529 n.22 (same); CHAFETZ, *supra* note 13, at 171, 280 n.68, 281 nn.81, 86, 282 n.90. Likewise, Chafetz quotes Justice Story for the proposition that *officers of the United States* extends to executive and judicial officers only. *Id.* at 280 n.68 (quoting Story's *Commentaries*). However, Story expressly excludes the President and Vice President from this category. See 1 STORY, COMMENTARIES, *supra* note 9, § 791, at 559-60 (“[C]ivil officers of the United States’ meant such, as derived their appointment from, and under the national government, and not those persons, who, though members of the government, derived their appointment from the states, or the people of the states. In this view, the enumeration of the president and vice president, as impeachable officers, was *indispensable*; for they derive, or may derive, their office from a source paramount to the national government. And the [Impeachment Clause] of the [C]onstitution . . . does not even affect to consider them officers of the United States. It says, ‘the president, vice-president, and all civil officers (not all *other* civil officers) shall be removed,’ &c. The language of the clause, therefore, would rather lead to the conclusion, that they were enumerated, as *contradistinguished* from, rather than as included in the description of, civil officers of the United States.” (emphasis added)); *cf.* THE FEDERALIST NO. 67 (Alexander Hamilton), *supra* note 4, at 360-62 (explaining that Senators, and by implication Representatives, are not “officers of the United States” under the Appointments Clause). *But compare* Steven G. Calabresi, Closing Statement, *A Term of Art or the Artful Reading of Terms?*, in Tillman & Calabresi, *supra* note 10, at 154-55 (“Original meaning is thus about what the ordinary citizen on the street would have thought words meant. It is not about the understanding of someone as *erudite* [!] as Justice Story.” (emphasis added)), *with* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (Chase, J.) (“The expressions ‘ex post facto laws,’ are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by Legislators, Lawyers, and Authors.”). Strangely, I have seen any number of journal articles by Professor Calabresi citing Story’s *Commentaries* approvingly, and until 2008, never once warning the reader that Story’s views might be *too* erudite. Likewise, post-2008, Professor Calabresi returned to form and continued to cite Story’s *Commentaries* approvingly. See, e.g., Steven G. Calabresi & Christopher S. Yoo, *Remove Morrison v. Olson*, 62 VAND. L. REV. EN BANC 103, 106 n.16 (2009). What precisely should we make of Calabresi’s claim that Story was too “erudite”? Has anyone in the entire history of Anglo-American law ever sought to reject an otherwise respectable source on such a ground?

Moreover, Presidents are not “appointed”; rather, they are “elected” or “chosen.” U.S. CONST. art. II, § 1, cl. 1 (mandating presidential selection by “elect[ion]” of the electors), *amended by* U.S. CONST. amend. XII (mandating elector participation by “votes,” and presidential selection by “choice” of the House when electoral college mode fails). In other words, Presidents, textually, do not fit into the framework of the Appointments Clause. For that reason, arguably, Presidents are not *officers of the United States*. *Cf.* JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT 9 (New Delhi, Lok Sabha Secretariat Dec. 22, 2008), *available at* <http://tinyurl.com/4xenbte> (“An

To put it another way, this statute could be understood in one of two ways. Under the first view, the scope of *offices . . . under the United States*, the scope of disqualification would attach exclusively to statutory and appointed offices: that is, those offices filled under the aegis of the Appointments Clause<sup>58</sup> (and under the aegis of the Inferior Office Appointments Clause,<sup>59</sup> and under the aegis of the Recess Appointments Clause<sup>60</sup>), and under the aegis of the House Officers Clause and the Senate Officers Clause.<sup>61</sup> This interpretation would exclude the presidency and vice presidency, senators, and representatives, *elected* or *constitutionally mandated offices*, from the category *Office . . . under the United States*.

The second possibility is that the presidency and vice presidency are *offices . . . under the United States*, and, if so, then the statute is unconstitutionally overbroad when applied in those situations. But why go there? Is not the former view the better view, that is, under the avoidance canon, the statute is constitutional precisely because Congress chose language that does not incorporate the presidency and vice-presidency?

I suppose Professor Calabresi (or others) might argue that the latter or second view is the correct view (as a matter of the original public meaning of the statute in question), and that the choice of language leading to an unconstitutional result (as would be the case under the second view) was an “oversight”<sup>62</sup> on Congress’s part. In other words, the First Congress just was not careful enough; the members did not see the implications in the language they chose and enacted into law. Those long gone members were *d-u-m-b*; we, by contrast, prove our great *wisdom* by realizing their error, by noticing their “oversight.” I suppose that is possible. But the claim of “oversight” (when applied exclusively to others), when repeated too often, becomes constitutional interpretation by narcissism. The simpler view, applying Ockham’s razor, is not that the First Congress passed an unconstitutional statute, and the modern consensus right, but that the First Congress chose language that passed constitutional muster, and the modern consensus wrong.<sup>63</sup> The constant claim of

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office of profit is a term used in a number of national constitutions to refer to executive appointments.” (emphasis added)).

<sup>58</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>59</sup> *Id.*

<sup>60</sup> U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”).

<sup>61</sup> U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives shall ch[oo]se their Speaker and other Officers . . . .”); U.S. CONST. art. I, § 3, cl. 5 (“The Senate shall ch[oo]se their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.”).

<sup>62</sup> See Steven G. Calabresi, Rebuttal, *Does the Incompatibility Clause Apply to the President?*, in Tillman & Calabresi, *supra* note 10, at 145 (affirming that historically presidents and vice presidents have not received commissions, and denominating such failure an “oversight”).

<sup>63</sup> See, e.g., Day v. McDonough, 547 U.S. 198, 217 (2006) (Scalia, J., dissenting) (“Ockham is offended by today’s decision, even if no one else is.”); Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 575 (1990) (Brennan, J., concurring in part and concurring in the judgment) (“The time has come to borrow William of Occam’s razor

“oversight” would simply reduce interpretivism to a series of unfalsifiable hypotheses or pseudo-religious faith claims—interesting, but intellectually wholly unsatisfying, or nearly so.

At a normative level, should not we interpret constitutional and statutory disqualifications narrowly—thereby preserving the widest scope for democratic action? Is it not more than merely noteworthy that the Constitution included express language in the Impeachment Clause reaching the President and Vice President,<sup>64</sup> but

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and sever this portion of our analysis.”); *Commodity Futures Trading Comm’n v. Zelener*, 373 F.3d 861, 868 (7th Cir. 2004) (Easterbrook, J.) (“Best to take Occam’s Razor and slice off needless complexity.”); Raul Berger, Response, *Impeachment: A Counter Critique*, 49 WASH. L. REV. 845, 856 (1974) (“Ever since Ockham, scientists have preferred the simpler to the more complicated explanation.”); Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 FORDHAM L. REV. 1435, 1449 (1997) (explaining that Lessig’s “translation theory fails the test of Ockham’s razor because it is not necessary to explain the changes that Professor Lessig seeks to explain”).

<sup>64</sup> Just as I argue in this Article that the President and Vice President are not within the ambit of the *Officers . . . under the United States*-type language in the Removal and Disqualification Clause, I argued in 2009 that the President does not fall within the ambit of the *Office under the United States*-type language within the Incompatibility Clause and the Ineligibility Clause. 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 [i]ncreased during such time; and no Person holding any Office **under** the United States, shall be a Member of either House during his Continuance in Office.” (the Ineligibility Clause (in italics) and the Incompatibility Clause) (bold added)); Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution’s Incompatibility Clause*, *supra* note 50 *passim*. Professor Prakash responded:

Presidents and Vice Presidents could freely accept presents, emoluments, offices and titles from foreign states because the constitutional bar [in the Foreign Emoluments Clause, Article I, Section 9, Clause 8] applies only to offices under the United States, and, according to Mr. Tillman, those two offices are not [offices] under the United States. But the provision barring Presidents from accepting foreign emoluments was *arguably* added to prevent Presidents from being corrupted by foreign bribes, as occurred when Charles II accepted money from France’s Louis XIV.

Prakash, *supra* note 45, at 149-50 (emphasis added) (footnotes omitted) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 68-69 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (reporting Gouverneur Morris’s statement at the Philadelphia Convention)); see also Prakash & Smith, *supra* note 9, at 84 (“A close examination of the text suggests that members of Congress are not the sorts of ‘civil Officers’ to which Article II’s impeachment provision applies at all . . . .” (emphasis added)). Compare BERGER, *supra* note 42, at 226 n.11 (“If a Senator holds no ‘office [under the United States],’ it follows that he is exempt from th[e] prohibition [of the Foreign Emoluments Clause], so that we may have a Duke of Oklahoma serving in the Senate[.]”—a position methodologically identical to Prakash’s, *supra*, but a position I doubt he would accept), WHARTON, *supra* note 52, at 270 (“If a Senator holds no office of profit or trust under the United States, it is *lawful* for him to accept a present title or office from any King or any foreign state. Can it be possible that a public functionary, of all others the peculiar object of this jealous restriction, is, in fact, the sole object of exemption from its operation?” (quoting Congressman James A. Bayard, Sr.’s speech on January 3, 1799 for the House managers at the Blount Impeachment trial before the Senate)), Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE

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L.J. 605, 613 n.26 (affirming that the Foreign Emoluments Clause limits “all branches of the government” (emphasis added)), Teachout, *supra* note 24 (affirming that members of Congress are subject to the Foreign Emoluments Clause), Teachout, *infra* note 66 *passim* (same), Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 310 & n.45 (1989) (“Other provisions of [A]rticle I prevent members of Congress from assuming or receiving gifts, titles or offices that might create conflicts of interest in the personal bias or interest sense.” (citing the Foreign Emoluments Clause)), and Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 510 (2002) (asserting that the Foreign Emoluments Clause applies to “all federal officeholders” and describing the Clause as one of a number of “limited anticorruption provisions” (emphasis added)), with AMAR, *supra* note 9, at 182 (“The [Presidential Emoluments] [C]lause also prohibited individual states from greasing a president’s palm, and the more general language of Article I, section 9 barred all federal officers, from the president on down, from accepting any ‘present’ or ‘Emolument’ of ‘any kind whatever’ from a foreign government without special congressional consent.” (emphasis added)), WALTER BERNS, *DEMOCRACY AND THE CONSTITUTION: ESSAYS* 139-40 (2006) (stating that “the president is ineligible to serve as an elector” because “he holds an ‘Office of Trust or Profit under the United States’”), LAWRENCE G. KRAUS, *THE DEMOCRACY ISSUE: REFORM THROUGH THE CONSTITUTION* 40 (1987) (“Who besides the President and the Vice President holds an ‘office of trust?’”), FURMAN SHEPPARD, *THE CONSTITUTIONAL TEXT-BOOK* § 342, at 146-47 (Philadelphia, Sower, Barnes & Potts 1855) (asserting that the Foreign Emoluments Clause applies to the President), and Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1772 (2009) (implying that the President falls under the scope of the Foreign Emoluments Clause). *But see* GLENNON, *supra* note 13, at 23 (“What constitutes an office of trust or profit is not clear.”).

It appears to me that Professor Prakash misunderstands the source he cites. Gouverneur Morris made his speech referencing the Charles II-Louis XIV incident during discussion on the clauses relating to *impeachment*, and *not* during debate on either the Foreign Emoluments Clause or on the Incompatibility and Ineligibility Clauses. *E.g.*, 2 FARRAND’S RECORDS, *supra* at 68-69 (“[Gouverneur Morris] was now sensible of the necessity of impeachments, if the Executive was to continue for any time in office. . . . One would think the King of England well secured agst [sic] bribery. . . . Yet Charles II was bribed by Louis XIV. The Executive ought therefore to be impeachable . . . .”); *see also*, *e.g.*, 3 FARRAND’S RECORDS, *supra* at 251 (reproducing General Pinckney’s floor statement to the South Carolina legislature, on January 16, 1788, discussing the Charles II-Louis XIV incident in relation to impeachment powers and to the treaty-making power); *cf.*, *e.g.*, Berger, *supra* note 49, at 430 n.168 (“[T]he bribe Louis paid to Charles . . . came out in the *impeachment* of Danby . . . .” (emphasis added)). The Impeachment Clause uses *express* language in regard to the President and Vice President.

By contrast, *no* such express language naming the President and Vice President appears in the Incompatibility Clause, in the Ineligibility Clause, or in the Removal and Disqualification Clause, and Professor Prakash puts forward no evidence that the Charles II-Louis XIV incident was on anyone’s mind during debate on those clauses, clauses which merely make use of *Officers under the United States*-type language. Like the Incompatibility Clause, the Ineligibility Clause, and the Removal and Disqualification Clause, the Foreign Emoluments Clause also makes use of *Officers under the United States*-type language. *See* U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any *Office of Profit or Trust under them*, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” (emphasis added)). When the Foreign Emoluments Clause was debated at the Philadelphia Convention, the discussion focused on the dangers associated with foreign powers bribing our ambassadors, particularly *while posted abroad*. *Cf.* Application of the Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission, 1986 OLC LEXIS 66, at \*6 (1986) (Cooper, Asst. Att’y Gen.)

("[A]lthough the possibility of corruption and foreign influence of foreign ministers apparently was of *particular concern to the Framers*, they expressly chose not to limit the prohibition on accepting emoluments from foreign governments to foreign ministers." (emphasis added)). Thus there was no strong reason to institute language in the Foreign Emoluments Clause affecting Presidents, Vice Presidents, or members of Congress. Moreover, I have not found a trace of debate or discussion at the Philadelphia Convention or in the ratifying debates on the Charles II-Louis XIV incident, *in relation to the Foreign Emoluments Clause*, the clause which interests us here, and Professor Prakash has put no such evidence forward. See ELLIOT'S DEBATES, *supra* note 10 *passim*; 2 FARRAND'S RECORDS, *supra passim*. The entirety of his evidence relates to debate on impeachment related provisions, and the Impeachment Clause, unlike the Foreign Emoluments Clause, uses express language to reach the President and Vice President. This would seem to substantially, if not entirely, undercut Prakash's historical argument. See Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 1994 OLC LEXIS 52, at \*6 n.4 (1994) (Dellinger, Asst. Att'y Gen.) ("The [Foreign] Emoluments Clause builds upon practices that had developed during the period of the Confederation. 'It was the practice of Louis XVI [*not Louis XIV*] of France to give presents to *departing ministers* who signed treaties with France.'" (emphasis added)); *id.* (reporting incident involving John Jay and the King of Spain); President Reagan's Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187, 1981 OLC LEXIS 33, at \*4 (1981) (Simms, Dep'y Asst. Att'y Gen.) (noting that the [Foreign Emoluments] [C]lause had been "prompted by the gift of a snuff box by the King of France to Benjamin Franklin, *then Ambassador to France*" (emphasis added)); 3 FARRAND'S RECORDS, *supra* at 327 (reporting Edmund Randolph's position at the Virginia ratifying convention, on June 17, 1788, who noted that the King of France had given a gift to the American "ambassador" during the Revolution); Gary J. Edles, *Service on Federal Advisory Committees: A Case Study of the OLC's Little-Known [Foreign] Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1, 4-5 (2006) ("Its inclusion in the Constitution was occasioned by a gift of a snuffbox to Benjamin Franklin when he was the *American ambassador* to France during the period of confederation. Other American *envoys* similarly received gifts from foreign monarchs, and the Continental Congress authorized, or at least acquiesced in, the acceptance of these gifts." (emphasis added) (footnote omitted)); Teachout, *supra* note 24, at 361, 410 n.302 (suggesting that the clause arose in the context of gifts from Louis XVI to Benjamin Franklin and Arthur Lee); *cf.* The Constitutionality of Cooperative International Law Enforcement Activities Under the Emoluments Clause, 20 Op. O.L.C. 346, 1996 OLC LEXIS 17, at \*4-5 (1996) (Schroeder, Acting Asst. Att'y Gen.) ("The Emoluments Clause was intended to protect *foreign ministers, ambassadors, and other officers of the United States* from undue influence and corruption by foreign governments." (emphasis added)).

One is genuinely left wondering upon what *facts* the modern consensus is based. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 948 n.51 (2010) (Stevens, J., dissenting) ("The notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers, whose 'obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country.'" (quoting Teachout, *supra* note 24, at 393 n.245)); 3 WILLIAM LAWRENCE, DECISIONS OF THE FIRST COMPTROLLER IN THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES 444 (Washington, Government Printing Office 1882) (suggesting that the Foreign Emoluments Clause extends to members of Congress); AMAR, *supra* note 9, at 182 (asserting that the Foreign Emoluments Clause applies to the President); Teachout, *supra* note 24, at 366 (asserting, without citations to any authority, that "[f]oreign corruption of the Executive was a concern [of the Framers] . . . as we saw in the Foreign Gifts Clause"); *id.* at 364 (asserting, without citation to any authority, that the Foreign Emoluments Clause applies to members of Congress, and thereby embracing a position akin to that of Raoul Berger, *supra* note 42); *id.* at 361-62 (suggesting that the Foreign Emoluments

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Clause reached Senators); *id.* at 362 (misquoting the Foreign Emoluments Clause as extending to “Office[s] of Project [?] or Trust under [the United States]”—a phrase nowhere appearing in the Constitution); Teachout, *infra* note 66 *passim* (taking the position that the Foreign Emoluments Clause reaches the President (and, by implication, the Vice President), members of Congress, and even state officials!); Zephyr Teachout, *The Historical Roots of Citizens United v. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights*, 5 HARV. L. & POL’Y REV. 163 (2011) (asserting that the Framers (or, perhaps, merely Hamilton) believed that “the President could be corrupted by foreign temptations”); Zephyr Teachout, *Original Intent: How the Founding Fathers Would Clean Up K Street*, DEMOCRACY: A J. OF IDEAS, Winter 2009, at 44, 49, available at <http://www.democracyjournal.org/11/6666.php> (affirming that the Foreign Emoluments Clause precluded “*federal officials*—without a special dispensation from Congress—from receiving gifts ‘of any kind whatever’ from any foreign party.” (emphasis added)); *cf.* Hills, *supra* note 23 (describing “congressional seats” as “offices of trust or profit”). *But see* 8 ANNALS OF CONG., *supra* note 42, at 1592-93 (reporting May 4, 1798 debate, i.e., the first recorded congressional debate on the Foreign Emoluments Clause, with Representative Albert Gallatin arguing that *officers* stand on a different ground from *members of Congress*); THE LETTERS OF LAFAYETTE TO WASHINGTON 1777-1799, at 347-48 (Louis Gottschalk ed., 1976) (reproducing March 17, 1790, letter from Lafayette, then an officer of the French government, giving the key to the Bastille to Washington). Washington never sought congressional consent, under the aegis of the Foreign Emoluments Clause, to keep the key, which is some indication that Washington did not believe that the President was subject to the clause, i.e., that the presidency was not an *officer . . . under the United States*. However, Professor Prakash rejects the inferences I draw from the incident involving the key to the Bastille. He reads the Lafayette letter as a personal gift to Washington and suggests that nothing in the letter put Washington (or, apparently, anyone else) on notice that the gift was from a foreign government and would, therefore, fall under the aegis of the Foreign Emoluments Clause. *See* Prakash, *supra* note 45, at 145-46. Prakash’s position is both puzzling and somewhat overwrought. *Id.* at 146 (“Had Mr. Tillman dug deeper . . .”—which, although not *ad hominem*, seems to casually personalize what should be, in my view, a fair minded academic inquiry). *First*, the gift was delivered to Washington at the capital, not at his home in Mt. Vernon. *Second*, all contemporaneous newspaper accounts represent the gift as a gift to the President, not to him personally. *See, e.g., Philadelphia, 12 August*, FED. GAZETTE & PHILADELPHIA DAILY ADVERTISER, Aug. 12, 1790, at 2 (“Last week the key of the Bastille, accompanied with a fine drawing of that famous building, was presented to the President of the United States, by John Rutledge, [J]un[<sup>r</sup>], Esq. to whose care they were committed by the illustrious patriot the Marquis de la Fayette . . .”); *New-York, August 10*, PA. PACKET & DAILY ADVERTISER, Aug. 13, 1790, at 2 (same). *Third*, Lafayette’s letter to Washington suggests that the key came into Lafayette’s possession as a result of his “order[ing]” the destruction of the Bastille—which seems to indicate that the key was not Lafayette’s *personal* property, but *public* property which he was authorized (or so Lafayette thought) to give to Washington as a gift. *See* THE LETTERS OF LAFAYETTE, *supra* at 348 (“Give me leave, my dear General, to present you with a picture of the Bastille just as it looked a few days after I had *ordered* its demolition, with the main kea [sic] of that fortress of despotism—It is a tribute which I owe as a son to my adoptive father . . .” (emphasis added)). *Fourth*, our modern concepts of private, personal, and public do not easily map onto the world of 1789. *Compare* Prakash, *supra* note 45, at 146 n.22 (“Moreover, that governments always act through their officers hardly means that every act an officer takes is an act of the government. Officers of government have *personal* lives too.” (emphasis added) (citing *Clinton v. Jones*, 520 U.S. 681 (1997) (Stevens, J.)), *with Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 539 (1977) (Burger, C.J., dissenting) (“Since George Washington’s Presidency, our constitutional tradition, without a single exception, has treated Presidential papers as the President’s personal property. This view has been congressionally and judicially ratified, both as to the ownership of Presidential papers . . . and, by the practice of Justices as to ownership of their



judicial papers.”), *To Amend the Federal Property and Administrative Services Act of 1949: Hearing on H.R. 7545, H.R. 8353, H.R. 8416, Hr. 8890, and H.R. 9219 Before the Executive and Legislative Reorganization Subcomm. of the House Comm. on Expenditures in the Executive Dept's*, 81st Cong. 99-100 (1950) (Dr. Wayne C. Grover, Archivist of the United States: “[T]he papers—in fact all of the papers—accumulated in the White House by our Presidents from George Washington to President Herbert Hoover have been removed as personal papers . . . . It would be at the discretion of the President whether or not he deposited the papers in the National Archives at all.”), and KALT, *supra* note 14, at 17 (“[T]he president can argue that he is the *only* person in the government for whom the *personal* and the *official* are linked so inextricably.” (emphasis added)). Finally, and most importantly, no anti-bribery regime could function if the mere representation made by the party giving the gift or bribe, that is, that the gift or bribe was made in a personal capacity, could take the recipient out of the purview of the monitoring regime. On these facts, where the status of Lafayette’s gift was ambiguous, best practice would have been to have consulted Congress, assuming the President fell under the aegis of the Foreign Emoluments Clause. The fact that Washington did not consult Congress, in regard to this gift or any other gift, is some substantial indication that he did not believe the Foreign Emoluments Clause applied to him. See, e.g., Calabresi & Prakash, *supra* note 48, at 642 n.450 (“Moreover, Washington was acutely aware that the precedents established in the beginning would influence posterity. Accordingly, [President Washington] ‘devoutly wished’ that ‘these [Executive Branch] precedents may be fixed on true principles.’” (quotation marks omitted) (quoting Washington to Madison correspondence from May 5, 1789)); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 792 n.524 (same). As far as I know, the first President to consult Congress in regard to a gift and also to receive congressional authority to accept the gift was President Benjamin Harrison. See J. Res. 39, 54th Cong., 29 Stat. 759 (1896) (“authoriz[ing]” President Harrison “to accept certain medals presented to him by the Governments of Brazil and Spain during the term of his service as President of the United States”); Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1, 2009 WL 6365082, at \*5 n.5, 2009 OLC LEXIS 18, at \*14 n.5 (2009). Practice from the late nineteenth century Benjamin Harrison administration is hardly strong evidence as to *original* public meaning.

As to earlier Presidents the record is less than clear. President John Quincy Adams apparently received, circa 1827, a medal of no intrinsic value from the King of Sweden. I have found no indication that Adams (or the United States’ minister to Sweden) asked for or received congressional consent to accept the gift. It may be that Adams thought no permission was necessary, as he may have regifted the medal to the United States. Or, perhaps, Adams thought permission was unnecessary because the medal only had *de minimis* value. President Andrew Jackson received a gold medal from the South American revolutionary Simón Bolívar, President of Colombia. Jackson deposited the medal with Congress and asked for consent to accept it. It appears that Jackson only received consent from the House. Subsequently, circa February 9, 1830, the House directed the medal to be deposited with the State Department. See MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TO THE TWO HOUSES OF CONGRESS AT THE COMMENCEMENT OF THE FIRST SESSION OF THE TWENTY-THIRD CONGRESS 258-59 (Washington, Gales & Seaton 1833) (reproducing January 22, 1834 letter from the Secretary of State to the President explaining, in summary fashion, the history of the Adams and Jackson medals and how they came into the possession of the State Department); CALVIN TOWNSEND, ANALYSIS OF CIVIL GOVERNMENT 227 (N.Y., Ivison, Blakeman, Taylor & Co. rev. ed. 1868) (“Were a costly present to be made by the Emperor of France or Queen of England to the President of the United States, he would not be at liberty to accept it on his own account, though he might in behalf of the people, and have it preserved in the archives of the nation, as it might seem rude to decline it.”).

no such language appears either in the Constitution's Removal and Disqualification Clause<sup>65</sup> or in Congress's 1790 anti-bribery statute?

Does this statute (in conjunction with all the other evidence mustered to date<sup>66</sup>) establish that the President and Vice President are neither *officers of the United*

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<sup>65</sup> Again, unlike the Impeachment Clause, there is no express language either in the Ineligibility Clause or in the Incompatibility Clause reaching either the President or Vice President. See *infra* note 64 (quoting the Ineligibility Clause and the Incompatibility Clause). Should not all such exclusions be interpreted narrowly, thereby preserving the widest domain for democratic action? Since when do exclusions, incompatibilities, and disqualifications arise by mere implication? See *infra* notes 68 & 75 and accompanying text; Commonwealth *ex rel.* Bache v. Binns, 17 Serg. & Rawle 219, 229 (Pa. 1828) (“[I]f there was a doubt upon the subject [of incompatibility between federal and state office], that policy required a decision affirming the incompatibility of the offices in question. But this court unanimously answered, no [in a prior case]; and held that the doubt and uncertainty of the letter [of the law in regard to incompatibility] was to have an operation *directly the reverse*.” (emphasis added)); THOMAS FALCONER & EDWARD H. FITZHERBERT, CASES OF CONTROVERTED ELECTIONS, DETERMINED IN COMMITTEES OF THE HOUSE OF COMMONS, IN THE SECOND PARLIAMENT OF THE REIGN OF QUEEN VICTORIA 587 (Saunders & Benning 1839) (reproducing committee debate from disputed Galway election of 1838, where Mr. Austin (counsel for the sitting member who prevailed) stated: “In all cases respecting eligibility, eligibility is to be aided, and ineligibility ought to be strictly proved. Severe penalties are imposed by the acts of parliament creating disqualification, and they are not favoured.”); 67 C.J.S. *Officers* § 23 (2012) (“The courts have a duty to liberally construe words limiting the right of a person to hold office so that the public may have benefit of choice from all those who are in fact and in law qualified, and in favor of those seeking to hold office. Ambiguities should be resolved in favor of eligibility to office, and constitutional and statutory provisions which restrict the right to hold public office should be strictly construed against ineligibility.” (footnotes omitted)); see also 62 C.J.S. *Municipal Corporations* § 273 (2012) (“Statutory or charter provisions prescribing the qualifications for members in a municipal council are to be strictly construed, and a person elected or appointed to membership therein should not be prevented from taking office unless he is clearly ineligible . . .”); 62 C.J.S. *Municipal Corporations* § 280 (2012) (“The proceedings and grounds for removal of a member of a municipal governing body are controlled by constitutional, statutory, and charter provisions, which are to be strictly construed.” (footnote omitted)); 3 G.M. TREVELYAN, HISTORY OF ENGLAND 179 (1953) (“The [Municipal Corporations] Act of 1835 was more dramatic than the [Great] Reform Bill [of 1832], for it gave all ratepayers the right to vote for the new Municipalities. At last the ice-age of English institutional and *corporate* life had come to an end . . .” (emphasis added)). Compare Prakash, *supra* note 45, at 144 (objecting to using evidence from corporate law field in order to understand public law terms), with Prakash & Smith, *supra* note 9, at 107 (using evidence from trust law in order to understand public law terminology).

<sup>66</sup> See, e.g., *supra* notes 10-13, 42-52; *infra* note 67 and accompanying text. See generally IV JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 651, at 577 (Washington, Government Printing Office 1906) (citing State Department material taking the position that persons holding offices under a state are not subject to the Foreign Emoluments Clause); Seth Barrett Tillman, Opening Statement, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. 399 (2012), 107 NW. U. L. REV. COLLOQUY 1 (2012) (arguing based on other Washington-era precedents that the *Office . . . under the United States* language of the Foreign Emoluments Clause does not reach elected federal or state officials); Seth Barrett Tillman, Closing Statement, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013) (same). But see generally Zephyr Teachout, Rebuttal, *Gifts, Offices,*

*States, nor officers under the United States?* I think so.<sup>67</sup> But if Professor Chafetz, and Professors Akhil Amar, Vikram Amar, Steven Calabresi, Saikrishna Prakash,

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and *Corruption: A Response to Tillman*, 107 NW. U. L. REV. COLLOQUY 30 (2012) (arguing that the Foreign Emoluments Clause reaches federal and state elected officials).

<sup>67</sup> See, e.g., Field, *supra* note 45 (“Whether the president and vice-president are officers of the United States is a subject on which conflicting opinions are held. It is not possible to deal here at length with . . . that question . . .” (footnote omitted)); see also *supra* note 45 (collecting sources); *infra* notes 77-79 (collecting sources). The position that the President and Vice President are not *officers of the United States* has deep roots in early and modern sources. See *United States v. Mouat*, 124 U.S. 303, 307 (1888) (“Unless a person in the service of the Government, therefore holds his place by virtue of an *appointment* by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not strictly speaking, an officer of the United States.” (emphasis added)); ROSENBERG, *supra* note 52, at CRS-7 (“[T]he constitutional term ‘civil office’ was meant to include only those offices which are created by Congress and subject to appointment, and not those elective offices established by the Constitution itself.” (emphasis in the original)); PROCEEDINGS OF THE SENATE SITTING FOR THE TRIAL OF WILLIAM W. BELKNAP, LATE SECRETARY OF WAR, ON THE ARTICLES OF IMPEACHMENT EXHIBITED BY THE HOUSE OF REPRESENTATIVES 130 (Washington, Government Printing Office 1876) (Senator George Sewell Boutwell stating, on May 27, 1876, “[F]or according to the Constitution, as well as upon the judgment of eminent commentators, the President and Vice-President are not civil officers”); *id.* at 145 (Senator Newton Booth, from California, stating, on May 27, 1876, “[T]he President is not an officer of the United States. As was tersely said by the Senator from Massachusetts, [Mr. BOUTWELL,] ‘He is part of the Government.’”); GOODNOW, *supra* note 10, at 225 (“[T]he United States Supreme Court has held that no one can be an officer of the United States government unless he be appointed as the constitution provides, *viz.*, by the President and Senate, the President alone, one of the United States courts, or the head of an executive department.”); WILLIAM BENNETT MUNRO, THE GOVERNMENT OF THE UNITED STATES NATIONAL, STATE, AND LOCAL 297 (5th ed. 1946) (“The phraseology [of the Incompatibility Clause and Elector Incompatibility Clause] suggests that appointment, as against election, is the essential mark of ‘civil office’ or even ‘office.’ In more recent times both the President and members of Congress appear as elective federal officers, though not as ‘civil’ officers, in statutes and judicial decisions.”); SILVA, *supra* note 9, at 135 (“The courts have been especially careful not to enlarge the meaning of the term ‘officer’ as used in the Constitution. They have defined an officer of the United States as a person appointed by the President and the Senate, by the President alone, by the courts of law, or by a department head.” (collecting case law)); SILVA, *supra* note 10, at 149 (“‘Officers of the United States’ are not appointed by electoral colleges. They are appointed by the President and Senate, by the President alone, by the department heads, or by the courts of law.”); 1 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION § 199(i), at 412-13 (Henry St. George Tucker ed., Chicago, Callaghan & Company 1899) (“The language of the [Impeachment] [C]ause indicates that, in a constitutional sense, the President and Vice-President are not civil officers of the United States, for otherwise the language would have been ‘and *other* civil officers.’”); *id.* § 199(k), at 413 (“The President and Vice-President are constitutional officers. Who, then, were included in the terms ‘civil officers’? The meaning of these words is interpreted by the last clause of [S]ection 3 of [A]rticle II, which just precedes the use of the term ‘civil officers’ as subject to impeachment. It explicitly declares that the President ‘shall commission all the officers of the United States,’ and these are the officers who, under [A]rticle II, [S]ection 2, [C]ause 2, are to be appointed by the President, by and with the advice and consent of the Senate, under the words ‘ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States,’ etc.”); JAMES WILSON & THOMAS M’KEAN, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 111

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(London, J. Debrett et al. 1792) (reproducing James Wilson’s December 11, 1787 A.M. statement to the Pennsylvania ratifying convention: “[e]very officer must be nominated solely and exclusively, by the President” (originally published in T. Lloyd’s *Debates*)); Luther Martin, “*The Genuine Information, Laid Before the Legislature of Maryland*, in ROBERT YATES, SECRET PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT PHILADELPHIA, IN THE YEAR 1787, FOR THE PURPOSE OF FORMING THE CONSTITUTION OF THE UNITED STATES OF AMERICA 49 (John Lansing, Jr. ed., Louisville, Ky., Alston 1844) (“[T]he President ha[s] the power to nominate *all* offices . . .” (emphasis added)); Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469, 480 (2006) (noting that “the Constitution of 1787 created a unitary executive, provided for no executive council, and gave the president the power to nominate *all* officers of the United States and the power to make recess appointments” (emphasis added)); 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, 1021 (2007) (noting that “if some of the ‘other Officers of the United States, whose Appointments are not herein otherwise provided for,’ are not inferior, then they *must* be appointed by the President with the advice and consent of the Senate”—the logic of which would seem to exclude the President and Vice President (emphasis added)); *id.* at 1010 (“Although the Constitution assumes that there will be officers of the House and Senate, heads of executive departments (specifically including a Treasury department), ‘Ambassadors [and] other public Ministers and Consuls,’ and various other ‘Officers of the United States,’ [the Constitution] does *not* itself create any of these legislative or executive offices. Rather, it is left to Congress to create (or not to create) these institutions pursuant to its power to ‘make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.’” (emphasis added) (footnotes omitted)); *id.* at 1021 (“The Appointments Clause does not in any way distinguish the named officers from ‘all other Officers of the United States, whose Appointments are not herein otherwise provided for.’”); Pergler, *supra* note 9 (“The President and Vice President, being elective functionaries, are not ‘civil officers of the United States’ within the meaning of Article II, Section 4.”); Prakash, *How the Constitution Makes Subtraction Easy*, *supra* note 48, at 1871 (“Congress may remove, via statute, *all* officers of the United States, save for federal judges with good behavior tenure.” (emphasis added)). It appears that Professors Calabresi and Prakash no longer adhere to their prior positions. See Steven G. Calabresi, Rebuttal, *Does the Incompatibility Clause Apply to the President?*, in Tillman & Calabresi, *supra* note 10, at 141-46 (arguing that the President and Vice President are officers of and/or under the United States); Steven G. Calabresi, Closing Statement, *A Term of Art or the Artful Reading of Terms?*, in Tillman & Calabresi, *supra* note 10, at 154-59 (same); Prakash, *supra* note 45 *passim* (same). See generally *supra* notes 10 (discussing *officers of the United States*), 13 (discussing *Officers . . . under the United States*), 48 (distinguishing *officers of the United States* from *Officers . . . under the United States*). It is also important to keep in mind that the technical meaning of *officer of the United States*, as used in the Appointments Clause, and elsewhere in the Constitution, is somewhat distinct from the everyday use of that phrase—which merely distinguishes state from federal officeholders. Compare *Buckley v. Valeo*, 424 U.S. 1, 275 (1976) (White, J., concurring in part and dissenting in part) (“[N]o case in this Court even remotely supports the power of Congress to appoint an officer of the United States aside from those officers each House is authorized by Art. I to appoint to assist in the legislative processes.” (emphasis added)), with Steven G. Calabresi, Closing Statement, *A Term of Art or the Artful Reading of Terms?*, in Tillman & Calabresi, *supra* note 10, at 155 (“Speakers and Committee Chairs are thus not *officers of the United States* but are only officers of the House of Representatives or the Senate. Surely [my interlocutor] would not confound the United States with the House or the Senate”! (emphasis added)). Maybe I would not, but apparently Justice White would, at least depending on context.

etc., remain unconvinced. I must ask, in clear and direct language, what (if anything) would it take to convince you? Do I need to find a signed letter from a Framers or Ratifier?

### III. IS THIS RESULT “ABSURD”?

Is it absurd to argue that impeached, convicted, removed, and disqualified Presidents, Vice Presidents, and civil officers are eligible to hold the presidency? Some people who have taken the time to privately comment on this Article think so.<sup>68</sup> In other words, those that doubt the position put forward here ask: what is the

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As an aside, it is interesting to note that Justice Story appears (although the matter is hardly free from doubt) to have taken the position that *office under the United States*, as used in the Incompatibility Clause, also extended to state office. Compare 1 STORY, COMMENTARIES, *supra* note 9, § 869, at 635 (noting that the Incompatibility Clause was “*doubtless* founded in a deference to state jealousy, and a sincere desire to obviate the fears . . . that the general government would obtain an undue preference over the state governments” (emphasis added) (citing RAWLE, *supra* note 9, ch. 19, and THE FEDERALIST NO. 56 (James Madison), *supra* note 4), with RAWLE, *supra* note 9, ch. 19, at 189 (“The [C]onstitution contains no provision advertent to the [joint] exercise of offices under the United States and separate states at the same time, by the same persons.” (emphasis added)), and THE FEDERALIST NO. 56 (James Madison), *supra* note 4, at 306 (affirming that federal legislators may hold simultaneous membership in their state legislature). *But see* Amar & Amar, *supra* note 9, at 117 n.25 (noting that Elbridge Gerry took the position in debate in the First Congress that the reach of “Office” in the Succession Clause extended beyond federal office to mere state office, and denominating Gerry’s position as “implausibl[e]”); *but cf.* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1014 (2011) (“In other words, when the Constitution restricts the states, it does so expressly, usually with the words ‘No State shall.’”). Madison’s report of the Federal Convention’s debate on this subject lacks his customary level of confidence and clarity. *See* 2 FARRAND’S RECORDS, *supra* note 64, at 535 (reporting debate from September 7, 1787, and stating: “It seemed to be an objection to [the Succession Clause] . . . that the Legislature was restrained in the temporary appointment to ‘officers’ of the U.S[.] . . .” (emphasis added) (emphasis in the original omitted)). *Seemed?*

<sup>68</sup> *See also* Randall Kennedy, *A Natural Aristocracy?*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 54, 55 n.1 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (asserting that a disqualified official cannot become President); Prakash, *supra* note 45, at 149 (denominating the position that a disqualified President, Vice President, and officer remains eligible to serve as President and Vice President as a “fairly odd conclusion[]” but supplying no reasoned basis for his intuition); *cf.* BERGER, *supra* note 42 (arguing that the Constitution’s use of *office* and *officer* embraces Senators and Representatives else “a judge impeached, convicted, and disqualified ‘to hold any office’ could yet be elected to the Congress, for a member of Congress would not be a ‘person holding an office’”); *supra* note 42 (collecting authority for the proposition that impeached, convicted, removed, and disqualified officials are not eligible to sit in Congress); WHARTON, *supra* note 52, at 270 (“If a Senator holds no office of profit or trust under the United States, it is *lawful* for him to accept a present title or office from any King or any foreign state. Can it be possible that a public functionary, of all others the peculiar object of this jealous restriction, is, in fact, the sole object of exemption from its operation?” (quoting Congressman James A. Bayard, Sr.’s speech on January 3, 1799 for the House managers at the Blount Impeachment trial before the Senate)). The argument from absurdity does not of necessity lead to the modern consensus position. Indeed, in that light, Berger’s position (i.e., including all elected officials as *officers of the United States*) is far more attractive than the position announced by the Amars in 1995 and subsequently embraced in *Impeachment and Assassination* by Chafetz (i.e., including the President and Vice President, but not members of Congress, as *officers of the United States*).

logic, rationale, or normative justification which would limit disqualification to relatively low ranking *appointed* office (such as cabinet and subcabinet posts) while still leaving such persons eligible to hold *elective* office (such as the presidency and vice presidency). There are several potential answers to this question.

First, looking for a normative justification may be a mistake. The various constitutional clauses relating to impeachment represent compromises arising from both shared and divergent experiences, first as (royal, proprietary, and corporate) colonies, and later as newly independent states. The legal work product of such group efforts and compromises may not have any independent justification. This is particularly true where multiple constitutional provisions, as is the case in regard to impeachment, are involved.

Second, where a complex institution is not the creation of any single mind or, even, a single historical or legal epoch—where it is an inherited organic institution—the only justification to be had may be Burkean: viz., if a long enduring institution conforms to our shared historical experience, then its maintenance (assuming it is permeable to evolutionary change short of violent revolution) confirms its usefulness. To believe or search for a more particularistic justification is to fall into (what Hayek denominated) the constructivist-rationalist fallacy.<sup>69</sup>

Alternatively, it may be that the Framers and Ratifiers believed that *appointed* office posed particular or acute dangers to society, dangers that *elected* office did not. In that situation, extending the scope of disqualification exclusively to *appointed* or *statutory* office makes sense. *Indeed, the Ineligibility Clause hardwires this precise distinction into the Constitution.* The Ineligibility Clause precludes certain *elected* officeholders from subsequently taking *appointed* (not *elected*) office.<sup>70</sup> Furthermore, even if the Framers and Ratifiers believed that

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*Compare, e.g., Arthur Krock, In The Nation; Succession List Now Suits the Politicos The "Officer" Dispute Holmes, White and John W. Davis, N.Y. TIMES, July 17, 1945, at 12 (quoting former Solicitor General John W. Davis, who argued Lamar v. United States, 240 U.S. 60 (1916) (Holmes, J.), as stating: "While the Lamar case deals with the statute and not with the Constitution itself, I think it stands for the doctrine that 'members of Congress are officers.' I don't accept the contrary view that that term is applicable only to those who hold office by reason of appointment rather than election." (emphasis added)), with Chafetz, supra note 1 passim, and Amar & Amar, supra note 9 passim. What is the normative rationale for precluding a disqualified office-holder from holding the presidency (and vice-presidency), but permitting her to hold a seat in Congress? See supra note 65 and accompanying text; infra note 75 and accompanying text.*

<sup>69</sup> See FRIEDRICH A. HAYEK, 2 LAW, LEGISLATION AND LIBERTY *passim* (1976); see also EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE *passim* (F.G. Selby ed., 1890) (1790). *But see* Steven G. Calabresi, Rebuttal, *Does the Incompatibility Clause Apply to the President?*, in Tillman & Calabresi, *supra* note 10, at 143 (affirming, without recourse to any authority, that the "whole point of the two houses of the British Parliament was to give the Lords temporal and spiritual a place in the House of Lords and the commoners their own distinct house—the House of Commons" (emphasis added)).

<sup>70</sup> U.S. CONST. art. I, § 6, cl. 2 (Ineligibility Clause: "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 [i]ncreased during such time . . . ." (emphasis added)); John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 104 (1995) ("The Emoluments Clause goes one step further than prohibiting Members of Congress from holding federal offices that were created or had their emoluments

disqualified former officers posed similar dangers in regard to both *appointed* and *elected* offices, the decision to install such a candidate via *election* may have *cleansed* the decision in a way that mere *appointment* could not.<sup>71</sup> That may be why

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increased during the Member's current term; it literally proscribes the *appointment* to such offices, which in turn makes holding such offices impossible. *The key, then, is determining exactly when a person is 'appointed' to federal office.*" (emphasis added) (footnote omitted)). See generally Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473 (2008); Brian T. Fitzpatrick, *Errors, Omissions, and the Tennessee Plan*, 39 U. MEM. L. REV. 85 (2008). On the other hand, some modern commentators do not appear to be sympathetic to the existence of the appointed-officer/elected-officeholder divide. See Akhil Reed Amar & Josh Chafetz, *How the Senate can Stop Blagojevich*, SLATE, Dec. 31, 2008, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2008/12/how\\_the\\_senate\\_can\\_stop\\_blagojevich.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2008/12/how_the_senate_can_stop_blagojevich.html) ("Alternatively, we might think of an *appointment* as an '*election*' by one voter [with Tillman adding—a view that, at the very least, fails to discuss the plainly contrary language of the Ineligibility Clause, *supra*]." (emphasis added)); Calabresi & Larsen, *supra* note 52, at 1083 (listing President George Bush and Vice President Al Gore as persons "recently appointed to executive . . . offices"); O'Connor, *supra* at 104 n.73 (arguing that a future court would hold that the Ineligibility Clause applies to a Senator *appointed* to fill a vacant seat in the Senate, notwithstanding the Clause's textual limitation to *elected* Senators and Representatives); cf. Currie, *supra* note 56, at 657 n.96 ("Whether the assumption of presidential powers [by an acting President] under the [Succession] statute would constitute an 'appointment' to a 'civil office under the Authority of the United States' within this clause is not clear . . ."); Friedman, *supra* note 45 ("Probably not much weight should be put on the term 'appointment' . . ."). Indeed, some early materials do support the view that the term *appoint* would also encompass *election*. See, e.g., GA. CONST. of 1789, art. I, § 10 ("[N]or shall any [state] senator or representative be *elected* to any office of profit which shall be created during his *appointment*." (emphasis added)). This may very well have been a scrivener's error: transposing *election*-language with *appointment*-language. Indeed, less than ten years later, in the revised state constitution, this language was replaced with language akin to that appearing in the federal constitution. See GA. CONST. of 1798, art. I, § 11 ("[N]or shall any member [of the state legislature], after having taken his seat, be eligible to any of the aforesaid offices or appointments during the time for which he shall have been elected."). For another early authority suggesting that *appointment*-language might encompass *election*, see MONROE, *supra* note 42, at 362 ("[Senators] are appointed by the people themselves . . .").

<sup>71</sup> See, e.g., 1 TUCKER, *supra* note 67, § 199(o), at 415 ("The impeachment power was intended to *cleanse* the government from the presence of worthless and faithless officials, but not to debar a State from *electing* whom it pleases to represent it in the [House or Senate].") (emphasis added); Keith E. Whittington, *Bill Clinton was no Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 454 (2000) ("For those who sought to remove Clinton, the goal was to *cleanse* the presidency, not to weaken it." (emphasis added)); Jack Chaney, Note, *The Constitutionality of Censuring the President*, 61 OHIO ST. L.J. 979, 1005 (2000) ("The power of impeachment is provided to guard the country against a President who cannot be trusted; it is a remedial mechanism, designed to *cleanse* and purify the office." (emphasis added)); see also *Gantler v. Stephens*, 965 A.2d 695, 713 (Del. 2009) (Jacobs, J.) ("With one exception, the '*cleansing*' effect of such a *ratifying shareholder vote* is to subject the challenged director action to business judgment review [which is less demanding than entire fairness review], as opposed to '*extinguishing*' the claim altogether (*i.e.*, obviating all judicial review of the challenged action)." (emphasis added)); *id.* at 713 n.54 ("The only species of claim that *shareholder ratification* can validly extinguish is a claim that the directors lacked the authority to take action that was later ratified." (emphasis added)); *Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. 2002) (Chandler, C.) (explaining that a decision of a conflicted board can be ratified by a majority vote of the fully informed disinterested

when Congress raises the salary of a cabinet post, representatives and senators are precluded from taking that office, during the term for which they were elected, via *appointment*. But if Congress raises the salary of the President, the people can elect a sitting senator to the presidency, notwithstanding the change in salary, and notwithstanding that the person becomes President during the term for which she was first elected a senator. The people *cleans* the transaction.<sup>72</sup>

To put it another way, disqualification might be thought of as a decision by the *agent* (the elected government of the day) to preclude a would-be office-holder from holding office, but the decision of the *agent* does not (permanently) preclude the *principal* (the people<sup>73</sup> and, perhaps, the states<sup>74</sup>) from doing otherwise (even against

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stockholders); *cf.* *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006) (Berger, J.) (“After approval by disinterested directors, courts review the interested transaction under the business judgment rule . . .”); *Teachers’ Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 669 (Del. Ch. 2006) (Strine, V.C.) (“The informed approval of a conflict transaction by an independent board majority remains an important *cleansing device* under our law and can insulate the resulting decision from fairness review under the appropriate circumstances. For that device to be given credit, however, the board majority must have acted in an informed manner.” (emphasis added) (footnote omitted)); 3 TREVELYAN, *supra* note 65, at 179 (“The [Municipal Corporations] Act of 1835 was more dramatic than the [Great] Reform Bill [of 1832], for it gave all ratepayers the right to vote for the new Municipalities. At last the ice-age of English institutional and *corporate* life had come to an end . . .” (emphasis added)); Prakash & Smith, *supra* note 9, at 107 (using evidence from trust law in order to understand public law terminology).

<sup>72</sup> See *id.* (collecting authority suggesting cleansing rationale); Act of Jan. 17, 1969, Pub. L. No. 91-1, 83 Stat. 3 (doubling annual presidential compensation from \$100,000 to \$200,000). The Democratic Party’s presidential candidate in 1972 was George McGovern who, prior to receiving his party’s presidential nomination, had been reelected to the Senate in 1968. Had McGovern prevailed in the Electoral College, who, then or now, believed or believes he was ineligible? Was the whole country asleep? Admittedly, for the cleansing rationale to work, the People must have some notice of Congress’s intent to raise a future President’s salary. Compare AMAR, *supra* note 9, at 181 (“Congress could, however, change the salary for future presidential terms—presumably before anyone could be certain who would be in office when the new law would take effect.”), CHAFETZ, *supra* note 13, at 178 & 180 (reporting House and Senate precedents holding that the age qualification is determined at the time the member-elect presents himself to the house to be sworn in, even if that is after the start of the constitutional term of office, even if as a result a district or state suffers a temporal loss of representation, but suggesting that a member-elect might be excluded if he “had actively *lied* about his age” to his constituents prior to his election (emphasis added)), and ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 31-54 (2007) (discussing the Constitution’s frequent use of “veil” rules), with *supra* note 71 (noting that action taken by disinterested directors or stockholders only has cleansing effect on conflicted board decision-making if the former were “informed”).

<sup>73</sup> See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the *people*.” (emphasis added)); see also Aaron-Andrew P. Bruhl, Response, *Against Mix-and-Match Lawmaking*, 16 CORNELL J.L. & PUB. POL’Y 349, 360 (2007) (describing Members of Congress as “agents” and noting that “Every two years there comes a new *mandate from the principals*, and one must seek the agents’ views anew. The two houses of the legislature . . . are in this sense *unlike people* and *unlike states*.” (emphasis added)).



the expert advice of their ministers or masters—depending on your point of view). This normative worldview accounts for why a disqualified former officer remains free to take state office (including both *elective* positions and *appointed* state offices—each of which is beyond the scope of the President’s appointment power), to sit as a member of congress, and to become President or Vice President. It is Professor Chafetz and others within the academic consensus who, by contrast, have yet to present any normative case for *their* position in regard to disqualification: that it extends to the presidency and vice presidency, but not to state office or congressional service.<sup>75</sup> According to the consensus view, a disqualified former officer cannot become an Article III district court judge or circuit court judge, but he is permitted to sit as a Senator and to act in a *judicial* capacity in Senate trials in connection with impeachment proceedings.<sup>76</sup> Why? Again, according to the

<sup>74</sup> See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States* respectively, or to the *people*.” (emphasis added)); see also Bruhl, *supra* note 73, at 360.

<sup>75</sup> Chafetz, *supra* note 1 *passim*; see also Amar & Amar, *supra* note 9 *passim*; *supra* notes 65 & 68, and accompanying text.

<sup>76</sup> See Prakash & Smith, *supra* note 9, at 81-82 (“[The impeachment] provisions were *absolutely* necessary to invest the House and Senate with *nonlegislative* authority. In the absence of the impeachment provisions, there would have been no way that the House would have enjoyed a *judicial* power to indict and an *executive* power to prosecute. Likewise, but for the grant of power, the Senate would not have any *judicial* authority to try impeachments.” (emphasis added) (footnote omitted)); cf. AMAR, *supra* note 9, at 186 n.\* (“In effect, the veto provisions of Article I, [S]ection 7 gave certain legislative powers to the president, and the impeachment provisions of Article I, [S]ections 2 and 3 conferred certain judicial powers upon Congress.”). Characterizing Senate trial proceedings or House impeachment proceedings as an exercise of *judicial* authority is contestable. See, e.g., Mecham v. Gordon, 751 P.2d 957, 962 (Ariz. 1988) (Feldman, V.C.J.) (explaining that impeachment “is a uniquely legislative *and* political function. It is not judicial.”). Whether one considers Senate action on impeachment as *judicial* or *legislative* depends on whether one looks predominantly to the character of the action taken (*judicial*), or to the institutional history of the actor taking the action (*legislative*). See *R. v Richards (Ex parte Fitzpatrick & Browne)* (1955) 92 CLR 157, 167 (Austl.) (Dixon, C.J.) (“[T]hroughout the course of English history there has been a tendency to regard th[e] [power of a house of Parliament to jail a private person for contempt] as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection. This is not the occasion to discuss the historical grounds upon which these powers and privileges attached to the [United Kingdom] House of Commons. It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically—perhaps one might even say, scientifically—they belong to the judicial sphere.”); see also *Atkins v. United States*, 556 F.2d 1028, 1066 (Ct. Cl. 1977) (*per curiam*) (“[I]t is fitting to consider how powers are constitutionally apportioned among the three branches. However, a workable categorization has eluded even the most perspicacious of minds . . . .” (citing THE FEDERALIST NO. 37, *supra* note 4)), *disagreement on other grounds recognized by*, *Hatter v. United States*, 64 F.3d 647 (Fed. Cir. 1995); THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 195 (“Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches.”); James M. Landis, *Constitutional Limits on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 156 (1926) (“Legislative power unhappily fails to be either a word of art or a self-defining concept. Like judicial power, it

consensus view, a disqualified former officer cannot become President, but he may sit as a Senator and make determinations in regard to treaties and appointments—core *executive* activity. Again, one must ask, why? What is the logic, rationale, or normative justification for the consensus position?

The position I put forward here, the so-called “absurd” position, is a world view very different from that taught in legal academia today. I admit that this view *is* counter-intuitive; it cuts squarely against the ahistorical, but dominant, separation of powers theme<sup>77</sup> (or cult<sup>78</sup>) at the core of our modern jurisprudence—at least as that

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summarizes the history of an institution of government for any particular period of time. It did so in 1789.”) *But cf.* *Marshall v. Gordon*, 243 U.S. 521, 547 (1917) (White, C.J.) (concluding that the “the implied power to deal with contempt [is] ancillary to the legislative power” and is not “judicial authority”); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 342 (2002) (“The terms ‘legislative,’ ‘executive,’ and ‘judicial’ meant something to Madison, even if he could not articulate precisely (or even vaguely) what they meant.” (citing THE FEDERALIST NO. 37, *supra*)).

<sup>77</sup> See *supra* notes 45 & 67; *infra* note 79; *cf.* Calabresi & Larsen, *supra* note 52, at 1061 (concluding that prior to 1787, “the idea of providing for some measure of interdepartment[al] incompatibility had become something of an American constitutional tradition. *Interestingly, it was a tradition that existed independently of the contemporaneous devotion to the separation of powers.*” (emphasis added)). Compare AMAR, *supra* note 9, at 304 (“[Convicting a President in impeachment proceedings] is not something that Senators should do lightly, lest we slide toward a kind of parliamentary government that our *entire* structure of government was designed to *repudiate.*” (emphasis added)), Akhil Reed Amar, *An(Other) Afterword on the Bill of Rights*, 87 GEO. L.J. 2347, 2359 (1999) (“[Convicting a President in impeachment proceedings] is not something that senators should do lightly, lest we slide towards a kind of parliamentary government that our *entire* structure of government was designed to *repudiate.*” (emphasis added)), Amar & Amar, *supra* note 9, at 114 (asserting that “our Constitution[] [has] *careful[ly] reject[ed]* . . . a Parliamentary/Prime Minister Model of presidential selection” (emphasis added)), *id.* at 118 (“The Framers *self-consciously rejected* the governmental model embodied by eighteenth century Prime Minister Robert Walpole, who served simultaneously as the leading Member of Parliament and the Chief Executive Minister—simultaneously as Speaker and President in American constitutional parlance.” (emphasis added) (citing, absent any pin-point cite, Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994))), *id.* at 120 (using strangely anthropomorphic language in asserting that “to act simultaneously as President/Chief Executive Officer and Speaker of the House is to be precisely the kind of Walpolian Prime Minister our Constitution’s text, history, and structure *self-consciously reject*” (emphasis added) (citing, again, absent any pin-point cite, Calabresi & Larsen, *supra*)), *id.* at 124 (“[T]he Constitution[] *fundamental[ly] reject[s]* . . . a parliamentary system in which the legislature, or its dominant party, elects its own leader as Prime Minister/Chief Executive Officer.” (emphasis added)), *id.* at 127 (“In sum, whether we consider the deep implications of the Constitution’s separation of powers and its *rejection* of a Parliamentary/Prime Minister model or focus on the more mundane, practical issues of time and place, we reach the same conclusion . . .” (emphasis added)), *id.* at 120 n.48 (“If [the Speaker] must remain in this office in order to act as President, as the [purported] Madisonian reading insists, then his service as [acting] President wholly depends on the will of a simple House majority, in *obvious violation* of the Constitution’s *rejection* of the Walpole Prime Minister Model.” (emphasis added)), Goldstein, *supra* note 42, at 1022 (asserting that legislative officer succession “resembles parliamentary government, which our Constitution *emphatically rejected*” (emphasis added)), Kesavan, *supra* note 49, at 1766 (“Indeed, if we look at the Constitution as a whole, we see that it is a clause-by-clause *rejection* of the parliamentary system.” (emphasis added) (citing, absent any pin-point cite, Calabresi &

Larsen, *supra*), Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1238 (1995) (“The type of congressional power thereby created, in which the legislative branch directly supervised the execution of the law, was akin to the parliamentary form of government that the Framers *repudiated*.” (emphasis added)), and Vikram David Amar, *The TV Drama “Commander in Chief” and the Constitution: Is the Federal Presidential Succession Statute Unconstitutional? (Part II)*, FINDLAW (Dec. 8, 2005), <http://writ.news.findlaw.com/amar/20051208.html> (“When the Constitution’s framers reflected on the process of presidential selection, they *consciously rejected* a Parliamentary model in which the Chief Executive (a Prime Minister) is chosen by the legislature and its dominant party.” (emphasis added)), with AMAR, *supra* note 9, at 153 (noting, in a sentence somewhat obscured by surrounding parentheses, that in 1787, “[t]he modern Westminster model, in which Parliament picks its own leader with minimal monarchical involvement, still lay in the *future*” (emphasis added)), MICHAEL STOKES PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES: TEXT, STRUCTURE, HISTORY, AND PRECEDENT* 285 (2010) (“The Incompatibility Clause was adopted as an eighteenth century ethics rule to prevent the president from bribing members of Congress to support his policies by dangling federal offices in front of them the way British monarchs were thought to have bribed members of Parliament to build up a Court Party. . . . This ethics rule produced the American system of separation of personnel, as well as separation of powers. *But, that was all an unintended consequence.*” (emphasis added) (citing Calabresi & Larsen, *supra*)), Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1496 (1994) (“*Without realizing or intending to do so*, the Framers wrote a Constitution that absolutely forecloses the possibility of parliamentary English-style party government in this country.” (emphasis added)); Calabresi & Larsen, *supra* at 1095 (explaining that “the debates on incompatibility do not reveal a *self-conscious* attempt on the part of the Framers to set in motion a radical departure from the British system of parliamentary government” (emphasis added)), and Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 GEO. WASH. L. REV. 682, 688 (1999) (“[I]n fact, a full-blown model of parliamentary government was not yet available for the Framers to *reject*.” (emphasis added)).

So powerful is the separation of powers cult that otherwise sober scholars stray into hyperbole. Compare, e.g., Steven G. Calabresi, *Rebuttal, Does the Incompatibility Clause Apply to the President?*, in Tillman & Calabresi, *supra* note 10, at 143-44 (“Likewise, colonial governors, although advised by executive councils, did not sit as members of colonial legislatures. The office of governor was distinct and separate from, for example, the office of a member of the House of Burgesses.”), *id.* at 145 (asserting “that there is an eight-hundred-year-long Anglo-American practice of Kings and Presidents *never ever* sitting simultaneously as members of Parliament or Congress” (emphasis in the original)), and Steven G. Calabresi, *Closing Statement, A Term of Art or the Artful Reading of Terms?*, in Tillman & Calabresi, *supra* note 10, at 154 (“[My interlocutor’s] position is that Presidents can serve simultaneously as members of Congress even though in eight hundred years of English and American history no King, Queen, *colonial governor*, or President has *ever* served simultaneously in the legislature.” (emphasis added)), with JOHN F. BURNS, *CONTROVERSIES BETWEEN ROYAL GOVERNORS AND THEIR ASSEMBLIES IN THE NORTHERN AMERICAN COLONIES* 320 (1923) (“[Prior to 1733, Governor] Cosby [of New York] took part in the deliberations of the Council while acting in a legislative capacity. Thus as a *member* [!] of the Council he had one vote, as executive he had final veto power, and in case of tie he cast the deciding ballot. *Always two, and sometimes three, votes were at his command.*” (emphasis added)), MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 232 (Leonard W. Levy ed., Da Capo Press 1971) (1943) (explaining that “in some colonies, the governor frequently sat with the council, and there was some *difference of opinion* as to whether he was or was not a member of it” (emphasis added)), LEONARD WOODS LABAREE, *ROYAL GOVERNMENT IN AMERICA: A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783*, at 160

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(N.Y., Frederick Ungar Pub. Co. 1958) (1930) (noting that royal governors “not only often attended the legislative council but presided there”), *id.* (noting that “less commonly” royal governors asserted the right to vote in the legislative council, “either as a regular member, or as the presiding officer in case of a tie”), *id.* at 164-65 (noting that the law officers of the Board of Trade opposed the claim of New York’s Governor Cosby to a vote in the legislative council, but their advice and recommendation was not put into force by the Privy Council), and WILLIAM SMITH, A COMPARATIVE VIEW OF THE CONSTITUTIONS OF THE SEVERAL STATES WITH EACH OTHER AND WITH THAT OF THE UNITED STATES tbl.1 & n.n (Philadelphia, John Thompson 1796) (“Connecticut. [Governed under the] Old Colonial Charter of Charles II [of 1662]. unaltered, except where necessary to adapt it to the Independence of the United States. . . . Governor, as Presid[ent] of the council, and the Speaker of the House, have each a vote, besides a casting vote.” (emphasis omitted)). As I hope Professor Calabresi will come to agree: there is *no* sound historical basis for Professor Calabresi’s “eight hundred year[.]” claim: a claim he made absent *any* citation to *any* authority of *any* kind. During the one-hundred fifty year period prior to the American Revolution, royal and proprietary governors frequently sat in the upper house of bicameral colonial parliaments, even when the upper house acted in a legislative (as opposed to an executive) capacity. This was a contested *practice*, but a *practice* it was. See THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 4, at 372 n.\* (“[I]t is always justifiable to reason from the practice of government till its propriety has been constitutionally questioned.”). But see PATRICIA U. BONOMI, A FACTIOUS PEOPLE: POLITICS AND SOCIETY IN COLONIAL NEW YORK 134 (1971) (explaining that in 1736, an order from the Board of Trade directed Governor Cosby “to absent himself when the Council was considering legislation”); BURNS, *supra* at 320 (apparently referring to the same order discussed by Bonomi, *supra*, and suggesting that it was issued in 1733).

Moreover, in the absence of colonial governors, the senior member of the upper house frequently took on the role of acting governor, and similar practices prevailed in the States after independence. See 2 ANNALS OF CONG. 1903 (Joseph Gales, Sr. ed., Washington, Gales & Seaton 1834) (recording January 10, 1791 debate on a proposed bill on presidential succession, including statement by Congressman Sherman, who said: “In case of the death of a Governor and Lieutenant Governor, it is common in the several States for the oldest counselor to preside [Tillman adding—*over the administration*].”); EVARTS BOUTELL GREENE, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 56 & 233 n.26 (Cambridge, Harvard University Press 1898) (reproducing Queen Anne’s 1707 instruction “providing that thereafter the senior councillor should execute the [royal governor’s] commission in the governor’s absence” and further noting that this policy was “*universally* enforced [by] the reign of George III” (emphasis added)); M. EUGENE SIRMANS, COLONIAL SOUTH CAROLINA: A POLITICAL HISTORY 1663-1763, at 76 (1966) (noting that in 1700, in South Carolina, then a proprietary colony, after Governor Blake’s death, “the council met . . . to select one of themselves as governor”); see also LABAREE, *supra* at 160-61 (noting that councillor Van Dam presided over the legislative council while he was acting governor); cf. FEERICK, FROM FAILING HANDS, *supra* note 9, at 38 (describing pre-1787 state constitutional practice in Delaware and North Carolina providing for legislative officer succession in regard to the governorship); *id.* at 37-38 (describing pre-1787 state constitutional practice in New York running the line of succession to legislative officers after the lieutenant governor); *id.* at 35 (noting that Benjamin Franklin’s Albany Plan of 1754 provided for legislative officer succession in the case of the death of the “President General”); John D. Feerick, *Response to Akhil Reed Amar’s Address on Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 41, 62 (2010) (describing New York, Delaware, and North Carolina practices, and noting that “[t]he succession arrangements in the thirteen original colonies, as well as provisions of the early state constitutions, indicate that legislative [officer] succession was sometimes contemplated to fill a vacancy in the office of the governor.” (emphasis added)).

doctrine is understood in the United States *today*.<sup>79</sup> But that begs the question of whether our modern legal sensibilities (burdened by the weight of centuries of

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For the reader interested in assessing the primary documents on the Cosby-Van Dam dispute, which was the genesis of the celebrated John Peter Zenger trial, see 6 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 39-45 (E.B. O'Callaghan ed., Albany, Weed, Parsons and Co. 1855). Issues connected to colonial-era legislative officer succession were at the heart of the Zenger trial. *Zenger* was if not the most famous, at least, one of the most significant pre-1763 trials in the British New World colonies. Thus it seems likely that lawyers and the educated lay public would have been aware of the common practice of legislative officer succession. See also 2 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY 158 (Mass., Peter Smith 1958) (1924) (describing contested efforts by the senior member of the Massachusetts council, acting with the council, in 1715, to assume the government six months after the death of Queen Anne); *id.* at 441-42 (explaining that from July 1731 to August 1732, Lewis Morris, as "eldest councillor" administered the New Jersey government between the death of Governor Montgomerie and the arrival of his successor, Governor Cosby); *id.* at 443 (noting that Rip Van Dam, "as president of the council and its oldest member," "head[ed]" New York's government in 1731 after the death of Governor Montgomerie, prior to the arrival of Governor Cosby); *id.* at 161 (noting that from 1706 to 1710, Edward Jennings, president of the council, administered the Virginia government in the absence of an appointed governor). Jennings was Governor Edmund Jennings Randolph's great-grandfather. Thus it is more than likely that this particular Framer and Ratifier knew the relevant colonial history surrounding legislative officer succession, as it was his family's history.

One must ask: what is the historical basis for the modern consensus?

<sup>78</sup> See generally Richard Albert, *The Cult of Constitutionalism*, 39 FLA. ST. U. L. REV. 373 (2012).

<sup>79</sup> See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 224 (1989) ("No consensus existed as to the precise institutional arrangements that would satisfy the requirements of the doctrine [of separation of powers]."); Keith Werhan, *Normalizing the Separation of Powers*, 70 TUL. L. REV. 2681, 2684 (1996) ("The constitutional text usually is indeterminate with respect to important separation-of-powers disputes. Notwithstanding (or perhaps, because of) the multiple meanings of the separation-of-powers extant during the founding era, the Framers made no attempt to adopt a fixed, constitutional definition of the concept." (footnote omitted)); cf. Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329, 341 n.88 (2002) (noting that "there is no consensus among British legal scholars concerning the purpose served by the separation of powers"). See generally William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, in SEPARATION OF POWERS—DOES IT STILL WORK? 65, 76 (Robert A. Goldwin & Art Kaufman eds., 1986) (concluding "[t]here is . . . some separation of legislative and executive power in the parliamentary type of representative government"); *id.* at 78 (concluding that the view that "[t]he separation of powers is not part of [the British] constitution" is an "erroneous opinion"); ADAM TOMKINS, PUBLIC LAW 47-54 (2003) (describing separation of powers in the British Constitution as grounded in the supremacy of [a]cts of Parliament, independence of the Crown subject to ministerial responsibility, and courts subject to certain parliamentary controls); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 321-24 (1967); Richard Albert, *Presidential Values in Parliamentary Democracies*, 8 INT'L J. CONST. L. 207, 220 (2010) (concluding "that the separation of powers exists [in the United Kingdom] between Parliament and the Crown and not among government branches, as is otherwise the case in the American presidential model" (emphasis added) (citing Tomkins, *supra*, approvingly)); Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMP. L. 531, 534 (2009) (arguing that "[t]he separation of powers between Crown and Parliament emerged as part of

Supreme Court and other federal court jurisprudence) are consistent with the world-views of the Framers and Ratifiers of 1787–1789. It is a conceit to believe that *we* think (*today*) as *they* did (*then*) on all points.

#### IV. THE DANGER OF CHAFETZ'S WRONG METAPHOR

The difference between Professor Chafetz's view and my own is no mere object of historical curiosity. It has substantial practical implications with regard to concrete problems that confront our legal system. For example, Professor Chafetz states:

A proper appreciation for the virtues of American impeachment procedure might also lead us to be suspicious of other legal rules that have the effect of incentivizing assassination. The current presidential succession regime, in which the Speaker of the House and the President pro tempore of the Senate are third and fourth in line to the presidency, 3 U.S.C. § 19 (2006), does create such perverse incentives when the Speaker or President pro tempore is from a different party than the President. Cabinet officer succession, which would *ensure* party continuity, would thus both eliminate constitutional problems with the succession regime . . . .<sup>80</sup>

Professor Chafetz's position—although unfortunately widely shared—is plainly incorrect. Strict cabinet succession *fails* to preserve party continuity in the event that

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the Revolution Settlement, statutorily enshrined in the Act of Settlement of 1700 . . . .” (footnote omitted)); William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 265 (1989) (“As in the days of the framers . . . lawyers and judges today continue to invoke the doctrine without indicating . . . the range of institutional arrangements that might satisfy the doctrine.”); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474 (1989); Ronald J. Krotoszynski, Jr., *The Shot (Not) Heard ‘Round The World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers*, 51 B.C. L. REV. 1, 22 (2010) (“The question that demands to be asked and answered, obviously enough, is: why do other nations find the conflation of legislative and executive policy making power [as in British-type cabinet government] to be entirely unproblematic?”).

<sup>80</sup> Chafetz, *supra* note 1, at 421 n.567 (emphasis added) (citing Amar & Amar, *supra* note 9, at 123, 126, 135 n.134); *see also* Arthur M. Schlesinger, Jr., *Is the Vice Presidency Necessary?*, THE ATLANTIC, May 1974 (“[The Presidential Succession Act of 1886] . . . put the line of descent through the Cabinet, thereby . . . preventing the mechanics of succession from transferring the presidency from one party to the other without an election.”). It is cabinet officer succession, as proposed by the Amars and Chafetz, which “incentivizes” wiping out the entire statutory line of succession. *See* 3 U.S.C. § 19(d) (2006). Cabinet officer succession might be some protection against the occasional assassin, but it risks turning a catastrophic attack on the United States into a calamity from which recovery by regular, legal, constitutional, and timely means may be an impossibility. In other words, cabinet succession provides for party continuity (in some circumstances) at the risk of introducing short term chaos and long term political disunion. It bears noting that our current legal framework providing for legislative officer succession was the brainchild of President Truman, the only President to order a nuclear attack on an enemy nation. Is the risk we face today not John Wilkes Booth, but a dirty nuclear bomb the size of a suitcase? *Incentivizing? Are not Chafetz and the Amars fighting the last war?*

the incoming President and Vice President are killed (or otherwise unable to qualify for any reason) any time between the date of the general popular election until the new President's first cabinet officer is confirmed. That is more than several months. In such a situation, the acting presidency will fall to the first cabinet officer in the line of succession from the *outgoing administration*.<sup>81</sup> Such an officer may be part of an administration that has been thoroughly rejected at the polls (in primaries or in the general election) and/or of a party different from the President-elect.

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<sup>81</sup> See, e.g., Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1 (repealed by Presidential Succession Act, 3 U.S.C. § 19 (1947)). There is no complexity here. In a regime of strict cabinet succession, if the new administration has not yet installed any officers in the line of succession, then in the event of a double vacancy, the acting presidency falls to lame duck officers from the out-going administration (if we are lucky) or to *no one at all*. Cf. John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 1006 (2004) ("Finally, one should consider the case of a terrorist attack that kills the President-elect and Vice President-elect shortly before they take office. In all of these cases, Cabinet succession is *impossible*, because the new Cabinet (that of the President-elect) is officially nominated and confirmed only after the new President takes office." (emphasis added)); Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV. 67, 90 (2010) ("If there is no President-elect or Vice President-elect, there is no incoming Cabinet. The only Cabinet is the outgoing one, which may be associated with an administration just rejected at the polls. It would make no sense to designate an outgoing Cabinet officer as acting President."); Goldstein, *supra* note 42, at 1024 (same). *But cf.* Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 225 (1994) (noting that if after the inauguration, both the President and Vice President "die together, then congressional legislation—the Presidential Succession Act—kicks in and provides the rules of succession, pursuant to the explicit invitation of Article II"); *id.* at 226 (same, but discussing the period between Congress's counting the electoral votes and the inauguration); *id.* at 228 (same, but discussing the period between the meeting of the electors and prior to Congress's counting the electoral votes, and, further, making the analysis subject to proposed statutory reforms); *id.* at 233 (same, but discussing the period after the popular election but prior to the electors' meeting). Professor Amar is correct, but only under a regime permitting legislative officer succession (as does the current succession statute) or something akin to it. Professor Amar fails to clearly flag to the reader the inherent structural defects associated with Cabinet succession—a reform which he has supported throughout his many publications. See, e.g., Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 23 (2010) ("This rule of Cabinet succession (which was in place for sixty years before Congress changed the law in 1947) helps *maximize* the policy continuity between the President that Americans voted for on Election Day and the statutory successor who ends up taking his place." (emphasis added)); *id.* at 29 ("If Americans elect a President of one party, why should we get stuck with a President of the opposite party [under our current system of legislative officer succession]—perhaps (as in the fictional *The West Wing*) a sworn foe of the person we chose? Cabinet succession would *avoid* this oddity." (emphasis added)). *But see Presidential Succession Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 52 (2004) (statement of Akhil Amar: "And I do think in very, very highly unusual situations where you really try to have Cabinet succession, officer succession, and everyone's gone, I think only a real constitutional zealot, maybe without good judgment, would say you can't have congressional leaders in that circumstance because the Constitution really isn't a suicide pact, and so I think I appreciate sort of the prudence involved there."). Has Professor Amar said *anything* like this in *any* of his journal articles or books, including even those published *after* his 2004 testimony?

But wait, it gets worse. Much worse. If the President and Vice President are killed any time between inauguration day and prior to the confirmation of the new administration's first cabinet officer, then there are *no* officers in the line of succession because the officers in the line of succession from the prior administration will either have resigned or have been removed (by the outgoing President) prior to inauguration day.<sup>82</sup> In these circumstances, the continuity of the Executive Branch of the government of the United States would be at an end. *Strict cabinet succession risks the end of legitimate constitutional government.*<sup>83</sup>

The chief purpose of legislative officer succession is to enlist the surviving institutions of government—the House and the Senate—in recreating those

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<sup>82</sup> See L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL34722, PRESIDENTIAL TRANSITIONS: ISSUES INVOLVING OUTGOING AND INCOMING ADMINISTRATIONS 27 (2008) (“By tradition, appointees to these positions usually step down when the appointing President leaves office, unless asked to stay by the President-elect.”); cf. JOHN P. BURKE, PRESIDENTIAL TRANSITIONS: FROM POLITICS TO PRACTICE 395 (2000) (“[E]very new President encounters a ‘corporate headquarters’ in which the top positions are vacant and most offices empty.”). See generally Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009). As a matter of law, cabinet members of a prior administration do not retain their offices until their successors take office. Each officer’s hold on his office is at the discretion of the out-going President (if there is one) until the new administration begins, and, thereafter, at the discretion of the new President (if there is one). See HALCHIN, *supra* at 27. The modern tradition is that such officers resign prior to the start of a new administration. A President might leave an officer in office when requested by the incoming administration, particularly where the two Presidents (i.e., the incumbent and the President-elect) are of the same party. If an officer refuses to resign, a President may threaten to remove the officer in order to elicit the expected response. The continuity problem is not solved by leaving a few holdover cabinet members in office during the transition. Should the holdovers die (or be impeached, or otherwise become disabled), there is no way to appoint other officers into the line of succession absent a President or acting President. The problem inheres in cabinet succession itself: would-be successors must be appointed by a President, who *ex hypothesi* no longer exists.

<sup>83</sup> See *supra* note 81 (collecting authority); 2 ANNALS OF CONG., *supra* note 77, at 1914 (recording January 13, 1791 debate on a proposed bill on presidential succession, including statement by Congressman Giles, who stated: “[I]t was the duty of the House to make provision for the accident [of a double vacancy] before it occurred. If it was left till the case actually took place, it would then be too late to think of remedying the evil; for it was to be provided by a Legislative act . . . and could therefore not be obtained when the chair was vacant. Then, if the event should happen before it was provided for, there would be, he conceived, *an end to this Government.*” (emphasis added)); Silva, *supra* note 9, at 452 (“If calamity had befallen [President] Arthur [after the death of President Garfield, who Arthur succeeded] or [President] Cleveland [after the death of Vice President Hendricks] before the organization of Congress, there would have been no successor and no constitutional means of selecting one [at least until the House and/or Senate assembled, organized, and chose a presiding officer].”); cf. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 48 (Philadelphia, H.C. Carey & I. Lea 1825) (“[O]ne difficulty not provided for, may possibly some day occur. If more than three [candidates] of those highest in [electoral] votes for president, or [more] than two of those voted for as vice president should be equal in number of [electoral] votes, it is not directed [by Article II or the Twelfth Amendment] how the selection [of President and/or Vice President] shall be made.”).



institutions which have failed (e.g., the presidency).<sup>84</sup> And even if the House and Senate chambers were destroyed and all the members killed in a natural catastrophe or act of war, the membership could be replaced in relatively short order under well-established procedures.<sup>85</sup> This is not so for the cabinet line of succession: once it and the President and Vice President are gone, it is beyond our ability to effect timely and legally valid repair (at least until the next regularly scheduled presidential election).<sup>86</sup>

Burke, as usual, put it best:

The two principles of conservation and correction operated strongly at the two critical periods of the Restoration and Revolution, when England found itself without a king. At both those periods the nation had lost the bond of union in their ancient edifice; they did not, however, dissolve the

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<sup>84</sup> The problems associated with strict cabinet succession cannot be reliably ameliorated by ad hoc presidential elections, which, assuming that they are carried off without a hitch, might fill out the remainder of the presidential term. During the interregnum, the nation is still left rudderless.

Nor can the problems associated with strict cabinet succession be resolved through the intermediary of ad hoc presidential designees added to the line of succession. First, the President can only make those appointments after he takes office, not before. Second, even if the President-elect were granted such a power (via constitutional amendment or statute), this leaves a gap between final action by the electors (or by the House should the election fall to the House) and action by the President-elect (or President should the decision fall to the House and the House delays making a decision until past January 20—when the new administration should have come into office). To put it another way, any system of succession based on fixed lists (e.g., cabinet succession) can fail—assuming a big enough war or series of accidents or both. If everyone on the list of successors is dead (or fails to qualify), legitimate constitutional government in the Executive Branch is at an end. Likewise presentment of bills must entirely cease. The benefit of legislative officer succession is that at some point the House or Senate can reconstitute itself (if needs be) and one of those bodies can anoint a successor acting-President. The choice of the (reconstituted) House or Senate may not be of the same party as the President-elect, but our legal institutions will go on in a recognizably constitutionally valid way.

<sup>85</sup> See, e.g., Sanford Levinson, Comment, *Assuring Continuity of Government*, 4 PIERCE L. REV. 201, 201-02 (2006), 4 U.N.H. L. REV. 201, 201-02 (2006) (explaining that, under the Seventeenth Amendment, Senate vacancies, from “catastrophic disaster” or otherwise, can be filled by state governors, and concluding that “the Senate could be back up to its full strength . . . within a very few days”). A state governor may only fill Senate vacancies if authorized to do so by his state legislature. See U.S. CONST. amend. XVII, § 2. Unfortunately, several state legislatures have not granted their governor statutory authority to fill Senate vacancies. See Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 NW. U. L. REV. (forthcoming July 2013) (manuscript at 55 n.173) (on file with author), available at [http://papers.ssrn.com/abstract\\_id=1915673](http://papers.ssrn.com/abstract_id=1915673) (“Oregon, Rhode Island, and Wisconsin have clear laws prohibiting appointments, and Alaska . . . appears to have repealed its law governing appointments, though the issue is not yet resolved.”). In the House, the prevailing view is that vacancies may only be filled via election. See Levinson, *supra* at 203 & n.13 (citing Article I, Section 2, Clause 4, i.e., the Writs of Election Clause). However, such House elections could be held on an expedited basis; they need not wait for the regularly scheduled biennial election.

<sup>86</sup> See *supra* note 84.

whole fabric. *On the contrary, in both cases they regenerated the deficient part of the old constitution through the parts which were not impaired.* They kept these old parts exactly as they were, that the part recovered might be suited to them. They acted by the ancient organized [assemblies] in the shape of their old organization . . . .<sup>87</sup>

Thus, interpreting the word *Officer* (standing alone) as used in the Succession Clause<sup>88</sup> (as opposed to *Officers . . . under the United States* as used elsewhere in the Constitution) to include the Speaker and President pro tem facilitates orderly succession, with some (albeit less than perfect) democratic credentials.

#### V. A TURN OF THE TIDE

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.

—Akhil R. Amar and Vikram D. Amar, *Presidential Succession* (1995)<sup>89</sup>

[Professor Dionisopoulos’] reading, however, is *sloppy* . . . [As] the disqualification of any person “holding any Office under the United States” makes *clear*, the Constitution uses the phrase “Office . . . under the United States”—and its textual cousins, “Officers of the United States,” “civil Officers of the United States,” and “Office of Trust or Profit under the United States,”—as a term of art to refer to executive and judicial positions only.

—Josh Chafetz, *Democracy’s Privileged Few* (2007)<sup>90</sup>

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<sup>87</sup> BURKE, *supra* note 69, at 29-30 (emphasis added).

<sup>88</sup> U.S. CONST. art. II, § 1, cl. 6 (“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.” (emphasis added)).

<sup>89</sup> See Amar & Amar, *supra* note 9, at 114-15; see also PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY 39 (Second Report of the Continuity of Government Comm’n June 2009) (“The Constitution allows Congress to specify which ‘Officers’ shall be in the line of succession, a term that *almost certainly* refers to executive branch officials.” (emphasis added) (footnote omitted)). But see Schatz, *supra* note 13, at 157-58 (“The *obvious* distinction between ‘Office’ and ‘Office of Profit or Trust’ implies strongly that the framers did not intend to bring all U.S. Government employment within the [Emolument] [C]lause’s coverage.” (emphasis added)).

<sup>90</sup> CHAFETZ, *supra* note 13, at 280 n.68 (second set of ellipses in the original) (emphasis added) (emphasis in the original omitted) (citations omitted) (citing Dionisopoulos, *supra* note 23, at 108 n.16, 111); see also *id.* at 171 (rejecting Dionisopoulos’ position as “unpersuasive”). Compare Amar & Amar, *supra* note 9, at 134 (“Several members of Congress argued against the constitutionality of the 1947 [succession] law during the legislative debates, but the bill’s supporters relied on an opinion by Acting Attorney General Douglas McGregor, who concluded that congressmen were ‘Officers’ within the meaning of the Succession Clause. McGregor’s reasoning is—not to mince words—*shoddy*.” (emphasis

added) (footnote omitted)), and *id.* at 134 n.131 (“Correct interpretation [of the Constitution] requires careful examination of the Constitution itself, and this McGregor failed to offer.”), with *id.* at 114-15 (affirming that *officers of the United States* and *officers under the United States* and *officers under the Authority of the United States* are “essentially synonymous”). For some reason, issues touching on succession and impeachment seem to elicit unusually strong language. See, e.g., AMAR, *supra* note 9, at 568 n.53 (“Berger’s argument [with regard to the impeachability of Senators] made a *hash* of constitutional text, structure, and precedent.” (emphasis added)); *id.* at 545 n.45 (denominating Berger’s view as only “*somewhat* cranky” (emphasis added)); Vikram Amar, *supra* note 42, at 406 n.7 (“[L]et me set the record straight on a non-truth [!] Ms. Coulter asserts about the impeachability of Congresspersons. Notwithstanding her suggestions . . . House members and Senators are not ‘officers’ within the meaning of the impeachment clauses of the Constitution and are thus not impeachable.” (citing, somewhat unhelpfully, Amar & Amar, *supra* note 9, at 115-16)); Steven G. Calabresi, Rebuttal, *Does the Incompatibility Clause Apply to the President?*, in Tillman & Calabresi, *supra* note 10, at 141 (affirming that a position with which he disagrees is “*utterly* implausible” (emphasis added)); Robert H. Bork, *Read the Constitution: It’s Removal or Nothing*, WALL ST. J., Feb. 1, 1999, at 21A (describing views on impeachment with which he disagrees as “grotesque” and “preposterous,” and further describing Professor Isenbergh’s position as “fanciful”). Like Chafetz, I too look to English literature for understanding. Cf. 7 J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS 497 (2007) (“Whether it needs to pass by murder, I do not know. Its history is bloody, but that may be simply due to the fact that it is such a desirable object, and *arouses such passions . . .*” (emphasis added) (emphasis in the original omitted)); 2 J.R.R. TOLKIEN, THE LORD OF THE RINGS: THE TWO TOWERS 669 (50th ann. ed. 2004) (1954) (“[I]t is a mighty heirloom of some sort, and such things do not breed peace among confederates, not if aught may be learned from ancient tales.”).

For example, recently, Professor Saikrishna Prakash objected to my asserting that historically Presidents and Vice Presidents are not issued commissions under the Commissions Clause. Prakash wrote: “That *no physical evidence* [Tillman adding—*as opposed to?*] of such a commission [granted to a President or Vice President] exists, however, certainly does not *prove* that the President never issued one.” Prakash, *supra* note 45, at 148 (emphasis added). Does not the burden of proof lie with Professor Prakash to show that such artifacts exist, as opposed to my showing that they do not? Cf. Gary Lawson, *Optimal Specificity in the Law of Separation of Powers: The Numerous Clauses Principle*, 124 HARV. L. REV. F. 42, 47 (2011) (“It is a *basic* principle of epistemology that he who asserts the existence of something bears the burden of proof.” (emphasis added)); *id.* at 47 n.20 (“There is good warrant for this principle. The existence of any entity has consequences, and one can look for those consequences as evidence of the entity’s existence. Nonexistence, however, does not always have consequences, so the absence of evidence is *prima facie* proof of nonexistence.”). Is Professor Prakash’s attempt to shift the burden of proof reasonable?

Hermione Granger: “Well, how can that be real”?

Xenophilius Lovegood: “Prove that it is not . . . .”

Granger: [She] looked outraged. “But that’s—I’m sorry, but that’s completely ridiculous! How can I *possibly* prove it doesn’t exist? . . . I mean, you could claim that *anything’s* real if the only basis for believing in it is that nobody’s *proved* it doesn’t exist!”

Lovegood: “Yes, you could . . . . I am glad to see that you are opening your mind a little.”

7 ROWLING, *supra* at 411-12 (emphasis in the original). *But see supra* note 52 (collecting authority tending to establish, but not proving, that such commissions do not and have never existed). Albeit, historically, strong language is no stranger to law journals. See, e.g., Edward W. Bailey, *Dean Pound and Administrative Law—Another View*, 42 COLUM. L. REV. 781, 802

In England, ‘office of profit *from* the Crown’ was understood to be narrower than ‘office of profit *under* the Crown’ . . . .

—John Waugh, *Disqualification of Members* (2005)<sup>91</sup>

Essentially, the distinction between Chafetz’s (and the Amars’) views and my own position comes down to this. Those in the academic consensus believe the Constitution embodies a hard “textual” distinction between “officers” and members of Congress. I agree with that position. But with this caveat. The distinction put forward by those in the consensus is merely an exemplar of the higher order structural division embodied in the constitutional text between: on the one hand, constitutionally mandated officials (i.e., elected positions, members of Congress, Speaker of the House, Senate President pro tem, Vice President, and President—i.e., those individually or collectively presiding over departments or branches of the government of the United States, persons also colloquially known as *magistrates* or

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(1942) (“The extent of [Professor Kenneth Culp Davis’s] accomplishment in that enterprise . . . is to demonstrate his own agility in *avoiding contact with unpleasant facts.*” (emphasis added)); Raoul Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783, 808 (1996) (“Professor Davis assumes that bare restatement of his position suffices to still criticism, and he stubbornly avoids the uncomfortable issues. But assertion *ex cathedra* cannot take the place of reasoned refutation, even when it comes from Professor Davis.” (footnote omitted) (citing Bailey, *supra*)).

<sup>91</sup> John Waugh, *Disqualification of Members of Parliament in Victoria*, 31 MONASH U. L. REV. 288, 297 (2005) (“In England, ‘office of profit *from* the Crown’ was understood to be narrower than ‘office of profit *under* the Crown’; appointment to an office from the Crown was made personally by the monarch [Tillman adding—*or by the monarch’s constitutional representative acting under delegated authority, the latter method having particular salience in the colonies.*]” (emphasis in the original)); *see also* CASES OF CONTROVERTED ELECTIONS, DETERMINED IN COMMITTEES OF THE HOUSE OF COMMONS, *supra* note 65, at 591-92 (reproducing committee debate from disputed Galway election of 1838, where Mr. Austin (counsel for the sitting member who prevailed) distinguished offices “*from* the Crown” from offices “*under* the Crown” and cited statutes from the reign of Queen Anne, William IV, and George III (emphasis added)); *cf.* Orders of the Day: Report from Select Committee on the Clare County Writ considered (House of Commons Debate Apr. 25, 1879), *available at* <http://yourdemocracy.newstatesman.com/parliament/orders-of-the-day/HAN814899>. Compare ANNE TWOMEY, THE CONSTITUTION OF NEW SOUTH WALES 437 (2004) (suggesting that *officers under the Crown* encompasses, *inter alia*, positions subject to some “degree of supervisory power by the Crown over the office”), *id.* at 438 (suggesting that an *officer under the Crown* is one “appointed by” or “removable by” a “representative of the Crown,” and “accountable to the Crown and subject to the supervision of an officer appointed by the Crown”), *id.* (“[O]ne would assume that [an elective office] is not . . . held ‘under the Crown.’”), and THE FEDERALIST NO. 72 (Alexander Hamilton), *supra* note 4, at 386 (arguing that “[t]he persons, therefore, to whose immediate management these different [administrative] matters are committed . . . ought to be subject to [the President’s] superintendence”), with THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 4, at 379 (“[E]very *magistrate* [Tillman adding—as opposed to *officer*] ought to be *personally responsible* for his behaviour in office . . . .” (emphasis added)), and THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 4, at 376 (“If it be a *public trust* or *office* in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity.” (emphasis added)).

holders of a *public trust*<sup>92</sup>), and, on the other hand, appointed or statutory offices (i.e., offices created or regularized by Congress, or offices which Congress could terminate,<sup>93</sup> including both *officers of the United States* and *legislative officers chosen by either house of Congress*, such as the Secretary of the Senate and the Clerk of the House, collectively the *Officers . . . under the United States*).<sup>94</sup> I would

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<sup>92</sup> See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 540 (2d ed. 2001) (defining “magistrate” and noting “the word . . . once referred to the official first in rank *in a branch of government*” (citing Justice Cardozo) (emphasis added)); *supra* note 48 (discussing *magistrates* and *departments*) and *infra* note 94 (discussing *magistrates* and holders of *public trusts*) and accompanying text; see also THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 4, at 379 (“[E]very *magistrate* ought to be personally responsible for his behaviour in office . . .” (emphasis added)); AMAR, *supra* note 9, at 558 n.10 (“Note the use of the juristic word ‘Magistracy’ to describe the executive, a common mode of expression and thought in 1787.”); *id.* at 572 n.21 (noting that the “eighteenth-century world [was] sensitive to fine gradations of formal title”); *cf.*, e.g., TENCH COXE (*nom de plume* AN AMERICAN CITIZEN), AN EXAMINATION OF THE CONSTITUTION FOR THE UNITED STATES OF AMERICA NO. 2 (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 140, 146 (Paul Leicester Ford ed., Brooklyn, no publisher 1888) (“The office of the President, a Senator, and a Representative, and every other place of power or profit, are therefore open to the whole body of the people.”). Notice how Coxe gives priority to the elected officials.

<sup>93</sup> The intuition here is that although a first-in-time federal statute may terminate a non-member legislative office, a next-in-time single-house order, rule, resolution, or vote can recreate the office and appoint a person to that office. Notwithstanding the subsequent appointment, the statute still may implement the rule of recognition by which third-parties (e.g., the other House, the other branches, state governments, and private persons) will recognize such a legislative office and the scope of the appointee’s powers. Thus, if a federal statute has the potential to reduce a non-member legislative office to a nullity vis-à-vis the world beyond that officer’s house, its members, employees, and property, then the office is an *office under the United States*. Compare *Anderson v. Dunn*, 19 U.S. 204, 225-32 (1821) (recognizing, based on practical and historical considerations, despite the lack of any express constitutional grant of authority, that the House of Representatives possesses an inherent power (while the House remains in session) to imprison a third-party or citizen for contempt), with THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES § 3.5—*Privilege*, at 8 (Government Printing Office 1993) (Washington City, Samuel Harrison Smith 1801) (suggesting that a federal statute could regularize each house of Congress’s purported inherent contempt power). On the other hand, if the Constitution vests powers in an office, and those powers are not defeasible by federal statute, then the office is a *public trust under the United States*. Looked at this way, one could argue that both federal electors and the Chief Justice of the United States hold *public trusts under the United States*.

<sup>94</sup> If as Chafetz and the Amars argue *officers of the United States* is coextensive with *officers . . . under the United States*, then the Secretary of the Senate and the Clerk of the House (and other non-member non-presiding congressional officers chosen by either house of Congress) are eligible to be chosen presidential electors. See U.S. CONST. art. II, § 1, cl. 2 (Elector Incompatibility Clause: “[N]o Senator or Representative, or Person holding an *Office of Trust or Profit under the United States*, shall be appointed an Elector.” (emphasis added)). This would render the selection of the president both dependent on Congress, and on officers who lack independence. See AMAR, *supra* note 9, at 143 (“If . . . a president were allowed to stand for reelection, he needed to be allowed to make his case to a body of electors *independent* of Congress.” (emphasis added)); Kesavan, *supra* note 48, at 130 (“The purpose of the Elector Incompatibility Clause is to *ensure* the independence of Electors from the

Federal Government.” (emphasis added)). Compare JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 92 (Philadelphia, Hogan & Thompson 1833) (noting that the purpose of the Elector Incompatibility Clause is “[t]o prevent any improper influence from being exerted, by the [President] in office”), with 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (N.Y., O. Halsted 2d ed. 1832) (noting that the purpose of the Elector Incompatibility Clause is “to prevent the [President] in office, at the time of the election, from having any improper influence on his re-election, by his *ordinary agency in the government*” (emphasis added)). The focus of the exclusion relates to the President’s ability to sway (other) electors through his control over other their positions in the government. Once those dependent or affiliated with the President are excluded (i.e., *officers of the United States*), also excluding the President serves no purpose traditionally associated with the clause. See also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 745, at 532 (Boston, Hilliard, Gray, and Co. abridged ed. 1833) (noting that the purpose of the Elector Incompatibility Clause is to exclude those who “might be suspected of too great a devotion to the president”—again the exclusion would not seem to incorporate the President). An interpretation of the Constitution—such as Chafetz’s and the Amars’—permitting presidential election to be dependent on congressional officers strikes me as particularly troubling. See Vikram Amar, *supra* note 77 (“[T]he framers wanted the President ordinarily to have a power base independent of Congress, so he could stand up to the legislature; that is why Congresspersons cannot serve as presidential electors in the so-called ‘electoral college.’” (emphasis added)); see also NOTES OF ROBERT YATES, reprinted in 1 FARRAND’S RECORDS, *supra* note 64, at 380 (recording George Mason’s June 22, 1787 contribution to debate on the then-evolving predecessor to Article 1, Section 6, Clause 2: “It seems as if it was taken for granted, that all offices will be filled by the *executive*, while I think many will remain in the gift of the *legislature*. In *either* case, it is necessary to shut the door against corruption.” (emphasis added)); cf. JOHN A. SCHUTZ, LEGISLATORS OF THE MASSACHUSETTS GENERAL COURT, 1691-1780: A BIOGRAPHICAL DICTIONARY 65 (1997) (“Roland Cotton was a clerk for many years—sometimes as a member . . . . From 1766, Samuel Adams was both a member and clerk of the House . . . .”); WILLIAM TUDOR, LIFE OF JAMES OTIS 271 (1823) (“[Otis] grew conspicuous after his admission to the [Massachusetts lower house], of which he was chosen clerk; it being the practice to take that officer from among the members.”).

Whether or not the Chief Justice of the United States should be characterized as a holder of a *public trust under the United States* or as an *officer under the United States* is a peculiar and complex question, full development of which will have to wait a wholly separate article. My tentative view is that the office of Chief Justice of the United States, the constitutional office, sits atop or presides over the Judicial Branch, and, is, therefore, a *holder of a public trust under the United States*. See U.S. CONST. art. 1, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the *Chief Justice* [Tillman adding—*not Chief Judge*] shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.” (emphasis added)). By contrast, the office of Chief Judge of the Supreme Court of the United States is a statutory office, and, is, hence, an *officer under the United States* and an *officer of the United States*. See U.S. CONST. art. 2, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, *Judges* [Tillman adding—*not Justices*] of the *supreme Court*, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .” (emphasis added)); Todd E. Pettys, *Choosing a Chief Justice: Presidential Prerogative or a Job for the Court*, 22 J.L. & POL. 231, 233 (2006) (noting that “[t]he Constitution says nothing about how the Chief Justice is to be chosen”—which might imply that the Chief Justice is not an “officer of the United States”); Edward T. Swaine, *Hail, No: Changing the Chief*, 154 U. PA. L. REV. 1709 *passim* (2006) (same). The confusion between

further argue that it is precisely because *Officers . . . under the United States* language does not reach the President and Vice President and members of Congress that it was necessary to add language within the Religious Test Clause speaking to *public Trust[s] under the United States*—the latter *public trust* language accommodated the presidency, vice presidency, and members of Congress (and, perhaps, federal electors).<sup>95</sup>

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Chief Justice (of the United States) and Chief Judge (of the Supreme Court of the United States) arises, in part, because the same person has always held both offices. *See also* Mary E. Crock, Note, *Abebe v. Commonwealth Minister for Immigration & Multicultural Affairs v. Eshetu*, 24 MELBOURNE U. L. REV. 190, 195 (2000) (“The phrase ‘officer of the Commonwealth’ has been read broadly to include everyone from Ministers of the Crown (and their delegates) to judges of lower federal courts.”); *cf.* Luke Beck, *The Constitutional Prohibition on Religious Tests*, 35 MELBOURNE U. L. REV. 323, 347 & n.172 (2011) (peer reviewed) (explaining, with respect to a provision of the Australian Constitution granting judicial review jurisdiction to the High Court with respect to decisions made by “officers of the Commonwealth,” that “High Court judges are not officers of the Commonwealth” and therefore the jurisdiction does not extend to decisions made by members of the High Court in their individual or collective capacity (citing *Federated Engine Drivers’ & Firemen’s Ass’n of Australasia v Colonial Sugar Ref. Co.* (1916) 22 CLR 103, 109 (Austl.) (Griffith, C.J.); *id.* at 117 (Isaacs, Gavan Duffy, and Rich, JJ.)). It is worth noting that Beck also affirms that “it could hardly be doubted that . . . [each member of the High Court] hold[s] an office *under* the Commonwealth.” Beck, *supra* at 24. *See generally* Luke Beck, Note, *Williams v Commonwealth, School Chaplains and the Religious Tests Clause of the Constitution*, 38 MONASH U. L. REV. 271, 290 & n.130 (2012); Plaintiff’s Submissions in Reply to the Submissions of the Interveners, *Williams v Commonwealth*, No. S307 of 2010 (Austl. July 28, 2011), available [http://www.hcourt.gov.au/assets/cases/s307-2010/Williams\\_Plf\\_Repy-int.pdf](http://www.hcourt.gov.au/assets/cases/s307-2010/Williams_Plf_Repy-int.pdf) (collecting sources discussing officers *of* and *under* the Commonwealth).

<sup>95</sup> *See* U.S. CONST. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any *Office* or *public Trust under the United States*.” (emphasis added)); THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 4, at 376 (“If it be a *public trust* or *office* in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity.” (emphasis added)); *see also* Letter from George Washington to Eléonor François Élie, Comte de Moustier (May 25, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON 333, 334 (John C. Fitzpatrick ed., 1939) (“The impossibility that one man should be able to perform all the great business of State, I take to have been the reason for instituting the great Departments, and appointing *officers* therein, to assist the supreme *Magistrate* in discharging the duties of his *trust*.” (emphasis added)). The Washington–Élie letter is widely cited in legal materials. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010) (Roberts, C.J.) (quoting from the same passage of the Washington-to-Élie letter); AMAR, *supra* note 9, at 193 (same); Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647, 658-59 (1996) (same); Calabresi & Prakash, *supra* note 48, at 637 (same); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1475-76 (1997) (same); *cf.* 9 STATE OF NEW YORK: MESSAGES FROM THE GOVERNORS, 1892-1898, at 515 (Charles Z. Lincoln ed., Albany, J.B. Lyon Co. 1909) (reproducing May 23, 1894 veto message of Governor Roswell P. Flower, which stated: “That one who holds the power to appoint a *public officer*, to remove him at will and appoint his successor, to fix his salary and to change it from time to time, *holds a public trust* will not be disputed . . .”—placing the *officers* below the holders of *public trusts* (emphasis added)); Kesavan, *supra* note 48, at 133 (noting that the *public trust* language of the Religious Test Clause is unique to that clause, and opining that the Constitution’s *public trust* language in that clause was intended to accommodate federal electors, as well as members of Congress). On one occasion James Madison intimated that *officer* and *officer of the United States* extended only to statutory

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officers. *See, e.g.*, 2 FARRAND'S RECORDS, *supra* note 64, at 344-45 (recording Madison's Philadelphia Convention entry for August 20, 1787: "And to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the Government of the U.S. or any department or *officer* thereof.' Mr. Madison and Mr. Pinkney [sic] moved to insert between 'laws' and 'necessary' 'and establish all offices.' [I]t appearing to them liable to cavil that the latter was not included in the former. Mr. Govr. Morris<sub>[,]</sub> Mr. Wilson, Mr<sub>[,]</sub> Rutledge [sic] and Mr. Elseworth [sic] urged that the amendment could not be necessary. On the motion for inserting 'and establish all offices' . . . [Ayes -- 2; noes 9.]" (emphasis added) (footnote omitted)).

For what appears to be a period document distinguishing *officials at the apex of (state or federal) government authority* (i.e., *magistrates*) from mere *officers* see Sabbath Prayer for the Government, The Congregation Mikveh Israel, Philadelphia, Pennsylvania (founded 1740):

May he who granteth deliverance unto nations and understanding unto their leaders, whose kingdom is an everlasting kingdom, who delivered His servant David from the destructive sword, who maketh a way in the sea and a path in its mighty waters, bless, preserve, guard and assist the *President* and *Vice-President* of the United States, the *Senate* and *House of Representatives* [in Congress assembled],\* the *Governor* of this Commonwealth, the members of the *Legislature*, the *Mayor* and other *constituted authorities* in this City.

May the Supreme King of kings in His infinite mercy preserve them, grant them life, and deliver them from all manner of trouble and danger. May the Supreme King of kings in His infinite mercy inspire them and *all their counselors and officers* with good towards us and all Israel, our brethren.

\*This phrase is recited only when Congress is actually in session. *See* Letter Insert from Rev. Albert E. Gabbai of Mikveh Israel to Seth Barrett Tillman (circa Nov. 25, 2008) (emphasis added), available at [http://works.bepress.com/seth\\_barrett\\_tillman/164/](http://works.bepress.com/seth_barrett_tillman/164/) (click, in *Related Files*, "letter\_insert\_mikveh\_israel.pdf").

For a period British example, distinguishing those at the *apex of political authority* from mere *subordinate officers*, compare 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW, *Offices and Officers* 718, 719 (London, J. Worrall et al. 3d ed. 1768) ("The King is the universal Officer and Disposer of Justice within this Realm, from whom all *others* are said to be derived . . ." (emphasis added) (footnote omitted)), with 4 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND, *Officer* 239 (London, H. Woodfall & W. Strahan 1766) ("The King is the Fountain of all Power and Authority, and by his prerogative has the Nomination of all Officers originally." (emphasis added)), and 2 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES 271 (St. George Tucker ed., Philadelphia, W.Y. Birch & A. Small 1803) (circa 1765) ("The king is likewise the fountain of honour, of office, and of privilege: and this in a different sense from that wherein he is stiled the fountain of justice; for here he is really the parent of them."); *see also* GARNER, *supra* note 92, at 540 (defining "magistrate" and noting "the word . . . once referred to the official first in rank in a branch of government" (citing Justice Cardozo) (emphasis added)); *cf.* *The Useless Electors*, N.Y. TIMES, June 19, 1905, available at [http://works.bepress.com/seth\\_barrett\\_tillman/164/](http://works.bepress.com/seth_barrett_tillman/164/) (click, in *Related Files*, "USELESS\_ELECTORS\_NYT.pdf") ("In every [p]residential campaign it happens, as it happened in this State last Fall, that *Directors or officers* of [n]ational banks are placed upon the list of Electors. It is of course absurd to suppose that a bank Director holds an office of profit or trust under the Government, but it is the uniform practice of party committees to avoid all doubt and danger by substituting other names as soon as the supposed disqualification is discovered." (emphasis added)). The same ambiguity of language appears in modern American legal literature. Compare Calabresi, *Reply to Professor Ackerman*, *supra* note 67, at 480 (noting that "the Constitution of 1787 created a unitary executive, provided for



Here, I should like to pose a question to the reader and to those in the academic consensus. The Religious Test Clause provides: “[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”<sup>96</sup> There is very little scholarship discussing the Religious Test Clause, much less the meaning or scope of “public trust under the United States.”<sup>97</sup> Given that nearly

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no executive council, and gave the president the power to nominate *all* officers of the United States and the power to make recess appointments” (emphasis added), with Calabresi, Response, *Political Question*, *supra* note 1, at 160 (“The [‘executive and judicial Officers . . . of the United States’ language within the Oaths and Affirmations] Clause is *clearly* referring to the President . . .” (emphasis added)). And the same ambiguity of language appears in ancient legal systems too. Compare *Deuteronomy* 16:18 (The Jerusalem Bible 232) (Harold Fisch ed., 1989) (translating *Deuteronomy* 16:18 as: “Judges and officers shalt thou make thee in all thy gates . . .” (emphasis added)), and *Deuteronomy* 16:18 (The New Oxford Annotated Bible 236) (Herbert G. May & Bruce M. Metzger, eds., rev. std. vers. 1973) (translating *Deuteronomy* 16:18 as: “You shall appoint **judges** and **officers** in all your towns . . .” (emphasis and bold added)), with 5 R. ABRAHAM BEN ISAAH & R. BENJAMIN SHARFMAN, *THE PENTATEUCH AND RASHI’S COMMENTARY: A LINEAR TRANSLATION INTO ENGLISH* 157 (1977) (recording Rashi’s commentary explaining *Deuteronomy* 16:18 as: “[J]udges who decide the law; and officers are those who govern the people after their command (i.e., of the judges) . . .”); compare 1 TRACTATE SANHEDRIN 2a<sup>3</sup> (Rabbi Hersh Goldwin et al. eds., 1993) (“The original Great Sanhedrin was composed of seventy Elders with Moses *over* them. This totals seventy-one judges. R’Yehudah says: The Great Sanhedrin was composed of seventy judges.” (emphasis added) (emphasis and Hebrew omitted) (footnote omitted)), with *id.* at 16b<sup>4</sup> (“The dispute is based on the question of whether Moses was a member of the original Great Sanhedrin together with the seventy Elders.”), and *id.* at 16b<sup>4</sup> n.36 (noting that “[p]erhaps Moses was not an actual *member* of the court, and merely *presided* over them . . .” (emphasis in the original) (citing *Yad Ramah*, and *Chamra VeChayei*)). I am not suggesting that any Framers believed this material, but only that it was a literary tradition that they would have comprehended. See, e.g., AMAR, *supra* note 9, at 572 n.21 (noting that the “eighteenth-century world [was] sensitive to fine gradations of formal title”); cf. CONFUCIUS, *THE ANALECTS* (circa 500 B.C.E.), available at <http://classics.mit.edu/Confucius/analects.4.4.html> (“Confucius said, ‘When good government prevails in the empire, ceremonies, music, and punitive military expeditions proceed from the [Emperor]. When bad government prevails in the empire, ceremonies, music, and punitive military expeditions proceed from the princes. When these things proceed from the princes, as a rule, the cases will be few in which they do not lose their power in ten generations. When they proceed from the great officers of the princes, as a rule, the case will be few in which they do not lose their power in five generations. When the subsidiary ministers of the great officers hold in their grasp the orders of the state, as a rule the cases will be few in which they do not lose their power in three generations.’”).

<sup>96</sup> U.S. CONST. art. VI, cl. 3.

<sup>97</sup> There is some scholarship discussing the Article VI Religious Test Clause, but no substantial discussion, Professor Destro and Mr. Kesavan excepted, discussing the scope of the clause’s *public trust* language. See *Torcaso v. Watkins*, 367 U.S. 488, 489 n.1 (1961) (Black, J.) (applying the First and Fourteenth Amendment, and finding it “unnecessary to consider [the] contention that [the Religious Test Clause] applies to state as well as federal offices”); *Newdow v. Eagen*, 309 F. Supp. 2d 29, 37-38 & n.5 (D.D.C.) (Kennedy, J.) (discussing standing requirements to assert a claim under the Religious Test Clause), *appeal dismissed*, No. 04-5195, 2004 WL 1701043 (D.C. Cir. July 29, 2004) (per curiam); *Idaho v. Freeman*, 507 F. Supp. 706, 729 (D. Idaho 1981) (Callister, J.) (“This [A]rticle VI religious test clause has received little, if any, attention from the courts . . .” (citing *Torcaso*, *supra*)); MORTON BORDEN, *JEW, TURK, AND INFIDEL* 44 (1984); Gerard V. Bradley, *The No*

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*Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 718-20 (1987); Daniel L. Dreisbach, *The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 J. OF CHURCH & STATE 261 (1996); Note, *An Originalist Analysis of the Religious Test Clause*, 120 HARV. L. REV. 1649 (2007); cf. Francis J. Beckwith, *The Court of Disbelief: The Constitution's Article VI Religious Test Prohibition and the Judiciary's Religious Motive Analysis*, 33 HASTINGS CONST. L.Q. 337 (2006); Winston E. Calvert, *Judicial Selection and the Religious Test Clause*, 82 WASH. U. L.Q. 1129 (2004); Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75 (2006); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-1873*, 18 J. CONTEMP. LEGAL ISSUES 153, 190 n.117, 236 n.257 (2009) (discussing scholarship opining on whether the Religious Test Clause was incorporated against the States by the Fourteenth Amendment). Compare *Silverman v. Campbell*, 486 S.E.2d 1, 2 (S.C. 1997) (Finney, C.J.) (affirming challenge under the Religious Test Clause to a state constitutional provision), and *Bradley, supra* at 718 (explaining that the Supreme Court's opinion in "*Torcaso*, if it is to be grasped at all, affects an 'incorporation' of [A]rticle VI . . ."), with *Torcaso v. Watkins*, 162 A.2d 438, 442 (Md. 1960) (Henderson, J.) (holding that the Religious Test Clause is "plainly inapplicable" to the States), *rev'd on other grounds*, 367 U.S. 488 (1961).

A few authorities discuss the Religious Test Clause's *public trust* language in some detail. See Memorandum for William P. Marshall, Deputy Counsel to the President, from Randolph D. Moss, Asst. Att'y Gen., Office of Legal Counsel, Re: Application of the Coreligionists Exemption in Title VII of the Civil Rights Act, at \*22 n.46 (Oct. 12, 2000), available at [http://works.bepress.com/seth\\_barrett\\_tillman/164/](http://works.bepress.com/seth_barrett_tillman/164/) (click, in *Related Files*, "MOSS\_DOJ\_MEMORANDUM.pdf") (noting that "[t]here is virtually no federal case law discussing what constitutes a 'public trust' for purposes of [A]rticle VI's religious test ban," and hypothesizing that it extends either to "Senators and Representatives" and/or to "any position or function the performance of which is subject to a *duty of loyalty* to the United States" (emphasis added)); Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 369 n.59 (1995) (arguing that *public trust under the United States* extends to elective positions); Kesavan, *supra* note 48 *passim* (hypothesizing that *public trust under the United States* extends to members of Congress and to federal electors). Notice how Assistant Attorney General Moss makes use of a concept well-developed in private law—the *fiduciary duty of loyalty*—to understand a public law concept, i.e., the meaning of *public trust under the United States*. See Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, in *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 144 (Gary Lawson et al. eds., 2010); Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J.L. & POL'Y 1 (2001); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004); see also 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); cf. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006). Compare Prakash, *supra* note 45, at 144 (objecting to using evidence from corporate law field in order to understand public law terms), with Prakash & Smith, *supra* note 9, at 107 (using evidence from trust law in order to understand public law terminology). See generally *R. v Boston* (1923) 33 CLR 386, 412 (Austl.) (Higgins, J.) ("He is a member of Parliament, holding a fiduciary relation towards the public, and that is enough."); Paul D. Finn, *The Forgotten "Trust": The People and the State*, in *EQUITY: ISSUES AND TRENDS* 131, 133 (Malcolm Cope ed., 1995) (noting that English judges brought public officials "into a fiduciary relationship with the public" (citing *R. v Bembridge*, (1783) 99 Eng. Rep. 679 (K.B.), 22 St. Tr. 1)); Robert French, Chief Justice of the High Court of Austl., Seventh Annual St. Thomas More Forum Lecture: Public Office and Public Trust (Canberra June 22,

every article, section, clause, and word of the Constitution has been examined in detail, the absence of commentary on the scope of the *public trust* language in the Religious Test Clause is surprising. This is particularly true in light of our society's deep fascination with church-state issues and the First Amendment. Some authors simply punt in regard to the scope of the *public trust* language.<sup>98</sup> The majority view posits that the *public trust* language extends to Members of Congress.<sup>99</sup> Recently, Vasana Kesavan suggested that it extends to Members of Congress and to federal electors.<sup>100</sup> *Either one of these interpretations poses an existential threat to those in the academic consensus with regard to the Constitution's language related to office and officer.* If the Amars, Chafetz, and Kesavan are correct—if *officers of the United States* is coextensive with *officers under the United States* and the President and Vice President are embraced by these two categories which (according to the consensus) extend only to executive and judicial officers—then no language in the Constitution extends the force of the Religious Test Clause to non-member non-presiding congressional officers, e.g., the Clerk of the House, the Secretary of the Senate, etc. That is a startling and deeply counter-intuitive result. One wonders if Professor Chafetz, Professor Akhil Amar, Professor Vikram Amar, or any of the other promoters of the academic consensus will own up to the difficulty in their position. Should not those in the consensus come forward with *some* theory as to the scope of the Religious Test Clause's *public trust* language? Is not this a minimal requirement for any structuralist or intratextual account of the Constitution's meaning as a whole?<sup>101</sup>

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2011), available at <http://www.hcourt.gov.au/assets/publications/speeches/currentjustices/frenchcj/frenchcj22jun11.pdf>.

<sup>98</sup> See AMAR, *supra* note 9, at 301 (“As a further gesture of religious inclusiveness and tolerance, Article VI forbade any ‘religious Test’ for any federal *office* or *post* . . . .” (emphasis added)). What is an *office*? What is a *post*? See also GOLD, *supra* note 9, at 163 (using the phrase “offices of public trust under the United States”—a phrase nowhere appearing in the Constitution); HUGH HEWITT, A MORMON IN THE WHITEHOUSE 237 (2007) (“Because the First Amendment’s breadth is as wide as all government activity, questions about the precise meaning of ‘office of public trust’ [Tillman adding—a phrase nowhere appearing in the Constitution] are also moot. Whether the Religious Test Clause by itself extends to members of Congress or all the way down to postal workers no longer matters—save perhaps to historians.”); cf. AMAR, *supra* note 14, at 74 (interpreting the Religious Test Clause to mean that “no federal public servant may ever be forced to pass a religious test”).

<sup>99</sup> Cf. U.S. Term Limits v. Thornton, 514 U.S. 779, 903 (1995) (Thomas, J., dissenting) (“But the only reason for extending the [Religious Test] Clause to the States would be to protect Senators and Representatives from state-imposed religious qualifications; I know of no one else who holds a ‘public Trust under the United States’ yet who might be subject to state disqualifications.”).

<sup>100</sup> Kesavan, *supra* note 48 *passim*.

<sup>101</sup> See Amar & Amar, *supra* note 9, at 136 n.143 (“The Constitution must mean something—the best reading of the document either permits or bars legislative succession.”). To which I would add: The Constitution must mean something—the best reading of the Constitution (prior to passage of the First Amendment) either permitted imposition of religious tests on non-member non-presiding legislative officers or it did not. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 761 (1999) (“[T]he same (or very similar) words in the same document should, at least presumptively, be construed in the same (or a very similar) way. But the flip side of the intratextual coin is that when two (or more)

By contrast, the position I put forward here clears up this difficulty. *Office . . . under the United States* embraces statutory and appointed officers (including non-member non-presiding legislative officers such as the Clerk and Secretary); *public trust under the United States* embraces *elected* or *constitutionally mandated positions*.<sup>102</sup> Thus, the language of the Religious Test Clause covers, just as one might suspect, *all* positions expressly created by the Constitution and *all* offices that were to be created in the future, i.e., post-1789, under delegated or statutory authority.<sup>103</sup>

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clauses feature different wording, this difference may also be a clue to meaning, and *invite different construction of the different words.*" (emphasis added)).

<sup>102</sup> *Compare* *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1365 (Fed. Cir. 2006) (Gajarsa, J., concurring in part and concurring in the *en banc* judgment) ("[T]he President of the United States [is] a constitutional *official* who is *plainly* not an 'officer of the United States' for Appointments Clause purposes but whose office is [instead] *created by the Constitution itself.*" (emphasis added) (emphasis in the original omitted)), KALT, *supra* note 14, at 89 n.16 ("[A] good case [can be made] that officers 'under the *authority* of the United States' in the Emoluments Clause are not the same set as officers '*under*' or '*of*' the United States, and that people should be careful about treating these different phrasings as though they are necessarily identical." (emphasis added)), and PETER K. ROFES, *THE RELIGION GUARANTEES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 12* (2005) (noting that the Religious Test Clause originally extended to "any office or public trust under the Authority of the United States," but "the Authority of"-language was dropped by the Committee of Style), with David J. Shaw, Note, *An Officer and a Congressman: The Unconstitutionality of Congressmen in the Armed Forces Reserves*, 97 GEO. L.J. 1739, 1743 & nn.19, 20 (2009) (arguing that one may infer from the Constitution's text that the presidency is an "office of the United States," and that the differences between "office" and "office of the United States" and "office *under* the United States" and other such similar *office*-related categories are "minor textual differences without any meaningful distinction[]"), and Schatz, *supra* note 13, at 146 ("The Constitution's usage regarding public officials is inconsistent and reflects no evident intent to establish terms of art in this regard." (footnote omitted)). See generally Alexander B. Haskell, *Deference, Defiance, and the Language of Office in Seventeenth-Century Virginia*, in *EARLY MODERN VIRGINIA: RECONSIDERING THE OLD DOMINION* 161 (Douglas Bradburn & John C. Coombs eds., 2011) ("[Professor Conal] Condren has argued that, in England, the *language of office* was just that, a vocabulary for moral discourse rather than a particular ideology or *even a singular concept*. Particular shared presuppositions arose from the vocabulary, making it far more than simply random talk; indeed, because it was almost universally accepted the language effectively gave rise to the world of offices that it described." (emphasis added) (footnote omitted)); Karen Orren, *Officers' Rights: Towards a Unified Field Theory of American Constitutional Development*, 34 LAW & SOC'Y REV. 873 (2000); Karen Orren, *The Work of Government: Recovering the Discourse of Office in Marbury v. Madison*, 8 STUD. AM. POL. DEV. 60 (1994).

<sup>103</sup> See Destro, *supra* note 97, at 369 n.59 ("There are only a few sources which shed light on the content of the phrase 'any Office or public Trust under the United States.' The first part—'office under the United States'—is relatively clear given the language of Article I, § 6 (Incompatibility Clause) and Art. II, §§ 1, 2. It is arguable, though not by any means settled, that all persons who hold *elective* offices, federal *appointments*, or who perform a federal function of any sort, including members of the Armed Services and presidential Electors, are protected by the Test Clause. . . . The more interesting question is what constitutes a 'public Trust under the United States.'" (emphasis added)); *supra* note 64 (quoting the Incompatibility Clause); see also *supra* note 97 (collecting authority other than Destro). See generally MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* 711-12 (2d ed. 2002) (suggesting that the Religious Test Clause's *public trust* language is

## VI. AFTERWARD

There is, or at least was, an apocryphal story told at the University of Chicago. It went something like this: In the time before time, Aaron Director invited Ronald Coase to present a paper at the Law & Economics Colloquium. Coase presented a paper titled *The Problem of Social Cost*.<sup>104</sup> After presenting his paper to a room full of luminaries, he asked for a vote to get the sense of the audience. Not one person bought into his new view, and, all who voted, voted against it. He recast his argument. The vote was the same. He did it a third time—and low and behold, one vote broke from the pack, but all others still stood opposed. He presented it again, and some three persons supported the new view. By the end of the evening, he had brought around the largest part of the audience. In years past, I heard this story from both Milton Friedman and George Stigler, o.b.m. The only difference in the telling

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“broader” than the Clause’s *officer* language and may extend to federal contractors, grantees of federal funds, and holders of “broadcast license[s]”); JOHN LOUIS LACAITE, FLEXIBILITY AND CONSTITUENCY IN EIGHTEENTH-CENTURY ANGLO-WHIGGISM: A CASE STUDY OF THE RHETORICAL DIMENSIONS OF LEGITIMACY (1984). Professor Destro suggests as one possibility, among others, that non-member non-presiding legislative staff might hold a public trust under the United States. Destro, *supra* note 97, at 366 n.45. He suggests that “their close identification with the individual [member] who employs them makes them administrators of the public Trust held by that individual.” *Id.* By contrast, I think the more linguistically “true” reading is that *officers* work for *trustees*. See, e.g., Letter from George Washington to Eléonor François Élie, Comte de Moustier (May 25, 1789), *supra* note 95, at 334 (“The impossibility that one man should be able to perform all the great business of State, I take to have been the reason for instituting the great Departments, and appointing *officers* therein, to assist the supreme *Magistrate* in discharging the duties of his *trust*.” (emphasis added)); 9 STATE OF NEW YORK: MESSAGES FROM THE GOVERNORS, *supra* note 95, at 515 (reproducing May 23, 1894 veto message of Governor Roswell P. Flower, which stated: “That one who holds the power to appoint a *public officer*, to remove him at will and appoint his successor, to fix his salary and to change it from time to time, *holds a public trust* will not be disputed . . .”—placing the *officers* below the holders of *public trusts* (emphasis added)); Victoria F. Nourse, *Law’s Constitution: A Relational Critique*, 17 WIS. WOMEN’S L.J. 23 (2002) (“[A]ny real life relation will do—it need not be the relation between men and women or women and children, it need not be a sexual or an intimate relation, but may be the relation between contracting parties, between the *members of a board of directors and the company’s officers*, or between voters and their public agents.” (emphasis added)); Eric Lichtblau, *Conflict of Interest is Raised in Eavesdropping Ruling*, N.Y. TIMES, Aug. 23, 2006, at A19 (“The federal judge who ruled last week that President Bush’s eavesdropping program was unconstitutional is a *trustee* and an *officer* of a group that has given . . . to the American Civil Liberties Union . . .”).

Professor Akhil Amar agrees that the Religious Test Clause covers the gamut or all federal positions. See AMAR, *supra* note 14, at 74 (interpreting the Religious Test Clause to mean that “no federal public servant may ever be forced to pass a religious test”). But, it is difficult to see how his conclusion in regard to the Religious Test Clause squares with his other publications touching on the meaning of *office* and *officer*. Further clarity on this point will have to come from Professor Amar.

<sup>104</sup> See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); see also R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

was that when Friedman told it, *he* was the first to agree with Coase, and when Stigler told it . . . well you get the idea.<sup>105</sup>

I believe that there are already some signs in the literature that the modern consensus is falling.<sup>106</sup> The Executive Branch has, on occasion, broken from that

<sup>105</sup> This passage is my personal recollection of the story as I heard it some years ago. I have no source for it. Cf. Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163, 220-21 (1983) (recounting what appears to be basically the same tale); *id.* at 233 (“A striking aspect of the whole discussion [and conference which gave awards to Coase and Director] is the repeated emphasis on the importance of oral communication.”).

<sup>106</sup> See, e.g., *supra* note 64 (quoting the text of the Incompatibility Clause and Ineligibility Clause); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (Roberts, C.J.) (“The diffusion of power carries with it a diffusion of accountability. The people do not vote for the ‘Officers of the United States.’ Art. II, § 2, cl. 2. They instead look to the President [Tillman adding—who is *elected*] to guide the ‘assistants or deputies . . . subject to his superintendence.’ The Federalist No. 72, p.487 (J. Cooke ed. 1961) (A. Hamilton). . . . That is why the Framers sought to ensure that ‘those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade [officers], and the *highest* [officers], will depend, as they ought, on the President, and the *President on the community.*’ 1 Annals of Cong., at 499 (J. Madison).” (emphasis added)); *Freytag v. Comm’r*, 501 U.S. 868, 904 (1991) (Scalia, J., concurring) (“The Framers’ experience with postrevolutionary self-government had taught them that combining the power to create offices with the power to *appoint* [Tillman adding—not *elect*] officers was a recipe for legislative corruption. The foremost danger was that legislators would create offices with the expectancy of occupying them themselves. This was guarded against by the Incompatibility and Ineligibility Clauses, Article I, § 6, cl. 2.”); KALT, *supra* note 14, at 89 n.16 (“[A] good case [can be made] that officers ‘under the authority of the United States’ in the Emoluments Clause are not the same set as officers ‘under’ or ‘of’ the United States, and that people should be careful about treating these different phrasings as though they are necessarily identical.” (emphasis added)); Richard Albert, *The Constitutional Politics of Presidential Succession*, 39 HOFSTRA L. REV. 497, 508 (2011) (“But with respect to the founding era, the evidence from the first succession act indicates the contrary: *joint interbranch service* [between Congress and the Presidency] *may well have been constitutional.*” (emphasis added)); Steven G. Calabresi, Closing Statement, *A Term of Art or the Artful Reading of Terms?*, in Tillman & Calabresi, *supra* note 10, at 156 (recognizing the possibility that *officer under the United States* may be “potentially broader” than *officer of the United States*, although arguing that the President is in the former category, even if not in the latter); Calabresi & Yoo, *supra* note 95, at 1496 n.163 (“The Incompatibility Clause was added to the Constitution to prevent the President from inducing Members of Congress to vote for his legislative program by offering to *appoint* them to high executive and judicial offices.” (emphasis added)); Feerick, *supra* note 77, at 62 (“I am not entirely convinced that it is unconstitutional to place legislators in the line of presidential succession . . .”); James Fleming, *Presidential Succession: The Art of the Possible*, 79 FORDHAM L. REV. 951, 954 (2010) (“I see no constitutional infirmity in legislative succession. . . . [T]he better originalist arguments are in favor of the constitutionality of legislative succession.”); Goldstein, *Akhil Reed Amar and Presidential Continuity*, *supra* note 81, at 83-95 (collecting authority and argument distinguishing “officer” from “officer of the United States”); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto*, 76 TULANE L. REV. 265, 331 (2001) (noting that the “Framers prohibited members of Congress from also serving as U.S. officers and *assigned to Congress the power to establish such offices*”—which would seem to exclude the President and Vice President (emphasis added) (footnote omitted) (citing the Incompatibility Clause)); Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U.

PA. J. CONST. L. 745, 779 (2008) (“The Incompatibility Clause sets a limit both on membership in Congress and on holding an *appointed* [Tillman adding—not *elected*] office—namely, that the same person cannot do both at the same time.” (emphasis added)); Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 289 (2003) (“The counterargument is that the unmodified term ‘Officers’ [as used in the Succession Clause] is broader than ‘Officers of the United States’ and also may include legislative officers, such as the Speaker and President Pro Tempore.” (citing Manning, *supra* note 45, at 143–44 (arguing that the failure to use in the Succession Clause the otherwise frequently-used phrase *Officers of the United States* suggests that the use of *Officer*, standing alone and unmodified, in the Succession Clause, refers to a broader class of actors than does *Officers of the United States*))); Adam J. White, *Will the Real VP Please Step Forward?*, LEGAL TIMES, Oct. 27, 2008, at 36, 37 (“But ultimately, Article I, Section 3’s internal tension is a red herring. No matter which constitutional branch the vice president is ‘in’—or whether he is ‘in’ both branches or neither branch—his office’s constitutional powers are exclusively legislative.”); Steven G. Calabresi, Abstract to *Does the Incompatibility Clause Apply to the President?*, SOCIAL SCIENCE RESEARCH NETWORK (Nov. 4, 2008), <http://papers.ssrn.com/abstract=1294671> (describing “office under the United States” as “an arguably murky term”); Richard Heald, *Separation of Powers (or is it?)*, CONSTI WEBLOG: WHAT’S HOT AND WHAT’S NOT (Jan. 6, 2009, 5:23:11 AM), [http://khei.etch.net/cm/blog/rheald/posts/post\\_1231248220160.html](http://khei.etch.net/cm/blog/rheald/posts/post_1231248220160.html) (taking the view that “one could say that the text [of the Constitution] doesn’t require [a senator to resign before assuming the presidency] ([which seems allowable] perhaps by oversight), but that a *convention* requires it”). *But cf.* Memorandum to Hugh M. Durham, Chief, Legislative & Legal Section, Office of Legislative Affairs, from Antonin Scalia, Asst. Att’y Gen., Office of Legal Counsel, Re: Proposed Bill to Increase the Salary of the Attorney General, at \*6 (Nov. 22, 1974), *available at* [http://works.bepress.com/seth\\_barrett\\_tillman/164/](http://works.bepress.com/seth_barrett_tillman/164/) (denominating the Ineligibility Clause as “essential[ly] incohesiv[e]”). However, in a recent student note, Mr. David Shaw restated and reaffirmed the modern academic consensus view: that although the Constitution uses a variety of terms relating to “office” and “officer,” the different terminology is without “meaningful distinction.” Shaw, *supra* note 102, at 1743 n.20. The lone eighteenth century source Shaw puts forward in support of his position is debate from the North Carolina ratifying convention purporting to illustrate that “office of Authority under” was used interchangeably with other variants—but neither Shaw’s “office of Authority under” (a phrase nowhere appearing in the Constitution) nor the phrase “Office under the Authority of the United States” (apparently the phrase Shaw intended) appears *anywhere* in the debate cited by Shaw. *Id.* at 1746 n.47 (citing three days’ debate in the North Carolina ratifying convention, a convention which failed to ratify the Constitution). One is (again) left wondering upon what *facts* the modern consensus is based. *See supra* note 64.

Likewise, in a recent book, Professor Jay Wexler uses carefully chosen language leaving it unclear whether he believes the (elected) President and/or Vice President are *officers of the United States*. *See* JAY WEXLER, *THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS* 43–44 (2011) (“What the Constitution is saying here [in the Appointments Clause] . . . is that the US government has two kinds of officers *when it comes to appointments*: ‘principal officers’ . . . and ‘inferior officers’ . . .” (emphasis added) (commas omitted)). *In other words*, Wexler leaves unclear if there are other federal actors properly denominated officers of the United States who are not subject to appointment, (i.e., elected positions). *Cf. id.* at 8–9, 52–54, 221 (discussing Tillman’s publications). Wexler’s unwillingness to directly address this obscure point may very well reflect the fact that he believes the question is an open one, i.e., one which reasonable minds have and may continue to disagree about. His open-mindedness is a view not universally shared. *See* Steven G. Calabresi, Rebuttal, *Does the Incompatibility Clause Apply to the President?*, in Tillman & Calabresi, *supra* note 10, at 141 (responding, to the position that

consensus.<sup>107</sup> I believe that when that time comes, the view I put forward in 2007, or something like it, will become the new view. When that time comes, I sincerely

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joint presidential-senate office-holding is constitutional, by opining that such a view is “utterly implausible”).

<sup>107</sup> See Application of the [Foreign] Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, 6 Op. Off. Legal Counsel 156, 157, 1982 WL 170682, at \*2, 1982 OLC LEXIS 46, at \*4-5 (Feb. 24, 1982) (Shanks, Dep’y Asst. Att’y Gen.) (affirming that different “language” relating to *office* in different constitutional clauses relates to different “purpose[s]”); see also Authority of Foreign Law Enforcement Agents to Carry Weapons in the United States, 12 Op. Off. Legal Counsel 67, 68, 1988 WL 391002, at \*2, 1988 OLC LEXIS 41, at \*5 (Apr. 12, 1988) (McGinnis, Dep’y Asst. Att’y Gen.) (“The [Foreign] Emoluments Clause must be read broadly in order to fulfill that purpose. Accordingly, the Clause applies to all persons holding an office of profit or trust under the United States, and not merely to that *smaller group of persons* who are deemed to be ‘officers of the United States’ for purposes of Article II, Section 2 of the Constitution.” (emphasis added) (citing 1986 Opinion, *infra*)); Application of the [Foreign] Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission, 10 Op. Off. Legal Counsel 96, 98, 1986 WL 213241, at \*2, 1986 OLC LEXIS 66, at \*5 (June 3, 1986) (Cooper, Asst. Att’y Gen.) (“Prior opinions of this Office have assumed without discussion that the persons covered by the [Foreign] Emoluments Clause were ‘officers of the United States’ in the sense used in the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. Nevertheless, in [the] 1982 [Opinion, *supra*], we did advise that a person may hold an ‘office of profit or trust’ under the [Foreign] Emoluments Clause without necessarily being an ‘officer of the United States’ for purposes of the Appointments Clause.” (footnote omitted)); *cf.* Brief for Petitioners, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (No. 72-1188), 1973 WL 173884, at \*52 (“Various statutes impose limitations and prohibitions upon officers of the United States. Because there is a close relationship between such officers and offices under the United States—in most, and perhaps all instances, the concepts are co-extensive—the cases defining ‘officer’ of the United States are relevant in determining what constitutes an ‘office’ under the United States.” (emphasis added)) (filed by Solicitor General Robert H. Bork et al.); *cf.* SILVA, *supra* note 10, at 149 (“‘Officers of the United States’ are not appointed by electoral colleges. They are appointed by the President and Senate, by the President alone, by the department heads, or by the courts of law.”); Silva, *supra* note 9, at 475 (“[T]he *only* election by presidential electors known in the Constitution is the election of the President and Vice President. ‘Officers of the United States’ are appointed by the President and the Senate, by the President alone, by the department heads, or by the courts.” (emphasis added)). In its most recent opinions touching on the subject, the Office of Legal Counsel (OLC) has impliedly rejected the position put forward in the Cooper, McGinnis, and Shanks opinions. See Applicability of the [Foreign] Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize, 33 Op. Off. Legal Counsel (slip op. at 4), 2009 WL 6365082, at \*4, 2009 OLC LEXIS 18, at \*10 (Dec. 7, 2009) (Barron, Acting Asst. Att’y Gen.) (announcing in *ipse dixit* that “[t]he President *surely* ‘hold[s] an[] Office of Profit or Trust[] [under the United States]’ . . . .” (emphasis added) (quoting Article I, Section 9, Clause 8)); *cf.* Applicability of the [Foreign] Emoluments Clause to Nongovernmental Members of ACUs, 34 Op. Off. Legal Counsel (slip op. at 4), 2010 WL 2516024, at \*4, 2010 OLC LEXIS 2, at \*12-13 (June 3, 2010) (Barron, Acting Asst. Att’y Gen.) (“Our [2005] *Bioethics Council* and [our 2007] *FBI Advisory Board* opinions go further than our [1996] *IEP* opinion and indicate that only those persons considered officers within the meaning of the Appointments Clause . . . may be subject to the [Foreign] Emoluments Clause . . . .”). Puzzlingly, however, the Barron opinions neither distinguish nor cite to the counter-authority in the earlier OLC opinions. See generally Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1448 (2010) (“The data show that OLC rarely openly departs from its prior opinions, but that an express request for



hope that Professor Chafetz can play the role of Stigler or Friedman, rather than that of the many others (good people no doubt) who waited in the wings.

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overruling from the executive entity most affected by the opinion is a good predictor of such a departure.”).