THE FOREIGN EMOLUMENTS CLAUSE—WHERE THE BODIES ARE BURIED: "IDIOSYNCRATIC" LEGAL POSITIONS*

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* A draft version of Part III, absent footnotes, appeared on *The Originalism Blog*.

† Lecturer, Maynooth University Department of Law. Roinn Dlí Ollscoil Mhá Nuad. I thank Professor Josh Blackman and the student editors at *South Texas Law Review* for the opportunity to present my preliminary thoughts at their September 8, 2017 symposium on the Foreign Emoluments Clause. In addition to my academic and popular, print and online, publications, I have filed several briefs in the three federal district court actions—one of which is now on appeal. *See, e.g.*, Brief of Scholar Seth Barrett Tillman & the Judicial Education Project as Amici Curiae Supporting Appellee and Affirmance, Citizens for Responsibility & Ethics in Wash. v. Trump, No. 18-0474-cv (2d Cir. June 5, 2018), ECF No. 135, 2018 WL 2722468; Corrected Response of Scholar Seth Barrett Tillman & the Judicial Education Project as Amici Curiae in Support of the Defendant, District of Columbia & Maryland v. Trump, No. 8:17-cv-01596-PJM (D. Md. Dec. 31, 2017), ECF No. 77, 2017 WL 6880026; Motion and Brief for Scholar Seth Barrett Tillman & the Judicial Education Project as Amici Curiae Supporting Defendant, District of Columbia & Maryland v. Trump, No. 8:17-cv-01596-PJM (D. Md. Oct. 6, 2017), ECF No. 27-1, 2017 WL 4685826; Brief for Scholar Seth Barrett Tillman & the Judicial Education Project as Amici Curiae Supporting Defendant, Blumenthal v. Trump, No. 1:17-cv-01154 (D.D.C. Sept. 19, 2017), ECF No. 16-1, 2017 WL 4230605; Amicus Curiae Scholar Seth Barrett Tillman's & Proposed Amicus Curiae Judicial Education Project's Response to Amici Curiae by Certain Legal Historians, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Sept. 19, 2017), ECF No. 85-1, 2017 WL 4685886; Motion and Brief for Scholar Seth Barrett Tillman as Amicus Curiae Supporting Defendant, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. June 16, 2017), ECF No. 37, 2017 WL 2692500. My publications can be found on Westlaw, LexisNexis, HeinOnline, and on the Social Science Research Network. *See Scholarly Papers* [*of Seth Barrett Tillman*], SOCIAL SCIENCE RESEARCH NETWORK (last visited Jan. 7, 2018), https://ssrn.com/author=345891; *see also Selected Works of Seth Barrett Tillman*, BEPRESS (last visited Jan. 7, 2018), https://works.bepress.com/seth_barrett_tillman/. Feel free to contact me if you have any difficulty finding Tillman-authored materials. sbarrettillman@yahoo.com, @SethBTillman.

I. INTRODUCTION

In 2017, three sets of plaintiffs in three different federal district courts brought civil actions against the President of the United States: each action alleged that the President has and continues to violate the Constitution's Foreign Emoluments Clause.[1] The Foreign Emoluments Clause provides:

> No Title of Nobility shall be granted by the United States: And no Person holding any *Office of Profit or Trust under them*, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.[2]

There are only a handful of federal cases discussing the Foreign Emoluments Clause.[3] Not one of these cases has any extensive discussion of the scope of the Foreign Emoluments Clause or the scope of the clause's *Office of Profit or Trust under the United States* language ("*Office-*

1. *See, e.g.*, Amended Complaint, District of Columbia & Maryland v. Trump, No. 8:17-cv-01596-PJM (D. Md. Feb. 23, 2018), ECF No. 90-2, 2018 WL 1051866, *amending* Complaint, District of Columbia & Maryland v. Trump, No. 8:17-cv-01596-PJM (D. Md. June 12, 2017), ECF No. 1, 2017 WL 2559732 (motion to dismiss briefing and oral argument was based on the original complaint); First Amended Complaint, Blumenthal v. Trump, No. 1:17-cv-01154-EGS (D.D.C. Aug. 15, 2017), ECF No. 14, 2017 WL 7355132; Second Amended Complaint, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. May 10, 2017) (No. 1:17-cv-00458-RA), ECF No. 28, 2017 WL 2734681 [hereinafter Second Amended Complaint, CREW v. Trump] (*CREW v. Trump* was subsequently transferred from Judge Abrams to Judge Daniels). Each case brings a claim based on the Foreign Emoluments Clause. *See* U.S. CONST. art. I, § 9, cl. 8. But only *CREW v. Trump* and *District of Columbia. & Maryland v. Trump* bring a claim based on the Domestic Emoluments Clause (a/k/a Presidential Compensation Clause or Presidential Emoluments Clause). *See* U.S. CONST. art. II, § 1, cl. 7. Detailed discussion of that second cause of action and constitutional provision is beyond the scope of this Article. Many of the documents (including pleadings and briefs) related to these cases can be found on the websites of litigators associated with the plaintiffs in these matters. *See Emoluments Clause Litigation*, GUPTA WESSLER, P.L.L.C. (last visited Mar. 26, 2018), http://guptawessler.com/emoluments/; *Rule of Law: Blumenthal, et al. v. Trump, Holding President Trump Accountable for His Violations of the Foreign Emoluments Clause*, CONSTITUTIONAL ACCOUNTABILITY CTR. (last visited Mar. 26, 2018), https://www.theusconstitution.org/litigation/trump-and-foreign-emoluments-clause/. These websites would be more helpful to interested third-parties if they were complete. Regrettably, my amicus briefs in *District of Columbia & Maryland v. Trump* and *Blumenthal v. Trump* are not listed, or if listed, are listed absent links. Likewise, some Department of Justice briefs are not listed, or if listed, are listed absent links. No doubt, this was all an oversight. *See generally* Seth Barrett Tillman, *A Work in Progress: Select Bibliography of Court Filings and Other Sources Regarding the Foreign and Domestic Emoluments Clauses Cases*, NEW REFORM CLUB (Feb. 28, 2018, 8:59 AM), https://reformclub.blogspot.com/2018/02/a-work-in-progress-select-bibliography.html [hereinafter *A Work in Progress*].

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

3. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 424 n.51 (2010) (Stevens, J., dissenting) (quoting the Foreign Emoluments Clause); United States *ex rel.* Newdow v. Rumsfeld, 448 F.3d 403, 410 (D.C. Cir. 2006) (discussing the Foreign Emoluments Clause).

language" or "*Office . . . under the United States*-language"). Not one of these cases, expressly or impliedly, affirms or denies that the clause applies to the President. Likewise, there is no decision by any court of record—of which I am aware—which affirms or denies that the clause's *Office*-language, or closely similar language in any other constitutional provision, encompasses the presidency. If the courts were to reach the merits,[4] the issue at hand, the scope of the clause's *Office*-language, is entirely one of first impression. Still, there has been some discussion of the clause and its *Office*-language, primarily, but not exclusively, amongst academics. Such discussion has appeared in the Department of Justice's Office of Legal Counsel memoranda, academic articles, popular magazines focusing on news, politics, and law, and in amicus briefs.

Since 2008, I have argued in multiple publications that the Foreign Emoluments Clause's *Office*-language, and closely similar language in other constitutional provisions, reaches only *appointed* federal officers, and not any *elected* federal officials, including the presidency.[5] My position has not gone entirely unnoticed; indeed, it has even occasioned some firm and thoughtful opposition.[6] My goal in this Article is not to illustrate the full

4. If one of the Foreign Emoluments Clause cases is dismissed on a traditional threshold issue, e.g., standing or justiciability, a court is less likely to address the scope of the Foreign Emoluments Clause's *Office*-language. *See, e.g*., Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174, 195 n.1 (S.D.N.Y. Dec. 21, 2017), *appeal docketed*, No 18-474 (2d Cir. Feb. 16, 2018) [hereinafter CREW v. Trump] ("Because Plaintiffs' claims are dismissed under Rule 12(b)(1), this Court does not reach the issue of whether Plaintiffs' allegations state a cause of action under either the Domestic or Foreign Emoluments Clauses, pursuant to Rule 12(b)(6)."). *But see generally* District of Columbia & Maryland v. Trump, 291 F. Supp. 3d 725 (D. Md. Mar. 28 2018) (finding plaintiffs have standing, but refraining from ruling on other threshold questions, and so not granting discovery at this juncture). It might be argued that the scope of the Foreign Emoluments Clause's *Office*-language is akin to personal jurisdiction, and so a threshold issue, rather than a merits question.

5. My earliest publications on the subject include: Seth Barrett Tillman & Steven G. Calabresi, *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, 135–40, 146–53 (2008). *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. L. & PUB. POL'Y SIDEBAR 1 (2009), *with* Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 35 (2009).

6. *Compare, e.g*., Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30 (2012) [hereinafter Teachout, *Gifts, Offices, and Corruption*], *and* Zephyr Teachout, *Constitutional Purpose and the Anti-Corruption Principle*, 108 NW. U. L. REV. ONLINE 200 (2014), *with* Seth Barrett Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1 (2012) [hereinafter Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*], *and* Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013) [hereinafter Tillman, *The Original Public Meaning of the Foreign Emoluments Clause*]; *compare, e.g*., Zephyr Teachout &

spectrum of views opposing my position on the subject. There are far too many such views—many of which contradict one another, and many of which do not appear to have gone through any sort of independent review process, by student editors, peer review, or otherwise.[7] Instead, my more

Seth Barrett Tillman, *Common Interpretation*, *The Foreign Emoluments Clause: Article I, Section 9, Clause 8*, NAT'L CONSTITUTION CTR. (last visited Mar. 26, 2018), https://constitutioncenter.org/interactive-constitution/articles/article-i/the-foreign-emoluments-clause-article-i-section-9-clause-8/clause/34 [hereinafter *Common Interpretation, The Foreign Emoluments Clause*], *with* Zephyr Teachout, *Matter of Debate*, *The Foreign Emoluments Clause*, NAT'L CONSTITUTION CTR., https://constitutioncenter.org/interactive-constitution/articles/article-i/the-foreign-emoluments-clause-by-zephyr-teachout/clause/34, *with* Seth Barrett Tillman, *Matter of Debate*, *The Foreign Emoluments Clause Reached Only Appointed Officers*, NAT'L CONSTITUTION CTR., https://constitutioncenter.org/interactive-constitution/articles/article-i/the-foreign-emoluments-clause-reached-only-appointed-officers/clause/34; *compare, e.g.*, Zephyr Teachout, Room for Debate, *Trump's Foreign Business Ties May Violate the Constitution*, N.Y. TIMES (Nov. 17, 2016, 5:06 PM), https://www.nytimes.com/roomfordebate/2016/11/17/would-trumps-foreign-business-ties-be-constitutional/trumps-foreign-business-ties-may-violate-the-constitution, *with* Seth Barrett Tillman, Room for Debate, *Constitutional Restrictions on Foreign Gifts Don't Apply to Presidents*, N.Y. TIMES (Nov. 18, 2016, 10:41 AM), https://www.nytimes.com/roomfordebate/2016/11/17/would-trumps-foreign-business-ties-be-constitutional/constitutional-restrictions-on-foreign-gifts-dont-apply-to-presidents?module=ArrowsNav&contentCollection=undefined&action=keypress®ion=FixedLeft&pgtype=blogs. *See generally, e.g.*, Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

7. *See, e.g.*, Norman L. Eisen et al., *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, GOVERNANCE STUDIES AT BROOKINGS 9 n.32 (Dec. 16, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf (citing Tillman disapprovingly). It is possible that all Brookings publications (including this one) go through some sort of internal review—I see no indication of any such review noted in the publication itself. There are other such recent publications which argue that the President is covered by the Foreign Emoluments Clause. These papers do not cite my publications (or me), nor have they gone through (as far as I can tell) any sort of independent review. *See, e.g.*, Joshua Matz & Laurence H. Tribe, *President Trump Has No Defense Under the Foreign Emoluments Clause*, ACSBLOG (Jan. 24, 2017), https://acslaw.org/sites/default/files/pdf/Trump%20and%20the%20Emoluments%20Clause.pdf [https://perma.cc/R4TA-BMSY]; Laurence H. Tribe et al., *The Courts and the Foreign Emoluments Clause*, CASETEXT (Jan. 30, 2017), https://casetext.com/posts/the-courts-and-the-foreign-emoluments-clause-1 [https://perma.cc/G2LX-BD5B]; *The Text and History of the Foreign Emoluments Clause*, CONST. ACCOUNTABILITY CTR. (last visited Feb. 4, 2018), https://www.theusconstitution.org/think_tank/the-text-and-history-of-the-foreign-emoluments-clause/; *see also, e.g.*, Jonathan Hennessey, *Reconstituting: The U.S. Constitution's Emoluments Clause and Donald Trump—Full Documentary*, JONATHAN HENNESSEY (July 24, 2017), http://www.jonathanhennessey.com/documentary-donald-trump-emoluments/ ("30:04–48:00 Explaining and refuting Seth Barrett Tillman's case that the Foreign Emoluments Clause does not apply to the president."); John Mikhail, The Definition of "Emolument" in English Language and Legal Dictionaries, 1523–1806 (July 1, 2017), https://ssrn.com/abstract=2995693 [hereinafter Mikhail, Definition of Emolument] (citing two Tillman-authored publications). Mikhail's article is a serious publication, but there is no information posted on the Social Science Research Network indicating that Mikhail's article (which is now over a year old) has been accepted for publication by any journal of any sort. *Id*. Moreover, notwithstanding that these publications have not gone through any sort of independent review, some of the authors of these publications cite their own

modest goal here is to illustrate how deeply idiosyncratic[8] some of these views are—not merely in their conclusions, but more importantly in their broad methodological approach.

publications in court filings in which they are acting as attorneys (or "clients" in the amicus context). *See, e.g.*, Brief of Amici Curiae by Certain Legal Historians on Behalf of Plaintiffs at 3 n.10, Blumenthal v. Trump, No. 1:17-cv-01154-EGS (D.D.C. Nov. 2, 2017), ECF No. 26-1, 2017 WL 5513219 [hereinafter Legal Historians Brief (DC)] (citing Mikhail, Definition of Emolument, *supra*); Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss (NY) at 58, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Aug. 4, 2017), ECF No. 57, 2017 WL 3444116 (citing Tribe, *supra*); Second Amended Complaint, CREW v. Trump, *supra* note 1, at 2 n.1 (citing Eisen et al., *supra*). Amongst this entire group of academics and litigators listed in this footnote, it appears that the only person who had published on the Foreign Emoluments Clause prior to the election of President Trump was Richard Painter. He wrote two pages on the clause. *See, e.g.*, RICHARD W. PAINTER, TAXATION ONLY WITH REPRESENTATION 107 (2016) ("The Emoluments Clause does curtail some avenues of foreign influence, but its reach is limited."); *id.* at 120.

8. One should not be so thin-skinned as to imagine that "idiosyncratic" or other similar language is a mean-spirited expression rooted in sarcasm, contempt, or derision. It is a perfectly acceptable term, which might fairly apply to *all* interpretations, including my own, not well grounded in Supreme Court and other federal court case law. *See, e.g.*, Memorandum of Law in Support of Plaintiffs' Opposition to Motion to Dismiss at 33 n. 20, District of Columbia & Maryland v. Trump, No. 8:17-cv-01596-PJM (D. Md. Nov. 7, 2017), ECF No. 46, 2017 WL 5598183 (characterizing Tillman's amicus brief as "idiosyncratic"); Eisen et. al., *supra* note 7, at 9 n.32 (denominating Tillman's position as "idiosyncratic," "myopic," and "strained"); Gautham Rao & Jed Handelsman Shugerman, *Presidential Revisionism:* The New York Times *Published the Flimsiest Defense of Trump's Apparent Emoluments Violations Yet*, SLATE (July 17, 2017, 5:42 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/the_new_york_times_published_the_flimsiest_defense_of_trump_s_apparent_emoluments.html (using, in its title, "flimsiest" in characterizing Blackman and Tillman's position—albeit titles are customarily chosen by editors, not contributors); *id.* (making arguments about the 1793 Hamilton-signed roll of officers, which Professors Rao and Shugerman subsequently retracted in other fora, but, for whatever reason, no such retraction, even as a letter to the editor, appears on *Slate*); Deepak Gupta (@deepakguptalaw), TWITTER (Aug. 1, 2017, 10:58 AM), https://twitter.com/deepakguptalaw/status/892444459157381120 ("More evidence—and visit to National Archives—further discredits idiosyncratic view that President is immune from Foreign Emoluments Clause"); Mark Joseph Stern (@mjs_DC), TWITTER (Jan. 3, 2017, 11:48 AM), https://twitter.com/mjs_DC/status/816370577804054529 [https://perma.cc/7ZUY-6DK7] ("Conservative professors, seizing on a 1974 Scalia memo, are arguing that the [Foreign] Emoluments Clause doesn't apply to the president. Nonsense."); Mark Joseph Stern (@mjs_DC), TWITTER (Jan. 3, 2017, 12:00 PM), https://twitter.com/mjs_DC/status/816373583073054721 [https://perma.cc/X9GF-LN3G] ("Maybe you're right; I just find the argument so gobsmackingly bad that I can't think of another explanation [other than politics]."); *see also, e.g.*, Brief of Separation of Powers Scholars as Amici Curiae Supporting Plaintiffs at 16 n.9, Blumenthal v. Trump, No. 1:17-cv-01154-EGS (D.D.C. Nov. 2, 2017), ECF No. 25-1, 2017 WL 5513218 ("Defendant [Tillman's] *Amicus*'s arguments hold no water."); Brief of Amicus Curiae by Certain Legal Historians on Behalf of Plaintiffs at 22, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Aug. 11, 2017), ECF No. 70-1, 2017 WL 5483629 ("But [Tillman's] interpretation of the clause does not withstand scrutiny.") [hereinafter Legal Historians Brief (NY)]; Plaintiff's [CREW's] Memorandum in Opposition to Defendant's Motion to Dismiss, *supra* note 7, at 31 n.18 (noting that "an amicus advances the idiosyncratic argument that the president is not subject to the Foreign Emoluments Clause").

II. PRESIDENTIAL ELECTORS AND THE BRIEF OF THE LEGAL HISTORIANS

The first filed of the three Foreign Emoluments Clause cases was *Citizens for Responsibility and Ethics in Washington* ("*CREW*") *v. Trump*.[9] Five academics (the "Legal Historians")[10] filed an amicus brief (the "Legal Historians Brief")[11] in support of the plaintiffs. The Legal Historians Brief

9. Complaint, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Jan. 23, 2017), ECF No. 1, 2017 WL 277603 [hereinafter Complaint, CREW v. Trump]. The operative complaint, the Second Amended Complaint, was filed on May 10, 2017, at docket number 28. *See* Second Amended Complaint, CREW v. Trump, *supra* note 1.

10. The authors (or clients) of the Legal Historians Brief are Professor Jack N. Rakove (Stanford University), Professor Jed Handelsman Shugerman (Fordham University School of Law), Professor John Mikhail (Georgetown University Law Center), Professor Gautham Rao (American University), and finally Professor Simon Stern (University of Toronto, Faculty of Law), who has blocked me from reading his Twitter feed. In addition to the Legal Historians Brief (NY), *supra* note 8, at 26–27, the same five academics on that brief also filed amicus briefs in the other two Foreign Emoluments Clause cases. *See* Brief of Amici Curiae by Certain Legal Historians on Behalf of Plaintiffs at 29, District of Columbia & Maryland v. Trump, No. 8:17-cv-01596-PJM (D. Md. Nov. 14, 2017), ECF No. 58-1, 2017 WL 5624876 [hereinafter Legal Historians Brief (Maryland)]; Legal Historians Brief (DC), *supra* note 7, at 26.

11. *See* Legal Historians Brief (NY), *supra* note 8. In the course of this brief, certain very regrettable claims were made—albeit, not by my counsel or by me. *Id*. at 22 n.82. These claims were subsequently retracted by the Legal Historians in a letter to the Court and on *Balkinization*, a well-read legal blog. *See* Letter from Daniel J. Walker, Counsel for the Legal Historians, to Judge George B. Daniels, U.S. District Court Judge (Oct. 3, 2017) [hereinafter Letter to Judge Daniels]; John Mikhail, *Our Correction and Apology to Professor Tillman*, BALKINIZATION (Oct. 3, 2017, 8:30 PM), https://balkin.blogspot.ie/2017/10/our-correction-and-apology-to-professor.html [hereinafter, Mikhail, *Our Correction and Apology to Professor Tillman*]; *see also* Jed Shugerman, *An Apology to Tillman and Blackman*, TAKE CARE (Sept. 22, 2017), https://takecareblog.com/blog/an-apology-to-tillman-and-blackman [hereinafter Shugerman, *An Apology to Tillman and Blackman*]. *In this Article, I have taken care not to criticize the Legal Historians Brief (and its authors) in relation to the position it (and they) put forward in that brief involving the authenticity of the signature of the original 1793 Hamilton-signed roll of officers and the purported signature in subsequent reproductions of that document.* Other positions put forward by the Legal Historians, collectively and individually, in their brief and elsewhere, such as their position on presidential electors, must remain on the table for public discussion. It would be remiss for me to fail to note that for many, many years, I had hoped that all the documents relating to Hamilton's 1793 roll of officers would become the subject of inquiry and discussion by other scholars. It is with genuine regret that my hopes were not realized along the lines I had sought. *See supra* note 8 (discussing Rao & Shugerman's article on *Slate*). Recently, Professors Shugerman and Rao created a website archiving these documents. *See* THE FOREIGN EMOLUMENTS CLAUSE: EVIDENCE FROM THE NATIONAL ARCHIVES (last visited Feb. 25, 2018), https://sites.google.com/view/foreignemolumentsclause. They cited this website in their amicus brief and elsewhere. *See* Legal Historians Brief (NY), *supra* note 8, at 23 n.82; Jed Shugerman, *Questions about the Emoluments Amicus Brief on Behalf of Trump*, TAKE CARE (Aug. 31, 2017), https://takecareblog.com/blog/questions-about-the-emoluments-amicus-brief-on-behalf-of-trump ("Our colleague Rebecca Brenner followed up with her own visit [to the National Archives] and took photos of every document in the archival box. We posted them online here on a website *to offer to the public* images of all of the contents of the archival box." (emphasis added)); Gautham Rao (@gauthamrao), TWITTER (Aug. 11, 2017, 2:11 PM), https://twitter.com/gauthamrao/status/896116983099400192 [https://perma.cc/CTD6-XNAR]

("Some of our archival evidence for the Historians Brief can be seen here: http://sites.google.com/view/foreignemolumentsclause . . . (hat tip to @BrianneGorod too!)") (reporting "likes" and/or "retweets" from Professors Shugerman and Mikhail). Again, it is with some regret that I report that this website is no longer active—my attempts to view it produce: "Google 404. That's an error. The requested URL was not found on this server. That's all we know." (For an alternative website see *A Work in Progress*, *supra* note 1.) Whether the Shugerman-Rao website's designers passively allowed it to go moribund, or purposely deactivated the website, I do not know—but I do know that an appeal in *CREW v. Trump* was filed on February 16, 2018. *See supra* note 4 (reporting subsequent history in *CREW v. Trump*). Yet, sources cited in the trial court record by the Legal Historians (who include academics both in law schools and in history departments) are already dissolving before our very eyes. *E.g.*, Jed Shugerman, *Questions about the Emoluments Amicus Brief on Behalf of Trump UPDATED*, SHUGERBLOG (Aug. 31, 2017), https://shugerblog.com/2017/08/31/questions-about-the-emoluments-amicus-brief-on-behalf-of-trump-and-its-use-and-misuse-of-historical-sources/ ("I'm not deleting this Aug. 31 [2017] post because it's important to acknowledge my error, *not to erase it*." (emphasis added)). I do not have to wonder what the response on social media and elsewhere would be if I had done (or allowed to have been done) such a thing; you—gentle reader—might consider the response if you had done (or allowed to have been done) such a thing. *See, e.g.*, Brianne J. Gorod, *What Alexander Hamilton Really Said*, TAKE CARE (July 6, 2017), https://takecareblog.com/blog/what-alexander-hamilton-really-said [https://perma.cc/YCY8-XQC9 ("[A]fter months of *pretending* like this document didn't exist, [Tillman] finally acknowledged it—and was forced to describe it in grossly *misleading* terms in order to discount its significance." (emphases added)); Joshua Matz, *Foreign Emoluments, Alexander Hamilton & a Twitter Kerfuffle*, TAKE CARE (July 12, 2017), https://takecareblog.com/blog/foreign-emoluments-alexander-hamilton-and-a-twitter-kerfuffle [http://perma.cc/66Z7-VY76] ("It's hardly an impressive defense to *mislead so dramatically* in the *NYT* but then say that it's all okay, since a few years ago I had a footnote in a law review article alluding vaguely to this contrary material." (emphasis added)); *id*. (noting that Tillman's publications are "low-profile academic articles"); Mark Joseph Stern (@MJS_DC), TWITTER (Aug. 1, 2017, 11:36 AM), https://twitter.com/mjs_DC/status/892454064532934658 [https://perma.cc/4DRT-WD5G] ("@BrianneGorod went to the National Archives to *debunk* the claim that the Emoluments Clause doesn't apply to Trump[.]" (emphasis added) (showing that the tweet was subsequently deleted with the link now indicating: "Sorry, that page doesn't exist!")); Laurence Tribe (@tribelaw), TWITTER (Sept. 1, 2017, 7:20 PM), https://twitter.com/tribelaw/status/903804726717841409 [https://perma.cc/GS65-VAYA] ("Another devastating critique of *Tillmania* by @jedshug[.]" (emphasis added)). Three of these four people are litigators in the Foreign Emoluments Clause cases against the President of the United States; the fourth, Stern, a journalist, is cheering on the other three. *See, e.g.*, First Amended Complaint, Blumenthal v. Trump, *supra* note 1, at 57 (listing Brianne J. Gorod among the attorneys for plaintiffs); Plaintiff's [CREW's] Memorandum in Opposition to Defendant's Motion to Dismiss, *supra* note 7, at 60 (listing Joshua Matz among the attorneys for plaintiffs); Second Amended Complaint, CREW v. Trump, *supra* note 1, at 66 (listing Professor Tribe among the attorneys for plaintiffs). It is possible that this sort of overreach is caused by participation in high-stakes litigation, and then finding out that someone you might otherwise respect is on the "other" side. Prior to the start of litigation, some demonstrated better behavior. *See, e.g.*, Laurence Tribe (@tribelaw), TWITTER (Nov. 19, 2016, 6:38 PM), https://twitter.com/tribelaw/status/800166406897672192 [https://perma.cc/DS27-U2L9] ("Just wait, @kurteichenwald: Some kook will argue the Emoluments Clause doesn't apply to the President. Ridiculous but predictable."); Laurence Tribe (@tribelaw), TWITTER (Nov. 21, 2016, 4:00 PM), https://twitter.com/tribelaw/status/800851329178566657 [https://perma.cc/7DQQ-EVEU] ("Must apologize: turns out scholar @SethBTillman makes that argument carefully. He's no kook, but I find the argument seriously unconvincing."). Or, perhaps, such overreach is caused by commentators' speaking without familiarizing themselves with—some or any of—the extant

stated: "As holders of an office 'of trust' under the United States, [presidential] electors [like the President] would also be subject to the [Foreign Emoluments] [C]lause."[12]

The Legal Historians' claim regarding presidential electors is perplexing. They cite no authority for this position. The Legal Historians quote anti-federalist George Mason for the proposition that: "the electors in the states might also [like the President] 'be easily influenced,' . . . by foreign emoluments."[13] But Mason does not actually say presidential electors fall under the scope of the Foreign Emoluments Clause or its *Office*-language. The Legal Historians also quote Edmund Randolph, a mercurial figure who chose not to the sign the Constitution at the Philadelphia Convention, but argued for ratification at his state's (i.e., Virginia's) ratification convention. According to the Legal Historians, "Randolph argued that the requirement that electors be appointed separately in the states and have to vote on the same day 'renders it unnecessary and impossible for foreign force or aid to interpose.'"[14] If Mason's language tends to suggest presidential electors fall under the aegis of the Foreign Emoluments Clause, Randolph's statement suggests just the opposite. In any event, none of the language quoted appears to be direct or substantive evidence, even of the (weak) original public expectations variety, for the Legal Historians' position.[15]

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literature. *See* Glenda Gilmore (@GilmoreGlenda), TWITTER (Aug. 31, 2017, 4:53 AM), https://twitter.com/GilmoreGlenda/status/903224236843704320 [https://perma.cc/53TX-VDJ5] ("Trump lawyers use 1 Hamilton letter for argument; *bury* 2nd Hamilton letter to the contrary written same day. Historians know better." (emphasis added) (blocking Tillman from her Twitter feed thereafter)). Professor Gilmore is, I believe, a recently retired historian from Yale University's Department of History. There are many other such examples. *See* Marc Johnson, *Episode 8: Article 1, Section 9, Clause 8*, MANY THINGS CONSIDERED (Jan. 18, 2017), http://manythingsconsidered.com/podcast (Dean Erwin Chemerinsky stating that the position that the President is not covered by the Foreign Emoluments Clause is "a silly argument") (at 32:25ff). Dean Chemerinsky is also a litigator in the Foreign Emoluments Clause cases. *See* Second Amended Complaint, CREW v. Trump, *supra* note 1, at 66 (listing Dean Chemerinsky among the lawyers for plaintiffs). Think about the example Gilmore and Chemerinsky are setting for others, including their own students, particularly JD and PhD candidates—people who will emulate their behavior in academic and other professional settings.

12. *See* Legal Historians Brief (NY), *supra* note 8, at 17 n.59 (inner quotation marks are in the Legal Historians Brief (NY), which is, apparently, quoting the Constitution's Foreign Emoluments Clause).

13. *Id.* at 17 (quoting 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA 1365–66 (John P. Kaminski et al. eds., 1993)). The material in the inner quotation marks is a quotation from Mason.

14. *Id.* (quoting 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA, *supra* note 13, at 1367). The material in the inner quotation marks is a quotation from Randolph.

15. *See* Legal Historians Brief (Maryland), *supra* note 10, at 19–21 (discussing George Mason's and Edmund Randolph's expectations: i.e., the Foreign Emoluments Clause applied to

More troubling is that there is a substantial body of authority taking the position that presidential electors are state positions,[16] not federal positions, and so entirely beyond the scope of the Foreign Emoluments Clause and its *Office . . . under the United States*-language.[17] The Legal Historians did not discuss this line of authority. Furthermore, there is a more recent line of academic authority, initially put forward by Vasan

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the presidency); Legal Historians Brief (DC), *supra* note 7, at 16–18 (same); Legal Historians Brief (NY), *supra* note 8, at 17–18 (same); *see also* Legal Historians Brief (NY), *supra* note 8, at 22 n.82 ("For contemporaneous evidence that the founders understood that the [Foreign Emoluments Clause] applied to the president, see the exchange between Mason and Randolph . . . ."); Jack M. Balkin, *Text, Principle, and Living Constitutionalism*, BALKINIZATION (May 20, 2008, 1:57 PM), https://balkin.blogspot.ie/2008/05/text-principle-and-living.html (explaining that "central to my theory is the claim that we are not bound by the original expected application"). *But see* Letter to Judge Daniels, *supra* note 11 (withdrawing footnote 82 from the Legal Historians Brief). *See generally* Letter from Professor William Andreen et al. to Majority Leader Mitch McConnell et al., Re: President Obama's Nomination of Judge Merrick Garland (Mar. 7, 2016), https://www.afj.org/wp-content/uploads/2016/03/Law-professor-SCOTUS-vacancy-letter.pdf ("The Senate must not defeat the *intention of the Framers* by failing to perform its constitutional duty." (emphasis added) (signed by Dean Chemerinsky and others)); *but see generally* Seth Barrett Tillman, *The Two Discourses: How Non-Originalists Popularize Originalism and What That Means*, NEW REFORM CLUB (Mar. 28, 2016, 9:22 AM), http://reformclub.blogspot.ie/2016/03/the-two-discourses-how-non-originalists.html (expressing doubts that Dean Chemerinsky and many of the other signatories to the McConnell letter are originalists of the original intent type—or any other type).

16. *See, e.g.*, Walker v. United States, 93 F.2d 383, 388 (8th Cir. 1937) ("It is contended by defendants that presidential electors are officers of the state and not federal officers. We are of the view that this contention is sound and should be sustained."); Buckley v. Valeo, 519 F.2d 821, 904 (D.C. Cir. 1975) (per curiam), *aff'd in part and rev'd in part on other grounds*, 424 U.S. 1 (1976) ("[A] Presidential elector is a state officer, not a federal one.") (citing *In re* Green, 134 U.S. 377, 379 (1890)); Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL'Y 665, 692 (1996) ("Relevant constitutional provisions imply that electors are state, not federal, officers."); *id*. at 693–94 (collecting state court authority taking the position that electors are state officers); s*ee also, e.g.*, *In re* Green, 134 U.S. 377, 379 (1890) ("Although the electors are appointed and act under and pursuant to the [C]onstitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal [S]enators, or the people of the states when acting as electors of [R]epresentatives in [C]ongress."); CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 28, 2012, S. DOC. NO. 112-9, at 475, https://www.govinfo.gov/content/pkg/GPO-CONAN-2012/pdf/GPO-CONAN-2012.pdf ("[I]n *Ray v. Blair*, the [Supreme] Court reasserted the conception of electors as state officers . . . .") (citing Ray v. Blair, 343 U.S. 214 (1952)). I take no position in regard to whether CRS correctly characterized *Ray v. Blair*.

17. *See* 4 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 651, at 577 (1906) ("The provisions of the Constitution 'neither prevent nor authorize persons who may hold office under any one of the States from accepting an appointment under a foreign government.'" (quoting State Department correspondence from 1872)). *But cf*. Teachout, *Gifts, Offices, and Corruption*, *supra* note 6, at 37 (discussing the possibility that the Foreign Emoluments Clause might reach state officers, but conceding that such a view is probably not the "better reading").

Kesavan, that notes that the Constitution's Religious Test Clause[18] distinguishes *offices under the United States* from *public trusts under the United States*. Kesavan argues that the position of presidential elector, although a federal position, is a *public trust under the United States*, as opposed to an *office under the United States*.[19] Again, this alternative view was not discussed by the Legal Historians.

Failing to discuss academic authority and nonbinding federal case law is not best practice. But it is certainly within the norms of the legal profession, particularly in a brief where space is scarce.[20] Failing to discuss contrary Supreme Court authority is another matter entirely. In 1867, in *United States v. Hartwell*,[21] the Supreme Court held: "The term ['office'] embraces the ideas of tenure, duration, emolument, and dutie*s*."[22] Presidential electors fail each and every element of this four-factor test. Presidential electors do not have tenure in office: what the state legislature gives, the state legislature can take back (at least prior to the electors' voting).[23] The position of elector lacks duration: it exists only for a short

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18. 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)).

19. *See* Vasan Kesavan, *The Very Faithless Elector*, 104 W. VA. L. REV. 123, 133 & n.45 (2001) (discussing "office" and "public trust" language in the Religious Test Clause); *id*. at 129 ("Electors are—by definition—neither (1) 'Senator[s] or Representative[s],' nor (2) 'Person[s] holding an Office of Trust or Profit under the United States.'"). *But compare* Jed Shugerman (@jedshug), TWITTER (May 30, 2017, 6:20 AM), https://twitter.com/jedshug/status/869543960905211904 [https://perma.cc/7X5H-77XQ] ("Foreign Emoluments clause applies to all offices of public trust, so would apply to TJ, Madison, Monroe[.]" (adding without explanation, the word "public" prior to "trust" or, perhaps, mistakenly converting the "or" in the Religious Test Clause's language to an "of")), *with* Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81, 97 n.55 (1994) (misquoting the Constitution's Religious Test Clause as stating: "no religious test shall be required as a qualification to any office of public trust under the United States" where it should state "office or public trust"). For the reader who is interested in my view, I agree with Kesavan's position: presidential electors—as a matter of original public meaning—hold an Article VI "public trust under the United States." Albeit, there is federal case law to the contrary. *See supra* note 16. For my apologia for academics (and others, including presidents) who misquote the Constitution see Seth Barrett Tillman, *Trump, Academia, and Hyperbole*, NEW REFORM CLUB (Aug. 19, 2016, 2:30 PM), http://reformclub.blogspot.ie/2016/08/trump-academia-and-hyperbole.html.

20. *See, e.g.*, Matz, *supra* note 11 ("To be sure, there's always a fine balance to be struck between scholarly nuance and word limits, especially in op-eds and works of legal advocacy. Many capable lawyers and legal scholars fail, at times, to reckon adequately with contrary precedents and primary sources."). *But see generally* FED. R. EVID. 901 (requiring authentication or identification of evidence); FED. R. CIV. P. 44 (discussing authentication in regard to official records).

21. United States v. Hartwell, 73 U.S. (6 Wall.) 385, 385 (1867).

22. *Id.* at 393 (emphasis added).

23. *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) ("The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.").

time—roughly, the time between the certification of the state general election ballot and the day the electors meet and vote. The position then ceases to exist for about 4 years—until the next presidential election cycle. The federal government does not pay presidential electors any compensation, i.e., the position comes with no federal emoluments (albeit, some states provide for travel and other expenses[24]). Presidential electors are best characterized as special federal agents (or holders of a "public trust under the United States") with a single duty, i.e., to cast a ballot for President and Vice President.[25] By contrast, a bona fide office, per *Hartwell*, must have *duties*, as opposed to a single duty. As the Congressional Research Service and the Library of Congress have opined since (at least) 2013: "The truth of the matter is that the electors are not 'officers' at all, by the usual tests of office. They have neither tenure nor salary, and having performed their single function they cease to exist as electors."[26] Prior to the start of the Foreign Emoluments Clause cases against President Trump, none of this was considered controversial in any way.

Let's clarify: If presidential electors are state positions, then the Legal Historians Brief erred. If presidential electors hold Article VI *public trusts under the United States*, as opposed to Article VI *offices under the United States*, then the Legal Historians Brief erred. If, per *Hartwell*, presidential electors do not hold "office" of any type, then it would seem to follow that electors do not hold an *Office . . . under the United States*, and are, therefore, beyond the ambit of the Constitution's Foreign Emoluments Clause and its *Office . . . under the United States*-language—and, again, the Legal Historians Brief erred. It is true that historical context matters, but legal context is an element, a very substantial element, of historical context.[27] To be clear, my point is not that because the Legal Historians were wrong (and I do think they were wrong) about presidential electors being officers under the United States, then they must also be wrong about

24. *Cf., e.g.*, Satrucharla Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev, A.I.R. 1992 S.C. 1959, para. 7 (India), https://indiankanoon.org/doc/1633748/ (explaining that in determining if a position is an office of profit under the government of India, the court examines, among other factors, if the post is "paid out of the revenues of [the] Government of India").

25. *See In re* Green, 134 U.S. 377, 379 (1890) ("The *sole function* of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation." (emphasis added)).

26. S. DOC. NO. 112-9, *supra* note 16, at 474 (citing *Hartwell*, 73 U.S. at 393).

27. *See, e.g.*, Legal Historians Brief (NY), *supra* note 8, at 24 n.86 ("[W]e caution against a narrowly linguistic approach to original public meaning if it ignores the historians' commitment to understanding the political and intellectual contexts of constitutional debate. For sophisticated discussions of these methodological questions, see Jack N. Rakove . . . ."); *see also, e.g.*, Legal Historians Brief (Maryland), *supra* note 10, at 24 n.72 (same); Legal Historians Brief (DC), *supra* note 7, at 22 n.64 (same).

the President's being an officer under the United States. Instead, the methodological point here is that the Legal Historians' (and others') focus on the Foreign Emoluments Clause's abstract purpose does not tell the interpreter if both of these positions (i.e., the presidency and presidential electors), if only one of these two positions, or if neither of these two positions are officers under the United States. A focus on purpose provides little guidance about the precise scope of the clause's *Office*-language. At best, purpose might guide us as a tiebreaker or in a close situation. But with regard to presidential electors, in my opinion, it is not close, and so abstract purpose teaches us very little. Professor Zephyr Teachout is an *Office*-maximalist, i.e., one who ascribes a wide (if not the widest) meaning to the Constitution's divergent *Office*-language. But, as far as I know, even Teachout has never argued that presidential electors hold *Office . . . under the United States*.[28] Her intellectual caution is an example others should emulate.

Given all that, I pose the question: How could five academics tell a federal court, without citing any supporting authority or noting any contrary authority,[29] that presidential electors hold an "office 'of trust' under the United States" and that electors fall under the scope of the Foreign Emoluments Clause?[30]

28. *See* Seth Barrett Tillman, *Originalism & The Scope of the Constitution's Disqualification Clause*, 33 QUINNIPIAC L. REV. 59, 68–71 (2014) (describing the maximalist view) [hereinafter Tillman, *Originalism & The Scope of the Constitution's Disqualification Clause*].

29. *See* Matz, *supra* note 20 (discussing the lawyer's duty to "reckon adequately with contrary" authority). Matz was speaking generally in regard to "contrary precedents;" here, by contrast, we are considering (what I would characterize as): [i] contrary [ii] binding [iii] controlling [iv] Supreme Court precedent. Just to be clear, my larger point is not that those involved in the Legal Historians Brief (NY) knew about *United States v. Hartwell*, thought it contrary, binding, and controlling, and failed to disclose what they knew. Rather, my point is that they might never have heard or considered *Hartwell* at all, and so were in no position to offer the federal trial court well informed friend-of-the-court guidance about the status of presidential electors and other positions ostensibly subject to the Constitution's Foreign Emoluments Clause and its *Office*-language. *See supra* note 27 (quoting the Legal Historians' repeated guidance in regard to "context").

30. *See supra* notes 9–12 and accompanying text. The Legal Historians made this claim only in their amicus brief in *CREW v. Trump*. They filed that brief on August 11, 2017. *See* Legal Historians Brief (NY), *supra* note 8, at 17 n.59. They filed similar amicus briefs in *Blumenthal v. Trump*, filed on November 2, 2017, and in *District of Columbia & Maryland v. Trump*, filed on November 14, 2017, but their expansive claim about presidential electors was dropped. *See* Legal Historians Brief (DC), *supra* note 7, at 17 n.50; Legal Historians Brief (Maryland), *supra* note 10, at 20 n.58. Why this claim was made in August, but was gone by November, is unclear. I presume that the Legal Historians do not see *Hartwell* as contrary, binding, and controlling precedent, as they never communicated with Judge Daniels and retracted the claim that they had made about electors in their Southern District of New York amicus brief. *See* Seth Barrett Tillman (@sethbtillman), TWITTER (Oct. 26, 2017, 11:57 PM), https://twitter.com/SethBTillman/status/923805904486785024 [https://perma.cc/Y3BR-SVU6]

Here, I can only hypothesize. The Legal Historians are not particularly interested in the linguistic or genealogical history of the Foreign Emoluments Clause's controlling phraseology: *Office of Profit or Trust under* [*the United States*]. Perhaps, they believe that such meaning never existed, or that it cannot now be rediscovered and reclaimed through modern research. Rather, their focus is on the historical purpose of the clause, which was (as all accept) an anti-corruption provision. Their thinking is (I hypothesize) if the clause were meant to apply to some federal positions, as it plainly was, then it is obvious that it was meant to apply to the most important positions,[31] and that would include (among others) the presidency. And if the clause's *Office*-language applied to the presidency, it is only logical (they suppose) that it would also extend to the electors who choose the President.[32]

("Congressional Research Service: 'The truth of the matter is that the electors are not "officers" at all, by the usual tests of office.' citing *U.S. v. Hartwell* (1868)"). *Compare* Seth Barrett Tillman (@sethbtillman), TWITTER (Nov. 14, 2017, 4:43 AM), https://twitter.com/SethBTillman/status/930415788321886208 [https://perma.cc/98A6-KJQL] ("Congressional Research Service: 'The truth of the matter is that the electors are not "officers" at all ….' (citing *U.S. v. Hartwell* (1868)), https://www.congress.gov/content/conan/pdf/GPO-CONAN-2017-9-3.pdf"), *with* Gautham Rao (@gauthamrao), TWITTER (Nov. 14, 2017, 5:09 AM), https://twitter.com/gauthamrao/status/930422432682397697 [https://perma.cc/V2KH-RANT] ("This [discussion of presidential electors] is all very interesting. Thank you. We deeply respect your scholarship and look forward to discussing your critiques as we work on future briefs and scholarship.") (reporting a "like" from Professor Shugerman), *with* Seth Barrett Tillman (@sethbtillman), TWITTER (Nov. 14, 2017, 5:42 AM), https://twitter.com/SethBTillman/status/930430714251800576 [https://perma.cc/L2MD-3PWR] ("That's not exactly publicly reaffirming the correctness of your submission to the SDNY court. If you stand by your statement, that's fine. But if you do not, if it is plainly inconsistent with *Hartwell*, binding Supreme C[our]t precedent, then don't you think you should do something?"), *with* Gautham Rao (@gauthamrao), TWITTER (Nov. 14, 2017, 7:13 AM), https://twitter.com/gauthamrao/status/930453706784559105 [https://perma.cc/WU3P-BAY4] ("We're grateful for your continued engagement on this, and I'm sure it will be on our docket as we continue to work on future briefs etc.") (reporting, again, a "like" from Professor Shugerman). *See generally* Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174, 179 n.1 (S.D.N.Y. Dec. 21, 2017), *appeal docketed*, No 18-474 (2d Cir. Feb. 16, 2018) (dismissing case on standing grounds—a month after the Tillman-Rao-Shugerman exchange on Twitter).

31. *See* Johnson, *Episode 8: Article 1, Section 9, Clause 8*, *supra* note 11 (Dean Chemerinsky states that the Framers/ratifiers/framing-era public "above all . . . would [have] want[ed] to make sure that the President and Vice President were not influenced by foreign governments.") (at 32:58ff). I might respond that the President and Vice President are not expressly listed under the Foreign Emoluments Clause. By contrast, the Impeachment Clause expressly lists the President and Vice President. *See* U.S. CONST. art. II, § 4 ("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.").

32. One really wonders how far the Legal Historians would embrace their chain of reasoning. If electors hold office under the United States because they elect the President (who, according to the Legal Historians, also holds an office under the United States), then do the voters (or members of the state legislatures) also hold office under the United States because the voters

The Legal Historians' mistake, in my view, is to allow abstract purpose determine linguistic meaning as opposed to actual text in its contemporaneous historical *legal* context. When one attempts to reconstruct the historical purpose of a constitutional provision, as understood by the ratifying generation, there is no good reason to think that one will arrive at the right level of generality or abstraction which accords with the actual language chosen. This is particularly true where chosen language is technical[33] or the result of compromise, reconsideration, and reflection.[34] In

(or members) elect the electors (and, therefore, indirectly elect the President)? *See, e.g.*, *In re* Green, 134 U.S. 377, 379 (1890) ("Although the electors are appointed and act under and pursuant to the [C]onstitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal [S]enators, or the people of the states when acting as electors of [R]epresentatives in [C]ongress.").

33. The Legal Historians expressly claim that electors hold an "office 'of trust' under the United States," as opposed to an office of profit under the United States. *See* Legal Historians Brief (NY), *supra* note 8, at 23 (quoting the Constitution's Foreign Emoluments Clause); *see also* U.S. CONST. art. I, § 3, cl. 7 (referring to "Office[s] of honor . . . under the United States"). In other words, it appears that the Legal Historians have conceded that the words used in the clause have a technical meaning, quite apart from any general or abstract discussion of purpose. *See infra* note 34 (discussing meaning connected to compromise). In such circumstances, the search for meaning requires our looking to how such language was used among participants within the legal system (contemporaneous with ratification), in addition to or as an important component of the greater general public. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798) (explaining that "expressions" which are "*technical*" and "in use long before the Revolution . . . acquire[] an appropriate meaning, by *Legislators, Lawyers,* and *Authors*" (emphases in the original)); *see also, e.g.*, Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 34 n.24, Blumenthal v. Trump, No. 1:17-cv-01154-EGS (D.D.C. Oct. 26, 2017), ECF No. 17, 2017 WL 5485653 ("Of course, the [Foreign Emoluments] Clause's scope is limited by factors beyond the meaning of 'emolument,' such as the requirement that an officeholder 'accept' an emolument 'from' a foreign state. This means that certain benefits which might fit within the broadest definition of emolument . . . are nevertheless outside the Clause's scope, because they cannot be 'accepted' or are not 'from' a foreign state." (citing James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English, 1760–1799*, 59 S. TEX. L. REV. 181 (2018))).

34. The progenitor clause of the Constitution's Foreign Emoluments Clause was Article VI of the Articles of Confederation. Article VI of the Articles of Confederation stated: "[N]or shall any person holding any office of profit or trust under the United States, or any of them [i.e., any State], accept of any present, emolument, office or title of any kind whatever, from any King, Prince or foreign State . . . ." ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1. Article VI became the Constitution's Foreign Emoluments Clause, except Article VI's language relating to state positions was dropped. *See* Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, *supra* note 6, at 5; Tillman, *The Original Public Meaning of the Foreign Emoluments Clause*, *supra* note 6, at 195–98; *see also* MOORE, *supra* note 17, at 577. I suggest this change in language was the result of compromise, or, at least, new thinking about the scope of the language ultimately chosen, quite apart from any general or abstract discussion of purpose untethered to the actual text. After all, the Framers could have simply copied the language already in the Articles of Confederation. Likewise, the contemporaneous (ratifying) public would (or, at least, could) have seen that the Constitution's language departed from the extant language in the Articles. *See supra* note 33 (discussing technical meaning). The change in language here is not hidden; it is quite obvious.

such circumstances, abstract purpose will tend to push the interpreter beyond the intended and public meaning of the language. I believe this is what has happened here. On the other hand, once one concedes that presidential electors do not hold *office under the United States*, then the Legal Historians' entire intellectual house of cards no longer appears quite safe and satisfactory. This is not to say that their position is flat out wrong, but only that their point of view, like any point of view lacking a firm basis in Supreme Court and other federal court case law, must be supported by argument and evidence beyond their mere assertion that it must be so.[35]

35. *See, e.g.*, Jed Shugerman, *George Washington's Secret Land Deal Actually Strengthens CREW's Emoluments Claim*, TAKE CARE (June 2, 2017), https://takecareblog.com/blog/george-washington-s-secret-land-deal-actually-strengthens-crew-s-emoluments-claim [hereinafter *George Washington's Secret Land Deal Actually Strengthens CREW's Emoluments Claim*] ("If Tillman thinks no one ever has 'impugned' [President] Washington's land deal [where Washington purchased government-owned land in a public auction in 1793 in the new federal capital], [Tillman] may want to update that sentence: I've seen *other* commentators question Washington's deal as improper, and *I'll impugn that deal here*." (emphasis added)). As far as I know, over the course of the last year since Professor Shugerman wrote this post on *Take Care* blog, he has failed to come forward with *any* publication by *any* other commentator who has impugned Washington's conduct in regard to the 1793 land auction. Shugerman's own willingness to do so, i.e., to impugn President Washington's conduct, while he (Professor Shugerman) is actively involved in high-stakes litigation against President Trump, and so not properly behind the veil of ignorance, is not quite the sort of unbiased expert evidence the fair-minded naturally turns to. *See also, e.g.*, Rao & Shugerman, *supra* note 8 (asserting, while behind the veil of ignorance, that "[i]n every subsequent report of the Treasury Department listing the employees and offices 'under the United States'—[including those] from *Treasury Secretary Hamilton himself* . . . —the president is included . . . ." but not producing, quoting, or citing, directly or indirectly, any such document, although a year has passed (emphasis added)). *Compare* Gorod, *supra* note 11 (writing, while behind the veil of ignorance, "[s]o it's *important* to know everything Hamilton did, in fact, say—including that George Washington was a person holding an 'office[] under the United States'" (emphasis added)), *with* Adam Liptak, *'Lonely Scholar With Unusual Ideas' Defends Trump, Igniting Legal Storm*, THE NY TIMES, Sept. 25, 2017, https://www.nytimes.com/2017/09/25/us/politics/trump-emoluments-clause-alexander-hamilton.html?mtrref=undefined (quoting Gorod, who stated, after she was no longer behind the veil of ignorance, the provenance of the Hamilton documents is "ultimately *immaterial*" (emphasis added)); *compare* Rao & Shugerman, *supra* note 8 (writing, while behind the veil of ignorance, "[u]ltimately, the *central* piece of documentary evidence [Tillman points to] for this emoluments argument is a manuscript version of a 1792 [sic] document by Secretary of the Treasury Alexander Hamilton" (emphasis added)), *with* Jed Shugerman & Josh Blackman (with Jeff Rosen as moderator), *The Emoluments Clause in Court*, NATIONAL CONSTITUTION CENTER (Oct. 26, 2017), https://player.fm/series/we-the-people-69963/the-emoluments-clause-in-court (Professor Jed Shugerman, stating, after no longer behind the veil of ignorance, in regard to gifts given to early Presidents, "[Tillman and Blackman] put a lot of eggs into this particular basket") (at 12:24ff); *compare, e.g.*, Shugerman, *George Washington's Secret Land Deal Actually Strengthens CREW's Emoluments Claim*, *supra* (characterizing Washington's 1793 land purchases as a "secret"), Shugerman & Blackman, *The Emoluments Clause in Court*, *supra* (Shugerman asserting that the auction "was not publicized") (at 33:55ff), *and* Gautham Rao (@gauthamrao), TWITTER (May 29, 2017, 7:04 PM), https://twitter.com/gauthamrao/status/869373840303980545 [https://perma.cc/Z3G7-YASL] ("One might also [critique] the ahistorical nature of Tillman's 'public' fwiw[.]") (reporting a

III. THE AFTERMATH OF THE HAMILTON DOCUMENTS IMBROGLIO: MIKE STERN'S "NATIONAL TREASURE ORIGINALISM"

My amicus brief in *CREW v. Trump* stated:

> In 1792, the Senate directed President Washington's Secretary of the Treasury, Hamilton, to draft a financial statement listing the "emoluments" of "*every* person holding *any civil office or employment under the United States*."[36] The Foreign Emoluments Clause's language is limited to *offices of profit or trust under the United States*. The broader language used in the Senate order, however, includes all *offices under the United States*, without the "of profit or trust" limitation.
>
> Hamilton took more than nine months to draft and submit a response, which spanned some ninety manuscript-sized pages. In it, he included appointed or administrative personnel in *each* of the three branches of the federal government, including the Legislative Branch (e.g., the Secretary of the Senate and Clerk of the House). But Hamilton did *not* include the President, Vice President, Senators, or Representatives. In other words, Hamilton did not include *any* elected positions in *any* branch. Like [President] Washington's acceptance of [Ambassador] Ternant's gift of the framed portrait of Louis XVI, the Hamilton document is another probative Executive Branch

"like" from Professor Shugerman), *with* John M. Gantt, *City of Washington. January 7, 1793*, 67(IV) GAZETTE OF THE UNITED STATES (Philadelphia), Jan. 19, 1793, at 267 ("A number of Lots in this City will be offered for sale at *auction* . . . ." (emphasis added)). On the other hand, if Shugerman's statement here—impugning Washington's 1793 land purchases at a public auction—were something he stood ready to support by referencing independent historians (writing in a non-litigation context) or something he had published long before he turned his mind to litigation against President Trump or even if it were a natural extension of such prior publications, then his statement would carry more weight than it does now. *See, e.g.*, Mikhail, *Our Correction and Apology to Professor Tillman*, *supra* note 11 ("We appreciate [Tillman's] *long-standing position* on how to interpret the Constitution's reference to 'Office of Profit or Trust under [the United States],' regardless of who is holding the office of President . . . ." (emphasis added)). I am hopeful that Professors Shugerman, Rao, and their Legal Historian colleagues (as well as others) will engage us all on these points in the not too distant future. *See* Mikhail, *Our Correction and Apology to Professor Tillman*, *supra* note 11 ("We look forward to continuing to engage the many important historical questions raised by this lawsuit."); Shugerman, *An Apology to Tillman and Blackman*, *supra* note 11 ("There is much more to the arguments about the [Foreign and Domestic] Emoluments Clauses, and I look forward to engaging [Tillman and Blackman] in future briefs."). Of course, as websites in the trial court record are allowed to deteriorate, the process of engagement becomes more difficult for us all. *See generally supra* note 11 (discussing the Legal Historians' website of archived Hamilton-related documents, a website which is no longer active, although it was cited in their Southern District of New York amicus brief); Tillman, *A Work in Progress*, *supra* note 1.

36. Motion and Brief for Scholar Seth Barrett Tillman as Amicus Curiae Supporting Defendant at 18 n.75, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (June 16, 2017), ECF No. 37, 2017 WL 2692500 [hereinafter Tillman, Motion and Brief Against CREW] (citing S. JOURNAL, 2nd Cong., 2nd Sess. 441 (May 7, 1792)).

> construction of the Constitution's *office under the United States*-language, which was established during Washington's first term (and so contemporaneous with the ratification of the Constitution). This official and meticulous correspondence is not consistent with Plaintiffs' claim that the Foreign Emoluments Clause's "office . . . under the United States" language encompasses the presidency.[37]

The intellectual claims reflected in the passage above were entirely consistent with arguments I had made in my publications, including in, among others, a peer reviewed publication and a conference paper, over the course of many years of active publishing—all long before President Trump announced his candidacy and became President.

I also discussed the provenance of the Hamilton-signed original in my brief. This too is something I had discussed in my prior publications. I pointed out that the original Hamilton document is housed in the national archives,[38] and a (partial) reproduction appears in *The Papers of Alexander Hamilton*.[39] I also noted the existence of a second, less interesting document, a reproduction or scrivener's copy of the Hamilton-signed original, which was not particularly relevant to the inquiry at hand. Why? Unlike the Hamilton-signed original, the second document was "not signed by Hamilton."[40] Unlike the Hamilton-signed original, the second document was "undated."[41] Finally, unlike the Hamilton-signed original, the second document was drafted by "an unknown Senate functionary."[42] This particular copy of the Hamilton-signed original was reported in *American State Papers*, and unlike the Hamilton-signed original, the copy included the President and Vice President.[43] I posted copies (or partial copies) of both documents (which were in long hand) and both the typeset reports, appearing in *The Papers of Alexander Hamilton* and in *American State Papers*, on my Bepress website circa 2011—again, long before Donald J. Trump announced his candidacy.[44] All these documents, along with other

37. *Id.* at 18–19 (emphases and bold in the original).

38. *Id.* at 19 n.76.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* Why the scrivener (or scriveners) changed the substantive contents in this manner is also something I have recently turned my attention to. *See* Seth Barrett Tillman, *The Blue Book & the Foreign Emoluments Clause Cases Against the President: Old Questions Answered*, NEW REFORM CLUB (Dec. 31, 2017, 6:10 AM), https://reformclub.blogspot.com/2017/12/the-blue-book-foreign-emoluments-clause.html [hereinafter Tillman, *The Blue Book & the Foreign Emoluments Clause Cases Against the President: Old Questions Answered*].

44. *See* Seth Barrett Tillman, *Selected Works of Seth Barrett Tillman*, BEPRESS (last visited Mar. 3, 2018), https://works.bepress.com/seth_barrett_tillman/203/ (click files listed under "Related Files").

interesting related documents, remain plainly visible and accessible to this day on my Bepress website.

Five legal historians came to the conclusion—exactly how, even now, I do not understand[45]—that the second document (i.e., the one reported in *American State Papers*) was a second original of some sort, Hamilton-signed (like the original), and drafted contemporaneously with the original. Their push back, along with the pushback of others who joined them on social media, blogs, and podcasts, against my long-standing views regarding these two documents was quite astounding. Astounding in regard to the substantive position my opponents took, and also in regard to its intensity.

I chose (in part by necessity dictated by factors beyond my personal control) to reply in a timely, orderly, and professional manner. I drafted an

45. A wide group of academics and litigators agreed with the five legal historians on Twitter, blogs, etc.—or, actively took the initiative to express similar views, before and after the five legal historians filed their brief. *See, e.g.*, *supra* note 11 (collecting authority); Gorod, *supra* note 11 ("[A]fter months of *pretending* like this document didn't exist, [Tillman] finally acknowledged it—and was forced to describe it in grossly *misleading* terms in order to discount its significance." (emphases added)); Matz, *supra* note 11 ("It's hardly an impressive defense to *mislead so dramatically* in the *NYT* but then say that it's all okay, since a few years ago I had a footnote in a law review article alluding vaguely to this contrary material." (emphasis added)); *id*. (adding that Tillman's publications are "low-profile academic articles"); Norm Eisen (@normeisen), TWITTER (July 6, 2017, 7:28 AM), https://twitter.com/NormEisen/status/882969451557249025 [https://perma.cc/GBY3-HRK4] ("[D]evastating @BrianneGorod rebuttal of '*evidence*' for *fringe* claim that emoluments clause doesn[']t apply to POTUS" (emphasis added)); Glenda Gilmore (@GilmoreGlenda), TWITTER (Aug. 31, 2017, 4:53 AM), https://twitter.com/GilmoreGlenda/status/903224236843704320 [https://perma.cc/53TX-VDJ5] ("Trump lawyers use 1 Hamilton letter for argument; *bury* 2nd Hamilton letter to the contrary written same day. Historians know better." (emphasis added)); Laurence Tribe (@tribelaw), TWITTER (July 6, 2017, 8:00 AM), https://twitter.com/tribelaw/status/882977561986420736 [https://perma.cc/9PAF-BXDP] ("Read this *devastating* reply to the *weird* claim that Hamilton thought Presidents could accept Foreign Emoluments[.]" (emphasis added)); Laurence Tribe (@tribelaw), TWITTER (Aug. 1, 2017, 8:00 AM), https://twitter.com/tribelaw/status/892381453312503808 [https://perma.cc/W8VR-W4XW] ("A National Archives visit *obliterates* @SethBTillman's thesis that [President] DJT isn't covered by the Foreign Emoluments Clause" (emphasis added)); Laurence Tribe (@tribelaw), TWITTER (Sept. 1, 2017, 7:20 PM), https://twitter.com/tribelaw/status/903804726717841409 [https://perma.cc/GS65-VAYA] ("Another devastating critique of *Tillmania* by @jedshug[.]" (emphasis added)); s*ee also, e.g*., Jack Metzler (@SCOTUSPlaces), TWITTER (Aug. 31, 2017, 8:29 AM), https://twitter.com/SCOTUSPlaces/status/903278565902491648 [https://perma.cc/43YD-2LYS] ("Tillman uses the document repeatedly when it suits him, and then *misrepresents* it as 'nearly identical' when it refutes his central point." (emphasis added)). Jack Metzler has since blocked Tillman from his Twitter feed. *But cf.* Milan Markovic (@profmarkovic), TWITTER (Sept. 19, 2017, 11:48 PM), https://twitter.com/ProfMarkovic/status/910395103134355456 [https://perma.cc/HXN4-KMMS] ("But, [because] of confirmation bias, I'd be surprised if your adversaries considered [the] possibility that Hamilton['s] signature was fake[.]"). Just to be clear, my own view is that the signature on the *Condensed Report* was not a "fake;" it was a copy—from a time before photocopiers.

affidavit explaining my position in detail, and I supported my filing with declarations from five experts: two from leading experts in regard to authenticating eighteenth century American primary documents,[46] and three from well-published Hamilton experts.[47] The five Legal Historians did not respond with counter-declarations. Instead, they conceded my point—at least (or, better, only) in regard to my claims relating to the provenance of the two documents.[48] I do not recount this singularly unhappy episode to embarrass the participants. I only do so in order that the reader can understand what came next.

Mike Stern,[49] on the *Point of Order* blog, wrote:

46. *See* Declaration of Professor Kenneth R. Bowling, Ph.D. (Exhibit H) at 3, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Sept. 19, 2017), ECF No. 85-9, 2017 WL 7964226; Declaration of John P. Kaminski (Exhibit G) at 3, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Sept. 19, 2017), ECF No. 85-8, 2017 WL 7964226. These declarations have been collected by Josh Blackman and Seth Barrett Tillman. *See* Josh Blackman, *New Filings in the Emoluments Clause Litigation*, JOSH BLACKMAN'S BLOG (Sept. 20, 2017), http://joshblackman.com/blog/2017/09/20/new-filings-in-the-emoluments-clause-litigation/; Tillman, *A Work in Progress*, *supra* note 1.

47. *See* Declaration of Stephen F. Knott (Exhibit I) at 1–2, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Sept. 19, 2017), ECF No. 85-10, 2017 WL 7964225; Declaration of Robert W.T. Martin (Exhibit J) at 1–3, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Sept. 19, 2017), ECF No. 85-11, 2017 WL 7964229; Declaration of Michael E. Newton (Exhibit E) at 1–3, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Sept. 19, 2017), ECF No. 85-6, 2017 WL 796420; Supplemental Declaration of Michael E. Newton (Exhibit F) at 1–3, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Sept. 19, 2017), ECF No. 85-7, 2017 WL 7964223. These declarations have been collected by Josh Blackman and Seth Barrett Tillman. *See* Josh Blackman, *New Filings in the Emoluments Clause Litigation*, *supra* note 46; Tillman, *A Work in Progress*, *supra* note 1.

48. *See supra* notes 11, 46–47 (showing collection of sources discussing the Hamilton-signed original, scrivener's copy, and subsequent reproductions); Letter to Judge Daniels, *supra* note 11 ("Although *amici* do not believe footnote 82 bears on an issue which is disputed by the parties in this case, additional research and new information that has come to light since their brief was filed have led them to conclude that footnote 82 is mistaken . . . ."). After the five Legal Historians conceded that my position in regard to the provenance of the two documents (i.e., the Hamilton-signed original and the scrivener's copy drafted circa 1833) was correct, the five Legal Historians neither *affirmed nor denied*, directly or indirectly, that I was correct in regard to the substantive issue. *Id. Namely, the issue that the Hamilton-signed original is probative in regard to resolving the original public meaning of the Foreign Emoluments Clause's Office-language. Id.* What Judge Daniels, in the Southern District of New York, and other readers should have understood by the Legal Historians' silence then and continued silence since remains puzzling. *See* Mikhail, *Our Correction and Apology to Professor Tillman*, *supra* note 11 ("We look forward to continuing to engage the many important historical questions raised by this lawsuit."); Shugerman, *An Apology to Tillman and Blackman*, *supra* note 11 ("There is much more to the arguments about the [Foreign and Domestic] Emoluments Clauses, and *I look forward to engaging* [Tillman and Blackman] *in future briefs*." (emphasis added)).

49. "Michael Stern specializes in legal issues affecting Congress, including congressional ethics, elections, investigations, and lobbying. He served as Senior Counsel to the U.S. House of Representatives from 1996 to 2004. He later served as Deputy Staff Director for Investigations for the Senate Committee on Homeland Security and Governmental Affairs and Special Counsel to

> Tillman responded to these charges [by the Legal Historians] by filing a proposed amicus response brief with a number of supporting exhibits, including declarations from five expert witnesses, two with expertise on authenticating founding-era documents and three with expertise on Alexander Hamilton. The evidence from these witnesses showed, to the satisfaction even of Tillman's critics, that Hamilton signed only the Hamilton Report and not the version which listed the president and vice president. (That second version, which we will discuss later, was likely created in the 1830s, well after Hamilton's death[.])[] In fact, the legal historians who had filed the brief criticizing Tillman issued a formal apology to him as well as a letter to the court withdrawing the footnote in which the criticism was made.
>
> At this point you may be thinking this is all very interesting (if you've read this far I will assume you are the sort of person who would find this interesting), *but is this really the way we go about determining the meaning of a constitutional provision*? An inference from omission that is said to *cast light on the view of a single framer about the meaning of a phrase* that is used in an entirely different context but is similar (though not identical) to a phrase used in the Constitution? And which then leads to a battle of forensic experts about whether the omission happened in the first place? Is this original public meaning originalism or *National Treasure originalism*?[50]

Stern made other arguments; some of which I have already responded to on my blog.[51] Here, I only intend to respond to Stern's points above.

Stern says there was "a battle of forensic experts." Not true. There were only experts on one side—then the other side conceded.[52] This is

the House Permanent Select Committee on Intelligence." Mike Stern, *About*, POINT OF ORDER: A DISCUSSION OF CONGRESSIONAL LEGAL ISSUES (last visited Feb. 27, 2018), http://www.pointoforder.com/about/. As a long time employee of Congress, one might expect that Stern has some facility for researching congressional documents and archives. *See infra* notes 59–61, 63 (showing the various congressional documents which are publicly available, and material to the legal issues being discussed here). He certainly would have drawn our attention to relevant congressional documents—i.e., those about which he knew existed.

50. Mike Stern, *Why Tillman's Experts Show He is Wrong*, POINT OF ORDER: A DISCUSSION OF CONGRESSIONAL LEGAL ISSUES (Oct. 22, 2017, 12:47 PM), http://www.pointoforder.com/2017/10/22/why-tillmans-experts-show-he-is-wrong/ (emphases added); *see also, e.g.*, Tillman, *The Blue Book & the Foreign Emoluments Clause Cases Against the President: Old Questions Answered*, *supra* note 43.

51. *See, e.g.*, Seth Barrett Tillman, *You Do Understand That The 1793 (Complete) Report Was Not Hamilton's Only Such Report, Right?—A Letter to Mike Stern & Point of Order Blog*, NEW REFORM CLUB (Nov. 28, 2017, 5:35 AM), https://reformclub.blogspot.com/2017/11/you-do-understand-that-1793-complete.html.

52. *See, e.g.*, *CREW v. Trump: Debate Over the Emoluments Clauses October 26, 2017 Podcast Resource Materials*, NATIONAL CONSTITUTION CENTER (last visited Mar. 26, 2018),

precisely how the legal system is supposed to work in regard to the production of evidence. This is not a bug; it is a feature. Indeed, the production of evidence by one party, leading to concession by the other party, is one of the main justifications for our summary judgment rules.[53]

Stern says the Hamilton document is significant (if at all) because it "cast[s] light on the view of [only] a single framer about the meaning of a phrase." Not true. The Hamilton document was part of an official communication from the Treasury Department to the Senate, and so, its contents cast light on the original public meaning of the document's operative *Office . . . under the United States*-language. That meaning is further supported by the fact that Hamilton, the document's primary signatory and author, was a lawyer, Framer, ratifier, and Cabinet member in Washington's first administration. Thus, the Hamilton-signed original carries every bit as much weight as a modern memorandum from the Comptroller General or the Office of Legal Counsel. One might even say that it carries more weight.

Stern says the language in the two documents is "similar." The language is more than similar, it is identical as a practical matter. First, the language in the Constitution's Foreign Emoluments Clause is "Office of Profit or Trust under [the United States];" the language in the Hamilton document is "civil office or employment under the United States." The language in the latter does not include the "of profit or trust" limitation in the former, and so, the language in the Hamilton document has a (potentially) wider ambit than the language expressed in the Foreign Emoluments Clause. Second, the language in the Hamilton document includes both "office[s] . . . under the United States" and "employment[s] under the United States," and so, the language in the Hamilton document has (again) a wider ambit than the language expressed in the Foreign Emoluments Clause. It is true that the Hamilton document's language is limited to "civil" positions. But the civil/military distinction is irrelevant to our discussion: Hamilton's list did not include *any* elected (federal or state) positions—it did not include the President, Vice President, Representatives, or Senators. These positions are civil positions, not military positions, and many contemporaneous documents (including documents emanating from Hamilton's Treasury Department) reporting the "civil list" included all of these elected federal positions. Even Professors Rao and Shugerman

https://constitutioncenter.org/media/files/CREW_v_Trump_update_podcast_resource.pdf ("Progressive scholars argued that other documents, excluded by Tillman, countered [Tillman's] assertion—but review by historians and other experts revealed Tillman's interpretation and identification of [the] documents to be correct—the progressive scholars were not citing to an original Hamilton letter but only a scrivener's copy.").

53. *See* FED. R. CIV. P. 56.

acknowledge this[54]—so should Stern. It follows that if any elected federal position (e.g., the presidency) fell within the ambit of the Foreign Emolument Clause's limited *Office of Profit or Trust under* [*the United States*] language, then there was good reason for that position to have been reported in Hamilton's 1793 roll of officers because the operative language in the latter was clearly a superset of the more limited operative language in the former. The language is not "similar," but identical as a practical matter.

That takes us to Stern's final objection: "Is [Tillman engaged in] original public meaning originalism or National Treasure originalism?" It seems to me that Stern could be making one of two arguments here. First, his complaint might be that something is methodologically unsound about examining core documents (i.e., "National Treasure[s]") from American history when interpreting constitutional provisions. One can only surmise that such a restriction does not apply to the Constitution itself. If this is what Stern meant, it is hard to see the force of it. Judges and commentators have never refrained from finding meaning by exploring America's rich Founding-era documentary heritage, even beyond the Constitution itself. American judicial opinions and scholarship frequently discuss the Articles of Confederation, the speeches and communications of Washington and his successors, etc., etc., etc. Of course, if we had on-point Supreme Court or other federal judicial precedents examining the Foreign Emoluments Clause or its *Office*-language, then there would be less reason to turn to non-judicial extrinsic sources. But we have no such precedents, and in such

54. *See* Rao & Shugerman, *supra* note 8 (discussing the "civil list" and noting that it systematically included the President, under both Hamilton and his successors at the Treasury Department); *see also* Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 79 (1861) ("[The President] is a *civil magistrate*, not a *military chief* . . . ."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 789, at 258 (Boston, Hilliard, Gray, and Co. 1833) ("The sense, in which the term ['civil'] is used in the Constitution, seems to be in contradistinction to *military* . . . ."); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114–15 (1995) (noting the Constitution's "civil/military distinction"). *But cf.* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 577 n.17 (2012) ("Under Article II, section 4 [the Impeachment Clause], only 'civil Officers' are impeachable. (Presidents and vice presidents are also mentioned separately in this clause, perhaps 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.)"). For Professor Amar to make his theory work, he has to convince the reader that the President and Vice President are in the "military" chain of command. *But see* Parker v. Levy, 417 U.S. 733, 751 (1974) ("The military establishment is subject to the control of the *civilian* Commander in Chief and the *civilian* departmental heads under him, and its function is to carry out the policies made by those civilian superiors." (emphases added)). Stern has an even more difficult road to travel. He has to convince himself and the reader that the President, Vice President, Senators, Representatives are all non-civil, i.e., military, officers.

circumstances, where we are plainly outside the thicket of precedent,[55] the use of extrinsic sources becomes methodologically necessary and proper. Given how little sense this interpretation of Stern's position makes, I can only suppose that this was *not* Stern's point. Stern was, I think, trying to make a different point.

It seems that Stern's objection is not that I turned to an early American document per se; rather, Stern's complaint is that I turned to this purportedly peculiarly obscure document and/or the methodological use I made of this document was somehow idiosyncratic—beyond the customary methodological practices of our legal system. In other words, his complaint is not that I had engaged in "National Treasure originalism," but that I had engaged in "National Treasure [Hunt] originalism."

Is the Hamilton document obscure? In the 1830s, the editors of *American State Papers*, the Clerk of the House and the Secretary of the Senate,[56] had to collect and choose among tens of thousands of documents in Congress's archives (and elsewhere) for reproduction in this multivolume collection. A great many documents were left out.[57] Hamilton's 1793 roll of officers was among those chosen. Nor has the Hamilton roll of officers gone unnoticed since. Even after two centuries, it has been cited within our corpus of modern academic articles and case law.[58] That a document two generations after it is created is reported in a collection of America's documentary heritage, and that two centuries after it is created, it continues to be cited by courts and commentators—these reasons seem to me, at least, to be some substantial evidence that this document cannot be fairly characterized as obscure.

Was my (Tillman's) methodological approach to the Hamilton document idiosyncratic? I don't think so—here's why. Four score and six

55. *See, e.g.*, Josh Blackman, *Back to the Future of Originalism*, 16 CHAP. L. REV. 325, 342–43 (2012) ("Perhaps the best examples in the first category are *District of Columbia v. Heller* and *McDonald v. Chicago*. In these cases, the Court was largely writing on a blank slate—precedential *open fields*, as opposed to deep in the *thicket*. The Court was in no way bound by any sort of New Deal compromise, as the precedential slate was clear. Thus, the Court was free to receive, and did apply originalist arguments. In fact, both the majority and dissent in *Heller* and *McDonald* advanced originalist arguments." (emphases in original) (footnotes omitted)).

56. *See* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, at title page & vii (Clerk of the House of Representatives and Secretary of the Senate eds., Gales & Seaton 1833).

57. *See* Declaration of Seth Barrett Tillman (Exhibit D) in response to Amici Curiae by Certain Legal Historians at 18–20, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. Sept. 19, 2017), ECF No. 85-5, 2017 WL 7795997.

58. *See, e.g.*, Tucker v. Comm'r of Internal Revenue, 135 T.C. 114, 124 n.8 (2010) (citing Hamilton's 1793 roll of officers); Daniel J. Hulsebosch, *The Founders' Foreign Affairs Constitution: Improvising Among Empires*, 53 ST. LOUIS U. L.J. 209, 215 n.49 (2008) (same); David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145, 195 n.263 (2008) (same).

years after the founding of the nation, during the Civil War, Congress passed a statute. The statute mandated that certain officeholders take a loyalty oath—this was a second oath, in addition to the ordinary oath prescribed by Congress pursuant to Article VI. The statute extended to "every person" holding "any office of honor or profit under the government of the United States."[59] The oath was passed during the Thirty-Seventh Congress. That Congress terminated on March 3, 1863. During that Congress, Senator James Asheton Bayard, Jr. (Delaware-Democrat) failed (or, perhaps, refused) to take the newly prescribed loyalty oath. Bayard was re-elected in 1863.[60] When the first regular session of the new Congress met, Senator Charles Sumner (Massachusetts-Republican) put forward a resolution requiring all Senators to take the newly prescribed loyalty oath. Bayard refused to do so on a point of principle. Bayard contested the constitutionality of the statute (at least, as applied to members of Congress) and also its construction: i.e., *Did the statute's language reach members of Congress?* Bayard made a variety of arguments. Bayard opened a copy of *American State Papers*, which was by then some three decades old, and on January 19, 1864, on the floor of the Senate, he proceeded to state:

> Early in the history of the country, on the 7th of May, 1792, an order was made by the Senate—
>
> "That the Secretary of the Treasury do lay before the Senate, at the next session of Congress, a statement of the salaries, fees, and emoluments for one year ending the 1st day of October next, stated quarterly, of every person holding any civil office or employment under the United States, except the judges . . . ."
>
> To that resolution, in February following, Alexander Hamilton made his return, and in that return of the persons holding civil offices under

59. *See* An Act to Prescribe an Oath of Office, and for Other Purposes, 37 Cong., 2d Sess., ch. 128, 12 Stat. 502 (July 2, 1862) (codified as amended at 5 U.S.C. § 3331). I do not adopt every aspect of Bayard's position. *See also, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416 (1819) (stating, in dicta, in a discussion about inferior Executive Branch officers, "[y]et he would be charged with insanity who should contend that the legislature might not superadd, to the oath directed by the constitution, such other oath of office as its wisdom might suggest"). Legal usage in regard to "office" and "officer" changed between 1776/1788 and 1861. After all, it was a span of more than eighty years. *See* Seth Barret Tillman, Either/Or: Professors Zephyr Rain Teachout and Akhil Reed Amar—Contradictions and Suggested Reconciliation 69–70 n.119 (Jan. 1, 2012), https://ssrn.com/abstract=1970909 (noting linguistic slippage between the *Office*-language in the Fourteenth Amendment and that used in the original Constitution); s*ee also* Jack Tsen-Ta Lee, *The Text Through Time*, 31 STATUTE L. REV. 217, 218 (2010). *See generally* John Randolph Tucker, *General Amnesty*, 126 N. AM. REV. 53, 54–56 (New York, D. Appleton & Co. 1878) (discussing scope of *Office*-language in the Fourteenth Amendment).

60. *See Dates of Sessions of the Congress*, UNITED STATES SENATE (last visited Mar. 26, 2018), https://www.senate.gov/reference/Sessions/sessionDates.htm; *BAYARD, James Asheton, Jr., (1799–1880)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS (last visited Mar. 26, 2018), http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000248.

> the United States . . . he included [administrative] officers of the Senate and [administrative] officers of the House of Representatives with their emoluments, but he did not include members of Congress. What, then, is the inference? Alexander Hamilton was certainly, as a jurist, as one familiar with the language of the Constitution, and with the mode in which it ought to be interpreted, a man whose opinions would be entitled to great weight; and in obeying an order of the Senate which required him to return the emoluments of all civil officers whatever, though he gave the officers of the Senate, the Secretary, all the clerks, the Doorkeeper, and also all the officers of the House of Representatives in the same way, he made no return of members of Congress, for the simple reason that they did not, in the language of the resolution, hold a civil office under the United States.[61]

Bayard was an honest man. Six days after Bayard made his speech, the debate on the resolution concluded. A vote was held. The resolution passed, and afterwards Bayard resigned in protest. Of course, because Bayard was working from Hamilton's 1793 roll of officers as (mis)reported in *American State Papers*—Bayard believed the President was an "officer under the United States." *As a result, Bayard's specific conclusions do not matter: what matters is his methodology.*[62] To put it another way, my methodology is the same as Bayard's—I have used Hamilton's 1793 roll of officers precisely as Bayard did—the only difference is that I had the advantage of having easy access to the Hamilton-signed original, to *The Papers of Alexander Hamilton*, to researchers at Columbia University's *Alexander Hamilton Papers Project*, and to helpful archivists at the National Archives. By contrast, Bayard had to make do with what appeared in *American State Papers*. In short, my use of Hamilton's 1793 roll of officers is consistent with what legal practitioners customarily do when construing undefined language. My use of the 1793 roll is consistent with what legal practitioners

61. CONG. GLOBE, 38th Cong., 1st Sess. 31, 37 (1864) (statement of Sen. Bayard), http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=067/llcg067.db&recNum=684. *But see also* Legal Historians Brief (NY), *supra* note 8, at 24 n.86 ("Tillman and Blackman ostensibly rely on originalist interpretation, but struggle to find original public meaning in overlooked and low-salience practices . . . .").

62. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009); *see also, e.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1131 (2017); *cf., e.g.*, Balkin, *supra* note 15 (rejecting originalism based on original "expectations"). *See generally, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); William Baude (@WilliamBaude), TWITTER (Feb. 21, 2018, 9:51 AM), https://twitter.com/WilliamBaude/status/966369683367702529 [https://perma.cc/T4W2-CLGN] ("[Nourse's paper] seems to badly misread @SethBTillman's work[.]").

have done *even with this specific document*. There was and is no treasure hunt; nothing I have done was idiosyncratic.

I imagine that someone, somewhere will now say that Tillman is still wrong (they always do!), and Bayard was a crank. Let's nip that argument in the bud before it too explodes on an unsuspecting and all too trusting public. Bayard was a lawyer, United States Attorney for Delaware, elected to the Senate three times, then resigned (on a point of principle connected to Hamilton's 1793 roll of officers!), subsequently appointed to the Senate, and then again re-elected to the Senate. He was chairman of the Judiciary Committee in the Thirty-Fifth and Thirty-Sixth Congresses.[63] He was the author of an antebellum treatise on the Constitution.[64] His treatise continues to be cited by the Supreme Court and in modern scholarship.[65] And, as far as I know, neither in 1864 nor any time since, has anyone criticized Bayard for engaging in "National Treasure" or "National Treasure Hunt" originalism.

IV. PROFESSOR VICTORIA F. NOURSE AND THE ABYSS

In 1995, Professors Akhil Amar and Vikram Amar wrote a highly influential article which appeared in *Stanford Law Review*. They argued that the Constitution's varying terminology in regard to *office* and *officer* are all coextensive. In other words: "officer" (standing alone), "officer of the United States," and "office under the United States" (and its variants) all mean the same thing.[66] Their view is puzzling in three ways. First, different language raises a presumption or inference that different meanings were

63. *See BAYARD, James Asheton, Jr., (1799–1880)*, *supra* note 60; *History of the District of Delaware*, UNITED STATES DEPARTMENT OF JUSTICE (last visited Mar. 26, 2018), https://www.justice.gov/usao-de/history.

64. *See* JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES (Philadelphia, Hogan & Thompson 1833).

65. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 981 (1991) (quoting BAYARD, *supra* note 64); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 486 & n.263 (2017) (same).

66. *See, e.g.*, Amar & Amar, *supra* note 54, at 114–15 ("As a textual matter, each of these five [differing] formulations [involving 'office' and 'officer'] seemingly describes the same stations (apart from the civil/military distinction)—the modifying terms 'of,' 'under,' and 'under the Authority of' are essentially synonymous."); *id.* at 115 ("'Officers' *of* or *under* the United States thus means certain members of the executive and judicial branches, but not legislators—the legacy of an earlier view sharply distinguishing the 'people's' representatives in Parliament from 'crown' officers in executive and judicial positions." (emphases added)). *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 . . . ."); *but cf.* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1447 n.87 (1987) (suggesting "that congressional delegates [to the Articles Congress] were state [as opposed to federal] officers").

intended and understood. Second, ascribing the same meaning to different constitutional text seems to cut against the authors' reputations as textualists. Nevertheless, many other interpretivists, textualists, originalists, and others adopted their position.[67] Their willingness to adopt the Amars' position absent substantive discussion, argument, and evidence is equally puzzling. Third, the Constitution was drafted by, among others, able politicians and lawyers over several months. It was not a rushed job cobbled together by amateurs. Likewise, later drafts were scrutinized by the Philadelphia Convention's Committee of Detail and Committee of Style. For example, the Committee of Style changed the draft Religious Test Clause's "any office or public trust under the Authority of the United States" language to what became that clause's final language: "any Office or public Trust under the United States." Nevertheless, the committee left much of the other divergent *Office*-language in the draft Constitution unchanged. This and other similar examples are some evidence that fine textual distinctions regarding *Office* and *Officer* were meaningful circa 1788.[68] Certainly, neither committee made any efforts to standardize the

67. *See, e.g.*, JOSHUA A. CHAFETZ, DEMOCRACY'S PRIVILEGED FEW 168 n.68 (2007); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1063 (1994) ("The sentence structure [in the Incompatibility Clause], beginning with the key words 'no person' and moving on to the phrase 'holding any Office *under* the United States,' clearly indicates that 'Officers *of* the United States' are the suspect bad apples here." (emphases added)); Kesavan, *supra* note 19, at 129 n.28 ("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."' (omission in original) (emphases added)); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1208 (2003) ("There is good reason to believe that 'officer' in the Committee of Style draft [which is as it appears in the Constitution] *is* shorthand for 'officer of the United States' in the draft referred by the Framers to the Committee of Style, especially in the absence of any additional recorded debate on the point."); Prakash, *supra* note 5, at 40 ("All federal officers [including the President], executive and judicial, occupy 'offices under the United States' and are 'officers of the United States.'"); Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 288 (2003) (describing "Officers *of* the United States" and "Officers *under* the United States" as "synonymous terms" (emphases added)); *cf.* John F. Manning, *Not Proved: Some Lingering Questions about Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 142 n.9 (1995) ("For convenience, I will refer to the many clauses that associate 'Officer' or 'Office' with 'United States' under the rubric of 'Officer of the United States.'").

68. *See* PETER K. ROFES, THE RELIGION GUARANTEES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 12 (2005) (noting that "[t]he Committee of Style rephrased the language by eliminating the words 'the authority of'" from the draft Religious Test Clause). Likewise, the Committee of Style changed the draft Presidential Succession Clause's "officer of the United States"-language to what became the clause's final language: "officer" without modifiers. *See* Amar & Amar, *supra* note 54, at 116 (noting that "[a] later style committee deleted the words 'of the United States'"); *see also id*. at 116 n.18 (noting "that the Committee of Style had authority to consolidate and clarify, but not to change, substantive provisions").

Constitution's divergent *Office*-language across the Constitution's articles, sections, and clauses.

Since 2008, I have written a number of articles on this question. I have flatly rejected the Amars' position. My position is: *office* (standing alone) means one thing, *officer of the United States* means another thing, and *office under the United States* (and its close variants) means something else. *Officer of the United States* is the narrowest category. It extends to appointed officers in the Executive Branch and Judicial Branch.

Office . . . under the United States (i.e., the language in the Foreign Emoluments Clause) is a wider category. This latter category (*Office . . . under the United States*) is a superset of the former category (*Officer of the United States*). *Office under the United States* extends to all positions created, regularized, or defeasible by federal statute, including nonelected Legislative Branch positions. The major difference between the two categories is that *Officer of the United States* only includes Judicial Branch and Executive Branch appointees (and, potentially, civil servants below appointees), but *Office . . . under the United States* also includes administrative personnel, i.e., appointed officers, in the Legislative Branch, such as the Clerk of the House and Secretary of the Senate.

Office, standing alone without modifiers, is a yet wider category. This latter category (*Office*, standing alone without modifiers) is a superset of the former category (*Office . . . under the United States*). *Office*, standing alone without modifiers, includes all those holding *Office under the United States* as well as those holding certain elected positions: e.g., President, Vice President, and Speaker of the House (but not rank-and-file members).

Furthermore, I have never argued that the Constitution's text is determinate. I have consistently recognized that there are competing streams of good authority on these difficult textual questions. Given that the text is indeterminate, I have regularly turned to contemporaneous history, e.g., historical practice in the Federalist Era and Early Republic regarding diplomatic gifts to presidents, Hamilton's roll of officers, and other contemporaneous and roughly contemporaneous extrinsic evidence. Although I recognize that there are competing streams of good authority, I have also written that some views are better than others, and that one position, i.e., the position explained above, is (in my opinion) the best.

Professor Victoria F. Nourse published—during February 2018—an article on this topic. She discussed my prior research. She wrote:

> Consider the now-important battle over the otherwise ignored Foreign Emoluments Clause. The Constitution states: "no person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or

foreign State." Long before this issue arose as a public question with regard to the current President, scholars had staked out positions on this matter. At least one constitutional textualist/originalist argued that the clause *did not even apply to the President* because the clause says "Office," and based on a survey of the use of the term "office" throughout the Constitution, the term "office" typically applies to *unelected* members of the executive branch, not the President. He claimed that many other scholars, originalists and others, agreed with the position that "office" means the same thing throughout the Constitution. More recently, the President's lawyers, claiming allegiance to original meaning, have asserted that, even if the clause does apply to the President, it only covers emoluments from "offices."

First, let us take the argument that the clause does not apply to the President. This is a classic form of textual gerrymandering—an argument that takes text out of context to create a new meaning. Let us assume that, in some parts of the Constitution, the term "office" means a lower ranking, unelected, member of the [E]xecutive [B]ranch. The problem comes in moving that definition from one part of the Constitution (call this the home clause) to another part (the receiving clause). Once isolated from the home clause, the term "office" is recontextualized within the receiving clause. If the home clause only covers unelected officials, then the receiving clause is now deemed to cover unelected officials. Such inferences, however, can rewrite the Constitution. The transferred home context effectively amends the new receiving context—the Foreign Emoluments Clause—by inserting the term "unelected." Of course, that is not the actual text of the Constitution. The term "unelected" does not exist in the Foreign Emoluments Clause; it has been added by the interpreter.

Under "analytic textualism," one asks whether a pragmatic addition such as "unelected" is falsified by any other text in the Constitution. And, yes, there is powerful evidence that the President can be covered by the term "Office." No one doubts that the President can be impeached. And so, no one should doubt that the term "Office" in the Foreign Emoluments Clause can easily be interpreted to cover an elected official like the President. Article II, Section 4 provides that the President "shall be removed from Office [on] Impeachment" for "high [C]rimes and Misdemeanors." Article I, Section 3, Clause 7 provides that the "Judgement in cases of Impeachment shall not extend further than to removal from Office." This falsification procedure allows us to see that the claimed textual enrichment is not the "only possible" interpretation; in fact, it is not a terribly plausible

enrichment at all: even President Trump's lawyers now admit that the Foreign Emoluments Clause does in fact cover the President.[69]

69. Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 26–28 (2018) (footnotes omitted), http://www.californialawreview.org/wp-content/uploads/2018/04/1Nourse-33.pdf; *see also infra* note 91 (discussing post-hardcopy publication changes to Professor Nourse's article). The only Tillman-authored publication Nourse cites is my publication, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*. Nourse, *supra*, at 27 nn.120–22 (citing Seth Barrett Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. L. REV. COLLOQUY 1 (2012)). I share Professor Nourse's admiration for Professor Grewal's and Professor Natelson's recent papers on this subject. Nourse, *supra*, at 27 n.121 ("For more recent and far more comprehensive claims about the Foreign and Domestic Emoluments Clauses, see A[mandeep] S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. [639 (2017)] [and] Robert G. Natelson, *The Original Meaning of "Emoluments" in the Constitution*, 52 GA. L. REV. [1 (2017)] . . . ."). If, however, Nourse had wanted a "more recent" Tillman-authored article, she could have turned to any number of my more recent publications. *See, e.g.*, Seth Barrett Tillman, *Business Transactions and President Trump's "Emoluments" Problem*, 40 HARV. J.L. & PUB. POL'Y 759 (2017); Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRIT. J. AMER. LEG. STUDIES 95 (2016); Tillman, *Originalism & The Scope of the Constitution's Disqualification Clause*, *supra* note 28; Seth Barrett Tillman, *Why Professor Lessig's "Dependence Corruption" Is Not a Founding-Era Concept*, 13 ELECTION L.J. 336 (2014); Seth Barrett Tillman, *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, 61 CLEV. ST. L. REV. 285 (2013); Tillman, *The Original Public Meaning of the Foreign Emoluments Clause*, *supra* note 6. Nourse could have also utilized my more recent, lesser publications on the same general subject. *See, e.g.*, Teachout & Tillman, *Common Interpretation, The Foreign Emoluments Clause*, *supra* note 6; Tillman, *Matters of Debate, The Foreign Emoluments Clause Reached Only Appointed Officers*, *supra* note 6; Josh Blackman & Seth Barrett Tillman, Op.-Ed., *The 'Resistance' vs. George Washington*, WALL ST. J., Oct. 15, 2017, https://www.wsj.com/articles/the-resistance-vs-george-washington-1508105637; Josh Blackman & Seth Barrett Tillman, Op.-Ed., *Yes, Trump Can Accept Gifts*, N.Y. TIMES, July 13, 2017, https://www.nytimes.com/2017/07/13/opinion/trump-france-bastille-emoluments.html. Finally, Nourse could have turned to any of my recently filed amicus briefs in the three Foreign Emoluments Clause lawsuits. *See, e.g.*, *supra* note n.† (collecting Tillman briefs); *see also* Josh Blackman, *Defiance and Surrender*, 59 S. TEX. L. REV. 157 (2018).

Finally, notice that Professor Nourse ends her analysis with the assertion that President Trump's lawyers "now admit" that the Foreign Emoluments Clause covers the President. *Compare* Nourse, *supra* at 28 ("[E]ven President Trump's lawyers *now admit* that the Foreign Emoluments Clause does in fact cover the President." (emphasis added)), *with* SHERI DILLON ET AL., MORGAN LEWIS LLP WHITE PAPER, CONFLICTS OF INTEREST AND THE PRESIDENT (Jan. 11, 2017), https://assets.documentcloud.org/documents/3280261/MLB-White-Paper-1-10-Pm.pdf [https://perma.cc/B8BU-X4U3] (showing that the President's personal lawyers took the position that the Foreign Emoluments Clause applies to the President and that this document was made public more than a full calendar year before Nourse published her paper). So why does Nourse write "now admit"? And why write "admit"? Is there any evidence that the President's Morgan Lewis attorneys had first taken or considered taking a different position, but were pressed or consented to making the "admission" that the Foreign Emoluments Clause applies to the President? I have no good reason to believe that Morgan Lewis counsel considered the alternative, i.e., that the clause does not apply to the President. Moreover, Department of Justice counsel representing the President, in his official capacity, i.e., counsel who have submitted actual court

I trust the fair-minded reader and, in time, even Professor Nourse, will not object to my stating that Nourse does not actually understand my position in regard to the Constitution's divergent *Office*-language. Because she does not understand it, she fails to characterize it fairly. Although I wholeheartedly agree with the textual falsification method put forward by Professor Nourse, she has not actually falsified anything I have argued. It might help the reader if I point out that at no point does Nourse ever quote *any* actual language from *any* of my publications where I take the positions which she incorrectly asserts are mine.

First, Professor Nourse states that my view is that the term "Office," as used in the Constitution, does not extend to the President. I have made no such claim. After all, such a position is a nonstarter: the Constitution squarely states the President holds an "office."[70] What could be more clear? Rather, my view is that the President does not hold an "office . . . under the United States."[71]

My position was aptly summarized by Professor Baude in a four-page article on *Jotwell*.[72] In fact, Nourse cites Baude's article.[73] Just to avoid any confusion on these issues, Baude presented my views in a helpful chart. I reproduce the most relevant part of Baude's chart.[74]

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filings, and who have written on this issue more recently than the President's Morgan Lewis counsel, have made no such "admission." Department of Justice Counsel have announced this more nuanced view both before and after Nourse published her academic article. *Compare* Defendant's Supplemental Brief in Support of his Motion to Dismiss and in Response to the Briefs of Amici Curiae at 21, Blumenthal v. Trump, Civ. A. No. 1:17-cv-01154-EGS (D.D.C. April 30, 2018), ECF No. 51, 2018 WL 2042235 ("For purposes of his motion to dismiss, the President has assumed that he is subject to the Foreign Emoluments Clause on the assumption that he holds an 'Office of Profit or Trust' within the meaning of the Clause.") (filed after Nourse published her article in February 2018), *and* President of the United States' Statement of Interest at 4 n.2, District of Columbia & Maryland v. Trump, No. 8:17-cv-01596-PJM (D. Md. Mar. 26, 2018), ECF No. 100, 2018 WL 1511801 ("We assume for purposes of this Statement that the President is subject to the Foreign Emoluments Clause.") (filed after Nourse published her article in February 2018), *with* Letter to Judge Daniels, *supra* note 11, at 1 ("[T]he government has not conceded that the President is subject to the Foreign Emoluments Clause.") (filed on October 25, 2017, that is, before Nourse published her article in February 2018, but long after Morgan Lewis counsel had made their legal advice for the President public). It appears that Professor Nourse does not understand the prior filings, current posture, and the chronology of events in the three Emoluments Clauses cases.

70. U.S. CONST. art. II, § 1, cl. 1 ("He shall hold his Office during the Term of four Years . . . .").

71. U.S. CONST. art. II, § 1, cl. 2.

72. *See* William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016) (reviewing Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, *supra* note 69; Tillman, *Originalism & The Scope of the Constitution's Disqualification Clause*, *supra* note 28), https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/.

73. *See* Nourse, *supra* note 69, at 27 n.122 (citing Baude, *supra* note 72).

74. *See* Baude, *supra* note 72, at 3.

Phrase	Meaning	Constitutional Provisions
Officer (simpliciter)	Holds an office – includes those holding "office … under the United States" as well as those holding elected positions: The President, Vice President, and Speaker of the House and Senate President Pro Tem	Succession Clause, Art. II, sec. 1
Officer of the United States	Appointed officers in the executive and judicial branches – subset of those holding "Office … under the United States"	Appointments Clause, Art. II, sec. 2 Commissions Clause, Art. II, sec. 3 Impeachment Clause, Art. II, sec. 4 Oaths Clause, Art. VI
Office … under the United States	All positions created, regularized, or defeasible by federal statute including (nonelected) legislative branch positions	Incompatibility Clause, Art. I, sec. 6 Rebellion Disqualification Clause, Amdt. XIV, sec. 3 Religious Test Clause, Art. VI
Offices of Honor/Trust/Profit under the United States	Subsets of "Office … under the United States" Honor: Honorary offices with no regular duties, salary, or other emoluments Trust: Offices with regular duties that are not delegable, e.g., an Article III judge Profit: Offices holding regular salary or other emoluments	Disqualification on Impeachment Clause, Art I, sec. 3 Foreign Emoluments Clause, Art. I, sec. 9 Elector Disqualification Clause, Art. II, sec. 1

Second, Nourse states that my view is that the term "Office," as used in the Constitution, "applies to *unelected* members of the executive branch." I have made no such claim. My view is that *Office* and *officer*, standing alone without modifiers, include those holding *office under the United States*—i.e., appointed positions in all three branches—as well as those holding certain elected positions: e.g., President, Vice President, and Speaker of the House. (My view is that rank-and-file members of Congress, in the House and Senate, are not encompassed by the word "Office," as used in the Constitution.)

Third, after telling her readers that my position is that "Office" means the same throughout the Constitution, Nourse tells her readers that I claim to have found support for my position among other scholars who take the same position. This also is not correct. I report the position of the Amars and others to distinguish my position from their position. These other scholars have argued that the Constitution's divergent *Office*-language is coextensive. I disagree with that position. My position is that divergent language accommodates different meanings.

Fourth, Nourse states that "[t]his falsification procedure [which she puts forward] allows us to see that the claimed textual enrichment [put forward by Tillman] is not the 'only possible' interpretation . . . ." I ask: Why is "only possible" in quotation marks? Who is she quoting? Given that

the only scholarship she discusses in that section of her paper is my scholarship, the reader is likely to think I am being quoted. Nourse cites only a single Tillman-authored publication, and I do not use the quoted language anywhere in my article.

For what it is worth, I do not believe that by interpreting the text of the Constitution, standing alone, one ought to conclude that there is only a single possible interpretation in regard to the Constitution's divergent *Office*-language. In fact, I have repeatedly made a very different claim. In my *Northwestern University Law Review* article, which is my only publication actually cited by Nourse, I stated:

> I do not suggest that the Constitution's text, drafting history, and ratification debates are free from all ambiguity on the meaning of *Office . . . under the United States*. Fortunately, we can turn to two incidents from President George Washington's first Administration to understand the meaning of this somewhat opaque phrase.[75]

My position is that where the constitutional text is ambiguous, one turns to early practice and history. I would add that the practices of President George Washington and his administration, and that of the First Congress are entitled to special consideration. My methodological outlook is hardly an outlier.

Finally, Nourse concludes that my use of intratextualism (with its assumptions of coherence) is methodologically unsound, and that my conclusion in regard to the scope or reach of the Foreign Emoluments Clause is not "terribly plausible." My response, beyond what I have written above, is that using intratextualism in this fashion predates my publications, predates original public meaning originalism, and even predates original intent originalism. It is far older.

In his *Commentaries on the Constitution*, Justice Joseph Story wrote:

> [T]he [Impeachment] [C]lause of the [C]onstitution now under consideration, does not even affect to consider the[] [President and Vice President] officers of the United States. It says, "the [P]resident, [V]ice-[P]resident, 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. Other clauses of the Constitution would seem to favour the same result; particularly the clause, respecting appointment of officers of the United States by the

75. *See* Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, *supra* note 69, at 14.

> executive, who is to "commission all the officers of the United States;" and the 6th section of the first article which declares that "no person, *holding any office under the United States*, shall be a member of either house during *his continuance in office*; . . . ."[76]

In short, Story concludes that the President is neither an *officer of the United States* nor holds an *Office under the United States* (which is a superset of the Foreign Emoluments Clause's more limited *Office of Profit or Trust under the United States*-language). At the very least, Story thinks this position is plausible and supported by the text of the Constitution. Indeed, although not discussed by Story, the drafting history of the Impeachment Clause also confirms Story's interpretation: an early draft of the Impeachment Clause applied to "other Civil officers of the U.S.," but the "other" was dropped by the Committee of Style.[77] Nor was Story alone—a fair number of later commentators followed Story's lead.[78] Nourse says (in effect that) Story's view (a view with which I agree) is not

76. STORY, *supra* note 54, § 791, at 260. I hope this quotation from Story sinks in with the disbelieving reader. Story puts forward the position that the President is *not* covered by the Incompatibility Clause and its operative "Office under the United States" language. In other words, although the Incompatibility Clause precludes a Senator from serving in the cabinet, the text of the clause does not preclude a Senator from concurrently serving as President. If Story's position, which defies modern separation of powers intuitions, is not implausible, my position in regard to the Foreign Emoluments Clause (i.e., that the clause's *Office . . . under the United States*-language applies to appointed positions, not elected ones) is equally reasonable—even if it defies modern intuitions involving foreign policy and conflicts of interest.

77. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 545, 552, 600 (Max Farrand ed., 1911).

78. *See, e.g.*, DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES 346 (Philadelphia, J.B. Lippincott & Co. 1878) ("[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.'" (emphases added)); *see also Proceedings of the Sen. Sitting for the Trial of William W. Belknap, Late Secretary of War, on the Articles of Impeachment Exhibited by the H. of Rep.*, 44th Cong. 145 (1876) (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 . . . Senator [Boutwell] from Massachusetts, . . . 'He is a part of the Government.'" (citing STORY, *supra* note 54)); RUTH C. SILVA, PRESIDENTIAL SUCCESSION 135 (2d ed. 1968) ("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 (1951) ("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."); Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 475 (1949) ("'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. *Officers in the constitutional sense are not elected by the electoral colleges*." (emphasis added)).

plausible. But saying that it is implausible does not make it so,[79] nor does her more strongly condemnatory language.[80]

This is not the place for a full defense of my views regarding the Constitution's divergent *Office*-language. That has been done several times elsewhere. Here, I will respond to Nourse's charge that I have engaged in intellectual "gerrymandering." What is meant by this charge? Nourse provides helpful examples. Article II, Section 1, Clause 1, the Executive Power Vesting Clause, states: "The executive power shall be vested in a President of the United States of America." In reading this clause, Justice Scalia has stated: "this [language] does not mean *some of* the executive power, but *all of* the executive power."[81] Scalia, in effect, is changing the language of the clause to: "*All* the executive power shall be vested in a President of the United States of America." Nourse challenges this type of textual enrichment as unsupported by the text. In other words, such enrichment is both reliant on unsupported assumptions of coherence across the Constitution's text and reliant on unstated preferences of the interpreter.[82] I agree. Nourse also objects to "intratextual arguments . . . that come from excising particular words from one 'home' clause and moving that enrichment to a different 'receiving' clause, where the term takes on a new meaning."[83] I agree with this too: such a strategy poses dangers.

Consider 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

79. *See, e.g.*, Edward W. Bailey, *Dean Pound and Administrative Law—Another View*, 42 COLUM. L. REV. 781, 802 (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 (1966) ("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)).

80. *See, e.g.*, Nourse, *supra* note 69, at 40–41 ("[F]or example, the assumption that 'office' must mean the same thing throughout the Constitution leads to the *verging-on-silly* argument that the Foreign Emoluments Clause does not apply to the President." (emphasis added)); *see also* Johnson, *Episode 8: Article 1, Section 9, Clause 8*, *supra* note 11 (Dean Erwin Chemerinsky stating that the position that the President is not covered by the Foreign Emoluments Clause is "a silly argument") (at 32:25ff). Although I think that both the Dean and Professor are incorrect, and that both display an inability to thoughtfully comment on ideas with which they disagree (or fail to understand)—quite an unappetizing state of affairs for academics—between the two, Dean Chemerinsky and Professor Nourse, I strongly prefer the former. The Dean, at least, is saying exactly what he means. I suspect Nourse's use of "verging" is not quite what she actually meant, and if it is what she meant, more is the pity.

81. Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

82. *See, e.g.*, Nourse, *supra* note 69, at 25 (complaining that "the interpreter is injecting the interpreter's preferences into the text"); *id.* at 40 (rejecting "assumptions" about textual coherence across the constitutional text).

83. *Id.* at 40.

Crimes and Misdemeanors."[84] Now some read this clause as suggesting that the clause's use of *Office*, standing alone, is equivalent to the clause's "Officers of the United States" language. In other words, such interpreters engage in textual enrichment. Such people read the clause either as:

> The President, Vice President and all Civil *Officers* shall be removed from *Office* on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.
>
> or
>
> The President, Vice President and all Civil *Officers of the United States*, shall be removed from [the] *Office of the United States* [that they are holding] on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Others assumes redundancy—they assume that the latter "Officers of the United States" language also covers the presidency and vice presidency. They read the clause as:

> 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.
>
> or
>
> The President, Vice President and all *other* 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.

All this textual enrichment—assuming *Office* is coextensive with *Officer of the United States*—and assuming *Officers of the United States* also encompasses the President and Vice President—relies on just the sort of assumptions and inferences Nourse objects to. So do I. The meanings above are textually possible. It is also textually possible, as Story has stated, that the President and Vice President hold "office," but they are not encompassed by the category of "Officers of the United States" or "Civil Officers of the United States." The clause-bound text does not answer this question.

Let's look at another clause: the Elector Incompatibility Clause. It states: "[N]o Senator or Representative, or Person holding *an Office of Trust or Profit under the United States*, shall be appointed an Elector."[85] Some think the clause uses redundant language. They think the clause means: "[N]o Senator or Representative, or Person holding *any other* Office of Trust or Profit under the United States, shall be appointed an Elector." In other words, they think the clause's "Office of Trust or Profit under the

84. U.S. CONST. art. II, § 4 (emphases added).

85. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

United States" language extends to Senators and Representatives. To put it another way, the positions of Senator and Representative need not have been separately listed as they were included by the clause's *Office*-language. By contrast, others, like the Amars, think the Constitution's divergent *Office*-language does not extend to members of Congress. Is the clause's language redundant? That question cannot be answered from the text of the Elector Incompatibility Clause (standing alone). There is a second question. Does the clause's "Office of Trust or Profit under the United States" language extend to the President and Vice President? Here too, the text of the clause (standing alone) supplies no determinate answer. The fact that some elected federal positions were listed (Senators and Representatives), but not others (President and Vice President), might mean the latter positions are excluded from the scope of the clause. But such an inference is not obvious.

Finally, there is the Foreign Emoluments Clause. Again, the clause states:

> [N]o Person holding any *Office of Profit or Trust under* [*the United States*], 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.[86]

How does Nourse read the clause?

> *The President, Vice President,* and no Person holding any *other Office of Profit or Trust under* [*the United States*], 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.[87]

Here, it is Nourse that is engaged in just the sort of pragmatic enrichment she decries in Justice Scalia (who, you will remember, added "all" to the Executive Power Vesting Clause). *Talk about unsupported assumptions and unstated preferences!* Not only does Nourse not recognize the clause's

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

87. The Constitution and its Foreign Emoluments Clause "must mean something." Either the clause applies to the President or it does not. The choice is a binary one. *See* Amar & Amar, *supra* note 54, at 136–37 n.143 ("The Constitution must mean something—the best reading of the document either permits or bars legislative succession."). Professor Nourse has stated that my position—i.e., the position that the Foreign Emoluments Clause does not apply the President—"verg[es]-on-silly." Nourse, *supra* note 69, at 40. It is a fair inference that Nourse's position is that the clause *does* apply to the President. Her claim to the contrary, i.e., that she is not "demand[ing] a particular textual reading" of the clause, is one the reader must judge for herself. *Id.* at 28 n.128. I point out to the reader, should Nourse respond that she has no actual view in regard to the applicability of the Foreign Emoluments Clause to the presidency or that her view is that the clause is ambiguous, then it made little sense for her to call my position "silly." A position can only be characterized as "silly" relative to its rivals. If my position is "silly," then it follows Nourse has embraced a rival position, and there is only one such rival position.

ambiguity in regard to the presidency, she affirmatively states that the contrary reading (i.e., the reading which excludes the presidency—a post not expressly mentioned by the clause's text—from the scope of the clause) is "verging-on-the-silly."[88]

Nourse's sole defense of her interpretation of the Foreign Emoluments Clause—where she pragmatically enriches the text by adding language about the presidency—is that: "Article II, Section 4 provides that the President 'shall be removed from *Office* by Impeachment' for 'high crimes and [m]isdemeanors.' [Likewise,] Article I, Section 3, Clause 7 provides that the 'Judgment in cases of Impeachment shall not extend further than to removal from *Office*.'"[89] Here too, Nourse is engaged in just the sort of weak intratextualism she decries in others. She assumes that "Office," standing alone, in the Impeachment Clause, and "Office," standing alone, in the Disqualification Clause are co-extensive or sufficiently similar with the Foreign Emoluments Clause's "Office of Profit of Trust under [the United States]" language to make comparison, enrichment, or even *falsification* meaningful.[90] I do not suggest that such a view is stupid; it is not. Others have held this view in the past. I do suggest that Nourse's position is "not the 'only possible' interpretation."[91] The text

88. *See, e.g.*, Nourse, *supra* note 69, at 40–41 ("[F]or example, the assumption that 'office' must mean the same thing throughout the Constitution leads to the *verging-on-silly* argument that the Foreign Emoluments Clause does not apply to the President." (emphasis added)).

89. Nourse, *supra* note 69, at 28 (quoting the Impeachment Clause and the Disqualification Clause) (emphases added).

90. *See* Nourse, *supra* note 69, at 28 n.128 ("It is worth noting that by invoking this comparison, I am not repeating 'borrowing' errors. My claim is not that the impeachment clauses use the term 'Office,' therefore the term 'Office' in the Foreign Emoluments Clause must include the President. I am using that clause to negate a hypothesized interpretation, not to demand a particular textual reading."). *Just as intratextualism requires identical or sufficiently similar language across clauses, analytic textualism requires identical or sufficiently similar language across clauses to effect falsification*. Nourse assumes the Constitution's use of "office" (alone, and without modifiers) in the Impeachment Clause and the Constitution's use of "office" (alone, and without modifiers) in the Disqualification Clause are sufficiently similar to the Foreign Emolument Clause's *Office of Profit or Trust under* [*the United States*] language such that the two former uses falsify my proposed view of the meaning of the latter language. She offers no justification or defense for this intratextual assumption. Such supposed "similarit[ies] . . . need to be defended, not assumed." *Id.* at 41. Notwithstanding all her protestations to the contrary, Nourse's analytic textualism is *ad idem* with Professor Akhil Amar's intratextualism. *See id.* at 40 ("'Analytic textualism' makes no such assumption [about similar and dissimilar words and phrases in the Constitution], indeed it seeks to interrogate such assumptions, by attempting to falsify claimed similarity relationships."). That is precisely why her only efforts to falsify my position make use of clauses using the word "office" (standing alone and without modifiers), or merely announce her interpretive intuitions in a conclusory fashion.

91. Nourse, *supra* note 69, at 28 (inner quotation marks do not expressly refer to any distinct source). After hardcopy publication of Professor Nourse's article in *California Law Review* [hereinafter *CLR*], and in response to my critique and complaints, the student editors at *CLR* removed these quotation marks from extant electronic reproductions of Nourse's article. Nonetheless, the student editors refused to publish any response by me in *CLR* or on *CLR Online*.

is not determinate. There are competing reasonable views. Given that competing reasonable views are consistent with the clause's text, I have turned to historical practice in the Federalist Era and Early Republic regarding diplomatic gifts to presidents, the Hamilton document, and other contemporaneous and roughly contemporaneous extrinsic evidence. But the merits of that debate are beside the primary point. The primary point I am making here is that Nourse does not understand my position, and that in seeking to argue the contrary (i.e., contrary to the positon she imagines I have taken), she has engaged in just the sort of interpretive strategies that she says she opposes.

Professor Nourse's inability to understand and properly characterize a line of argument—i.e., Joseph Story's line of argument, Story's successors' line of argument, my line of argument—does not breed confidence that she has actually grappled with and fairly considered the underlying legal materials, including the fairly small corpus of academic literature on the Foreign Emoluments Clause.[92] For me that is a small loss; one I have experienced several times before. For her and her readers it is a greater loss, and for her students, colleagues, and wider legal academia—a mentor's, colleague's, and peer's inability to deal with idiosyncratic ideas in an even-handed manner—that is a loss beyond calculation.

V. THE WAY FORWARD

As illustrated above, much of the discussion regarding the Foreign Emoluments Clause, the scope of its *Office*-language, and relevant textual, scholarly, and historical inquiry has been less than useful. I think there are several reasons why we have come to this unfortunate state of affairs.

First, the commentators above (along with other commentators) believe their position carries a strong presumption of correctness (if not certitude), that it is my duty to displace that presumption, and that they will be the judges if I have carried that burden. Certainly, I have never agreed to such terms for this debate. Nor should I. The text of the Constitution does not expressly state that the Foreign Emoluments Clause applies to the

Furthermore, I have received no assurances that an errata sheet will be published in any subsequent issue of *CLR*. Finally, I have no idea if these post-publication changes to Professor Nourse's article were made with Professor Nourse's approval, and I have received not one word of explanation from Professor Nourse in regard to all these strange goings-on.

92. *But see id.* at 28 n.130 ("Nothing in this Article presumes to be a comprehensive review of the emoluments literature, which since the initial draft of this Article has grown *exponentially*." (emphasis added)). The corpus of full-length articles on the Foreign Emoluments Clause and Domestic Emoluments Clause remains quite small, and a good many (if not most) of those articles deal primarily with standing and justiciability, as opposed to the meaning of "emoluments" and the scope of the Foreign Emoluments Clause's *Office*-language. One wonders where lurks this "exponential" growth of articles about which Professor Nourse is speaking.

President. The text of the Constitution does not expressly define the scope of the Constitution's "Office of Profit or Trust under [the United States]" language. The Supreme Court has had no occasion to address the scope of the clause or the meaning of the clause's operative language, or even the scope of closely similar language in other clauses. As educated generalists who have only recently chosen to inject themselves into this debate, these commentators' opinions should get a fair hearing. I would add: so should mine. And because what is involved here is a debate between opinions lacking firm judicial support, our divergent ideas (and we) meet as equals.[93] In regard to the actual lawsuits brought against the President, it behooves those who brought these lawsuits, supporting amici, and those offering them scholarly shelter to bear in mind that, as a general matter, in civil litigation, plaintiffs bear the burden of proof, production, and persuasion.[94]

93. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 10 (1996) (rewriting the words of Chief Justice Marshall, and stating "historians can never forget that it is a debate they are interpreting"), https://www.amazon.com/Original-Meanings-Politics-Making-Constitution/dp/0679781218; Declaration of Professor Bowling, *supra* note 46, at 4 ("In Hamilton's day . . . . *Office under the United States* did not extend to elected officials. In my professional judgment, Hamilton's roll of officers, *The Complete Report*, is consistent with what was one strand . . . of the contemporaneous . . . public understanding of *office under the United States*."). Professor Rakove has cited Professor Bowling and his publications favorably in the past—but not here in the context of the Emoluments Clauses litigation. *See, e.g.*, THE ANNOTATED U.S. CONSTITUTION AND DECLARATION OF INDEPENDENCE 348 (Jack N. Rakove ed., 2009) (citing Bowling); JACK N. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS 204 (1998) (same); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI. KENT L. REV. 103, 105–06 n.12 (2000) (same). Rakove's amicus co-authors agree. *See, e.g.*, GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE 226 n.52, 227 n.66 (2016) (same); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1059 n.47 (2014) (same); Shugerman, *An Apology to Tillman and Blackman*, *supra* note 11 (citing Tillman's experts, including Bowling, approvingly). *See generally* Legal Historians Brief (NY), *supra* note 8 (filed on behalf of Professors Rakove, Shugerman, Mikhail, Rao, and Stern); *supra* note 10 (listing the Legal Historians' other amicus filings).

94. *See* Nourse, *supra* note 69, at 28 n.128 (asserting that Professor Nourse is not "demand[ing] a particular textual reading"). In my amicus brief in *Blumenthal v. Trump*, I wrote: "Plaintiffs cannot point to a single judicial decision holding that this language in the Foreign Emoluments Clause, or the similar phrase 'Office . . . under the United States' in other constitutional provisions, applies to the President." *See* Brief for Scholar Seth Barrett Tillman & the Judicial Education Project as Amici Curiae Supporting Defendant at 2, Blumenthal v. Trump, No. 1:17-cv-01154 (D.D.C. Sept. 19, 2017), ECF No. 16-1, 2017 WL 4230605; *id.* at 22 (same). An amicus supporting plaintiffs responded: "Defendant [Tillman's] Amicus [brief] 'cannot point to a single judicial decision . . . holding that . . . the Foreign Emoluments Clause . . . [does not] appl[y] to the President.'" Brief of Separation of Powers Scholars as Amici Curiae Supporting Plaintiffs at 16–17 n.9, Blumenthal v. Trump, No. 1:17-cv-01154-EGS (D.D.C. Nov. 2, 2017), ECF No. 25-1, 2017 WL 5513218 (quoting Tillman's *Blumenthal v. Trump* amicus brief, *supra*). Efforts to turn my language on its head are not availing: the burden of proof, production, and persuasion lies with plaintiffs, not defendant. *See also, e.g.*, Shugerman, *Questions about the Emoluments Amicus Brief on Behalf of Trump UPDATED*, *supra* note 11 ("No court has ever adopted [Tillman's] interpretation [of the Foreign Emoluments Clause's *Office*-language] . . . .").

If the very best that plaintiffs can show is that their position is no better than mine, then that ends the judicial challenge.

Second, it is time for my intellectual opponents to be fair.[95] Claims that they have made that they know or now know to be incorrect should be withdrawn or revised. Claims that they have made asserting the existence of documentary support, should be promptly supported with actual documents—or else the claims should be withdrawn. If they have to go through this process repeatedly, they might ask themselves if their position and expertise is really as strong as they have led themselves and others to believe.[96]

Shugerman's claim here is entirely correct—he just fails to note that no court has ever held the converse, i.e., that the Foreign Emoluments Clause's *Office*-language applies to the President.

95. A good place for my opponents to start might be to refrain from making key admissions about contrary arguments in their footnotes. Such admissions belong in the main text, not one's footnotes. *See, e.g.*, Nourse, *supra* note 69, at 27 n.122 ("To be fair, Tillman also relies upon various historical claims . . . ."). Likewise, Professor Nourse reports claims I have made, but she fails to report limitations I have put on those claims in the very sentence in which I have made them. *Compare id*. ("According to Tillman, other scholars . . . embrace the position that 'all office-related language means the same thing' . . . ." (quoting Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, *supra* note 69, at 20 n.55)), *with* Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, *supra* note 69, at 20 n.55) (noting "[o]ther (living) commentators who have embraced this position that all office-related language means the same thing, *or who have taken a position akin to it, include*" (emphases omitted) (emphasis added)), *and supra* notes 66–67 (showing examples of others with positions similar to the stance that all office-related language means the same thing). Finally, when presenting my ideas to the reader, Professor Nourse announces in her main text that they are the ideas of some unnamed originalist. *See* Nourse, *supra* note 69, at 26–27 ("At least one constitutional textualist/originalist argued that the clause did *not even apply to the President* because . . . ."). She fails to put the reader on *any* notice that my reading is supported by Joseph Story's *Commentaries on the Constitution*. *See* STORY, *supra* note 76, and accompanying text. This is not fair to the reader, and well-informed scholars (including those who disagree with my position) have avoided doing what Nourse has done here. *See, e.g.*, Benjamin Cassady, *"You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify*, 32 QUINNIPIAC L. REV. 209, 291 nn.393, 395–96 (2014) (asserting that the President is covered by the Constitution's *officer of the United States*-language, and then in regard to the contrary position, first citing Joseph Story's *Commentaries on the Constitution* and then Tillman's publications). Yet, we know that Nourse considers Story's *Commentaries on the Constitution* good authority. *Compare* Nourse, *supra* note 69, at 43 n.198 (citing Story's *Commentaries on the Constitution*), *with id*. at 27 (accusing other scholars of "gerrymandering"). Just as Nourse does, there are many legal academics who consider their own legal intuitions, and that of their modern peers, as evidence, without recognizing the contrary evidence in the form of the legal intuitions of others. *See, e.g.*, Erik M. Jensen, *The Foreign Emoluments Clause*, 10 ELON L. REV. 73, 90 (2018) ("Come on (I have heard colleagues say), we really cannot be expected to think the President is not holding an office of profit or trust under the United States."); *see also, e.g.*, Josh Blackman & Dan Hemel, University of Chicago Federalist Society: Debate on the Emoluments Clauses (Apr. 9, 2018) (Dan Hemel: "But those trained in analytic philosophy think that actually intuition is argument or that intuition is a source of data that leads to arguments . . . .") (at 36:50ff), https://www.youtube.com/watch?v=biN5nrQQLfw&t=824s.

96. Another way to think about this issue is that if you believe (as I do) that the arguments and objections launched by the commentators above (against the *president-is-not-an-officer-*

Finally, it is time for my intellectual opponents to be forthcoming in regard to an improved debate and debate atmosphere—an atmosphere rooted in mutual respect and goodwill. If that future debate is going to be informative, might not I (or you, the reader) ask these commentators to do more than make a mere tactical claim: viz., *the President falls under the aegis of the Foreign Emoluments Clause*. Might not I (or you, the reader) ask these commentators to turn to the more challenging intellectual question: viz., *What is the scope of the Foreign Emoluments Clause and its operative "Office of Profit or Trust under* [*the United States*]*" language?* Some heavy intellectual lifting might be involved. Once they have defined that language, maybe they could, maybe they should, tell us if the clause extends to: (i) Senators, (ii) Representatives, (iii) presidential electors, (iv) federal jurors, (v) attorneys admitted to practice in federal courts, (vi) advisors to the President who lack individualized legal discretion to affect binding legal relations, (vii) state judges subject to mandamus orders by federal courts, (viii) elected territorial officials, (ix) territorial officers appointed by elected (nonjudicial) territorial officials, (x) enlisted federal military personnel, (xi) state militia officers called into national service by the President, (xii) federal civil servants, (xiii) federal contractors, (xiv) members of a national Article V convention, (xv) members of state ratifying conventions called pursuant to Article V, (xvi) American appointees to treaty-created offices (where the treaty is not domesticated by federal statute), (xvii) multistate compact officials, (xviii) *qui tam* plaintiffs asserting federal causes of action, (xix) holders of letters of marque and reprisal, (xx) trustees, directors, members, officers, employees, and other

under-the-United-States view) have failed, as did similar prior efforts, then that is some good reason to accept the position that has withstood their objections. *Compare, e.g.*, Prakash, *supra* note 5, at 38–39 ("[Tillman] asserts that although the Constitution provides that the President 'shall Commission all the Officers of the United States,' Washington never commissioned himself or John Adams . . . . Unfortunately, [Tillman] offers no evidence to support any of these propositions, but merely asserts them as fact." (footnotes omitted)), *with* Case of Brigham H. Roberts, H.R. 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 . . . ."). As Chief Justice McKean explained "It is in argument, in law, and in logic, as it is in nature (*destructio unius, est generatio alterius*) that the destruction of an objection, begets a proof." Boyd's Lessee v. Cowan, 4 U.S. (4 Dall.) 138, 141 (Penn. 1794). McKean, a proponent of the then proposed federal constitution, made the same argument at the Pennsylvania ratification convention. *See* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA 542 (John P. Kaminski et al. eds., 1993) (McKean, on December 10, 1787, stating: "It holds in argument as well as nature, that *destructio unius est generatio alterius*—the refutation of an argument begets a proof."); *see also* 1 ANNALS OF CONG. 560 (1789) (Joseph Gales ed., 1834) (Congressman Fisher Ames, on June 18, 1789, stating: "I believe nearly as good conclusions may be drawn from the refutations of an argument as from any other proof. For it is well said, that *destructio unius est generatio alterius*.").

agents of federally chartered trusts, corporations, and other private entities with legal personality, and (xxi) individuals affiliated with private entities created under state (or federal, or even foreign) law in which significant equity is held by the United States government. I do not ask this to satisfy idle curiosity. Rather, the commentators above believe they have a coherent, if not correct, intellectual position. But the only way for us to be confident that their position is coherent (or correct)—and also better than its rivals—is for them to communicate their position to the rest of us so that we can see how it plays out, not only in regard to the presidency, but in regard to other federal and state positions. And if they cannot do so, if they are unwilling to do so, is that not telling?