

# ORIGINALISM & THE SCOPE OF THE CONSTITUTION’S DISQUALIFICATION CLAUSE

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## I. WHY THIS DEBATE IS IMPORTANT

The United States Constitution comes without either an answer key or instructions. As a result, we Americans have argued since ratification and the founding era about what it means and how (best) to interpret it. Unsurprisingly, there are any number of competing methodologies for interpreting our Constitution’s provisions; these include, among others, common law constitutionalism,<sup>1</sup> living originalism,<sup>2</sup> functional theories,<sup>3</sup>

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<sup>1</sup> See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 3 (2010) (“Our constitutional system, without our fully realizing it, has tapped into an ancient source of law,

and pragmatism.<sup>4</sup>

The different methodologies are useful, particularly where we are trying to *re*interpret a constitutional provision, having already interpreted it on a prior occasion or occasions.

But these different methodologies do not have much to teach us when we are interpreting a constitutional provision for the first time. When we interpret on a clean slate, absent fully developed Marshallian precedents, common law constitutionalism cannot guide us. Similarly, regarding legal issues that have little resonance with the public, democratic moments cannot offer substantial guidance to any living originalism.<sup>5</sup>

What about consequentialist theories, such as functionalism or pragmatism? Our Constitution is some 225 years old. If the first time we adjudicate, parse, or discuss a constitutional provision is only after 225 years, then it is probably because the provision defies functional or

one that antedates the Constitution itself by several centuries. That ancient kind of law is the common law.”); *see also, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 259 (1999) (“[J]udicial minimalism consists of an effort to limit the width and depth of judicial decisions. . . . Minimalism also maintains flexibility for the future . . . . Like a sailor on an unfamiliar sea . . . a court may take small, reversible steps, allowing itself to accommodate unexpected developments.”).

<sup>2</sup> *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 3 (2011) (“The method of text and principle is both originalist and living constitutionalist. It is faithful to the original meaning of the constitutional text and to its underlying purposes. It is also consistent with a basic law whose reach and application evolve over time . . . .”).

<sup>3</sup> *See, e.g.*, Richard H. Fallon, Jr., *Appraising the Significance of the Subjects and Objects of the Constitution: A Case Study in Textual and Historical Revisionism*, 16 U. PA. J. CONST. L. 453, 453, 460–61 (2013) (criticizing Professor Rosenkranz’s failure to consider functional and dysfunctional results arising in connection with Rosenkranz’s naked originalism).

<sup>4</sup> *See, e.g.*, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 147 (2006) (“A constitutional right *should* be modified when changed circumstances indicate that the right no longer strikes a sensible balance between competing constitutional values, such as personal liberty and public safety.”).

<sup>5</sup> *See, e.g.*, Josh Blackman, *Back to the Future of Originalism*, 16 CHAP. L. REV. 325, 342–43 (2013) (“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.” (footnotes omitted)).

pragmatic concerns. Useful things—things that work (or, even, fail!)—get adjudicated or, at the very least, actively discussed.

To put it another way, one reason we credit consequentialist theories is because we can see the consequences of a line of prior decisions, and we trust that we can predict (with some confidence) the consequences of maintaining or departing from those prior holdings. But it is simply naïve (or vain) to believe that mere judges, lawyers, and academics can reasonably predict the consequences of a novel judicial holding, one way or the other, when the constitutional provision at hand has no track record or close, already-adjudicated analogue. In such circumstances, consequentialist methodologies hold little allure.

On the other hand, it is precisely in such circumstances that originalism—with its attention to text and history—is at its justificatory zenith. Originalism is the best method because it is the *only* method left for determining a constitutional provision's disputed meaning.

In a recent issue of this law review, Benjamin Cassady did just that: he investigated the original meaning and scope of the Constitution's almost entirely moribund Disqualification Clause. The Removal Clause and Disqualification Clause provide: "Judgment [by the Senate] in Cases of Impeachment [by the House] shall not extend further than to removal from Office, and *disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . .*"<sup>6</sup> The italicized latter half of this provision, the Disqualification Clause, is not a high profile clause. Only three persons have ever been disqualified by the United States Senate, and only one of those three is now alive.<sup>7</sup>

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<sup>6</sup> U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

<sup>7</sup> Many state constitutions have analogous provisions providing for disqualification of state officials from state office. *See, e.g.*, ILL. CONST. art. IV, § 14 ("[A] [j]udgment [of impeachment] shall not extend beyond removal from office and disqualification to hold any public office of this State."). Cassady does not opine on these provisions. *Cf.* Brian C. Kalt, *The Application of the Disqualification Clause to Congress: A Response to Benjamin Cassady*, "You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify, 33 QUINNIPIAC L. REV. 7, 12 (2014) (discussing Governor Blagojevich's impeachment and disqualification). Over the course of the history of the United States, the Senate has impeached, convicted, removed (while still in office), and disqualified three persons: (1) West Hughes Humphreys, a federal district court judge, for taking a confederate judgeship without having resigned from his United States judicial post (1862), ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS



Cassady takes the position that the disqualification penalty bars disqualified former Presidents, Vice Presidents, and officers of the United States from subsequent election or re-election to the presidency and vice presidency. In this Article, I take the contrary position: disqualified former Presidents, Vice Presidents, and officers of the United States are not barred from any *constitutionally mandated elected* positions, state or federal. Rather, disqualified former Presidents, Vice Presidents, and officers of the United States are precluded from holding federal *appointed* or *statutory* offices.

Given the infrequency by which the Senate invokes the disqualification penalty, one might very well ask: “Why is this issue important?” The answer, primarily, is for two reasons. First, just because disqualification has been rare in the past does not mean that it might not become more widely used in changed future circumstances. One thing we know about the future (if only from past futures) is that it might be very different from what we have lived and from what we currently expect. Because the effect of disqualification on candidates and voters is (ostensibly) permanent and (according to Cassady and others) profound, in regard to limiting their participatory and voting rights, we all might be better off having a frank discussion now, while we are behind a common Rawlsian veil of ignorance, before the effects of partisanship and the demands for speed under the pressure of litigation blind us from the permanent interests of our political community.<sup>8</sup>

Second, the Disqualification Clause’s “Office . . . under the United States” language and very similar language appear within many other provisions of the Constitution.<sup>9</sup> So, if our originalist investigation teaches us the scope of the Disqualification Clause’s specific “Office . . . under the United States” language, what we learn will (or, at least, may) have much to say regarding any number of other

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116–17, 123 (1992); (2) Robert Wodrow Archbald, a federal circuit court judge, for corruption in office (1913), *id.* at 217; and (3) Gabriel Thomas Porteous, Jr., a federal district court judge, for corruption (2010), 156 CONG. REC. S8611 (daily ed. Dec. 8, 2010) (statement of President pro tempore).

<sup>8</sup> See generally BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES (2012).

<sup>9</sup> See *infra* Appendix (putting in bold all relevant *Office*-related language).

constitutional provisions (using that language). Our investigation is likely to have a global or intratextual impact across our understanding of the Constitution as a whole.<sup>10</sup> In other words, we can use the Disqualification Clause as a wedge to pry open a door to constitutional meaning and meanings. The combined stakes here are reasonably high.

## II. THE CONSTITUTION'S *OFFICE*-LANGUAGE: CLAUSE-BOUND OR INTRATEXTUAL INTERPRETATION?

As discussed above, the Constitution uses a variety of language for “office” and “officer.” Some clauses, such as the Disqualification Clause, speak to “Office . . . *under* the United States”<sup>11</sup> (or a close variant on that language<sup>12</sup>). Other clauses, such as the Appointments Clause, use the language “Officers *of* the United States”<sup>13</sup> or a close variant. For example, the Impeachment Clause speaks to “civil Officers *of* the United States.”<sup>14</sup> Still other clauses, such as the Succession Clause, use “Officer”<sup>15</sup> standing alone, and without modifiers. What, if anything, can we and should we glean from this divergent *Office*-language?

First, we might reject any intratextual or global approach in favor of clause-bound interpretation. There are good, pragmatic reasons for such an approach. If we do not know what disputed constitutional text means, if we have no clear sources or traditions illuminating what such language was likely to have meant at the time it was enacted, and if recovering ancient meanings is difficult and time-consuming, it might be best to simply interpret the Constitution's *Office*-language using a clause-bound

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<sup>10</sup> Our investigation might also have an impact regarding our understanding of early federal statutes and state constitutions using similar language. See Kalt, *supra* note 7, at 12 (discussing Governor Blagojevich's impeachment and disqualification under analogous state constitutional provisions).

<sup>11</sup> U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

<sup>12</sup> See, e.g., *id.* art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office *under* the Authority of the United States.” (emphasis added)). This clause is customarily called the Ineligibility Clause; it is also called the Sinecure Clause or the Emoluments Clause.

<sup>13</sup> U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

<sup>14</sup> *Id.* art. II, § 4 (emphasis added).

<sup>15</sup> *Id.* art. II, § 1, cl. 6.

approach based on our best understanding of each individual clause's purpose.<sup>16</sup>

For example, section 116 of the Australian Constitution,<sup>17</sup> the Australian Religious Test Clause, is a copy of the Religious Test Clause of (our) Article VI.<sup>18</sup> Article VI speaks to "Office . . . under the United States"<sup>19</sup> and section 116 of the Australian Constitution speaks to "office . . . under the Commonwealth."<sup>20</sup> Opining on this language, a recent opinion of the High Court of Australia explained:

It has been said in this Court that the meaning of "office" turns largely on the context in which it is found, and it may be accepted that, given the significance of the place of s 116 in the Constitution, the term should not be given a restricted meaning when used in that provision. Nevertheless, the phrase "office . . . under the Commonwealth" must be read as a whole. If this be done, the force of the term "under" indicates a requirement for a closer connection to the Commonwealth than that presented by the facts of this case [where the purported officer worked for a private entity doing business with the Australian national government]. The similar terms in which the "religious test clause" is expressed in Art VI, cl 3 of the United States Constitution was emphasised by the plaintiff but there is no clear stream of United States authority on this provision which points to any conclusion contrary to that expressed above.<sup>21</sup>

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<sup>16</sup> See David P. Currie, *The Constitution in Congress: The Second Congress, 1791–1793*, 90 NW. U. L. REV. 606, 624–25 (1996) ("It is hard to find anything in the text or purpose of either of these provisions to justify construing them to apply only to executive and judicial officers. Thus, it is difficult to say that the Constitution adopts a single meaning of the term 'office' or 'officer'; each clause employing these terms must be interpreted according to its own context, history, and purpose." (footnote omitted)).

<sup>17</sup> AUSTRALIAN CONSTITUTION S 116 ("[N]o religious test shall be required as a qualification for any office or public trust under the Commonwealth.").

<sup>18</sup> U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

<sup>19</sup> *Id.*

<sup>20</sup> AUSTRALIAN CONSTITUTION S 116.

<sup>21</sup> *Williams v Commonwealth* (2012) 248 CLR 156, ¶ 110 (Gummow & Bell, JJ) (Austl.) (footnotes omitted). The High Court of Australia is Australia's highest court: the Australian equivalent of the Supreme Court of the United States. See *Role of the High Court*, HIGH CT.

The pragmatic concerns which animated the High Court of Australia have particular force in the context of adjudication, where favored authority—judicial precedent—is absent *ex hypothesi*, and where judicial and litigants' time and costs are at a premium. But these concerns should play a lesser role in scholarship. For scholars, such as Cassady (and those who share his basic understanding of constitutional meaning) and his several respondents here, it is precisely because we do not have any clients or cases that we can take our time and search for difficult to find authority.

There are also good institutional reasons to reject clause-bound interpretations of the Constitution's divergent *Office*-language. First, giving the same meaning to identical phrases in different provisions (particularly if enacted at the same time) is parsimonious and straightforward, and it would confirm widely held rule of law notions. Second, intratextualism is consistent with how the Constitution was drafted. The Philadelphia Convention met over many months and its members included able lawyers.<sup>22</sup> Indeed, the Convention appointed two committees charged with, *inter alia*, standardizing the Constitution's text.<sup>23</sup> Third, intratextualism not only comes with modern scholarly bona fides,<sup>24</sup> but it was approved by the Supreme Court in the early Federalist period.<sup>25</sup>

Finally, the Constitution's *Office*-language reads like jargon—jargon, which for reasons I will explain, is likely to have had a common,

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AUSTRALIA, <http://www.hcourt.gov.au/about/role> (last visited Oct. 4, 2014).

<sup>22</sup> Sol Bloom, *Constitution of the United States: Questions and Answers*, ARCHIVES.GOV, [http://www.archives.gov/exhibits/charters/constitution\\_q\\_and\\_a.html](http://www.archives.gov/exhibits/charters/constitution_q_and_a.html) (last visited Oct. 4, 2014).

<sup>23</sup> See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 249 (Max Farrand ed., 2d prtg. 1974) (James Madison's *Notes of Debates in the Federal Convention of 1787*, entry for Sept. 10, 1787) (reporting the formation of the Committee on Style and Arrangement); *id.* at 85 (entry for July 23, 1787) (reporting the formation of the Committee on Detail).

<sup>24</sup> See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999) ("Textual argument as typically practiced today is blinkered . . . focusing intently on the words of a given constitutional provision in splendid isolation. . . . [I]ntratextualists [by contrast] read a two-dimensional parchment in a three-dimensional way, carefully folding the parchment to bring scattered clauses alongside each other.").

<sup>25</sup> See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. 304, 328–330 (1816) (Story, J.).

settled, determinate meaning circa 1787–1788, when the Constitution was drafted, proposed, and ratified. Consider the Incompatibility Clause, which provides: “[N]o Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office.”<sup>26</sup> A single house acting alone makes decisions regarding congressional incompatibility; such decisions are taken absent bicameralism, absent presentment, and (in most cases) absent meaningful or timely judicial review.<sup>27</sup> Such legislative determinations

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<sup>26</sup> U.S. CONST. art. I, § 6, cl. 2 (emphasis added).

<sup>27</sup> *But see* Kalt, *supra* note 7, at 13 (“Given all of this, it is a problem for *Your Crook* that a [disqualified person subsequently] elected-to-Congress case would almost certainly end up in [the Supreme Court]. This much seems clear from the landmark case of *Powell v. McCormack*.”). It is frequently forgotten that by the time Congressman Powell prevailed before the Supreme Court, both the two-year term from which he had been (wrongfully) excluded and his most recent two-year term (following his re-election) had already expired. *As a result, the Supreme Court never ordered the House to seat Powell*. The primary relief Powell received was monetary (i.e., payment for back pay). Judicial review of single-house action in the incompatibility and related contexts can rarely be timely, and as *Powell* illustrates, even if available, it is not meaningful. *See Powell v. McCormack*, 395 U.S. 486 (1969) (Warren, C.J.); *see also* THE FEDERALIST NO. 53, at 368–69 (James Madison) (Benjamin Fletcher Wright ed., 4th prtg. 1974) (“It is an inconvenience mingled with the advantages of our frequent elections, even in single States, where they are large, and hold but one legislative session in a year, that spurious elections cannot be investigated and *annulled in time for the decision to have its due effect*. If a return can be obtained, no matter by what unlawful means, the irregular member, who takes his seat of course, is sure of holding it a sufficient time to answer his purposes. Hence, a very pernicious encouragement is given to the use of unlawful means, for obtaining irregular returns. Were elections for the federal legislature to be annual, this practice might become a very serious abuse, particularly in the more distant States. Each house is, as it necessarily must be, the judge of the elections, qualifications, and returns of its members; and whatever improvements may be suggested by experience, for simplifying and accelerating the process in disputed cases, *so great a portion of a year would unavoidably elapse, before an illegitimate member could be dispossessed of his seat*, that the prospect of such an event would be little check to unfair and illicit means of obtaining a seat. All these considerations taken together warrant us in affirming, that biennial elections will be as useful to the affairs of the public, as we have seen that they will be safe to the liberty of the people.” (emphasis added)); *cf.* REPORT FROM THE SELECT COMMITTEE ON OFFICES OR PLACES OF PROFIT UNDER THE CROWN WITH MINUTES OF EVIDENCE, APPENDICES AND INDEX 177 (1941) (“[I]t is inconceivable that mandamus should be issued against the House of Commons as a body and, if it were, it would be as impossible of enforcement . . .”) (joint memorandum of the Clerk of the House of Commons and Parliamentary Counsel to the Treasury); Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 633 (1949) (“We all know the tragic issue of that uncertainty in the brief civil war that arose out of the conflict between the judiciary, on the one hand, and the

do not require supermajorities, just simple majorities: a majority of those voting, a quorum present.<sup>28</sup>

If the Framers had chosen ambiguous language—unsettled language whose meaning had to be determined by contestable purpose or context—then that would have risked future majorities oppressing and excluding an otherwise duly elected minority. In such circumstances, the anti-federalists would have objected: something they did not do. All this is some reason to believe that the Constitution’s “Office . . . under the United States” language had a fixed, widely held meaning circa 1787–1788. Recovering that meaning may pose practical problems, it may be difficult, but there is good reason to believe that there is a concrete meaning to recover.

### III. THE CONSTITUTION’S *OFFICE*-LANGUAGE: THREE INTRATEXTUAL THEORIES

To date, three primary intratextual positions have been put forward attempting to explain the meaning of “Office . . . under the United States” as used in the Disqualification Clause and elsewhere in the Constitution.

#### A. *The Maximalist Position*

The maximalist position reads the Constitution’s *Office*-language expansively. For maximalists, this language extends (at least) to all federal positions: elected or appointed, created by the Constitution or created by future (i.e., post-1789) federal statutes.<sup>29</sup> What are the

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executive and the legislature, on the other.”).

<sup>28</sup> See U.S. CONST. art. I, § 5, cl. 1 (“[A] Majority of each [House] shall constitute a Quorum to do Business . . . .”); *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (Burger, C.J.); cf. Benjamin Cassady, “You’ve Got Your Crook, I’ve Got Mine”: *Why the Disqualification Clause Doesn’t (Always) Disqualify*, 32 QUINNIPIAC L. REV. 209, 299 (2014) (noting that “disqualification . . . is both imposed and enforced by a majority vote”); *id.* at 300 (“[T]he Senate permits a [mere] majority vote on the separate question of whether a convicted official should be disqualified.”).

<sup>29</sup> Maximalists can even make a textual argument. In common language, legislative positions are frequently referred to using *Office*-language. See, e.g., Cassady, *supra* note 28,

implications of this view? 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 Crimes and Misdemeanors.”<sup>30</sup> For maximalists, Senators and Representatives are officers of the United States, and therefore, they are impeachable.<sup>31</sup> This view had substantial

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*passim* (using the expression “legislative office” more than half a dozen times).

<sup>30</sup> U.S. CONST. art. II, § 4. Most modern commentators, based on the text of this clause, limit the scope of the impeachment power to the listed positions and categories, i.e., the President, Vice President, and officers of the United States. Some maximalists (perhaps most) do not read the clause this way, i.e., as a limit on the scope of the impeachment power. Rather, they read this provision only as an automatic removal provision in regard to the listed positions and categories. Read this way, the impeachment power extends to all federal positions (including Representatives and Senators) and, perhaps, even to private parties. *See, e.g.*, Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL’Y REV. 53, 66 & n.49, 98 & n.207 (1999); *cf., e.g.*, Charles Pergler, Note, *Trial of Good Behavior of Federal Judges*, 29 VA. L. REV. 876, 879 (1943) (“[W]e are dealing with a mandatory requirement, prescribing removal if a civil officer is impeached and convicted of the offenses . . .”).

<sup>31</sup> Obviously, my discussion regarding the three primary intratextualist positions regarding the Constitution’s “Office . . . under the United States” language has been simplified for expositional purposes. Buckner Melton has argued that many Founders stated that Senators were impeachable. *See generally* Buckner F. Melton, Jr., *Let Me Be Blunt: In Blount, the Senate Never Said that Senators Aren’t Impeachable*, 33 QUINNIPIAC L. REV. 33 (2014). These Founders were silent regarding whether the scope of impeachment reaches House members. I believe Melton understands these Founders as believing that Representatives were beyond the scope of the House’s impeachment power. I suspect Melton is correct, but we do not know. I might add that the primary argument associated with the Founders for interpreting the House’s impeachment power to include the power to impeach Senators also arguably applies to Representatives. The argument is that the Impeachment Clause reaches “officers of the United States”—persons subject to the Appointments Clause who exercise executive or judicial powers. Senators, although not subject to the Appointments Clause, exercise *functional* executive powers (e.g., appointments) and so are (arguably) “Officers of the United States” who fall within the scope of the House’s impeachment power. Likewise, Representatives (arguably) exercise a functional judicial or executive power in bringing impeachments. *See, e.g.*, Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 81 (2006) (“[The impeachment] provisions were absolutely necessary to invest the House and Senate with nonlegislative authority. In the absence of the impeachment provisions, there would have been no way that the House would have enjoyed a judicial power to indict and an executive power to prosecute.”). Thus, Representatives—like Senators—are also (arguably) “officers of the United States” who fall within the scope of the House’s impeachment power. *See, e.g.*, Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 716 (1988) (“Thus, judges, as well as

support during the Constitution's ratification debates. For example, at the Virginia convention, Governor Edmund Randolph stated in plain terms that Senators were impeachable.<sup>32</sup> And the first person to be impeached by the House of Representatives, William Blount, was a Senator.<sup>33</sup> In more recent times, this view or very similar views have had impressive and diverse scholarly supporters, including Professors Raoul Berger, Lawrence Lessig, Ronald Rotunda, Zephyr Teachout, and others.<sup>34</sup>

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all *legislators* and all executive officials, whether in the 'highest or the lowest departments' of the national government, are subject to impeachment." (emphasis added)); *infra* notes 32, 34–35; *cf.*, e.g., WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 214 (Phila., Philip H. Nicklin 2d ed. 1829) (1825) ("Their deliberations, after the arguments of counsel, being held in private, we can *only infer* from those arguments, that the term *officers of the United States*, as used in the Constitution, was held by a majority of the senate, not to include members of the senate, and on the same principle, members of the house of representatives would also be excluded from this jurisdiction." (emphasis added)).

A variant of the maximalist position would include not all members of Congress, but only *officers* of the two houses. See *Buckley v. Valeo*, 424 U.S. 1, 275 (1976) (White, J., concurring in part and dissenting in part) ("[N]o case in this Court even remotely supports the power of Congress to appoint an officer of the United States aside from those officers each House is authorized by Art. I to appoint to assist in the legislative processes."), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, 116 Stat. 81.

<sup>32</sup> 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 194, 202 (Washington, Jonathan Elliot ed., 2d ed. 1836) (1828) (quoting Governor Edmund Randolph's June 10, 1788 speech at the Virginia ratifying convention) ("Who are your senators? They are chosen by the legislatures, and a third of them go out of the Senate at the end of every second year. They may also be impeached. There are no better checks upon earth."). *But see* JAMES MONROE, *nom de plume* A NATIVE OF VIRGINIA, *Observations Upon the Proposed Plan of Federal Government* (Hunter & Prentiss 1788), in 1 THE WRITINGS OF JAMES MONROE 1778–1794, at 347, 361 (N.Y.C. & London, Stanislaus Murray Hamilton ed., G.P. Putnam's Sons 1898) ("I conceive that the Senators are not impeachable, and therefore Governor Randolph's objection falls to the ground."). Cassady states that "the Framers did not address the potential application of the Impeachment and Disqualification Clauses to legislators." Cassady, *supra* note 28, at 284. Given that Randolph was a Framers, it is difficult to see the sense of Cassady's position.

<sup>33</sup> BUSHNELL, *supra* note 7, at 26.

<sup>34</sup> See RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 225–26 n.10 (1974); *supra* note 31 (quoting Professor Rotunda); see also 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 117 n.21 (5th ed. 2012) ("For example, when the Senate impeaches someone, it can impose a disqualification for U.S. Representative or Senator, as well as any other office of trust under the United States. Art. I, § 3, cl. 7."); Lawrence Lessig, *A Reply to Professor Hasen*, 126



Under the maximalist view, the scope of disqualification is broad: a disqualified former President, Vice President, or officer of the United States is precluded from holding the presidency, vice presidency, a senate seat, a house seat, or any office created by federal statute.<sup>35</sup> Disqualification is political death and (apparently) permanent.<sup>36</sup>

### B. *The Minimalist Position*

The minimalist position reads the Constitution's *Office*-language narrowly. Under this view, "Officer of the United States" (as used in the Appointments Clause, the Impeachment Clause, and elsewhere in the Constitution) extends *exclusively* to statutory or appointed offices in the Executive Branch and Judicial Branch. By contrast, "Office . . . under the United States" (as used in the Disqualification Clause and elsewhere in the Constitution) is a somewhat broader category; it extends to all statutory or appointed offices in any branch, including the Legislative Branch, and includes such positions as the Secretary of the Senate and Clerk of the House. In other words, where the Constitution speaks to "officers of the United States" and "Office . . . under the United States," this language includes at most statutory or appointed positions. Such language excludes all elected federal positions: President, Vice President, Senator, and Representative.

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HARV. L. REV. F. 61, 70 (2013) (stating that the Constitution's Foreign Emoluments Clause bans members of Congress from accepting gifts or titles from foreign powers); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 354, 361–62 (2009) (same).

<sup>35</sup> Compare JACK MASKELL, CONG. RESEARCH SERV., R41946, QUALIFICATIONS OF MEMBERS OF CONGRESS 21 (2014), available at <http://fas.org/sgp/crs/misc/R41946.pdf> ("A federal officer who is impeached and removed from office, when disqualification is included and approved by the Senate as part of the judgment upon conviction, will be disqualified from holding federal office, and could be subject to exclusion on this basis by the House or Senate, as appropriate."), with *id.* at 21 n.112 ("Although the term 'civil Officer of the United States' in the impeachment clause in Article II, § 4, has been interpreted by Congress as *not* applying to Members of Congress . . . the disqualification penalty uses the terms 'any Office of honor, Trust or Profit under the United States' (Art. I, § 3, cl. 7), and thus might be seen to be broader than the meaning of 'civil Officer' in Article II, and to thus include a Member of Congress within those offices from which one is disqualified.").

<sup>36</sup> See, e.g., Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 351 (2010) (using the language of political "death" in regard to impeachment processes).

What are the implications of this view? 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 Crimes and Misdemeanors.”<sup>37</sup> Senators and Representatives are not officers, and therefore, they are not impeachable. This view had some support during the Constitution’s ratification debates. Monroe published a tract during ratification rejecting the idea that Senators were impeachable, and he expressly contradicted Randolph.<sup>38</sup> It is true that the House impeached Blount, but the Senate dismissed the impeachment, and did so, arguably, on jurisdictional grounds.<sup>39</sup> As I explain below, the real strength of this view—and it is one which I share—is how the Constitution’s *Office*-language was used in the period immediately following ratification.<sup>40</sup>

Under the minimalist view, the scope of disqualification is narrow: a disqualified former President, Vice President, or officer of the United States is precluded from holding any statutory or appointed federal office. Such a person is free to hold any elected position, state or federal, including the presidency.

### C. *The Intermediate Position*

Like the maximalist position, the intermediate position makes no distinctions among the Constitution’s divergent *Office*-language.<sup>41</sup>

<sup>37</sup> U.S. CONST. art. II, § 4.

<sup>38</sup> MONROE, *supra* note 32, at 361 (quoting James Monroe’s contrary position).

<sup>39</sup> 8 ANNALS OF CONG. 2319 (1799) (recording Senate adoption of a resolution on January 11, 1799, to the effect that: “this Court ought not to hold jurisdiction”). *But see generally* Melton, *supra* note 31, at 35 (“The claim that the Senate decided, in the *Blount* case, that Senators aren’t civil officers, or that members of Congress aren’t subject to impeachment, is simply flat-out wrong.”).

<sup>40</sup> *See infra* Part IV.A.–E.

<sup>41</sup> *See* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114–15 (1995) (“As a textual matter, each of these five formulations seemingly describes the same stations (apart from the civil/military distinction)—the modifying terms ‘of,’ ‘under,’ and ‘under the Authority of’ are essentially synonymous.”); *see also* JOSHUA A. CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 280 n.68 (2007). *See generally* Cassady, *supra* note 28. Cassady cites British

“Officer of the United States” and “Office . . . under the United States” mean the same thing; in other words, this language reaches Judicial Branch and Executive Branch officers, and it also includes the President and Vice President.

Under the intermediate view, what is the scope of disqualification? A disqualified former President, Vice President, or officer of the United States is precluded from holding any Judicial Branch or Executive Branch office, and also from holding the presidency and vice presidency.

The intermediate position was announced in 1995 by Professors Akhil Reed and Vikram David Amar in an article in *Stanford Law Review*,<sup>42</sup> and subsequently adopted by Professor Chafetz,<sup>43</sup> and now by Benjamin Cassady in his recent article in *Quinnipiac Law Review*.<sup>44</sup>

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statutes throughout his paper, but British law makes the very sort of “officer” related distinctions that Cassady rejects. *See* *Lewis v. Cattle*, [1938] 2 All E.R. 368 (K.B.) 371 (Lord Hewart, L.C.J.) (appeal by way of a case stated by justices for the county borough of Stockport) (Eng.) (“There are many offices which are held under His Majesty the holders whereof are not in any proper sense of the words in the service of His Majesty. So also there are many persons in the service of His Majesty who do not in any proper sense of the word hold office under His Majesty.”); REPORT FROM THE SELECT COMMITTEE ON OFFICES OR PLACES OF PROFIT UNDER THE CROWN WITH MINUTES OF EVIDENCE, APPENDICES AND INDEX, *supra* note 27, at viii (investigating “the precise question” of the scope of “office under the Crown”); GERARD CARNEY, MEMBERS OF PARLIAMENT: LAW & ETHICS 67 (2000) (reporting judicial authority distinguishing “office of profit ‘from’ the crown” from “office[] of profit under the crown” (emphasis added)); John Waugh, *Disqualification of Members of Parliament in Victoria*, 31 MONASH U. L. REV. 288, 297 (2005) (noting that English law distinguished “office of profit from the crown” from “office of profit under the crown”); *see also* OFFICIAL REPORT OF THE AUSTRALASIAN CONVENTION DEBATES: ADELAIDE, MARCH 22 TO MAY 5, 1897, at v, 633–34 (Adelaide, C.E. Bristow 1897) (entry for April 14, 1897) (reporting debate on the Commonwealth of Australia Bill, where Edmund Barton, a convention member for New South Wales, expressly distinguished office “under the Crown” from “office”), available at <http://tinyurl.com/mthj258>; Luke Beck, *The Constitutional Prohibition on Religious Tests*, 35 MELBOURNE U. L. REV. 323, 347 (2011) (opining that the distinction between “officers of the Commonwealth” and “office under the Commonwealth” can “hardly be doubted”). Indeed, it is sensible for the modern (American) interpreter to recognize the Constitution’s repeated textual distinction between “officers of the United States” and “Office . . . under the United States” because the “eighteenth-century world [was] sensitive to fine gradations of formal title . . . .” AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 572 n.21 (2005).

<sup>42</sup> *See* Amar & Amar, *supra* note 41, at 114–15.

<sup>43</sup> *See* CHAFETZ, *supra* note 41, at 280 n.68.

<sup>44</sup> *See* Cassady, *supra* note 28, at 220–21.

Chafetz and Cassidy are former students of Professor Akhil Amar.

The Amars and Chafetz point to no early sources validating their (surprisingly) atextualist position. Cassidy's lone early source for the intermediate position is a statement made by Alexander J. Dallas on the floor of the Senate during impeachment proceedings while he was acting as (one of several) counsel for Blount.<sup>45</sup>

#### IV. CASSADY'S EVIDENCE & EVIDENCE CASSADY DID NOT DISCUSS

As explained, other than a floor statement by Blount's counsel, Alexander J. Dallas, Cassidy puts forward *no* early American document or documents confirming the intermediate view he espouses.<sup>46</sup> It is worth noting that Dallas's position was not adopted by his co-counsel in the *Blount* proceedings, by the prosecution, by the Senate, or even by any roughly contemporaneous commentators. Dallas's position almost completely disappeared from our jurisprudence until a similar position was re-launched by Professors Akhil and Vikram Amar in 1995. And Dallas's position—as independent authority—should carry little weight: his position was created during and for litigation.

Wisely, Cassidy puts little weight on Dallas as an authority. Instead, Cassidy puts forward a structural (or, what I would call, an intuitive) mode of interpretation. This does not mean it is wrong or less than thoughtful. But it is odd to *start* with a structural modality. Generally, one turns to structure after one first establishes textual ambiguity. But Cassidy never puts forward evidence to show *any* textual ambiguity.

What then is Cassidy's position? Cassidy starts with the constitutional provision governing expulsion from Congress. That

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<sup>45</sup> See *id.* at 267. Cassidy also cites a statement by Robert Goodloe Harper, a prosecutor during the *Blount* impeachment. *Id.* at 293–94. Cassidy's reliance on Harper is misplaced: Harper, a maximalist, believed Senators were impeachable. See 8 ANNALS OF CONG. 2294, 2305–06 (1799). Clearly, Harper's position is antithetical to Cassidy's.

<sup>46</sup> As early as 2012, I identified and publicized one such document arguably supporting Cassidy's position. Its authorship and provenance are unknown. It was created pre-1834, but otherwise, its date of creation is unknown. See Seth Barrett Tillman, *Either/Or: Professors Zephyr Rain Teachout and Akhil Reed Amar—Contradictions and Suggested Reconciliation*, 68 & n.117–18 (Feb. 14, 2012), available at [http://papers.ssrn.com/abstract\\_id=1970909](http://papers.ssrn.com/abstract_id=1970909).

clause, the Rules of Proceedings Clause, provides: “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”<sup>47</sup> He argues that our modern understanding of the clause and congressional expulsion should be informed by the precedents involving the British House of Commons’ eighteenth-century proceedings to expel (but ultimately seat) John Wilkes.<sup>48</sup> Cassady concludes that a well-informed American electorate has (or should have) the power (in most circumstances) to re-elect an expelled member.<sup>49</sup> (Likewise, each House is obligated to seat such a re-elected member, notwithstanding that the member had been expelled.) He offers little support for the historical proposition that Wilkesian principles were at issue either at the Federal Convention or in the state ratifying conventions, or were even within the wider public mind during ratification. Professor Hoffer contests Cassady’s historical exposition.<sup>50</sup> But for the purpose of my response here, I assume that Cassady’s position is within the range of reasonable opinion.

Cassady then shifts from the Expulsion Clause to the Impeachment Clause and the 1797–1799 congressional proceedings involving the impeachment of Senator William Blount. The Impeachment Clause provides: “The President, Vice President and *all Civil Officers of the United States*, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>51</sup> Without any textual analysis of the meaning of the Impeachment Clause’s “officers of the United States” language or any

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<sup>47</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>48</sup> See Cassady, *supra* note 28, at 294–310.

<sup>49</sup> *Id.* at 310.

<sup>50</sup> See generally Peter Charles Hoffer, *The Pleasures and Perils of Presentism: A Meditation on History and Law*, 33 QUINNIPIAC L. REV. 1, 5 (2014) (“Go to [Cassady’s] citation to Max Farrand’s edition of *The Records of the Federal Convention of 1787* and look in vain for any mention of Wilkes. It isn’t there . . .” (footnote omitted)). Likewise, I see no mention of Wilkes in *Elliot’s Debates*, which records debate from the Constitution’s state ratifying conventions. See *Elliot’s Debates*, AMERICAN MEMORY: A CENTURY OF LAWMAKING FOR A NEW NATION—U.S. CONGRESSIONAL DOCUMENTS AND DEBATES 1774–1875, <http://memory.loc.gov/ammem/amlaw/lwed.html> (last visited Dec. 24, 2014); see also *supra* note 32 (quoting *Elliot’s Debates*); *infra* note 96 (same).

<sup>51</sup> U.S. CONST. art. II, § 4 (emphasis added).

analysis of early historical records using that term, Cassady concludes that the impeachment power does not reach members of Congress, and, likewise, the clause's "officer of the United States" language does not reach members of Congress. His analysis is driven largely by his reading of the records of the Senate's *Blount* proceedings. Buckner F. Melton, Jr. argues that the records of the Senate's *Blount* proceedings are ambiguous and do not support Cassady's interpretation.<sup>52</sup> But for the purpose of my response here, I assume that Cassady's position is within the range of reasonable opinion.

Finally, Cassady shifts to the Disqualification Clause and its "Office . . . under the United States" language.<sup>53</sup> Again, Cassady engages in no textual analysis of the clause's "Office . . . under the United States" language, and he examines no early documents using this phrase. He assumes that the Impeachment Clause's "Officer of the United States" language is coextensive with the Disqualification Clause's "Office . . . under the United States" language. He reasons that the two phrases are coextensive, except that the latter obviously reaches the presidency and vice presidency, and so the Disqualification Clause need not mention the presidency and vice presidency expressly.<sup>54</sup> He argues, however, that the Impeachment Clause's use of "civil" prior to "officer of the United States" might lead to confusion regarding impeaching a President, as the latter has military functions and duties.<sup>55</sup> To avoid doubt regarding the President's being subject to impeachment, the Impeachment Clause has express language extending its scope to the "President, [and] Vice President" in addition to "civil officers of the United States."<sup>56</sup>

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<sup>52</sup> See generally Melton, *supra* note 31, at 35 ("[Cassady's and others'] claim that the Senate decided, in the *Blount* case, that Senators aren't civil officers, or that members of Congress aren't subject to impeachment, is simply flat-out wrong."). Melton would know. See BUCKNER F. MELTON, JR., *THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT* (1998).

<sup>53</sup> See Cassady, *supra* note 28, at 265–94.

<sup>54</sup> See *id.* at 291–93.

<sup>55</sup> See *id.* at 293.

<sup>56</sup> See *id.* Cassady also argues that the Vice President was expressly included in the Impeachment Clause's text to ensure that all understood that a Vice President was impeachable for malfeasance, even in regard to his legislative role. See Cassady, *supra* note

Cassady argues that the Constitution requires normative unity across these three provisions. In other words, just as democratic Wilkesian principles implicit in the Constitution require Congress to seat an expelled but re-elected member, Congress must also seat a formerly impeached, convicted, removed, and disqualified President, Vice President, or officer of the United States subsequently elected to Congress. The contrary position, that it might be correct to admit one but not the other, he calls “hypocritical,”<sup>57</sup> particularly because it would allow for congressional self-dealing by punishing its former (i.e., expelled) members less harshly than Executive Branch and Judicial Branch officers disqualified in impeachment proceedings. To sum up, Cassady bases his position, not on textual analysis of the operative language (or even on Dallas’s statement as best authority), but on *Wilkes*, *Blount*, congressional practice in the expulsion and impeachment context (but not the disqualification context), and his particular normative or structural vision rooted in fears of congressional self-dealing and hypocrisy. Beyond his “hypocrisy” argument, he never explains why Wilkesian principles and congressional precedents from the expulsion context should map onto the impeachment and disqualification context. Nor does he explain why, if impeachment and disqualification were meant to interlock seamlessly (as he supposes), the former uses “officers of the United States” language, but the latter uses “Office . . . under the United States” language. Cassady never explains (or even attempts to explain) why the Philadelphia Convention’s Committee of Detail and Committee of Style failed to standardize the Constitution’s *Office*-language globally or even just between these two impeachment-related clauses.

Finally, when Cassady shifts to the question of whether a formerly impeached, convicted, removed, and disqualified President, Vice President, or officer of the United States can be elected (or re-elected) to the presidency or vice presidency, Cassady in a volte-face completely

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28, at 293. But if the Founders wanted Vice Presidents rendered impeachable for legislative malfeasance, one wonders why the scope of the Impeachment Clause was not modified to apply to any Senate President Pro Tem and to the Speaker of the House, who occupy a legislative role congruent to the Vice President.

<sup>57</sup> See *id.* at 299.

drops Wilkesian principles and other democratic norms as guiding principles.<sup>58</sup> He concludes that such disqualified officers are not eligible.<sup>59</sup> But here too, he puts forward no historical or textual analysis of the operative language in the Disqualification Clause. So how does he support his conclusion that a formerly disqualified President, Vice President, or officer of the United States cannot be elected (or re-elected) to the presidency or vice presidency? Here, he makes a purely functional argument: viz., as a general matter, officers act alone, but members of Congress act collectively.<sup>60</sup> Cassady's abstract understanding is (largely) correct as far as it goes. But so what? Cassady puts forward no evidence from the historical record that this particular aspect of the officer-member distinction was at the root of any discussions when the Constitution was drafted, debated, and ratified, and he certainly points to no evidence that this particular abstract distinction relates to the core meaning of the Disqualification Clause. Moreover, there is no explanation why this distinction must trump democratic norms and the people's right to elect their own governors, i.e., *Wilkes*.

More importantly, Cassady's functional distinction between officers and legislators makes a mockery of his hypocrisy and self-dealing argument. Imagine two officials—one in the Senate, and one a President—both engage in a joint conspiracy to defraud the federal government. The conspiracy was formed prior to their election, but the underlying crime was completed in secret just after they begin serving in their two respective positions. It is then that they are exposed. The Senator is expelled and the President impeached, convicted, removed, and disqualified.

Cassady's position is that it would be hypocritical and self-dealing for members of Congress to allow the (expelled) former Senator back into the Senate (via re-election), but for the same members to deny the (disqualified) former President the (same) opportunity to take a Senate (or House) seat (via election). After all, the conduct is the same—so the former Senator and former President should be treated the same. The

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<sup>58</sup> See *id.* at 275.

<sup>59</sup> See *id.*

<sup>60</sup> See Cassady, *supra* note 28, at 275.



intuition here is: Let both (as opposed to just one) in—that's fair; let the voters prevail: that's democracy and *Wilkes*.

But if Cassady's theory of the Disqualification Clause is correct, then the former Senator can become President, but the former President cannot. Why the distinction? They were punished for the same pre-election and post-election behavior. So the risk of future misconduct is identical. *Here, the officer/member distinction is wholly irrelevant.* Likewise, the consequential nature of the presidency (including its ability to act alone, rather than collectively) does not enter into the calculation either: as both former officials will pose (*ex hypothesi*) the same risk of future wrongdoing.

In short, Cassady's intermediate position, arising from his structural intuitions, allows for congressional self-dealing regarding punishing its former members less harshly than otherwise similarly situated disqualified former Executive Branch and Judicial Branch officers. *Cassady's position makes congressional self-dealing and hypocrisy the law of the land in the name of the Constitution.* By contrast, the minimalist position would treat both officials the same. After all, the conduct is the same—so the former Senator and former President should be treated the same. The intuition here is: Let both (as opposed to just one) in—that's fair; let the voters prevail: that's democracy and *Wilkes*.

Cassady's (partial) response to all this is to historically tether *Wilkes* exclusively to legislative positions, on the theory that the executive presidency was a novel American innovation. He reasons:

[I]t should be noted that the Presidency was a uniquely American institution, substituting an elected and impeachable chief executive for an English monarch who was legally unreachable because he was presumed to be incapable of wrongdoing. As a result, the *Wilkesian* lessons of popular sovereignty and electoral pardon did not develop in the context of the executive branch, and it is sensible that the Framers would settle on a different default rule (impeachment and disqualification) for the elected President than the rule (expulsion and re-election) applied traditionally to the people's legislators. Put another way, disqualifying an elected President for official wrongdoing couldn't encroach on the people's traditional right to pardon and

re-elect a chief executive, because no such right existed in English history.<sup>61</sup>

It is at this juncture that Cassady's interpretive position loses internal coherence. Cassady puts forward no good reason to tie the norms derived from *Wilkes* exclusively to legislative positions of the type extant at the times *Wilkes* was expelled and subsequently seated. Cassady points to no early materials indicating how Americans, circa 1787, expected *Wilkes* to apply in our constitutional order (assuming the public expected it to apply at all). Perhaps, they thought Wilkesian principles would apply to all elected federal positions? But even if we assume Cassady is correct, all that proves is that Cassady's larger interpretive project falls to the ground. Arguing, as Cassady does, that Wilkesian principles arising in the context of expelled members do not apply to the disqualification of officers, only illustrates that expulsion and disqualification cannot be and should not be harmoniously interpreted. Of course, Cassady's whole interpretive project assumes and imposes aspirational uniformity across (legislative) expulsion, (officer) impeachment, and (officer) disqualification-related proceedings (even where the operative clauses use divergent *Office-language*).

It is not my primary goal here to challenge Cassady's remaining structural intuitions, or to challenge his use of precedents involving expulsion and impeachment (e.g., *Wilkes*, *Blount*, and nineteenth century congressional expulsion precedents) to understand related disqualification procedures. Nor is it my purpose here to challenge his assumption that the Constitution has sufficient aspirational uniformity such that one can glean the precise meaning of the Disqualification

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<sup>61</sup> *Id.* at 276 n.332. I could just as easily counterposit (as a historical matter) that the reason the British monarch was not subject to impeachment was because he was insulated by sovereign immunity and related doctrines. Such doctrines do not apply in the American context, where the President is subject to the rule of law and the operation of the courts. It might follow, that, once adapted to the American position (i.e., the Executive is subject to law and the operation of the courts), Wilkesian principles "expand" to include offices they could not encompass in the British legal environment. I do not suggest that this is the best description of the underlying legal materials. I only put it forward to illustrate how easily manipulable *Wilkes* remains as a precedent for our guidance. Cassady has to justify his specific characterization and the level of generality he chooses to assign *Wilkes*. In my view, Cassady's characterization and application of *Wilkes* to American institutions is unsupportable and arbitrary.

Clause and the scope of its “Office . . . under the United States” language from other clauses using different *Office*-language. I assume that Cassady’s assumptions and arguments carry some weight; I assume here that Cassady has met his burden of production.

Instead, my goal here is to discuss the primary American materials and evidence that Cassady does not develop in order to make the case that the Disqualification Clause’s “Office . . . under the United States” language is not ambiguous. It is my view that because that language is not ambiguous, there is no reason to look to constitutional provisions, procedures, and precedents involving expulsion or impeachment—the primary evidence put forward by Cassady. Likewise, there is no reason to turn to so-called constitutional structure and other such intuitionist modalities of interpretation.

Alternatively, even if the reader concludes that ambiguity remains, any full evaluation of the issue in dispute—the meaning of the Disqualification Clause and the scope of its “Office . . . under the United States” language—requires a full examination not only of the evidence Cassady put forward, but also the evidence Cassady left out. What is that evidence?

#### A. *Evidence from Executive Branch Practice*

##### 1. Secretary of the Treasury Alexander Hamilton

In 1792, the Senate issued an order directing Secretary of the Treasury Alexander Hamilton to draft a financial statement listing all persons holding “Office . . . under the United States” and their salaries.<sup>62</sup> Hamilton took more than nine months to draft a response. His response was 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).<sup>63</sup> But Hamilton did *not* include the

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<sup>62</sup> S. JOURNAL, 2D CONG., 1ST SESS. 441 (1792).

<sup>63</sup> Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under the United States (Feb. 26, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, 157, 157–59 (Harold C. Syrett & Jacob E. Cooke eds., 1969). Foreign parliamentary authority would seem

President, Vice President, Senators, or Representatives.<sup>64</sup> In other words, Hamilton did not include *any* elected positions in any branch.

This document's creation was roughly contemporaneous with the enactment of the Constitution and was written by an actor who played a prominent role in drafting and ratifying the Constitution. Hamilton's response was a communication from the Treasury to the Senate: his document represents an official Executive Branch construction of (what is now) contested language.

Hamilton's document is on all fours with the minimalist position; it contradicts the intermediate and maximalist positions. Can Cassady argue that Hamilton erred? Yes. But ascribing error to Hamilton requires something akin to evidence. If Cassady had some good reason to think Hamilton erred, or that Cassady's (and Chafetz's and Amar's) intuitions were better than Hamilton's, or even some roughly contemporaneous document of equally good provenance suggesting that the intermediate position was once widely held, we could put this Hamilton-authored document to one side. But what is that good reason? Where is that document?

## 2. President George Washington

The Constitution's Foreign Emoluments Clause provides: "no Person holding any Office . . . 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."<sup>65</sup> Cassady agrees that the operative *Office*-language in the Foreign Emoluments Clause is coextensive with the *Office*-language in the Disqualification Clause.<sup>66</sup> If Cassady is correct, then the Foreign

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to agree with Hamilton. *See, e.g.*, KATHRYN COLE, ISSUES BRIEF NO. 5-1993, 'OFFICE OF PROFIT UNDER THE CROWN' AND MEMBERSHIP OF THE COMMONWEALTH PARLIAMENT 18 (1993), available at <http://tinyurl.com/mzeqe26> ("[I]t seems reasonable to infer that the staff of ministers *and other senators and members* would occupy offices of profit under the Crown." (emphasis added)).

<sup>64</sup> Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under the United States, *supra* note 63, at 157–59.

<sup>65</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>66</sup> *See* Cassady, *supra* note 28, at 282.

Emoluments Clause applies to the President.

George Washington was a President, and he is usually considered a well-informed, honest, and diligent one. In 1791, President George Washington received, accepted, and kept a gift from the French ambassador to the United States,<sup>67</sup> but Washington never sought nor received congressional consent to keep this valuable gift.<sup>68</sup> Again, this precedent from the Washington administration is on all fours with the minimalist position. If Washington acted correctly here, then the intermediate and maximalist positions are dead. Dead—unless Cassady could point out a good reason to think Washington (*and also Hamilton*) erred or could point to a similar precedent of equally good provenance.

Cassady has suggested that such gifts carry little weight because Washington failed to seek legal advice.<sup>69</sup> Cassady's position is odd. If Washington had a scintilla of doubt as to the propriety of his actions, then best practice would have been to seek legal advice or to err on the side of caution and to seek congressional consent (which—in my opinion—would have been forthcoming). Given that Washington was justly famous for his probity and was equally scrupulous in maintaining his reputation,<sup>70</sup> the fact that he just kept the gift without seeking congressional consent is some indication that he thought the question

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<sup>67</sup> Letter from Ambassador Ternant to George Washington (Dec. 22, 1791), in 9 THE PAPERS OF GEORGE WASHINGTON 306, 306 n.1 (Mark A. Mastromarino & Jack D. Warren, Jr. eds., 2000) (giving a framed portrait of Louis XVI); Letter from George Washington to Ambassador Ternant (Dec. 22, 1791), in 9 THE PAPERS OF GEORGE WASHINGTON, *supra* at 306 (accepting the French ambassador's gift).

<sup>68</sup> See 8 ANNALS OF CONG. 1582–95 (1798) (recording 1798 House debate—after President Washington's second administration had ended—regarding permitting a United States ambassador to accept gifts from two foreign governments); *id.* at 1582 (Congressman McDowell explaining that “this was a new subject.”); *id.* at 1589 (Congressman Robert Williams stating that “this was the first application which had been made since the existence of the present Government, for this leave, [therefore] it was the proper time for Congress to say, they will or will not countenance the practice of receiving these presents.”).

<sup>69</sup> Cassady, *supra* note 28, at 287 n.381.

<sup>70</sup> See Letter from George Washington to Bushrod Washington (July 27, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON 334 (Dorothy Twohig ed., 1989) (“You cannot doubt my wishes to see you appointed to any office of honor or emolument in the new government . . . My political conduct in nominations . . . must be exceedingly circumspect and proof against just criticism, for the eyes of Argus are upon me, and no slip will pass unnoticed that can be improved into a supposed partiality for friends or relations.”).

obvious, and if not obvious, then at least reasonably clear: the President does not fall within the scope of the Foreign Emolument Clause's *Office-language*, and so neither a legal opinion, nor congressional consent, was necessary.

Cassady's position is mistaken also in that it critiques Washington's subjective decision-making. But no one should be interested in Washington's thinking as a thing in itself. One is only interested in Washington's conduct as evidence of public meaning. The question is not (merely) why Washington did what he did, but why Cassady and others in the intermediate camp remain unable to point to any evidence in Congress (among anti-administration members), the press, the contemporaneous public discourse, or even private letters complaining in regard to Washington's conduct.<sup>71</sup> This gift—a framed full-length portrait of Louis XVI showing the king's initials above Washington's family crest<sup>72</sup>—was not a secret; rather, it was on prominent display where Washington conducted public business.<sup>73</sup> The public was in a

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<sup>71</sup> Cf. Cassady, *supra* note 28, at 282 n.361 (“[S]ince the voters and state legislatures at the time of the Framing were catatonically [or, perhaps, categorically] opposed to any incidents of monarchism or nobility, it would have been political suicide for a Representative or Senator accountable to them to accept *any* gift . . . from a foreign state.” (emphasis added)). Cassady has to answer why President Washington would chance “political suicide.” *Id.*

<sup>72</sup> William B. Adair, *A Masterpiece of Artisanry*, PICTURE FRAMING MAG., Aug. 2010, at 28 (describing the print and frame as “an official diplomatic gift”); *id.* at 32 (“The history of this Royal Palace frame is clear, having been an official gift to Washington.”); William Adair, *George Washington's Frames: A Study in Contrasts*, PICTURE FRAMING MAG., June 1992, at 34; Wendy Wick Reaves, *The Prints*, ANTIQUES, Feb. 1989, at 502, 502–03; *Louis Seize, Roi des Français, Restaurateur de la Liberté, 1790*, GEORGE WASHINGTON'S MOUNT VERNON EST., MUSEUM & GARDENS, <http://tinyurl.com/pmp6lt6> (last visited Oct. 4, 2014) (“French ambassador Jean-Baptiste Ternant (1750–1816) presented George Washington with this portrait of King Louis XVI on December 22, 1791. Washington prominently displayed it in the state room of his Philadelphia residence and, later, in Mount Vernon's Large Dining Room. Its magnificent frame—one of the most significant French palace-style frames extant—would have been commissioned by the King as a gift for the President of the new United States. Although the frame symbolically places the Royal crest of the Kings of France above Washington's coat of arms at bottom, this regal gift embodies the amicable Franco-American relations that characterized Washington's first term as president.”).

<sup>73</sup> See S.W. Jackman, *A Young Englishman Reports on the New Nation: Edward Thornton to James Bland Burges, 1791–1793*, 18 WM. & MARY Q. (3d ser.) 85, 121 (1961) (reporting that the portrait was on display in Washington's anteroom, beyond which he entertained official visitors).

position to complain about this gift and at least one other gift of state that Washington received while President. But they did not.

In short, Executive Branch practice—established personally by President Washington and Secretary Hamilton—validates the minimalist position and falsifies both Cassady’s intermediate position and the maximalist position.

### *B. Evidence from Legislative Branch Practice*

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

That if any person shall, directly or indirectly, give any sum or sums of money, or any other bribe, present or reward, or any promise, contract, obligation or security, for the payment or delivery of any money, present or reward, or any other thing to obtain or procure the opinion, judgment or decree of any judge or judges of the United States, in any suit, controversy, matter or cause depending before him or them, and shall be thereof convicted . . . and the judge or judges who shall in any wise accept . . . shall be fined and imprisoned . . . and shall forever be disqualified to hold any *office of honour, trust or profit under the United States*.<sup>74</sup>

This statute works a disqualification: a person convicted of bribery in regard to federal judicial proceedings is permanently precluded from holding an “Office . . . under the United States.” *The Office-language here is exactly the same as that appearing in the Constitution*. One would expect that the First Congress (which included a number of members who attended the Federal Convention, and some who attended their state’s ratifying convention, and a few who attended both) knew what this language meant and how to use it.

If Cassady and others within the intermediate camp are correct, if the President and Vice President hold an “office . . . under the United States,” then this statute is deeply problematic because it purports to add, by statute, to the qualifications for constitutionally established elected

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<sup>74</sup> An Act for the Punishment of certain Crimes against the United States, ch. 9, § 21, 1 Stat. 112, 117 (1790) (emphasis added). Cassady discusses and cites dozens of English and British statutes, but not any American ones. Puzzling.

federal positions. Congress has no such power,<sup>75</sup> and Cassady knows this.<sup>76</sup> Cassady can only maintain his position as to the scope of this statute's, and the Constitution's, *Office*-language by arguing that majorities in the First House and the First Senate mistakenly passed, and President Washington mistakenly signed, a statute that is unconstitutional (when applied to the most significant elected federal positions).

There is an alternative view: Cassady and others in the intermediate and maximalist camps might consider the possibility that the statute was constitutional precisely because the scope of the statute's *Office*-language reaches only statutory or appointed positions, as opposed to elected ones. Because statutory offices are creatures of Congress, Congress is free to create disqualifications—something it cannot do in regard to constitutionally mandated elected positions.

Following the avoidance canon, and given a choice between two interpretations, one leading to a determination that a statute is constitutionally infirm and the other leading to the conclusion that the statute is sound, the latter interpretation makes more sense. Furthermore, this statute is hardly unique: Congress has created other such statutory disqualifications using the “Office . . . under the United States” language at issue here.<sup>77</sup>

Consider this provision from the *United States Code*:

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<sup>75</sup> See THE FEDERALIST NO. 60, *supra* note 27, at 402 (Alexander Hamilton) (noting that the qualifications for membership in Congress are “defined and fixed in the Constitution, and are unalterable by the [national] legislature”).

<sup>76</sup> See Cassady, *supra* note 28, at 219 (describing qualifications for elected federal positions as “fixed”).

<sup>77</sup> See Treasury Act, ch. 12, § 8, 1 Stat. 65, 67 (1789); An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States, ch. 5, § 35, 1 Stat. 29, 46 (1789); An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes, ch. 11, § 34, 1 Stat. 55, 64–65 (1789); *see also* *De Veau v. Braisted*, 363 U.S. 144, 158–59 (1960) (Frankfurter, J., plurality opinion) (“Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas. Federal law has *frequently* and *of old* utilized this type of disqualification. . . . In addition, a large group of federal statutes disqualify persons ‘from holding any *office . . . under the United States*’ because of their conviction of certain crimes, generally involving official misconduct.” (emphasis added)).



Whoever, being an officer of the United States concerned in the collection or the disbursement of the revenues thereof, carries on any trade or business in the funds or debts of the United States, or of any State, or in any public property of either, shall be fined under this title or imprisoned not more than one year, or both; and shall be removed from office, and be incapable of holding any office under the United States.<sup>78</sup>

Now Cassady and other intermediatists might argue that the reason the Impeachment Clause uses “Officers *of* the United States” and the Disqualification Clause uses “Office . . . *under* the United States” is because the Committee of Style and the Committee of Detail failed to do their job. The members of the two committees failed to standardize the Constitution’s language across the Constitution’s several articles and provisions. Mistakes were made.<sup>79</sup> But that explanation will not wash for

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<sup>78</sup> 18 U.S.C. § 1901 (1948) (emphasis added). There were technical amendments to section 1901 in 1994. Section 1901 was based on 35 Stat. 1107 (1909) which, in turn, was based on section 1788 of *Revised Statutes*. See REVISED STATUTES OF THE UNITED STATES, PASSED AT THE FIRST SESSION OF THE FORTY-THIRD CONGRESS, 1873–’74, at 317 (Washington, Gov’t Printing Office 2d ed. 1878) (“Every *officer of the United States* concerned in the disbursement of the revenues thereof who carries on any trade or business in the funds or debts of the United States, or of any State . . . shall, upon conviction, be removed from office, and forever thereafter be incapable of holding any *office under the United States*.” (emphasis added)); *accord id.* § 1789 (using *office under the United States*-language in a similar fashion). The codifiers of *Revised Statutes* report that sections 1788 and 1789 were, in origin, based on the (first) Treasury Act, ch. 12, § 8, 1 Stat. 65, 67 (1789), and subsequently amended by An Act making alterations in the Treasury and War Departments, ch. 37, § 12, 1 Stat. 279, 281 (1792), and amended again by An Act to regulate the collection of duties on imports and tonnage, ch. 22, § 88, 1 Stat. 627, 695 (1799).

<sup>79</sup> Indeed, *Office*-language will also vary within a single sentence in the Constitution. For example, the Incompatibility Clause and Ineligibility Clause state: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil *Office under the Authority of the United States*, which shall have been created, or the Emoluments whereof shall have been [i]ncreased during such time; and no Person holding any *Office under the United States*, shall be a Member of either House during his Continuance in Office.” U.S. CONST. art. I, § 6, cl. 2 (emphasis added). Do Cassady and others in the intermediate camp really believe that this is merely (more) sloppy drafting, or that the different language accommodates different meanings? If they accept the latter, then how can they continue to maintain that “officer *of* the United States” must be coextensive with “Office . . . *under* the United States”?

Likewise, the *Office*-language in the Removal and Disqualification Clauses varies within a single sentence. The Removal and Disqualification Clauses state: “Judgment [by the Senate] in Cases of Impeachment [by the House] shall not extend further than to removal from

the federal statute above. This provision is a single sentence long, and yet it shifts from “officer of the United States” to “office under the United States.” Cassady could again assume that this was an error by the statute’s drafters or compilers. Indeed, Cassady might fault the statute for two errors: (1) the shift in language is unnecessary, and (2) the “office under the United States” language extends to the presidency and vice presidency, thereby imposing an unconstitutional statutory disqualification. I would argue that there is a simpler, better position: one more consonant with the presumption that legislatures and their staffs have a basic working understanding of the Constitution’s well-known structural imperatives. The statute’s “officer of the United States” language extends only to statutory or appointed officers in the Executive and Judicial Branches; the statute’s “office under the United States” language extends to statutory or appointed officers in any branch. The statute is constitutional precisely because the disqualification does not apply to any elected positions.

Of course, Congress can err, including the First Congress. Cassady can (yet again) take that approach. But it is not enough for Cassady to suggest that such error is conceivable (as it clearly is). Rather, Cassady needs to give us reason to believe that, in fact, the members of the First House and the First Senate (*along with more recent Congresses, the Committee of Detail and the Committee of Style, Secretary Hamilton and*

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*Office*, and disqualification to hold and enjoy any *Office of honor, Trust or Profit under the United States* . . . .” U.S. CONST. art. I, § 3, cl. 7 (emphasis added). Does it not stand to reason that the Disqualification Clause’s use of *Office of honor, Trust or Profit under the United States* is a subset of the Removal Clause’s more generic *Office*, which is used alone and without modifiers? See Amar, *supra* note 24, at 761 (“[W]hen two (or more) clauses feature different wording, this difference may also be a clue to meaning, and *invite different construction of the different words*.” (emphasis added)); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1172 (2003) (“It is far better to use two different words in a sentence when we mean to convey two different meanings.”); *infra* note 87 (discussing different *Office*-language within Article I, Section 6, Clause 2, which is also only a single sentence long). *Office*, standing alone and without modifiers, is broad enough to encompass the presidency and vice presidency, as the Constitution expressly refers to the President as holding an “office.” See, e.g., U.S. CONST. art. II, § 1, cl. 1 (“[The President] shall hold his *Office* during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows . . . .” (emphasis added)).

*President Washington*) erred.

In short, legislative practice, established by the First House and First Senate, confirms the minimalist position and falsifies both Cassidy's intermediate position and also the maximalist position.

### C. Evidence from the Supreme Court of the United States

I have yet to find any early federal judicial decision expressly opining on the scope of "Office. . . under the United States" or even doing so implicitly. By the late nineteenth century, however, the Supreme Court had occasion to opine on the meaning of "officers of the United States," usually in the context of litigation addressing the Appointments Clause.

For example, in 1888, in *United States v. Mouat*, the Supreme Court of the United States held that:

Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not strictly speaking, *an officer of the United States*.<sup>80</sup>

The *Mouat* Court clearly identified *officer of the United States* with appointed positions, not elected ones. Moreover, *Mouat* is not an outlier decision. In 2010, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court explained: "[t]he people do not vote for the 'Officers of the United States.' Art. II, § 2, cl. 2. They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'"<sup>81</sup> According to the

<sup>80</sup> *United States v. Mouat*, 124 U.S. 303, 307 (1888) (Miller, J.) (emphasis added).

<sup>81</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 130 S. Ct. 3138, 3155 (2010) (Roberts, C.J.) (quoting THE FEDERALIST NO. 72, *supra* note 27, at 463 (Alexander Hamilton)); *see also, e.g.*, *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1372 (Fed. Cir. 2006) (Gajarsa, J., concurring in part and concurring in the *en banc* judgment) ("It is plain that the President is not an 'officer of the United States' for Appointments Clause, Commission Clause, or Oath of Office Clause purposes."); 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

Supreme Court, elected positions—President, Vice President, Senator, and Representative—are not “officers of the United States.” In short, there is a judicial tradition—more than a century old—affirming the minimalist position, and rejecting the intermediate and maximalist positions.

One might argue that although the President and Vice President are not “officers of the United States,” they might still be properly categorized as holding “Offices . . . under the United States.” Such a position would depart from the intermediate position (as posited by Amar, Chafetz, and Cassady); those adhering to the intermediate position have consistently argued that “officer of the United States” is coextensive with “Office . . . under the United States.”

To put it another way, Cassady and the other proponents of the intermediate position can be correct about the scope of the Disqualification Clause (i.e., that it extends to the President and Vice President), only either: (1) if the Supreme Court erred in *Mouat* and *Free Enterprise Fund*, or (2) if the intermediate position’s operative assumption is wrong—i.e., the assumption that the meaning of “officer of the United States” (as used in the Impeachment Clause and Appointments Clause) is coextensive with the meaning of “Office . . . under the United States” (as used in the Disqualification Clause).

1. The Supreme Court Erred Regarding the Scope of “officers of the United States” in *Mouat* and *Free Enterprise Fund*

In other words, if *Mouat* and *Free Enterprise Fund* correctly expounded on the scope of the Constitution’s “officers of the United States” language, and if “officer of the United States” and “Office . . . under the United States” are coextensive, then it follows that the Disqualification Clause does not reach the President and Vice President, and the intermediate position is wrong.

Cassady could save his position regarding the scope of the

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colleges.”).

Disqualification Clause. One way for him to do so is to argue that the *Mouat* Court and the *Free Enterprise Fund* Court erred. How might he do that? His complaint against the Washington precedent was that Washington failed to seek legal counsel, but that criticism cannot be applied to decisions of the Supreme Court arising in the context of adversarial appellate litigation. Cassady needs to explain how the *Mouat* Court and the *Free Enterprise Fund* Court erred, or, alternatively, Cassady needs to explain why his structural intuition (based on *Wilkes*, *Blount*, and the assumption of aspirational uniformity across divergent constitutional provisions using different *Office*-language) should overcome: (1) on-point precedents established by Secretary Hamilton, President Washington, the First House, and the First Senate using “Office . . . under the United States” language; (2) the drafting conventions bequeathed to us by the Committee of Detail and the Committee of Style textually distinguishing “Office . . . under the United States” from “officers of the United States;” and (3) precedents established by the Supreme Court using “officers . . . of the United States” language. All of this is something Cassady has not done.

2. The Supreme Court Correctly Expounded on the Scope of “officers of the United States” in *Mouat* and *Free Enterprise Fund*, but the Scope of “Office . . . under the United States” Remains Open

If *Mouat* and *Free Enterprise Fund* correctly expounded on the scope of the Constitution’s “officers of the United States” language, but if “officers of the United States” and “Office . . . under the United States” are *not* coextensive, then the President and Vice President might be encompassed by the Disqualification Clause’s “Office . . . under the United States” language, even if not encompassed by the “officers of the United States” language used in the Impeachment Clause and elsewhere in the Constitution.

I doubt Cassady and others in the intermediate camp could go down this latter road. First, doing so probably does not solve their problem. It still leaves them with the very real difficulty of *actually* interpreting the Constitution’s “Office . . . under the United States” language and negotiating the multiple on-point precedents established by Hamilton,

Washington, the First House, and the First Senate using “Office . . . under the United States” language in a manner contradicting their favored meaning.

More importantly, those embracing the intermediate position have affirmatively stated, or at least assumed, that the Constitution’s divergent *Office*-language is coextensive,<sup>82</sup> and that the Constitution embraces significant aspirational uniformity across its provisions. As Cassady argues:

Why would the Framers explicitly make the President, Vice President, and all civil officers impeachable [under the Impeachment Clause]; provide for their removal from office; and authorize their disqualification from holding any future office [under the Disqualification Clause]; and *yet* leave them eligible to return to the two highest and most important offices of all?<sup>83</sup>

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<sup>82</sup> See Cassady, *supra* note 28, at 287 (“First, the Constitution’s text itself reads most reasonably when the President and Vice President are included under the terms ‘office’ and ‘officer,’ in all their variants.”); *supra* note 41 (quoting positions of Professors Akhil Amar, Vikram Amar, and Josh Chafetz); cf. 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.” (emphasis added)); Vasav Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 129 n.28 (2001) (“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) (emphasis added)); 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” (emphasis added)).

<sup>83</sup> Cassady, *supra* note 28, at 288. Potential answers to Cassady’s rhetorical question are easy to come by. For example, Mr. Carpenter, counsel for Belknap, a nineteenth century defendant in impeachment proceedings, stated:

The disqualification clause of punishment was evidently put in for the purpose of making the power of removal by impeachment effectual. After providing that the officers of the United States might be removed on impeachment, although the President could not pardon the offender convicted and removed, yet if he could reinstate him the next morning he would have substantially the power of pardon. To prevent this was the object of the disqualifying clause; which Story says is not a necessary part of the judgment. You might impose it where you had removed an officer appointed by the President whom the President could reinstate. You could stop that by fixing disability upon the officer; and that I take to have been the sole

Once one acknowledges, however, that divergent *Office*-language embraces different meanings, then the assumption of aspirational uniformity gives way where different language is chosen. Here different language has been chosen. The Impeachment Clause uses “officer of the United States,” and also expressly applies to the President and Vice President. The Disqualification Clause uses “Office . . . under the United States,” and makes no mention of either the President or Vice President. Cassady wants us to determine the scope of the Disqualification Clause based on divergent language in the Impeachment Clause, but the very fact that different language was chosen counsels against our doing so.

In reality, Cassady’s rhetorical question above is not an argument; rather, it is an intuition.<sup>84</sup> Cassady’s security-related intuition is that the presidency and vice presidency are *very, very, very* important, and, therefore, the Framers used language precluding a formerly impeached, convicted, removed, and disqualified officer from holding the presidency

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purpose of this clause.

3 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES INCLUDING REFERENCES TO PROVISIONS OF THE CONSTITUTION, THE LAWS, AND DECISIONS OF THE UNITED STATES SENATE 318 (1907). Cassady gives us no reason to prefer his position over Carpenter’s or over any other of the legion of potential answers to his rhetorical question.

My own view is that Cassady’s search for aspirational harmony between the Impeachment Clause and Disqualification Clause is mistaken in principle. As explained, the two clauses use different *Office*-language. More importantly, the two clauses also treat military officers very differently. Military officers are not impeachable. But if an on officer moves from civil to military office, and is subsequently impeached, convicted, and disqualified for wrongdoing committed while holding his former civil office, the Disqualification Clause will work an immediate removal from military office even though military officers *per se* are beyond the scope of the Impeachment Clause. *Compare* U.S. CONST. art. II, § 4, *with* U.S. CONST. art. I, § 3, cl. 7.

<sup>84</sup> Cassady’s intuition is not *sui generis*. Melton—making the best argument for the maximalist position—puts forward an identical intuitionist argument, *only in reverse*. *See* Melton, *supra* note 31, at 35–36 (“If Senators can be impeached, then the notion that an impeached Senator can be removed from the Senate but not disqualified from returning to the Senate seems counterintuitive. And if Senators can be barred from future Senate service, then so should all convicted and disqualified impeachment defendants, whatever their government position.”). There is an important lesson here. Intuitions are powerful: powerful enough to facilitate one’s reaching just about any conclusion or conclusions—even contradictory ones. That is why a fair minded interpretivist looks for evidence: to validate or falsify one’s intuitions.

or vice presidency. That's a reasonable intuition.

But an alternative democracy-related intuition is that it is precisely because the presidency and vice presidency are important that the Framers would not have allowed contingent and politically charged congressional processes (i.e., impeachment and disqualification) to overcome the Constitution's fixed determinate qualifications (e.g., citizenship, age, and residence) for elected positions, and that as the importance of the federal position grows, so does the importance of maintaining the people's right to choose their own rulers.<sup>85</sup> That's also a reasonable intuition. Indeed, it is this democracy-reinforcing vision which is consonant with *Wilkes*—so, it is more than a little surprising that Cassady chooses the alternative.

#### D. Evidence from Coordinate Constitutional Provisions

As explained above, in choosing between these two competing normative visions, Cassady fails to discuss contemporaneous usage in regard to the Disqualification Clause's "Office . . . under the United States" language. Instead, he turns to structure (e.g., Cassady's hypocrisy and congressional self-dealing argument, discussed above) and to coordinate constitutional provisions (discussed below). As with his discussion regarding hypocrisy and constitutional structure, his discussion of coordinate constitutional provisions is largely based on historically-unmoored, modern intuitions.<sup>86</sup>

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<sup>85</sup> Kalt, *supra* note 7, at 22 ("Although *Your Crook*'s contrast between congressional office and the presidency is undeniably true, it leaves a lot out. For one thing, the point can be flipped on its head: given that presidential elections are so much more consequential, it is correspondingly more important to allow the people their choice and to respect it.")

<sup>86</sup> See Cassady, *supra* note 28, at 289 n.388 ("[R]ather than distinguish between elected and appointed officers, the Framers tended to group government officials into two separate categories: legislators and officers, which included everyone else up to and including the President and Vice President."). Cassady does not supply even one source to justify his meta-historical and meta-textual claim. See *infra* note 87 (discussing domestic authority, i.e., the text of the Constitution, suggesting that the key distinction is between elected and appointed positions); see also *infra* note 109 (discussing foreign authority suggesting that the key distinction is between elected and appointed positions). Indeed, Cassady's division of the government between "legislators" and Executive and Judicial Branch "officers" is underinclusive; such a binary grouping fails to include non-member legislative staff, e.g., the



### 1. Cassady on the Incompatibility Clause

The Incompatibility Clause states: “[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”<sup>87</sup> In regard to this clause, Cassady states:

Take Article I, Section 6, for example, which prohibits anyone holding “any Office under the United States” from serving in the House or Senate during his time in office. This provision makes the *most sense* if all executive officers, from the top down, are barred from the legislature as long as their allegiances and their political judgments are divided because of their positions in other branches of government.<sup>88</sup>

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Secretary of the Senate and the Clerk of the House. Moreover, *contra* Cassady, the Framers’ Constitution expressly provides for such staff. *See* U.S. CONST. art. I, § 2, cl. 5 (House Officers Clause); U.S. CONST. art. I, § 3, cl. 5 (Senate Officers Clause). Likewise, Secretary Hamilton reported the salary of such staff to Congress, notwithstanding that such personnel worked for Congress and that Congress determined the salary of such staff. *See supra* note 63.

<sup>87</sup> U.S. CONST. art. I, § 6, cl. 2. (“No Senator or Representative shall, during the Time for which he was *elected*, be *appointed* to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been [i]ncreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” (emphasis added)). The second clause of Article I, Section 6, Clause 2 (i.e., everything following the semicolon) is the Incompatibility Clause. The first clause is the Ineligibility Clause: a clause left entirely unaddressed by Cassady’s *Your Crook*. It is worth noting that the Ineligibility Clause textually hard wires the distinction between *elected* and *appointed* positions. *But see* Cassady, *supra* note 28, at 289 n.388 (arguing that the key structural distinction in the Constitution is between legislators and officers, and not between elected and appointed officers). Furthermore, Article I, Section 6, Clause 2 distinguishes between “Office under the United States” and “Office under the Authority of the United States.” U.S. CONST. art. I, § 6, cl. 2. Does Cassady believe that this is yet more sloppy drafting by the Committee of Detail and Committee of Style? Do Cassady and other intermediatists believe that this is yet another intrasentence distinction without a meaningful difference? *See supra* note 79 (discussing different *Office*-language within Article I, Section 3, Clause 7, which is also a single sentence long). *But see* Geneviève Cartier, *Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?*, 53 U. TORONTO L.J. 217, 223 (2003) (“[Chief Justice Laskin] insisted [!] on the fact that the *common law* makes a distinction between *offices held under the Crown* and *offices held under the authority of a Board created by statute . . .*” (emphasis added) (citing *Nicholson v. Haldimand-Norfolk Regional Bd. of Comm’rs of Police*, [1979] 1 S.C.R. 311, 319–20, 324 (Laskin, C.J.) (Can.))). My own view is that any global interpretive position which must consistently reject the constitutional text is no theory at all.

<sup>88</sup> Cassady, *supra* note 28, at 287 (citing only counter-authority) (emphasis added)

Cassady here points to no sources; he entirely relies on his personal intuition as to the scope of the clause and its “office under the United States” language. He sees it as a separation of powers clause: a clause whose purpose is to keep the branches separate.

What makes Cassady’s interpretation particularly strange is that twenty pages later, Cassady writes: “The Incompatibility Clause keeps the executive branch from diluting representatives’ *loyalty* to their constituents’ interests, by eliminating the President’s power to bribe legislators with lucrative employment posts.”<sup>89</sup> Here Cassady cites good authority for his position, including *The Federalist*.<sup>90</sup> Under this view, the Incompatibility Clause is not so much a separation of powers clause as it is an anti-conflicts or anti-bribery clause regarding lucrative office controlled by the President. Of course, this historically-grounded view of the clause undermines Cassady’s interpretation. The President can make appointments to statutory offices; he cannot appoint anyone to the presidency (even assuming he were willing to do so)—only federal electors (or, in certain circumstances, Congress) can choose a President. So, the better view of the Incompatibility Clause, the view making the “most sense,” the one rooted in the clause’s historical context and original meaning, is that its purpose was to keep members of Congress from concurrently holding statutory or appointed offices, not the presidency.

Of course, many people will unthinkingly, if not unhesitatingly, agree with Cassady. Why? Because it would (by some modern understandings) undermine the larger purposes of our constitutional framework if one person held a seat in Congress and also the presidency. This is true. But the fact that a result is problematic does not mean the Incompatibility Clause addresses, was intended to address, or was

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(footnote omitted); *see also* AMAR, *supra* note 41, at 131, 171.

<sup>89</sup> *Id.* at 307 (emphasis added).

<sup>90</sup> *Id.* at 307 n.440 (citing THE FEDERALIST NO. 76, *supra* note 27, at 480–84 (Alexander Hamilton) and AMAR, *supra* note 41, at 182). *But cf.* REPORT FROM THE SELECT COMMITTEE ON OFFICES OR PLACES OF PROFIT UNDER THE CROWN WITH MINUTES OF EVIDENCE, APPENDICES AND INDEX, *supra* note 27, at x (“Judges were ‘assistants of the House of Lords’, and it was on this ground that the first recorded cases of Members [of the House of Commons] vacating their seats on appointment as judges were based.” (quoting memorandum by the Clerk of the House of Commons)).

understood to address that problem. There are a great many potential conflicts the Incompatibility Clause's text leaves unaddressed and, therefore, presumptively permitted (unless validly regulated by some other constitutional provision or by sub-constitutional means). For example, one person may concurrently hold: a state and a federal position; multiple appointed federal offices across the Executive and Judicial Branches; an appointed Legislative Branch position in conjunction with one or more appointed positions in the other two branches; two (or more) House seats (from the same state); two Senate seats (from the same state); or a House and Senate seat (from the same state). All these situations, and others,<sup>91</sup> pose conflicts and risks. But that does not establish that they are covered by the Incompatibility Clause and its "office under the United States" language. Indeed, whether holding multiple positions poses a threat to our constitutional order is contestable.<sup>92</sup>

## 2. Cassady on the Foreign Emoluments Clause

As explained above, the Foreign Emoluments Clause applies to

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<sup>91</sup> For example, the incumbent Vice President counts the electoral votes for President and Vice President, notwithstanding that she or he may be a candidate in that very election. *See* U.S. CONST. art. II, § 1, cl. 3 ("And the[] [electors] shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted."); Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 VA. L. REV. 551 (2004). I thank Professor Kalt for suggesting this point.

<sup>92</sup> *See, e.g.*, THE FEDERALIST NO. 56, *supra* note 27, at 380–81 (James Madison) ("The representatives of each State . . . will probably in all cases have been members, and may even at the very time be members, of the State legislature . . ."); *see also, e.g.*, Michael C. Dorf, *How Far Do Text and Early History Take Us? A Comment on Seth Barrett Tillman's Intriguing Argument*, DORF ON LAW (Aug. 20, 2012, 12:20 AM), <http://tinyurl.com/8kb7udg> ("I don't think that would necessarily be so bad [to have a President or Vice President also serving in Congress]. There are such strong political checks on simultaneous service in Congress and as Pres[ident] or V[ice] P[resident] that if someone were to attempt it nonetheless, that would likely be because we are facing some crisis to which the ordinary rules of politics do not apply.").

persons holding an “Office . . . under [the United States].”<sup>93</sup> Cassady affirms that “[t]his provision against foreign corruption reads most *sensibly* if it applies to the entire executive department, President and Vice President included . . . .”<sup>94</sup> He further asserts that the “the Clause sought to combat the corrupting influence of foreign graft on the President and his counselors when conducting foreign diplomacy.”<sup>95</sup> Cassady puts forward no evidence that anyone circa 1787–1788 understood this clause as applying to anyone but United States ambassadors to foreign countries and to other statutory officers. In other words, he puts forward no evidence that this clause applies to the presidency,<sup>96</sup> except his own intuition that that result is most “sensible.” But if his intuition on this matter were so “sensible,” then why did President Washington receive, accept, and keep a gift from Ternant, the French ambassador, absent congressional consent?<sup>97</sup> Cassady offers no explanation.

President Washington also received, accepted, and kept a separate gift from another French official, LaFayette, who gave Washington the key to the Bastille. And here too, as with the gift from the French ambassador, Washington never sought, nor received, congressional consent.<sup>98</sup> In regard to LaFayette’s gift, Cassady argues: “Washington

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<sup>93</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>94</sup> Cassady, *supra* note 28, at 287–88 (emphasis added); *see also* AMAR, *supra* note 41, at 182 (“[T]he . . . general language of Article I, section 9 barred all federal officers, *from the president on down*, from accepting any ‘present’ or ‘Emolument’ of ‘any kind whatever’ from a foreign government without special congressional consent.” (emphasis added)). Professor Amar offers no support for his position regarding the Foreign Emoluments Cause, and he fails to discuss President Washington’s diplomatic gifts.

<sup>95</sup> Cassady, *supra* note 28, at 282 n.361.

<sup>96</sup> As far as I know, the only Framers to suggest that the Foreign Emoluments Clause applied to the President was Edmund Randolph. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE CONVENTION AT PHILADELPHIA IN 1787, *supra* note 32, at 446. Of course, Randolph can hardly be used to support Cassady’s position: Randolph, was a maximalist—he believed that Senators were impeachable. *See id.* at 202 (“Who are your senators? They are chosen by the legislatures, and a third of them go out of the Senate at the end of every second year. They may also be impeached. There are no better checks upon earth.” (quoting Edmund Randolph’s June 10, 1788 speech at the Virginia ratifying convention)).

<sup>97</sup> *See supra* Part IV.A.2.

<sup>98</sup> Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A*

may have *erred* on the side of informality in accepting the key, viewing it as a warm and harmless ceremonial gesture from his son on behalf of France, a trusted ally.”<sup>99</sup> Anyone can err, including President Washington. But absent evidence, there is no good reason to assume that Washington erred.

Indeed, there are several good reasons to believe Washington acted correctly. First, Washington was self-consciously aware that his conduct would set precedents for future administrations. He stated: “As the first of every thing, *in our situation* will serve to establish a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles.”<sup>100</sup> Indeed, until Cassady’s publication, the dominant, if not uncontested, view was that Washington’s conduct deserves special deference in regard to both “foreign affairs” and “presidential etiquette.”<sup>101</sup> Both of those considerations apply here.

Second, LaFayette’s gift was widely reported in the American domestic press.<sup>102</sup> If Washington “erred,” then Cassady should be able to point to someone, somewhere, at some time taking issue with the President’s conduct. But no such evidence appears in Cassady’s publication.

Third, LaFayette was, at this time, an official of a foreign government, and contrary to Cassady’s claim, LaFayette was not

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*Conjecture on the Constitution’s Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL’Y 107, 130–131 (2009) (discussing LaFayette’s position in the French government and details regarding the gift of the key); *supra* note 68 (discussing the earliest congressional debate on the Foreign Emoluments Clause).

<sup>99</sup> Cassady, *supra* note 28, at 287 n.381 (emphasis added).

<sup>100</sup> Letter from George Washington to James Madison (May 5, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 310–11 (John C. Fitzpatrick ed., 1939); AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 564 n.2 (2012) (same).

<sup>101</sup> See AMAR, *supra* note 100, at 309–10.

<sup>102</sup> See, e.g., *Philadelphia, 12 August*, THE FEDERAL GAZETTE AND PHILADELPHIA DAILY ADVERTISER, Aug. 12, 1790, at 2 (“Last week the key of the Bastille, accompanied with a fine drawing of that famous building, was presented to the President of the United States, by John Rutledge, [J]un. Esq. to whose care they were committed by the illustrious patriot the Marquis de la Fayette . . .”); *New-York, August 10*, THE PENNSYLVANIA PACKET, AND DAILY ADVERTISER, Aug. 13, 1790, at 2 (same).

Washington's son: adopted or otherwise.<sup>103</sup> No doubt there was much genuine affection between the two,<sup>104</sup> but affection flowing from hard-fought military campaigns and other shared experiences of the revolutionary drama do not work, did not work, and could not work a constructive exception to the Foreign Emoluments Clause.

The simpler, and therefore preferable view, the view supported by Ockham's razor, is not that Washington "erred" and that the whole country was complicit in Washington's wrongdoing, but that Cassady's view of the Foreign Emoluments Clause errs. Washington's conduct and the country's silence make sense if the presidency is not an "office . . . under the United States."

### 3. Cassady on the Elector Incompatibility Clause

The Elector Incompatibility Clause provides: "[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."<sup>105</sup> Cassady argues that this language precludes the President and Vice President from serving as electors. He states:

The purpose of this provision, Hamilton explained, was to "exclude[] from eligibility to this trust, all those who from situation might be suspected of too great devotion to the President in office." *Common sense* would suggest that th[e] [provision's "office . . . under the United States" language] includes the President and Vice President, who could hardly be expected to serve as

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<sup>103</sup> Letter from Lafayette to Washington (Mar. 17, 1790), in *THE LETTERS OF LAFAYETTE TO WASHINGTON 1777-1799*, at 347, 348 (Louis Gottschalk & Shirley A. Bill eds., 2d prtg. 1976) (reproducing Mar. 17, 1790, letter from LaFayette to Washington giving the key to the Bastille, where LaFayette describes the key as "a tribute which I owe as a son to my adoptive father, as an aid de camp to my General, as a Missionary of Liberty to its Patriarch"). The language here is one of affection and admiration. Construing it literally to mean that LaFayette was Washington's son is historical error. See *infra* note 104 (discussing LaFayette's relationship with Washington).

<sup>104</sup> See 13 *ENCYCLOPAEDIA BRITANNICA* 587 (1955) (noting in the entry for LaFayette that LaFayette and Washington met on August 1, 1777 and became "lifelong friend[s]"); see also Marc Leepson, *An Adopted Hero, An Adopted Son*, *GW MAGAZINE*, Spring 2012, at 11 ("Washington, who never had biological children, for the rest of his life considered Lafayette his all-but-adopted son.").

<sup>105</sup> U.S. CONST. art. II, § 1, cl. 2.

detached electors, “free from any sinister bias,” in an election deciding their fate in their current posts.<sup>106</sup>

Cassady’s interpretation of Hamilton is entirely backwards; Cassady’s analysis conflates pre-commitment bias arising from self-interest with decisional independence vis-à-vis dominant third-parties. Hamilton’s exposition of the clause was wholly concerned with the latter, not the former. As Hamilton stated:

The[] [Framers] have not made the appointment of the President to depend on any preexisting bodies of men, who might be *tampered* with beforehand to *prostitute* their votes . . . And they have excluded from eligibility to this trust [as federal elector], all those who from [their] situation might be suspected of too great devotion to the President in office. No senator, representative, or other person holding a place of trust or profit under the United States, can be of the numbers of the electors. Thus without corrupting the body of the people,

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<sup>106</sup> Cassady, *supra* note 28, at 288 (first alteration in original) (emphasis added) (footnotes omitted) (quoting THE FEDERALIST NO. 68, *supra* note 27, at 442 (Alexander Hamilton)). The downside (such as it is) of allowing the Vice President to participate as an elector can *only* relate to pre-commitment bias, not decisional independence. The Vice President enjoys independence vis-à-vis the President. See Roy E. Brownell II, *The Independence of the Vice Presidency*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 297 (2014). This was particularly true prior to the Twelfth Amendment. Under the original unamended Constitution of 1787, the Vice President was the runner-up in the presidential election, and as such, the Vice President was a rival or competitor to the President, not his partner or representative in the Congress. See U.S. CONST. art. II. In such circumstances, it would be quite ahistorical to suggest that the Framing-era Vice President was “devoted” to the President. *But cf. infra* note 108 (discussing potential counter-authority).

Similarly, Cassady casually assumes that the Vice President is an “executive officer.” Cassady, *supra* note 28, at 271, 287. But Cassady never offers *any* support for his wholly contestable ahistorical intuition. Many early and modern authorities viewed and view the Vice President as a Legislative Branch officer or as an “amphibious,” “anomalous,” or “hybrid” position tied to two or more branches. See, e.g., Roy E. Brownell II, *A Constitutional Chameleon: The Vice President’s Place within the American System of Separation of Powers, Part I: Text, Structure, Views of the Framers and the Courts*, 24 KAN. J.L. & PUB. POL’Y 1, 58–59 (2014) (“Some [of the Framers] saw the Vice President as part of both political branches. Some believed him to be exclusively part of the legislative department. *None, however, seemed to argue that the position was solely an executive branch post.*” (emphasis added) (footnotes omitted)); see also, e.g., Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMP. L. 531, 547 (2009) (“[The] most compelling . . . instance of the fusion of personnel [across branches] in the American presidential system is embodied in the Vice Presidency.”).

the immediate agents in the election will at least enter upon the task free from any sinister bias.<sup>107</sup>

Statutory officers appointed by the President are excluded from serving as electors precisely because the President (or his immediate subordinates) appointed them, because the President is in a position to remove them, and because the President may appoint or promote them to additional or higher offices. By contrast, the President and Vice President (and their successors) are not subject to presidential appointment,<sup>108</sup> removal, or supervision in the ordinary course of business. As such they are not “officers . . . under the United States,”<sup>109</sup> and there is no danger in allowing them to serve as electors per Hamilton’s analysis. To put it another way, if pre-commitment bias arising from self-interest were the rationale for the Elector Incompatibility Clause, then candidates who are not incumbents would be precluded from acting as electors, and electors would be precluded from voting for themselves (and for family members). But the

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<sup>107</sup> THE FEDERALIST NO. 68, *supra* note 27, at 441–42 (Alexander Hamilton) (emphasis added). It might be argued that the President should be precluded from serving as an elector because the President might bribe an elector, including even a private person or state official serving as an elector, with a promise of a subsequent presidential appointment to a federal statutory office. But the risk of such bribery exists whether or not a President is an actual elector; the risk is there as long as the President has any opportunity to communicate with electors.

<sup>108</sup> Admittedly, there are exceptions. In modern times, party conventions choose vice presidential candidates, although in most cases the convention merely ratifies the choice of its party leader, i.e., the presidential candidate. It is not the President *per se* who chooses the Vice President; rather, it is the party’s leader or presidential candidate. Again, in modern times, in the event of a vacancy in the vice presidency, the President can nominate a replacement subject to congressional approval. See U.S. CONST. amend. XXV, § 2. *But cf. supra* note 106 (discussing the Vice President’s independence from the President). A President has substantial control over cabinet positions, i.e., “officers of the United States,” but enjoys few controls (in his capacity as President) over the Vice President.

<sup>109</sup> See COLE, *supra* note 63, at 3 & n.9 (“In considering whether an *office is under the Crown* one has to consider who appoints, who controls, who dismisses and the nature of the duties. If the Crown itself has the power of appointment and dismissal, this would raise a presumption that the Crown controls, and that the office is one under the Crown.” (emphasis added) (quoting a memorandum from the Attorney General of the United Kingdom published in a 1941 report)); *cf.* ANNE TWOMEY, THE CONSTITUTION OF NEW SOUTH WALES 438 (2004) (“As it is an elective office, and not generally subject to the direction or supervision of the government, one would assume that it is not an office held ‘under the Crown.’”).



Constitution does no such thing.

Now let's examine the consequences of Cassady's view of the clause. Cassady has argued that the scope of the Constitution's "Office . . . under the United States" language extends exclusively to Executive Branch and Judicial Branch officers. In other words, according to Cassady, the position of elector—although it cannot be filled by a member of Congress (as members are expressly precluded from serving as electors)—could be held by a non-member, non-presiding legislative officer, e.g., the Secretary of the Senate, Clerk of the House, doorkeeper, sergeant at arms, etc. Structurally, that is a truly disastrous result. What could be worse? Senators and Representatives must take an Article VI oath (or affirmation). But the Article VI oath does not reach non-member legislative officers.<sup>110</sup>

Likewise, all such (high level) congressional staff lack independence: they can be dominated and removed by the presiding member of their chamber (if the presiding member has a removal power) or by the factional majority of their chamber (which always has a removal power). If the goal of the Elector Incompatibility Clause was to keep members of Congress from participating in the Electoral College process, then it hardly makes sense to preclude those members from serving as electors but to allow their dependent appointees to do so. Indeed, it is far worse to have the Clerk than the Speaker serve in the Electoral College. The Speaker is (arguably) independent, subject to election (by the voters and by the House), and faces substantial transparency expectations in regard to his official conduct. Not so for the Clerk.

It is the minimalist position—in which "Office . . . under the United States" is understood to extend exclusively to all appointed or statutory positions in each branch, including the Legislative Branch—which solves this difficulty. If the correctness of an interpretation of a disputed constitutional provision is to be tested by global or deep structural

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<sup>110</sup> U.S. CONST. art. VI, cl. 3 (prescribing constitutional oath only for "Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several states"); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 162 (1995).

concerns, then Cassady's position fails that test.

*E. Evidence From Early Scholarship*

The Impeachment Clause states: "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."<sup>111</sup> In his *Commentaries on the Constitution*, Joseph Story maintained:

[T]he clause of the Constitution now under consideration does not even affect to consider them officers of the United States. It says, "the President, Vice-President, and *all civil officers* (not all *other* civil officers) shall be removed," &c. The language of the clause, therefore, would rather lead to the conclusion that they were enumerated, as contradistinguished from, rather than as included in the description of civil officers of the United States. Other clauses of the Constitution would seem to favor the same result, particularly the clause respecting appointment of officers of the United States by the executive, who is to "commission all the officers of the United States;" and the sixth 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*;" . . . .<sup>112</sup>

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<sup>111</sup> U.S. CONST. art. II, § 4.

<sup>112</sup> 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 578 (Melville M. Bigelow ed., William S. Hein & Co., Inc. 5th ed. photo. reprint 1994) (1891) (emphasis added); *see also* PROCEEDINGS OF THE SENATE SITTING FOR THE TRIAL OF WILLIAM W. BELKNAP, LATE SECRETARY OF WAR, ON THE ARTICLES OF IMPEACHMENT EXHIBITED BY THE HOUSE OF REPRESENTATIVES 145 (Washington, Gov't Printing Office 1876) (Senator Booth: "[Justice] Story very ably argues, and refers to this very section of the Constitution in confirmation, that the President is not an officer of the United States. As was tersely said by the Senator from Massachusetts, [Mr. Boutwell,] 'He is part of the Government.'" (second alteration in original)); 1 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES 412-13 (Henry St. George Tucker ed., Fred B. Rothman & Co. 1981) (1899); *cf.* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1447 n.87 (1987) ("[This provision in the Articles of Confederation states *any office*,] [n]ot '*any other*,' suggesting that congressional delegates were *state* [as opposed to federal] officers." (emphasis added)).

Cassady's only response to Story's position is to misstate it. Cassady explains: "Since the President has never commissioned himself or his Vice President, [Story] argue[s], neither

In short, Story arrives at the minimalist position by interpreting the express text of the Constitution. Indeed, although not discussed by Story, the drafting history of the clause also strongly confirms Story's interpretation: an early draft of the clause applied to "other Civil officers of the U.S.,"<sup>113</sup> but the "other" was dropped by the Committee of Style.<sup>114</sup> Story's position has advantages: simplicity and parsimony.

In 2012, Professor Akhil Amar put forward a different theory to explain why "other" is absent from the Impeachment Clause. Professor Amar suggested:

Under Article II, section 4, only "civil Officers" are impeachable. (Presidents and vice presidents are also mentioned separately in this clause, perhaps to

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of them is an 'Officer.'" Cassady, *supra* note 28, at 291 & n.295 (citing STORY, *supra*, at 576). But Story did not conclude that the President was not "an officer;" rather, Story concluded that the President was not an "officer of the United States." STORY, *supra*, at 578 ("[T]he clause of the Constitution now under consideration does not even affect to consider them officers of the United States."). Just because Cassady and other intermediatists believe the two categories—"officer" and "officer of the United States"—are coextensive does not mean that Story accepted that casual atextual assumption. If Cassady were correct, if the Vice President were an "officer of the United States," then Vice Presidents starting with John Adams should have received presidential commissions. See U.S. CONST. art. II, § 3 ("[The President] . . . shall Commission *all* the Officers of the United States." (emphasis added)). But Vice Presidents have not and do not receive such commissions. Cassady's response is that the President's power under the Commissions Clause is coextensive with his power under the Appointments Clause. See Cassady, *supra* note 28, at 291–93. The problem with Cassady's functional interpretation of the Commissions Clause is that it is inconsistent with the plain text of the clause, which directs the President to commission "all" officers of the United States. Nothing in the Commissions Clause's language limits the President's duty to officers subject to his power under the Appointments Clause. See Raoul Berger, *Impeachment for "High Crimes and Misdemeanors,"* 44 S. CAL. L. REV. 395, 424 (1971) ("One who would make 'all' mean less than 'all' has the burden of proving why the ordinary meaning should not prevail." (citing Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456, 1465 (1954) (reviewing WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953))); cf. AMAR, *supra* note 41, at 236 ("In the Article III vesting clause and roster, 'shall' and 'all' meant what they said."). It is one thing for an interpreter to turn to constitutional structure where the Constitution is silent. But on this point, the Constitution is not silent. Cassady has put forward no support, argument, or evidence establishing that the Commissions Clause or its use of "all" is ambiguous.

<sup>113</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 23, at 552 (reporting the draft Constitution as of September 8, 1787); see also *id.* at 545 (same).

<sup>114</sup> *Id.* at 600 (reproducing the draft Constitution as reported on September 12, 1787 by the Committee of Style).

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.)<sup>115</sup>

It turns out that Amar’s 2012 position was first put forward by Robert Goodloe Harper, one of the (failed) House prosecutors in the Senate’s *Blount* impeachment proceedings.<sup>116</sup> Harper’s position was entirely litigation-driven. Cassady puts forward no evidence indicating that anyone associated with the impeachment—e.g., Harper’s co-counsel, the defendant, the Senate, or contemporaneous commentators—adopted Harper’s position. Moreover, Harper was firmly embedded in the maximalist position: he believed Senators were impeachable officers of the United States.<sup>117</sup>

Still, Cassady adopts Harper’s (maximalist)/Amar’s (intermediate) position over Story’s (minimalist) position. Why? Cassady states:

Without evidence proving that the word [“other”] was purposefully removed [from the draft Impeachment Clause] to exclude the President and Vice President from the “officers” category, the meaning of its absence can only be debated—not definitively resolved. But, given the plethora of other Framing-

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<sup>115</sup> AMAR, *supra* note 100, at 577 n.17. In my opinion, Professor Amar’s position might explain why the President and Vice President are separately listed by the Impeachment Clause, but his position does not explain why “other” was dropped by the Committee of Style. Moreover, under Professor Amar’s interpretation, this clause seems radically underinclusive—the clause includes the Vice President, i.e., the first official in the line of succession to the presidency, but the clause fails to include any statutory successors to the presidency under the Succession Clause. *See* U.S. CONST. art. II, § 1, cl. 6. Furthermore, if a statute puts federal military officers in the line of presidential succession, it would seem that such officers are wholly exempt from impeachment processes. *See id.* art. II, § 4 (extending the scope of impeachment to “civil” officers); Cassady, *supra* note 28, at 293 & n.408 (same). Given the genuine oddity of this result, and the centrality of impeachment processes to the federal constitutional scheme, an interpreter interested in the Constitution’s global or deep structure should prefer Story’s understanding of the Impeachment Clause’s text over Amar’s. *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 237 (1985) (describing impeachment as an “important mechanism”); *id.* at 237 n.110 (describing impeachment as a “central constitutional check”); *see also* Cassady, *supra* note 28, at 289 n.388 (“The Senate polices the integrity of th[e] [constitution’s] structure through impeachment . . .”). Further enlightenment on this point must come from Professor Amar and Benjamin Cassady.

<sup>116</sup> 8 ANNALS OF CONG. 2306 (1799) (statement of Robert Goodloe Harper).

<sup>117</sup> *See id.*

era support for the proposition that the President and Vice President were understood to be officers, it seems wrong to read much into the decision to drop the word “other” from the Impeachment Clause.<sup>118</sup>

Cassady is faced with two potential explanations regarding the final form of the Impeachment Clause and its drafting history. He rejects Story’s position because the Constitution describes the presidency as an “office” (in Article II and elsewhere in the Constitution), and if the presidency is an “office,” he believes that it follows that the President is an “officer of the United States” (as used in the Impeachment Clause), and if the President is an “officer of the United States,” then it follows that the presidency is equally an “Office . . . under the United States” (as used in the Disqualification Clause).<sup>119</sup> Cassady’s willingness to pile intuition on top of intuition amounts to little more than: *it’s turtles all the way down*.

Cassady never gives frank, full, and fair consideration to the opposite rule-of-law oriented intuition: where the Constitution uses divergent language (e.g., “office,” “officer of the United States,” and “Office . . . under the United States”<sup>120</sup>) different meanings were intended and understood. He fails to see that his views represent a profound disrespect for the basic drafting skills of the Philadelphia Convention’s members and for its Committee of Detail and its Committee of Style. He fails to discuss (or even report) prior commentators whose intuitions veered from his own. As one nineteenth-century commentator explained: “[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.’”<sup>121</sup>

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<sup>118</sup> Cassady, *supra* note 28, at 294.

<sup>119</sup> Cassady’s position is *ad idem* with his mentor’s, Professor Akhil Amar. See, e.g., Amar & Amar, *supra* note 41.

<sup>120</sup> See *id.*

<sup>121</sup> DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION, AND OF THE ACTS AND PROCEEDINGS OF CONGRESS ENFORCING IT 346 (Fred B. Rothman 1993) (1878) (emphasis added) (quoting what appears to be the Necessary and Proper Clause); see also Roy E. Brownell II, *Can the President Recess Appoint a Vice President?*, 42 PRESIDENTIAL STUD. Q. 622, 627 (2012) (“[The Vice President’s] position is not created by statute (i.e., not ‘established by Law’). Nor is he an ‘Officer of the United States,’ a

Of course rejecting Cassady's *reasoning* does not prove his *conclusion* is wrong. We are still confronted with the difficulty of explaining why "other" is absent from the final text of the Impeachment Clause. I am forced to agree with Cassady that this is a problem which "can only be debated—not definitively resolved."<sup>122</sup> For reasons that I clarify below, if we are in equipoise (or even rough equipoise<sup>123</sup>) between Story's position and Harper/Amar/Cassady's position, we should adopt Story's position. Why?

#### V. CONCLUSION: BURDEN OF PERSUASION

The democracy canon puts the burden of persuasion on Cassady. As *Corpus Juris Secundum* explains:

Statutes limiting the right of a person to hold office are to be given a liberal construction in favor of those seeking to hold office in order that the public may have the benefit of choice from all those who are in fact and in law qualified. Ambiguities should be resolved in favor of eligibility to office, and constitutional and statutory provisions which restrict the right to hold public

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conclusion supported by the Supreme Court's reasoning on several occasions. As the high court observed in *United States v. Smith*, [124 U.S. 525, 532 (1888) (Field, J.),] "[a]n officer of the United States *can only* be appointed by the President, by and with the advice and consent of the Senate, or by a court of law or the head of a department' . . ." (third alteration in original) (emphasis added by Brownell).

<sup>122</sup> Cassady, *supra* note 28, at 294.

<sup>123</sup> The modern consensus view—with some support in the ambiguous Senate materials—is that *Blount* stands for the proposition that members of Congress cannot be impeached. *But see* Melton, *supra* note 31, at 35 ("The claim that the Senate decided, in the *Blount* case, that Senators aren't civil officers, or that members of Congress aren't subject to impeachment, is simply flat-out wrong."). The problem with the modern consensus view is that even if one assumes (which is hardly clear) that the Senate dismissed the impeachment because its members determined that members of the legislature are not within the scope of the House's impeachment power, one has (at least) equal reason to conclude that the House brought its charges because its members believed that members of Congress were within its scope. I think this is a fair conclusion, and I see no good reason to believe that the Senate is better authority than the House. The (apparently) divergent views of the House and Senate should leave us entirely in equipoise. It follows that *Blount's* ambiguity cannot support either Cassady's intermediate position or any other position.

office should be strictly construed against ineligibility.<sup>124</sup>

And, of course, there is good early American authority for *CJS*'s position. This authority goes back (at least) to Alexander J. Dallas—the very authority Cassady discusses!

In 1801, the President appointed Dallas to the post of United States Attorney for the Eastern District of Pennsylvania.<sup>125</sup> The Governor of Pennsylvania had also appointed Dallas to the position of recorder of the city of Philadelphia—a type of municipal judge.<sup>126</sup> When Dallas sought to hold both offices concurrently, the attorney for the city council sought to have him removed based on the Incompatibility Clause of the Pennsylvania Constitution.<sup>127</sup> That provision stated:

No member of Congress from this State nor any person holding or exercising any office of trust or profit under the United States, shall, at the same time, hold or exercise the office of judge, secretary, treasurer, prothonotary, register of wills and recorder of deeds, sheriff or any office of this State, to which a salary is by law annexed, or any other office, which future legislatures shall declare incompatible with offices or appointments under the United States.<sup>128</sup>

It was undisputed that Dallas's position as United States Attorney was an "Office . . . under the United States." Thus, the primary substantial issue was whether Dallas's position as recorder was a "judge" as used in the state constitutional provision. If the city recorder were a "judge" as used in the state constitutional provision, then Dallas's two public offices were incompatible (as a matter of state constitutional law).

The Supreme Court of Pennsylvania held that there was no incompatibility. The court explained:

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<sup>124</sup> 67 C.J.S. *Officers* § 23 (2012) (footnotes omitted); cf. 62 C.J.S. *Municipal Corporations* § 273 (2011) ("[A]n appointed or elected person should not be prevented from taking office unless clearly ineligible.").

<sup>125</sup> 2 RICHARD HILDRETH, *THE HISTORY OF THE UNITED STATES* 428 (N.Y.C., Harper & Bros. 1860).

<sup>126</sup> *Id.*

<sup>127</sup> Charlotte Crane, Pennington v. Cox: *A Glimpse at the Federal Government at the End of the Federalist Era*, 23 VA. TAX REV. 417, 441 & n.70 (2003).

<sup>128</sup> PENN. CONST. art. II, § 8 (1790) (emphasis added).

Mr. *Dallas* was *judge* in effect; in name, *recorder*. . . [T]he recorder of *Philadelphia* is a judge, and that the policy of the exclusion originated in a jealousy lest the federal government should overshadow the state governments; and if there was a doubt upon the subject [of incompatibility], that [jealousy] policy required a decision affirming the incompatibility of the offices in question. But this court unanimously answered, no; and held that the doubt and uncertainty of the letter [of the law] was to have an operation directly the reverse.<sup>129</sup>

That is the democracy canon: courts must squarely reject claims limiting eligibility to office where there is “doubt” or “uncertainty” regarding the letter of the law.

How does the democracy canon apply here?

Cassady’s intermediate-school interpretation of the Disqualification Clause restricts the scope for democratic action: his interpretation of the clause precludes former disqualified Presidents, Vice Presidents, and officers of the United States from subsequently being elected (or re-elected) to the presidency and vice presidency (even where the nation’s voters have full knowledge of the prior Senate conviction and full knowledge of all the allegations of wrongdoing). Cassady admits that he does not know why “other” was dropped from the Impeachment Clause by the Committee of Style. Indeed, the best evidence he can offer for his overall position—*Wilkes*, *Blount*, etc.—are precedents involving expulsion and impeachment, not disqualification. More importantly, the operative constitutional provisions regarding expulsion and impeachment do not make use of “Office . . . under the United States”

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<sup>129</sup> Commonwealth *ex rel.* Bache v. Binns, 17 Serg. & Rawle 219, 230 (Pa. 1828) (Tod, J.); see also Commonwealth v. Dallas, 4 U.S. 229, 4 Dall. 229, 230–31 (Pa. 1801) (Shippen, C.J.) (“[T]he Recorder of the city of *Philadelphia* is a *Judge*; and, consequently, within the clause of the constitution, which excludes an officer of the *United States*, from holding, or exercising, the office of a judge, in this state. It was said, that the policy of the exclusion, originated in a jealousy, lest the federal government, should overshadow the state governments; and, if there was a doubt upon the subject, *that* policy required a decision, affirming the incompatibility of the offices in question. . . . That the 8th section of the 2d article of the constitution, does not include in its prohibition, any other than the *state officers*. [] That the Recorder of the city of *Philadelphia* is not an *officer of the commonwealth*, or state; but an officer of the corporation. [] That the Recorder, according to the letter, the spirit, and the meaning, of the constitution, is not a *judge*.”). Interestingly, Dallas was both reporter and litigant!



language, i.e., the operative language in the Disqualification Clause. Even if there were no evidence at all on the other side, I think Cassady cannot meet the democracy canon's burden of persuasion.

In fact, there is evidence on the other side. Much evidence. Arrayed against Cassady's position, we have the Committee of Detail and the Committee of Style, statutory drafting traditions going back to the First House and First Senate, official Executive Branch communications between Secretary Alexander Hamilton and the Senate, and President Washington's gifts from foreign government officials. These are all Founding-era precedents involving the Constitution's "Office . . . under the United States" language, i.e., the operative language in the Disqualification Clause.

Once we look to the full body of evidence on both sides of the question, it is (in my view) time to ask the court of academic inquiry for a directed verdict against Cassady and the intermediate camp's other loyalists.<sup>130</sup>

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<sup>130</sup> To be sure, I am not today asking for a directed verdict against the maximalist position or on behalf of the minimalist position. It is difficult to fully engage the maximalist position because no modern commentator is willing to mount a complete, full, and vigorous defense of that position—originalist or otherwise. *See, e.g.,* Melton, *supra* note 31, at 54 n.81 (expressing an unwillingness to engage the "officers" debate, notwithstanding the centrality of that debate to the historical participants in the *Blount* proceedings). Although I believe the minimalist position remains better than the maximalist one, I (somewhat reluctantly) acknowledge that reasonable minds can and have disagreed. *See also, e.g.,* *Buckley v. Valeo*, 424 U.S. 1, 275 (1976) (White, J., concurring in part and dissenting in part) ("[N]o case in this Court even remotely supports the power of Congress to appoint an *officer of the United States* aside from those *officers* each House is authorized by Art. I to appoint to assist in the legislative processes." (emphasis added)); *cf., e.g.,* *NLRB v. Noel Canning*, 573 U.S. \_\_\_\_, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring in the judgment) ("Except where the Constitution or a valid federal law provides otherwise, all 'Officers of the United States' must be appointed by the President 'by and with the Advice and Consent of the Senate.'").

## APPENDIX

THE CONSTITUTION OF 1787: ARTICLES I THROUGH VII—SIGNIFICANT  
CLAUSES USING “OFFICE” OR “OFFICER” IN BOLD

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

## Article I

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative;

and until such enumeration shall be made, the State of New Hampshire shall be entitled to ch[oo]se three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall ch[oo]se their Speaker and other Officers; and shall have the sole Power of Impeachment.<sup>131</sup>

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

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<sup>131</sup> U.S. CONST. art. I, § 2, cl. 5 (House Officers Clause and the House Impeachment Clause).

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall ch[oo]se their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.<sup>132</sup>

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

Judgment in Cases of Impeachment [by the Senate] shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States;<sup>133</sup> but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of

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<sup>132</sup> U.S. CONST. art. I, § 3, cl. 5 (Senate Officers Clause).

<sup>133</sup> U.S. CONST. art. I, § 3, cl. 7 (the [Senate] Removal Clause and the Disqualification Clause).

absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been [i]ncreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.<sup>134</sup>

Section. 7. All Bills for raising Revenue shall originate in the

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<sup>134</sup> U.S. CONST. art. I, § 6, cl. 2 (the Ineligibility Clause and the Incompatibility Clause). The Ineligibility Clause is also known as the Sinecure Clause or the Emoluments Clause.

House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.<sup>135</sup>

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or *ex post facto* Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be

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<sup>135</sup> U.S. CONST. art. I, § 8, cl. 18 (the Necessary and Proper Clause). The Necessary and Proper Clause is also known as the Sweeping Clause.



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No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

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.<sup>136</sup>

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

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<sup>136</sup> U.S. CONST. art. I, § 9, cl. 8 (the Foreign Emoluments Clause). The Foreign Emoluments Clause is also known as the Foreign Gifts Clause.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## Article II

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.<sup>137</sup>

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately ch[oo]se by Ballot one of them for President; and if no Person have a Majority, then from the five highest

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<sup>137</sup> U.S. CONST. art. II, § 1, cl. 2 (the Elector Incompatibility Clause).

on the List the said House shall in like Manner ch[oo]se the President. But in ch[oo]sing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall ch[oo]se from them by Ballot the Vice President.

The Congress may determine the Time of ch[oo]sing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.<sup>138</sup>

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be [i]ncreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

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<sup>138</sup> U.S. CONST. art. II, § 1, cl. 6 (the [Presidential] Succession Clause).

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>139</sup>

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of

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<sup>139</sup> U.S. CONST. art. II, § 2, cl. 2 (the Appointments Clause and the Inferior Office Appointments Clause).

them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and [the President] shall Commission all the Officers of the United States.<sup>140</sup>

Section. 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.<sup>141</sup>

### Article III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State;— between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court

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<sup>140</sup> U.S. CONST. art. II, § 3 (the Commissions Clause).

<sup>141</sup> U.S. CONST. art. II, § 4 (the Impeachment Clause).

shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

#### Article IV

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

#### Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its

Consent, shall be deprived of its equal Suffrage in the Senate.

#### Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.<sup>142</sup>

#### Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names . . . .

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<sup>142</sup>U.S. CONST. art. VI, cl. 3 (the Oaths and Affirmations Clause and the Religious Test Clause).