OFFICES AND OFFICERS OF THE CONSTITUTION PART III: THE APPOINTMENTS, IMPEACHMENT, COMMISSIONS, AND OATH OR AFFIRMATION CLAUSES

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This Article is the third installment of a planned ten-part series that provides the first comprehensive examination of the offices and officers of the Constitution. The first installment introduced the series. The second installment identified four approaches to understand the Constitution's divergent "Office"- and "Officer"-language. This third installment will analyze the phrase "Officers of the United States," which is used in the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.

This Article proceeds in six sections. Section I describes our methodology, which includes textualism, original public meaning originalism, original methods originalism, and consideration of historical practices during the founding-era and later-in-time. Section II explains that the phrase "Officers of the United States" is defined by the Appointments Clause. This phrase refers to appointed positions in the Executive and Judicial Branches. Our position here is consistent with the drafting history of the Appointments Clause, and is also supported by Supreme Court precedent. Section III turns to the Impeachment Clause, which applies to "civil Officers of the United States." This latter category refers to non-military appointed positions in the Executive Branch and Judicial Branch. Members of Congress, as well as appointed positions in the Legislative Branch, are not

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"civil Officers of the United States," and therefore such positions cannot be impeached.

Section IV considers the Commissions Clause, which requires the President to commission "all the Officers of the United States." There is a longstanding practice of the President's commissioning appointed positions in the Executive Branch and Judicial Branch. But there is no evidence the President has ever commissioned an elected official, including himself. Section V analyzes the Oath or Affirmation Clause, and its text suggests that Senators and Representatives, as well as the President, are not "Officers of the United States." Finally, Section VI focuses on the Recess Appointments Clause. This provision does not use the phrase "Officers of the United States," and it is not clear whether recess appointees are "Officers of the United States."

INTRODUCTION

The Constitution of 1788's original seven articles include twenty-two provisions that refer to "Offices" and "Officers." Some clauses use the words "Office" or "Officer," standing alone and unmodified. Other clauses use the word "Office" or "Officer" followed by a modifier, such as "of the United States," "under the United States," or "under the Authority of the United States." We refer to the language in these twenty-two provisions as the Constitution's *divergent* "Office"- and "Officer"-language.

This Article is the third installment of a planned ten-part series that provides the first comprehensive examination of the offices and officers of the Constitution. The first installment introduced the series.[1] The second installment identified four approaches to understanding the Constitution's divergent "Office"- and "Officer"-language.[2] This third installment, Part III, will analyze the phrase "Officers of the United States," which is used in the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.

This Article proceeds in six sections. Section I of Part III of our series introduces our methodology. First and foremost, we rely on textualism. Second, we follow original public meaning originalism with respect to the Appointments Clause: this clause defines the phrase "Officers of the United States." Third, we rely on original methods originalism with respect to the phrase "Office . . . under the United States." Fourth, we give precedence to founding-era practices by the Washington Administration and the First Congress. Fifth, we only turn to the framers' purpose when the relevant constitutional text remains ambiguous.

Section II explains that the phrase "Officers of the United States" is defined by the Appointments Clause. This phrase refers to appointed positions in the Executive and Judicial Branches. The drafting history of the Appointments Clause is consistent with our position. The "Officers of the United States" can only be appointed and cannot be elected. Supreme Court precedent, including *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, provides additional support for our position.

Section III turns to the Impeachment Clause. The only positions that are subject to impeachment are the President, the Vice President, and "civil Officers of the United States." This latter category refers to non-military appointed positions in the Executive Branch and Judicial Branch. Members of Congress, as well as appointed positions in the Legislative Branch, are not

1. Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61 S. TEX. L. REV. 309 (2021).

2. Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part II: The Four Approaches*, 61 S. TEX. L. REV. 321 (2021).

"civil Officers of the United States," and therefore such positions cannot be impeached. The history of the Impeachment Clause is consistent with our view that members of Congress are not subject to impeachment. However, at the time of the framing—and even today—there was and remains a minority position with some support: members of Congress are "civil Officers of the United States" and are thus subject to impeachment.

Section IV considers the Commissions Clause. This provision obligates the President to commission "all the Officers of the United States." The phrase "Officers of the United States" has the same meaning in the Commissions Clause as it does in the Appointments and Impeachment Clauses: appointed positions in the Executive Branch and Judicial Branch, but not positions in the Legislative Branch. There is a longstanding practice of the President's commissioning appointed positions in the Executive Branch and Judicial Branch. But there is no evidence that any incumbent president has ever commissioned himself, his successor, or other elected officials, such as his vice president, his vice president's successor, or members of Congress.

Section V analyzes the Oath or Affirmation Clause. This provision requires "executive and judicial Officers . . . of the United States" to be bound by oath or affirmation. Once again, this phrase has the same meaning as "Officers of the United States" in the Appointments Clause, the Impeachment Clause, and the Commissions Clause. The text of the Oath or Affirmation Clause is limited to "executive and judicial Officers." Still, the text of the clause suggests that Senators and Representatives are not "Officers of the United States." And the Oath or Affirmation Clause, read in conjunction with the Article II Presidential Oath Clause, suggests that the elected president is not an "Officer[] of the United States." We also address the status of the Vice President.

Section VI focuses on the Recess Appointments Clause, which allows the President to temporarily fill certain positions. Are recess appointees "Officers of the United States"? This provision does *not* use the phrase "Officers of the United States." The text of the Recess Appointments Clause does not expressly address this issue, and other clauses do not offer clarity on this point. Supreme Court precedents point in opposite directions. Through a methodology we refer to as *interclausalism*, we discuss whether recess appointees are "Officers of the United States." Ultimately, the precise status of recess appointees is uncertain. But in any event, the precise status of recess appointees does not alter our broader conclusion: elected officials are not "Officers of the United States," and they do not hold "Office[s] . . . under the United States."

I. OUR METHODOLOGY

Our approach is premised on several different but closely related methodologies. First and foremost, we rely on textualism. We view the Constitution as a reasonably-cohesive document. Our default position is that the framers intentionally employed the same or similar language in different clauses to convey the same or a similar meaning. When the framers intended to convey substantially different meanings, they used different language. We avoid readings of the Constitution that would render text surplusage, redundant, or incoherent. Our first methodology should not be particularly controversial.

Second, we follow original public meaning originalism with respect to the Appointments Clause: this clause defines the phrase "Officers of the United States." A reasonable member of the public who read the Constitution would understand this meaning, even if such a person was not a lawyer and was not familiar with British drafting conventions.

Third, we rely on original methods originalism with respect to the phrase "Office . . . under the United States." We analyze British statutory drafting conventions that the educated public, attorneys, and parliamentarians in the framers' generation were familiar with. Under this approach, the phrase "Office under . . ." referred to appointed positions but not to elected positions. Thus, the Constitution did not define the phrase "Office . . . under the United States," nor did the Constitution need to do so to make this "Office . . . under"-language comprehensible. The general public would have understood this phrase. Or they would have understood that this phrase had a technical meaning because they did not know its precise contours.

Fourth, we give precedence to founding-era practices from the Washington Administration and the First Congress. These practices are entitled to more weight than the practices of later administrations and Congresses.

Fifth, and finally, we adopt a specific approach with respect to the framers' general purposes. We consider the framers' purposes only: (1) after exhausting textualism and the canons of legal interpretation; (2) after employing the customary tools for ascertaining original public meaning; and (3) after weighing competing historical practices. If the relevant constitutional text remains ambiguous after these three preliminary steps, then we will turn to purpose.

A. Our Approach is Textualist

Our approach is first and foremost textualist. And we rely on the traditional canons of legal interpretation. The *presumption of consistent*

usage suggests that "[a] word or phrase is presumed to bear the same meaning throughout a text[.]"[3] Justice Scalia and Bryan Garner explained, "The preparation of a legal instrument has traditionally been seen as a solemn and deliberative act that requires verbal exactitude."[4] Our approach starts from this basic premise. We think the Constitution's original seven articles formed a reasonably-cohesive document. The same or similar language used in different clauses conveys the same or a similar meaning. Moreover, the words of the Constitution should not be read as mere surplusage; each word and every provision should be given effect where it is possible to do so.

Critics may counter that the Constitution was not drafted with verbal exactitude. Rather, the argument goes, the Constitution was hastily cobbled together by people with wide-ranging agendas. Moreover, different committees, staffed by different framers, inserted or removed language, often with little recorded debate. These ad hoc alterations, critics argue, undermine any argument that the Constitution should be read as a cohesive document with consistent usage. And this disjointed drafting process may lead to some surplusage or redundancies. As a result, critics assert, the same word or phrase may have different meanings in different clauses. This position, which is contrary to our own, lends support to what we refer to as the Clause-Bound View.[5]

We offer three primary textualist rejoinders to this criticism. First, we develop the canon against surplusage. Second, the framers were consistent with how they referred to specific "Offices" and "Officers." Third, the framers' committees made specific alterations to standardize how the Constitution referred to specific "Offices" and "Officers." This evidence amply supports our position: the Constitution's consistent usage across provisions using "Office" and "Officer" supports the inference that the Constitution is a reasonably-cohesive document.

1. The Canon Against Surplusage

In *Marbury v. Madison*, Chief Justice John Marshall established an important rule: courts should avoid any reading of the Constitution that renders constitutional text "mere surplusage" or "entirely without meaning."[6] That canonical case considered whether Congress had the authority to expand

3. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012).

4. *Id.*

5. *See* Tillman & Blackman, *supra* note 2, at 425 (discussing the clause-bound view).

6. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). We illustrate the canon against surplusage through Chief Justice Marshall's canonical decision in *Marbury v. Madison*. Nothing in our argument is contingent on other aspects of *Marbury* having been correctly decided.

the Supreme Court's original jurisdiction. Chief Justice Marshall focused on the words of Article III, Section 2, Clause 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the [S]upreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the [S]upreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[7]

The first sentence establishes the Supreme Court's original jurisdiction. The second sentence provides that Congress can modify the Supreme Court's appellate jurisdiction. Marbury argued that "the power remains to the [L]egislature[] to assign original jurisdiction to that [C]ourt in other cases than those specified in the article which has been recited[,] provided those cases belong to the judicial power of the United States."[8] In other words, Marbury contended, Congress could expand the Supreme Court's original jurisdiction.

Chief Justice Marshall rejected Marbury's argument. If the framers had "intended" to give Congress the power to modify the Supreme Court's original jurisdiction, Marshall reasoned, then "it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested."[9] Why would the Constitution spell out with clarity that Congress can modify the appellate jurisdiction if Congress had the general power to modify all facets of the Supreme Court's jurisdiction? Marbury's preferred reading, Marshall concluded, would render the second sentence of Article III, Section 2, Clause 2 as "mere surplusage" and "entirely without *meaning*."[10] (We think Marshall would have been clearer had he written that the second sentence would have been "entirely without *function*" or, perhaps, "without *purpose*.") Chief Justice Marshall then concluded, "It cannot be presumed that any clause in the [C]onstitution is intended to be without effect[,] and therefore such a construction is inadmissible, unless the words require it."[11] Here, *Marbury* articulated the canon against constitutional surplusage. Marshall articulated a similar principle in *Sturges v. Crowninshield*: "It would be dangero[u]s in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation."[12]

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7. U.S. CONST. art. III, § 2, cl. 2.
8. *Marbury*, 5 U.S. at 174.
9. *Id.*
10. *Id.* (emphasis added).
11. *Id.*
12. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819).

Courts have adhered to this principle for more than two centuries.[13] And commentators have followed suit. Thomas M. Cooley wrote, "[T]he courts must . . . lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory."[14] In *Reading Law*, Justice Scalia and Bryan Garner described the surplusage canon this way: "[i]f possible, every word and every provision is to be given effect[.]"[15] And three decades ago, Akhil Reed Amar observed, "Where possible, each word of the Constitution is to be given meaning; no words are to be ignored as mere surplusage."[16] We agree that the canon only applies "where possible." Where it is possible, the canon supplies a strong presumption against surplusage. What happens after a court considers all relevant interpretive principles, and there still appears to be surplusage? Then the surplusage canon does not apply.

Supreme Court justices continue to adhere to the canon against surplusage. For example, in *Seila Law LLC v. Consumer Financial Protection Bureau*, Justice Kagan embraced the canon against surplusage. Kagan, a self-described textualist,[17] was troubled by a reading of the

13. *See* United States v. Butler, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used."); Myers v. United States, 272 U.S. 52, 151 (1926) ("[T]he usual canon of interpretation of [the Constitution] . . . requires that real effect should be given to all the words it uses."); Prout v. Starr, 188 U.S. 537, 544 (1903) ("It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed."); Hurtado v. California, 110 U.S. 516, 534 (1884) ("According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous."); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–71 (1840) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added . . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning[.]"); *see also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842) ("No Court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them."); *cf*. Kungys v. United States, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion) (calling it a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant").

14. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 57 (Boston, Little, Brown & Co. 1868).

15. SCALIA & GARNER, *supra* note 3, at 174.

16. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 242 (1985).

17. *See* Bryan A. Garner, *Old-fashioned textualism is all about interpretation, not legislating from the bench*, ABA JOURNAL (Apr. 1, 2019, 1:15 AM), https://www.abajournal.com/magazine/article/textualism-means-what-it-says [https://perma.cc/SW9M-JF93] ("As Justice Elena Kagan said famously a few years ago, 'We're all textualists now.'").

Constitution that rendered the Opinion Clause "redundant" or "inexplicable."[18] Again, she relied on a deeply-rooted and, perhaps, implied methodological norm: the courts should reject a reading of the Constitution that renders other parts of the Constitution "redundant" or "inexplicable." This principle is neither novel nor controversial. We know of no Supreme Court decision where the canon was expressly rejected.

Even critics of textualism seem to recognize that text must have *some* meaning. We think Judge Bork's analogy of the Ninth Amendment as an "inkblot" is an outlier.[19] Indeed, we suggest his "inkblot" remark created a backlash, even among non-textualists, precisely *because* it threatened to offend a deeply-rooted legal principle: Bork's approach would have nullified a constitutional amendment in violation of the surplusage canon. In this regard, the canon against surplusage reinforces the separation of powers. When a judge treats statutory language as a nullity, legislative primacy is threatened. When a judge treats constitutional language as a nullity, constitutional supremacy itself is at risk.

The canon against surplusage plays an important role in our methodology: we should not presume that precisely crafted "Office"- and "Officer"-language was without meaning. Rather, the presumption should be that each variant of the Constitution's "Office"- and "Officer"-language was drafted to convey a specific meaning and, likewise, divergent "Office"- and "Officer"-language refers to specific, identifiable, and distinguishable categories of positions.

2. The Framers Consistently Used the Phrases "Officers of the United States" and "Office . . . under the United States"

The framers' usage of "Offices" and "Officers" is consistent across the text of the Constitution of 1788. This usage is particularly consistent regarding the phrases "Officers of the United States" and "Office . . . under the United States."

Four provisions of the Constitution use the phrase "Officers of the United States": the Appointments Clause, the Commissions Clause, the Impeachment Clause, and the Oath or Affirmation Clause. The word

18. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2227 n.3 (2020) (Kagan, J., dissenting).

19. Kurt T. Lash, *Inkblot: The Ninth Amendment as Textual Justification for Judicial Enforcement of the Right to Privacy*, 80 U. CHI. L. REV. DIALOGUE 219, 220 (2013) ("I do not think you can use the [N]inth [A]mendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an inkblot and you cannot read the rest of it and that is the only copy you have, I do not think the [C]ourt can make up what might be under the inkblot if you cannot read it." (quoting *The Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, H. before the Comm. on the Judiciary*, 100th Cong. 249 (1987) (statement of Robert H. Bork))).

"Officers," when used in conjunction with "of the United States," is always used in the plural. The Constitution nowhere refers to an "*Officer* of the United States" in the singular. Similarly, the Constitution nowhere speaks of an "*Office* of the United States" or "*Offices* of the United States." The usage is consistent.

Four provisions of the Constitution use the phrase "Office . . . under the United States": the Impeachment Disqualification Clause, the Foreign Emoluments Clause, the Elector Incompatibility Clause, and the Religious Test Clause. This phrase is always singular. The Constitution never uses the phrase "*Offices* under the United States" in the plural. Similarly, the framers' text nowhere references an "*Officer* under the United States" or "*Officers* under the United States."

Finally, the Constitution never refers to an "Office *in* the United States" or an "Office *within* the United States." However, contemporaneous state constitutions used such terminology. For example, the North Carolina Constitution of 1776 used the phrase "any office or place of trust or profit *in* the civil department within this State."[20] The United States Constitution of 1788, however, only and consistently refers to an "Office . . . *under* the United States." In other words, where a preposition follows "Office," the only preposition used is "under." Likewise, where a preposition follows "Officers," the only preposition used is "of."

This precise terminology, used across eight provisions of the Constitution, suggests some degree of intentionality and deliberation. The language was not used indiscriminately. More likely than not, the phrase "Officers of the United States" in one provision was understood as having the same meaning as the phrase "Officers of the United States" in the other provisions. Likewise, the phrase "Office . . . under the United States" in one provision was likely understood as having the same meaning as the phrase "Office . . . under the United States" in the other provisions.

3. The Committee of Style Modified Three Provisions to Standardize the Constitution's "Office"- and "Officer"-Language

On September 8, 1787, the Constitutional Convention elected "a Committee of five to revise the style of and arrange the articles agreed to by the House."[21] Gouverneur Morris of Pennsylvania would serve on the Committee of Style.[22] Morris was joined by Alexander Hamilton of New

20. N.C. CONST. of 1776, art. XXXII (emphasis added).

21. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 547 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]; William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 4 (2021).

22. *See* Treanor, *supra* note 21, at 13.

York, William Johnson of Connecticut, Rufus King of Massachusetts, and James Madison of Virginia.[23] These prominent framers were attorneys or had legal training. The full extent of the Committee's work is far beyond the scope of this Article. Rather, we focus on three specific alterations the Committee made to the Constitution's "Office"- and "Officer"-language. These alterations involved: the Religious Test Clause, the Succession Clause, and the Impeachment Clause. Specifically, these changes standardized how the Constitution refers to offices and officers. We can reasonably infer there was some intentionality and deliberation to their decisions.

a. The Religious Test Clause

On Aug. 30, 1787, Charles Pinckney moved to insert into the draft constitution what would become the Religious Test Clause.[24] His draft proposal provided, "[B]ut no religious test shall ever be required as a qualification to any office or public trust under *the authority of* the U. States."[25] Pinckney's motion was seconded by Gouverneur Morris, and after a brief debate, was passed unanimously.[26] That provision, however, would soon be amended. The Committee of Style, which included Gouverneur Morris, removed the phrase "the authority of" from Pinckney's proposed language.[27] In its place, the Committee reported the version that was ultimately ratified: "office or public trust under the United States."[28]

That same Committee of Style reported out the Ineligibility Clause, which included the "under the *Authority*"-language.[29] That provision applies to "any civil Office *under the Authority* of the United States." In other words, the Committee retained the phrase "under the Authority" in the Ineligibility Clause but removed it from the Religious Test Clause. "[A] material variation in terms suggests a variation in meaning."[30] For this reason, it is fair to conclude that Morris and the members of his committee drew a distinction between the phrase "office or public trust under *the authority of* the United States" and the phrase "office or public trust under the United States."

William M. Treanor discussed Tillman's scholarship about this particular revision made to the Religious Test Clause by the Committee of Style.[31] Treanor wrote that "Tillman's thesis . . . concerns technical changes

23. *Id.* at 8.
24. 2 FARRAND'S RECORDS, *supra* note 21, at 468.
25. *Id.* (emphasis added).
26. *Id.*
27. *Id.* at 603.
28. *Id.*
29. *Id.* at 593 (emphasis added).
30. SCALIA & GARNER, *supra* note 3.
31. Treanor, *supra* note 21, at 47 n.275.

using terms of art with accepted meanings that created a coherent framework of office holding."[32] Treanor concluded that "[t]he changes [Tillman] describes are consistent with the mandate of a committee of style and arrangement."[33]

b. The Succession Clause

On September 7, 1787, Edmund Randolph proposed what would become the Succession Clause.[34] Randolph's draft provision provided, "The Legislature may declare by law what *officer of the U.S.*—shall act as President in case of the death, resignation, or disability of the President and Vice-President; and such officer shall act accordingly until the time of electing a President shall arrive."[35] Here, the text referred to an "officer of the United States." Madison moved to amend the proposal, from "until the time of electing a President shall arrive" to "until such disability be removed, or a President shall be elected."[36] Madison did not object to the phrase "officer of the United States." Madison observed that some delegates objected "that the Legislature was restrained in the temporary appointment to '*officers*' of the *U. S*[.]"[37] These objectors "wished it to be at liberty to appoint others than such" officers of the United States.[38] Randolph's proposal, as modified by Madison, passed by a vote of 6-to-4, with one state divided.[39]

Subsequently, the Committee of Style would alter the Succession Clause's language. The Committee stripped the words "of the United States," leaving the word "officer" standing alone and unmodified. As a result, the text then provided, "[T]he 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 the period for chusing another president arrive."[40] Recently, Treanor wrote that Morris

32. *Id.*
33. *Id.*
34. 2 FARRAND'S RECORDS, *supra* note 21, at 535.
35. *Id.* (emphasis added).
36. *Id.*
37. *Id.* (reporting Madison's original notes).
38. *Id.* (reporting Madison's original notes as subsequently modified by Madison, sometime after the constitutional convention had ended).
39. *Id.*
40. *Id.* at 599 (emphasis added) (citation omitted). The language reported in the main text was not the clause's final language. But the "Officer"-language relevant to the discussion in this Article remained unchanged.

"was the author of the change" to the Succession Clause.[41] It is fair to conclude that Morris, and by implication, his committee, understood that these two terms—"Officer of the U.S." and "Officer"—were not synonymous.

Our position is that Morris and his committee understood that the word "Officer" and the phrase "Officer of the United States," as they appeared in early drafts, had two distinguishable meanings. This position is met with two common objections. First, some scholars argue that the Committee of Style transcended its stylistic charter by making substantive changes that altered the Constitution's meaning. Therefore, the handiwork of Morris and his committee should be entitled to less weight. John Manning countered that "even if the Committee of Style acted ultra vires by making substantive changes to the text, the ratifiers accepted them."[42] Moreover, the Committee of Style did not have the final say. Morris and the committee simply reported to the Convention and all its members. And the members were free to debate, accept, amend, or reject the committee's changes—whether those changes had been properly authorized or not. The Succession Clause, as ratified, uses the word "Officer," standing alone and unmodified, and not "Officer of the United States."[43] And, we think it likely that other ratifiers had the same understanding that Morris and his committee shared: the word "Officer" and the phrase "Officer of the United States," as they appeared in early drafts, had two distinguishable meanings.

Second, Akhil Reed and Vikram Amar argued that "officer" was a "shorthand" for "officer of the United States."[44] We disagree with the Amars' position for reasons discussed in Part II of this ten-part series.[45] Moreover, Treanor explained that "Morris was consistently a careful drafter, which suggests that the change was intentional."[46] We agree. Morris and his committee likely understood that "Officer" had a different meaning than "Officer of the United States." And this understanding provides further proof for our position: the Committee of Style made specific alterations to standardize how the Constitution referred to specific "Offices" and "Officers." The Committee changed the language from "Officer of the United States" to "Officer" precisely because the latter accommodated a wider meaning.

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41. Treanor, *supra* note 21, at 78 ("When rearranging the Constitution's text on presidential succession, Morris changed 'officer of the United States' to 'officer.'").

42. John F. Manning, Response, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 144 (1995).

43. 2 FARRAND'S RECORDS, *supra* note 21, at 595.

44. Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 116 (1995).

45. *See* Tillman & Blackman, *supra* note 2, at 343–44, 357–69.

46. Treanor, *supra* note 21, at 82.

c. The Impeachment Clause

As late as September 8, 1787, the Impeachment Clause only extended to the President. That day, a motion was made to add "[t]he [V]ice-President and *other* Civil officers of the U. S." to the scope of the clause.[47] The motion was passed unanimously.[48] The use of the word "other" suggests that the President and Vice President are properly characterized as "Civil officers of the United States."

Here again, Morris and the Committee of Style changed the text. The amended text stated: "The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment . . . ."[49] The phrase "and *other* Civil officers of the U.S." was changed to "and *all* civil officers of the United States." The word *other* was not merely dropped; it was changed to *all*.

We have no good reason to believe that the Committee dropped the word "other" by accident or happenstance. On the contrary, omitting the word "other" provides some evidence that the meaning was altered. Arguably, Morris and his committee recognized that the President and Vice President were excluded from the category of "Civil officers of the U.S." Why else remove the word "other"?

* * *

We think the work of Morris and the Committee of Style shows that they intended to standardize how the Constitution refers to offices and officers. Morris maintained "Office . . . under the Authority of the United States"-language in the Ineligibility Clause but replaced that language in the Religious Test Clause with different "Office"-language. In the Succession Clause, Morris changed the phrase "Officer of the United States" simply to "Officer." And in the Impeachment Clause, the Committee changed the phrase "and other Civil officers of the U.S." to "and all civil officers of the United States."[50] These precise, almost surgical, textual changes cannot be described as random. The available evidence suggests that these framers' choices were intentional and deliberate. And if these choices were intentional and deliberate, then it is reasonable to infer that committee members intended the text-as-modified to be understood by the whole membership of the Convention and, ultimately, by those who would ratify the Constitution, as well as by the wider public.

47. 2 FARRAND'S RECORDS, *supra* note 21, at 552 (emphasis added).
48. *Id.* at 545, 552.
49. *Id.* at 600.
50. *Id.*

B. We Use Original Public Meaning Originalism to Understand the Phrase "Officers of the United States"

Our approach is also premised on original public meaning originalism. We think the phrase "Officers of the United States" is defined by the Appointments Clause.[51] The phrase "Officers of the United States" was *not* a fixed term of art.[52] It did not draw on any specific prior drafting conventions. The Articles of Confederation used the phrase "office . . . under the United States" in two provisions, but it did not use the phrase "Officers of the United States."[53] A study of the Corpus of Founding Era American English (COFEA) supports our position.[54] The phrase "Officers of the United States" had no apparent "specialized meaning attached to its use."[55] It was rarely used between 1787 and 1799, outside the context of the Constitution, in contrast with other more widely used "Officer"-language.[56]

Moreover, the general public would not have needed to be steeped in parliamentary practice to understand the phrase "Officers of the United States." Rather, the meaning of "Officers of the United States" would have been conveyed to a reasonable person who read the text of the Constitution. Had the framers not defined the phrase "Officers of the United States" in the Appointments Clause, its meaning would have been less than clear. And in that situation, the meaning of that phrase may have extended to elected officials. But the meaning of the phrase "Officers of the United States" was defined by the Constitution.

C. We Use Original Methods Originalism to Understand the "Office . . . under the United States" Drafting Convention

In our view, the meaning of the phrase "Officers of the United States" in the Constitution was defined by the Constitution. In contrast, our position

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51. *See infra* Section II.A (discussing the Appointments Clause).

52. A decade ago, Tillman had referred to "Officers of the United States" and "Office . . . under the United States" as "terms of art *as used in the Constitution of 1787*." *See* Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. 180, 191 (2013) (emphasis added). The phrase "term of art" is generally understood to extend beyond the document under examination. We now think that Tillman's use of the phrase "term of art" was less than entirely precise, particularly with regard to the phrase "Officers of the United States." This Article offers further clarity, and a substantial number of points raised here had already been developed in our amicus briefs and other scholarship.

53. ARTICLES OF CONFEDERATION of 1781, art. V, para. 2.

54. Brief of Amici Curiae Scholars of Corpus Linguistics at 18, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130) [https://perma.cc/GA6E-B5NA].

55. *Id.*

56. *Id.* ("The phrase 'Officer(s) of the United States' appears in COFEA just 109 times between 1787 and 1799, with just over a third of those being direct quotations of the Constitution. This is a tiny minority of the 5,353 times the word 'officer' appears in the data-base overall during this same period . . . ." (citation omitted)).

is that the Constitution's "Office . . . under the United States"-language draws on prior British statutory drafting conventions. These drafting conventions were well-known and well-established. In our view, the framers inherited a legal genealogical understanding of "Office under . . . ."

Part IV of this ten-part series will demonstrate how the framers used the "Office under" drafting convention.[57] Here, we will explain why members of the Philadelphia Convention would likely have been familiar with British statutory drafting conventions.[58] In particular, Morris and his committee, whose members were lawyers or otherwise had legal training, were likely to have been familiar with these conventions. Additionally, some of the framers read English law and were educated at the Inns of Court in London. Indeed, several of the most prominent attorneys in the founding generation trained at Middle Temple, one of the four Inns of Court that could call members to the English Bar. According to Chief Justice Roberts, the Middle Templars "included five signers of the Declaration of Independence, the president of the first Continental Congress, four of the drafters of the Articles of Confederation, and seven drafters of the Constitution."[59] This latter group of seven framers included three South Carolinians: John Rutledge, General Charles Cotesworth Pinckney, and Charles Pinckney.[60] This roster also included John Blair of Virginia, John Dickinson of Delaware, Jared Ingersoll, Jr. of Pennsylvania, and William Livingston of New Jersey.[61] Dickinson served on the Committee of Eleven, which proposed the near-final version of the Appointments Clause. Rutledge and Blair would both serve on the United States Supreme Court. The educational background and reputations of these

57. *See* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part IV: The "Offices . . . under the United States" Drafting Convention,* 62 S. TEX. L. REV. 455, 461–65 (explaining that the framers adapted the "Office under the Crown" British drafting convention to refer to appointed positions under the federal constitution).

58. Robert G. Natelson, *The Founders' Origination Clause and Implications for the Affordable Care Act*, 38 HARV. J.L. & PUB. POL'Y 629, 646 (2015) ("American political leaders knew something of the British Parliament. During the colonial era, Parliament produced much of the law affecting British America, and Parliament's overreach provoked the Revolution. Some American leaders learned about Parliament from direct experience.").

59. John G. Roberts, Jr., *Foreword* to ERIC STOCKDALE & RANDY J. HOLLAND, MIDDLE TEMPLE LAWYERS AND THE AMERICAN REVOLUTION, at xv–xvi (2007); E. ALFRED JONES, AMERICAN MEMBERS OF THE INNS OF COURT 21–22, 61–63, 102, 104, 134–35, 170–72 (1924) (listing, as members of the Inns of Court, seven framers of the Constitution, including, John Dickinson, John Blair, William Houston, Jared Ingersoll, William Livingston, Charles Pinckney, and Charles Cotesworth Pinckney).

60. STOCKDALE & HOLLAND, *supra* note 59, at 31 (identifying the three South Carolinians).

61. *Id.* at xvi, 31; Natelson, *supra* note 58, at 647 (observing that Dickinson, who studied in Middle Temple, wrote letters "from London to his father [that were] filled with reflections on parliamentary politics" (citing John Dickinson, *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754–1756*, PA. MAG. HIST. & BIO. 417–20 (H. Trevor Colbourn ed., 1962))) [https://perma.cc/624D-3TUK].

lawyers provide some reason to believe that they would have been familiar with these drafting practices and adapted them for the federal Constitution.

Were members of the state ratifying conventions aware of these drafting practices? Perhaps. Some ratifiers were also connected to the Inns of Courts.[62] John Blair attended the Philadelphia Convention, as well as Virginia's ratifying convention.[63] Chief Justice Thomas McKean of Pennsylvania, a member of Pennsylvania's ratifying convention, was a Middle Templar.[64] And Thomas Pinckney, the President of the South Carolina ratification convention, studied law at Inner Temple.[65]

We can cite one piece of evidence, in particular, which suggests that the framers' generation was familiar with the "Office under" drafting convention. In 1775, Jean Louis De Lolme published the first English edition of *The Constitution of England; Or, An Account of the English Government*.[66] De Lolme wrote a thorough account of the English system of government. But most relevant for our purposes, he discussed the British drafting convention. He explained that one holding a "new *office under the Crown* [is] incapable of being elected [a] Member[]" of the House of Commons. Likewise, he wrote, "if any Member [of the Commons] accepts any *office under the Crown*, except it be an Officer in the army or navy accepting a new commission, his seat becomes void; though such Member is capable of being re-elected."[67] For the last three centuries, "Office under the Crown," a phrase

62. JONES, *supra* note 59, at x (discussing framers and ratifiers who studied in London's Inns of Court). A fully comprehensive study would also include framers and ratifiers educated at the King's Inns in Dublin, Ireland, the Scottish Faculty of Advocates, and the coordinate and contemporaneous institutions of legal education in the Isle of Man (if any), and the Channel Islands (if any). The influence of these latter legal traditions on the framers and ratifiers is obscure. *See also* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *was Rightly Decided, and Why* INS v. Chadha *was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1332 n.141 (2005) (suggesting the possibility that framers and ratifiers were familiar with legislative practices from the Isle of Man and Channel islands).

63. *See John Blair, Jr.*, SUPREME COURT HISTORICAL SOCIETY, https://supremecourthistory.org/associate-justices/john-blair-jr-1790-1796/ [https://perma.cc/SJ4N-PGYX].

64. STOCKDALE & HOLLAND, *supra* note 59, at 132.

65. *Thomas Pinckney*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=P000357 [https://perma.cc/6C2E-LKZH]; 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 325 (Jonathan Elliot ed., 1876) (reporting South Carolina's ratification papers) [hereinafter ELLIOT'S DEBATES].

66. *See* JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT ix (David Lieberman ed. & trans., Liberty Fund, Inc. 2007) (1784) ("In 1771, De Lolme published a French version of the book.").

67. J. L. DE LOLME, THE CONSTITUTION OF ENGLAND; OR AN ACCOUNT OF THE ENGLISH GOVERNMENT 98 (London, G. Robinson and J. Murray 4th ed. 1784) (emphases added) [https://perma.cc/G8ZT-RH7K]. The Incompatibility Clause in the United States Constitution differs from its English predecessor. The Incompatibility Clause of the United States Constitution

commonly used in English, British, and United Kingdom statutes, has not extended to elected positions.[68] Here, De Lolme invoked the commonly-used drafting convention, "Office under. . ." to refer to appointed officers. And he used this phrase to draw a contrast with elected officials in Parliament, who could not hold these appointed offices. De Lolme repeated this same claim about the "Office under" drafting convention in the canonical 1784 edition of his treatise.[69]

De Lolme's book was widely read. It "was a major contribution to eighteenth-century constitutional theory and enjoyed wide currency in and beyond the eras of the American and French Revolutions."[70] In 1781, De Lolme had already sent a copy of his book to Benjamin Franklin.[71] In 1787, John Adams described the book as "the best defence of the political balance of three powers that ever was written."[72] Alexander Hamilton quoted De Lolme in *Federalist No. 70*: "I clearly concur in opinion, in this particular, with a writer whom the celebrated Junius pronounces to be 'deep, solid, and ingenious,' that 'the executive power is more easily confined when it is ONE[.]'"[73] David Wootton wrote that De Lolme's book was "admired by [John] Adams and [Alexander] Hamilton."[74] Wootton observed that "[i]t would be difficult to overemphasize the extent to which the key ideas of the *Federalist* were already present in [D]e Lolme."[75] Decades later, De Lolme's work remained influential. Indeed, Joseph Story, in his 1836 publication, *Commentaries on Equity Jurisdiction,* wrote favorably about De Lolme's book.[76] This praise of De Lolme's learned treatise provides some reason to believe that Hamilton, Adams, and other framers and founders were familiar with De Lolme's discussion of the "Office under" drafting convention. Robert Natelson observed that "[m]any Founders who had not spent time in

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did not create an exception for military positions, and would not permit a member to subsequently hold an otherwise incompatible positions based on his re-election.

68. *See* Tillman & Blackman, *supra* note 57.

69. *See* DE LOLME, *supra* note 67, at 98; *see also* DE LOLME, *supra* note 66, at ix, 79.

70. *See* DE LOLME, *supra* note 66, at ix.

71. Letter from Jean Louis De Lolme, writer on constitutional matters, to Benjamin Franklin, U.S. Minister to France (May 20, 1784) [https://perma.cc/HWX4-LV9V].

72. 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 70 (1787).

73. THE FEDERALIST NO. 70, at 457 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

74. David Wootton, *Introduction* to ALEXANDER HAMILTON ET AL., THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS xxxiii (David Wootton ed., 2003) (1787).

75. *Id.*

76. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISDICTION 22 n.3 (Boston, Hilliard, Gray & Co. 1836) ("De Lolme, in his work on the Constitution of England, has presented a view of English Equity Jurisprudence, far more exact and comprehensive, than many of the English text writers on the same subject.").

London were exposed to parliamentary institutions and procedures from popular writings[,]"[77] such as De Lolme's treatise.

This statutory drafting convention played a role in several important pieces of parliamentary legislation. Were members of the general public who read the Constitution cognizant of this drafting convention? We cannot be sure. Such a question is difficult to answer with certainty. But even if the general public did not widely understand the finer technical points of the Constitution, the ratifiers and the general public would have recognized that the phrase "Office . . . under the United States" was the sort of technical language known to the bench and bar. In other words, this language had a specific technical meaning, even if they did not know the exact content of that language.

In any event, we do not need to show that the ratifiers and the wider educated public shared a contemporaneous, widespread, and unified understanding of these technical concepts. Rather, they would have found this drafting convention comprehensible following the standard interpretive methodologies known to judges and members of the bar at the time. Our goal is to use the same methods to interpret the Constitution that the framers, ratifiers, and the contemporaneous general public would have used. This approach is known as *original methods originalism*.[78]

The 1798 Supreme Court decision in *Calder v. Bull* provides guidance about how to understand the Constitution's specific provisions that had a technical, legal meaning.[79] *Calder* involved a dispute over the meaning of the State Ex Post Facto Clause.[80] The question presented was whether Connecticut violated this clause when the state legislature "set aside a decree" of a probate court and "granted a new hearing[.]"[81] Did the State Ex Post Facto Clause apply only to criminal laws, or did it apply to civil laws as well?

As was common practice in appellate courts at the time, *Calder* was decided with a series of *seriatim* opinions. Justice Samuel Chase, who was a

77. Natelson, *supra* note 58, at 647 (citation omitted).

78. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751–52 (2009); *see also, e.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1131 (2017).

79. *See generally* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

80. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."); *see also id.* art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed [by Congress]."). *See generally Calder*, 3 U.S. (3 Dall.) at 386.

81. *Calder*, 3 U.S. (3 Dall.) at 386.

member of Maryland's ratification convention,[82] wrote the first opinion in *Calder*. He acknowledged that "[t]he prohibition, 'that no state shall pass any *ex post facto law*,' necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing."[83] Justice Paterson, who was a delegate to the Constitutional Convention from New Jersey,[84] wrote the second opinion in *Calder*. He agreed with Chase, and wrote that "[t]he words, *ex post facto*, when applied to a law, have a *technical meaning*, and, in legal phraseology, refer to crimes, pains, and penalties."[85]

We agree with the methodological approach taken in *Calder* by Justices Chase and Paterson regarding the Constitution's "ex post facto"-language. And we use this methodology to understand the Constitution's "Office . . . under the United States"-language. Following this methodology, the phrase "Office . . . under the United States" should be read in a similar fashion as the State Ex Post Facto Clause: it "requires some explanation; for, naked and without explanation, it is unintelligible[.]"[86] The British drafting convention clothes the otherwise-naked phrase "Office . . . under the United States" and made it intelligible to the framers' generation.

However, American judges, lawyers, and the public would not long remain cognizant of the framers' understanding of the British "Office . . . under" drafting convention. Around the time the Constitution was ratified, this older legal culture was quickly displaced. The American legal system was rapidly sundered from British courts and the wider British legal system. The Revolution terminated appeals from American courts to the Judicial Committee of the Privy Council. Moreover, some states formally precluded their courts from citing English judicial decisions.[87] Additionally, during and

82. *The Samuel Chase Impeachment Trial*, https://law.jrank.org/pages/5152/Chase-Samuel.html [https://perma.cc/7ZE5-UV6G] ("When the U.S. Constitution came before the Maryland Convention for ratification Chase was in the minority of delegates who voted against it. He was an ardent Anti-Federalist at the time and argued that the Constitution concentrated power in the hands of the central government at the expense of the common individual."); PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 244 (2010) ("The three leading members of the opposition raised no objection because, amazingly, they had not yet arrived. Samuel Chase, a prominent Annapolis lawyer, and Luther Martin, the disgruntled delegate who had left the federal Convention early, took their seats only on Thursday morning, about halfway through the convention's short life and after the rules of procedure were settled.").

83. *Calder*, 3 U.S. (3 Dall.) at 390 (emphasis added) (quoting U.S. CONST. art. I, § 10, cl. 1).

84. *William Paterson*, OYEZ, https://www.oyez.org/justices/william_paterson [https://perma.cc/F2R8-7CJN].

85. *Calder*, 3 U.S. (3 Dall.) at 396 (emphasis added).

86. *Id.* at 390.

87. *See, e.g.*, Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 806 (1951) ("During the latter part of the 18th century and continuing until well into the 19th century, there was manifest a general hostility to England and all that was English. Pennsylvania, New Jersey and Kentucky legislated against the citation of English decisions in the courts, and New Hampshire had a rule of court against it." (citations omitted)).

after the Revolution, it became less frequent for American lawyers to have received their university-level legal education at Oxbridge—that is the elite institutions of Oxford and Cambridge—and it was less likely for them to have received their legal training at London's Inns of Court. English parliamentary law, and to a lesser extent, English law, were displaced from American post-independence legal and political institutions and training.[88] Because of this displacement, among Americans the meanings of this and other British statutory drafting conventions were lost to the sands of time. However, we can use the framers' methods, and tune to American and other sources from the common law world. By doing so, we can recover the meaning of the phrase "Office . . . under the United States," a term that was not expressly defined by the text of the Constitution. In contrast, the phrase "Officers of the United States" was defined by the Constitution's text, and therefore, this latter phrase can be well understood through textualism and original public meaning originalism.

D. Founding Era Practices by the Washington Administration and the First Congress Are Entitled to More Weight Than Practices by Later Administrations and Congress

In large part, our approach draws on the practices of the Washington Administration and the First Congress. Specifically, we contend that our understanding of the phrase "Office . . . under the United States" is consistent with their actions. However, we acknowledge that later presidents and Congresses may not have acted consistently with this original understanding. Still, these earlier and later streams of authority should not be treated as entirely equal; the former should be given priority.

How should we consider or weigh competing lines of historical precedents and practices? *McPherson v. Blacker*, a seminal separation-of-powers decision from 1892, provides the relevant framework: later historical practices, even if widespread, do not undercut the practices established by the political branches during the Early Republic.[89] We agree with this judicially established framework.

McPherson considered whether Michigan voters could choose presidential electors based on individual congressional districts instead of on

88. *See* 2 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 29 (1965) ("In Pennsylvania several statutes were passed to repress not only the legal profession but also the common law of England, including the existing system of courts.").

89. McPherson v. Blacker, 146 U.S. 1, 24–25 (1892). In *NLRB v. Noel Canning*, Justice Breyer cited *McPherson* third chronologically in his string citation of canonical separation of powers decisions, following *Stuart v. Laird* and *McCulloch v. Maryland*. *See Noel Canning*, 134 S. Ct. 2550, 2560 (2014). And *McPherson* was cited in Chiafalo v. Washington, 140 S. Ct. 2316, 2324 (2020).

a statewide basis. (Today, forty-eight states use the statewide "general ticket" approach, but Maine and Nebraska award some of their electoral votes based on the "district" approach at issue in *McPherson*.[90]) Could a state award its electors using a district-based approach? The Constitution did not provide a clear answer. Justice Thomas would later observe that the text of the Constitution was "ambiguous on this score."[91] Because the constitutional text was ambiguous, the *McPherson* Court resolved the case based on practice—but not based on the majority practice that prevailed in 1892. Instead, the Court found "decisive" the practices of only a slim minority of states from the early years of the Republic.[92] These states bucked what became the national trend and, instead, asserted the authority to select electors by district.[93] In the event that "there is ambiguity or doubt," the *McPherson* Court noted, "or where two views may well be entertained, contemporaneous and subsequent practical construction is entitled to the greatest weight."[94]

McPherson illustrates why practices during the Early Republic are *more* probative than later-in-time practices. When *McPherson* was decided in the late Nineteenth Century, the statewide ticket approach was the *majority* approach. By contrast, the "district" approach was the *minority* practice in the Early Republic for choosing electors. Nevertheless, in 1892, the Court approved these states' Early-Republic minority practice.

Similarly, President Washington and the First Congress *established* the very first precedents with respect to the Constitution's "Office"- and "Officer"-language. Following the reasoning of *McPherson*, later-in-time practices concerning the Constitution's "Office"- and "Officer"-language are less probative than earlier practices. The original Washington Administration-era government practices are the better authority between these two streams of competing historical practices. And these Washington-era formative practices lend some support to our position. Later in this

90. *See Chiafalo*, 140 S. Ct. 2316, 2321 n.1 (2020) ("Maine and Nebraska . . . developed a more complicated system in which two electors go to the winner of the statewide vote and one goes to the winner of each congressional district. So, for example, if the Republican candidate wins the popular vote in Nebraska as a whole but loses to the Democratic candidate in one of the State's three congressional districts, the Republican will get four electors and the Democrat will get one. Here too, though, the States use party slates to pick the electors, in order to reflect the relevant popular preferences (whether in the State or in an individual district)." (citations omitted)).

91. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 864, 904 (1995) (Thomas, J., dissenting) ("More than a century ago, this Court was asked to invalidate a Michigan election law because it called for Presidential electors to be elected on a district by district basis rather than being chosen by 'the State' as a whole. Conceding that the Constitution might be ambiguous on this score, the Court asserted that 'where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction[s] are entitled to the greatest weight.'" (quoting *McPherson*, 146 U.S. at 27) (citation omitted)).

92. *McPherson*, 146 U.S. at 36.

93. *Id.*

94. *Id.* at 27.

Article, we will discuss how practices from the Washington Administration and the First Congress inform the meaning of the Commissions Clause and the Oath or Affirmation Clause, which both use the phrase "Officers of the United States."[95] And in Part V of this ten-part series, we will discuss how practices from the Washington Administration inform the meaning of the Foreign Emoluments Clause, which uses the phrase "Office . . . under the United States."[96]

We agree with the *McPherson* Court's approach. We also put forward another well-established methodology for weighing competing lines of historical practice. In our separation of powers system, one branch of the federal government often takes some action of doubtful constitutionality. And that action may arguably invade the constitutional sphere of a second branch. For example, the Executive Branch can encroach on the Legislative Branch's sphere of authority, or the Judicial Branch can intrude on the Executive Branch's sphere of authority. In response, the second branch, confronted with such an invasion of its constitutional powers, has a choice: it can push back or acquiesce. If the second branch pushes back, then the ongoing contest between the two branches leaves historical practice unsettled. But what if push-back was possible, but the second branch acquiesces? That acquiescence has the effect of ratifying the propriety of the contested action taken by the first branch. Leading separation of powers decisions have reflected this principle.[97]

In other situations, one branch of the federal government will take some action of doubtful constitutionality, but that act does not invade the constitutional sphere of a second branch. Rather, the first branch has surrendered its own powers. We accord little weight to such self-abnegation. Why? Because surrender by the first branch is less likely to occasion public discussion or pushback by a second branch. Decisions of the Supreme Court

95. *See infra* Section IV.C (noting that there is no evidence that President Washington commissioned himself, the Vice President, or members of Congress); *see also infra* Section V.C (discussing the first federal oath statute enacted in 1789).

96. Seth Barrett Tillman & Josh Blackman*, Offices and Officers of the Constitution, Part V: The Elector Incompatibility, Impeachment Disqualification, Incompatibility, and Foreign Emoluments Clauses,* 63 S. TEX. L. REV. (forthcoming 2023) (discussing foreign diplomatic and state gifts President Washington accepted).

97. *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) ("[I]t is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature."); *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952) (noting that "Congress ha[d] taken no action[]" after President Truman, absent legislative sanction, seized the steel mills); Dames & Moore v. Regan, 453 U.S. 654, 688 (1981) ("We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.").

have also reflected this principle.[98] The second branch may choose not to respond merely because it did not think its own powers had been invaded. As a result, the second branch might not have considered the legality of the actions of the first branch.

Acquiescence after an invasion—where pushback is possible—suggests an agreement between or among the branches. But where pushback is not possible or unlikely because the second branch's powers have not been invaded, historical practice—even a long enduring practice—does not suggest agreement between the political branches. Moreover, where the first branch surrenders its own powers, the precedential force of historical practice is relatively weak.

Again, actions that *assert* powers should be given more weight than actions that *relinquish* powers.[99] Consider the historical practice concerning the Foreign Emoluments Clause.[100] Presidents Washington and Jefferson accepted diplomatic gifts without seeking congressional consent.[101] And we have found no record that anyone, including their contemporaneous and subsequent critics, objected to these practices.[102] In contrast, President Jackson and his successors may have acted under the belief that the President must seek congressional consent before accepting foreign diplomatic gifts.[103] Between these two streams of competing historical precedents, *McPherson* teaches that the earlier practices from the Washington and Jefferson administrations should be entitled to greater weight. Why? Washington and Jefferson arguably invaded Congress's power to grant consent under the Foreign Emoluments Clause. By contrast, Jackson arguably surrendered the President's power to accept foreign gifts without seeking congressional consent. In this clash, the earlier encroaching practices should count for more than the later, self-abnegating practices—traditions of defiance trump traditions of surrender. We will discuss these foreign gifts at length in Part V of this ten-part series.

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98. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497 (2010) ("The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own." (citations omitted)); *cf.* Clinton v. City of New York, 524 U.S. 417, 451–52 (1998) (Kennedy, J., concurring) ("It is no answer, of course, to say that Congress surrendered its authority by its own hand . . . . Abdication of responsibility is not part of the constitutional design.").

99. *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 173 (Boston, H. Sprague 9th ed. 1802) ("[O]ne precedent in favor of power is stronger than [a] hundred against it.").

100. *See generally* Josh Blackman, *Defiance and Surrender*, 59 S. TEX. L. R. 157 (2018).

101. *Id.* at 158–62.

102. *Id.* at 159–62.

103. *Id.* at 162–64.

E. The Framers' Purpose or Intentions Should Only Be Considered After Exhausting Principles of Textualism and Originalism, and Weighing Competing Historical Practices

Critics offer a common response to our approach. They contend that the meaning of much eighteenth-century constitutional language is unknown at the present day. They infer the meaning of the constitutional language is no longer discoverable or that it never had an identifiable linguistic content to the framers, the ratifiers, and their contemporaries. This response was wrong when *Calder* was decided in 1798, and it is still wrong today.

Likewise, critics have argued that the practical consequences of our approach are undesirable by modern standards. For example, the framers would have never intended to allow the President to serve as an elector. And the framers would have never intended to exclude the President from the scope of the Foreign Emoluments Clause. Moreover, an impeached and disqualified President, Vice President, or civil officer of the United States should not be allowed to serve as an elector, a member of Congress, or a second term in the White House. In other regards, the clause even might be *underinclusive*. And this underinclusiveness undermines the critics' argument. For example the clause omits United States military officers and highly placed state officials who had engaged in treason, bribery, or high crimes and misdemeanors against the United States.

We disagree with the critics' framework because it inverts the usual mode of constitutional analysis. When interpreting constitutional text, courts should first consider "text and history."[104] Generally, we think this process has three steps, as discussed above. First, we start with the basic principles of textualist interpretation. Second, we turn to the original public meaning, including original methods originalism, based on pre-ratification materials and history. Some constitutional inquiries can be resolved with these initial two steps: textualism and original public meaning.

But a third step is needed to determine the meaning of other constitutional texts. Specifically, if that meaning cannot be settled based on "text and history"—both of which were determined *before* ratification—then

104. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008); *see also* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2131 (2022) ("The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's *text and historical* understanding." (emphasis added)); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283 (2022) ("As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the *Constitution's text or in our Nation's history*." (emphasis added)); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) ("An analysis focused on *original meaning and history*, this Court has stressed, has long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence.'" (emphasis added) (citations omitted)).

courts should turn to historical practices that developed *after* the constitutional text was ratified. In *Youngstown*, Justice Frankfurter explained that there may be "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and *never before questioned*, engaged in by Presidents who have also sworn to uphold the Constitution[.]"[105] In such cases, this "exercise of power [becomes] part of the structure of our government, [and] may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."[106] Critically, this exercise of power must have "never before [been] questioned[.]"[107] But if the practice had been questioned, or more importantly, if there were competing historical practices, then *McPherson* and other Supreme Court cases provide the judicially-approved framework to weigh those competing practices. If these three steps—text, original public meaning, and historical practices—cannot resolve the meaning of ambiguous constitutional text, only then should one turn to "purpose."[108]

Scholars should not start with a purported purpose and then use that purpose to deem a text ambiguous. For example, a common argument we have seen is that the framers would never have intended the President to serve as an elector.[109] Some critics use that purpose to declare as ambiguous, or even determine the meaning of, the phrase "Office of Trust or Profit under the United States" in the Elector Incompatibility Clause.[110] This approach puts the cart before the horse. We cannot use purpose to challenge a text's original public meaning. If a text is still ambiguous after the first three steps in our methodology—textualism, original public meaning, and historical practices—then, and only then, should purpose be considered. But we cannot leapfrog constitutional interpretation by beginning the analysis with a preordained result.

105. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (emphasis added).

106. *Id.* at 610–11.

107. *Id.*

108. *See* NLRB v. Noel Canning, 134 S. Ct. 2550, 2561 (2014) ("The constitutional text is thus ambiguous. And we believe the Clause's purpose demands the broader interpretation.").

109. Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of President*, 4 DUKE J. CONST. L. & PUB. POL'Y 35, 42 (2009) (available on Westlaw and other electronic platforms); *see* Asher Steinberg, *The Textual Argument That the President Does Not Hold an "Office Under the United States,"* THE NARROWEST GROUNDS, http://narrowestgrounds.blogspot.com/2017/09/the-textual-argument-that-president.html [https://perma.cc/AF86-LS6P] (noting skepticism in regard to any claim that the President can also serve as an elector).

110. U.S. CONST. art. II, § 1, cl. 2 ("[B]ut no Senator or Representative, or Person holding an *Office of Trust or Profit under the United States*, shall be appointed an Elector." (emphasis added)).

II. THE PHRASE "OFFICERS OF THE UNITED STATES" WHICH IS DEFINED BY THE APPOINTMENTS CLAUSE, REFERS TO APPOINTED POSITIONS IN THE EXECUTIVE AND JUDICIAL BRANCHES

In our view, the phrase "Officers of the United States" refers to appointed positions in the Executive and Judicial Branches. This language does not refer to appointed positions in the Legislative Branch, such as the Clerk of the House of Representatives or the Secretary of the Senate. The Appointments Clause defines the phrase "Officers of the United States" and, generally, how those officers are appointed: all such appointments are made to positions established by federal statute in the Executive and Judicial Branches. This category includes principal officers and inferior officers. Each of these positions must be created, authorized, or regularized "by law"; that is, by statute through bicameralism and presentment. And all of these positions are filled by appointment, not election. Positions created by the Constitution, including elected officials like the President and Members of Congress, are not created "by law." Therefore, they are not "Officers of the United States."

Our approach is consistent with the drafting history of the Appointments Clause: "Officers of the United States" can only be appointed, not elected. And our approach is also consistent with Supreme Court precedent. We acknowledge that some framers and ratifiers, on some occasions, argued that members of Congress were "Officers of the United States." However, we do not know how widespread this view was. And at the time, prominent framers and ratifiers opposed this view. On balance, the weight of evidence supports our position that "Officers of the United States" are appointed, not elected.

A. The Structure of the Appointments Clause

The Appointments Clause provides:

> [The President] 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.[111]

The structure of the Appointments Clause is, admittedly, not a perfect model of clarity. The clause is an overly-long single sentence, and its structure is grammatically complex. Moreover, its various sub-clauses can be read in different ways. Two centuries ago, Chief Justice Marshall labored to

111. *Id.* art. II, § 2, cl. 2.

interpret this clause in *United States v. Maurice*. This criminal prosecution turned on whether James Maurice, an "agent of fortifications[,] [was] an officer of the United States."[112] Marshall wrote, "I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause."[113]

We agree that determining the original public meaning of the Appointments Clause is not without some difficulty. Still, in our view, the text conveys a simple concept: all "Officers of the United States" are appointed positions that must be created by federal statute. Apex officials, who are elected, cannot be "Officers of the United States." This section will carefully parse the text of the Appointments Clause.

1. "And which shall be established by Law"

The Appointments Clause refers to positions that "shall be established by law." The phrase "shall be established by law" refers to post-ratification positions that *will* or *would* be established by future federal statutes. And these statutes must be created through bicameralism and presentment.[114] These positions were not established by the Constitution itself. The word "shall" here indicates futurity.[115] The Constitution does not mandate what particular positions Congress will create, in the future, by statute; however, the Constitution does mandate that all such positions—i.e., these future "Officers of the United States"—will be authorized by future statutes.[116]

Beyond the Appointments Clause, the Constitution of 1788 uses the phrase "by law" in eight other provisions—in each provision that phrase refers to the enactment of federal statutes.[117] Let us start with the second half of the Appointments Clause, sometimes referred to as the Inferior Officers Appointments Clause. The Inferior Officers Appointments Clause states, "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

112. United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C.J.).

113. *Id.* at 1213.

114. *See* U.S. CONST. art. I, § 7, cl. 2 (laying out the requirements for bicameralism and presentment). *But cf*. *id*. art. I, § 7, cl. 3 (laying out requirements for an order, resolution, or vote to have legal effect).

115. Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on* Shall *and* May, 50 AM. J. LEGAL HIST. 453, 455 (2008–2010).

116. *See* Richbourg Motor Co. v. United States, 281 U.S. 528, 534 (1930) ("Undoubtedly, 'shall' is sometimes the equivalent of 'may' when used in a statute prospectively affecting government action.").

117. *See* U.S. CONST. art. I, § 2, cl. 3; *id*. art. I, § 4, cl. 1; *id.* art. I, § 4, cl. 2; *id.* art. I, § 6, cl. 1; *id.* art. I, § 9, cl. 7; *id.* art. II, § 1, cl. 6; *id.* art. II, § 2, cl. 2 (Appointments Clause); *id.* art. II, § 2, cl. 2 (Inferior Office Appointments Clause); *id.* art. III, § 2, cl. 3; *see also id*. amend. III; *id*. amend. VI; *id*. amend. XIV, § 4.

of Departments."[118] Congress can enact statutes that empower the President, the courts of law, or the heads of departments, to appoint "Inferior Officers" without the need to obtain Senate advice and consent. The phrase "by law" has the same effect for both principal and inferior "Officers of the United States": only Congress has the power to create both types of positions by statute. This action must comply with the requirements of bicameralism and presentment—both houses of Congress must enact a statute, which is then presented to the President.[119]

There are seven other clauses in the original Constitution of 1788 that use the phrase "by law." First, the Appropriations Clause ensures that "Money" can only be "drawn from the Treasury" following "Appropriations made *by Law*."[120] The Supreme Court observed that "[m]oney may be paid out only through an appropriation made *by law*; in other words, the payment of money from the Treasury must be authorized by a statute."[121]

Second, the Enumeration Clause provides that Congress may regulate how to take the census "in such Manner as they shall *by Law* direct."[122] That is, by statute.

Third, the Election Regulation Clause provides that "Congress may at any time *by Law* make or alter such Regulations" concerning the "Times, Places and Manner of holding Elections for Senators and Representatives[.]"[123] Here, Congress can enact statutes to preempt certain state election laws.

Fourth, the Meeting of Congress Clause empowers Congress to "appoint" "*by Law* . . . a different Day" to "assemble[.]"[124] Again, "by law" refers to federal statutes.

Fifth, the Congressional Compensation Clause allows Congress to "ascertain[] *by Law*" the "compensation" that "Senators and Representatives shall receive . . . for their Services[.]"[125] Compensation must be set by law.

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118. *Id.* art. II, § 2, cl. 2 (emphasis added).
119. *See* INS v. Chadha, 462 U.S. 919, 948–49 (1983).
120. U.S. CONST. art. I, § 9, cl. 7 (emphasis added).
121. Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990) (emphasis added).
122. U.S. CONST. art. I, § 2, cl. 3 (emphasis added).
123. *Id.* art. I, § 4, cl. 1 (emphasis added).
124. *Id.* art. I, § 4, cl. 2 (emphasis added).
125. *Id.* art. I, § 6, cl. 1 (emphasis added). Congress's power regarding the control of congressional compensation was subsequently limited by the Twenty-Seventh Amendment. This amendment limited when statutes varying the compensation of Senators and Representatives could go into effect. Now, a "law, varying the compensation for the services of the Senators and Representatives, shall take effect," only after "an election of [R]epresentatives shall have intervened." *Id.* amend. XXVII.

Sixth, the Presidential Succession Clause allows Congress to declare "*by Law*" what "Officer[s]" can succeed to the presidency in the event of a double-vacancy.[126] Successors must be set by statute.

Seventh, the Criminal Trials Clause empowers Congress to "direct[]" "*by Law*" where to hold jury trials for crimes "not committed within any State[.]"[127] Again, the location of jury trials must be established by statute.

In the Appointments Clause, the Inferior Officers Appointments Clause, and the seven other provisions listed above, the phrase "by law" refers to Congress enacting a statute, after ratification of the Constitution, through the process described in Article I, Section 7, Clause 2: bicameralism and presentment.[128] This provision is known as the Presentment Clause or the Veto Clause. This provision controls how a bill becomes a law, statute, or act of Congress.[129] This understanding of "by law" is settled doctrine in the federal system,[130] as well as in state government.[131] The phrase "by law" does not refer to any and every legal action or procedure taken under general authority provided by the Constitution. Where a constitutional provision grants Congress powers, and the clause has a "by law" limitation, then congressional action by concurrent or single house resolution is unquestionably insufficient. "By law" refers to statutes.

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126. *Id.* art. II, § 1, cl. 6 (emphasis added); *see* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 170 (2006) (stating that "by Law," as used in the Succession Clause, means "by a statute presumably enacted in *advance*" (emphasis added)).

127. U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

128. *Id.* art. I, § 7, cl. 2 ("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.").

129. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1215 (2010) (explaining that a "statute" or "public law . . . is also called an Act of Congress" (internal quotation marks omitted)).

130. Harris L. White, Comment, *Constitutional Law: Joint Resolutions: Effect upon Statutes*, 22 CORNELL L. Q. 90, 92 (1936) ("It is understood by all authorities that when the words 'by law' or 'by statute' are used, the legislature means that the matter can be done only by a bill passed by the legislature and signed by the chief executive [or over his veto] . . . . The words 'by law' or 'by statute' are conspicuous by their absence." (citation omitted)).

131. *See* Case Comment, *Constitutional Law: Apportionment Bills Subject to Governor's Veto*, 50 MINN. L. REV. 1131, 1132 (1966) ("Where [a] constitution provides that certain items be 'prescribed by law' or that passage be 'by law,' the full lawmaking process clearly is required—passage by both houses plus the governor's approval or re-passage in case of veto." (citation omitted)).

However, where a constitutional provision grants Congress powers, and the clause lacks a "by law" limitation, then congressional action is not strictly limited to the procedures in the Presentment Clause. Rather, in such circumstances Congress can enact a traditional statute, or instead, satisfy the *alternative* procedural scheme in Article I, Section 7, Clause 3, which we refer to as the Order, Resolution, and Vote (ORV) Clause.[132] In 1789, the First Congress made use of this alternative procedural scheme in the Act to Establish the Treasury Department. This statute prospectively authorized each house of Congress, acting separately, to request information from the Secretary of the Treasury, and the statute made it the secretary's duty to report.[133]

Apparently, under the authority of the 1789 Act, in 1792, the Senate issued an order directing Secretary of the Treasury Alexander Hamilton to produce a financial statement listing the "salaries, fees, and emoluments" of "every person holding any civil office or employment under the United States, (except the judges)."[134] Hamilton responded to the Senate's order.[135] We do not have any direct evidence that President Washington approved the single-House request.

Hamilton and the Treasury Department took more than nine months to draft, sign, and submit a response, which spanned some ninety manuscript-sized pages.[136] The manuscript included several documents, which we refer to collectively as the *1793 Complete Report*. Hamilton listed appointed or

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132. U.S. CONST. art. I, § 7, cl. 3 ("Every [single-house] 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.").

133. An Act to Establish the Treasury Department, ch. 12, § 2, 1 Stat. 65, 65–66 (1789).

134. *Id.*

135. *See 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: FEBRUARY–JUNE 1793, at 157 (Harold C. Syrett & Jacob E. Cooke eds., 1969); *see also Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under the United States* (Feb. 26, 1793), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-14-02-0051 [https://perma.cc/B88K-AA99]; Amicus Curiae Scholar Seth Barrett Tillman's and Proposed Amicus Curiae Judicial Education Project's Motion for Leave to File Response to Amici Curiae by Certain Legal Historians at 79–168, Citizens for Resp. & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-GBD), ECF No. 85 [https://perma.cc/FQ83-4JDF].

136. During the Emoluments Clauses litigation, we published a copy of the *1793 Complete Report*, which was drafted in long hand. *See id.* Many years before Trump was in office, Tillman had already posted extracts from the *1793 Complete Report* and the *Condensed Report* on his personal Bepress website. *See* Seth Barrett Tillman, *Hamilton, the Secretary of the Senate, and Jefferson: Three (or Four) Views of the Cathedral and the Mysterious Identity of the 'Officers Under the United States*,*'* BEPRESS (Mar. 30, 2011), https://ssrn.com/abstract=1694172 [https://perma.cc/R46N-KFAQ].

administrative personnel in *each* of the three branches of the federal government. However, Hamilton did not include all positions in the federal government; his carefully worded response did *not* include the President, the Vice President, Senators, or Representatives. We will discuss the relevance of the *1793 Complete Report* in Part IV of this ten-part series.[137]

Tillman first articulated this view of the ORV Clause in 2005.[138] Other scholars have largely endorsed Tillman's view.[139] However, we acknowledge that our reading of the ORV Clause conflicts with *INS v. Chadha*.[140] In *Chadha*, Chief Justice Burger wrote that the ORV Clause was added to "assure" that the presentment requirement for all bicameral legislation, per the Presentment Clause, "could not be circumvented."[141] Here, Burger articulated the view that the ORV Clause was merely an anti-circumvention device. In other words, the ORV Clause was a device to ensure that Congress did not evade the requirements mandated by the Presentment Clause.

In our view, as a matter of original public meaning, *Chadha* was incorrect regarding the meaning of the ORV Clause.[142] But more importantly, Burger's analysis cannot explain why the Appointments Clause, Inferior Officers Appointments Clause, and seven other provisions in the Constitution of 1788 include a "by law" limitation, but the Constitution's remaining substantive grants of congressional power lack that limitation. In our view, the "by law" limitation is functional. It restricts Congress to the law-making processes set down in the Presentment Clause. Moreover, it appears that none of the litigants in *Chadha* flagged in their briefs to the Supreme Court the

137. *See* Tillman & Blackman, *supra* note 57, at 482–94.

138. *See generally* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *Was Rightly Decided, and Why* INS v. Chadha *Was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005).

139. *See, e.g.*, Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373, 1374 (2005) ("Mr. Tillman is quite likely correct about the original meaning of the ORV Clause. It does not merely prevent Congress from circumventing the presentment requirement for bills through clever labeling, though it certainly does at least that much. Instead, it also subjects to presentment a range of legislative action that is not subject to presentment under Article I, Section 7, Clause 2. The ORV Clause is not merely an anticircumvention device; it also has independent substantive bite."); Thomas A. Smith, *The Future of Article I, Section 7*, NAT'L CONST. CTR.: INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/766#the-future-of-article-i-section-7-by-thomas-smith [https://perma.cc/CVV8-EKA8] ("What Tillman uncovered was that Madison's interpretation of the ORV Clause is actually inconsistent with the constitutional text. Tillman's 2005 research suggests that the ORV Clause is not merely an anti-circumvention device, but also subjects to presentment certain legislative actions not addressed in the Presentment Clause. These actions include a range of single-house actions authorized by prior, bicameral legislation.").

140. INS v. Chadha, 462 U.S. 919, 946–47 (1983).

141. *Id.* at 947.

142. Tillman, *supra* note 138, at 1344 ("Notwithstanding its feigned textualism, *Chadha* had no intellectual legs on which to stand.").

1789 statute that established the Treasury Department. That statute, which delegated limited law-making authority to a single house, conflicts with how the *Chadha* Court understood the Constitution's bicameralism requirement.[143] Again, the phrase "by law" refers to statutes. But for other constitutional provisions that do not include a "by law" limitation, Congress has a broader range of procedures to make binding legal relations. For the many constitutional provisions lacking a "by law" limitation, Congress is not limited strictly to enacting statutes; rather, Congress can use *either* the procedural mechanisms in the well-known Presentment Clause or in the more-obscure ORV Clause. And, in 1789, the First Congress made use of the latter, alternative procedural scheme in the Act to Establish the Treasury Department.

2. "Whose Appointments are not herein otherwise provided for"

> The Appointments Clause states:
>
> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[144]

The Appointments Clause enumerates, or "provides," four categories of specific positions: "[1] Ambassadors, [2] other public Ministers and [3] Consuls, [and] [4] Judges of the supreme Court." But that list is not exclusive. The Appointments Clause also generally references "all *other* Officers of the United States." This list of positions is subject to two limitations: "whose Appointments are not herein otherwise provided for, and which shall be established by Law."

That phrase, "whose Appointments are not herein otherwise provided for," is, admittedly, a mouthful. We think this phrase tells the reader that the appointment of "Officers of the United States" is limited to the processes announced in Article II, Section 2.[145] This sub-clause directs the reader *not*

143. *See Chadha*, 462 U.S. at 951 ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

144. U.S. CONST. art. II, § 2, cl. 2.

145. *See infra* Section VI (discussing the interaction between the Appointments Clause and the Recess Appointments Clause). Like the Appointments Clause, the Recess Appointments Clause also appears in Article II, Section 2.

to scour the remainder of the Constitution for other provisions that provide authority to fill other federal "Officers of the United States" positions—by election or by appointment. In other words, the Appointments Clause's "not herein otherwise provided for"-language is not an invitation to search for other constitutional provisions providing authority to create or fill federal offices; rather, this language puts the reader on notice that no such constitutional provisions exist beyond the textual bounds of Article II, Section 2. We think any alternative reading that leads readers to look for other constitutional mechanisms to fill "Officers of the United States" positions is mistaken. The "Officers of the United States" are only those positions that are filled by Article II, Section 2 processes.

Thomas Merrill took a different position. He wrote that "[t]he most likely referent of 'herein otherwise provided for' would be the Members of Congress, whose method of appointment is detailed in Article I."[146] Chad Squitieri responded that Merrill's analysis "is not the best interpretation" of the Appointments Clause.[147] Squitieri observed, "Article I does not speak to the 'appointment' of Members of Congress—it speaks to their *election*."[148]

In our view, Squitieri is correct. The positions of President, Vice President, Senator, and Representative are, in the regular course, filled by *election*, and not by *appointment*.[149] Only appointed positions can be "Officers of the United States," i.e., positions "whose *Appointments* are not herein otherwise provided." Therefore, it would be a mistake to scour the Constitution for positions that are filled by election. The existence of these elected positions supports the exact opposite conclusion that Merrill drew: the Constitution provides for a class of elected officials that are not "Officers of the United States."

The Appointments Clause's reference to "Appointments" should not be read to refer to elected officials. Squitieri reached a similar conclusion that we do: "the use of 'herein' in Article II, Section 2, Clause 2 is best understood

146. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2136 n.157 (2004).

147. Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1262 (2021).

148. *Id.* (citation omitted).

149. Membership in the House is determined exclusively by election. Any vacancy can only be lawfully filled by a new election. Membership in the Senate is determined, in the regular course, by election. But governors, in certain circumstances, can make "temporary appointments" to fill Senate vacancies until the seat is filled via election. *See* U.S. CONST. art. I, § 3, cl. 2, *amended by, id*. amend. XVII, cl. 2. And "[i]n case of the removal of the President from office or of his death or resignation, the Vice President shall become President." *Id.* art. II, § 1, cl. 6; *see also* Presidential Succession Act 1947, 3 U.S.C. § 19. This process occurs without an election. And "Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress." Here too, the Constitution eschews "election"-language. *Id.* amend. XXV § 2.

as a reference to Article II, Section 2, Clause 2 itself."[150] And what are these positions? The "Officers of the United States" are "the types of appointed officers mentioned within the very same clause."[151] The phrase "whose Appointments are not herein otherwise provided for" in the Appointments Clause "refer[s] the reader to a specific article, not the Constitution generally."[152]

Our reading of "whose Appointments are not herein otherwise provided for" applies to both principal and inferior officers. The Inferior Officers Appointments Clause, which appears immediately after the Appointments Clause in Article II, Section 2, Clause 2, provides: "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."[153] In our view, the phrase "such inferior Officers" refers back to the phrase "Officers of the United States" in the Appointments Clause. And those positions must be established by federal statute—that is, positions "established by law." All Officers of the United States must be appointed—not elected—and they can only be appointed pursuant to Article II, Section 2 procedures. These procedures include the paths of appointment enumerated in Article II, Section 2: the Principal Officers Appointments Clause, the Inferior Officers Appointments Clause, and potentially the Recess Appointments Clause.

We will revisit the meaning of the phrase "not herein otherwise provided for" with regard to the Recess Appointments Clause in Section VI.C.

3. All "Officers of the United States" Positions Must Be "established by law"

"Officers of the United States" are positions created, authorized, or regularized by federal statute. We use the term *regularized* to refer to the process by which an irregularly-created or irregularly-filled position is later validated or ratified by statute.[154] We use the term *authorized* to refer to positions that Congress funds, but otherwise generally leaving it to the President's, or other authority's, discretion to specify the character and duties of those posts. Congress enacted such a statute in 1790 that allowed President Washington to spend up to $40,000 to fund diplomatic posts at his discretion.[155] We acknowledge that other scholars have taken the position that

150. Squitieri, *supra* note 147, at 1262–63 (citation omitted).
151. *See id.* at 1263.
152. *Id.* at 1262–63.
153. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).
154. *See* Tillman & Blackman, *supra* note 2, at 335.
155. An Act providing the means of intercourse between the United States and foreign nations, 1 Stat. 128 (1790).

the President can create diplomatic posts absent direct congressional authorization.[156]

The positions of "Officers of the United States" can be terminated by federal statute—that is, the offices are entirely *defeasible*.[157] We acknowledge that complex problems arise concerning the statutory termination of Article III posts, particularly positions on the Supreme Court. The same or similar difficult problems arise from the interplay between Congress's powers over the inferior courts and good behavior tenure. But these difficult problems extend to any theory acknowledging congressional primacy.

By contrast, apex presiding federal officials, including the most significant elected positions, are not created by statute. Rather, these positions are mandated by the Constitution. Such positions include the President, Vice President, Speaker of the House, Senate President Pro Tempore, and Chief Justice.[158] Moreover, these positions are not entirely *defeasible*. Courts and scholars have long considered Congress's power to regulate such apex positions. But these latter positions cannot be *entirely* stripped of their constitutional powers, nor can Congress terminate such positions by statute.

Consider a hypothetical in which Congress regulates the President's pardon power: Congress enacts a statute requiring the President to sign pardons and to do so in permanent ink rather than in pencil, which could be easily erased. The President's pardon power is *partially* defeasible. But Congress cannot *entirely* strip the President of his pardon power or transfer this power to itself or even to a third-party entity. Nor can Congress and the President pass a statute stripping the Vice President of his tie-breaking vote

156. *See* James Durling & E. Garrett West, *Appointments Without Law*, 105 VA. L. REV. 1281, 1284 (2019) ("Based on this theory, the President has long appointed diplomatic officers (i.e., 'Ambassadors,' 'other public Ministers,' and 'Consuls') without Congress first establishing the offices by statute."); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 309 (2001) ("[President Washington] also effectively created [diplomatic posts]. Congress never created foreign diplomatic posts. Rather, Washington erected all of America's diplomatic postings by merely nominating individuals to serve as a U.S. minister or agent to a foreign court. If the Senate confirmed the nominee, Washington had created a foreign post."); Ryan M. Scoville, *Ad Hoc Diplomats*, 68 DUKE L.J. 907, 920 (2019) ("[P]arts of Article II [of the Constitution] other than the Appointments Clause supply the president with power to appoint ad hoc diplomats on his own authority."); *But cf.* Prakash & Ramsey, *supra,* at 309 n.336 ("We are not sure whether the Constitution permits the President to appoint to a diplomatic post in the absence of a statute first creating that diplomatic post . . . . Some scholars may assume that the President can only appoint diplomatic officers to posts that have been created by statute because that is the familiar rule in the domestic context.").

157. *Defeasible*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "defeasible" as "(Of an act, right, agreement, or position) capable of being annulled or avoided").

158. *See* Tillman & Blackman, *supra* note 2, at 408–11 (discussing "officers" of the "government of the United States" that were created by the Constitution itself).

in the Senate. These elected apex presiding positions are not *entirely defeasible* by federal statute.

B. The Drafting History of the Appointments Clause Is Consistent with Our Approach

The drafting history of the Appointments Clause is, admittedly, complex. But it is consistent with our approach.

On May 29, 1787, James Madison introduced the Virginia Plan.[159] The Virginia Plan would have empowered the "National Legislature" to choose judges.[160] In contrast, at this juncture, the appointment of "executive branch officers" "inhered in the 'Executive rights'" of the "National Executive."[161] A later proposal put forward this text: "The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court."[162]

On July 17, 1787, the Committee of the Whole modified what would become the Appointments Clause.[163] The new text provided that the "National Executive" would have the power "to appoint to offices in cases *not otherwise provided for*[.]"[164] What are the "offices . . . not otherwise provided for"? At this juncture, the text could be read in two fashions. First, those other "offices" are certain positions that would be *chosen* by the National Legislature, such as judges and the Treasurer. Second, those other "offices" are certain apex *elected* officials that would not be appointed. Or perhaps both readings were possible in July of 1787. But the Convention would soon foreclose both of these readings.

On August 6, 1787, the Committee of Detail reported on a draft provision in which Congress had the power "[t]o Appoint a Treasurer by ballot[.]"[165] On August 17, 1787, there was a motion to remove Congress's powers to appoint the Treasurer.[166] This motion failed.[167]

On September 4, 1787, the Committee of Eleven moved the power to appoint judges from Congress to the President, in conjunction with Senate

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159. *The Virginia Plan*, U.S. SENATE, https://www.senate.gov/civics/common/generic/Virginia_Plan_item.htm [https://perma.cc/KL74-W8XP].

160. 1 FARRAND'S RECORDS , *supra* note 21, at 21–22.

161. Jennifer L. Mascott, *Who are "Officers of the United States"?*, 70 STAN. L. REV. 443, 472 (2018) (citing 1 FARRAND'S RECORDS, *supra* note 21, at 20–22, 20 n.10).

162. 2 FARRAND'S RECORDS, *supra* note 21, at 183 (Aug. 6, 1787), 389 n.8 (Aug. 23, 1787); 392–93 (same).

163. *Id.* at 21.

164. *Id.* at 23 (emphasis added).

165. 2 FARRAND'S RECORDS, *supra* note 21, at 177, 181–82.

166. *Id.* at 315.

167. *Id.*

advice and consent.[168] That draft text now provided, "The President . . . shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors and other public Ministers, Judges of the supreme Court, and all other officers of the U.S. whose appointments are not otherwise herein provided for."[169] It appears that with this revision, the phrase "officers of the U.S." was added to the Appointments Clause.[170] And ten days later, on September 14, John Rutledge of South Carolina moved to strike out Congress's power to appoint the Treasurer.[171] That officer, Rutledge explained, should be "appointed in the same manner with other officers[]"—that is, by the President.[172] The motion passed, 8 to 3.[173]

Even if the phrase "not otherwise provided for" in the draft Appointments Clause had referred to elected officials before September 4, that possible meaning was foreclosed after September 4. Now, the phrase "other officers of the U.S." would not refer to positions filled by persons chosen by the Legislature, nor could those "other officers of the U.S." refer to elected officials. These revisions restricted the "provided for" language to those positions that would be appointed through Article II, Section 2 procedures.

Prior to the end of the Convention, two final alterations were made to the Appointments Clause. First, a comma was added between "all other officers of the U.S." and "whose appointments." Second, an additional clause was added at the end: "and which shall be established by Law." This table represents the final two revisions made to the Appointments Clause, with the changes emphasized with bold and underline.

168. *Id.* at 493, 495; Mascott, *supra* note 161, at 473.

169. 2 FARRAND'S RECORDS, *supra* note 21, at 495, 539–40.

170. Mascott, *supra* note 161, at 472 ("Drafts of the Appointments Clause did not include the expanded phrase 'officers of the U.S.' until September 4, 1787—during the late stages of the Convention.").

171. 2 FARRAND'S RECORDS, *supra* note 21, at 612, 614.

172. *Id.* at 614. Rutledge stated that the position of the Treasurer should be filled in the same manner as other officers. He did not say that the position of the Treasurer should be filled in the same manner as the position of the President is filled through the electoral college. Here, Rutledge seems to draw a distinction between the other officers and the President. We draw the inference from Rutledge's statement that he did not think the President was an "officer." *See also infra* note 408 (making a similar point about James Madison's use of "office"-language at the Federal Convention).

173. *Id.*

Before the end of the Convention	**At the conclusion of the Convention**
[The President] 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: 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.	[The President] 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.

The Appointments Clause now provided in its entirety: "[a] [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint [b] Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, [c] whose Appointments are not herein otherwise provided for, [d] *and which shall be established by Law*." We have divided the Clause into four sections: [a], [b], [c], and [d].

The word "and" is highly significant. That conjunction suggests that clauses [c] and [d] *both* modify clause [b]. Stated differently, clauses [c] *and* [d] define which positions can be an "Officer[] of the United States." Clause [c] tells us that "all other Officers of the United States" must be appointed pursuant to Article II, Section 2. The word "all" is not surplusage.[174] And clause [d] tells us these "Officers of the United States" must be "established by law." In other words, those positions—"Officers of the United States"—would be created by statute after the new Constitution came into effect. It follows that these clauses cannot refer to elected officials because such apex positions were created by the Constitution, and not by statute. Indeed, the first President, the first Vice President, and all the members of the First Congress were—quite obviously—all elected *prior* to the enactment of any federal statutes.

The addition of the comma between clauses [b] and [c], and the addition of clause [d], provide some further support for our construction of the Appointments Clause. Had these alterations not been made, we still think our

174. *See supra* Section I.A.1 (discussing surplusage canon).

reading of the Appointments Clause would be the better one. But these changes bolster our construction.

We acknowledge that the drafting history of the Appointments Clause is complicated and messy. Ultimately, we think that drafting history leans towards our position. But even if we were wrong about that history, it is the final, printed Constitution that was sent to the States for ratification, which is "our" law, not the prior drafts.[175]

C. "Officers of the United States" Can Only Be Appointed, Not Elected

Many of the Constitution's provisions that reference "Offices" and "Officers" are seldom, if ever, litigated. By contrast, the Appointments Clause has played a central role in the Supreme Court's leading separation of powers precedents. Many leading cases turn on the interaction of the Appointments Clause and the Inferior Officers Appointments Clause. *Morrison v. Olson*, for example, asked whether Alexia Morrison, as independent counsel, was a "principal officer" who must be appointed by the President and confirmed by the Senate.[176] Or, was Morrison an "inferior Officer" who could be appointed by "the Courts of Law" without Senate confirmation?[177] Additionally, *Buckley v. Valeo* considered the status of a mere "employee"—one who is neither a "principal" nor an "inferior" officer.[178] Here, however, we do not focus on the fine lines between these different types of positions.[179] Instead, we make a more foundational point: the Appointments Clause defines who are the "Officers of the United States" and, generally, how they are appointed. "Officers of the United States" can only be appointed; they cannot be elected.

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175. Manning, *supra* note 42 ("Relying on the limited mission of the Committee of Style 'would constrain us to say that the *second to last draft* [of the Constitution] would govern in every instance where the Committee of Style added an arguably substantive word.' We would be mistakenly discarding the ratified Constitution for a prior draft." (quoting Nixon v. United States, 113 S. Ct. 732, 737 (1993))).

176. Morrison v. Olson, 487 U.S. 654, 659–60 (1988).

177. *Id.* at 670–71.

178. Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) ("'Officers of the United States' does not include all employees of the United States, but there is no claim made that the Commissioners are employees of the United States rather than officers. Employees are lesser functionaries subordinate to officers of the United States, whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative authority." (citations omitted)); *cf. Morrison*, 487 U.S. at 671 n.12 ("It is clear that [the independent counsel] is an 'officer' of the United States, not an 'employee.'").

179. *See* Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an 'Officer of the United States' or an 'Employee of the United States'?*, LAWFARE (July 23, 2018, 2:50 PM), https://www.lawfareblog.com/robert-mueller-officer-united-states-or-employee-united-states [https://perma.cc/XK32-Q3JW] (concluding that under current precedent, Special Counsel Mueller was not an "Officer[] of the United States," but a mere "employee of the United States").

The Appointments Clause lists several examples of the types of "Officers of the United States" that the President can nominate, all of which are in the Executive Branch or in the Judicial Branch: "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States*." Here, we rely on the *ejusdem generis* canon: "Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned."[180] The phrase "all other *Officers of the United States*" should be read to reference the same kind of Executive- and Judicial-Branch officers that the clause enumerates. All of these positions are appointed, not elected. Furthermore, the clause does not list any appointed Legislative Branch positions, such as the Clerk of the House or the Secretary of the Senate.

Elected officials created by the Constitution—such as the President, Vice President, Senators, and Representatives—are not "Officers of the United States" per the Appointments Clause. Article II, Section 2 is exclusive—no other provision in the Constitution authorizes the appointment of "Officers of the United States." The Constitution hardwired this distinction between appointment and election.

Critics may conflate the method by which a person becomes an "Officer[] of the United States" and the way that a person becomes President, Senator, or Representative. These three positions are not filled by appointment; they are in the regular course filled by elections.[181] First, Presidents are "elected" or "chosen" by electors, and the electors "vote by ballot."[182] In other words, election is the regular mechanism for filling the presidency. Members of the House are elected.[183] Indeed, election is the exclusive mechanism for filling the position of Representative. There is no lawful mechanism by which House seats can be temporarily filled by the state executive authority. Under the Constitution's original design, Senators, though "chosen by the [state] Legislature[s,]"[184] were nonetheless still described as "elected[.]"[185] Here too, election was and remains the regular mechanism for filling the position of Senator. The Constitution distinguishes between "Officers of the United States," who are appointed to positions that are created "by law," and officials whose positions were mandated by the Constitution and are filled by election. The Seventeenth Amendment

180. SCALIA & GARNER, *supra* note 3, at 199.

181. *See supra* note 149 (discussing how the positions of the Presidency, Vice Presidency, and Senators can be temporarily filled).

182. U.S. CONST. art. II, § 1, cls. 1–3; *see supra* Section II.A.1 (discussing how the President is elected and not appointed). Between regularly scheduled elections, presidential vacancies can be filled via succession. *See, e.g.*, *id.* art. II, § 1, cl. 6; Presidential Succession Act 1947, 3 U.S.C. § 19.

183. U.S. CONST. art. I, § 2, cls. 1–2.

184. *Id.* art. I, § 3, cl. 1, *amended by, id*. amend. XVII, cl. 2.

185. *Id.* art. I, § 3, cl. 3.

confirmed this linguistic practice; now, Senators are directly "elected by the people."[186]

D. Supreme Court Precedent on the Phrase "Officers of the United States"

Our position is consistent with Supreme Court precedent. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, Chief Justice Roberts observed that "[t]he people do not vote for the 'Officers of the United States.'"[187] Rather, the Appointments Clause requires appointment of these individuals. Chief Justice Roberts reaffirmed this position in *Seila Law LLC v. CFPB*.[188] He wrote, "Article II distinguishes between two kinds of officers—principal officers (who *must be appointed* by the President with the advice and consent of the Senate) and inferior officers (whose *appointment* Congress may vest in the President, courts, or heads of Departments)."[189]

Here, we think Roberts was not precise. The Constitution does not expressly say that "principal officers . . . *must be appointed* by the President with the advice and consent of the Senate." Indeed, the text of the Appointments Clause does not distinguish between principal and inferior officers, generally. The Appointments Clause does refer to "inferior Officers," which are "Officers of the United States" but, the phrase "principal Officer" does not appear in the Appointments Clause. The phrase "principal Officer" appears in the Opinion Clause—Article II, Section 2, Clause 1.[190] When read together with the Opinion Clause, the Appointments Clause creates an inference that the Appointments Clause refers to the appointment of *principal* "Officers of the United States." However, it is not self-evident that the officers referred to in the Appointments Clause are "principal Officers."

In *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, also known as the *PROMESA* case, the Supreme

186. *Id.* amend. XVII.

187. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010) (citation omitted) (first quoting U.S. CONST. art. II, § 2, cl. 2; then citing THE FEDERALIST NO. 72, *supra* note 73, at 463); *see* United States v. Mouat, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.").

188. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2199 n.3 (2020).

189. *Id.* (emphasis added).

190. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . 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 . . . ." (emphasis added)).

Court stated that "Officers of the United States" are appointed.[191] Justice Breyer's majority opinion observed, "[T]he *Appointments Clause governs the appointments of all officers of the United States*, including those located in Puerto Rico."[192] The majority opinion repeated this conclusion in three other places.[193]

This decision largely—but not fully—supports our position. We hesitate only slightly because Justice Breyer's phrasing was less-than-unequivocal. These statements could be consistent with an alternate reading of the Appointments Clause: that there are some "Officers of the United States" who are not appointed. In other words, the Appointments Clause only refers to those "Officers of the United States" who are appointed, but there are other elected "Officers of the United States." Still, we do not think Justice Breyer was hinting at this alternate view. Instead, the Court seemed to be saying that all "officers of the United States" must be appointed pursuant to the Appointments Clause. This reading of Justice Breyer's opinion is consistent with *Free Enterprise Fund* and *Seila Law*.

Moreover, Justice Breyer largely rejected another possible reading of the phrase "Officers of the United States." He wrote that "[t]he language at issue" in the Appointments Clause "does not offer us much guidance for understanding the key term 'of the United States.'"[194] He explained, "The text suggests a distinction between federal officers—officers exercising power of the National Government—and nonfederal officers—officers exercising power of some other government."[195] But the Court rejected that simplistic distinction.[196] Rather, the dividing line between who is and is not an "Officer[] of the United States" is not a mere federal-versus-state dichotomy. We are not entirely certain what line Justice Breyer drew.

Ultimately, three precedents from the Roberts Court—*Free Enterprise Fund*, the *PROMESA* case, and *Seila Law*—partially confirm that our position is correct. And our position has deep roots in federal case law. For

191. *See generally* Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

192. *Id.* at 1654 (emphasis added).

193. *Id.* at 1656 ("But, like the Court of Appeals, we believe the *Appointments Clause restricts the appointment of all officers of the United States*, including those who carry out their powers and duties in or in relation to Puerto Rico." (emphasis added)); *id.* at 1657 ("That text [of the Appointments Clause] firmly indicates that it *applies to the appointment of all 'Officers of the United States.'* And history confirms this reading." (emphasis added)); *id.* at 1658 ("Given the Constitution's structure, this history, roughly analogous case law, and the absence of any conflicting authority, we conclude that *the Appointments Clause constrains the appointments power as to all 'Officers of the United States,'* even when those officers exercise power in or related to Puerto Rico." (emphasis added)).

194. *Id*. at 1658.

195. *Id.*

196. *Id.* at 1661.

example, in 1888, Justice Miller reached a similar conclusion with respect to a statute that used the phrase "officers of the United States."[197] He wrote,

> 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*.[198]

Longstanding Supreme Court precedent suggests that all "Officers of the United States" are appointed, not elected.[199] We are unaware that any of these cases have ever been criticized for supporting this view: i.e., that "Officers of the United States" are appointed and not elected.

In short, all "Officers of the United States," including both principal officers and inferior officers, are always appointed. This view, which the courts have regularly supported, may seem obvious and uncontroversial. But other scholars maintain that the President and the Vice President are *elected* "Officers of the United States." The position that elected federal officials are "Officers of the United States" is not new. Indeed, this alternate perspective, which we disagree with, has been articulated by some people since the framing. We will discuss this alternate perspective in the context of the Impeachment Clause.

III. THE IMPEACHMENT CLAUSE ALLOWS CONGRESS TO IMPEACH "OFFICERS OF THE UNITED STATES" (THAT IS, APPOINTED POSITIONS IN THE EXECUTIVE AND JUDICIAL BRANCHES) BUT NOT ELECTED POSITIONS OR APPOINTED POSITIONS IN THE LEGISLATIVE BRANCH

The Impeachment Clause provides that "[1] The President, [2] Vice President and [3] *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."[200] Without question, the first two positions—the President and the Vice President—can be impeached. Who falls into the third category? In our view, the phrase "Officers of the United States" has the same meaning in the Impeachment Clause as in the

197. *See generally* United States v. Mouat, 124 U.S. 303 (1888).

198. *Id.* at 307 (emphasis added).

199. *See* United States v. Smith, 124 U.S. 525, 532 (1888) ("An officer of the United States can only be appointed by the [P]resident, by and with the advice and consent of the [S]enate, or by a court of law or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the [C]onstitution . . . . What we have here said is but a repetition of what was there authoritatively declared." (citations omitted)).

200. U.S. CONST. art. II, § 4 (emphasis added).

Appointments Clause: appointed positions in the Executive and Judicial branches.

From the text of the Impeachment Clause, we conclude that the President and Vice President are not "civil Officers of the United States." The text of the Impeachment Clause, however, does not squarely foreclose the possibility that members of Congress are "civil Officers of the United States." In this section, we contend that elected federal officials, including members of Congress, are not "civil Officers of the United States" as that phrase is used in the Constitution of 1788. Thus, we argue that members of Congress are not subject to impeachment. This position is consistent with the Impeachment Clause's drafting history and practice in the Early Republic.

Our analysis begins with the text of the Impeachment Clause. Next, this section will consider the views of George Mason and Edmund Randolph at the Virginia Ratifying Convention, as well as the response from James Monroe in a Ratification-Era pamphlet. This section will also discuss the impeachment proceedings of Senator William Blount. Finally, this section will turn to a recent Supreme Court case that indirectly addressed the scope of the Impeachment Clause.

A. The Text of the Impeachment Clause

The Impeachment Clause has five elements: "[1] The President, Vice President and all civil Officers of the United States, [2] shall be removed from [3] Office [4] on Impeachment for, and Conviction of, [5] Treason, Bribery, or other high Crimes and Misdemeanors."[201] Let us consider the elements in reverse order.

The fifth element defines the types of offenses for which a person can be impeached and convicted: "Treason, Bribery, or other high Crimes and Misdemeanors." The fourth element refers to the two-step impeachment process: "The House of Representatives . . . shall have the sole Power of Impeachment[,]"[202] and "[t]he Senate shall have the sole Power to try all Impeachments."[203]

"Office," the third element, appears in the Impeachment Clause alone and without modifiers: "removed from *Office*." We think this usage of "Office" refers not only to "all civil Officers of the United States" but also refers back to "[t]he President" and the "Vice President." In other words, "Office," as used in the Impeachment Clause, refers to two categories of positions: the *elected* President and Vice President, as well as the *appointed* "Officers of the United States" in the Executive and Judicial Branches. The

201. *Id.*
202. *Id.* art. I, § 2, cl. 5.
203. *Id.* art. I, § 3, cl. 6.

word "Office," standing alone and without modifiers, has a sufficiently-wide scope to include both the expressly enumerated elected apex federal positions and appointed civilian federal positions.

We think the same interpretation applies to the word "Officer," standing alone and unmodified, in the Presidential Succession Clause. It provides, "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."[204] As used in the Succession Clause, the phrase "Officer" can refer to both elected apex federal positions and appointed federal positions. For that reason, the Speaker of the House may be placed in the statutory line of succession of the Presidency.[205] The word "Office," standing alone and unmodified, also appears in the Impeachment Disqualification Clause: "Judgment in Cases of Impeachment shall not extend further than to removal from *Office*, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States[.]"[206] We think the word "Office," standing alone and unmodified, in the Impeachment Disqualification Clause also refers to both elected apex federal positions and appointed federal positions.[207] The word "Office" in the Impeachment Disqualification Clause refers to those elected and appointed positions otherwise subject to impeachment: the President, Vice President, and "civil Officers of the United States."

The second element of the Impeachment Clause spells out the consequences for a president, a vice president, or a civil officer of the United States who is impeached and convicted: he "shall be removed from Office." Under this interpretation, if the defendant is still in his position when convicted by the Senate, then he *must* be removed. (It is impossible to remove a person from an office that he no longer holds.)

We acknowledge that there is, and has been, a long-standing, alternate, minority view—the Impeachment Clause only requires the remedy of removal for the three expressly-listed classes of positions: "[1] The President, [2] Vice President and [3] all civil Officers of the United States."[208] In other

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204. *Id.* art. II, § 1, cl. 6.

205. *See* Tillman & Blackman, *supra* note 2, at 417–24 (discussing the word "Officer" in the Succession Clause).

206. U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

207. We will study the Impeachment Disqualification Clause in more detail in Part V of this series.

208. *See* Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 66 & n.49, 98 & n.207 (1999); *see also* TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 436 (Boston, Little, Brown, & Co. 3d ed. rev. 1872) ("The general power of impeachment and trial may extend to others besides civil

words, beyond the three enumerated classes of positions, there are other categories of positions that can be impeached. These impeachable positions could include: (i) current federal officials and officers beyond the three enumerated classes; (ii) former federal officials and officers beyond the three enumerated classes; (iii) state officers; and (iv) even private persons who never held any federal position.

Under the minority view, if a person in these other categories is impeached and convicted, removal is not mandatory. Specifically, for those positions that are not expressly listed by the clause's language, the Senate has two options if a defendant is convicted: first, the Senate may remove that official if the official holds an office at the time of conviction; second, the Senate may impose a lesser punishment, such as discipline, suspension, censure, or even no punishment. For example, under this minority view, if a member of Congress were impeached and convicted, the Senate may impose removal as a punishment, but it need not do so. We think this minority view is not correct; rather, we adhere to the standard view: the Impeachment Clause should be read jurisdictionally. The provision limits the scope of impeachment to the three listed classes of positions. In any event, our discussion of the scope of the Impeachment Clause's "Office"-language is unaffected by the debate over the jurisdictional scope of the clause's language.

Again, the first element is jurisdictional—the scope of the clause extends impeachment to the President and the Vice President. Those positions are enumerated. The Impeachment Clause also extends impeachment to "all civil Officers of the United States."

We draw one more inference from the text of the Impeachment Clause. The language shifts from "Officers of the United States" to "Office," standing alone and without modifiers.

We repeat the clause in its entirety:

> 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.[209]

This shift in "Office"-language is not explained. The clause does not provide "all Civil Offices shall be removed from the Civil Office that they hold." Nor does the clause say, "all Civil Officers of the United States shall be removed from Civil Offices of the United States that they hold." It certainly does not provide, "The President, Vice President and *all other*

officers, as military or naval officers, or even persons not in office, and to other offences than those expressly requiring a judgment of removal from office . . . .").

209. U.S. CONST. art. II, § 4 (emphasis added).

Officers, shall be removed from the civil *Offices of the United States which they hold*." We think this shift in language is meaningful: there is a reason why the language changes. (Likewise, the Impeachment Disqualification Clause uses a similar linguistic shift with its "Office"-language.) The Impeachment Clause reaffirms our conclusion that "Officers of the United" is not synonymous with "Office"—the two categories used in the text of this clause. The framers used these phrases to refer to different and distinct categories of positions. Simply put, the word "Office" is broad. This word encompasses the expressly enumerated elected apex federal positions, such as the President and the Vice President, which are expressly referenced in the Impeachment Clause. The word "Office" also encompasses "civil Officers of the United States." The latter language, which appears in the Impeachment Clause, includes appointed civilian federal positions.

Akhil Reed Amar and Vikram David Amar took a different position. They concluded that the word "Officer," as used in "the Succession Clause, is merely shorthand for any of the[] . . . longer formulations" of the Constitution's "Office"- and "Officer"-language, such as "Officers of the United States" and "Office . . . under the United States."[210] The Amars' position is in tension with the text of the Impeachment Clause, as read in conjunction with the Succession Clause. This latter provision uses "Officer," standing alone and without modifiers. The unmodified words "Office" and "Officer" are not coextensive, much less shorthand for "Officers of the United States" and "Office . . . under the United States." Textually, these unmodified phrases refer to a *broader* category of positions that can include elected and appointed federal positions.

B. The President and Vice President Are Not "Civil Officers of the United States" for Purposes of the Impeachment Clause

Our position is that the President and Vice President are not "Officers of the United States." The text of the Impeachment Clause provides further support for our view. If the President were an "Officer[] of the United States," there would have been no need to enumerate that position separately. It would have been sufficient to simply write that "all civil Officers of the United States" can be impeached. But the framers specifically enumerated the President and Vice President. That precise text should be given meaning. We should avoid any reading of the Impeachment Clause that renders the enumeration of the President as surplusage.[211] This same reasoning applies to the Impeachment Clause's enumeration of the vice presidency.

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210. Amar & Amar, *supra* note 44, at 115.

211. *See* Section I.A.1 (discussing surplusage canon).

Our textualist argument here is not novel. Justice Story advanced it two centuries ago.[212] Story explained in his *Commentaries on the Constitution* that if the President and Vice President were "Officers of the United States," then the framers should have written the Impeachment Clause differently: "The President, Vice President and all *other* civil Officers of the United States."[213] But the framers did not choose this construction. According to Story, the exclusion of the word *other* "lead[s] to the conclusion, that [the President and the Vice President] were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States."[214] The Latin maxim *Expressio unius est exclusio alterius* is apt: the expression of one thing is the exclusion of the other. Stated simply, the enumeration of the President and Vice President implies that they were not embraced in the term "Officers of the United States."

Story published his *Commentaries on the Constitution* in 1833. At the time, Madison's records of the federal convention had not yet been made public. These documents, which recorded the Constitution's drafting history, would be published in 1840, a few years after Madison's death.[215]

Today, we know what Story did not know in 1833. According to Madison's records and other records from the Convention, Story's inference is well supported by the Constitution's drafting history. We now know that early drafts of the Impeachment Clause included the word "other" at precisely this location, but that word was removed by the Committee of Style.[216]

The Impeachment Clause also limits what types of "Officers of the United States" can be impeached. Not all "Officers of the United States" are subject to impeachment. Rather, the provision refers to "all *civil* Officers of the United States."[217] The limitation to "civil" officers reflects the fact that military officers cannot be impeached; instead, they are subject to court martial. Again, Justice Story explained in his *Commentaries on the Constitution* that the phrase "*civil* Officers" in the Constitution "seems to be in contradistinction to military."[218] Both the President and Vice President are

212. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 791, at 260 (Boston, Hilliard, Gray, & Co. 1833).

213. *Id.*

214. *Id.*

215. *See* 1 FARRAND'S RECORDS, *supra* note 21, at xv.

216. *See supra* Section I.A.3.c (discussing drafting history of the Impeachment Clause).

217. U.S. CONST. art. II, § 4 (emphasis added).

218. 2 STORY, *supra* note 212, at 258 ("The sense, in which the term [civil] is used in the constitution, seems to be in contradistinction to *military*, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service of the government.").

civil officers.[219] Even as Commander in Chief, the President is still a civilian official with control over the military. And in no sense is the Vice President a military officer. Indeed, we are unaware of any early source that characterized the Vice President as a military officer.

There is a symmetry between the Appointments Clause and the Impeachment Clause. Officers of the United States appointed through the Appointments Clause can be impeached through the Impeachment Clause. But positions which are not filled through Article II, Section 2 procedures are not "Officers of the United States," and such officers cannot be impeached through the Impeachment Clause. The President and Vice President are not appointed at all; they are elected. As such, they are not "Officers of the United States." The President and Vice President can only be impeached *because* their positions are expressly enumerated in the Impeachment Clause. They cannot be impeached under the aegis of the Impeachment Clause's "Officers of the United States"-language.

C. Congressional Impeachment Practice During the Early Republic is Consistent with Our View That Members of Congress Are Not "Officers of the United States" and, Therefore, Are Not Subject to Impeachment

The Constitution provides a specific mechanism to expel members of Congress. The Rules of Proceedings Clause states, "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*."[220] In the normal course of House business, the Rules of Proceedings Clause does not permit the House to discipline a Senator. Nor can the Senate, in the

219. *See id.* at 259–60 (noting, e.g., that the President, even as Commander in Chief, is still a civil officer). In the Early Republic, the Treasury prepared rolls of federal officials and officers with their compensation. The President was included in the "civil list" and not in the military list. *See e.g., Report on the Estimate of the Expenditure for the Civil List and the War Department to the End of the Present Year* (Sept. 19, 1789), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-05-02-0162-0001 [https://perma.cc/EY2C-867F].

220. U.S. CONST. art. I, § 5, cl. 2 (emphasis added). The text of the Constitution suggests that the House can expel a Representative if two-thirds of the members voting cast a vote for expulsion, provided that a quorum is present. And the Senate can vote to expel a Senator with the same two-thirds vote. Nonvoting members, such as those who indicate that they are "present," do not count in the "denominator." By contrast, pursuant to the Senate Trial Clause, "two thirds of the Members *present*" are required to convict; thus, members who indicate that they are present would count in the "denominator." In other words, conviction under the Senate Trial Clause requires a higher threshold than does expulsion under the Rules of Proceedings Clause. Under the Senate Trial Clause, nonvoting members, such as those who indicate that they are "present," *do* count in the denominator, thereby increasing the number of votes necessary to convict. By contrast, under the Rules of Proceedings Clause, nonvoting members *do not* count towards expulsion, nor do they affect the number of votes necessary to expel. Thus, it is easier to expel than to convict. In other words, all things being equal, the Senate will require more votes to convict than to expel.

normal course of business, discipline a Representative. Perhaps in an unusual circumstance, a member of one house could be sanctioned by the other house; for example, if a Representative entered the Senate chamber and violated Senate rules. Perhaps the most famous such incident occurred in 1856 when Representative Preston Brooks caned Senator Charles Sumner in the Senate chamber.[221] Following that infamous altercation, the Senate took no action against Brooks, and the expulsion vote in the House failed.[222] But such a breach of rules has been exceedingly rare. Generally, there is a separation of powers between the two houses. This separation reflects the principle of cameral autonomy—each house manages its own affairs and its own members.[223]

Since the Framing, a minority view has maintained that there is an alternate path by which members of Congress can be removed: impeachment and conviction. Under this view, Representatives and Senators are "civil Officers of the United States." And, under this view, the House, by a majority vote, could impeach a Representative or a Senator. Then, following this impeachment vote, the Senate would hold an impeachment trial, trying a member of its own house or the other house.

This section will consider two episodes in American history that bear on two related questions. First, is a member of Congress an "Officer[] of the United States"? Second, can a member of Congress be impeached? To answer these questions, we will study statements made by George Mason and Edmund Randolph during the Virginia Ratifying Convention. Next, we will revisit the impeachment proceedings for Senator William Blount—the first and only time a House majority impeached a member of Congress. On balance, the history of the Impeachment Clause and the history of early impeachment practice are consistent with our view: members of Congress are not "Officers of the United States," and members of Congress are not subject to impeachment.

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221. *See The Caning of Senator Charles Sumner,* U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm [https://perma.cc/R5KX-H3SP].

222. *Roll Call Tally on the Expulsion of Preston Brooks*, U.S. HOUSE OF REP., https://history.house.gov/HouseRecord/Detail/15032449726 [https://perma.cc/4YAH-ZCFA] ("[T]he House did not achieve the two-thirds vote necessary to strip Brooks of his seat, with 121 Members voting to expel him and 95 voting against removal.").

223. *See* United States v. Munoz-Flores, 495 U.S. 385, 395 (1990) ("Provisions for the separation of powers within the Legislative Branch are thus not different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty."); *id*. at 394 ("What the Court has said of the allocation of powers among branches is no less true of such allocations within the Legislative Branch." (citing INS v. Chadha, 462 U.S. 919, 948–51 (1983))). Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 1001 (2007) ("[C]ameral autonomy is likewise a critical structural feature of our plan of government.").

1. George Mason, Edmund Randolph, and James Monroe's Positions During the Ratification Era

In 1787, George Mason and Edmund Randolph both attended the Philadelphia Convention. But neither delegate signed the Constitution.[224] In 1788, both Mason and Randolph attended Virginia's state ratifying convention.[225] At the state convention, Randolph stated that Senators "may also be impeached. There are no better checks upon earth."[226] Mason noted that the House of Representatives should impeach a Senator who ratified a treaty because of "bribery and corruption."[227]

Neither Virginian expressly stated that members of Congress were "civil Officers of the United States." But we can reasonably infer they held this view. The two Virginians likely contended that the Constitution's "Office"- and "Officer"-language referred to appointed and elected positions, including Representatives and Senators, and by implication, to the President and the Vice President.[228]

The Virginians also contended that the President was subject to the Foreign Emoluments Clause. That provision extends to those who hold an "Office . . . under the United States." Mason worried that foreign governments could exert pressure on the American President. He said, "This very executive officer may, by consent of Congress, receive a stated pension from European potentates."[229] In other words, Mason understood that the President was subject to the Foreign Emoluments Clause because the presidency was an "Office . . . under the United States." Randolph expressed a similar view. He added that the President "is restrained from receiving any present or emolument whatever. It is impossible to guard better against corruption."[230] Like Mason, Randolph assumed that the President held an "Office . . . under the United States." Again, in their view, the Constitution's "Office"- and "Officer"-language referred to appointed and elected positions. (We will revisit the scope of the Foreign Emoluments Clause in Part V of this series.) Randolph and Mason were early proponents of what we describe as the Maximalist View.[231]

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224. Martin Kelly, *Constitutional Convention: The History and Delegates Who Attended,* THOUGHTCO. (Jan. 2, 2021), https://www.thoughtco.com/constitutional-convention-105426 [https://perma.cc/748C-PP2E].

225. *See* 3 ELLIOT'S DEBATES, *supra* note 65, at 402.

226. *Id.* at 202.

227. *Id.* at 402.

228. *See id.* at 486 (Mason and Randolph asserted that the President was subject to the Foreign Emoluments Clause, from which one may infer that they believed the President held an "Office . . . under the United States").

229. *Id.* at 484.

230. *Id.* at 486.

231. *See* Tillman & Blackman, *supra* note 2, at 369–85 (discussing the Maximalist View).

The office-maximalist views of Mason and Randolph did not pass unnoticed. At the time, one prominent critic saw their view as inconsistent with the constitutional text. James Monroe objected in 1788. This ratifier and future president observed "that the Senators are not impeachable, and therefore Governor Randolph's objection falls to the ground."[232] Monroe concluded, "I am surprised that a man of that gentleman's abilities should have fallen into this mistake."[233]

Mason's and Randolph's views were not frivolous. But we do not think that Mason and Randolph exemplify the best view of the Constitution's original public meaning. In some regards, they were outliers. They both attended the Philadelphia Convention, but neither was willing to sign the Constitution. Mason said that "he would sooner chop off his right hand than put it to the Constitution as it now stands."[234] In particular, he objected to the "aristocratic" Senate.[235] Pauline Maier wrote that Mason was the "[o]nly . . . delegate [who] left the convention with a tarnished reputation[,]" as he "was said to have behaved with less good temper than [Patrick] Henry."[236] Randolph agreed with Mason and "thought the Senate was too powerful[.]"[237] Perhaps it is not surprising, then, that Mason and Randolph both thought Senators could be impeached. Mason ultimately voted against ratification at the Virginia convention; Randolph voted in favor of ratification.[238]

A decade later, Congress would consider whether a Senator could be impeached.

2. The Blount Impeachment Proceedings

In nearly 250 years of American history, only one member of Congress has been impeached. In 1797, the House of Representatives impeached Senator William Blount. During the Senate impeachment trial proceedings, one of Blount's attorneys argued that the phrase "Officers of the United States" did not encompass members of Congress. The attorney argued that Senators, who were not appointed pursuant to the Appointments Clause, could not be impeached.

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232. JAMES MONROE, *nom de plume* A NATIVE OF VIRGINIA, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT (Hunter & Prentis 1788), *in* 1 THE WRITINGS OF JAMES MONROE: 1778–1794, at 361 (Stanislaus Murray Hamilton ed., N.Y.C., G.P. Putnam's Sons 1898).

233. *Id.*

234. 5 ELLIOT'S DEBATES, *supra* note 65, at 502.

235. MAIER, *supra* note 82, at 43.

236. *Id.* at 311 (comparing Henry's and Mason's temperament). Patrick Henry was not at the Constitutional Convention, and Maier did not suggest otherwise.

237. *Id.* at 44.

238. DAVID L. PULLIAM, THE CONSTITUTIONAL CONVENTIONS OF VIRGINIA FROM THE FOUNDATION OF THE COMMONWEALTH TO THE PRESENT TIME 37–38 (1901).

After the lawyers concluded their opening speeches, the Senate, sitting as a court of impeachment, terminated the proceedings on a pure question of law. The Senate determined that "this Court ought not to hold jurisdiction."[239] And the Senate voted down a resolution stating that "Blount was a civil officer of the United States within the meaning of the Constitution of the United States, and therefore liable to be impeached by the House of Representatives[.]"[240] On balance, the Senate's vote—among all senators, framers, and ratifiers—was broadly consistent with our view that members of Congress are not "civil Officers of the United States."

a. The House of Representatives Impeached Senator Blount

In 1797, the House of Representatives impeached Senator William Blount of Tennessee.[241] Though this vote was held barely a decade after the Constitution was signed, only three Representatives in the Fifth Congress had attended the Philadelphia Convention: Abraham Baldwin of Georgia, Jonathan Dayton of New Jersey, and Richard Dobbs Spaight of North Carolina.[242] (Fifty-five delegates attended the Philadelphia convention, of whom only thirty-nine signed the Constitution.[243]) Dayton was the Speaker of the House, and the House selected Baldwin as an impeachment manager, but he was later excused.[244]

The House did not record a roll call vote on the final vote to impeach Blount. Buckner F. Melton, Jr. observed that "House votes by roll are so scarce as to make quantitative analysis of them meaningless."[245] Therefore, we do not know how each member actually voted on the resolution. It is reasonable to infer most of the Representatives concluded that Senators were "Officers of the United States." However, there may be another way to understand the proceedings.

The House did not vote on whether a senator was a "civil Officer[] of the United States." Indeed, the House's articles of impeachment did not refer to Blount as an "Officer[] of the United States." Instead, the articles of impeachment referred to Blount as a "senator" or one who holds a "trust and

239. *See* 8 ANNALS OF CONG. 2319 (1799) (adopting resolution on January 11, 1799).

240. *Id.* at 2318.

241. 7 ANNALS OF CONG. 459–62 (1797).

242. *See* CLIFFORD P. REYNOLDS, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774–1961, at 58–60 (U.S. Govt. Print Off. 1962).

243. *Meet the Framers of the Constitution*, NAT'L ARCHIVES (Mar. 16, 2020), https://www.archives.gov/founding-docs/founding-fathers [https://perma.cc/QYH6-ULK4].

244. 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 651 (1907).

245. BUCKNER F. MELTON, JR., THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT, app. 3 (1999).

station."[246] We think this language indicates the House may have punted on the precise question of whether a Senator was an "Officer[] of the United States"—in effect, the House let the Senate determine the legal issues: the precise status of a Senator and the amenability of a Senator to impeachment. In 1864, Senator James Asheton Bayard Jr. of Delaware understood the articles of impeachment in the same fashion.[247] The House may have left the legal determination for the Senate to make. It is common enough for a prosecutor to bring a prosecution based on the facts, where the law is unsettled, and leave the legal determination for the courts and, perhaps, a jury. Here, the Senate was constituted as a High Court of Impeachment.

b. The Blount Proceedings Begin in the Senate

Adversarial Senate impeachment trial proceedings with counsel began in 1798.[248] One of Senator Blount's defense attorneys, Jared Ingersoll, argued that members of Congress are not "Officers of the United States" and also opined on the presidency. Our view is generally consistent with Ingersoll's view: the phrase "Officers of the United States" did not refer to elected officials.

First, Ingersoll endorsed the position that the President is not an "Officer[] of the United States." He remarked, "that the President, in the constitution, is always designated by the appropriate term of office, and never

246. 7 ANNALS OF CONG. 499–502 (1798). There is another possibility. Some House members voted in favor of Blount's impeachment because they adhered to the minority view: the House Impeachment Clause is not jurisdictional, but only provides for mandatory removal of defendants convicted by the Senate for those holding the expressly enumerated positions. Positions that are not enumerated could be impeached, but would not be subject to mandatory removal, and could receive some lesser sanction. Members of the House are not enumerated in the House Impeachment Clause. Thus, under the minority view, representatives would be subject to impeachment, regardless of whether they were "Officers of the United States." If this were the House members' position, then they need not have considered the issue raised here: Are members of Congress "Officers of the United States"? *See supra* note 208 (collecting authority).

247. CONG. GLOBE, 38th Cong., 1st Sess. 37 (1864) (statement of Sen. Bayard: "Each article, after alleging the act which was charged as a misdemeanor, concluded in this form—that it was contrary to the *trust and station of a Senator*. The House of Representatives did not venture in their articles of impeachment, formally drawn by so able a lawyer, to designate the position of a Senator as an office. Is that no authority? Is it not entitled to some weight? The articles were skillfully drawn, with technical accuracy and precision in the statement of the alleged misdemeanor, and every article concluded with the allegation that the act was contrary to the duties of *his trust and station as a Senator of the United States*." (emphasis added)). We will revisit Bayard's arguments with respect to the phrase "office . . . under the United States" in more detail in Part IV of this series.

248. *Impeachment Trial of Senator William Blount, 1799*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-blount.htm [https://perma.cc/TY7Z-S8NS].

included under the expression of officer of the United States, or any generic term."[249]

Second, Ingersoll contended the phrase "Officers of the United States" is different from the phrase "Office . . . under the United States." He explained, "[t]he expression [in the Appointments Clause] is not, that the President shall appoint all officers holding *under* the United States, but all officers *of* the United States."[250] Ingersoll did not view "Officers *of* the United States" and "Office *under* the United States" as synonymous.

Finally, Ingersoll stated the phrase "civil Officers of the United States" in the Impeachment Clause referred to the *same* "Officers of the United States" referenced in the Appointments Clause. He noted, "Three characteristics distinguish the objects of impeachment"[251]—that is, the "civil Officers of the United States." Ingersoll excluded from those "objects of impeachment" the "President and Vice-President, who are specially designated, instead of being included under any general denomination."[252] First, the "objects of impeachment . . . are appointed by the President, with the advice of the Senate." That is, the same "Officers of the United States" who are appointed pursuant to the Appointments Clause are also the "civil Officers of the United States" who are subject to impeachment. Second, the "objects of impeachment," the "Officers of the United States," are "commissioned by the president." The Commissions Clause, which we will analyze in Section IV, provides the President "shall Commission all the *Officers of the United States*."[253] Under Ingersoll's reading of the constitutional text, only those appointed pursuant to the Appointments Clause receive commissions. It would seem to follow that Ingersoll understood the phrase "Officers of the United States" to have the same meaning in the Appointments Clause, the Impeachment Clause, and the Commissions Clause. Third, the "objects of impeachment," the "Officers of the United States," are "civil, in contradistinction to military officers." Justice Story reached similar conclusions in his *Commentaries on the Constitution*.[254] Story understood the *Blount* proceedings to support the conclusion that

249. PROCEEDINGS ON THE IMPEACHMENT OF WILLIAM BLOUNT, A SENATOR OF THE UNITED STATES FROM THE STATE OF TENNESSEE, FOR HIGH CRIMES AND MISDEMEANORS 70 (Philadelphia, Joseph Gales 1799).

250. *Id.* (emphases added).

251. *Id.*

252. *Id.*

253. U.S. CONST. art. II, § 3 (emphasis added).

254. *See supra* Section III.A (discussing Joseph Story's views and how the President holds a civil office).

members of Congress were not "civil officers" and were not subject to impeachment.[255]

Ingersoll's position, like Monroe's response to Randolph, provides a textual rejoinder to the office-maximalist view. More importantly, Monroe, Ingersoll, and Story put forward reasoned arguments showing how their reading flowed from the constitutional text. On the other hand, Mason and Randolph only offered a conclusion, with no analysis, voiced in a single, fast-moving ratification debate. Additionally, the House of Representatives did not expressly vote on whether a senator was an "Officer[] of the United States."

Ingersoll's arguments should carry some weight. Ingersoll was a delegate to the Continental Congress and attended the Philadelphia Convention.[256] After ratification, Ingersoll served in Congress and chaired the House Judiciary Committee.[257] Ingersoll later served as Pennsylvania Attorney General and U.S. Attorney for the Eastern District of Pennsylvania.[258] He also served as counsel in two landmark Supreme Court cases: *Chisholm v. Georgia*[259] and *Hylton v. United States*.[260] More importantly, in our view, Ingersoll finished his legal education at the Middle Temple in London.[261] He was likely familiar with British drafting conventions like "office under the Crown."[262] We are not surprised that Ingersoll distinguished between the phrase "Officers of the United States" and the phrase "Office . . . under the United States."

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255. 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., Boston: Little, Brown, & Co. 5th ed. 1891) (1833).

256. *See Ingersoll, Jared*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, https://history.house.gov/People/Listing/I/INGERSOLL,-Jared-(I000018)/ [https://perma.cc/8GGZ-5J2P].

257. *Id.*

258. *Id.*

259. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) ("And now Ingersoll, and Dallas, presented to the Court a written remonstrance and protestation on behalf of the State, against the exercise of jurisdiction in the cause; but, in consequence of positive instructions, they declined taking any part in arguing the question.").

260. *See* Hylton v. United States, 3 U.S. (3 Dall.) 172 (1796) ("The cause was argued at this term, by Lee, the Attorney General of the United States, and Hamilton, the late Secretary of the Treasury, in support of the tax; and by . . . Ingersoll, the Attorney General of Pennsylvania, in opposition to it.").

261. Gordon Lloyd & Jeff Sammon, *The Educational Background of the Framers*, TEACHING AMERICAN HISTORY, https://teachingamericanhistory.org/resource/convention/delegates/education/ [https://perma.cc/UYV6-EEGU].

262. *See supra* Section I.C (discussing prominent framers who attended the four Inns of Court in London).

We do not put forward Ingersoll as a high authority. After all, he was a litigator defending a client. Rather, we discuss his statements to show that shortly after the founding, prominent attorneys in important proceedings made sophisticated arguments based on the Constitution's divergent "Office"- and "Officer"-language. We approach the phrase "Officers of the United States" the same way Ingersoll and others have approached this phrase. Our view is not a new one.

c. The Blount Proceedings Concludes in the Senate

Senate proceedings concluded in 1799. Sitting as a court of impeachment, the Senate terminated the proceedings on a pure question of law, finding that "this Court ought not to hold jurisdiction."[263] Prior to terminating the case, the Senate considered a resolution that addressed the precise question that the House declined to address: was "William Blount . . . a civil officer of the United States within the meaning of the Constitution of the United States, and therefore liable to be impeached by the House of Representatives[.]"[264] On January 10, 1799, the resolution was rejected by a vote of 11 to 14.[265] The *aye* votes were from Senators Nathaniel Chipman (VT), Franklin Davenport (NJ), Benjamin Goodhue (MA), Henry Latimer (DE), Samuel Livermore (NH), James Lloyd (MD), Elijah Paine (VT), James Ross (PA), Theodore Sedgwick (MA), Richard Stockton (NJ), and Uriah Tracy (CT).[266] The *no* votes were from Senators Joseph Anderson (TN), William Bingham (PA), Timothy Bloodworth (NC), John Brown (KY), Theodore Foster (RI), Ray Greene (RI), James Gunn (GA), James Hillhouse (CT), John Eager Howard (MD), John Langdon (NH), Humphrey Marshall (KY), Alexander Martin (NC), Stevens T. Mason (VA), and Jacob Read (SC).[267]

Two of those twenty-five Senators had attended the Philadelphia Convention: John Langdon of New Hampshire[268] and Alexander Martin of North Carolina.[269] Both framers voted *no*. Senator William Blount also had attended the Philadelphia Convention as a delegate from North Carolina and presumably would have opposed the resolution had he voted.

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263. *See* 8 ANNALS OF CONG. 2319 (1799).
264. *Id.* at 2318–19 (adopting resolution on January 11, 1799).
265. *Id.* at 2318.
266. *Id.*
267. *Id.*
268. ROBERT K. WRIGHT, JR. & MORRIS J. MACGREGOR, JR., SOLDIER-STATESMEN OF THE CONSTITUTION 100–02 (John W. Elsberg ed., 1987).
269. *Meet the Framers of the Constitution*, NAT'L ARCHIVES (Mar. 16, 2020), https://www.archives.gov/founding-docs/founding-fathers [https://perma.cc/T6X4-FKYU].

Six of those twenty-five Senators were members of their state's ratification conventions. Four of the six ratifiers voted against the resolution: Humphrey Marshall and Stevens T. Mason of Virginia,[270] Timothy Bloodworth of North Carolina,[271] and (once again) John Langdon of New Hampshire.[272] (Alexander Martin of North Carolina, who attended the federal convention, was not a member of his own state's convention.[273]) Two of the six ratifiers voted for the resolution: Samuel Livermore of New Hampshire[274] and Theodore Sedgwick of Massachusetts.[275]

To summarize, sitting as a court of impeachment, the Senate terminated the proceedings on a pure question of law, finding that "this Court ought not to hold jurisdiction."[276] A majority of the Senate voted against the resolution stating that a Senator was an "officer of the United States." The two attendees of the Philadelphia Convention in the Senate voted against the resolution. And among the six Senators who attended state ratification conventions, four voted against the resolution.

To this day, there remains an academic debate about whether Senators or Representatives can be impeached. There is also some debate about what precisely the *Blount* Senate impeachment trial proceedings resolved. We need not weigh in on those disputes. Today, the consensus view is that Representatives and Senators are not "civil Officers of the United States" and cannot be impeached precisely because the *Blount* case settled this issue. We cannot find even one court that has suggested otherwise or suggests that this issue might be or should be reopened. We think the current consensus view is correct as a matter of original public meaning. Moreover, arguably, this position has been liquidated. Since the *Blount* case (1797–1799), a House majority has not successfully impeached a member of the House or Senate.[277] Perhaps efforts in the other direction have been attempted, but we are not aware of any instances in which a member, post-*Blount*, launched even an

270. *See* VIRGINIA RATIFYING CONVENTION JOURNAL 1–2 (Aug. Davis ed., 1788).

271. *See* JOURNAL OF THE CONVENTION OF N.C., 1789, *reprinted in* 22 THE STATE RECORDS OF NORTH CAROLINA 36–38 (Walter Clark ed., 1907).

272. *See* RATIFICATION OF THE CONSTITUTION BY THE STATE OF NEW HAMPSHIRE, *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1024–27 (1927).

273. *See* Jonathan Murray, *Alexander Martin (1740–1807)*, N.C. HIST. PROJECT, https://northcarolinahistory.org/encyclopedia/alexander-martin-1740-1807/ [https://perma.cc/9SSL-HNQL].

274. 6 THE DIARIES OF GEORGE WASHINGTON, JANUARY 1790–DECEMBER 1799, at 2–4 (Donald Jackson & Dorothy Twohig eds., 1979).

275. *Representative Theodore Sedgwick*, FIRST FED. CONG. PROJECT, https://www2.gwu.edu/~ffcp/exhibit/p1/members/reps/sedgwick.html [https://perma.cc/N57Q-T6LE].

276. 8 ANNALS OF CONG. 2318–19 (1799) (adopting resolution on January 11, 1799).

277. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3, 5 (2019).

unsuccessful effort to impeach a Representative or Senator, and if that effort resulted in a recorded vote. The modern consensus view, based on more than two centuries of uninterrupted practice, is that members of Congress are not subject to impeachment.

Then, and now, reasonable people can disagree about who is an "Officer[] of the United States" for purposes of the Impeachment Clause.[278] But we need not resolve this robust and longstanding debate about the *Blount* case here. Instead, on balance, our view is broadly consistent with the Senate's vote—among all senators, framers, and ratifiers—that members of Congress are not "civil Officers of the United States."

D. The Supreme Court and the Impeachment Clause

The Supreme Court has not directly opined on the meaning of the phrase "Officers of the United States" in the Impeachment Clause. Still, the Supreme Court has indirectly addressed this issue. In 2020, the Supreme Court decided the *PROMESA* case concerning the Puerto Rico Oversight, Management, and Economic Stability Act.[279] This case held that certain territorial officers were not "Officers of the United States" and thus were not subject to the requirements of the Appointments Clause.[280] The Court interpreted the phrase "Officers of the United States" in the Appointments Clause in isolation. In other words, the Court *only* considered the meaning of the phrase "Officers of the United States" in the Appointments Clause.[281]

Justice Breyer wrote the majority opinion in the *PROMESA* case. He did not read the phrase "Officers of the United States," which appears in several clauses of the Constitution, *intratextually*. Akhil Reed Amar identified this methodology.[282] With intratextualism, Amar explained, "the interpreter [should] tr[y] to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same

278. *See* MELTON, JR., *supra* note 245, at 428 (arguing that *Blount* proceedings did not conclusively determine that members of Congress were not impeachable); *see also* Kat Eschner, *This 1797 Impeachment Has Never Been Fully Resolved,* SMITHSONIAN MAGAZINE (July 7, 2017), https://www.smithsonianmag.com/smart-news/1797-impeachment-has-never-been-fully-resolved-180963926/ [https://perma.cc/FX7E-RXZS].

279. *See generally* Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020); *see also supra* note 191 and accompanying text.

280. *See Fin. Oversight & Mgmt. Bd*., 140 S. Ct. at 1665 ("We conclude, for the reasons stated, that the Constitution's Appointments Clause applies to the appointment of officers of the United States with powers and duties in and in relation to Puerto Rico, but that the congressionally mandated process for selecting members of the Financial Oversight and Management Board for Puerto Rico does not violate that Clause.").

281. *Cf. id*. at 1658 ("If they are not officers of the United States, but instead are some other type of officer, the Appointments Clause says nothing about them.").

282. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 747 (1999).

(or a very similar) word or phrase."[283] We agree with this general approach. We think intratextualism is consistent with original public methods originalism. Moreover, Amar illustrates that early Supreme Court decisions relied on this methodology. These practices support the conclusion that the Constitution's framers, ratifiers, and the wider public, would have likely expected the federal judiciary to use intratextualism.

The *PROMESA* Court did not consider how its decision would affect the interpretation or scope of other provisions of the Constitution that also use the phrase "officers of the United States."[284] We describe the Court's approach as the Clause Bound View.[285] Justice Breyer's majority opinion effectively narrowed the scope of the Impeachment Clause. That clause also applies to "Officers of the United States." As a result of the majority's analysis, certain presidentially-appointed territorial officers would not be considered "officers of the United States" and thus could not be impeached for bribery, treason, or any other high crime or misdemeanor.[286]

We suspect the members of the *PROMESA* Court did not recognize how their decision would limit the scope of the Impeachment Clause.[287] The Court did not consider other constitutional provisions. Therefore, it is unsurprising that the *PROMESA* Court put forward no analysis whether these territorial officers were subject to the Impeachment Clause. Indeed, the Court's holding is in tension with a 1796 Attorney General Opinion, which concluded that territorial judges could be impeached.[288] The Court failed to consider the full implications of its decision to distinguish so-called "territorial officers" from "Officers of the United States."

Had the Court considered the interplay between the Appointments Clause and the Impeachment Clause—that both clauses apply to "Officers of the United States"—the Court may have hesitated before concluding that certain territorial officers were not "Officers of the United States." The Court

283. *Id.* at 748.

284. *See* Josh Blackman & Seth Barrett Tillman, *The PROMESA Board Members Are Not "Officers of the United States." So What Are They?*, VOLOKH CONSPIRACY (June 10, 2020, 2:31 PM), https://reason.com/volokh/2020/06/10/the-promesa-board-members-are-not-officers-of-the-united-states-so-what-are-they/# [https://perma.cc/FRC6-AE3V].

285. *See* Tillman & Blackman, *supra* note 2, at 425–29 (discussing Clause Bound view).

286. *See* U.S. CONST. art. II, § 4 ("The President, Vice President and all civil *Officers of the United States*, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." (emphasis added)).

287. *See* Josh Blackman & Seth Barrett Tillman, *Justice Breyer made it impossible for Congress to impeach territorial officers for accepting bribes*, BALKINIZATION (July 14, 2020), https://balkin.blogspot.com/2020/07/justice-breyer-made-it-impossible-for.html [https://perma.cc/UTL2-9VBY].

288. Letter from Charles Lee, Att'y Gen., to the U.S. House of Representatives (May 9, 1796), *in* 1 AM. STATE PAPERS: MISCELLANEOUS 151 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales and Seaton 1834).

brought about these results by using a clause-bound approach that ignored intratextual consequences. The Constitution's text has a Newtonian quality to it. Every action has an equal and opposite reaction. The Court should not focus on a single provision at a time.[289] In short, excluding an officer position from the scope of the Appointments Clause will, by implication, exclude that position from the scope of the Impeachment Clause.

IV. THE COMMISSIONS CLAUSE

Article II, Section 3 provides that the President "shall Commission all the *Officers of the United States*."[290] This provision imposes an obligation on the President: to issue a commission that memorializes the completed appointment. In our view, the phrase "Officers of the United States" in the Commissions Clause has the same meaning as the phrase "Officers of the United States" in the Appointments Clause and in the Impeachment Clause. The "Officers of the United States" appointed pursuant to the Appointments Clause are commissioned by the President pursuant to the Commissions Clause. And all of those "Officers of the United States" can be impeached pursuant to the Impeachment Clause. Over the course of nearly 250 years, presidents have consistently commissioned appointed positions in the Executive and Judicial Branches that the President has personally appointed. However, there is not a similarly consistent tradition of presidents' commissioning those inferior officers who are appointed by the heads of departments or the courts pursuant to the Inferior Officers Appointments Clause.

But there is no evidence that the President has ever commissioned any elected officials. The President has never commissioned himself—the incumbent President—or his successor. The President has never commissioned the Vice President with whom he was elected or that Vice President's successor. The President has never commissioned any members of Congress.

The text and history of the Commissions Clause support our view that the phrase "Officers of the United States" does not extend beyond the appointed positions in the Executive and Judicial Branches. Moreover, this text and history further support our view that the phrase "Officers of the United States" does not include any elected or appointed positions in the Legislative Branch.

289. *Id.*
290. U.S. CONST. art. II, § 3 (emphasis added).

A. The Text of the Commissions Clause Obligates the President to Grant Commissions to "All" Officers of the United States

The Constitution does not define what a "Commission" is. The term commission, as used in the Commissions Clause, is generally understood to mean some act taken by the President, or, perhaps, under his direction, that produces a written record or evidence of an appointment. *Black's Law Dictionary* offers a definition of "commission" that traces to the Fourteenth Century: "A warrant or authority, from the government or a court, that empowers the person named to execute official acts[.]"[291] *Marbury v. Madison* teaches that the President's obligation to commission "all the officers of the United States" does not require actual delivery of that document.[292] Rather, "[t]he last act to be done by the President," according to that canonical case at least, "is the signature of the commission."[293] Congress can, by law, specify a different "last act" to memorialize the completed appointment.[294] The term "Commission" is also used in the Recess Appointments Clause.[295] For a recess appointment, the commission is the appointment. For a "regular" appointment, the appointment precedes the commission. We will discuss the Recess Appointments Clause in more detail in Section VI.

The Commissions Clause does not appear in the same section of the Constitution as the Appointments Clause, Article II, Section 2, which establishes the mechanism to appoint "Officers of the United States."[296] Rather, the Commissions Clause appears in the following section, Article II, Section 3, which lists some of the President's other significant responsibilities, duties, and powers.[297] For example, the President "shall from time to time give to the Congress Information of the State of the Union."[298] We do not think the word "shall" in the Commissions Clause necessarily imposes a mandatory duty. In other words, this provision may not mandate that the President must commission every position that can be fairly

291. *Commission*, BLACK'S LAW DICTIONARY (11th ed. 2019).

292. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 156–57 (1803).

293. *Id.* at 157.

294. *Id.* at 158 (stating Congress has the power to chart a "precise course accurately marked out by law," to complete the appointment); *see* Brief of the Mil. Officers Ass'n of Am. and the Flag & Gen. Officers' Network as Amici Curiae in Support of Petitioner at 3, Schwalier v. Carter, 576 U.S. 1035 (2015) (No. 14-1189) ("Congress can also establish the process that finalizes the appointment following confirmation.") [https://perma.cc/S4B3-9BET].

295. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting *Commissions* which shall expire at the End of their next Session." (emphasis added)).

296. *See id.* art. II, § 2.

297. *Id.* art. II, § 3.

298. *Id.*

characterized as an "Officer[] of the United States." Instead, the word "shall," as used in the Commissions Clause, may have a different meaning. Here the word "shall," as originally understood, may have simply described a course of action that the President was empowered to take in the future.[299] But at a minimum, the word "shall" in this provision suggests the President has an important responsibility: commissioning appointed officers.

Moreover, the framers added the Commissions Clause at the tail-end of this section, coupled with one of the most significant provisions of the Constitution, the Take Care Clause: "he shall take Care that the Laws be faithfully executed, *and* shall Commission all the Officers of the United States."[300] However you quantify the obligation of the Commissions Clause, its placement alongside the Take Care Clause suggests its importance.

Finally, "all" means "all." This straightforward language suggests that the President will grant Commissions to every Officer of the United States. We acknowledge that the Executive Branch has not strictly followed this practice. The Office of Legal Counsel concluded that not all Officers of the United States must receive a commission: "although the holder of an office usually receives a commission, that characteristic too, like an oath or pay, is incidental rather than essential."[301] We take no position on whether, as an original matter, an appointment of an "Officer[] of the United States" absent a commission is invalid. Under modern doctrine, what is the status of any acts or work performed by a commission-less "Officer of the United States," whose appointment is questioned merely because the officer lacks a commission? It would appear that the legal validity of such acts or work would be saved by the *de facto* officer doctrine. The Supreme Court has explained that the "*de facto* officer doctrine . . . confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment to office is deficient."[302] Rather, our work focuses on the meaning of the phrase "Officers of the United States" in the Commissions Clause.

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299. *See* Tillman & Tillman, *supra* note 115.

300. U.S. CONST. art. II, § 3 (emphasis added). Upon further reflection, Blackman now doubts his prior, mandatory reading of the Take Care Clause. *Cf.* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 TEX. REV. L. & POL. 215, 220–21 (2015) ("The [Take Care Clause of the] Constitution does not simply vest the President with powers concerning his own office, but imposes a *duty* on the President to [personally] *execute* the laws of Congress with those powers." (first emphasis added)).

301. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 122 (2007).

302. Nguyen v. United States, 539 U.S. 69, 77 (2003) (quoting Ryder v. United States, 515 U.S. 177, 180 (1995)); *see also In re* Griffin, 11 F. Cas 7, 27 (C.C.D. Va. 1869) (No. 5,815) (Chase, C.J.) ("This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they

B. The Commissions Clause Obligates the President to Commission "all the Officers of the United States," Which Are Appointed Positions in the Executive and Judicial Branches, but Not Positions in the Legislative Branch

Article II, Section 3 provides that the President "shall Commission all the *Officers of the United States*."[303] In our view, the phrase "Officers of the United States" in the Commissions Clause has the same meaning as the phrase "Officers of the United States" in the Appointments Clause and in the Impeachment Clause. The Appointments Clause defines the phrase "Officers of the United States." Only those positions appointed pursuant to Article II, Section 2 are "Officers of the United States" for purposes of the Commissions Clause. And this linkage makes sense. The Appointments Clause and the Commissions Clause are the bookends for the appointment process for "Officers of the United States." The Appointments Clause spells out the paths by which an "Officer[] of the United States" can be appointed. *Principal* "Officers of the United States" are appointed and subject to Senate advice and consent. *Inferior* "Officers of the United States," in some circumstances, may be appointed without the need for Senate advice and consent. And, to memorialize that the appointment process was completed, both types of "Officers of the United States" will receive a commission.

Of course, nothing would prevent the President from issuing a commission to someone who was not an "Officer[] of the United States." But those commissions would be issued without regard to the Commissions Clause. The Commissions Clause covers only those positions that are appointed pursuant to the Article II, Section 2.

If the phrase "Officers of the United States" referred to appointed *and* elected positions, then the President would be obligated to commission "all" appointed *and* elected positions. Indeed, if the President were an "Officer[] of the United States," then the President would have to commission himself and, arguably, his successor. The President would also be required to commission the Vice President and, arguably, his Vice President's successor. And the President would have to commission *all* members of Congress.

In our view, the President's duty under the Commissions Clause only extends to commissioning appointed positions in the Executive and Judicial Branches and, perhaps, only to the officers he has personally appointed.

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unanimously concur in the opinion that a person convicted by a judge de facto acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, can not be properly discharged upon habeas corpus."). For the modern-day relevance of *Griffin's* Case, see Josh Blackman & S.B. Tillman, *Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene*, N.Y. TIMES (Apr. 20, 2022), https://www.nytimes.com/2022/04/20/opinion/madison-cawthorn-marjorie-taylor-green-section-3.html [https://perma.cc/8FG9-9DCG].

303. U.S. CONST. art. II, § 3 (emphasis added).

There is an unbroken tradition going back to the Washington Administration of the President's commissioning the "Officers of the United States" that he appoints. For example, on September 11, 1789, President Washington nominated Alexander Hamilton as Secretary of the Treasury.[304] That same day, the Senate confirmed Hamilton,[305] and Washington promptly issued a commission to Hamilton.[306] From the outset of the Republic, the commissioning process was diligently executed.

Of course, there is William Marbury, who was perhaps the most famous appointed officer that never received his commission. But Marbury's circumstances were very unique in light of the Election of 1800 and the change in presidential administrations. Finally, we do not doubt that a successor president or administration *could* commission a commission-less appointee from the immediately-prior administration. Secretary James Madison could have lawfully issued William Marbury's commission.

C. There is No Evidence the President Has Ever Commissioned a President, Vice President, or Any Members of Congress

Over the past two centuries, there is no evidence that the President has ever commissioned a President, Vice President, or any members of Congress. Saikrishna Prakash wrote that the President holds an "office under the United States."[307] A decade ago, he stated that Tillman's position to the contrary was "fanciful."[308] Prakash suggested that the President should commission himself and that such commissions may exist.[309] Prakash argued that the burden was on Tillman to show that no such commissions exist.[310] Long-

304. S. EXEC. JOURNAL, 1st Cong., 1st Sess. 25 (1789).

305. *Id.* ("H's appointment was approved by the Senate on the same day it was submitted by Washington.").

306. *Appointment as Secretary of the Treasury,* FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-26-02-0002-0147 [https://perma.cc/MS9G-JQZ4] ("Know Ye, that reposing special Trust and Confidence in the Patriotism, Integrity, and Abilities of Alexander Hamilton of the City of New York in the State of New York, Esquire, I have nominated, and by and with the Advice and Consent of the Senate, do appoint him Secretary of the Treasury of the said United States, and do authorize and empower him to execute and fulfil the Duties of that Office according to Law; and to have and to hold the said Office, with all the Powers, Privileges, and Emoluments to the same of Right appertaining, during the Pleasure of the President of the United States for the Time being.").

307. Prakash, *supra* note 109, at 43.

308. *Id.*

309. *See id.*

310. *Id.* ("Tillman further declares that Presidents have never commissioned either themselves or their corresponding Vice-Presidents. Unfortunately, he offers no evidence to support any of these propositions, but merely asserts them as fact. He neither cites any of Washington's contemporaries nor cites any historians who claim that Washington never commissioned himself. That no physical evidence of such a commission exists, however, certainly does not prove that the President never

standing congressional practice, however, established that the Commissions Clause "does not mean that [the President] is to commission Members of Congress . . . and he does not commission himself, nor does he commission the Vice-President[.]"[311] Prakash's position warrants reconsideration.

Steven Calabresi also considered the President an "Officer[] of the United States."[312] He acknowledged that there is no evidence that the President has commissioned either himself or a Vice President. Instead, Calabresi wrote, "Our practice of not commissioning Presidents and Vice Presidents is thus a function of the fact that, like Kings, they take office in a public ceremony with elements of a coronation, and there is a magic moment when the powers of office become invested in them which is when they take the oath of office."[313] He added, "There is simply no need for a signed commission to prove that Presidents and Vice Presidents have been invested with power while there is often such a need as to lesser officials."[314] Thus, Calabresi concluded, "Washington's failure to commission thus looks far more like an understandable oversight on his part than it does like a deliberate decision in favor of the highly implausible conclusion that Presidents and Vice Presidents are not officers of the United States."[315]

We have offered substantial evidence to support the conclusion that the President and Vice Presidents are not "officers of the United States." This conclusion is far from "implausible." The text of the Appointments Clause supports our position. Further, we have seen no evidence that Washington considered his inauguration akin to a regal coronation. We think Washington would have rejected any notion that his inauguration was a regal affair. George Washington was the President who would not be king.[316]

Moreover, John Adams began presiding over the Senate on April 21, 1789.[317] He would not take the oath of office until June 3. In other words, he presided over the Senate for nearly two months. And during that period, Adams authenticated Congress's first statute.[318] All of these acts were

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issued one. Indeed, if there were no evidence of a commission granted to the first Secretary of State, that would hardly establish that Washington never commissioned Thomas Jefferson. The same must be said about whether Washington commissioned himself and John Adams.").

311. *See* 1 HINDS, *supra* note 244, at 547; *see also* Case of Brigham H. Roberts, of Utah, H. REP. No. 56-85, pt. 1, at 36 (1900).

312. Seth B. Tillman & Steven G. Calabresi, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. 134, 145 (2008).

313. *Id.*

314. *Id.*

315. *Id.*

316. *See generally* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING (2020).

317. *See* 1 ANNALS OF CONG. 22 (1789) (Joseph Gales ed., 1834).

318. *See id.*

performed *before* the "magic moment" of his taking the Article VI oath established by Congress.[319] During this time, Adams had not yet taken an Article VI oath. Under Calabresi's theory, before engaging in his official role, Adams would have first needed to have received a commission, in lieu of any public inauguration with its concomitant oath of office. But there is no evidence that President Washington ever commissioned Vice President Adams. And members of Congress take their oath in a moment far short of a regal coronation. Yet, President Washington never commissioned the members of the First Congress.

Finally, not a single president or vice president has commissioned himself in over two centuries. Nor has anyone lodged a complaint for their failure to be commissioned. Defending the position that the presidency is an "Officer[] of the United States" requires disregarding well-known history and speculating about alternative history.[320] Calabresi's argument, like Prakash's, warrants reconsideration. The far more likely conclusion is that the President is not an "Officer[] of the United States," as that phrase is used in the Constitution.

We acknowledge a potential weakness in our position. Article II distinguishes between "principal Officer[s]" and "inferior Officers." Under early practice, it appears that some inferior "Officers of the United States" who were not appointed by the President did not receive commissions.[321] Why did these positions not receive commissions? One possible rejoinder is that there was less urgency to ensure compliance for these lesser positions. If that view were true, we would still expect a stronger commitment to ensure compliance for important elected positions—especially for prominent individuals who are close at hand in the Capitol, such as members of Congress, the Vice President, and the President himself. It is also possible that something like the *de facto* officer doctrine could save the work performed by inferior officers who did not receive commissions.[322] We readily concede that our approach is not perfect. No theory is perfect. But our approach to the Commissions Clause provides a better fit in regard to history and early practice than those other approaches which maintain that the President is an "Officer[] of the United States."

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319. An Act to regulate the Time and Manner of administering certain oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789).

320. Tillman & Calabresi, *supra* note 312, at 152 (Tillman stating, "First Justice Story, now Washington and Adams. Exactly how much constitutional text and how many Founders will Professor Calabresi throw under the bus to accommodate his position? How is it that [Calabresi] is so *right*, and *they* are all so *wrong*?").

321. *See generally* 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 158–60 (Maeva Marcus & James R. Perry eds., 1985) (describing the appointment of the first clerk of the Supreme Court).

322. *See supra* Section IV.A (discussing de facto officer doctrine).

V. THE OATH OR AFFIRMATION CLAUSE

The Oath or Affirmation Clause in Article VI provides, "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."[323] This Clause applies to four categories of positions: [1] "The Senators and Representatives;" [2] "Members of the several State Legislatures;" [3] "all executive and judicial Officers . . . of the United States;" and [4] "all executive and judicial Officers . . . of the several States."[324] The Oath or Affirmation Clause is the only provision in the Constitution in which some text appears between "Officers" and "of the United States"—the word "both."

These four categories of positions take an oath to support the Constitution. In *Federalist No. 27*, Hamilton explained that the Oath or Affirmation Clause performs an important unifying function: "the legislatures, courts, and magistrates, of the respective [state] members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and it will be rendered auxiliary to the enforcement of its laws."[325]

In our view, the phrase "Officers . . . of the United States" in the Oath or Affirmation Clause refers to the same "Officers of the United States" in the Appointments Clause, in the Impeachment Clause, and in the Commissions Clause. The text of the Oath or Affirmation Clause suggests that Senators and Representatives are not "Officers of the United States." The Oath or Affirmation Clause, read in conjunction with the Article II Presidential Oath Clause, suggests that the elected president is not an "Officer[] of the United States."

The analysis for the Vice President is more complex. The first federal statute indirectly established an oath for the Vice President, not in his capacity as Vice President, but in the Vice President's capacity as President of the Senate. This statute also created oaths for other positions. In light of this statute, we conclude that the Vice President is not an "Officer[] of the United States" for purposes of the Oath or Affirmation Clause.

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323. U.S. CONST. art. VI, cl. 3.

324. The federal constitution is agnostic about how state judicial and executive officers are chosen. A state governor may be elected or appointed under state law. But for purposes of the federal constitution, he is still an executive officer of the state, and is subject to the Oath or Affirmation Clause. *See* Tillman & Calabresi, *supra* note 312, at 143 (Calabresi explaining: that the Article VI Oath or Affirmation Clause extends to state governors).

325. THE FEDERALIST NO. 27, *supra* note 73, at 221–22 (emphasis omitted).

A. The Text of the Oath or Affirmation Clause Suggests That Senators and Representatives Are Not "Officers . . . of the United States"

The text of the Oath or Affirmation Clause separately lists "Senators and Representatives" and "Officers . . . of the United States." If Senators and Representatives were "Officers of the United States," there would be no need to enumerate them separately. If Senators and Representatives were "Officers of the United States," then the enumeration of "Senators and Representatives" would be superfluous. Once again, we should avoid readings of the Constitution that render the text of the Constitution as "mere surplusage."[326] In our view, Senators and Representatives are not "Officers of the United States." Our approach avoids that surplusage.

The text of the Oath or Affirmation Clause also suggests that the framers knew how to extend a constitutional provision to Senators and Representatives: by listing them expressly. By contrast, the Impeachment Clause does not expressly refer to Senators and Representatives. Had the framers sought to subject members of Congress to impeachment, Senators and Representatives would have been expressly enumerated. But members of Congress were not expressly enumerated in the Impeachment Clause. Likewise, the Commissions Clause does not expressly refer to Senators and Representatives. Had the framers sought to require or authorize the President to commission members of Congress, then Senators and Representatives would have been expressly enumerated. But members of Congress were not expressly enumerated in the Commissions Clause.

Moreover, the Oath or Affirmation Clause specifically refers to "executive and judicial . . . officers . . . of the United States." We think the *expressio unius est exclusio alterius* canon applies here as it does with the Impeachment Clause.[327] The expression of one thing is the exclusion of the other.[328] The fact that the framers expressly referred to executive and judicial positions suggests that they intended to exclude legislative positions. The framing of the Oath or Affirmation Clause strongly supports our conclusion that "officers of the United States" are positions in the Executive and Judicial Branches.

We acknowledge a contrary argument. The Oath or Affirmation Clause refers to "*executive and judicial* Officers . . . of the United States." If

326. *See supra* Section I.A.1 (discussing canon against surplusage).

327. *See supra* Section III.B (discussing the *expressio unius est exclusio Alterius* canon with respect to the Impeachment Clause).

328. *See id.*

"Officers of the United States" had to be "executive and judicial" positions, adding that descriptor would be redundant. This construction may suggest that there could also be "Officers of the United States" who are not properly characterized as executive or judicial.[329] In other words, if the only types of "Officers of the United States" were executive and judicial, there would be no need to clarify that this provision applied to executive and judicial "Officers of the United States." Under this view, "Senators and Representatives" might be considered *legislative* "Officers of the United States." Thus, the framers would have had to enumerate these two positions separately.

Although we generally find this sort of reasoning effective—and often invoke the canon against surplusage[330]—we disagree with its application here. Such a construction conflicts with the Appointments Clause, which defines the scope of the phrase "Officers of the United States." Senators and Representatives are not, in any sense, appointed pursuant to Article II, Section 2 procedures. To accept the conclusion that there are *legislative* "Officers of the United States," one would likely have to also conclude that the phrase "Officers of the United States" has a broader meaning in the Oath or Affirmation Clause than it does in the Appointments Clause. We find it very unlikely that the exact same phrase has distinct meanings in different clauses.

We think there is a likely reason why the framers included the express reference to "executive and judicial" in the Oath or Affirmation Clause. This addition was not designed to clarify who are federal "Officers of the United States." The Appointments Clause takes care of that function. Rather, the addition of "executive and judicial"-language helped to clarify who are the "Officers . . . of the several States." The Constitution's Appointments Clause defines the phrase "Officers of the United States" and, by implication, it excludes legislative positions from the category of "Officers of the United States." By contrast, there is no comparable text in the Constitution that defines the scope of "Officers . . . of the several states." The Oath or Affirmation Clause is the only place in the Constitution of 1788 that references the "Officers . . . of the several states." We know that this category includes executive and judicial positions because the Oath or Affirmation Clause expressly tells us so. Moreover, the Oath or Affirmation Clause also separately enumerates "Members of the several State Legislatures." Thus, the Constitution's "executive or judicial"-language in the Oath or Affirmation Clause gives that otherwise undefined expression (i.e., "Officers of . . . the

329. *See generally* David J. Shaw, Note, *An Officer and a Congressman: The Unconstitutionality of Congressmen in the Armed Forces Reserves*, 97 GEO. L.J. 1739 (2009).

330. *See supra* Section I.A.1 (discussing the canon against surplusage).

several states") a more concrete definition by bringing it into general alignment with its federal analog ("Officers of the United States").

Indeed, we think the language referencing state executive officers is arguably broad enough to include *elected and appointed* governors, even if "Officers of the United States" includes only appointed officers and not the elected President and Vice President.[331] The terms "officers . . . of the United States" and "officers . . . of the several states" need not be read to refer to the exact same types of positions. When the Constitution was drafted and ratified, the structure of state governments were varied. Some state officials were chosen by popular election and others were chosen by state legislative houses.[332] To reflect the different types of state governments, the more capacious phraseology in the Oath or Affirmation Clause would ensure a broader application of the constitutional oath. Rather than looking to specific state laws to define local governmental structure, the framers adopted loose federal constitutional language that would embrace many different types of state positions. Moreover, the language in the Oath or Affirmation Clause was forward-looking. This loose federal constitutional language would also accommodate future changes to state governmental structures.

The very first act of Congress supports this interpretation of the Oath or Affirmation Clause. This law, which we will discuss in Section V.C, established the oath for "members of the several State legislatures[] and all executive and judicial officers of the several States."[333] The statute covered these positions, which could be "chosen or appointed."[334] That is, elected or appointed.

We draw one more conclusion from the text of the Oath or Affirmation Clause: the framers knew how to extend a constitutional provision to positions in the states. Zephyr Teachout has suggested that the phrase "Office . . . under the United States," which is used in the Foreign Emoluments

331. Calabresi suggested that Tillman's theory could not account for state governors. Tillman & Calabresi, *supra* note 312, at 142–43 ("Thus when the Oath Clause of Article VI requires that all federal and state executive and judicial officers take oaths to uphold the Constitution the Clause is clearly referring to the President, the Vice President and to state governors as well as to all federal and state judges. There is no sense here that Presidents, Vice Presidents, or governors are trustees and not officers in the way the words are used.").

332. *See* WILLIAM LOUGHTON SMITH, A COMPARATIVE VIEW OF THE CONSTITUTIONS OF THE SEVERAL STATES WITH EACH OTHER, AND WITH THAT OF THE UNITED STATES 9 (Philadelphia, John Thompson 1796); *see also* MARYLAND CONST. of 1776, art. XXV, available at *Constitution of Maryland–November 11, 1776*, THE AVALON PROJECT, https://avalon.law.yale.edu/17th_century/ma02.asp [https://perma.cc/AQD2-HS4V].

333. An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 3, 1 Stat 23, 23–24 (1789).

334. *Id.*

Clause, may embrace positions in state governments.[335] We think this conclusion is unlikely. Instead, a clear statement rule ought to apply—the Constitution only extends to state positions when those positions are expressly described. This drafting convention was also used in Section 3 of the Fourteenth Amendment which, for example, expressly refers to state positions.[336]

B. The Article VI Oath or Affirmation Clause, Read in Conjunction with the Article II Presidential Oath Clause, Suggest That the Elected President Is Not an "Officer[] of the United States"

In our view, the better reading of the Oath or Affirmation Clause distinguishes members of Congress from "Officers of the United States." And the text strongly suggests that "Officers of the United States" are appointed to the "executive and judicial" Branches but not to the Legislative Branch. But does the Oath or Affirmation Clause, standing by itself, demonstrate that the elected President is not an "Officer[] of the United States"? Not directly, at least.

To answer this question, we turn to the Presidential Oath Clause. Article II provides a special oath that only the President takes: "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.'"[337] There is some overlap between the Presidential Oath Clause in Article II and the Oath or Affirmation Clause in Article VI—both provisions require taking an oath to support the Constitution. But we know of no historical evidence that the President has ever taken a separate oath pursuant to the Article VI Oath or Affirmation Clause, in addition to his presidential oath prescribed by Article II.

This unbroken practice—or perhaps nonpractice—that started with George Washington suggests the President is not an "Officer[] of the United States" per Article VI. This unbroken practice is also consistent with the

335. *See* Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30, 33, 36–38 (2012).

336. U.S. CONST. amend. XIV, § 3 ("No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any *office*, civil or military, under the United States, or *under any State*, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a *member of any State legislature*, or as an *executive or judicial officer of any State*, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability." (emphases added)).

337. *Id.* art. II, § 1, cl. 8 (emphasis added).

President's not commissioning himself or his successor—such self-commissions would be required if the President were an "Officer[] of the United States."[338] Again, history supports our position that the President is not an "Officer[] of the United States."

C. The Article VI Oath or Affirmation Clause, Read in Conjunction with the First Federal Statute, Suggest That the Elected Vice President Is Not an "Officer[] of the United States"

The separate presidential oath in Article II provides further evidence that the President is not an "Officer . . . of the United States" for purposes of the Oath or Affirmation Clause. However, the analysis for the Vice President is more complicated. The text of Article VI, standing by itself, cannot rule out the possibility that the Vice President is an "Officer . . . of the United States." (We think the Appointments Clause, the Impeachment Clause, and the Commissions Clause textually foreclose the Vice President's characterization as an "Officer[] of the United States.") Rather, to assess the status of the Vice President, we consider the first statute enacted by Congress, which established oaths for different positions, but not for the President. This statute supports our position, though we acknowledge that there is some ambiguity.

1. The Oath for President Washington, Vice President Adams, and the First Congress

The United States Senate was supposed to assemble on March 4, 1789, but on that date, it lacked a quorum.[339] The Senate would finally achieve a quorum on April 6, 1789.[340] The House of Representatives was also supposed to convene on March 4, 1789.[341] The House would finally achieve a quorum on April 1, 1789.[342] But when both houses first established a quorum, the Representatives and Senators had not yet taken the Article VI oath of office. The text of that oath would be set by statute—and no statutes had yet been passed. On April 6, 1789, the House took one of its first official actions: "Ordered, That leave be given to bring in a bill to regulate the taking the oath or affirmation prescribed by the Sixth article of the Constitution."[343] Five

338. *See supra* Section II.C (noting that "Officers of the United States" can only be appointed).

339. S. JOURNAL, 1st Cong., 1st Sess. 5 (1789).

340. *Id.* at 7.

341. H.R. JOURNAL, 1st Cong., 1st Sess. (1789).

342. *Id.* at 6.

343. *Id.* at 7.

Representatives, including James Madison, were assigned to a committee to prepare the bill.[344]

However, the House would not wait for the statute to be enacted for Representatives to take an oath. Rather, the House simply established an oath for its own members.[345] We think the House could adopt this single-house resolution pursuant to the Rules of Proceedings Clause.[346] The House Journal reported:

> That the form of the oath to be taken by the members of this House, as required by the third clause of the sixth article of the Constitution of Government of the United States, be as followeth, to wit: "I, A B a Representative of the United States in Congress thereof, do solemnly swear (or affirm as the case may be) in the presence of Almighty GOD, that I will support the Constitution of the United States. So help me GOD."[347]

On April 8, "[t]he Chief Justice of the State of New York attended" the House Session "and administered the oath required by the Constitution" in the form proposed, "first to Mr. Speaker in his place, and then to the other Members of the House present."[348] In our view, at that point other positions in the House, such as the Clerk of the House, did not take an oath. On its face, the House resolution only applied to the members.

The Senate, however, chose a different path. It seems that "[t]he House of Representatives held a different view of its duty" than the Senate.[349] The members of the Senate, and Vice President Adams, would not take their oath of office until the oath statute was signed into law, nearly two months later. On April 6, 1789, when the Senate convened, Vice President Adams was not yet introduced to the Senate. Indeed, Adams did not formally participate in the April 6 joint session of Congress to count the electoral votes.[350] Rather, Senator John Langdon of New Hampshire was "elected [Senate President pro tempore] for the purpose of counting the [electors'] votes[.]"[351] And it was at that joint session that the electoral votes were counted, and Washington and Adams became President and Vice President.[352] Following the joint session,

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344. *Id.*

345. *Id.*

346. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

347. H.R. JOURNAL, 1st Cong., 1st Sess. 7 (1789).

348. *Id.* at 11.

349. LOUIS CLINTON HATCH, A HISTORY OF THE VICE-PRESIDENCY OF THE UNITED STATES 12 n.1 (1970).

350. S. JOURNAL, 1st Cong., 1st Sess. 7 (1789); *see* U.S. CONST. art. II, § 1, cl. 3 ("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.").

351. S. JOURNAL, 1st Cong., 1st Sess. 7–8 (1789).

352. *Id.* at 8.

Congress notified Washington and Adams that they had been chosen as President and Vice President.[353]

On April 20, 1789, two Senators were appointed to "a committee to wait on the Vice President, and conduct him to the Senate Chamber."[354] The next day, on April 21, 1789, Senator John Langdon, the Senate President Pro Tempore, met the Vice President on the floor of the Senate Chamber, addressing him as follows: "Sir: I have it in charge from the Senate, to introduce you to the chair of this House . . . ."[355]

However, according to the *Journal of the Senate*, Langdon did not issue Adams an oath of office on April 21, 1789.[356] Again, Langdon and the other Senators had not yet taken an oath at that point. Rather, the *Journal of the Senate* recounted that "Mr. Langdon conducted the Vice President to the chair, when the Vice President addressed the Senate."[357] Adams then gave a speech, and the Senate adjourned. We acknowledge some secondary sources state that Adams took a non-statutory oath of office on April 21, 1789.[358] We disagree with these sources because they are not consistent with the contemporaneous record from the *Journal of the Senate* and persuasive secondary sources.

Nine days later, on April 30, 1789, President George Washington took the oath of office pursuant to the Article II Presidential Oath Clause.[359] Still, at that point, Vice President Adams and the Senators had not yet taken any Article VI oath of office because no such oath existed.

The House of Representatives passed the oath bill on April 27, 1789.[360] On April 29, 1789, the Senate assigned the oaths bill to a committee of five,

353. *Id.* at 8–9.

354. *Id.* at 14.

355. *Id.*

356. *Id.*; *see* Stephen W. Stathis & Ronald C. Moe, *America's Other Inauguration*, 10 PRESIDENTIAL STUD. Q. 550, 551 (1980) ("Adams, however, like the distinguished Senators seated before him, would continue to transact business for several weeks before Congress framed a specific oath of office for Federal officers other than the President."); CALVIN TOWNSEND, ANALYSIS OF CIVIL GOVERNMENT 315 (New York, Am. Book Co. 1869) ("John Adams of Massachusetts entered on the duties of his office as Vice-President, and president of the Senate, April 21, 1789, but did not take the oath of office until June 3, 1789.").

357. S. JOURNAL, 1st Cong., 1st Sess. 14 (1789).

358. *Vice Presidential Inaugurations,* ARCHITECT OF THE CAP., https://www.aoc.gov/what-we-do/programs-ceremonies/inauguration/vice-president [https://perma.cc/8NF5-KKJ9] (stating that John Langdon, President pro tempore of the Senate, issued the oath of office to John Adams on April 21, 1789); Lindsay M. Chervinsky, *The Households of President John Adams,* THE WHITE HOUSE HIST. ASS'N (Jan. 3, 2020), https://www.whitehousehistory.org/the-households-of-john-adams [https://perma.cc/TN8D-FHMM] ("On April 21, 1789, John Adams took the oath of office to become the first Vice President of the United States.").

359. S. JOURNAL, 1st Cong., 1st Sess. 18 (1789).

360. H.R. JOURNAL, 1st Cong., 1st Sess. 18–21 (1789).

including Senator William Paterson of New Jersey, who would later serve on the Supreme Court.[361]

On May 2, Senator Strong, one of the committee members, "reported sundry amendments" would be made to the House Bill.[362] Two days later, on May 4, the Senate proposed amendments to the House bill.[363] For example, the bill clarified when and how the oaths should be taken by "the members of the several state legislatures, and all executive and judicial officers of the several states[.]"[364] On May 5, the Senate approved the bill with several proposed Senate amendments.[365] On May 6, the House proposed further amendments, which the Senate agreed to.[366] On May 19, a joint committee was formed to present the bill to the President.[367] On May 22, the "committee did . . . wait on the President, and present him with the said engrossed bill, for his approbation."[368] The First Congress took its responsibility under the Presentment Clause literally.[369]

On June 1, 1789, President Washington signed into law *An Act to regulate the Time and Manner of administering certain Oaths*.[370] Again, according to the *Journal of the Senate,* John Adams had not yet taken an Article VI oath as prescribed by statute when this law was enacted. On June 3, 1789, two days after the oaths statute was enacted, Vice President Adams took the Article VI oath.[371] The *Senate Journal* recounts, "Ordered. That Mr. Langdon administer the oath to the Vice President; which was done accordingly."[372] Next, "the Vice President administered the oath, according to law" to the Senators, including Langdon.[373] As the events played out, Langdon issued an oath to Adams before Langdon himself had taken an oath. After Adams issued the oath to the Senators, "[t]he same oath was, by the

361. S. JOURNAL, 1st Cong., 1st Sess. 18 (1789).
362. *Id.* at 21.
363. *Id.*
364. *Id.*
365. *Id.* at 22.
366. H.R. JOURNAL, 1st Cong., 1st Sess. 19 (1789) (indicating that the House amended the bill); S. JOURNAL, 1st Cong., 1st Sess. 28 (1789) (indicating that the Senate agreed to the House's amendments).
367. H.R. JOURNAL, 1st Cong., 1st Sess. 38 (1789).
368. *Id.* at 40.
369. U.S. CONST. art. I, § 7, cl. 2 ("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 . . . ." (emphasis added)).
370. An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789). We will parse this statute in *infra* Section V.C.2.
371. S. JOURNAL, 1st Cong., 1st Sess. 34 (1789); Stathis & Moe, *supra* note 356, at 551–52 ("Only after the passage of that legislation was the Vice President elect permitted to take his oath from President *pro tempore* Langdon within the three day period required by the new.").
372. S. JOURNAL, 1st Cong., 1st Sess. 34 (1789).
373. *Id.*

Vice President, administered to the Secretary [of the Senate], together with the oath of office."[374] That same day, the *House Journal* reported that the Senate relayed a message to the House, which the Speaker read aloud:

> The Senate are about to proceed to take the oath to support the Constitution of the United States, pursuant to the act, entitled "An act to regulate the time and manner of administering certain oaths," and request that the said act, to which the President of the United States has affixed his signature, may be sent to them for that purpose.[375]

Finally, by June 3, 1789—nearly three months after both Houses first assembled—the President, Vice President, Representatives, and Senators had all taken an oath of office. Yet, Representatives and Senators transacted business and voted on a bill before taking their Article VI oath. Likewise, as President of the Senate, John Adams authenticated the first statute before taking his Article VI oath.

In 1790, Congress determined that "the terms for which the President, Vice President, Senators, and Representatives . . . were respectively chosen, did, according to the [C]onstitution, commence on the 4th day of March, 1789 . . . ."[376] Congress would incorporate this finding into the Presidential Succession Act of 1792. Section 12 of that statute provided that "the term of four years for which a President and Vice President shall be elected shall in all cases commence on the fourth day of March."[377] We think this history shows that the constitutional terms for all these elected positions did not begin when those first holding these positions took their Article VI oath. Instead, their terms began prior to this time.

2. The Text of the First Oaths Statute

The *Act to regulate the Time and Manner of administering certain Oaths* has five sections. Section 1 provides, in part, that "the oath or affirmation required by the sixth article of the Constitution of the United States [the Oath or Affirmation Clause], shall be administered in the form following, to wit: 'I, A. B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States.'"[378] This oath had to be "administered

374. *Id.*

375. H.R. JOURNAL, 1st Cong., 1st Sess. 44–45 (1789).

376. 1 ANNALS OF CONG. 1010–11 (1790) (Joseph Gales ed., 1834).

377. An Act relative to the Election of a President and Vice President of the United States, ch. 8, § 12, 1 Stat. 239, 241 (1792).

378. An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789). This oath differed from the oath taken by the members of the House on April 8, 1789, which was made "in the presence of Almighty GOD." H.R. JOURNAL, 1st Cong., 1st Sess. 7 (1789).

within three days after the passing of this act."[379] And, indeed, Vice President Adams and the Senate took their oaths two days after Washington signed the bill. Section 1 further provided that this oath "shall be administered . . . to the President of the Senate, and by him to all the members and to the secretary [of the Senate]."[380] Thus, under the terms of the statute, Senate President Pro Tempore Langdon issued the oath to President of the Senate Adams, then Adams issued the oath to the Senators. The statute does not expressly mention the President. Nor do we think his position is referenced impliedly. We think the statute does not mention the President because Article VI reaches "Officers of the United States" and that category does not include the presidency. Moreover, there was no need to reference the President because he had his own oath in Article II. This statute also made no express mention of the Vice President; instead this statute refers to the Vice President strictly in his capacity as "President of the Senate."

Section 1 also provided that the same oath would be administered "by the Speaker of the House of Representatives, to all the members who have not taken a similar oath, by virtue of a particular resolution of the said House, and to the clerk [of the House]."[381] The statute referred to the House members who, on April 8, had already taken an oath pursuant to a single-house resolution.[382]

Section 2 of the statute provided that in subsequent Congresses, the oath would be administered to Representatives and Senators.[383] Section 3 stated that "members of the several State legislatures . . . and all executive and judicial officers of the several states" would take the same oath.[384] Section 4 required "all officers appointed, or hereafter to be appointed under the authority of the United States" to take the same oath.[385]

Finally, Section 5 created a second and separate oath of office for the "secretary of the Senate, and the clerk of the House of Representatives."[386] It provided, "I, A. B. secretary of the Senate, or clerk of the House of Representatives (as the case may be) of the United States of America, do

379. An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789).

380. *Id.*

381. *Id.*

382. *See id.* ("particular resolution of the said House"); *see also supra* Section V.C.1 (discussing oath taken by Representatives).

383. *See* An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789); *see also* An Act to establish the Judicial Courts of the United States, ch. 20, § 17, 1 Stat. 73, 83 (1789) ("[A]ll the said courts of the United States . . . shall have the power to impose and administer all necessary oaths and affirmations.").

384. An Act to regulate the Time and Manner of Administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23–24 (1789).

385. *Id.* at 24.

386. *Id.*

solemnly swear or affirm, that I will truly and faithfully discharge the duties of my said office, to the best of my knowledge and abilities."[387] Again, prior to the statute's enactment, on April 8, 1789, some members of the House had already taken an oath, but the clerk of the House had not taken an oath.[388]

3. The Constitutional Authority for the Oaths Statute with Respect to the Clerk of the House and the Secretary of the Senate

The Article VI Oath or Affirmation Clause enumerated the following positions: [1] Senators and Representatives, [2] Members of the State Legislatures, [3] "executive and judicial Officers . . . of the United States," and [4] "executive and judicial Officers . . . of the several States." We think this provision provides the constitutional authority for Congress to specify the oaths of these four categories of positions. But what about the Clerk of the House and the Secretary of the Senate? They are not expressly enumerated in Article VI. Nor are these positions "executive and judicial Officers" of any stripe—they are *legislative* officers.

Furthermore, the specialized Section 5 oath for "the secretary of the Senate, and the clerk of the House" departs from the text of the Oath of Affirmation Clause.[389] The Section 5 statutory oath makes no reference to supporting the Constitution; it only requires the clerk and secretary to "truly and faithfully discharge the duties of [their] said office, to the best of [their] knowledge and abilities." The Oath or Affirmation Clause in Article VI, standing by itself, does not grant Congress the power to impose an oath on the Clerk of the House and the Secretary of the Senate. Congress could not have relied solely on its Article VI powers to enact these provisions.

We think that the statutory oath for the Clerk of the House and the Secretary of the Senate was authorized by three provisions of the Constitution. First, the statute was authorized by the House Officers Clause, which provides that "[t]he House of Representatives shall chuse their Speaker and other Officers[.]"[390] The Clerk of the House is a House officer. Second, the statute was authorized by the Senate Officers Clause, which states, "The Senate shall chuse their other Officers[.]"[391] The Secretary of the Senate is a Senate officer. Third, the statute was authorized by the Rules of Proceedings Clause, which provides that "[e]ach House may determine the Rules of its Proceedings[.]"[392] These three provisions, working in tandem, allowed the

387. *Id.*
388. H.R. JOURNAL, 1st Cong., 1st Sess. 7 (1789).
389. *See* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 162 (1995).
390. U.S. CONST. art. I, § 2, cl. 5.
391. *Id.* art. I, § 3, cl. 5.
392. *Id.* art. I, § 5., cl. 2.

House and Senate to establish the oaths for their own officers. This action could have been taken by single-house resolution, but it can also be accomplished through bicameralism and presentment.

4. The Constitutional Authority for the Oaths Statute with Respect to the Vice President

The Article VI Oath or Affirmation Clause does not expressly refer to the Vice President. When the First Congress met, there may have been some uncertainty about the scope of Congress's power to enact an oath for the Vice President.[393]

The Oath or Affirmation Clause provides Congress with the power to establish an Oath for "executive . . . Officers of the United States." If the Vice President is an "executive . . . Officer[] of the United States," then the Oath or Affirmation Clause provides a clear source of constitutional authority for the oath statute. But there are many problems with deeming the Vice President an "Officer[] of the United States."

In our view, the Vice President is not an "Officer[] of the United States" appointed pursuant to Article II, Section 2 procedures.[394] And the Impeachment Clause expressly lists the Vice President separate from the category of "civil Officers of the United States"—precisely because the Vice President is not an "Officer[] of the United States."[395] Finally, there is no evidence that the Vice President has ever received a commission under the Commissions Clause as an "Officer[] of the United States."[396] In our view, the *elected* Vice President is not an "Officer[] of the United States" in his capacity as Vice President or President of the Senate.

As President of the Senate, the Vice President could be considered a legislative officer. If so, then the Oath or Affirmation Clause would not provide a clear source of constitutional authority for the Oath Statute. The Vice President would be in a similar position as the Clerk of the House and the Secretary of the Senate. Specifically, the Vice President, like the Clerk and the Secretary, are not expressly covered by the Oath or Affirmation Clause. Furthermore, there is a is a long-standing academic debate about whether the Vice President is properly characterized as an executive branch

393. *See supra* Section V.C.1 (discussing the oath for Vice President Adams).

394. *See supra* Section II.C (finding that the Vice President is not appointed pursuant to the Appointments Clause).

395. *See supra* Section III.B (finding that the Vice President is not a "civil Officer[] of the United States" for purposes of the Impeachment Clause).

396. *See supra* Section IV.C (finding that the Vice President has never received a commission pursuant to the Commissions Clause).

officer, or a legislative branch officer, or both, or neither.[397] That debate is beyond the scope of this Article.

For Congress to establish an oath for the Vice President in his role as President of the Senate, the statute would have had to rely on some constitutional authority other than Article VI. Congress could not rely on the Senate Officers Clause because the Senate cannot "chuse" the Vice President as one of "their other Officers" pursuant to the Senate Officers Clause.[398] The House Officers Clause also has no bearing on the status of the Vice President.

Congress relied on non-Article VI authority to impose an oath on the clerk and secretary; that is, Congress relied on the Rules of Proceedings Clause. Likewise, we think Congress relied on that latter authority to impose an oath on the Vice President in his capacity as President of the Senate. That analysis accounts for the fact that the statute does not expressly refer to the Vice President but instead uses the phrase "President of the Senate." The Rules of Proceeding Clause provides the requisite authority to control how the Senate, and its presiding officer, conducts its business, not the vice presidency per se.

Longstanding history lends some support for this reading of the Oath or Affirmation Clause. Under senate practice before 1937, the vice-presidential oath was generally administered inside the Senate Chamber, usually by the highest-ranking Senate officer—either the outgoing Vice President or the Senate President pro tempore.[399] In 1789, the Senate President Pro Tempore issued the oath to Vice President Adams in the Senate chamber. After the newly-sworn Vice President took his oath, he delivered his inaugural address and called the Senate into an extraordinary session. At that time, the Senators took their Article VI oaths. Only then would the procession go outside for the President's swearing-in ceremony. The Vice President's oath had been an essential element of the commencement of the Senate's session until fairly modern times. These swearing-in practices are consistent with the first statute, which imposed an oath on the Vice President in his capacity as President of the Senate. In 1937, following the ratification of the Twentieth

397. *See* Tillman & Blackman, *supra* note 2, at 332 (discussing the Vice Presidents "two hats"); 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."). Recently, a federal district court held that the Vice President, who presides over the Joint Session of Congress, is considered a Senator for purposes of the Speech or Debate Clause. https://www.politico.com/news/2023/03/28/judge-says-pence-must-testify-to-jan-6-grand-jury-00089222 [https://perma.cc/B5N9-SVES].

398. U.S. CONST. art. I, § 3, cl. 5.

399. *Vice President's Swearing-In Ceremony*, JOINT CONG. COMM. ON INAUGURAL CEREMONIES, https://www.inaugural.senate.gov/vice-presidents-swearing-in-ceremony/ [https://perma.cc/2XMB-UZD3].

Amendment, the Vice President began to take his oath outside the Capitol on the presidential inauguration platform.[400]

Still, we acknowledge that our answer here is not perfect. No theory is. And the Constitution had gaps—particularly regarding the Vice President. For example, the original Constitution did not expressly impose *any* qualifications on the Vice President. As ratified, the Constitution did not require the Vice President to be a natural-born citizen, a citizen of the United States, or even a resident of the United States.[401] The President had to be thirty-five years old, but the vice presidency did not have an express age requirement.[402] The omission of these qualifications was significant since the primary purpose of the Vice President was to succeed the President. The Twelfth Amendment filled this gap by imposing the same eligibility requirements on the Vice President as on the President.[403] As a general matter, the vice presidency, which was added to the Constitution fairly late in the Convention, was ill-defined. Vice President Adams famously derided his position in a letter to his wife Abigail: "my Country has in its Wisdom contrived for me, the most insignificant Office that ever the Invention of Man contrived or his Imagination conceived."[404] Ultimately, it is not entirely unreasonable to think that the framers simply forgot to account for the Vice President in the Oath or Affirmation Clause.

D. The Article VI Oath or Affirmation Clause Does Not Expressly Extend to "Office[s] . . . under the United States" and "Office[s] under the Authority of the United States"

The Oath or Affirmation Clause extends to "Officers of the United States." But this provision does not expressly extend to two broader

400. *Id.*

401. *Cf.* U.S. CONST. art. II, § 1, cl. 5 ("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.").

402. *Id.*

403. *See* U.S. CONST. amend. XII ("But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."). *See generally* BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 133–57 (2012) (discussing competing views regarding vice presidential qualifications); Bruce G. Peabody & Scott E. Gant, *The Twice and Future President*, 83 MINN. L. REV. 565, 620 (1999) (discussing limited scope of vice presidential eligibility requirements).

404. *John Adams to Abigail Adams, 19 December 1793*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/04-09-02-0278 [https://perma.cc/9S6J-3DJ6]; *see* Lin-Manuel Miranda, *Take A Break*, *Hamilton An American Musical*, GENIUS (Sept. 25, 2015), https://genius.com/Phillipa-soo-anthony-ramos-lin-manuel-miranda-and-renee-elise-goldsberry-take-a-break-lyrics [https://perma.cc/DHV3-HTDZ] ("Eliza: Angelica, tell this man John Adams spends the summer with his family. Hamilton: Angelica, tell my wife John Adams doesn't have a real job anyway.").

categories of positions: "Office[s] . . . under the United States" and "Office[s] . . . under the Authority of the United States." In our view, these two latter categories are broader than the "Officers of the United States" category. In our view, the phrase "Office . . . under the United States" refers to appointed positions in all three branches of the federal government but not to any elected federal positions.[405] As relevant here, the Secretary of the Senate and the Clerk of the House hold "Office[s] . . . under the United States" but are not "Officer[s] of the United States."[406] We think this "Office . . . under the United States" category is not expressly covered by the Article VI Oath or Affirmation Clause.

Similarly, the Oath or Affirmation Clause also does not expressly extend to those who hold an "Office . . . under the Authority of the United States." In our view, this phrase includes all "Office[s] . . . under the United States" and extends further to include a broader category of officers. For example, the category of "Office . . . under the Authority of the United States" would include holdover officers from the outgoing Articles of Confederation government.[407] This category would also include privateers holding letters of marque and reprisal authorized by statute. Section 4 of the Oath Statute required "all officers appointed, or hereafter to be appointed *under the authority of the United States*" to take the same oath as the previously enumerated positions. In short, the relatively wide and varied "Office"-language of the Oaths Act can be distinguished from the narrower and more specific "Officer"-language in Article VI's Oath or Affirmation Clause.

Why did the drafters of the Oaths Act not use the same language that the Framers of the Oath or Affirmation Clause used? We cannot know for certain. But we do know that text of the Oath or Affirmation Clause did not limit the positions that a future oaths act could apply to. The Oath or Affirmation Clause mandated a constitutional oath for the listed positions. Article VI did not preclude Congress from mandating oaths for *other* positions created by statute or by single-house resolution. Accordingly, the drafters of the Oaths Act had a valid reason to extend the statutory oath to a broader category of positions. Specifically, there are some statutory offices that would not fall under the aegis of the Oath or Affirmation Clause: appointed positions that are not "Officers of the United States." For these appointed positions, Congress was under no obligation to mandate a constitutional oath. But, through the Oaths Act, Congress *chose* to establish an oath for these positions.

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405. *See* Tillman & Blackman, *supra* note 2, at 392–93 (discussing the phrase "Office . . . under the United States").

406. *See id.* at 332–37 (discussing appointed positions in the legislative branch).

407. *See id.* at 394–95 (discussing the phrase "office under the Authority of the United States").

Stated differently, Congress has the power to create and define appointed federal offices by statute.[408] And incidental to that power to create offices, Congress could establish an oath for those positions.[409] By contrast, for statutory positions that do fall under the aegis of the Oath or Affirmation Clause, Congress was *required* to impose a statutory oath or affirmation. After all, the Constitution specified that those positions were required to take a constitutional oath.

The analysis above can help account for the textual distinctions between Article VI's Oath or Affirmation Clause and the first federal statute. The former provision uses limited "Officers of the United States"-language" and the latter provision uses more expansive "Office . . . under the Authority of the United States"-language. And this distinction reflects the fact that Congress could establish oaths for a larger number of positions that are not under the aegis of the Oath or Affirmation Clause.

VI. THE RECESS APPOINTMENTS CLAUSE

The Recess Appointments Clause provides, "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."[410] It is unclear from the text of the Constitution whether recess appointees are "Officers of the United States." We are not entirely sure. The clause's text does not expressly refer to an "Office" or "Officer" of any type.

Our analysis starts with Supreme Court precedent. In *NLRB v. Noel Canning*, the Supreme Court suggested that recess appointees are "Officers

408. During the Constitutional Convention, James Madison proposed an amendment to what would become the Necessary and Proper Clause. Under Madison's proposal, Congress would have the express power to "establish all offices." Madison suggested that it appears "liable to cavil" that this power was not already included in the Constitution. Gouverneur Morris, James Wilson, and others disagreed. They "urged that the amendment could not be necessary." Madison's motion failed by a 9-to-2 vote. 2 FARRAND'S RECORDS, *supra* note 21, at 345. The Constitution of 1788 established the presidency and the Congress. Moreover, the first President would elected without any action by the Congress created by the Constitution of 1788. If "all offices" were to be created by Congress under Madison's proposal, and the President was created by the Constitution, then the presidency could not be an "office." We draw an inference from Madison's statement: he did not think that the phrase "all offices" referred to the presidency. *See also supra* note 172 (making a similar point about Rutledge's use of "officer"-language at the Federal Convention).

409. *See* HENRY B. HOGUE, CONG. RESEARCH SERV., RL33886, STATUTORY QUALIFICATIONS FOR EXECUTIVE BRANCH POSITIONS 3 (2015) (explaining that the "power of Congress to specify qualifications for a particular office is generally understood to be incident to its constitutional authority to establish the office"), https://crsreports.congress.gov/product/pdf/RL/RL33886/12 [https://perma.cc/N9ZP-FPNT]; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416 (1819) (explaining "[y]et he would be charged with insanity who should contend that the legislature might not superadd, to the oath directed by the constitution, such other oath of office as its wisdom might suggest").

410. U.S. CONST. art. II, § 2, cl. 3.

of the United States." But in *Lucia v. SEC*, the Supreme Court suggested that recess appointees cannot be "Officers of the United States." These precedents are difficult to reconcile. Next, we consider the relationship between, on the one hand, the Recess Appointments Clause and, on the other hand, the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause. To assess these related provisions, we use a methodology we describe as *interclausalism*.

A. The Supreme Court and the Recess Appointments Clause

In *NLRB v. Noel Canning*, the Supreme Court endorsed the view that recess appointees are "Officers of the United States."[411] This case considered whether President Obama's selections for the National Labor Relations Board were validly appointed pursuant to the Recess Appointments Clause.[412] Specifically, the case turned on whether the circumstances of President Obama's appointments fell within the ambit of the Recess Appointments Clause. The question of whether recess appointees were "Officers of the United States" was not necessary to the Court's holding. Still, the Court opined on this issue. Justice Breyer's majority opinion stated that "the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing *officers of the United States*."[413] Critically, the phrase "Officers of the United States" does *not* appear in the Recess Appointments Clause.

In *Noel Canning*, Justice Breyer assumed that recess appointees were "Officers of the United States." This result is not obvious, and the text of the clause does not expressly address it. Moreover, there was no need to decide the precise status of recess appointees in *Noel Canning*. Yet, the majority reached out to decide an important constitutional question and announced that recess appointees were "Officers of the United States."

Justice Scalia's concurring opinion also seemed to assume that recess appointees were "Officers of the United States[.]"[414] He wrote, "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.'"[415] Scalia seemed to agree with Breyer that the Recess Appointments Clause was a subsidiary means for the President to appoint "Officers of the United States" in the absence of Senatorial advice and consent.

411. *See* NLRB v. Noel Canning, 573 U.S. 513, 522–26 (2014).
412. *Id.* at 518–19, 557.
413. *Id.* at 522 (emphasis omitted).
414. *Id.* at 569 (Scalia, J., concurring) (quoting U.S. CONST. art. II, § 2, cl. 2).
415. *Id.*

In *Federalist No. 67*, Hamilton articulated a similar view. Hamilton wrote that the Appointments Clause is the "general mode of appointing officers of the United States."[416] And the Recess Appointments Clause is "nothing more than a supplement" or an "auxiliary method of appointment" when "the general method was inadequate"—that is, when "vacancies might happen IN THEIR RECESS."[417] Hamilton reasoned that for the Recess Appointments Clause to be "supplementary" to the Appointments Clause, the "*vacancies* of which . . . [the Recess Appointments Clause] speaks must be construed to relate to the 'officers' described in the" Appointments Clause.[418] In any event, Hamilton's language strongly suggests that he held the view that recess appointees were "Officers of the United States."

Four years later, in *Lucia v. SEC*, the Supreme Court would indirectly address the Recess Appointments Clause. *Lucia v. SEC* held that administrative law judges of the Securities Exchange Commission are not "Officers of the United States."[419] Therefore, they do not need to be confirmed by the Senate. This case did not involve the Recess Appointments Clause. Yet, language in Justice Kagan's majority opinion in *Lucia* was in considerable tension with language in Justice Breyer's majority opinion in *Noel Canning*.

Noel Canning described the Recess Appointments Clause as a "*subsidiary*" method of appointing "Officers of the United States."[420] In contrast, *Lucia* held that "[t]he Appointments Clause prescribes the *exclusive* means of appointing 'Officers.'"[421] Which one is it? "Subsidiary" or "exclusive"? Justices Kagan and Kennedy were the only members of the Court who joined both majority opinions. In doing so, they took conflicting positions on this narrow issue. We do not know if *Lucia* (2018) intended to supersede *Noel Canning* (2014). In fact, we suspect that few commentators even noticed this conflict.

Some of the other votes in *Noel Canning* and *Lucia* are difficult to explain. Justice Scalia concurred in *Noel Canning*, joined by Chief Justice Roberts and Justices Thomas and Alito. Justice Scalia wrote that the Recess Appointments Clause was "an *exception*" to the "general rule" by which "Officers of the United States" are appointed pursuant to the Appointments

416. THE FEDERALIST NO. 67, *supra* note 73, at 348.

417. *Id.* Here, Hamilton has endorsed the view later put forward by Justice Scalia's concurrence in *Noel Canning* that the Recess Appointments Clause only applies to those vacancies that actually arise, or happen, *during* the Recess of the Senate. *See Noel Canning*, 573 U.S. at 594 (Scalia, J., concurring) ("I would hold that the recess-appointment power is limited to vacancies that arise during the recess in which they are filled[.]").

418. THE FEDERALIST NO. 67, *supra* note 73, at 348.

419. Lucia v. SEC, 138 S. Ct. 2044, 2044 (2018).

420. *Noel Canning*, 573 U.S. at 522.

421. *Lucia*, 138 S. Ct. at 2051 (emphasis added).

Clause.[422] Is an "exception" equivalent to a "subsidiary" approach? Did Justice Scalia agree with Justice Breyer's majority opinion in *Noel Canning*? Here, Justice Scalia's language was less than clear. Notably, Justice Scalia did not endorse the position the Court would announce subsequently in *Lucia*: that the Appointments Clause was the "exclusive" means of appointing "officers of the United States." In *Noel Canning*, Scalia may have hedged to avoid reaching this specific position.

When *Lucia* was announced in 2018, Justice Scalia was no longer on the Court, but Chief Justice Roberts and Justices Thomas and Alito joined the *Lucia* majority. They all agreed with Justice Kagan's majority opinion, which held that "[t]he Appointments Clause prescribes the exclusive means of appointing '*Officers*.'"[423] Justice Thomas stated this rule even more categorically in his concurrence, which Justice Gorsuch joined: "The Appointments Clause provides the exclusive process of appointing '*Officers of the United States*.'"[424] The votes of Chief Justice Roberts and Justices Thomas and Alito across these two cases, decided just four years apart, are in tension with one another.

Ultimately, these precedents are not entirely helpful to determine whether recess appointees are "Officers of the United States." These precedents are also not entirely helpful determining what kinds of positions the President can fill under the Recess Appointments Clause.

B. What Types of Vacant Positions Can the President Fill Pursuant to the Recess Appointments Clause?

The text of the Recess Appointments Clause does not specify which positions the President can fill. The provision does not expressly refer to "Officers of the United States," "Office[s] . . . under the United States," or even "Officer[s]." The text merely states, "The President shall have Power to fill up *all Vacancies* that may happen during the Recess of the Senate." In *Noel Canning*, the Supreme Court sharply divided about when "Vacancies that may happen during the Recess of the Senate" occur. The majority found that the vacancies could arise before or during the Senate recess; Justice Scalia's concurrence found that the vacancies could only arise during the Senate recess. But the Court did not have to determine what types of vacant positions the President could temporarily fill. Can the President fill a temporary Senate vacancy pursuant to the Recess Appointments Clause? During the ratification debates, this question arose.

422. *Noel Canning*, 573 U.S. at 569 (Scalia, J., concurring) (emphasis added).
423. *Lucia*, 138 S. Ct. at 2051 (emphasis added).
424. *Id.* at 2056 (Thomas, J., concurring) (emphasis added).

Under the original Constitution, before the Seventeenth Amendment, the state legislatures would choose the Senators.[425] However, "if Vacancies [of a Senator] 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."[426] We think the "Executive" referenced in the Senatorial Vacancies Clause was the state executive, such as the governor. During the ratification process, there was some debate on this point.

Cato was a pseudonymous Anti-Federalist who wrote in opposition to the ratification of the Constitution. Cato is believed to have been New York Governor George Clinton.[427] In his fifth paper, Cato criticized the organization of the Senate under the proposed Constitution.[428] He wrote that the framers gave "the executive the unprecedented power of making temporary Senators, in case of vacancies, by resignation or otherwise."[429] We think the better reading of Cato's statement is that he was referring to the state executive, like a governor. Still, Cato's use of "executive" is not entirely clear.

Alexander Hamilton, however, wrote that Cato was arguing that the President—that is, the *federal* "Executive"—could fill a temporary Senate vacancy pursuant to the Recess Appointments Clause. In *Federalist No. 67*, Hamilton wrote that Cato "ascribe[d] to the President of the United States a power, which by the instrument reported is *expressly* allotted to the executives of the individual States. I mean the power of filling casual vacancies in the Senate."[430]

Hamilton explained why the President could *not* appoint temporary Senators—a power that belonged to state executives. We do not flag this debate to contend that Cato was correct—albeit, we think Cato was correct that the state executive could make a temporary appointment to a vacant Senate seat during the recess of the state legislature.[431] Rather, we highlight this disagreement to illustrate which types of positions may be filled under the authority of the Recess Appointments Clause. To fully understand

425. U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

426. *Id.* art. I, § 3, cl. 2.

427. *The Anti-Federalist Papers*, HIST. SOC'Y OF THE N.Y. COURTS, https://history.nycourts.gov/about_period/antifederalist-papers/ [https://perma.cc/729T-LTVF].

428. *See Cato V, New York Journal, 22 November 1787*, CTR. FOR THE STUDY OF THE AM. CONST., https://archive.csac.history.wisc.edu/Cato_V(1).pdf [https://perma.cc/AG75-FEM6].

429. *Id.*

430. THE FEDERALIST NO. 67, *supra* note 73, at 347.

431. *See* U.S. CONST. art. I, § 3, cl. 2 ("[I]f Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.").

Hamilton's response to Cato, we next turn to the relationship between the Recess Appointments Clause and the Appointments Clause.

C. The Appointments Clause and the Recess Appointments Clause

Pursuant to the Appointments Clause, the President can appoint "Officers of the United States." And, pursuant to the Recess Appointments Clause, the President can make recess appointments. Are recess appointees a type of "Officer[] of the United States" referenced in the Appointments Clause? This section will explain why recess appointees may or may not be "Officers of the United States" for purposes of the Appointments Clause. There are arguments to be made on both sides.

1. Recess Appointees May Be "Officers of the United States" for Purposes of the Appointments Clause

The Appointments Clause and the Inferior Officers Appointments Clause appear in Article II, Section 2, Clause 2 of the Constitution. In the very next clause—Article II, Section 2, Clause 3—is the Recess Appointments Clause. We present the three provisions, side-by-side, in this table:

The Appointments Clause Art. II, § 2, Cl. 2	**The Inferior Officers Appointments Clause Art. II, § 2, Cl. 2**	**The Recess Appointments Clause Art. II, § 2, Cl. 3**
The President "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."	"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."

The Inferior Officers Appointments Clause is an exception to the Appointments Clause. The Constitution empowers Congress to "by Law"—

that is, by statute[432]—"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." Here, "such inferior Officers" refers to a limited group of "Officers of the United States" who need not be confirmed by the Senate and who need not be appointed by the President. The word "Officers" provides a textual linkage between the Appointments Clause and the Inferior Officers Appointments Clause. The Inferior Officers Appointments Clause is an exception to the general manner in which "Officers of the United States" are appointed—that is, through the Senate "advice and consent" process.

The Recess Appointments Clause may function in a similar fashion. This provision, which follows in the clause immediately after the Inferior Officers Appointments Clause, may also be a textual exception to the Appointments Clause. Under that reading, recess appointees would be "Officers of the United States."

Another possibility is that recess appointees are a type of "inferior Officer" that could be appointed without Senate confirmation. For example, recess appointees could fill a position that would otherwise be a "principal Officer," if that position had been filled by presidential nomination and Senate consent.[433] One such position is the Secretary of the Treasury. A recess-appointed Secretary of the Treasury might nonetheless be considered an inferior officer who could be appointed without Senate confirmation. Under this reading, the Recess Appointments Clause does provide an alternate path by which "Officers of the United States" can be appointed. If this view is correct, then inferior officers and recess appointees would be the *only* textual exceptions to the general appointment process described in the Appointments Clause.

There are other potential ways to characterize recess appointees. For example, it is possible that a recess appointee filling a position customarily characterized as a principal officer is a *temporary* type of principal "Officer[] of the United States." Or, perhaps, a recess appointee may not be an "Officer[] of the United States" at all. This conclusion is not as odd as it may appear. After all, the Recess Appointments Clause does not use any "Office" or "Officer"-language in characterizing such recess appointees. We will address this point in the next subsection.

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432. *See supra* Section II.A.1 (explaining that the phrase "by law" means by statute, pursuant to the Presentment Clause).

433. *See supra* Section II.D (observing that the phrase "principal Officer" appears in the Opinion Clause, and not the Appointments Clause).

2. Recess Appointees May Not Be "Officers of the United States" for Purposes of Article II, Section 2

There is a significant textualist reason to conclude that recess appointees are not "Officers of the United States." The Inferior Officers Appointments Clause references "such inferior *Officers*." However, there is no textual linkage that uses the language of "Office" or "Officer" between the Appointments Clause and the Recess Appointments Clause. The Recess Appointments Clause does not expressly refer to an "Office" or "Officer" of any type. Instead, the Recess Appointments Clause refers to "Vacancies." Cato, the pseudonymous Anti-Federalist made use of this lack of textual linkage in his fifth paper.[434] According to Hamilton, Cato argued that the President could fill Senate vacancies pursuant to the Recess Appointments Clause.[435] However, there may be an *indirect* textual linkage between the Appointments Clause and the Recess Appointments Clause.

The Appointments Clause provides that the President "shall appoint . . . all other Officers of the United States, *whose Appointments are not herein otherwise provided for*, and which shall be established by Law[.]"[436] Are recess appointees a type of "Officer[] of the United States, whose Appointments are not herein otherwise provided for" in the Appointments Clause?

Asher Steinberg, for example, drew an implication from the text. He inferred one possible meaning of the Appointments Clause: the phrase "not herein otherwise provided for" could be an invitation to scour the remainder of the Constitution for other provisions that provide authority to fill federal "Officers of the United States" positions.[437] These "Officers of the United States" would be outside the process of Presidential nomination and Senate confirmation. Among these positions might be recess appointees. Steinberg wrote,

> Further, to the extent otherwise-herein-provided appointed officers of the United States are implied, it is possible that these could be found in the *Recess Appointments Clause* (an exception to the normal Appointments Clause procedure) or the inferior officers discussed in the Appointments Clause, or the members of the Electoral College, who the states "appoint." And it is also possible that they can be found in the "Officers" of the militia, the appointment of which Article 1, section 8, clause 16 leaves to the states, even though the state militias could be, under that clause, "employed in the Service of the United

434. *See Cato V*, *supra* note 428.

435. *See supra* Section VI.B (discussing Cato's position with respect to Recess Appointments Clause).

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

437. *See* Steinberg, *supra* note 109.

> States," and thus might be viewed as containing officers of the United States that are appointed in a manner "otherwise herein provided."[438]

For Steinberg, the phrase "not herein otherwise provided for" could reference any other *appointed* officer in the Constitution. In other words, Steinberg reads this phrase as an invitation to scour the remainder of the Constitution for other provisions that provide authority to fill "Officer" positions by *appointment*. In Steinberg's view, if the Constitution describes a federal position as one filled by *appointment*, then that position is an "Officer of the United States."

Let's assume that Steinberg is correct, and some other positions in the Constitution may be characterized as "Officers of the United States." And let's also assume that the implication Steinberg draws from the constitutional text is correct: the Appointment Clause is an invitation to scour the constitutional text for other positions created by the Constitution. If both of these assumptions are correct, then the phrase "Officers of the United States" might also include positions that are *elected*. For example, members of Congress and the President could be "Officers of the United States" who are "not herein otherwise provided for" in the Appointments Clause. However, in order to reach this latter conclusion, the interpreter must reject the distinction we drew between *elected* and *appointed* federal positions.

Thomas Merrill reached just this conclusion. His conclusion elided over the significance of any textual distinction between constitutionally-mandated *elected* federal officials and officers *appointed* to statutory officers that are created, authorized, or regularized at Congress's discretion. Merrill contended that the phrase "whose Appointments are not herein otherwise provided for" in the Appointments Clause "clearly suggests that the referent is the Constitution as a whole, not a single article," that is, Article II.[439] And Merrill wrote, "The most likely reference of 'herein otherwise provided for' would be the Members of Congress, whose method of appointment is detailed in Article I."[440]

However, in our view, the phrase "not herein otherwise provided for" directs the reader *not* to scour the remainder of the Constitution for other provisions that provide authority to fill "Officers of the United States" positions.[441] We developed this analysis above in Section II.A.2.

To clarify our disagreement with Steinberg, let us revisit *Federalist No. 67*, in which Hamilton responded to Cato concerning the Recess

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438. *Id*. (emphasis added).
439. Merrill, *supra* note 146, at 2136.
440. *Id.* at 2136 n.157.
441. *See supra* Section II.A.2 (discussing the meaning of "whose Appointments are not herein otherwise provided for").

Appointments Clause.[442] In this paper, Hamilton included a quotation from the Appointments Clause, but Hamilton modified the Constitution's text:

> The first of these two clauses, it is clear, only provides a mode for appointing such officers, "whose appointments are *not otherwise provided for* in the Constitution, and which *shall be established by law*"; of course it cannot extend to the appointments of senators, whose appointments are *otherwise provided for* in the Constitution, and who are *established by the Constitution*, and will not require a future establishment by law.[443]

Hamilton modified the phrase "not herein otherwise provided for" to "not otherwise provided for in the Constitution." We do not know for certain why Hamilton made this modification to the text of the Appointments Clause. Nor can we be sure that Hamilton intended this revision to advance any substantive arguments. It is possible to read Hamilton's revision as supporting Steinberg's position: that the officers "not herein otherwise provided for" may be found throughout the entire Constitution and not just within Article II, Section 2. But Hamilton does not expressly adopt this position. Hamilton does not affirmatively state that Senators are "Officers of the United States." Indeed, Hamilton draws the opposite inference. Nowhere does Hamilton point to any positions, which he characterizes as "Officers of the United States," that are filled beyond the ambit of Article II, Section 2. In short, Hamilton does not tell us his position on the meaning of "not herein otherwise provided for."

There is another, prominent supporter of the position that the phrase "not herein otherwise provided for" was an invitation to scour the Constitution for other "Officers of the United States" who take office outside the aegis of Article II, Section 2. But this position has not been made public—until now.

3. Justice Scalia's Letter to Tillman

Justice Scalia's concurrence in *Noel Canning* began with this sentence: "*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.'"[444] Scalia's specific phrasing—"Except where the Constitution . . . provides otherwise"—mirrors the language used in the Appointments Clause: "whose Appointments are not herein otherwise provided for." Scalia's restatement of the constitutional text is subject to multiple interpretations. Under one interpretation, Scalia meant

442. *See* THE FEDERALIST NO. 67, *supra* note 73, at 347.

443. *Id.* at 348.

444. NLRB v. Noel Canning, 573 U.S. 513, 569 (2014) (Scalia, J., concurring) (emphases added).

that the Appointments Clause was an invitation to scour the Constitution for other "Officers of the United States" who take office outside the aegis of Article II, Section 2. Under a second interpretation, Scalia was just rephrasing the language of the Article II, Section 2, and left unclear whether he believed there were "Officers of the United States" who are not appointed under the aegis of the Article II, Section II.

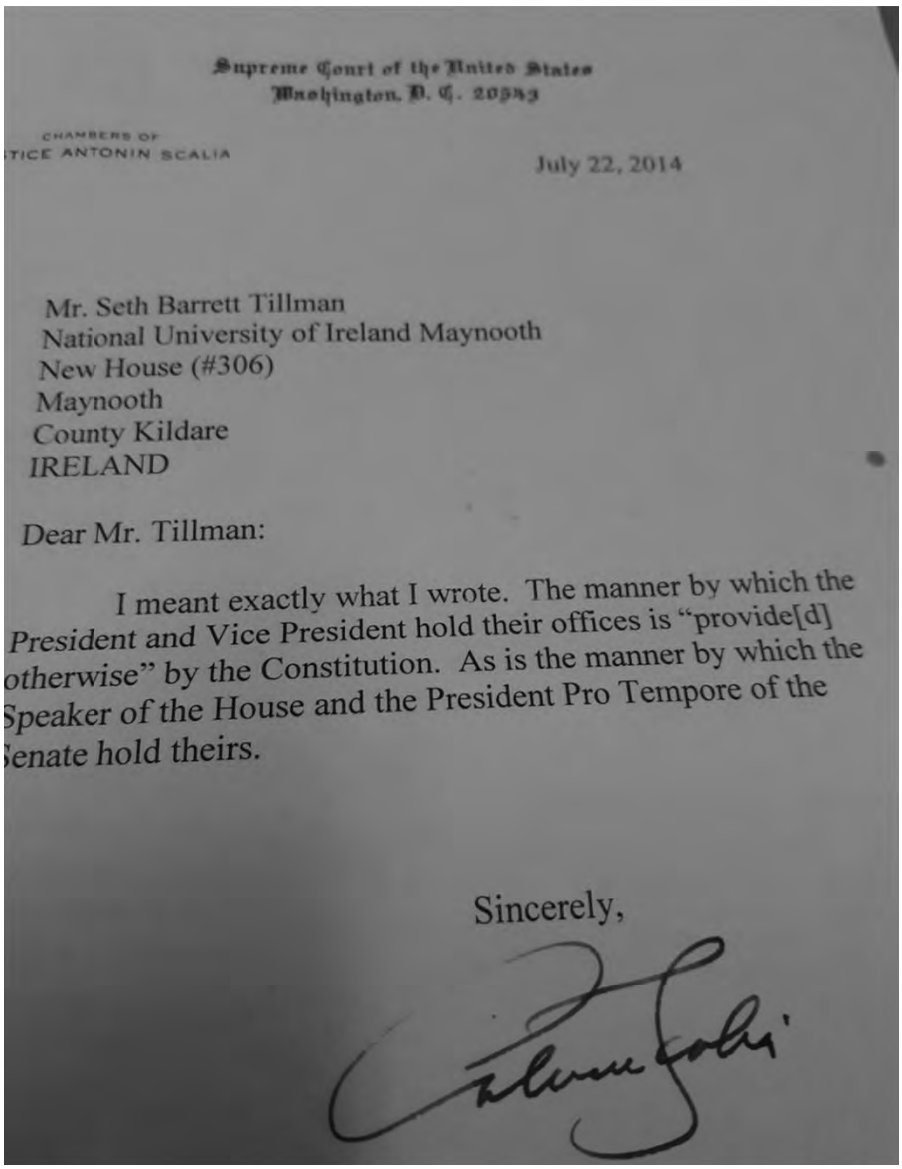
Shortly after *Noel Canning* was decided, Tillman wrote to Justice Scalia, and asked him to explain this sentence. At the time, Blackman told Tillman that Scalia would never reply. Blackman was wrong. On July 22, 2014, Justice Scalia wrote a terse note to Tillman.[445]

Dear Mr. Tillman:

> I meant exactly what I wrote. The manner by which the President and Vice President hold their offices is "provide[d] otherwise" by the Constitution. As is the manner by which the Speaker of the House and the President Pro Tempore of the Senate hold theirs.

Sincerely
/s/ Antonin Scalia

445. Letter from Hon. Antonin Scalia, U.S. Sup. Ct. J., to Seth Barrett Tillman, Lecturer at Nat'l University of Ireland Maynooth [https://perma.cc/JX3Z-DDYB].



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

July 22, 2014

Mr. Seth Barrett Tillman
National University of Ireland Maynooth
New House (#306)
Maynooth
County Kildare
IRELAND

Dear Mr. Tillman:

I meant exactly what I wrote. The manner by which the President and Vice President hold their offices is "provide[d] otherwise" by the Constitution. As is the manner by which the Speaker of the House and the President Pro Tempore of the Senate hold theirs.

Sincerely,

Here, Scalia adopted the first interpretation: the Appointments Clause was an invitation to scour the Constitution for other "Officers of the United States" who take office outside the aegis of Article II, Section 2. Indeed, he

thought that the President and Vice President were "Officers of the United States" who "hold their offices" in a "manner" that was "'provide[d] otherwise' by the Constitution." And Scalia thought that the Speaker of the House and the President Pro Tempore of the Senate were also "Officers of the United States" who "hold their offices" in a "manner" that was "'provide[d] otherwise' by the Constitution."

We are hesitant to treat a brief correspondence from Justice Scalia as a definitive statement of his jurisprudence. Indeed, this short letter lacks the sort of thorough legal analysis that Justice Scalia would employ in his legal opinions. Still, Justice Scalia's position suffers from many of the problems that face scholars who argue that the President is an "Officer[] of the United States."

First, and foremost, the Appointments Clause does not merely speak to how certain officers "hold" their positions, as Scalia wrote. The language used is "appointments." Did Scalia think the President is "appointed"? The text of the Constitution repeatedly refers to the President and Members of Congress as "elected."[446] Steinberg, discussed earlier, limits his reading of this provision to *appointed* positions, and not to *elected* positions. Merrill, by contrast, thought that members of Congress would be among those *appointed* officers referenced in the Appointments Clause. Moreover, the Appointments Clause refers to positions that "shall be established by law"—that is, by statute.[447] Did Scalia think the presidency and members of Congress were "established by law"? These positions were created by the Constitution, not by statute. Scalia's argument, like that of Merrill, cannot be squared with the text of the Appointments Clause.[448]

Second, Antonin Scalia circa-1974 cast doubt on the position of Antonin Scalia circa-2014. During the Ford Administration, Scalia served as Assistant Attorney General of the Office of Legal Counsel. In December 1974, he wrote a memorandum to the President's Associate Counsel. Scalia explained that when "the word 'officer' is used in the Constitution, it invariably refers to someone other than the President or Vice President."[449] Scalia then cited seven provisions of the Constitution, *including* the Appointments Clause. He added that "The Supreme Court, moreover, has interpreted Article II, Section 2, Clause 2, as being the *exclusive* means by which one may become an 'officer.'"[450] And Scalia observed that "[t]his use of the word 'officer' in the

446. *See supra* Section II.C.

447. *See supra* Section II.A.1.

448. *See supra* Section II.A.2.

449. Memorandum from Antonin Scalia, Asst. Att'y Gen, Re: Applicability of 3 C.F.R. Part 100 to the President and Vice President, to Kenneth A. Lazarus, Assoc. Couns. to the President, at 2 (1974) [https://perma.cc/2PUP-2ZVQ].

450. *Id.* (emphasis added).

Constitution has led the Department of Justice consistently to interpret the word in other documents as not including the President or Vice President unless otherwise specifically stated."[451] We agree with everything Scalia wrote in 1974. These principles in the memorandum, if applied to the Appointments Cause, suggest that the President is not an "Officer of the United States" whose appointment is not otherwise provided for beyond the text of the Appointments Clause. Rather, the better answer is that the phrase "whose Appointments are not herein otherwise provided for" does not refer to the elected President. Four decades is a long time. It is possible Justice Scalia reconsidered the view he expressed while working for the Executive Branch.

Third, we can point to other evidence throughout this Article that refutes Scalia's position. Supreme Court precedent that Scalia joined, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, recognized that "[t]he people do not vote for the 'Officers of the United States.'"[452] Plus there are many difficulties that arise if the President is an "officer of the United States" with regard to the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.

We have some trepidation with stating that Justice Scalia, whose correspondence is sorely missed, was mistaken. But on balance, Scalia's short statement does not hold up. Even Homer sometimes nods.[453]

D. Interclausalism and the Recess Appointments Clause

Section III.D discussed the concept of *intratextualism*. With intratextualism, Amar explained, "the interpreter [should] tr[y] to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."[454] Here, we introduce a related but different concept we call *interclausalism*: When the Supreme Court interprets one provision of the Constitution, it should consider how that provision interacts with other

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451. *Id.*

452. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010) (citation omitted) (first quoting U.S. CONST. art. II, § 2, cl. 2; then citing THE FEDERALIST NO. 72, *supra* note 73, at 463); *see* United States v. Mouat, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.").

453. *See even Homer sometimes nods,* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/even-homer-sometimes-nods [https://perma.cc/474D-9MKN] ("[U]sed to say that even an expert sometimes makes mistakes: The famous aphorism about human fallibility is that even Homer nods.").

454. Amar, *supra* note 282, at 748.

related provisions where they share common or closely similar language—or, even if the provisions are related, but there is no precise textual overlap. When should the Court consider this interplay? First, in situations where clarifying the original public meaning of one provision clarifies the original public meaning of another provision. Second, in situations where modifying the judicially-approved scope of one provision will likely modify the judicially-approved scope of another provision. We refer to this methodological approach as *interclausalism*. Our approach is similar to what prior commentators have described as the harmonious-reading canon.[455]

In this section, we will use interclausalism to interpret the Recess Appointments Clause with regard to the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause.

1. Interclausalism and the Impeachment Clause

Let us revisit *Noel Canning* in light of interclausalism. Had Justice Breyer broadened his analysis beyond the single provision at issue in the case, the Court would have considered how its broad reading of the Recess Appointments Clause would affect the scope of other related provisions. If the Court had followed our methodological approach, it would have been more hesitant to reach out and decide an unnecessary issue: the status of recess appointees as "Officers of the United States." This methodological approach serves as a safeguard and prevents the courts from resolving unnecessary issues, thereby avoiding unintended and potentially undesirable consequences. Interclausalism functions as something of a precautionary or avoidance principle: courts should hesitate before unnecessarily deciding a constitutional issue unless the judges have considered the possible collateral consequences in connection with the meaning and scope of other clauses. In other words, before what is, in effect, an unnecessary holding is injected into the case law, the Court should consider where that holding might lead.

For example, whether recess appointees can be impeached is an open question. If recess appointees are not "Officers of the United States," then they cannot be impeached. We are not aware of any prior efforts to impeach one of these temporary appointees, but this specific issue has never been judicially settled. Let's assume that in the future, the House impeaches a recess appointee. During her trial, she could argue that she was not an "Officer[] of the United States" because she was not appointed pursuant to the Appointments Clause. (Senator Blount made that same argument more than two centuries ago.[456]) Maybe the answer ought to be "yes"; maybe the

455. *See* SCALIA & GARNER, *supra* note 3, at 180 ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.").

456. *See supra* Section III.C.2 (discussing *Blount* impeachment proceedings).

answer ought to be "no." Before *Noel Canning* was decided, it would have been up to Congress, in the first instance, to decide this question based on concrete facts and focused briefing from the parties.

However, in *Noel Canning*, the Court may have resolved that issue. If recess appointees are "Officers of the United States," then they are subject to the Impeachment Clause. In effect, the Court *implicitly* decided an important structural question without any substantive analysis. We say implicitly because Justice Breyer's statement about "Officers of the United States" might be understood as dicta or otherwise nonbinding. In *Noel Canning*, the only question presented was whether the President's appointments were valid. The Court did not need to resolve whether recess appointees were "Officers of the United States." For that reason, among others, Congress could, in theory, treat the issue as unsettled. But before *Noel Canning* was decided, Congress could consider the issue on a blank slate. Now, there is some Supreme Court precedent for Congress to contend with—as it is likely to do in the impeachment context. Had the Court followed our preferred approach, red flags would have been raised, and the Justices would have likely avoided reaching this issue.

If Justice Breyer had relied on interclausalism, our preferred methodology, he could have avoided this situation. First, he should have recognized that the Recess Appointments Clause does not specifically use the language "Officers of the United States." As a result, there was already some reason to be cautious before linking the Recess Appointments Clause to the language used in the Appointments Clause and elsewhere in the Constitution. Second, Justice Breyer apparently deemed recess appointees as "Officers of the United States." If he did make that decision, then he brought recess appointees under the aegis of the Impeachment Clause. Likewise, if Justice Breyer had decided that recess appointees were not "Officers of the United States," then that decision would have taken recess appointees out of the scope of the Impeachment Clause. Third, he should have recognized that the impeachability of recess appointees would remain unsettled but for this decision. The Court should always hesitate before deciding important constitutional questions that are not necessary to decide the precise question presented—all the more so in cases where the parties did not fairly raise and brief such issues. These three reasons should have led Justice Breyer to return to step one and not to announce that recess appointees were "officers of the United States."

Section III.D also discussed the relationship between the Appointments Clause and the Impeachment Clause. In the *PROMESA* case, the clause-bound reading of the Appointments Clause narrowed the scope of the

Impeachment Clause.[457] As a result, territorial officers cannot be impeached—again, we assume that future Congresses are likely to follow the Supreme Court's precedent in the impeachment context. If Congress chooses to evade that precedent, then a territorial officer defendant convicted in Senate impeachment proceedings could seek judicial review in collateral judicial proceedings.

By contrast, in *Noel Canning*, the clause-bound reading of the Recess Appointments Clause expanded the scope of the Impeachment Clause. Now, a congressional impeachment of a recess appointee will be consistent with Supreme Court precedent, but a congressional impeachment of a territorial officer will not be consistent with Supreme Court precedent. These two cases illustrate the unintended consequences that flow from the Justices' failure to consider the relationship among related provisions—whether or not the related provisions have overlapping language. *Noel Canning* deemed recess appointees "Officers of the United States" for purposes of the Appointments Clause. In doing so, the Court indirectly included those positions in the scope of the Impeachment Clause. Again, the Constitution's text has a "Newtonian quality" to it.[458] Every action has an equal and opposite reaction.

2. Interclausalism and the Commissions Clause

Under one interpretation of the Commissions Clause, which we do not fully embrace, interclausalism may cast some doubt on the conclusion that recess appointees are "Officers of the United States." Those appointed pursuant to the Appointments Clause receive Commissions under the Commissions Clause, which obligates the President to "Commission *all* the Officers of the United States."[459] In contrast, recess appointees receive their commissions under the Recess Appointments Clause, which empowers the President to "grant[] Commissions which shall expire at the End of their next Session."[460] In other words, Recess Appointees receive their commissions under an express provision of the Constitution. They do not need to rely on the more general Commissions Clause and their being "officers of the United States." This relationship might suggest that recess appointees are not "Officers of the United States" for purposes of the Commissions Clause. Arguably, this textual linkage would weaken the argument that recess appointees are "Officers of the United States" for purposes of the Appointments Clause and the Impeachment Clause.

457. *See supra* Section III.D (discussing the *PROMESA* case and the Impeachment Clause).
458. *See supra* Section III.D.
459. U.S. CONST. art. II, § 3 (emphasis added).
460. *Id.* art. II, § 2, cl. 3.

3. Interclausalism and the Oath or Affirmation Clause

The relationship between the Recess Appointments Clause and the Commissions Clause might support the alternate reading that recess appointees are not "Officers of the United States." However, the relationship between the Recess Appointments Clause and the Oath or Affirmation Clause might support the reading that recess appointees are "Officers of the United States." The Oath or Affirmation provides, "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." If recess appointees are "executive . . . Officers . . . of the United States," then they are squarely covered by the Oath or Affirmation Clause. Alternatively, if recess appointees are not "Officers of the United States," then Congress would have to enact a statute that establishes their separate oath—outside the ambit of Article VI. In this regard, the recess appointees would resemble appointed legislative positions, such as the Clerk of the House and the Secretary of the Senate.[461]

History shows that Congress, through its first statute, created an oath for the Clerk of the House and the Secretary of the Senate.[462] But that statute did not specify a separate oath for recess appointees. And we are not aware of any statutes that expressly created a separate oath for recess appointees. In 1795, President Washington recess-appointed John Rutledge as Chief Justice of the Supreme Court.[463] He took both the judicial and constitutional oaths.[464] As far as we know, Rutledge took the same oath that other appointed-and-confirmed Justices of the Supreme Court took. This early practice could suggest that Rutledge, and perhaps Congress, viewed recess appointees as "Officers of the United States."

E. What Are Recess Appointees?

In dicta, the Supreme Court has suggested, that recess appointees both are and are not "Officers of the United States." The Appointments Clause suggests that recess appointees may or may not be "Officers of the United States." The relationship between the Recess Appointments Clause and the

461. *See supra* Section V.C.3 (discussing the oath for the Clerk of the House and the Secretary of the Senate).

462. An Act to regulate the Time and Manner of administering certain oaths, ch. 1, §§ 1–5, 1 Stat. 23, 23–24 (1789).

463. *Oaths Taken by the Chief Justices*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/oath/oathsofthechiefjustices.aspx [https://perma.cc/ZC69-TSNN].

464. *Id.*

Commissions Clause suggests that recess appointees are not "Officers of the United States." However, the relationship between the Recess Appointments Clause and the Oath or Affirmation Clause suggests that recess appointees are "Officers of the United States." Ultimately, we are not entirely certain about the status of recess appointees.

Perhaps the better way to think of recess appointees is that they are federal agents acting under a special, limited, and temporary authority, but because they lack duration in their position, they are not *bona fide* officers. Stated differently, such recess appointees might be construed as officers *pro tem*, like the Senate President Pro Tempore. Under that view, recess appointees might be classified as "Office[s] under the Authority of the United States," the language used in the Ineligibility Clause. Indeed, the first statute expressly provided an oath for officers "appointed under the Authority of the United States."[465] (In Part VI of this ten-part series, we will discuss the Constitution's "Office under the Authority of the United States"-language.)

In any event, the precise status of recess appointees does not alter our broader conclusion: elected federal officials are not "Officers of the United States."

CONCLUSION

Our goal in this third installment was to show that the phrase "Officers of the United States" has a consistent meaning in the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oath or Affirmation Clause. In each provision, this phrase refers to appointed positions in the Executive and Judicial Branches of the federal government. This phrase does not refer to elected officials like the President and members of Congress. We think the text of each provision supports our position. Moreover, our position is supported by, or is at least consistent with, history and a wide swath of case law.

We acknowledge that some people have long contended that elected officials like the President and, even, members of Congress are "Officers of the United States." But this contrary position conflicts with the Constitution's text and is inconsistent with historical practice.

In the fourth installment of this ten-part series, we will show that the phrase "Office . . . under" is a British statutory drafting convention that was well-established when the Constitution was ratified in 1788. To do so, we will trace the history of this drafting convention from English and British sources, to the Articles of Confederation, to the Washington Administration,

465. An Act to regulate the Time and Manner of administering certain oaths, ch. 1, §§ 1–5, 1 Stat. 23, 23–24.

through the Antebellum Era, to the Civil War, and, finally, through the end of the Nineteenth Century. In the Anglo-American legal tradition, the phrase "Office under . . ." was, and remains, a commonly used drafting convention that refers to appointed officers. Like the phrase "Officers of the United States," the phrase "Office . . . under the United States" does not refer to elected officials. In our view, the phrase "Officers of the United States" is a subset of the phrase "Office . . . under the United States." The phrase "Office . . . under the United States" includes every position within the scope of the phrase "Officers of the United States." The phrase "Office . . . under the United States" *also* extends to appointed positions in the Legislative Branch, such as the Clerk of the House and Secretary of the Senate.[466]

466. *Cf.* TENCH COXE, AN EXAMINATION OF THE CONSTITUTION FOR THE UNITED STATES OF AMERICA 13 (Philadelphia, Zachariah Poulson 1788) ("The house of representatives is not, as the senate, to have a president chosen for them from without their body, but are to *elect* their speaker from their own number—They will also *appoint* all their other officers." (emphases added)).