Exhibit 5

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DINNER TABLE ACTION, *et al.*, Plaintiffs, v. WILLIAM J. SCHNEIDER, *et al.*, Defendants.	**Civ. A. No. 1:24-cv-00430-KFW**[1]

DECLARATION OF PROFESSOR SETH BARRETT TILLMAN

I, Seth Barrett Tillman, hereby declare as follows:

[1] I am a citizen of the United States, and a resident of the Republic of Ireland.

[2] In 1984, I graduated from the College of the University of Chicago with a BA (*honors*), and, in 2000, I graduated from Harvard Law School with a JD (*cum laude*). After graduating from law school, I practiced law in the United States. I have also been a law clerk for a judge in the United States Court of Appeals for the Third Circuit and in three district courts—for two federal district court judges (in the United States District Court for the Middle District of Alabama and in the United States District Court for the District of New Jersey) and for one federal magistrate judge (in the United States District Court for the Middle District of Pennsylvania).

[3] I have taught as an adjunct in a U.S. law school. Since 2011, I have been part of the full-time faculty in the Maynooth University School of Law and Criminology, Ireland / Scoil an Dlí agus na Coireolaíochta Ollscoil Mhá Nuad. In 2021, I was

[1] Karen Frink Wolf, United State District Court for the District of Maine, Magistrate Judge, sitting by consent.

promoted to associate professor. (*My university affiliation and title are listed for identification purposes only*.)

[4] I have authored or co-authored well over 70 publications since I began actively publishing in 2003.[2] My publications include articles in domestic (that is, U.S.) and foreign, online and print: traditional academic peer reviewed journals,[3] student-edited

[2] *See, e.g.*, Seth Barrett Tillman, *Misconstruing the Electoral Count Act: A Response to Evan A. Davis and David M. Schulte*, 2025 Harv. J.L. & Pub. Pol'y Per Curiam 1, https://tinyurl.com/2925dttn; 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) (cited 81 times); Seth Barrett Tillman, The Federalist Papers *as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. Va. L. Rev. 601 (2003) (cited 43 times).

[3] *See, e.g.*, Seth Barrett Tillman, *Understanding Nativist Elements Relating to Immigration Policies and to the American Constitution's Natural Born Citizen Clause*, 32(2) Study on the American Constitution 1 (Aug. 2021) (peer review) (a South Korean journal, publishing in English and Korean), https://tinyurl.com/dhkxfzby; Seth Barrett Tillman, *Ex parte* Merryman*: Myth, History, and Scholarship*, 224(2) Mil. L. Rev. 481 (2016) (peer review) (cited 63 times), http://ssrn.com/abstract=2646888; Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5(1) British J. Am. Leg. Studies 95 (2016) (peer review) (cited 20 times), https://ssrn.com/abstract=2679512.

journals,[4] professional journals,[5] policy-makers' forums,[6] magazines,[7] newspapers (including opinion editorials and letters),[8] etc.

[5] I have won prizes for my publications.[9]

[6] My publications and amicus briefs have elicited over 20 full-length responses by judges,[10] academics,[11] and others.[12]

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[4] *See, e.g.*, Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 Tex. Rev. L. & Pol. 350 (2024) (cited 129 times), https://ssrn.com/abstract=4568771; *supra* note 2 (collecting authority).

[5] *See, e.g.*, Seth Barrett Tillman, *COVID-19: Can the Oireachtas Legislate During the Pandemic?*, 38(7) Irish Law Times 94 (2020) (refereed professional journal) (cited 6 times), https://ssrn.com/abstract=3561117; R. Franklin Balotti & Seth Barrett Tillman, *Gazing into the Crystal Ball of Future Developments in Delaware Corporate Law: What if the Past is Not Prologue?*, 15(3) The Corporate Governance Advisor 3 (May/June 2007) (cited 4 times), https://ssrn.com/abstract=986308.

[6] *See, e.g.*, Seth Barrett Tillman, *The Right to a Unanimous Verdict and the Jury Instructions in* People v. Trump, Just Security (June 10, 2024), https://www.justsecurity.org/96654/trump-unanimous-verdict/; Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an "Officer of the United States" or an "Employee of the United States"?*, Lawfare: Hard National Security Choices (July 23, 2018, 2:50 PM), https://www.lawfaremedia.org/article/robert-mueller-officer-united-states-or-employee-united-states (cited 10 times).

[7] *See, e.g.*, Josh Blackman & Seth Barrett Tillman, *The Weird Scenario That Pits President Pelosi Against Citizen Trump in 2020*, The Atlantic (Nov. 20, 2019, 6:40 AM ET), https://www.theatlantic.com/ideas/archive/2019/11/2020-election-could-pit-pelosi-against-trump/602308/ (cited 5 times); Seth Barrett Tillman, *Advice to the Allies—1945*, 15(2) Claremont Review of Books 13, Spring 2015 (cited 1 time), http://ssrn.com/abstract=2478600.

[8] *See, e.g.*, Josh Blackman & Seth Barrett Tillman, Essay, *Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene*, New York Times, Apr. 23, 2022, A22 (cited 14 times), https://tinyurl.com/59s8c6er; Seth Barrett Tillman, Opinion Editorial, *Court of Appeal just a new version of Supreme Court—only more costly*, Irish Times (July 28, 2014, 1:30 AM), Business & Innovation at 7 (cited 7 times), https://www.irishtimes.com/news/crime-and-law/court-of-appeal-just-a-new-version-of-supreme-court-only-more-costly-1.1874746.

[9] *See* Landmark Legal Foundation's 2024 John Locke Liberty Award; North Carolina Society of Historians: 2021 Award of Excellence for Outstanding Contribution to the Preservation and Perpetuation of North Carolina History and Heritage.

[10] *See, e.g.*, Chief Judge Peter J. Eckerstrom, *Yes, the Senate Elevated Partisan Political Goals Over Constitutional Text When It Refused to Consider President Obama's Nominee to Replace Justice Scalia*, 21 U. Penn. J. Const. L. 891 (2019) (replying to a Tillman-authored publication).

[11] *See, e.g.*, Professor Jeremy D. Bailey, *The Traditional View of Hamilton's* Federalist *No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman*, 33 Harvard J.L. & Pub. Pol'y 169 (2010), http://ssrn.com/abstract=1473276.

[12] *See, e.g.*, A Government Lawyer, *Yes, Trump's Shakedown of Ukraine Was Impeachable "Bribery,"* Harv. Nat'l Sec. J. Online 1 (Mar. 27, 2020), https://tinyurl.com/rty8r6s (anonymous government attorney responding to a Tillman co-authored publication).

[7] My publications and amicus briefs have elicited multiple retractions from academics and others.[13]

[8] There are over 1400 citations to my publications and amicus briefs in over 1000 sources,[14] including over 150 citations in sources from over 40 foreign countries,[15] including many sources published in languages other than English.[16]

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[13] *See, e.g.*, *Our correction and apology to Professor Tillman*, Balkinization (Oct. 3, 2017, 8:30 PM), https://balkin.blogspot.ie/2017/10/our-correction-and-apology-to-professor.html (retraction by Professor Jack Rakove and four other academic legal historians based on Tillman's publications and amicus filings); *accord* Letter from Counsel for the Legal Historians to Judge George B. Daniels, Citizens for Responsibility and Ethics in Washington v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (Civ. A. No. 1:17-cv-00458-GBD) (letter filed Oct. 3, 2017), ECF No. 96 (retraction filed on behalf of Jack Rakove and four other "Legal Historians"), https://tinyurl.com/ybd783uf; *see also, e.g.*, Steven Calabresi, Letters, *President Trump Can Not Be Disqualified—Prof. Steven Calabresi changes his mind*, Wall Street J. (Sept. 12, 2023, 4:30 pm ET), https://wsj.com/articles/trump-can-not-be-disqualified-14th-amendment-calabresi-16657a1b (retraction by Professor Calabresi based on Tillman's and others' publications); Michael Mukasey, *as reported on* Eugene Volokh, *No, Hillary Clinton wouldn't be legally ineligible for the Presidency even if she had violated government records laws*, Washington Post: Volokh Conspiracy (Aug. 26, 2015, 12:54 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/26/no-hillary-clinton-wouldnt-be-legally-ineligible-for-the-presidency-even-if-she-had-violated-government-records-laws/ (retraction by Michael Mukasey, former Chief Judge (S.D.N.Y.) and former Attorney General of the United States, based on Tillman-authored blog post). *But see* Deposition of Professor Jack Rakove (Apr. 4, 2025) 12:3–12:6 ("Q[uestion]. Have you ever had to make *any* retractions of *any* declaration or anything you said in a declaration or *amicus brief* in any case? A[answer]. No." (emphases added)).

[14] *See, e.g.*, William Baude & Michael Stokes Paulsen, *Sweeping Section Three under the Rug: A Comment on* Trump v. Anderson, 138 Harv. L. Rev. 677, 682 n.34 (2025) (citing a Tillman co-authored publication); Travis Crum, *The Unabridged Fifteenth Amendment*, 133 Yale L.J. 1039, 1140 n.614 (2024) (same).

[15] *See, e.g.*, *Chapter One Foundation Limited v The Attorney General (Re: Article 128 of the Constitution)*, No. 2021-CCZ-0036 (Constitutional Court of Zambia Feb. 25, 2022) (Mulenga, J), slip op. at J2, and J24–25 (citing a Tillman-authored publication), https://media.zambialii.org/files/judgments/zmcc/2022/4/2022-zmcc-4.pdf; Luke Beck, *When Is an Office or Public Trust 'Under the Commonwealth' for the Purposes of the Religious Tests Clause of the Australian Constitution?*, 41(1) Monash U. L. Rev. 17, 35 n.76 (2015) (Austl.) (peer review) (citing Tillman-authored publications).

[16] *See, e.g.*, Rob van der Hulle, Focus, *De verkiesbaarheid van Donald Trump*, Nederlands Juristenblad 22, 27 n.32, 28 n.45 (Jan. 5, 2024) (citing a Tillman co-authored publication), https://www.njb.nl/media/ah3nvnj1/njb01_de-verkiesbaarheid-van-donald-trump.pdf; Shigemoto Suzuki, *Law and politics on judicial supremacy—Based on the Debate in the United States*, 74(4–6) Hokkaido University Law Review 269, 273 n.16 (2024) (peer review) (citing a Tillman-authored publication in an article published in Japanese),

[9] I have also participated as an amicus or co-amicus in over 35 briefs and motions, in federal and state courts, in both civil[17] and criminal cases.[18] While in private practice, I submitted declarations on behalf of clients. As an amicus, I submitted one declaration in a prior judicial proceeding.[19]

[10] My publications and amicus briefs have been cited by domestic and foreign courts of record, justices and judges,[20] by named parties in litigation,[21] by other amicus

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https://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/91455/1/lawreview_74_4%E3%83%BB5%E3%83%BB6_all.pdf.

[17] *See, e.g.*, Brief Submitted for Professor Seth Barrett Tillman as Amicus Curiae in Support of Petitioner, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719) (brief filed Jan. 9, 2024) (cited 23 times), 2024 WL 184282, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-719.html.

[18] *See, e.g.*, Brief of Professor Seth Barrett Tillman et al. as Amici Curiae in Support of Defendant Trump's Motion to Dismiss the Indictment, United States of America v. Trump, 740 F. Supp. 3d 1245 (S.D. Fla. 2024) (Crim. No. 9:23-cr-80101-AMC-BER) (brief filed Mar. 21, 2024), ECF No. 410 (citied 15 times), 2024 WL 1214430, https://ssrn.com/abstract=4755563.

[19] *See* Declaration of Seth Barrett Tillman, Lecturer (Exhibit D), *in Amicus Curiae* Scholar Seth Barrett Tillman's and Proposed *Amicus Curiae* Judicial Education Project's Response to *Amici Curiae* by Certain Legal Historians, Citizens for Responsibility and Ethics in Washington v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (Civ. A. No. 1:17-cv-00458-GBD) (declaration filed Sept. 19, 2017), ECF No. 85-5 (cited 3 times), 2017 WL 7795997, https://ssrn.com/abstract=3037107.

[20] *See, e.g.*, *Citizens for Responsibility and Ethics in Washington v. Trump*, 971 F.3d 102, 111 n.16 (2d Cir. 2020) (Menashi, J., dissenting from denial of en banc review) (citing Tillman co-authored amicus appellate brief); *see also, e.g.*, *Anderson v. Griswold*, Civ. A. No. 2023CV32577, 2023 WL 7017745, at *9 (Dist. Ct., City and County of Denver, Colo. Oct. 25, 2023) (Wallace, J.) (citing Tillman co-authored publication); *accord id.*, 2023 WL 8006216, *43–46 (Dist. Ct., City and County of Denver, Colo. Nov. 17, 2023) (Wallace, J.) (holding that the President is neither an "officer of the United States" nor holds an "office under the United States" as those phrases are used in Section 3 of the Fourteenth Amendment), *rev'd*, 543 P.3d 283 (Colo. 2023) (per curiam), *rev'd*, *Trump v. Anderson*, 601 U.S. 100 (2024) (per curiam); *Anderson*, 543 P.3d at 348, 351 & n.7, 356 (Samour, J., dissenting) (citing Tillman co-authored publication); *Senator Ivana Bacik & Ors v An Taoiseach, Ireland and the Attorney General* [2020] IEHC 313 [70] (High Court of Ireland) (Irvine, President Judge) (citing a Tillman-authored publication); *supra* note 15 (listing a decision of the Constitutional Court of Zambia citing a Tillman-authored publication); [Justice] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 113, 504, 563 (2012) (citing Tillman co-authored publication).

[21] *See, e.g.*, Government's Response to Professor Seth Barrett Tillman, et al., Amici Curiae Brief in Support of Donald J. Trump's Motion to Dismiss Based on the Appointment of the Special Counsel at 1, 3, 5–7, United States of America v. Donald J. Trump, 740 F. Supp. 3d 1245 (S.D. Fla. 2024) (Crim. No. 9:23-80101-CR-CANNON) (brief filed Apr. 4, 2024 by Special Counsel Jack Smith), ECF No. 432 (responding to Tillman co-authored amicus brief),

filings,[22] in filings before quasi-judicial or executive or administrative bodies,[23] in filings by the United States Department of Justice and it officers[24] and by analogous state-level departments and their officers,[25] in Congressional Research Service and

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2024 WL 1490604, https://tinyurl.com/3kju33w4; Opening Brief of Donald J. Trump at 50 n.115, Trump v. Bellows, 2024 WL 989060 (Superior Court, Kennebec County, Me. Jan. 17, 2024) (No. AP-24-01) (brief filed Jan. 8, 2024) (citing a Tillman co-authored amicus brief), 2024 WL 989427.

[22] *See, e.g.*, Brief of Amicus Curiae Landmark Legal Foundation in Support of Petitioner at 14, 15, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719) (brief filed Jan. 11, 2024) (citing Tillman co-authored amicus brief and Tillman co-authored publication), 2024 WL 184284; Brief of Amicus Curiae by Certain Legal Historians on Behalf of Plaintiffs at 22 nn.81 & 82, Citizens for Responsibility and Ethics in Washington v. Donald J. Trump, in his official capacity as President of the United States of America (S.D.N.Y 2017) (Civ. A. No. 1:17-cv-00458-GBD) (brief filed Aug. 11, 2017), ECF No. 70-1 (citing Tillman co-authored amicus brief), 2017 WL 5483629.

[23] *See, e.g.*, President Donald J. Trump's Hearing Brief at 12 n.3, *In re*: Challenge to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States (Me., Dep't of the Sec. of State 2023) (brief filed Dec. 14, 2023) (citing multiple Tillman co-authored publications) (on file with Maine's Secretary of State); President Donald J. Trump's Closing Argument Brief at 20, 22, *In re*: Challenge to Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States (Me., Dep't of the Sec. of State 2023) (brief filed Dec. 19, 2023) (citing a Tillman co-authored Colorado Supreme Court amicus brief) (on file with Maine's Secretary of State); *see also* Motion to Dismiss Objectors' Petition at 15 n.9, Steven Daniel Anderson v. Trump, 24 SOEB GP 517 (Ill. State Bd. of Elections 2024) (brief filed Jan. 19, 2024) (citing Tillman co-authored publication), https://news.wttw.com/sites/default/files/article/file-attachments/Election_Board_Agenda_013024.pdf; *cf.* Environmental NGO Partners to the Environmental Law Implementation Group–Aarhus Submission at 31 n.43, 37, Irish Department of Environment, Community and Local Government (submission filed Sept. 26, 2014) (citing Tillman-authored publications).

[24] *See, e.g.*, Reply Brief for the Respondent at 10, Seila Law LLC v. Consumer Finan. Protection Bureau, 591 U.S. 197 (2020) (No. 19-7) (brief filed Feb. 14, 2020 by Noel Francisco, Solicitor General) (citing Tillman-authored publication), 2020 WL 774433, https://www.justice.gov/brief/file/1249666/download.

[25] *See, e.g.*, State of West Virginia's Memorandum of Law in Support of its Motion to Dismiss at 14–15, Castro v. Secretary of State Andrew Warner and Donald John Trump (S.D. W. Va. 2023) (Civ. A. No. 2:23-cv-00598) (brief filed Oct. 12, 2023 by Patrick Morrisey, A.G.), ECF No. 44 (citing multiple Tillman-authored and Tillman co-authored publications), 2023 WL 7001813, https://ago.wv.gov/Documents/Motion%20to%20Dismiss.pdf.

other congressional documents,[26] in Ph.D. dissertations,[27] and in articles in academic and professional journals.[28]

[11] My amicus filings, and the debate and retractions associated with them, have even been considered newsworthy by newspapers of record.[29]

[12] I frequently write on constitutional law, Founding-era, Framing-era, and Early Republic-era history and legal history, and the original public mean of constitutional provisions.

[13] In preparation for this declaration, the primary publications, sources, and litigation-related documents I consulted included:

> Declaration of Jonathan Gienapp (filed Feb. 26, 2025).
>
> Deposition of Jonathan Gienapp (Apr. 4, 2025) (rough draft).
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> Jonathan Gienapp, The Transformation of the American Constitution (2013) (unpublished Ph.D. dissertation, Johns Hopkins University Dep't of History) (on file with ProQuest Dissertations & Theses Global).
>
> Declaration of Jack N. Rakove (filed Feb. 26, 2025).
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> Deposition of Jack N. Rakove (Apr. 4, 2025) (rough draft).
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> …
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> *The Federalist 1787–1788* (New York, Heritage Press 1945).

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[26] *See, e.g.*, T.J. Halstead, Cong. Research Serv., RL 33009, Recess Appointments: A Legal Overview CRS-11 n.74 (updated July 11, 2007) (citing multiple Tillman-authored publications), https://tinyurl.com/4cb2z45n.

[27] *See, e.g.*, [Professor] David Bradley Froomkin, Structuring Democracy 51 n.88, 243 (2024) (unpublished Ph.D. dissertation, Yale University Dep't of Political Science) (citing Tillman-authored publication) (on file with author); Vipat Rujipavesana, The Role of the Court of Justice in Protecting the Rights and Liberties of the People Due to the Coup 213 n.8, 215 n.11, 273 (2022) (unpublished Ph.D. dissertation, Thammasat University Dep't of Justice Administration, Bangkok, Thailand) (citing Tillman-authored publication), http://ethesisarchive.library.tu.ac.th/thesis/2022/TU_2022_6001305090_17590_27112.pdf.

[28] *See, e.g.*, Rachel A. Shelden, *The* Griffin's Case *Phenomenon and the Problem of Historical Knowledge in Legal Arguments*, 33 Wm. & Mary Bill Rts. J. 397, 399 n.12, 403 n.34 (2024) (citing Tillman co-authored amicus brief and publications); Kyle L. Greene, *National Security Rules: America's Constitution of Law and War*, 73 Maine L. Rev. 271, 294 n.131 (2021) (citing a Tillman-authored publication); *supra* notes 14–16 (collecting authority).

[29] *See, e.g.*, Adam Liptak, *'Lonely Scholar With Unusual Ideas' Defends Trump, Igniting Legal Storm*, N.Y. Times, Sept. 26, 2017, Section A, page 17 (discussing Tillman co-authored amicus filings and publications), https://www.nytimes.com/2017/09/25/us/politics/trump-emoluments-clause-alexander-hamilton.html?mtrref=Undefined.

Akhil Amar, *America's Constitution: A Biography* (Random House Trade Paperbacks 2006).

F.H. Buckley, *The Republic of Virtue* (Encounter Books 2017).

Josh Chafetz, *Democracy's Privileged Few* (Yale University Press 2007).

Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (Da Capo Press 1971) (1943).

Paul Einzig, *The Control of the Purse* (London, Secker & Warburg 1959).

…

Seth Barrett Tillman, Opening Statement, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 Nw. U. L. Rev. 399–421 (2012), https://ssrn.com/abstract=2182078.

Seth Barrett Tillman, Closing Statement, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U. L. Rev. Colloquy 180–208 (April 2, 2013), https://ssrn.com/abstract=2012803.

Seth Barrett Tillman, *Why Professor Lessig's "Dependence Corruption" Is Not a Founding-Era Concept*, 13(2) Election L.J. 336–45 (June 2014) (peer review), https://ssrn.com/abstract=2342945.

Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61(3) S. Tex. L. Rev. 309–19 (2021), https://ssrn.com/abstract=3890400.

Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part II: The Four Approaches*, 61(3) S. Tex. L. Rev. 321–429 (2021), https://ssrn.com/abstract=4021548.

Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, 62(4) S. Tex. L. Rev. 349–454 (2023), https://ssrn.com/abstract=4432164.

Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part IV: The "Office . . . under the United States" Drafting Convention*, 62(4) S. Tex. L. Rev. 455–532 (2023), https://ssrn.com/abstract=4432246.

Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part V: The Elector Incompatibility, Impeachment Disqualification, Incompatibility, and Foreign Emoluments Clauses*, 63(3) S. Tex. L. Rev. 237–425 (2024), https://ssrn.com/abstract=4527680.

Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part VI: The Ineligibility Clause*, 64(3) S. Tex. L. Rev. 209–56 (forth. circa May 2025), https://ssrn.com/abstract=5198712 (final version available on SSRN).

[14] I have not asked for, negotiated, received, or accepted any fee, emoluments, or any other compensation for my participating in the instant litigation.[30] Should my future participation in this litigation incur any significant out-of-pocket expenses, at that juncture, I will ask plaintiffs to cover my expenses. To date, I have incurred no such expenses.

[15] I have been asked: [i] to opine on the concept of "corruption" as it was used circa 1787–1788 when the original Constitution was drafted by the members of the Constitutional Convention, debated by the public, and ratified by state conventions, and [ii] to expound on my views as to how useful the concept of corruption is in regard to understanding the Constitution today. I have had more than one occasion in the past to opine on these and closely related issues, and I have done so in publications prior to Trump-47 and prior to Trump-45.[31] My view is that discussion of the concept corruption, albeit useful in understanding the broad motivations of members of the Constitutional Convention and their contemporaries, is not useful in regard to understanding the contours or meaning of specific constitutional provisions. Indeed, a corruption-focused discourse is likely to confuse the substantive issues and lead the fair-minded judge or interpreter astray.

[16] To be sure, I am not commenting on the discussion of corruption in *Buckley v. Valeo*, 424 U.S. 1 (1976) and its progeny. My discussion relates to whether Founding-era, Framing-era, and Early Republic-era discussions of corruption are useful in order to understand the specific language and original public meaning of the original Constitution's provisions. Modern understandings of corruption and how those modern understandings of corruption should be used to interpret the Constitution is a different

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[30] *See* Complaint, Dinner Table Action v. Schneider, Civ. A. No. 1:24-cv-00430-KFW (D. Me. 2023).

[31] *See, e.g.*, Seth Barrett Tillman, *Why Professor Lessig's "Dependence Corruption" Is Not a Founding-Era Concept*, 13(2) Election L.J. 336 (June 2014) (peer review) (cited 15 times), https://ssrn.com/abstract=2342945; Seth Barrett Tillman, Opening Statement, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 Nw. U. L. Rev. 399 (2012) (cited 80 times), https://ssrn.com/abstract=2182078; Seth Barrett Tillman, Closing Statement, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U. L. Rev. Colloquy 180 (2013) (cited 63 times), https://ssrn.com/abstract=2012803.

set of issues. Certainly, Founding-era, Framing-era, and Early Republic-era discussions of corruption may inform modern understandings. Although the two issues (that is, 18th century understandings and modern understandings) are related, they are not the same.

[17] In 2009, in *Cornell Law Review*, Professor Zephyr Teachout published *The Anti-Corruption Principle*,[32] and in 2011, Professor Lawrence Lessig published a book: *Republic Lost: How Money Corrupts Congress—And a Plan to Stop it*.[33] These publications were enormously influential: they were cited in a partial concurrence/partial dissent by Justice Stevens,[34] and in a separate concurrence by Justice Scalia,[35] in decisions by courts of record, in briefs, and in 100s of books and academic articles. Both publications discussed debates in the Constitutional Convention where limiting corruption was the order of the day, and both publications also discussed constitutional provisions which were intended to limit corruption. Both publications focused on the Foreign Emoluments Clause as *a* (if not *the*) lead constitutional provision whose purpose was to limit corruption involving elected United States officials—such as the President and members of Congress. According to Teachout and Lessig, these convention debates and constitutional provisions illustrated the Framers' and ratifiers' deep purpose to limit corruption among the leading officials of the new government created by the Constitution of 1788. Teachout and Lessig were not alone or the first to take the position that the Foreign Emoluments Clause applied to the Presidency: the

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[32] *See, e.g.*, Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 361–66 (2009).

[33] *See, e.g.*, Lawrence Lessig, *How Money Corrupts Congress—And a Plan to Stop it* 18 (2011).

[34] *See Citizens United v. FEC*, 130 S. Ct. 876, 929, 948 n.51, 963–4 (2010) (Stevens, J., concurring in part and dissenting in part) (citing Teachout's *Anti-Corruption Principle* favorably).

[35] *See id.* at 925, 928 (Scalia, J., concurring) (citing Teachout's *Anti-Corruption Principle* unfavorably). Scalia would repeat this point in private correspondence with me. I reproduced that correspondence posthumously on my blog. *See* Seth Barrett Tillman, *How Seth Barrett Tillman Has From Time To Time Been The Recipient Of Undeserved Goodwill For Being Irish*, The New Reform Club (May 10, 2017, 6:12 AM), http://tinyurl.com/kd5v2wo (Scalia to Tillman (Mar. 30, 2012): "I applaud[] your responses to [Professor] Teachout. With respect to the question of what constitutes an 'Office,' I find it alone enough to carry the point that other constitutional provisions plainly exclude from that term the Members of Congress.").

Office of Legal Counsel also has taken that position.[36] As I explain below, the oddity of these discussions involving the Foreign Emoluments Clause is that they uniformly failed to cite pre-Jackson historical precedents or to discuss the clause's specific text.

[18] As I understand their position, Teachout and Lessig argue that the Framers' and ratifiers' abstract anti-corruption concern was the purpose behind and effected the meaning and scope of the Foreign Emoluments Clause. This purpose becomes a rationale or free-standing interpretive position of constitutional dimension supporting the constitutionality of statutes aimed at limiting the role of money in politics, including campaign contributions. Indeed, Teachout has argued that the Framers were "obsessed" with corruption. My own view is that this is an oversimplification: corruption was just one of many policy concerns which occupied Framers', ratifiers', and the wider public's political mind and imagination.

[19] My view is that the second step in the Teachout-Lessig framework, per [18], *supra*, is undercut because the first step, per [17], *supra*, is in not supportable as a matter of original public meaning. Although it is contestable, the better view is that the text of the Foreign Emoluments Clause applies only to *appointed* or *subordinate* federal officers, and it does not apply either to any *elected* or *apex* federal officials or to any (elected or appointed) state officials or officers. (Generally, a position is an apex position if it is not subject to appointment and removal in the ordinary course of its duties, and if its decisions are not subject to reversal in the ordinary course of its duties—or, if it presides over a branch or department of the constitutionally-established government, e.g., the Vice President presides over the Senate.)

[20] The Foreign Emoluments Clause states: "[N]o Person holding any Office of Profit or Trust under them [i.e., the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." This provision covers those holding an "office

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[36] *See* Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, O.L.C., 2009 WL 6365082, at *4 (2009) (prelim. print) (Acting Assistant Attorney General David J. Barron announcing in *ipse dixit* that "[t]he President surely 'hold[s] an[] Office of Profit or Trust' . . . ." (quoting U.S. Const. art. I, § 9, cl. 8)).

. . . under the United States." Positions that are not offices . . . under the United States" are not covered by the clause. The clause has metes and bounds; indeed, the Foreign Emoluments Clause's scope is less than the scope of the Religious Test Clause, which extends to any "office or *public trust* under the United States." U.S. Const. art. VI, cl. 3 (emphasis added). The question for the fair-minded interpreter who is aiming to determine the Foreign Emoluments Clause's original public meaning is to understand the provision's "Office . . . under the United States"-language.

[21] Does the Foreign Emoluments Clause's "Office . . . under the United States"-language extend to members of Congress? Neither Lessig in his 2011 book, nor Teachout in her 2009 *Cornell Law Review* article offers any affirmative support for the proposition that the provision covers members of Congress. It appears that prior to my publications they had not actively considered the issue. Contra their unsupported assumption that the clause extends to members of Congress is the plain text of the Constitution. For example, the Electoral Incompatibility Clause states: "[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1, cl. 2. This provision lists "Office[s] . . . under the United States," and it separately lists the positions of Senator and Representative as distinct. One might suggest that the provision's general "Office . . . under the United States"-language includes the positions of Senator and Representative, and that this provision lists the latter positions (that is, Senator and Representative) to be redundant. But if redundancy was necessary for this provision, then we are left wondering: Why other constitutional provisions, such as the Foreign Emoluments Clause, do not also expressly include Senators and Representatives in a similar fashion? The simpler view, the better view, applying Occam's Razor, is that Senators and Representatives were listed in the Elector Incompatibility Clause precisely because these *elected* or *apex* positions are not covered by the Constitution's "Office . . . under the United States"-language. And if that is the case, then the Foreign Emoluments Clause does not apply to members of Congress. Likewise, the Incompatibility Clause states: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2. Again, if the position of Senator or Representative (that is, a "Member of

either House") is properly characterized as an "Office under the United States," then this provision states: "No Senator or Representative shall be a member of either House," and plainly, that cannot be correct. Here too, the simpler view, the better view, applying Occam's Razor, is that in 1788, the phrase "Office . . . under the United States" simply did not reach members of Congress.[37]

[22] Early historical practice during the administration of President George Washington aligns with the view that the phrase "Office . . . under the United States" does not extend to members of Congress. For example, in 1792, the Senate ordered Secretary of the Treasury Alexander Hamilton to draft a financial statement listing "*every* person holding *any* civil office or employment under the United States" and their compensation.[38] Hamilton took more than nine months to draft a response. His 1793 response was some ninety manuscript-sized pages. In that response, Hamilton included *appointed* or *subordinate* legislative branch officers and other personnel, e.g., the

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[37] In discussing the Incompatibility Clause, Professor Buckley has written:

> The goal was to prevent the kind of corruption that the delegates [to the Constitutional Convention] saw in the British government, where the king could build a group of supporters in Parliament with the promise of lucrative executive offices. The principal effect of the Incompatibility Clause is to close the door to parliamentary government by making it impossible for a congressman to accept a cabinet position *or serve as President at the same time.*

F.H. Buckley, The Republic of Virtue 72 (2017) (italics added) (underscore added) (footnote omitted). The underscored language is entirely correct, and it is supported by Buckley's citations. *Id*. at 222 n.4. By contrast, the italicized language is not supported by Buckley's citations. This illustrates that the term "corruption" is amorphous, and this vessel can be filled with any idea or ideal that the reader already agrees with (or can be persuaded to agree to). *See generally* Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. Penn. L. Rev. PENNumbra 134, 135–40, 141–45, 146–53, 154–59 (2008) (cited 44 times), http://ssrn.com/abstract=1292359. To be sure, I do not doubt that many other modern commentators agree with Professor Buckley. *See also supra* note 36 (quoting Office of Legal Counsel memorandum).

[38] *See* 1 Journal of the Senate of the United States of America 441 (Washington, Gales & Seaton 1820) (reproducing the Senate's May 7, 1792 entry and order) (emphases added); Alexander Hamilton, *Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under the United States* (Feb. 26, 1793), *in* 14 Papers of Alexander Hamilton 157, 157–59 (Harold C. Syrett & Jacob E. Cooke eds., 1969) (reproducing Hamilton's 1793 response to the Senate's order). *See generally* Tillman, Opening Statement, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, *supra* note 31, at 414–15.

Secretary of the Senate and the Clerk of the House,[39] but he did not list the members of Congress and their compensation. (Unlike *appointed* or *subordinate* officers, members of Congress are better characterized as *elected* or *apex* officials.) By contrast, on other occasions, a house of Congress requested that Hamilton report on the nation's financial information, but those requests did not use any limiting "Office . . . under the United States"-language. In those documents, Hamilton reported the "Civil List," and under that heading, Hamilton included members of Congress and their compensation.[40] In short, when the language of *Office . . . under the United States* was used, Hamilton and the Treasury gave every indication that that language did not extend to members of Congress.

[23] This view was not unique to Secretary Hamilton. There is good reason to believe that this was also Congress's view. In 1790, Congress enacted an anti-bribery statute; it was signed by President Washington. The statute declared that a defendant convicted of bribing a federal judge "shall forever be disqualified to hold *any office of honor, trust, or profit under the United States*."[41] This language is at least as wide as the "Office of trust or profit under" the United States-language in the Foreign Emoluments Clause. If this statute's "office . . . under the United States"-language extends to members of Congress, then this anti-bribery statute purports to add a new qualification for members

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[39] *See also, e.g.*, 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 t* all their other officers." (emphases added)).

[40] *See* H.R. Journal, 1st Cong., 1st Sess. 113 (Sept. 17, 1789) (that the Secretary of the Treasury report the expenses "of the civil list, and of the Department of War"); 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]. The President and Vice President were also included in the Civil List.

[41] Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 (emphasis added); *id*. at 119 (signed by President Washington on April 30, 1790). The 1790 anti-bribery statute was hardly unique. *See De Veau v. Braisted*, 363 U.S. 144, 158–59 (1960) (Frankfurter, J., plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas. Federal law has frequently and of old utilized this type of disqualification. . . . In addition, a large group of federal statutes disqualify persons 'from holding any office . . . under the United States' because of their conviction of certain crimes, generally involving official misconduct.").

of Congress. However, Congress does not have the power to add, by statute, new qualifications for members of Congress. In *Federalist No. 60*, Hamilton wrote, "The qualifications of the persons who may choose or be chosen [for Congress], as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the [national] legislature."[42] The better view, the simpler view, applying Occam's Razor, is not that Congress passed an unconstitutional statute, but that the statute's "Office"-language simply does not reach members of Congress. And if the "Office"-language in the statute does not reach members of Congress, than that is a substantial reason to believe that the Foreign Emoluments Clause's "Office"-language does not reach members of Congress. *See Powell v. McCormack*, 395 U.S. 486 (1969) (holding that Congress cannot create new qualifications for members of Congress); *see also US Term Limits, Inc. v. Thornton*, 514 US 779 (1995) (holding that States cannot impose new qualifications for members of Congress).

[24] Indeed, the position that the Constitution's "Office"-language does not extend to members of Congress is so overwhelming that Professor Akhil and Professor Vikram Amar would state:

> Article VI explicitly distinguishes between "Members of the several State Legislatures," on the one hand, and "executive and judicial Officers . . . of the several States" on the other. So too, it distinguishes "Senators and Representatives" from "Officers . . . of the United States." This carefully chosen language strongly reinforces the Constitution's *global officer/legislator distinction.*

Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113, 117 (1995) (emphasis added); *id*. at 117 n.28 (explaining that the global officer/legislator distinction also extends to Section 3 of the

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[42] *Federalist No. 60* (1788) (Hamilton). Madison took the same position at the Constitutional Convention. Madison stated:

> Mr <Madison> was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution.

James Madison, *Notes*, *in* 2 The Records of the Federal Convention of 1787, at 249–50 (Max Farrand ed., 1911) (reproducing August 10, 1787 entry).

Fourteenth Amendment); *see also* Josh Chafetz, Democracy's Privileged Few 280 n.68 (Yale University Press 2007). Finally, Kenneth Bowling, a leading period historian, explained: "In [Alexander] Hamilton's day . . . Office under the United States did not extend to elected officials."[43]

[25] Indeed, the predecessor of the Constitution of 1788's Foreign Emoluments Clause was a coordinate Foreign Emoluments Clause in the Articles of Confederation (1781). Article VI of the Articles of Confederation provided: "[N]or shall any person holding any office of profit or trust under the United States, or any of them [i.e., any State], accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State . . . ." Although Articles of Confederation provision is similar to the 1788 Constitution's Foreign Emoluments Clause, the two provisions are not identical. First, the earlier confederation provision precluded holders of "office . . . under the United States" and holders of "office . . . under . . . any . . . [State]" from accepting gifts from foreign governments. By contrast, the Foreign Emoluments Clause of 1788 only restricts those holding an "Office . . . under [the United States]" from accepting gifts from foreign governments. Second, the Article VI provision of the Articles of Confederation, on its face, appears to be a mandatory provision not subject to congressional control or waiver. By contrast, the Foreign Emoluments Clause expressly permits covered federal officers to accept foreign government gifts if Congress consents. Contra Teachout, if the Framers had been "obsessed" by the potential for foreign corruption vis-à-vis *elected* or *apex* federal officials, then they would have made use of the more expansive language from the already extant Article VI of the Articles. They did not. Instead, the modern clause represents a reform and a significant relaxation of the strictures of the older clause. Article VI precluded holders of offices under any State from receiving gifts from foreign governments, not so the modern (that is, the Constitution of 1788's) Foreign Emoluments Clause. Moreover, the Foreign Emoluments Clause's exclusion of state officials from its scope is no small thing. In 1788 (and, to some lesser extent, today) state officials had (and have)

[43] Declaration of Professor Kenneth R. Bowling, Ph.D. (Exhibit H) at 4, Citizens for Responsibility and Ethics in Washington v. Donald J. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (Civ. A. No. 1:17-cv-00458-GBD) (filed Sept. 19, 2017), ECF No. 85-9.

significant powers over the federal government. For example, state legislatures had the power to directly choose presidential electors, and some state legislatures exercised that power. Likewise, state legislatures chose United States Senators (state governors now exercise a similar power, subject to state law, in the event of a Senate vacancy). State legislatures call Article V national conventions, and state legislatures ratify proposed federal constitutional amendments, when that power is not vested in state conventions. To put it a different way, one can freely admit at a certain abstract level of analysis that the purpose of the Foreign Emoluments Clause was to limit corruption. But the actual provision, on its face, did not limit corruption vis-à-vis *all* federal officials or vis-à-vis *any* state officials. The Constitution's Foreign Emoluments Clause's corruption-related effects were attenuated in comparison with its predecessor under the Articles of Confederation. Our Foreign Emoluments Clause, from 1788, did not extend to members of Congress or to any state positions. If that is correct, then I do not believe that the Framers' and ratifiers' more abstract corruption-related concerns, untethered to the Foreign Emoluments Clause or to other constitutional text, can supply a rationale or a free-standing interpretative principle permitting, rationalizing, or justifying the regulation of otherwise protected political speech or association.

[26] Does the Foreign Emoluments Clause's "Office . . . under the United States"-language extend to the presidency? Again, although it is contestable, the better view is that the text of the Foreign Emoluments Clause applies only to *appointed* or *subordinate* federal officers, not to any *elected* or *apex* federal or state officials. Many of the arguments made above, which illustrated that the Foreign Emoluments Clause does not apply to members of Congress also go far to establish that the clause's "Office . . . under the United States"-language does not reach the presidency.

[27] Again, Professor Bowling, a leading period historian, explained: "In [Alexander] Hamilton's day . . . Office under the United States did not extend to elected officials."[44] The presidency is an *elected* (or *apex*) position, not an *appointed* (or *subordinate*) one. *See* U.S. Const. art. II, *amended by id.* amend. XII. Again, in 1790, Congress enacted an anti-bribery statute; it was signed by President Washington. The statute declared that

[44] *See supra* note 43 (quoting Kenneth Bowling).

a defendant convicted of bribing a federal judge "shall forever be disqualified to hold *any office of honor, trust, or profit under the United States*."[45] Just as this statute cannot create a new qualification for members of Congress, Congress cannot create new qualifications for the presidency. The principles announced in *Federalist No. 60*, *Powell v. McCormack*, and *US Term Limits, Inc. v. Thornton* apply equally to all elected federal positions. As Chief Judge Posner explained:

> The democratic presumption is that any adult member of the polity . . . is eligible to run for office . . . . The requirement in the U.S. Constitution that the President be at least 35 years old and Senators at least 30 is unusual and reflects the felt importance of mature judgment to the effective discharge of the duties of these important offices; nor . . . may Congress or the states supplement these requirements.[46]

The list of other federal courts, state courts, and academic authority announcing the same position is lengthy.[47]

[28] Again, in 1792, the Senate ordered Secretary of the Treasury Alexander Hamilton to draft a financial statement listing "*every* person holding *any* civil office or employment under the United States" and their salaries.[48] Hamilton took more than nine months to draft a response. His 1793 response was some ninety manuscript-sized pages. In that response, Hamilton included *appointed* or *subordinate* officers and other personnel in each of three branches, e.g., the Secretary of the Senate and the Clerk of the House,[49] cabinet members, and clerks of the federal courts, but he did not list: the President and his compensation, and the Vice President and his compensation. (Unlike *appointed* or *subordinate* officers, the President and Vice President are better characterized as *elected* or *apex* officials.) By contrast, on other occasions, a house of Congress requested that Hamilton report on the nation's financial information, but those

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[45] *See supra* note 41 (citing 1790 statute and related authority).

[46] Herman v. Local 1011, United Steelworkers of Am., AFL-CIO, CLC, 207 F.3d 924, 925 (7th Cir. 2000) (Posner, C.J.) (citing *Powell v. McCormack* and *U.S. Term Limits, Inc. v. Thornton*); *see also* Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 564, 571 (2015).

[47] *See* Tillman, *Who Can Be President of the United States?*, *supra* note 3, at 114 & n.57, 115 & nn.58 & 59 (collecting authority).

[48] *See supra* note 38 (collecting authority).

[49] *See also supra* note 39 (quoting Tench Coxe).

requests did not use any limiting "Office . . . under the United States"-language. In those documents, Hamilton reported the "Civil List," which included the President, Vice President, and their compensation.[50] In short, when the language of *Office . . . under the United States* was used, Hamilton and the Treasury gave every indication that that language did not extend to the President, Vice President, and members of Congress. For these reasons, and others, I conclude that the Constitution of 1788's "Office . . . under the United States"-language extended to *appointed* or *subordinate* federal officers, and not to *elected* or *apex* federal officials, and not to any state positions.

[29] In 2023, Judge Wallace, presiding over a state trial court of record, held that the President is neither an "officer of the United States," nor holds an "office under the United States" as those phrases are used in Section 3 of the Fourteenth Amendment.[51] That decision remains good law.[52] Judge Wallace is not alone. In 1833, in his celebrated *Commentaries on the Constitution*, Justice Story announced a closely similar position in regard to the antebellum Constitution's "Office . . . under the United States"-language.[53] Likewise, David A. McKnight, a nineteenth century legal commentator, explained: "It is *obvious* that . . . the President is not regarded as 'an officer *of*, or *under*, the United States,' but as one branch of 'the Government.'"[54]

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[50] *See* H.R. Journal, 1st Cong., 1st Sess. 113 (Sept. 17, 1789) (that the Secretary of the Treasury report the expenses "of the civil list, and of the Department of War"); 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].

[51] *See* U.S. Const. amend. XIV (1868); *Anderson v. Griswold*, Civ. A. No. 2023CV32577, 2023 WL 8006216, *43–46 (Dist. Ct., City and County of Denver, Colo. Nov. 17, 2023) (Wallace, J.) (holding that the President is neither an "officer of the United States" nor holds an "office under the United States" as those phrases are used in Section 3 of the Fourteenth Amendment), *rev'd*, 543 P.3d 283 (Colo. 2023) (per curiam), *rev'd*, *Trump v. Anderson*, 601 U.S. 100 (2024) (per curiam).

[52] *See* Seth Barrett Tillman, *The Law of the Case:* Trump v. Anderson, New Reform Club (Mar. 5, 2024, 2:37 AM), https://reformclub.blogspot.com/2024/03/the-law-of-case-trump-v-anderson.html.

[53] *See* 2 Joseph Story, Commentaries on the Constitution of the United States § 791, at 259–60 (Boston, Hilliard, Gray, & Co. 1833).

[54] David A. McKnight, The Electoral System of the United States 346 (Philadelphia, J.B. Lippincott & Co. 1878) (emphases added).

[30] There is an additional reason to conclude that the Constitution's and the Foreign Emoluments Clause's "Office . . . under the United States"-language does not apply to the President. On December 22, 1791, the French ambassador to the United States, Jean-Baptiste, chevalier de Ternant, sent President George Washington a letter and a gift. The letter stated: "Permit me to present you with a new print of the [K]ing of the [F]rench—I shall feel a very great Satisfaction if you will consider that feeble mark of my lively and respectful attachment for your person, as worthy your kind acceptance."[55] President Washington replied the same day. He wrote:

> Philadelphia Decr 22nd 1791.
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> Dear Sir,
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> I *accept*, with great pleasure, the new and elegant print of the King of the French, which you have been so obliging as to send to me this morning as a mark of your attachment to my person. You will believe me, Sir, when I assure you, that I have a grateful and lively sense of the personal respect and friendship expressed in your favor which accompanied the Print, and that I am, with sentiments of sincere esteem and regard, Dear Sir, your most obedt Servt
>
> Go: Washington.[56]

Washington *accepted* the ambassador's gift (the print and its frame), he *kept* the gift, and he *never* asked for congressional consent to *accept* or to *keep* the gift. This gift was not one of *de minimis* value,[57] nor was it a gift from a close personal friend or relative

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[55] *See* Letter from George Washington to Ambassador Ternant (Dec. 22, 1791), *in* 9 The Papers of George Washington 306 (Mark A. Mastromarino & Jack D. Warren, Jr., eds., 2000).

[56] *See* William Adair, *George Washington's Frames: A Study in Contrasts*, Picture Framing Magazine, June 1992, at 34, 34–35; Wendy Wick Reaves, *The Prints*, Antiques, Feb. 1989, at 502, 502–03; *Louis Seize, Roi de Français, Restaurateur de la Liberté, 1790*, George Washington's Mount Vernon: Estate, Museum & Gardens, https://emuseum.mountvernon.org/objects/1324/louis-seize-roi-des-francais-restaurateur-de-la-liberte (last visited April 21, 2025).

[57] *See* Declaration of William Adair (June 21, 2023), https://reason.com/wp-content/uploads/2024/07/2023-06-21-Adair.pdf [https://perma.cc/DC3H-JRW6]. Professor Josh Blackman, my regular co-author, and I asked Adair to provide an affidavit to summarize his scholarship, including studies of French archival materials, on which he had not yet published. *Id*. ¶ 15 ("Ambassador Ternant's [full-length] framed portrait print by Bervic of Louis XVI . . . is extremely valuable today and was very valuable in 1791 when Ambassador de Ternant gave the portrait, on behalf of France, to George Washington, President of the United States.") And Adair reached this conclusion "with a high degree of confidence." Adair estimated that in 1791, the frame "would have, at the very least, commanded a price in excess of $1000." *Id*. ¶ 17. This "value would be based on the quality of the frame's gold leaf and

of Washington's. *It was an official or diplomatic gift from a foreign ambassador to our head of state*.[58] Similarly, in 1790, President Washington received the main key to the Bastille, along with a picture of the Bastille, from the Marquis de Lafayette.[59] At the time, Lafayette was a French government official.[60] Here again, Washington kept LaFayette's gifts, but he never asked for congressional consent to accept or keep these gifts. These gifts were not considered personal gifts from friends. There were diplomatic or state gifts, and they were discussed in contemporaneous British and French administrative and diplomatic correspondence.[61] Moreover, these gifts were on public display for all to see.[62]

[31] Again, these gifts were on public display for all to see. I have yet to discover any contemporaneous record in the press, in Congress, in private correspondence, or

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specialized re-carving of the gesso." *Id*. ¶ 21. $1000 was a significant amount of money. At this period of time, senior cabinet members' compensation, such as Jefferson as Secretary of State and Hamilton as Secretary of the Treasury, was $3500 per year. *See* 1 American State Papers: Miscellaneous 57, 57 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales and Seaton 1834).

[58] *See* William B. Adair, *A Masterpiece of Artisanship*, Picture Framing Magazine, Aug. 2010, at 28, 28 (describing the print and frame as "an official diplomatic gift"); *id*. at 32 ("The history of this Royal Palace frame is clear, having been an official gift to Washington."); *cf*. *Gifts of State*, National Archives, http://tinyurl.com/7nk9cvs (last visited Mar. 4, 2012) ("[I]ndeed, every President since George Washington has received gifts of state.").

[59] *See* The Letters of Lafayette to Washington 1777–1799, at 347, 348 (Louis Gottschalk ed., 1976) (reproducing March 17, 1790 letter stating: "Give me leave, my dear General, to present you with a picture of the Bastille just as it looked a few days after I had ordered its demolition, with the main kea [sic] of that fortress of despotism . . . ."); *Extract of a Letter from a Gentleman in Barbadoes to His Friend in Philadelphia* (July 20, 1790), *in* Fed. Gazette & Phila. Daily Advertiser, Aug. 12, 1790, at 2, https://reason.com/wp-content/uploads/2023/01/1790-08-12-Fed-Gazette-Phila-Daily-Advertiser.pdf [https://perma.cc/KMD3-3QUE]; *America, New-York, August 10*, Pa. Packet, & Daily Advertiser, Aug. 13, 1790, at 2, https://reason.com/wp-content/uploads/2023/01/1790-08-13-Pa-Packet-Daily-Advertiser.pdf [https://perma.cc/8CK6-BBEQ].

[60] *See, e.g.*, André Maurois, Adrienne: The Life of the Marquise de La Fayette 178–82 (Gerard Hopkins trans., 1961) [https://perma.cc/L4LG-VY53]; An Officer in the Late Army, A Complete History Of The Marquis De Lafayette 193–94 (New York, Robert Lowry 1826), https://archive.org/details/completehistoryo00lowr/page/192/mode/2up.

[61] 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. 237, 310–13 (2024) (cited 1 time), https://ssrn.com/abstract=4527680 (discussing administrative and diplomatic correspondence).

[62] *Id*.

anywhere else indicating that Washington's accepting these gifts amounted to a constitutional wrong or a violation of the Foreign Emoluments Clause. The First and Second Congress had 33 and 37 anti-administration Representatives and Senators.[63] If the Foreign Emoluments was understood in the 1790s as applying to the President, then the members of this anti-administration faction surely had the ability to raise their voices and to be heard. But they did not do so.

[32] Historical practices arising in connection with President Washington and his administration are generally considered good evidence of the Constitution's original pubic meaning and superior to that of evidence arising in connection with later administrations. Why? First, Washington's administration was contemporaneous with the Constitution's ratification. Second, the President was a Framer and his cabinet (and administration) contained other prominent Framers and ratifiers. Indeed, between the President and his nine cabinet members (over the course of two terms), half of the group were either Framers or ratifiers or both. Third, the President saw himself above party or faction; indeed, active partisan federal electoral politics did not arise until after Washington announced that he would not run for a third term. Fourth, Washington both valued his reputation for probity and acted under the assumption that his conduct was closely monitored by political opponents and opportunists. Fifth, Washington understood that his personal and his administration's conduct were precedent-setting in regard not only to significant deeds, but even in regard to what might appear to be minor events and conduct.[64] As Professor Akhil Amar explained: "Washington defined the archetypical presidential role," and "[a]s America's first 'first man,' [he] set precedents from his earliest moments on the job." Amar added, "constitutional understandings that crystallized during the Washington administration have enjoyed special authority on a wide range of issues, especially those concerning presidential power and presidential etiquette."[65]

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[63] *See* Biographical Directory of the United States Congress, https://bioguide.congress.gov/search.

[64] *See* Tillman, *Who Can Be President of the United States?*, *supra* note 3, at 105–08.

[65] Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 290, 307, 309 (2012); *see also* Martin S. Lederman, *Of Spies, Saboteurs, and Enemy*

[33] Again, I have yet to discover any *contemporaneous* record in the press, in Congress, in private correspondence, or anywhere else indicating that Washington's accepting these gifts amounted to a constitutional wrong or a violation of the Foreign Emoluments Clause. Moreover, I have found no *subsequent* antebellum record by any Justice, Judge, lawyer, historian, political scientist, academic, journalist, or anyone else—writing in public or in private—suggesting that Washington's public conduct in regard to these diplomatic or state gifts violated the Constitution or the Foreign Emoluments Clause. Indeed, as far as I know, no such critique of Washington's conduct emerged until plaintiffs, their attorneys, and supporting amici began litigation (and began preparing for litigation) against Trump-45 asserting that President Trump's private commercial dealings violated the Foreign Emoluments Clause[66] and the Domestic (Presidential) Emoluments Clause.[67] Only then did efforts emerge to rewrite the historical past. The absence of any contemporaneous or antebellum critique of President Washington's conduct is a strong reason to believe that no one believed his conduct amounted to a constitutional wrong or a violation of the Foreign Emoluments Clause. Again, if that is correct, if the Foreign Emoluments Clause's "Office . . . under the United States"-language does not apply to the President and does not apply to members of Congress,[68] then I do not believe that the Framers' and ratifiers' more abstract corruption-related concerns, untethered to the Foreign Emoluments Clause or

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Accomplices, 105 Geo. L.J. 1529, 1543 (2017) ("Washington's example [as President], in particular, has frequently been a touchstone for constitutional understandings.").

[66] *See* U.S. Const. art. I, § 9, cl. 8.

[67] *See* U.S. Const. art. II, § I, cl. 7.

[68] *See, e.g.*, Proceedings on the Impeachment of William Blount, A Senator of the United States from the State of Tennessee, for High Crimes and Misdemeanors 34 (Philadelphia, Joseph Gales 1799) (Rep. James A. Bayard Sr.: "The officers, properly speaking *under* the United States are all appointed . . . ." (emphasis added)); *id.* at 35 (Bayard: "Now it is clear that a Senator is not an officer under the Government. The Government consists of the President, the Senate and House of Representatives; and they who constitute the Government, cannot be said to be under it."); *see also, e.g.*, *Attorney General* ex rel. *Bashford v. Barstow*, 4 Wisc. 567, 652 (1855) (explaining that in the Senate's *Blount* trial proceedings, the Senate held that the Impeachment Clause's controlling "officer of the United States"-language "did not embrace members of the [S]enate, but *only* [embraced] *the subordinate civil officers* of the government who were appointed and commissioned by the president" (emphasis added) (reporting an attorney's argument)). *Elected* or *apex* positions in the federal government are not *subordinate* positions.

to other constitutional text, can supply a rationale or a free-standing interpretative principle permitting, rationalizing, or justifying the regulation of otherwise protected political speech or association.

[34] We might also ask: Do the anti-corruption concerns of the Framers and ratifiers, apart from constitutional text, supply a free-standing interpretive principle through which we could understand the Constitution? I believe the answer to this question is "no." Where there is genuine ambiguity in a constitutional provision, a fair-minded interpreter who is aiming to determine a clause's original public meaning can look to purpose, background assumptions, and policy concerns (such as limiting corruption) to determine the meaning and scope of a provision's text. But where there is no genuine ambiguity, the agreed text should control. Likewise, a fair-minded interpreter should not look to Framers' and ratifiers' purposes, background assumptions, and policy concerns to generate interpretive principles abstracted from constitutional text. Why? First, no one agreed to purpose, background assumptions, and policy concerns. What was agreed to was the Constitution's text. The Constitution nowhere uses the language of "corruption." Thus, our injecting "corruption" into the interpretive process risks displacing other purposes, background assumptions, and policy concerns which were in play in 1787–1788. Second, we should not confuse a widely shared policy concern (e.g., limiting corruption) with widespread agreement as to what that policy entails. I do not doubt that every member of the Constitutional Convention sought to limit corruption. Corruption-discourse was widespread in the 18th century, at the Constitutional Convention, and in public debate on the Constitution during 1787–1788. But a shared use of corruption-related language in political debate does not mean that the participants in that debate had any widely shared understanding of what corruption was, or what policies would effectively limit corruption, or what level of corruption (if any) should be risked to facilitate accomplishing *other* important and widely shared policy goals. It is precisely because such questions are, in my view, unanswerable that our understanding of the law of the Constitution should be tethered to constitutional text. Finally, "corruption" is an amorphous term, as is "virtue" or the "common good." In my opinion, the idea that specific substantial legal issues should be decided by reference to such amorphous terms, abstracted from constitutional text, is fundamentally unsound.

[35] Corruption in the form of *quid-pro-quo* bribery is relatively easy to identify. When an elected official solicits or accepts a bribe in the form of cash or property for performing or promising to perform some public act (or some inaction), all the benefits flow to the recipient, and none to the public. The transaction is usually hidden from public view, and the money or property may be secreted in a closet or under an assumed name or false identity. And the recipient is unlikely to pay taxes on his "earnings." Perhaps, this relative ease in regard to identifying such transactions is one reason why this wrong, that is, *quid-pro-quo* bribery, is among the three charges which will support a conviction under the Constitution's Impeachment Clause.[69] By contrast where a public official trades an official action for another public act, it is much less clear if the public official's conduct is a bribe or corrupt. On *Lawfare*, my co-author and I wrote:

> Judge Frank Easterbrook stated this principle in even stronger terms regarding the conviction and sentencing of Illinois Governor Rod Blagojevich, who offered to appoint Valerie Jarrett, a close associate of President-elect Obama, to a vacant U.S. Senate seat, in exchange for Blagojevich's receiving an appointment to the Obama cabinet. Blagojevich was convicted on multiple counts. On appeal, in *U.S. v. Blagojevich* (2015), the U.S. Court of Appeals for the Seventh Circuit found that particular counts of his conviction could not stand. Judge Easterbrook explained that "a proposal to trade one public act for another, a form of logrolling, is fundamentally unlike the swap of an official act for a **private** payment." He added that "[g]overnance would hardly be possible without" political log-rolling, "which allow[s] each public official to achieve more of his principal objective while surrendering something about which he cares less, but the other politician cares more strongly."
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> Thus, according to Easterbrook, in such circumstances, even mixed motives are irrelevant. Such acts are presumptively lawful, and should not be investigated, let alone be considered for indictment or impeachment. If there is any evidence that there was some sort of secret benefit (such as a suitcase full of cash), then the government can investigate and, if warranted, prosecute that additional act. The secretness of the benefit is evidence of corrupt intent. Where one public official act is traded for another public official act, there has not been any illegal conduct.

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[69] *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)).

> We can think of one high-profile and far more brazen effort by a president to improve his party's prospects through the use of official communications. In 1864, during the height of the Civil War, President Lincoln encouraged Gen. William Tecumseh Sherman to allow soldiers in the field to return to Indiana to vote. What was *his* primary motivation? It was to make sure that the government of Indiana remained in the hands of Republican loyalists who wished to continue the war until victory. This action risked [temporarily] undercutting the military effort by depleting the ranks. Lincoln had dueling motives. Privately, he sought to secure a victory for his party. This personal interest should not impugn his public motive: win the war and secure the nation.[70]

A common definition, but by no means universal definition, for "corruption," is using public power or resources for private gain or ends. Using this definition, the key problem for deciding what is or is not corrupt would depend on what is considered "private gain or ends" as opposed to legitimate public ends.[71] In his PhD dissertation, Professor Jonathan Gienapp wrote:

> In the wake of several political defeats (including the dispute over the [B]ank [of the United States]), Madison began spending more time with [his] old friend Jefferson. The two began more consciously recognizing the connection between their relationship and the political fate of the nation. In the spring of 1791 the two Virginians took a fateful "botanizing" tour north to New York and New England during which time they contemplated opposition and forged political alliances. From their perspective, the situation was too dire, Hamilton's schemes too pernicious, and Washington's innocence too unreliable not to take more drastic steps.

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[70] Josh Blackman & Seth Barrett Tillman, *Defining a Theory of "Bribery" for Impeachment*, Lawfare: Hard National Security Choices (Dec. 6, 2019, 12:43 PM), https://www.lawfaremedia.org/article/defining-theory-bribery-impeachment (bold added) (cited 6 times).

[71] There will always be borderline and other hardcases. For example, where a public official intentionally spends public funds absent legislative (or other necessary) authorization, such actions may be done for the best motives even if they are not strictly legal. But are such actions corrupt? Lincoln, for example, at the outbreak of Civil War hostilities, spent public funds to arm and protect the Union at a time when Congress was out of session and had not authorized such actions. *See* Note, *Recent Emergency Legislation in West Germany*, 82 Harv. L. Rev. 1704, 1708–09 (1969). *But see* Paul Einzig, The Control of the Purse 166 (1959) (noting a House of Commons 1784 resolution "to the effect that public officers responsible for paying out public money without the authority of an Appropriation Act would be guilty of [a] 'high crime and misdemeanour, a daring breach of public trust, derogatory to the fundamental privileges of Parliament, and subversive to the Constitution.'" (quoting the resolution)).

> The critical move was to bring Philip Freneau, who had acquired a reputation through his earlier newspaper work, to Philadelphia. Just days after Washington signed the bank bill into law, [Secretary of State] Jefferson offered Freneau a position as translating clerk in the State [D]epartment in the hope that he would establish a newspaper to challenge John Fenno's strongly pro-administration *Gazette of the United States.* Freneau agreed and in October began publishing the *National Gazette*, a paper which while at first tame would explode in anti-Hamiltonian hysteria the next spring in the wake of the financial speculations that had begun to unsettle the nation. With rival newspapers unleashed, before long open partisanship would consume the infant republic.[72]

I do not doubt Gienapp's report of the history here. What is interesting about this passage is that it does not address whether or not, given all the circumstances, and then prevailing norms, Jefferson's appointing Freneau to a public post was corrupt. Sometimes seeing the issue, and its complexity, is more important than identifying an answer (or, better, what one believes to be the answer).[73]

A corruption-minimalist would argue that Jefferson was not seizing Freneau's public salary, and that (as far as we know) Freneau, like other potential candidates for the State Department translator position, was capable and, in fact, did his job. The public was not meaningfully disadvantaged by the appointment and the public received the primary benefits for which Congress authorized the creation of that position and its compensation with a salary drawn on the public treasury. Using that narrow framework, Jefferson's conduct was not wrongful or corrupt. Furthermore, Jefferson subjectively

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[72] Jonathan Gienapp, The Transformation of the American Constitution 305–06 (2013) (footnotes omitted) (unpublished Ph.D. dissertation, Johns Hopkins University Dep't of History) (on file with ProQuest Dissertations & Theses Global) (footnotes omitted).

[73] *Compare* Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 Am. J. Legal Hist. 229, 237–38 (2023) (arguing that Hamilton's "The consent of that body would be necessary to displace as well as to appoint"-language in *Federalist No. 77* referred to removal, and not to replacement), *with* 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1532–1533 (Boston, Hilliard, Gray, & Co. 1833) (explaining that presidential "removal takes place in virtue of the new appointment [that is, by replacement], by mere operation of law" and that this was Hamilton's position in *Federalist No. 77*). *See generally* Seth Barrett Tillman, *The Puzzle of Hamilton's* Federalist *No. 77*, 33 Harv. J.L. & Pub. Pol'y 149 (2010) (cited 51 times) (explaining that Hamilton's use of "displace" in *Federalist No. 77* is ambiguous, but remaining generally supportive of Justice Story's position).

believed that his faction's winning seats in Congress and his prevailing in a future contest for the presidency was in the public interest.

By contrast, a corruption-maximalist would argue that Jefferson was not choosing the candidate most fit for the job. He was not using his control over a public position entirely for the ends for which Congress authorized the position and authorized its compensation with a salary drawn on the public treasury. Rather, he was using the position to facilitate an arguably private interest: *his* and *his* faction's prevailing in contested elections. He was using public power, at least in part, for private ends. And in arriving at that conclusion, Jefferson's subjective and self-interested beliefs as to what constitutes good policy and who is best capable of bringing that about (that is, himself or his political opponents) should play no role.

So who is correct? The corruption-minimalist or the corruption-maximalist? Honestly, I do not think this question has anything like a clear answer. Furthermore, I do not think there is any way to determine if the Framers, ratifiers, and the public circa 1788 were, systematically as a group, closer to one of these two views or to the other. We do not have information in regard to their views at this level of specificity.[74] All we have is the language they agreed to in the as-ratified Constitution. It is the meaning of that language which should be our central focus.

The real issue is something else entirely. Had Jefferson been impeached by the House or had a prosecutor sought to try Jefferson for (non-*quid-pro-quo*) criminal bribery or extortion, would the merits have been decided by any particular 18th conception of corruption? I think not. Rather corruption would have become a vehicle casually used to decide the political contest between the Hamiltonian and Jeffersonian factions—the incipient factions which gave birth to our first political parties as the Washington administration dragged on and came to a close.[75] And that's the point:

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[74] *See, e.g.*, *supra* note 37 (criticizing Professor Buckley's position for extending well-grounded and historically-rooted corruption concerns relating to the *executive*'s "bribing" members of the *legislature* by *appointing* members to lucrative office . . . to other factual circumstances relating to a member of the *legislature*'s holding a second *elected* position absent intervention by the executive).

[75] One might say that Hamilton predicted all this in *Federalist No. 65*. In discussing impeachment, Hamilton wrote:

corruption, as that term was used in the late 18th century, is conceptually too amorphous to determine concrete legal questions involving the Constitution, and where that concept is given room, it merely provides an awkward arrow in the quiver held by partisans in naked contests for political power. Finally, it is worth noting that the Framers had actually included "corruption" as an impeachable offense in the draft constitution reported by the Committee of Detail, but it was subsequently dropped out.[76] As a result, the Framers did not include term "corruption" in any provision of the Constitution of 1788—so, whatever they meant by that term, they left it out, apparently deliberately after having considered including it, and for that reason, among others, we should not inject *their* understanding of that term back into *our* (and *their*) Constitution.

(***continued***)

> A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and *in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.*

Federalist No. 65 (1788) (Hamilton) (italics added).

[76] *See* Madison, *Notes*, *supra* note 42, at 186 (reproducing August 6, 1787 report of the Committee of Detail); *Journal*, *id.* at 422 (approving, August 27, 1787, "treason, bribery, or corruption" language); Madison, *Notes*, *id*. at 550 (reporting September 8, 1787 debate where "mal-administration" was considered, but not voted upon, and "corruption" was apparently dropped in favor of "other high crimes & misdemeanors"); *supra* note 42, at 600 (reproducing, from September 12, 1787, the Committee of Style's proposed draft impeachment provision, which did not make use of any "corruption" language).

I declare under the penalty of perjury that the above is true and correct to the best of my knowledge, information, and belief. Executed on this 21st day of April 2025 in Dublin, Ireland.

/s/ Seth Barrett Tillman
Seth Barrett Tillman