

INSURRECTION, DISQUALIFICATION, AND THE
PRESIDENCY

John Vlahoplus*

ABSTRACT

Section 3 of the Fourteenth Amendment provides in part that anyone who takes an oath as an officer of the United States to support its Constitution but engages in insurrection may not hold any civil or military office under it until Congress removes the disability by a two-thirds vote of each House. The insurrection of January 6, 2021, and the coming presidential election raise two pressing constitutional questions. For purposes of Section 3, is the President an officer of the United States, and is the Presidency an office under the United States?

This Article makes the case that the President is an officer of, and holds an office under, the United States for those purposes. It contributes to the debate over the provision’s reach by setting out the broad case for Section 3’s application to Presidents and the Presidency, utilizing text, purpose, legislative history, canons of construction, ordinary usage, and contemporaneous judicial and executive interpretations.

The Article demonstrates public understandings before and after ratification that Section 3 bars eligibility to the Presidency, both in general and for the most important disqualified rebel—Jefferson Davis. It catalogues descriptions of Presidents as officers of the United States from Washington in 1794 to Jefferson, Jackson, Van Buren, Harrison, Polk, Taylor, Fillmore, Buchanan, Lincoln, Johnson, Grant, and Garfield, many of which occurred in the context of the President’s election, constitutional position, and role in preventing domestic violence, preserving the Union, and enforcing the law during Reconstruction. Finally, it ties related Reconstruction statutes, legislative history, and contemporaneous judicial and executive interpretations into the broad case that Section 3 bars faithless Presidents from again taking the oath to “preserve, protect and defend the Constitution of the United States” until Congress permits.

KEYWORDS

U.S. Const. amend. XIV, § 3; Insurrection, Disqualification and the Presidency

CONTENTS

INTRODUCTION.....	239
I. SECTION 3: BACKGROUND, DRAFTING HISTORY, AND FINAL TEXT...	240
II. A DIGRESSION: THE CONSTITUTION OF 1788	242

* B.A., Washington & Lee University; J.D., Harvard Law School; D.Phil., Oxford University; Member, New York State Bar. Thanks to Stephen D. Hibbard for helpful comments on an early draft.

III. OFFICE UNDER THE UNITED STATES	243
A. Specific References in the Legislative History of Section 3	243
B. Specific References in Ordinary Usage	244
1. Pre-Ratification	244
2. Post-Ratification.....	244
C. Specific References in Related Federal Statutes	246
D. Elective Offices Under Generally.....	247
E. Contemporaneous Judicial Interpretations	248
IV. OFFICER OF	249
A. Contemporaneous Executive Interpretation	249
B. Contemporaneous Judicial Interpretations	251
C. References in Ordinary Usage and the Thirty-Ninth Congress...	252
D. Related Federal Statute.....	255
E. Petitions for removal of disabilities	256
V. ESSENTIAL HARMONY OF THE TERMS.....	257
A. Substituted Usage in Legislative History of Section 3.....	257
B. Combined Usage	258
C. One Contemporaneous Understanding of the Constitution of 1788 and the Act of August 31, 1852.....	258
CONCLUSION	261

INTRODUCTION

The Civil War and Reconstruction were the second American Revolution.¹ They ended slavery, preserved the Union, remade the Constitution,² and “radically transformed . . . the distribution and exercise of political power in the United States.”³ Section 3 of the Fourteenth Amendment played an important role in that transformation by disqualifying rebels from holding important positions in the post-war state and federal governments.⁴ Section 3 provides in part that anyone who takes an oath as an officer of the United States to support its Constitution but engages in rebellion or insurrection against it may not hold any civil or military office under it until Congress removes the disability by a two-thirds vote of each House.

The insurrection of January 6, 2021, and the coming presidential election raise two pressing constitutional questions. For purposes of Section 3, is the President an officer of the United States, and is the Presidency an office under the United States?

This Article makes the case that the President is an officer of, and holds an office under, the United States for purposes of Section 3. It does not canvass counterarguments or counter-authorities but seeks to contribute to the debate over Section 3’s reach by setting out a broad case for the provision’s application to Presidents and the Presidency.⁵ Part I summarizes the background, drafting history, and final text of Section 3. Part II digresses to discuss one interpretation of the relevant terms in the Constitution of 1788. Parts III and IV make the case that the

¹ See, e.g., JAMES M. MCPHERSON, *ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION* 3–7 (1990), Bruce Levine, *The Second American Revolution*, JACOBIN.COM (Aug. 17, 2015), <https://jacobin.com/2015/08/second-american-revolution-civil-war-charleston-emancipation-lincoln-union>.

² See, e.g., GREGORY P. DOWNS, *THE SECOND AMERICAN REVOLUTION: THE CIVIL WAR-ERA STRUGGLE OVER CUBA AND THE REBIRTH OF THE AMERICAN REPUBLIC* 1–4 (2019).

³ See Levine, *supra* note 1.

⁴ See, e.g., Mark A. Graber, *Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory*, 62 ST. LOUIS U. L.J. 639, 642 (2018).

⁵ The Article responds to a limited number of counterarguments, principally in footnotes to avoid interrupting the main case. For different interpretations of Section 3’s applicability to Presidents and the Presidency, see, e.g., Josh Blackman & Seth Barrett Tillman, *Is the President an “Officer of the United States” for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J. L. & LIBERTY 1 (2021) (arguing that the President is not an “officer of” the United States and taking no position on whether the Presidency is an “office under” the United States), Andrew C. McCarthy, *One More Thing on Section 3 of the 14th Amendment*, NATIONALREVIEW.COM (Jan. 6, 2022), <https://www.nationalreview.com/corner/one-more-thing-on-section-3-of-the-14th-amendment/>, Congressional Research Service, *The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment* (Sept. 7, 2022), Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021), Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153 (2021), Mark A. Graber, *Their Fourteenth Amendment, Section 3 and Ours*, JUST SECURITY (Feb. 16, 2021), <https://www.justsecurity.org/74739/their-fourteenth-amendment-section-3-and-ours/>, Roger Parloff, *After the Cawthorn Ruling, Can Trump Be Saved From Section 3 of the 14th Amendment?*, LAWFARE (June 7, 2022), <https://www.lawfareblog.com/after-cawthorn-ruling-can-trump-be-saved-section-3-14th-amendment>.

President is an officer of, and holds an office under, the United States for purposes of Section 3. Part V extends the case for those propositions with additional authorities showing the essential harmony of the two terms.

What constitutes engaging in rebellion or insurrection is a separate question. Regarding the Confederate rebellion, however, Attorney General Stanbery opined that “when a person has, by speech or by writing, incited others to engage in rebellion, he must come under the disqualification.”⁶ President Johnson and his Cabinet approved that interpretation,⁷ and Johnson directed officers commanding the Southern military districts to follow it.⁸ Newspapers and other publications reported the foregoing broadly.⁹

I. SECTION 3: BACKGROUND, DRAFTING HISTORY, AND FINAL TEXT

Congress sought to break the political power of rebels and their supporters during and after the Civil War using statutes that disenfranchised them and excluded them from positions in the federal and post-war provisional state governments.¹⁰ Statutes could be repealed, however, so congressional Republicans sought more secure protection against resurgent rebel power through the Fourteenth Amendment.¹¹

⁶ See The Reconstruction Acts (June 12, 1867), 12 U.S. Op. Att’y Gen. 182, 205 (1867) (“Second Opinion”). The opinion considered federal statutes enforcing Section 3 prior to its ratification. See *id.* at 182, The Reconstruction Acts (May 24, 1867), 12 U.S. Op. Att’y Gen. 141, 141–42 (1867) (“First Opinion”). Cf. Lynch, *supra* note 5, at 172 (authority for the proposition that words of encouragement by a person occupying an influential position may constitute aid or comfort to an enemy).

⁷ See 9 JOINT COMMITTEE ON PRINTING OF THE HOUSE AND SENATE, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3726, 3728–29 (1897) (IN CABINET, *June 18, 1867*, summary item 16).

⁸ See *id.* at 3750 (WAR DEPARTMENT, ADJUTANT-GENERAL’S OFFICE, *Washington, June 20, 1867*).

⁹ See, e.g., *The Attorney General’s Opinion*, TRI-WKLY. CONSTITUTIONALIST (Augusta, Ga.), June 21, 1867, at 2, *From Washington*, *id.* at 3, *Opinion of Attorney General Stanbery as to the Powers of the Military Commanders*, *id.* at 4, *From Washington—Cabinet on Attorney General’s Opinion—Votes of the Members*, DUBUQUE DAILY HERALD, June 21, 1867, at 1, *Night Dispatches*, FLAKE’S DAILY GALVESTON BULL., June 21, 1867, at 5, *Washington, June 20*, MORNING J. (Columbus, Ohio), June 22, 1867, at 1, *Official Opinion of the Attorney General*, WKLY. INTELLIGENCER (Atlanta, Ga.), June 26, 1867, at 4, 7 AM. ANN. CYCLOPAEDIA AND REG. OF IMPORTANT EVENTS OF THE YEAR 1867, at 665 (1868), Ex. Doc. No. 20, Reconstruction—Letter from The Secretary of War at 11, EXECUTIVE DOCUMENTS OF THE HOUSE OF REPRESENTATIVES (1868). Note that some newspaper citations in this article use data like page numbers provided by electronic databases that do not appear in the scans of the actual articles.

¹⁰ See, e.g., Act of July 2, 1862, ch. 128, 12 Stat. 502 (repealed 1868) (requiring loyalty oath to hold specified positions), Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (disenfranchisement and limit on holding specified positions), Act of Mar. 23, 1867, ch. 6, 15 Stat. 2 (oath to effectuate Act of Mar. 2, 1867).

¹¹ See, e.g., Mark A. Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment*, manuscript at 6–7, 23–24 (2014), available at <http://ssrn.com/abstract=2483355>.

An early version of Section 3 would have disenfranchised through mid-1870 anyone who had given aid and comfort to the rebellion.¹² A later one shifted gears to bar from specified state and federal positions certain officials who had violated their oath to support the Constitution.¹³ The exclusion would ensure the election of “loyal men” in what would otherwise be a losing political battle against unreconstructed rebels.¹⁴ President Johnson and “his Southern friends” pushed back with a proposal for Reconstruction without exclusion, which incensed Northerners.¹⁵

Congressional Republicans prevailed. They limited rebel power over the franchise and government positions through Sections 2 and 3 of the Fourteenth Amendment.¹⁶ Section 3 has the following broad and exclusionary terms:

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.¹⁷

Unpacked, the provision has three principal clauses. The first (the “Officials Clause”) defines which officials are potentially subject to disqualification—specified federal and state legislators and officers who took an oath to support the Constitution.¹⁸ The second defines the offenses triggering disqualification—engaging in insurrection or rebellion or giving aid or comfort to enemies of the United States.¹⁹ The third (the “Positions Clause”) defines the positions prohibited to faithless officials.²⁰

¹² See Graber, *supra* note 5.

¹³ See *id.*

¹⁴ See *Democratic Duplicity*, INDIANAPOLIS DAILY J., July 12, 1866, at 2.

¹⁵ See *Rebels and Federal Officers*, GALLIPOLIS J. (Gallipolis, Ohio), Feb. 21, 1867, at 2.

¹⁶ Section 2 reduces a state’s seats in the House of Representatives for denying certain voting rights. See U.S. CONST. AMEND. XIV, § 2.

¹⁷ U.S. CONST. AMEND. XIV, § 3.

¹⁸ Blackman and Tillman call this the “jurisdictional element” and characterize it by equating *positions* and *persons*. See Blackman & Tillman, *supra* note 5, at 2 (“the jurisdictional element, [1], specifies which *positions* are subject to Section 3: a ‘person . . . who, having previously taken an oath . . .’” (emphasis added)). This perhaps unwittingly suggests the essential harmony of offices and officers discussed later in this Article. See *infra* note 144 and accompanying text.

¹⁹ Blackman and Tillman call this the “offense element.” See Blackman & Tillman, *supra* note 5, at 2.

²⁰ Blackman and Tillman call this the “disqualification element.” See *id.* They argue that the terms “officer of the united States” and “office . . . under the United States” are different and therefore “refer to different types of officers and offices” because of the presumption that different language used in the same sentence is not used uniformly. See *id.* at 3, 7. However, “officer of” refers to *persons*, while “office under” refers to *positions*. There is no reason to infer noncongruent usage from text used for these two purposes. After all, a single sentence in Section 3 uses the different terms “a member of

Section 3's text is not limited to the Confederate rebellion.²¹ It is broad enough to reach offenses in earlier years, such as any committed in the Mexican-American War.²² It is also broad enough to reach offenses in later years,²³ such as those committed on January 6.

II. A DIGRESSION: THE CONSTITUTION OF 1788

Professors Josh Blackman and Seth Barrett Tillman have closely read the offices and officers language in the Constitution of 1788. They conclude that within that document the term “Officers of the United States” refers “to appointed positions in the Executive and Judicial Branches,” and the term “Office . . . under the United States” refers to those positions plus “non-apex appointed positions in the Legislative Branch.”²⁴ Under their reading, the terms exclude elected officials and elective positions.²⁵ The President is not an officer of, and does not hold an office under, the United States. After all, for example, Article II Section 3 provides that the President “shall commission all the Officers of the United States,” but Presidents do not commission themselves.²⁶

This Article takes no position on whether Professors Blackman and Tillman correctly interpret the 1788 Constitution. Instead, it addresses the use of those terms after 1788 including proximate to the ratification of the Fourteenth Amendment in 1868, a time of Reconstruction that differed radically from the original Founding. As

Congress” in the Officials Clause and “a Senator or Representative in Congress” in the Positions Clause without any implication that they are not congruent.

²¹ Earlier proposals were so limited. See Lynch, *supra* note 5, at 168.

²² See First Opinion, *supra* note 6, at 160.

²³ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2900 (1866) (Senator Van Winkle: “This is to go into our Constitution and to stand to govern future insurrection as well as the present . . .”), *id.* at 3335–36 (Senator Henderson: “The language of this section is so framed as to disfranchise from office the leaders of the past rebellion as well as the leaders of any rebellion hereafter to come.”) (cited in Mark A. Graber, *Disqualification From Office: Donald Trump v. the 39th Congress*, LAWFARE (Feb. 24, 2023), <https://www.lawfareblog.com/disqualification-office-donald-trump-v-39th-congress>). Blackman and Tillman write that they “are not aware of any evidence that Section 3 was forward-looking, and was drafted to disqualify future presidents who might participate in future rebellions.” See Blackman & Tillman, *supra* note 5, at 46–47. The provision’s plain text and the Senators’ statements strongly support the case that Section 3 is forward-looking. The Congressional Globe is generally considered “an accurate and reliable source” that “achieved almost verbatim accounts of the floor debates” and “was widely available almost immediately after every debate,” making debates over the proposed Fourteenth Amendment “neither secret nor difficult for interested outsiders to follow.” See Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment’s Original Meaning*, 49 CONN. L. REV. 1069, 1075 (2017).

²⁴ See Josh Blackman & Seth Barrett Tillman, *Offices and Officers of the Constitution Part I: An Introduction*, 61 S. TEX. L. REV. 309, 309 (2021).

²⁵ See *id.*

²⁶ See William Baude, *Constitutional Officers: A Very Close Reading*, CONSTITUTIONAL LAW: THE JOURNAL OF THINGS WE LIKE (LOTS) (July 28, 2016) (summarizing Tillman’s analysis and giving the example), <https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/>.

the Fixed-Meaning Canon provides, “[w]ords must be given the meaning they had when the text was adopted.”²⁷ And what the words of a legal text “convey, *in their context*, is what the text means.”²⁸ This Article makes the case that in the context of the Civil War and Reconstruction, the Section 3 terms include elected officials and elective positions generally, and the President and Presidency specifically.

III. OFFICE UNDER THE UNITED STATES

The case for including the Presidency as an office under the United States has six parts: specific contemporaneous references to the Presidency in the legislative history of Section 3, in ordinary usage, and in related federal statutes; general references to elective “offices under;” and contemporaneous executive and judicial interpretations.

A. SPECIFIC REFERENCES IN THE LEGISLATIVE HISTORY OF SECTION 3

Members of Congress referred to both the Presidency and presidential election in debating the proposed Section 3. Representative Stevens, leader of the Radical Republicans in the House,²⁹ asserted that “as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have a right to do.”³⁰

Senator Johnson suggested that the text did not go far enough because it allowed election to the Presidency and Vice Presidency.³¹ He read the named exclusion of Senators and Representatives to imply that Section 3 did not exclude those executive positions.³² Senator Morrill corrected him by calling his attention to the words “or hold any office, civil or military, under the United States.”³³ Senator Johnson acknowledged his mistake, recognized that the named exclusions had “misled” him, and concluded that there was “no doubt” that he had been wrong.³⁴

Even before the Fourteenth Amendment, the House Committee on Foreign Affairs had determined in 1834 that the President is subject to the Foreign Emoluments Clause of the Constitution of 1788, which applies to persons “holding any office of Profit or Trust under” the United States.³⁵ The Committee’s view does

²⁷ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78 (2012).

²⁸ See *id.* at 56 (emphasis added).

²⁹ See U.S. House of Representatives, *Representative Thaddeus Stevens of Pennsylvania*, <https://history.house.gov/Historical-Highlights/1700s/Representative-Thaddeus-Stevens-of-Pennsylvania/>.

³⁰ See CONG. GLOBE, *supra* note 23, at 2544, Graber, *supra* note 5.

³¹ See CONG. GLOBE, *supra* note 23, at 2899.

³² See *id.*

³³ See *id.*, Magliocca, *supra* note 5, at 93.

³⁴ See CONG. GLOBE, *supra* note 23, at 2899. Andrew C. McCarthy was similarly misled in his interpretation of Section 3. See McCarthy, *supra* note 5.

³⁵ See H. Rep. No. 302, 23d Cong., 1st Sess. at 2 (1834) (regarding President Jefferson), U.S. CONST. art. I, § 9, cl. 8, Michael Stern, *Historical Practice and the Applicability of the Foreign Emoluments Clause to the President*, POINT OF ORDER (Nov. 27, 2019), <https://www.pointoforder.com/2019/11/27/historical-practice-and-the-applicability-of->

not control the interpretation of the Constitution of 1788, but it does support the case that nineteenth century usage included the Presidency.

B. SPECIFIC REFERENCES IN ORDINARY USAGE

1. Pre-Ratification

American newspapers kept the public aware of the status and implications of Section 3 and of removing its disabilities. Even before ratification, Americans recognized that the proposed amendment would bar holding the Presidency, while President Johnson's watered-down counterproposal would not.

An 1866 article noted that an important feature of the proposed Fourteenth Amendment was "the disqualification of all noted rebels from holding positions of trust and profit under the Government."³⁶ It explained that Democrats opposed the proposal, blaming the North equally for the war and believing "that a rebel is as worthy of honor as a Union soldier; that ROBERT E. LEE is as eligible to the Presidency as Lieut. General GRANT."³⁷

An 1867 article attacked President Johnson's watered-down counterproposal because it

imposes no disabilities, political or otherwise, upon the leading men of the rebellion, but leaves them, as they were prior to their treason, eligible to any and all offices under the Federal government. Reconstruction upon this basis would render Jefferson Davis eligible to the Presidency of the United States . . . To such reconstruction the loyal North can never assent. There is something revolting in the very thought.³⁸

2. Post-Ratification

After ratification, rebels sought amnesties to remove Section 3's disabilities.³⁹ American newspapers regularly reported that amnesty would restore eligibility to the Presidency, often with outrage and predictions of resurgent rebel power.

An 1871 article asserted that "WERE the demands of the amnesty shriekers complied with, JEFF DAVIS would be elligible [sic] to the Presidency, and would be the most available of all Democratic candidates."⁴⁰ Another asked rhetorically whether it was time "to depopulate Arlington of its sixteen thousand buried Union heroes, and make Jeff. Davis and John C. Breckinridge eligible to the Presidency of the United States?"⁴¹ Yet another took the opposite tack, proposing "a universal amnesty, as provided in the fourteenth amendment, such an amnesty as will make

the-foreign-emoluments-clause-to-the-president/.

³⁶ See *Democratic Duplicity*, *supra* note 14.

³⁷ *Id.*

³⁸ See *Rebels and Federal Officers*, *supra* note 15.

³⁹ See, e.g., *infra* note 140, JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861–1898, at 367–69 (1953).

⁴⁰ See TERRE HAUTE WKLY. EXPRESS, April 19, 1871, at 4, col.1.

⁴¹ See B.J.L., *Columbus Letter: An Unexpected Opposition*, CIN. COM., Jan. 9, 1871, at 3.

even Jeff Davis eligible again to the Presidency,” predicting that the amnesty would bring “responsible white classes of the South” back into the national fold and undercut the appeal of the Ku Klux Klan.⁴²

In 1872 liberal Republicans split from the party, pushed for a universal amnesty, and nominated Horace Greeley for President in their Cincinnati convention. Mainstream Republicans partially relented, agreeing to remove the disabilities for all but the most senior rebels in the Amnesty Act of 1872.⁴³ The Chicago Tribune crowed that the liberals had forced the party to accept the amnesty, making many rebels “as eligible to the Presidency and to the United States Senate as General Logan or General Butler.”⁴⁴

In a later mainstream Republican convention speech reported in the Philadelphia Inquirer, Indiana Senator Morton attacked the liberals for risking the party’s election chances over Davis’s exclusion:

One of the main things talked about at Cincinnati was universal amnesty: that the disabilities of Davis and Tombs might be removed that they might get into power.

The Republican party has not granted universal amnesty, but general amnesty. Do you want to overthrow the Republican party because it will not make Jeff Davis eligible to the Presidency of the United States? (Cries of “No!”)⁴⁵

In 1876, with Republican power fading, Democrats proposed a universal amnesty.⁴⁶ As newspapers reported, the bill was drafted and pushed “so ostentatiously to make Davis eligible to the Presidency” that it was “practically a bill for that purpose.”⁴⁷ In response, Republican Representative Blaine sought an amendment to impose one exception—for Jefferson Davis.⁴⁸

Blaine’s supporters rallied to prevent Davis’ eligibility. One paper asserted that “[t]he only justification that Mr. Blaine requires for his amendment is

⁴² See *The Administration, Congress and the Southern States—The New Reconstruction Bill*, N.Y. HERALD (N.Y., N.Y.), Mar. 29, 1871, at 6, reproduced in *Northern View*, FAIRFIELD HERALD (Winnsboro, S.C.), April 12, 1871, at 1. For a discussion of this “carrot” approach, see Magliocca, *supra* note 5, at 113.

⁴³ Act of May 22, 1872, ch. 193, 17 Stat. 142.

⁴⁴ *The Philadelphia Platform*, CHI. TRIB., June 8, 1872, at 4. The reference to the Philadelphia platform is to the mainstream Republican platform adopted at the party’s nominating convention held in that city. Although the Chicago Tribune was generally a leading proponent of Lincoln and the mainstream Republican party, it supported the liberals during its “lost” postwar years. See Harris L. Dante, *The Chicago Tribune’s “Lost” Years, 1865–1874*, 58 J. ILL. ST. HIST. SOC’Y 139, 139–40 (1965).

⁴⁵ See *Address of Senator Morton*, PHILA. INQUIRER, June 5, 1872, at 8. The reference to “Tombs” was presumably to Robert Toombs, former Confederate Secretary of State. See PLEASANT A. STOVALL, ROBERT TOOMBS, STATESMAN, SPEAKER, SOLDIER, SAGE 221 (1892). See, e.g., DORRIS, *supra* note 39, at 380–82.

⁴⁷ See, e.g., *The Amnesty Debate (From the Chicago Tribune—Rep.)*, EVENING POST (N.Y., N.Y.), Jan. 14, 1876, *Current Notes*, PORTLAND DAILY PRESS (Portland, Me.), Jan. 17, 1876, at 1 (citing CHI. TRIB.).

⁴⁸ For a general discussion of Blaine’s motives and the debate over his proposal generally, see DORRIS, *supra* note 39, at 380–82.

the monstrous anomaly of rendering the Confederate president eligible to the presidency of the United States.”⁴⁹ Another itched for battle, writing that “[i]f the Confederates cannot restrain themselves from letting loose a hell of Southern fury because somebody objects to making Jeff Davis eligible to the Presidency, it will be best to give them a chance so that all men may know just what sort of fellows they are.”⁵⁰ Yet another criticized the inconsistency of making Davis “eligible for the Presidency, while [naturalized] patriots like Carl Schurz, who have been true to their adopted country, are debarred by the Constitution.”⁵¹

Democrats reacted with outrage⁵² and defeated the entire proposal.⁵³ As one paper reported, Democrats “stood up and said unless Jeff Davis shall be made eligible to the presidency, we will have no further amnesty.”⁵⁴ The debate continued in later years,⁵⁵ and Congress did not provide a universal amnesty until 1898,⁵⁶ nine years after Davis’s death. Congress relieved him posthumously in 1978.⁵⁷

C. SPECIFIC REFERENCES IN RELATED FEDERAL STATUTES

In July 1862, Congress prescribed the Ironclad Oath to exclude rebels and their supporters from positions in the federal government.⁵⁸ The oath applied to everyone holding “any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States.” The statute recognized that the President holds an “office under the government of the United States,” language virtually identical to Section 3.⁵⁹ There is no indication that the difference has any significance. On the contrary, Senator Doolittle considered the terms equivalent and insisted that the oath already prevented holding any civil or military office under the United

⁴⁹ See *Current Notes*, PORTLAND DAILY PRESS (Portland, Me.), Jan. 13, 1876, at 2 (citing BOSTON TRANSCRIPT).

⁵⁰ See, e.g., *A Hell of Southern Fury*, LEAVENWORTH DAILY COM. (Leavenworth, Kan.), Jan. 14, 1876, at 2 (citing CHI. TRIB.), OSKALOOSA INDEP. (Oskaloosa, Kan.), Jan. 29, 1876, at 2, col. 3 (citing CHI. TIMES).

⁵¹ See *Editorial Notes*, LYON COUNTY TIMES (Yerington, Nev.), Feb. 6, 1876, at 2.

⁵² See, e.g., *About Blaine*, QUINCY WKLY. WHIG (Quincy, Ill.), Jan. 27, 1876, at 1 (citing CHI. TIMES), *Ben. Hill’s Speech*, RICHMOND DAILY DISPATCH (Richmond, Va.), Jan. 17, 1876, at 6.

⁵³ See *Important Vote on Amnesty*, ELLSWORTH AMER. (Ellsworth, Me.), Jan. 20, 1876, at 2.

⁵⁴ See *id.* Professor Gerard N. Magliocca has supposed that “Congress did not intend (nor would the public have understood) that Jefferson Davis could not be a Representative or Senator but could be President.” See Magliocca, *supra* note 5, at 93–94. See also Saikrishna B. Prakash, *Why the Incompatibility Clause Applies to the Office of President*, 4 DUKE J. CONST. L. & PUB. POL’Y 143, 161 (2009) (it “would be rather strange” to require congressional consent for rebels to be postmaster but not President.), *cited in* Blackman & Tillman, *supra* note 5, at 35 n.89. Public usage supports Magliocca’s and Prakash’s intuitions.

⁵⁵ See, e.g., CIN. COM. GAZETTE, May 2, 1885, at 7, col 2.

⁵⁶ See Act of June 6, 1898, ch. 389, 30 Stat. 432. For a discussion of the statute in the context of the Spanish-American War, see DORRIS, *supra* note 39, at 389–92 (1953).

⁵⁷ See Act of Oct. 17, 1978, P.L. 95-466, 92 Stat. 1304.

⁵⁸ Act of July 2, 1862, ch. 128, 12 Stat. 502 (repealed 1868).

⁵⁹ For a discussion of the Ironclad Oath and its exception for the President, see Lynch, *supra* note 5, at 163.

States, making the proposed Section 3 unnecessary as to federal offices.⁶⁰ The Supreme Court also considered them equivalent in an 1888 decision interpreting a non-Reconstruction statute.⁶¹

Although the Ironclad Oath was repealed in 1868, Congress substantially restored it in 1884 with similar prefatory language, providing that the oath for persons holding “any office of honor or profit either in the civil, military, or naval service, except the President of the United States, shall be as prescribed in section seventeen hundred and fifty-seven of the Revised Statutes.”⁶² That oath, prescribed only two days after the ratification of the Fourteenth Amendment, applied to certain persons “not rendered ineligible to office” by the amendment who hold “any office of honor or trust under the government of the United States.”⁶³

Section 3 was enacted with the same broad protective purpose as the Ironclad Oath and Section 1757, in the same context of feared rebel power. It uses similar language as those provisions—one of which specifically references the Fourteenth Amendment. Section 3 should be interpreted consistently to treat the Presidency as an office under the United States under the Related-Statutes Canon: “Statutes *in pari materia* are to be interpreted together, as though they were one law.”⁶⁴ Reconstruction statutes and Section 3 were generally interpreted *in pari materia*.⁶⁵

D. ELECTIVE OFFICES UNDER GENERALLY

The Positions Clause covers in part “any office, civil or military, under the United States, or under any state.” Under the presumption of intra-sentence uniformity and the Presumption of Consistent Usage,⁶⁶ “office under” should have the same meaning for both federal and state offices. And after 1788 popular, statutory, and constitutional usage referred to elective offices as offices under the state⁶⁷ as well as under “provisional [State] governments,”⁶⁸ under the state and federal

⁶⁰ See CONG. GLOBE, *supra* note 23, at 2900. For a similar contemporaneous treatment of the two variants as equivalent, see *infra* note 168 and accompanying text.

⁶¹ See *United States v. Mouat*, 124 U.S. 303, 305–06 (1888) (reading a statute applicable to persons “holding employment or appointment under the United States” as referring “to persons serving under the Government of the United States.”).

⁶² Act of May 13, 1884, ch. 46, § 2, 23 Stat. 21, 22.

⁶³ Act of Feb. 15, 1871, ch. 53, 16 Stat. 412.

⁶⁴ See SCALIA & GARNER, *supra* note 27, at 252.

⁶⁵ See, e.g., First Opinion, *supra* note 6, at 149, *Presidential Usurpation*, TROY WKLY. TIMES 2 (Troy, N.Y.), Sept. 14, 1867, at 2, *Mr. Dawes and the Reconstruction Acts*, EVENING POST (N.Y., N.Y.), Oct. 26, 1874, at 2.

⁶⁶ See Blackman & Tillman, *supra* note 5, at 7 (intra-sentence uniformity), SCALIA & GARNER, *supra* note 27, at 170 (Presumption of Consistent Usage).

⁶⁷ See ME. CONST. art. 9, § 1 (1819) (prescribing oath for “everyone elected, appointed, or commissioned to any judicial, executive, military, or other office under this State.”), GAZETTE OF THE UNITED STATES (N.Y., N.Y.), Dec. 26, 1789, at 294 (proposal to forbid the elective Pennsylvania governor to “hold any other office under this State”).

⁶⁸ Act of Mar. 2, 1867, § 6, ch. 153, 14 Stat. 428, 429.

governments,⁶⁹ under “the government of the United States,”⁷⁰ under the state constitution,⁷¹ and under the authority of the state,⁷² with no indication that those textual variations had any legal significance. Senator Van Winkle apparently saw no such significance during debates over the proposed Section 3. He referred to the provision’s application to “an office under the national Government or the State governments.”⁷³

These uses included elective state executive offices.⁷⁴ Together with the presumption of intra-sentence uniformity and the Presumption of Consistent Usage, they support Section 3’s application to the elective office of President.

E. CONTEMPORANEOUS JUDICIAL INTERPRETATIONS

The North Carolina Supreme Court held in 1869 that the Fourteenth Amendment barred a rebel from holding the elective office of state solicitor.⁷⁵ The court gave Section 3’s “office under” term the same meaning as “office” simpliciter. After describing the party’s pre-war position and Confederate military service, the court noted that he “seeks to be admitted into the office of Solicitor for the State” and held “that he is disqualified from holding office under the 14th Amendment.”⁷⁶

A Circuit Court in North Carolina reached the same result in 1871 in a case involving the elective office of sheriff. The defendant was indicted for holding the office in violation of a federal statute applicable to “any person who shall hereafter knowingly accept or hold any office under the United States, or any State to which he is ineligible under the third section of the fourteenth article of the Constitution

⁶⁹ See, e.g., *On Foreigners*, DIARY (N.Y., N.Y.), Mar. 28, 1793, at 2 (referring to persons “elected to any office under the government of the state or of the United States.”), *Dedicated to the Rattlesnake, in Herkemer County*, OTSEGO HERALD (Cooperstown, N.Y.), Jan. 12, 1797, at 2 (describing an elected senator as holding “an important office under the government of this state.”). In debating the proper compensation for the Vice President in 1789, James Madison compared him to the lieutenant governor of a state, whom he called an “officer under a State Government.” 1 THOMAS HART BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 121 (debate of July 16, 1789) (1860). All lieutenant or deputy governors were elected at the time. See CHARTER OF CONN. (1662); MA. CONST. ch. II, § II, art. I (1780); N.Y. CONST. art. XX (1777); CHARTER OF R.I. AND PROVIDENCE PLANTATIONS (July 15, 1663); S.C. CONST. art. III (1778) (elected by the General Assembly); VA. CONST. (1776) (elected by Council of State). The other states lacked a lieutenant governor.

⁷⁰ Act of July 2, 1862, ch. 128, 12 Stat. 502 (repealed 1868), Act of July 11, 1868, ch. 139, 15 Stat. 85, Act of Feb. 15, 1871, ch. 53, 16 Stat. 412.

⁷¹ See GAZETTE OF THE UNITED STATES (N.Y., N.Y.), Sept. 22, 1790, at 603.

⁷² Act of Feb. 20, 1799, PATERSON’S LAWS 376, § 2 (prescribing an oath for “every person who shall be appointed or elected to any office, legislative, executive, or judicial, under the authority of this state.”).

⁷³ See CONG. GLOBE, *supra* note 23, at 2898. For Van Winkle’s use in describing the Officials Clause, see *infra* note 146 and accompanying text.

⁷⁴ See, e.g., Act of Feb. 20, 1799, *supra* note 72 (executive offices generally), ME. CONST., *supra* note 67 (executive offices generally), BENTON, *supra* note 69 (lieutenant governor).

⁷⁵ See *In re Tate*, 63 N.C. 308 (1869). For a discussion of *Tate*, see Magliocca, *supra* note 5, at 98 n.59.

⁷⁶ See *Tate*, 63 N.C. at 309.

of the United States.”⁷⁷ The court directed the jury to find the defendant guilty if they found that, as charged, he had taken an oath to support the Constitution in his pre-war office and had later engaged in rebellion or insurrection.⁷⁸

These courts were not alone in treating Section 3’s bar as applying to elective offices and offices simpliciter. An 1866 article asserted that in opposing the Fourteenth Amendment “Democrats practically advocate the election of active rebels to office, and the throwing open the halls of Congress to those who have violated the oaths once taken there.”⁷⁹ An 1869 article explained that faithless rebels could “only be restored to the right to hold an office of any sort, civil or military, State or national, by a two-thirds vote of each house of Congress.”⁸⁰

IV. OFFICER OF

The Officials Clause of Section 3 applies in part to anyone who has previously taken an oath to support the Constitution “as an officer of the United States . . . or as an executive or judicial officer of any state.” The case for including the President as an officer of the United States has five parts: contemporaneous executive and judicial interpretations; references in ordinary usage and in the Thirty-Ninth Congress, which proposed Section 3; a related federal statute; and legislative history of removing Section 3’s disabilities.

A. CONTEMPORANEOUS EXECUTIVE INTERPRETATION

In 1867 Attorney General Stanbery considered the Officials Clause when rendering two opinions on federal statutes implementing Section 3 pending its ratification.⁸¹ He began by determining who are executive or judicial officers of any state within the meaning of Section 3.⁸² He concluded that the qualifier “executive or judicial” excludes militia officers.⁸³ He then opined that the term clearly includes all executive “officers as are generally known by the proper description of State officers or officers of a State,” including governors.⁸⁴ Stanbery followed the Ordinary-Meaning Canon: “Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.”⁸⁵ Stanbery did not recognize any context indicating a technical sense—instead, he opined that the Officials Clause reaches any executive officers “generally known by the proper description of State officers,” including governors.

⁷⁷ See *United States v. Powell*, 27 Fed. Cas. 605, 606, 606 n.2 (D. N.C. 1871); Act of May 31, 1870, § 15, ch. 114, 16 Stat. 140, 143. For discussions of *Powell*, see Lynch, *supra* note 5, at 208; Gerard N. Magliocca, *Oaths and Offices*, BALKINIZATION (Jan. 21, 2021) (link in “UPDATE” postscript), <https://balkin.blogspot.com/2021/01/oaths-and-offices.html>.

⁷⁸ See *Powell*, 27 Fed. Cas. at 607.

⁷⁹ See *Democratic Duplicity*, *supra* note 14.

⁸⁰ See *A General Pardon. PRESIDENT JOHNSON signalized Christmas Day*, FRANK LESLIE’S ILLUSTRATED NEWSPAPER (N.Y., N.Y.), Jan 16, 1869, at 274.

⁸¹ See *supra* note 6.

⁸² See First Opinion, *supra* note 6, at 149.

⁸³ See *id.* at 151.

⁸⁴ See *id.* at 152.

⁸⁵ See SCALIA & GARNER, *supra* note 27, at 69.

Stanbery equated holding an office with being an “officer of.” He opined:

that to work disqualification two elements must occur—

First. Holding the designated office, State or federal, accompanied by an official oath to support the Constitution of the United States; and

Second. Engaging in rebellion against the United States, or giving aid or comfort to its enemies.⁸⁶

Stanbery further reasoned that the term “officer of the United States” in the Officials Clause is unqualified, comprehensive, and more general than the “executive or judicial”-limited state version and therefore reaches military as well as civil officers.⁸⁷ Stanbery used the General-Terms Canon: “General terms are to be given their general meaning.”⁸⁸ And as shown in Part IV.C. below, post-1788 usage supports the case that the President was generally known as an officer of the United States in the nineteenth century.

The reason for the comprehensiveness of the federal term is that “the violation of the official oath and the official trust has relation to fealty to the United States,” and federal officers stand “in more direct relation and trust to the United States than the officers of a State.”⁸⁹ Of all federal officials, Presidents stand in the most direct relation and trust to the United States given their constitutionally prescribed oath and their obligations to “faithfully execute the Office” and to “take Care that the Laws be faithfully executed.”⁹⁰ To allow Presidents but not their appointed subordinates to again take an oath that they have violated would contravene the Presumption Against Ineffectiveness: “A textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.”⁹¹

The President holds an office,⁹² takes an oath to support the Constitution,⁹³ and is therefore within Attorney General Stanbery’s definition of an officer of the United States. The President is the federal analog of a state governor, who Stanbery

⁸⁶ See First Opinion, *supra* note 6, at 158.

⁸⁷ See *id.*

⁸⁸ See SCALIA & GARNER, *supra* note 27, at 101.

⁸⁹ See First Opinion, *supra* note 6, at 158.

⁹⁰ See U.S. CONST. art. II, § 1, cl. 8, and § 3.

⁹¹ SCALIA & GARNER, *supra* note 27, at 63. Cf. *Worthy v. Barrett*, 63 N.C. 199, 204 (1869), (Reade, J.) (“The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress.”), *appeal dismissed sub nom. Worthy v. Comm’rs*, 76 U.S. 611 (1869), *cited in* *Lynch*, *supra* note 5, at 155.

⁹² See e.g., U.S. CONST. art. I, § 3, cl. 5 (“office of President of the United States”), art. II, § 1, cl. 5 (“office of President”), art. II, § 1, cl. 8 (“office of President of the United States”), Graber, *supra* note 23 (reference in Thirty-Ninth Congress to Presidency as a “high office”). Cf. *supra* Part III (making the case that the Presidency is an office under the United States). Because Presidents hold the *office* of President of the United States, they should be *officers* of the United States.

⁹³ See U.S. CONST. art. II, § 1, cl. 8

concluded is clearly an executive officer of a state, and so under the Consistent-Usage Canon the President is an officer of the United States.⁹⁴

B. CONTEMPORANEOUS JUDICIAL INTERPRETATIONS

Judicial decisions during Reconstruction relied on ordinary meaning and generality of terms just like the Attorney General's opinion.⁹⁵ The Florida Supreme Court interpreted Section 3 as incorporated in the state constitution to apply to anyone who holds a public office. It defined an "office" as "a public charge or employment" and an "officer" as "a person commissioned or authorized to perform any public duty."⁹⁶ It opined that "[a]n officer of the State . . . is a person in a public charge or employment, commissioned or authorized to perform any public duty, under an oath to support the Constitution and Government, and to perform the duty faithfully."⁹⁷

The North Carolina Supreme Court reasoned similarly in 1869 when it held that Section 3 applied to a pre-war elected sheriff.⁹⁸ The court took no special notice of the word "of" in "officer of." It interpreted Section 3 to apply to officers simpliciter, asking only "[i]s a Sheriff an officer?"⁹⁹

⁹⁴ Cf. Graber, *supra* note 23 ("if Blackman and Tillman's thesis is correct, then elected state governors are not officers of their states").

⁹⁵ Blackman and Tillman cite authorities that apply the term "officer of the United States" to appointed officials. See Blackman & Tillman, *supra* note 5, at 26 *et seq.* None, however, interprets Section 3 or any other constitutional or statutory provision that applies to both officers of the United States and officers of the states in the same sentence. Blackman and Tillman further imply that "officer of the United States" has a single meaning at any point that might drift over time but would have to "have drifted back and forth" during the relevant period if it included the President in Section 3 but not in the other authorities. See *id.* at 28. But words or phrases do not have a single legal meaning that is subject to linear change over time. Rather, what the words of any given legal text "convey, in their context, is what the text means." See SCALIA & GARNER, *supra* note 27, at 56 (emphasis added). Three of the authorities that Blackman and Tillman cite recognize that Congress can use the same term with different meanings in different contexts. See *United States v. Mouat*, 124 U.S. 303, 308 (1888) ("Undoubtedly Congress may have used the word 'officer' in some other connections in a more popular sense, . . . in which case it will be the duty of the court in construing such an act of Congress to ascertain its true meaning and be governed accordingly."), *United States v. Hartwell*, 73 U.S. 385, 395–96 (1867), *Employee's Compensation Act—Assistant United States Attorney*, 31 U.S. Op. Att'y Gen. 201, 202 (1918). The fourth specifically refers only to the Constitution of 1788. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497–98 (2010). In the context of the Civil War and Reconstruction, and Section 3's application to officers of both the United States and the states, Section 3's use of the term can properly include elected Presidents just like elected governors, regardless of how other texts from the same period use the term.

⁹⁶ In the Matter of the Executive Communication of the 14th October, 1868, 12 Fla. 651, 651–52 (1868).

⁹⁷ *Id.*

⁹⁸ See *Worthy v. Barrett*, 63 N.C. 199 (1869), *appeal dismissed sub nom. Worthy v. Comm'rs*, 76 U.S. 611 (1869). For other discussions of *Worthy* see Magliocca, *supra* note 5, at 98 n.59, Magliocca, *supra* note 78, Lynch, *supra* note 5, at 155, 164.

⁹⁹ See *Worthy*, 63 N.C. at 202.

The court equated holding an office with being an officer for purposes of disqualification under Section 3. It listed “the *officers* in North Carolina who are required to take an oath to support the Constitution,” including the governor, and opined that anyone “who held any of these *offices* before the rebellion, and then engaged in the rebellion, is prohibited from holding office until relieved by Congress.”¹⁰⁰ The court defined a public office as a right to exercise public employment with its attendant compensation, duties, and obligation to take the oath,¹⁰¹ which included the elective office of sheriff.¹⁰²

A Circuit Court in North Carolina reasoned the same in a case involving a person appointed and then elected constable before the war.¹⁰³ The court found that the party was an “officer in the state” holding “an executive office” before the war and thus within Section 3’s Officials Clause.¹⁰⁴

Usage in these cases is consistent with uses of “officer of” involving judicial power over governors and Presidents. An 1867 Supreme Court challenge to military Reconstruction asserted that “[i]f the chief executive officer of a State is liable to be controlled by the courts of the State in the discharge of ministerial duties, for much stronger reasons is the chief executive officer of the United States liable to be controlled by this court under the provisions of the Federal Constitution.”¹⁰⁵ A legal journal explained in 1881 that “[th]e writ of *mandamus* has at various times been prayed for, against every officer of government, both State and national, except the President of the United States, and even he has not escaped wholly . . .”¹⁰⁶ The Georgia Supreme Court opined in 1850 “that for *political* reasons alone, the remedy by *mandamus* ought not to be enforced against the chief executive officer of the State.”¹⁰⁷ And the Arkansas Supreme Court similarly concluded in 1839 that “[a]ll the officers of the government, except the President of the United States, and the Executives of the States, are liable to have their acts examined in a court of justice.”¹⁰⁸

C. REFERENCES IN ORDINARY USAGE AND THE THIRTY-NINTH CONGRESS

The American President has been generally known here and abroad as an officer of the United States since as early as 1794, when the anonymous author Nestor described President Washington as “the first executive officer of the United States.”¹⁰⁹ Other Presidents were routinely called the “chief executive officer of the

¹⁰⁰ See *id.* at 203, emphasis added.

¹⁰¹ See *id.* at 202.

¹⁰² See *id.* at 205 (dismissing petition per curiam with costs).

¹⁰³ See *United States v. Powell*, 27 Fed. Cas. 605 (D. N.C. 1871).

¹⁰⁴ See *id.* at 606 (appointed and then elected constable), 607 (holding and description as an “officer in the state” holding an “executive office” before the war).

¹⁰⁵ See *The Military Reconstruction Bill*, CHARLESTON MERCURY (Charleston, S.C.), Apr. 10, 1867, at 1.

¹⁰⁶ See 15 W. JURIST 122 (1881).

¹⁰⁷ See *State ex rel. Law v. Towns*, 8 Ga. 360 (1850).

¹⁰⁸ See *Hawkins v. The Governor*, 1 Ark. 570, 587 (1839).

¹⁰⁹ See Nestor, Letter To the President of the United States, GENERAL ADVERTISER (Phila., Pa.), Aug. 12, 1794, <https://founders.archives.gov/documents/Washington/05-16-02-0365>. Similarly, a friend writing to Vice President John Adams called him a “high officer of the United States.” See To John Adams from John Browne Cutting, 18 October 1796, <https://founders.archives.gov/documents/Adams/99-02-02-1795> (Early Access Link).

United States,” including Jefferson,¹¹⁰ Jackson,¹¹¹ Van Buren,¹¹² Harrison,¹¹³ Polk,¹¹⁴ Taylor,¹¹⁵ Fillmore,¹¹⁶ Buchanan,¹¹⁷ Lincoln,¹¹⁸ Johnson,¹¹⁹ Grant,¹²⁰ and Garfield.¹²¹

Britain’s Prime Minister described Polk as the “chief executive officer of the United States” during the Oregon boundary negotiations.¹²² Johnson used the same term to describe himself during Reconstruction,¹²³ and an English paper used it to describe him upon his impeachment acquittal.¹²⁴ On the eve of the Civil War, Buchanan called himself “the chief executive officer under the Constitution of the United States.”¹²⁵ And as candidates, General Fremont and Horace Greeley were attacked as “totally devoid of those stern virtues which the chief executive officer

¹¹⁰ To Thomas Jefferson from Samuel Latham Mitchill, July 12, 1808, <https://founders.archives.gov/documents/Jefferson/99-01-02-8305> (Early Access Link).

¹¹¹ *Mr. Jenkins’ Remarks*, ANNAPOLIS MD. REPUBLICAN, Feb. 19, 1833, at 2 (praising Jackson for upholding the law and the republican system and defending the Union in the context of Nullification), ALEXANDRIA GAZETTE, Aug. 11, 1837, at 5, col. 3 (in the context of defending the currency).

¹¹² *See For President, Martin Van Buren, for Vice President, Richard M. Johnson*, EVENING POST (N.Y., N.Y.), Oct. 5, 1840, at 2, *Thursday Morning, April 29, 1843*, WKLY. ECONOMIST (Buffalo, N.Y.), Apr. 26, 1843, at 1.

¹¹³ *See Hereabouts and Thereabouts*, WAYNE COUNTY HERALD (Honesdale, Pa.), Sept. 4, 1873, at 3.

¹¹⁴ *See Arrival of the Caledonia*, HURON REFLECTOR (Norwalk, Ohio), Apr. 29, 1845, at 3, *Oregon—Our Relations with Britain*, BRATTLEBORO VT. PHOENIX, May 2, 1845, at 2.

¹¹⁵ *See Ample Reasons for Being a Democrat*, PORTAGE SENTINEL (Ravenna, Ohio), Sept. 27, 1848, at 1, *To the Democratic Voters of the Senatorial District, composed of the counties of Henry and Fayette*, MILLEDGEVILLE FED. UNION (Milledgeville, Ga.), Sept. 18, 1849, at 6.

¹¹⁶ *See Mr. Fillmore*, REPUBLIC (D.C.), Aug. 27, 1851, at 2.

¹¹⁷ *See The Republican Orator and Organs on the Crisis—Duty of Mr. Lincoln*, N.Y. HERALD (N.Y., N.Y.), Dec. 14, 1860, at 5, *Questions and Answers*, RICHMOND ENQUIRER (Richmond, Va.), July 4, 1859, at 2.

¹¹⁸ *See The President’s Speech*, COUNCIL BLUFFS BUGLE (Council Bluffs, Iowa), July 23, 1862, at 3.

¹¹⁹ *See By the President of the United States of America: A Proclamation*, BOSTON POST, May 30, 1865, at 2 (describing himself), *The Assemblies*, ST. LOUIS CHRISTIAN ADVOCATE, May 24, 1866, at 7, *A Good Suggestion from an Old Soldier*, QUINCY DAILY HERALD (Quincy, Ill.), Sept. 19, 1866, at 2, *Interesting Letter from Judge Abell on the Louisiana Troubles*, WILMINGTON J. (Wilmington, N.C.), June 28, 1867, at 3.

¹²⁰ *See The New Administration*, MEMPHIS DAILY APPEAL, Feb. 10, 1869, at 5, *Should Gen. Grant Be Re-elected*, NEW ALBANY LEDGER STANDARD (New Albany, Ind.), Sept. 11, 1872, at 2 (asserting that Grant was not satisfied with honor and lifetime pension from service in the war but “said it is not enough; I want more. I want to be the chief executive officer of the United States. I want the power that belongs to the President of the United States.”).

¹²¹ *See CRESTED BUTTE ELK MOUNTAIN PILOT* (Crested Butte, Colo.), Mar. 3, 1881, at 2.

¹²² *See Arrival of the Caledonia*, *supra* note 114, *Oregon—Our Relations with Britain*, *id.*, *House of Commons*, SYDNEY MORNING HERALD (Sydney, Australia), Aug. 12, 1845, at 3.

¹²³ *See By the President of the United States of America: A Proclamation*, *supra* note 119. Johnson’s proclamation was widely reported. *See, e.g., America*, GUARDIAN (London), June 12, 1865, at 3.

¹²⁴ *See Mr. Johnson’s Acquittal*, CHRONICLE (Chester, England), May 30, 1868, at 8.

¹²⁵ *See The President’s Message*, W. RES. CHRON. (Warren, Ohio), Jan. 16, 1861, at 2.

of the United States should possess,”¹²⁶ and as “just the kind of material of which the Chief Executive officer of the United States is never made.”¹²⁷

Crucially, many of these uses occurred in the context of the President’s election,¹²⁸ constitutional position,¹²⁹ and role in preventing domestic and international violence,¹³⁰ preserving the Union,¹³¹ and enforcing the law during Reconstruction.¹³² For example, an 1850 article declared that

President FILLMORE . . . places himself where the Constitution places him as the Chief Executive officer of the United States, and in that position looks to the interest of the country—of the whole people—as above any consideration connected with a mere party in politics, or any section of the country.”¹³³

An 1860 article attacked those mulling rebellion and added “that the arch traitor of the gang is the chief executive officer of the United States, by name James Buchanan,” who refuses to acknowledge any authority to employ the armed forces against seceding states, thereby “virtually proclaiming that he would protect his brother traitors in their rebellion.”¹³⁴ And a Southern writer questioned in 1869 whether “Gen. Grant will discharge his duties faithfully as the chief executive officer of the United States, or whether he will act as the President of the Republican party” to perpetuate the oppression of the South.¹³⁵

These and other period uses, including in the Thirty-Ninth Congress,¹³⁶

¹²⁶ See *Gen. Fremont*, TERRE HAUTE WKLY. WABASH EXPRESS, June 15, 1864, at 1.

¹²⁷ See *Greeley and Brown*, TIPTON ADVERTISER (Tipton, Iowa), May 9, 1872, at 4.

¹²⁸ See *Election of President and Vice President*, CONST. WHIG (Richmond, Va.), Feb. 28, 1826, at 1 (“the important operation of electing the two chief executive officers of the United States is not regulated by any Constitutional rule whatever.”).

¹²⁹ See *infra* note 133 and accompanying text.

¹³⁰ See, e.g., *To the President of the United States*, *supra* note 109 (calling out state militias during the Whiskey Rebellion), *From Canada*, WASH. NAT’L INTELLIGENCER (D.C.), Nov. 12, 1838, at 2 (“The chief Executive officer of the United States, and all officers acting by his authority, under the laws, have a duty to perform” in preventing Americans from fighting with Canadian separatists against British forces), *The President’s Message*, *supra* note 125 (Buchanan disclaiming any authority to use military force against secession), *The Republican Orator and Organs on the Crisis—Duty of Mr. Lincoln*, *supra* note 117 (attacking Buchanan for same).

¹³¹ See *Mr. Jenkins’ Remarks*, *supra* note 111.

¹³² See, e.g., *A Good Suggestion from an Old Soldier*, *supra* note 119, *Interesting Letter from Judge Abell on the Louisiana Troubles*, *id.*

¹³³ See *From the Cincinnati (Ohio) Gazette*, DAILY REPUBLIC (D.C.), Dec. 20, 1850, at 1. An 1851 article praised Fillmore for showing more conciliation than any other “chief executive officer of the United States,” having discharged his duties “to the satisfaction of all sections” and having “done justice to North and South.” See *Mr. Fillmore*, *supra* note 116.

¹³⁴ See *The Republican Orator and Organs on the Crisis—Duty of Mr. Lincoln*, *supra* note 117.

¹³⁵ See *The New Administration*, *supra* note 120.

¹³⁶ Graber provides examples from the Thirty-Ninth Congress describing the President as the “chief executive officer of the United States,” elected officials generally as “officers of,” and elected governors specifically as “officers of.” See Graber, *supra* note 23. Magliocca provides examples of uses from 1865 to 1868 including Johnson referring to

make the case under contemporaneous executive and judicial interpretations, the Presumption of Consistent Usage, and the Ordinary-Meaning and General-Terms Canons that the President is an officer of the United States for purposes of Section 3.¹³⁷ These uses continued into the twentieth century, supporting the case that nineteenth century usage was not anomalous.¹³⁸

D. RELATED FEDERAL STATUTE

An 1868 federal statute provided that when specified rebel states ratified the Fourteenth Amendment “the officers of each State duly elected and qualified under the constitution thereof shall be inaugurated without delay,” except that no person disabled under the proposed Section 3 and not relieved “shall be deemed eligible to any office in” the state.¹³⁹ The statute recognized that elected officers are “officers of” the state and implicitly equated holding an “office in” the state with being an “officer of” the state.

Under the Related-Statutes Canon, the term “officer of” in Section 3 has the same meaning as in that statute. And under the Presumption of Consistent Usage, the term “officer of the United States” in Section 3 includes the President as the holder of an elective office.

himself as the “chief civil executive officer of the United States” and others referring to Lincoln or Johnson as “the executive officer of the United States,” “the chief executive officer of the United States,” and the “chief civil executive officer of the United States.” See Gerard Magliocca, *Section 3 and the Presidency*, PRAWFSBLAWG (Dec. 21, 2021), <https://prawfsblawg.blogs.com/prawfsblawg/2021/12/section-3-and-the-presidency.html>.

¹³⁷ Blackman and Tillman dismiss other scholarship citing descriptions of the President as an officer of the United States as being too “scattered” to establish the term’s meaning in Section 3. See Blackman & Tillman, *supra* note 5, at 43, 45. The citations in this Article are hardly scattered, and they are cited in relation to authorities that use the Ordinary-Meaning and General-Terms Canons to interpret Section 3. Moreover, many of the uses occur in the context of the Civil War and Reconstruction, including in the Thirty-Ninth Congress.

¹³⁸ See, e.g., 39 CONG. REC. 3474 (1905) (proposed constitutional amendment to make “[a]ll civil officers of the United States other than the President and Vice President” removable by Congress), 40 CONG. REC. 489 (1905) (referring to a salary “twice as large as that of any civil officer of the United States except the President of the United States.”), LEWIS MAYERS, *THE FEDERAL SERVICE* 91 (1922) (“This provision forbids any officer of the United States (other than the President, who is not included in its terms) . . .”), DEPARTMENT OF THE TREASURY, OFFICE OF THE GENERAL COUNSEL, *MANAGEMENT REVIEW ON THE PERFORMANCE OF THE U.S. DEPARTMENT OF THE TREASURY IN CONNECTION WITH THE MARCH 30, 1981 ASSASSINATION ATTEMPT ON PRESIDENT RONALD REAGAN* 99 (1981) (“it seems prudent to provide for an officer of the United States other than the president to exercise what is, in effect, a veto authority [sic] over Securities and Exchange Commission action.”). Late nineteenth century usage includes similar references to officers of the government with an exclusion for the President. See, e.g., 12 CONG. REC. 523 (1881) (statement of Senator Sherman: “there is no officer of the Government except the President of the United States who is not bound, when directed to do so, to lay every paper in his Department before either House of Congress . . .”).

¹³⁹ See Act of June 25, 1868, § 3, ch. 70, 15 Stat. 73, 74.

E. PETITIONS FOR REMOVAL OF DISABILITIES

Many of those disabled under Section 3 filed petitions for the removal of disabilities.¹⁴⁰ On January 20, 1869, Representative Farnsworth of the Committee on Reconstruction offered a bill to relieve the disabilities of over one hundred petitioners from Alabama, Georgia, Louisiana, Mississippi, North Carolina, and Virginia.¹⁴¹ Representative Ward resisted granting individual relief and asked whether there was any reason these particular individuals deserved relief.¹⁴² Farnsworth read one petition, from Ira Garrett of Virginia, as representative of the group. The petition, as recorded in the Congressional Globe, read in part:

REMARKS.

The following is an accurate statement of the offices held before the war, the acts committed in support of the rebellion, and the present political status of the above named:

Mr. Ira Garrett is seventy-six years of age—was elected clerk of the county court in 1831, and clerk of circuit court, of Albemarle, in 1852 and has continued to act in each court to the present time.

He gave no support to the rebellion other than sympathy, which was carried out by feeding the hungry soldiers, and attending to the wants of the sick.

He accepts the political situation of the country.

He is *now* a Republican, and indorsed the reconstruction policy of Congress.¹⁴³

Neither Ward nor any other member of the House objected that relief was unnecessary because Garrett had held elective rather than appointed offices before the war. Nor did anyone object that the petition treated having held a state office as demonstrating that the petitioner had been an “officer of” the state. Holding an office, even an elective office, made one an “officer of” the state for purposes of the

¹⁴⁰ See, e.g., CONG. GLOBE, 40th Cong., 3rd Sess. 480 (1869).

¹⁴¹ See *id.*

¹⁴² See *id.* at 481.

¹⁴³ See *id.* For a scan of Garrett’s petition, see petition of Ira Garrett (Dec. 16, 1868), https://history.house.gov/Records-and-Research/Listing/pm_025/. Thanks to Professor Magliocca for the reference and link. For the National Archives collection of petitions see U.S. House of Representatives, Record Group 233, Select Committee on Reconstruction, Petitions and Other Records Relating to the Removal of Political Disabilities, July 1867–March 1871, <https://catalog.archives.gov/id/563356>. For petitions of other Virginia pre-war elected officials in that collection, see, e.g., petition of R.J.W. Duke (pre-war attorney for the commonwealth) and petition of [Drury] W. Burnley (pre-war sheriff), B50 E1007, and petition of Charles W. Statham (pre-war justice of the peace), B51 E1116. Those positions were elective under the 1851 Virginia Constitution. See VA. CONST. art. VI, §§ 27, 30 (1851).

Officials Clause. Under the Presumption of Consistent Usage, holding the office of President of the United States makes one an officer of the United States.

V. ESSENTIAL HARMONY OF THE TERMS

Parts III and IV make the case for the essential harmony of Section 3's two critical terms. Section 3 applies to officers and offices simpliciter, and an officer is simply one who holds an office.¹⁴⁴ This essential harmony appears in other uses that support the case that the President is an officer of, and holds an office under, the United States for purposes of Section 3.

A. SUBSTITUTED USAGE IN LEGISLATIVE HISTORY OF SECTION 3

In debates over the proposed Section 3 both Senator Van Winkle and Senator Johnson described having held an “office under” as the predicate for disqualification—substituting having held an “office under” for having been an “officer of” in the Officials Clause.¹⁴⁵ Senator Van Winkle questioned whether Section 3 should apply to anyone who had ever previously taken the oath or only those who had violated the oath during the term of the position for which they had sworn it. “If it is the intention to exclude from these privileges any one who has ever held an office under the national Government or the State governments, then the language of the section is correct as it is . . .”¹⁴⁶ Senator Johnson doubted that any Southern state would ratify the amendment if Section 3 indeed applied to “all who have at any time held any office under the United States” or “under any State.”¹⁴⁷

For these two Senators, holding an “office under” made one an “officer of” for purposes of the Officials Clause. If the Presidency is an “office under” the United States for purposes of Section 3, the President is an “officer of” the United States for the same purposes.¹⁴⁸ Indeed, in Blackman and Tillman's own 1788 taxonomy everyone who holds an executive office under the United States is an officer of the United States.¹⁴⁹

¹⁴⁴ Blackman and Tillman perhaps unwittingly approach this type of analysis when they write that “the jurisdictional element, [1], specifies which *positions* are subject to Section 3: a ‘person . . . who, having previously taken an oath . . .’” See *supra* note 18, and Blackman & Tillman, *supra* note 5, at 2 (emphasis added).

¹⁴⁵ Lynch has suggested that although “under-explored, it facially appears that people who hold ‘offices under’ are ‘officers of.’” See Lynch, *supra* note 5, at 158–59, 158 n.28, and 159 n.29. The Senators' statements support his suggestion. See also Graber, *supra* note 23 (holders of “offices under” are “officers of”).

¹⁴⁶ See CONG. GLOBE, *supra* note 23, at 2898.

¹⁴⁷ See *id.*

¹⁴⁸ Blackman and Tillman acknowledge that “in everyday parlance, the President is an officer of the United States.” See Blackman & Tillman, *supra* note 5, at 45. If the Attorney General's opinion, judicial decisions, legislative history, canons of construction, and congressional disability relief practice cited above control, the contemporaneous everyday parlance cited in Part IV.C. above would make the President an officer of the United States for purposes of Section 3.

¹⁴⁹ See *supra* note 24 and accompanying text.

B. COMBINED USAGE

Several authorities consider both the Officials Clause and the Positions Clause together. In *United States v. Powell*, for example, the court found that an appointed then elected constable was within the Officials Clause, and the elective position of sheriff was within the Positions Clause by simply concluding that the former was an “officer” and the latter an “office.”¹⁵⁰ Interpreting federal statutes enforcing Section 3 before its ratification, Attorney General Stanbery opined that an elected governor was an “officer of” a state and that his position was an “office under” the state’s provisional government.¹⁵¹

This combined usage appears even before Reconstruction. The 1790 Pennsylvania constitution provided that “[t]he Governor, and all other civil officers, under this commonwealth, shall be liable to impeachment for any misdemeanor in office . . .”¹⁵² The elected governor was an officer under the commonwealth, merging “officer” and “office under” into the singular “officer under.” James Madison noted the provision in 1821,¹⁵³ and a guide for families and schools cited it as well.¹⁵⁴

That constitution also cautions against reading constitutional text too technically. It describes the governor as an officer,¹⁵⁵ establishes the elective office of governor,¹⁵⁶ and provides that the governor “shall appoint all officers, whose offices are established by this Constitution.”¹⁵⁷ Read closely, the constitution is incoherent—it requires elected governors to appoint themselves.¹⁵⁸ However, common sense and purposive readings should trump technical readings, particularly for constitutions.

C. ONE CONTEMPORANEOUS UNDERSTANDING OF THE CONSTITUTION OF 1788 AND THE ACT OF AUGUST 31, 1852

In 1866 a select committee of the House of Representatives interpreted the officers and offices provisions of the Constitution of 1788 and rejected both the textual analysis that Professors Blackman and Tillman rely on and the conclusions that they draw. The committee dismissed their type of textual analysis as “mere verbal criticism” and asserted that “[n]o method of attaining the Constitution is more

¹⁵⁰ See *supra* notes 77–78 and 103–104 and accompanying text.

¹⁵¹ See Second Opinion, *supra* note 6, at 189–91.

¹⁵² See PA. CONST. art. IV, § 3 (1790).

¹⁵³ See Letter From James Madison to Tench Coxe, January 17, 1821 (Madison responding that he read enclosed piece by Phocian, which quoted the constitution, and stating that “It indicates intelligence and acuteness in the writer, and no inconsiderable fairness, in facing, at every point, the subject he discusses.”), <https://founders.archives.gov/documents/Madison/04-02-02-0182>.

¹⁵⁴ See WILLIAM B. WEDGWOOD, A.M., THE REVISED STATUTES OF THE STATE OF PENNSYLVANIA AND ADDITIONAL LAWS TO 1844, REDUCED TO QUESTIONS AND ANSWERS, FOR THE USE OF SCHOOLS AND FAMILIES 15 (1843).

¹⁵⁵ See PA. CONST., art. IV, § 3 (1790).

¹⁵⁶ See *id.*, art. II, § 1 (establishing position), 2 (providing for election), 3 (governor holds office).

¹⁵⁷ See *id.*, art. II, § 8.

¹⁵⁸ Cf. Baude, *supra* note 26.

unsafe than this one of ‘sticking’ in sharp verbal criticism.”¹⁵⁹ The committee applied a common sense purposive method of interpretation instead.

The committee concluded that members of Congress hold offices under the United States and “that no argument can be based on the different sense of the words ‘of’ and ‘under,’ as used in” the relevant clauses of the Constitution.¹⁶⁰ It reached those conclusions in part by considering the Foreign Emoluments Clause, which bars those who hold offices under the United States from accepting emoluments, titles, and the like from foreign sovereigns.¹⁶¹ The committee reasoned that members of Congress must hold offices under the United States. Otherwise that clause would not apply to them, and foreign sovereigns could purchase Congress—a result that is “repugnant to all just or safe principles of government.”¹⁶²

The select committee’s conclusion is consistent with the Foreign Affairs Committee’s earlier view that the President is subject to the Foreign Emoluments Clause.¹⁶³ It is also consistent with Professor Zephyr Teachout’s use of an anti-corruption principle to interpret the Constitution generally and to reach the same conclusion as to elected federal officials.¹⁶⁴

The select committee’s conclusions are particularly noteworthy given their context. Representative Blaine had read a letter on the House floor charging Representative Conkling with corruption for, among other things, having received his House pay while also receiving compensation for prosecuting a court martial as an acting federal judge advocate.¹⁶⁵ The House empaneled the committee to review the charges. The committee considered potentially applicable laws including an 1852 statute (the “Act”) that in part forbade anyone holding an “office under the government of the United States” bearing annual compensation of at least two thousand five hundred dollars to “receive compensation for discharging the duty of

¹⁵⁹ See CONG. GLOBE, *supra* note 23, at 3939. Blackman and Tillman provide a “systematic” and “comprehensive” analysis of the text of all provisions in the Constitution of 1788 that use any terms relevant to Section 3, including the Foreign Emoluments Clause, along with changes made during the drafting process. See Blackman & Tillman, *supra* note 24, at 309, 314–15, Blackman & Tillman, *supra* note 5, at 6–21. The select committee noted almost all of those provisions, including the Foreign Emoluments Clause, in its report. See CONG. GLOBE, *supra* note 23, at 3939. Blackman and Tillman also provide non-textual defenses of their interpretation. See, e.g., Blackman & Tillman, *supra* note 24, at 315.

¹⁶⁰ See CONG. GLOBE, *supra* note 23, at 3939, *cited in* Lynch, *supra* note 5 at 159 n.29, and Graber, *supra* note 23.

¹⁶¹ See U.S. CONST. art. I, § 9, cl. 8.

¹⁶² See CONG. GLOBE, *supra* note 23, at 3939–40. A contemporaneous Supreme Court opinion reasoned similarly in construing “officer” in a criminal statute broadly to include subordinates because otherwise no penalty would apply to them, and they could “commit any of the crimes specified with impunity.” See *United States v. Hartwell*, 73 U.S. 385, 395 (1867).

¹⁶³ See *supra* note 35 and accompanying text.

¹⁶⁴ See Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. 30, 47–48, 51 (2012).

¹⁶⁵ See, e.g., 3 ASHER C. HINDS, LL.D., HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 1133–34 (1907), CONG. GLOBE, *supra* note 23, at 2298. The committee considered the two alternative cases of a member and a member-elect (given that members-elect receive House pay before being sworn in). See CONG. GLOBE, *supra* note 23, at 3939. This Article only considers the committee’s views on the former case.

any other office,” whether they held that other office or not.¹⁶⁶

Conkling argued that the Act could not apply to him because members of Congress do not hold offices under the government of the United States.¹⁶⁷ The committee first considered his defense by reference to the officers and offices terms in the Constitution of 1788. The committee rejected the defense for the reasons stated above, reading the terms “officer of” and “officer under” interchangeably, and the terms “officer ‘of’ the United States” and officer “‘under’ the Government of the United States” interchangeably.¹⁶⁸ The committee viewed the anti-corruption principle as so strong that it put members of Congress at risk under the Act.

As a fallback, the committee concluded that even if members of Congress do not technically hold an office under the government of the United States for purposes of the Constitution of 1788, they nevertheless do for purposes of the Act given its underlying purpose—“the absolutely vital importance of” keeping members “as far as possible from the bad influences of corruption and avarice.”¹⁶⁹ The anti-corruption principle controlled the independent statutory interpretation.¹⁷⁰

Finally, the committee had to determine whether a temporary judge advocate discharges “the duty of any other office.” The committee defined “office” much as Attorney General Stanbery and state courts later would when interpreting Section 3—as “a particular duty, charge, or trust, conferred by public authority, and for a public purpose, with a right usually attached to receive a fixed compensation for

¹⁶⁶ See Act of Aug. 31, 1852, ch. 108, § 18, 10 Stat. 76, 100, CONG. GLOBE, *supra* note 23, at 3940 (determining whether position was an office itself or discharged the duties of any other office).

¹⁶⁷ See CONG. GLOBE, *supra* note 23, at 3939. This Article’s description of Conkling’s actions comes from the committee’s report. Conkling’s account differs. For example, Conkling asserted that he was merely engaged as counsel, not as an acting judge advocate. See *id.* at 2296. The differences are not relevant to how the committee interpreted the law under its characterization of the facts.

¹⁶⁸ See *id.* at 3939. The committee considered contrary authorities including the leading case of the impeachment of William Blount. See *id.* at 3940. The committee read that case to hold that a former Senator is not subject to impeachment after expulsion, not that members of Congress are not officers of the government “in the enlarged and general sense of the Constitution.” See *id.* For some of Tillman’s discussions of the Blount case, see, e.g., Seth Barrett Tillman, *Motion for Leave to File Brief of Scholar Seth Barrett Tillman as Amicus Curiae in Support of the Defendant*, Citizens for Responsibility and Ethics in Washington v. Trump, No. 17 Civ. 458 (RA) 23–25 (S.D. N.Y. 2017), Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. 180, 192–95 (2013).

¹⁶⁹ See CONG. GLOBE, *supra* note 23, at 3940.

¹⁷⁰ The *Hartwell* Court echoed this approach, insisting that even when construing a penal statute strictly “the wider popular” meaning of a term should prevail over “the more narrow technical one” where the purpose of the statute applies to all within the former. See *United States v. Hartwell*, 73 U.S. 385, 396 (1867). “The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature.” *Id.* (citing the Court’s own precedent dating back to 1820 and treatises). The select committee report and *Hartwell* strongly support requiring purposive interpretation of the Reconstruction amendments under original methods originalism. Cf. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009) (original meaning depends “on the applicable interpretive rules of the time.”).

such service.”¹⁷¹ The committee examined the position and concluded that it was not itself an office and that performing its functions did not discharge the duties of any other office.¹⁷² The committee resolved to exonerate Conkling.¹⁷³

The committee’s report was unanimous and read in its entirety to the House one month after Congress sent the Fourteenth Amendment to the states for ratification.¹⁷⁴ The committee’s report does not control the interpretation of the Constitution of 1788, of course. But it does vitiate any claim that the narrow definitions that Professors Blackman and Tillman propose were fixed, generally accepted, or presumptively correct for any purpose at the adoption of the Fourteenth Amendment.¹⁷⁵ And it supports the case for applying a common sense, purposive, ordinary meaning method of interpretation to Section 3.¹⁷⁶

CONCLUSION

The United States adopted the Reconstruction amendments in a radically different context than it did the Constitution of 1788. Congressional Republicans rightly feared the resurgence of rebel power at the state and federal levels. They tried to prevent that through franchise and exclusion rules, first by statute and then in Sections 2 and 3 of the Fourteenth Amendment.

Section 3 applies to faithless state and federal officers. It bars holding state and federal offices until Congress permits. Its text uses ordinary terms, and the legislative, executive, judicial, interpretive, and popular materials cited above make the case for ascribing ordinary meanings to them. Those materials, along with canons of construction like the Presumption of Consistent Usage, support the provision’s application to Presidents and the Presidency just as much as to governors and governorships.

¹⁷¹ See CONG. GLOBE, *supra* note 23, at 3940.

¹⁷² See *id.*

¹⁷³ See *id.* at 3935.

¹⁷⁴ See *id.* (committee appointed April 30, 1866; report read before House on July 19, 1866), National Archives, *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, ARCHIVES.GOV (retrieved Mar. 4, 2023) (amendment submitted to states on June 16, 1866), <https://www.archives.gov/milestone-documents/14th-amendment>.

¹⁷⁵ Blackman and Tillman rely on the proposition that when “‘a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.’” See Blackman & Tillman, *supra* note 5, at 23, *citing* United States v. Castleman, 572 U.S. 157, 176–77 (2014) (Scalia, J., concurring), *quoting* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)) (actual quotation from 572 U.S. at 176, and emphasis omitted). It is not obvious that Section 3 transplanted “officer of” or “office under” from the Constitution of 1788. Quite the opposite. And if Section 3 left “office under” from that constitution behind, then it also left behind any soil that might support a narrow meaning of the related term “officer of.” Blackman and Tillman also write “[h]ere, Section 3’s jurisdictional element was ‘quite obviously modeled’ on the Oath or Affirmation Clause,” *citing* Justice Scalia’s concurring opinion in *Castleman*. See Blackman & Tillman, *supra* note 5, at 23–24. Justice Scalia was interpreting a modern criminal statute, however. See *Castleman*, 572 U.S. at 177. So that reference provides no support for a narrow reading of “officer of” in Section 3.

¹⁷⁶ The *Hartwell* decision provides similar support. See *supra* note 170.

As North Carolina Supreme Court Justice Reade explained in 1869, Section 3's purpose is to ensure "that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress."¹⁷⁷ This Article makes the case that Section 3's text reaches Presidents and the Presidency and reminds interpreters that "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."¹⁷⁸ One who takes the oath of the office of President of the United States then engages in insurrection or rebellion against it, or gives aid or comfort to its enemies, should not be eligible to take that oath again without permission from Congress.

¹⁷⁷ See *Worthy v. Barrett*, 63 N.C. 199, 204 (1869), *appeal dismissed sub nom.* *Worthy v. Comm'rs*, 76 U.S. 611 (1869). For similar descriptions of Section 3's purpose by members of the Thirty-Ninth Congress, see Graber, *supra* note 23 (statements of Senators Hendricks and Sherman).

¹⁷⁸ See SCALIA & GARNER, *supra* note 27, at 63.