Balkinization

Front page
Balkin.com

Balkinization
an unanticipated
consequence of
Jack M. Balkin

- Archives -

E-mail:
Jack Balkin:
jackbalkin at
yahoo.com
Bruce Ackerman
bruce.ackerman at
yale.edu
Ian Ayres
ian.ayres at yale.edu
Corey Brettschneider
corey_brettschneider
at brown.edu
Mary Dudziak
mary.l.dudziak at
emory.edu
Joey Fishkin
joey.fishkin at
gmail.com
Heather Gerken
heather.gerken at
yale.edu
Abbe Gluck
abbe.gluck at
yale.edu
Mark Graber
mgraber at
law.umaryland.edu
Stephen Griffin
sgriffin at tulane.edu
Jonathan Hafetz
jonathan.hafetz at
shu.edu
Jeremy Kessler
jkessler at
law.columbia.edu
Andrew Koppelman
akoppelman at
law.northwestern.edu
Marty Lederman
msl46 at
law.georgetown.edu
Sanford Levinson
slevinson at
law.utexas.edu
David Luban
david.luban at
gmail.com
Gerard Magliocca
gmaglioc at iupui.edu
Jason Mazzone
mazzonej at
illinois.edu
Linda McClain
lmcclain at bu.edu
John Mikhail
mikhail at
law.georgetown.edu

Wednesday, September 13, 2023

Section Three "Of" and "Under" Nonsense: The Sequel

Mark Graber

The persons responsible for Section Three of the Fourteenth Amendment would have laughed at the suggestion that past or future presidents who never held any other office could not be disqualified from present and future office. That whether former president John Tyler, who became a secessionist in 1861, would have been disqualified from office had he survived the Civil War depended on whether Tyler held other state or federal offices is nonsensical. No serious constitutionalist would interpret Section Three as exempting presidents who held no other public office absent a very clear constitutional mandate. Section Three of the Fourteenth Amendment disqualifies any person from holding "any office, civil or military, under the United States, ... who, having previously taken an oath ... as an officer of the United States, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same." The common sense reading is that the set of offices that make persons subject to Section Three are the same as the set of offices from which persons may be disqualified. That a traitorous former president is exempt from Section Three, but not traitorous Representatives, Senators, Judges, and Generals boggles the imagination.

Last winter in an essay for Lawfare, I demonstrated that the Fourteenth Amendment hardly compels such foolishness. My survey of every congressional use during the first session of the Thirty-Ninth Congress of "office(s) of," "office(s) under," "officer(s) of," and "officer(s) under" would not surprise anyone with common sense. The members of the 39th Congress who drafted Section Three spoke of the president as "an officer of the United States/Constitution" and as an "officer under the United States/Constitution." They spoke of the presidency as "an office of the United States/Constitution" and as an "office under the United States/Constitution." Some linguistic differences explain the use of "of" and "under" but there is no (not hardly any) evidence in the pages of the Congressional Globe that any member of Congress thought the president might be an officer under the United States/Constitution or an officer of the United States/Constitution, but not both. The essay paid particular attention to a House Report issued a month after the Fourteenth Amendment was sent to the state. That report insisted that no constitutional difference existed in the constitutional usage of "officers under the United States/Constitution" and "Officers of the United States/Constitution." The blog post summaries my conclusions. I may elaborate in the future.

Josh Blackman and Seth Barrett Tillman are nevertheless determined to repeat their comedic performance of December 2021 when they posted on SSRN an essay claiming, contrary to the evidence and common sense, "that the President is not a Section 3 'officer of the United States.'" As was the case with their original piece, the new piece they have recently posted on SSRN claims to be an understanding of the original meaning of Section Three. Their lack of cotemporaneous historical evidence for a claimed work of originalism is stunning. The number of persons they cite in support of their conclusions who might have influenced the drafting and framing of Section Three is zero. Blackman and Tillman

Frank Pasquale
pasquale.frank at gmail.com
Nate Persily
npersily at gmail.com
Michael Stokes Paulsen
michaelstokespaulsen at gmail.com
Deborah Pearlstein
dpearlst at yu.edu
Rick Pildes
rick.pildes at nyu.edu
David Pozen
dpozen at law.columbia.edu
Richard Primus
raprimus at umich.edu
K. Sabeel Rahman
sabeel.rahman at brooklaw.edu
Alice Ristroph
alice.ristroph at shu.edu
Neil Siegel
siegel at law.duke.edu
David Super
david.super at law.georgetown.edu
Brian Tamanaha
btamanaha at wulaw.wustl.edu
Nelson Tebbe
nelson.tebbe at brooklaw.edu
Mark Tushnet
mtushnet at law.harvard.edu
Adam Winkler
winkler at ucla.edu

Compendium of posts on *Hobby Lobby* and related cases

The Anti-Torture Memos: Balkinization Posts on Torture, Interrogation, Detention, War Powers, and OLC

The Anti-Torture Memos (arranged by topic)

Recent Posts

Section Three "Of" and "Under" Nonsense: The Sequel

I Power Blogger

Just A Few Blogs

ACS Blog
Alas, a Blog
Althouse
Arts and Letters Daily
Atrios (Eschaton)
Bill of Health
Buzzflash.com
Buzz Machine
Cato at Liberty
Juan Cole (Informed Comment)
Concurring Opinions

fail to provide any evidence that any member of the 39th Congress maintained that the president is not an officer of the United States or distinguished between an "officer of the United States" and an "officer under the United States." Blackman and Tillman do not point to any member of a state ratification convention or editorialist who, when the Fourteenth Amendment was debated, maintained that the president is not an officer of the United States or distinguished between an "officer of the United States" and an "officer under the United States." They do not point to any governing official, political actor, or small child who during the 1860s made a claim that remotely supports their assertions about the original meaning of an "officer of the United States."

Blackman and Tillman do make the odd claim that William Baude and Michael Paulsen in their influential article claiming that an originalist reading would disqualify Donald Trump under Section Three and my somewhat less famous (i.e., obscure) blog post "disregard the fact that the debates they cite from the 1860s in support of their position look back to debates from the early Republic." But Reconstruction Republicans insisted those debates supported their position that no constitutional difference existed between "officers of the United States" and "officers under the United States." Whether members of Congress in 1866 were right or wrong about their interpretation of debates in 1790s has no bearing on what members of Congress thought in 1866.

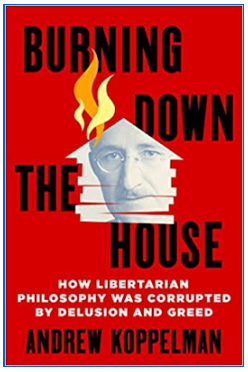
The crucial passage occurs in a Congressional Report issued barely a month after Congress sent the 14th Amendment to the states. That passage declares,

> "But a little consideration of this matter will show that 'officers of' and 'officers under' the United States are (as said by Mr. Dallas in this Blount case, p. 277) 'indiscriminately used in the Constitution.'" (Congressional Globe, at 3939).

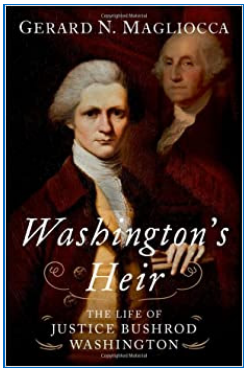
My blog post intentionally omitted "(as said by Mr. Dallas in this Blount case, p. 277)" which I interpreted as a footnote in the original House Report being reproduced in a Congressional Globe that did not include footnotes (I was also madly cutting to stay within word limits). Blackman and Tillman correctly point out that some members of Congress in 1797 disagreed with Dallas when Dallas claimed that no difference exists between "officers of" and "officers under." So what. The issue is what people in 1866 believed, not whether there was a disagreement in 1797. If members of the Thirty-Ninth Congress uniformly thought Dallas was right about the Constitution, pointing out that some members of Congress in 1797 disagreed has no bearing on the original meaning of constitutional language drafted in 1866. The evidence from the Thirty-Ninth Congress and House Report is unambiguous. Reconstruction Republicans uniformly spoke of the president as an "officer of the United States." They never distinguished between "officers of" and "officers under" the Constitution/United States. The committee report insisted, "It is irresistibly evident that no argument can be based on the different sense of the words 'of' and 'under.'" No difference existed between "an officer 'of' the United States, or one 'under' the government of the United States," the House Report concluded. "In either case he has been brought within the constitutional meaning of these words . . . because they are made by the Constitution equivalent and interchangeable."

Pundits who know nothing about history risk confusing the public by citing Blackman/Tillman in efforts to engage in "balanced" journalism. We may see posts on social media contending:

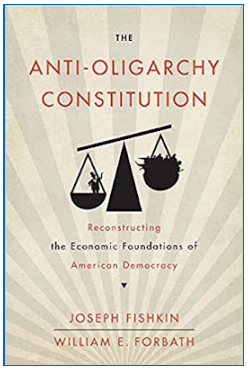
> Some scholars maintain the president is both an officer of and an officer under the Constitution. Others maintain the president is not an



Andrew Koppelman, Burning Down the House: How Libertarian Philosophy Was Corrupted by Delusion and Greed (St. Martin's Press, 2022)



Gerard N. Magliocca, Washington's Heir: The Life of Justice Bushrod Washington (Oxford University Press, 2022)



Joseph Fishkin and William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy (Harvard University Press, 2022)

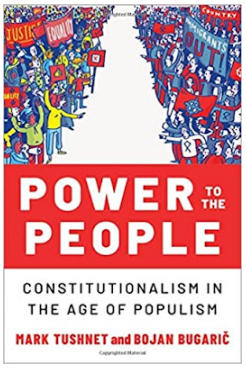
The Constitution in 2020
Corrente
Crooked Timber
Daily Howler
Daily Kos
Dana Boyd
Brad DeLong
Digby (Hullabaloo)
Discriminations
Daniel Drezner
Kevin Drum (Mother Jones)
Electrolite
En Banc
Eunomia (Daniel Larison)
Fafblog
Michael Froomkin (Discourse.net)
GovLab (Beth Noveck)
Rick Hasen (Election Law)
History News Network
How Appealing
Ignatz (Sam Heldman)
The Importance of (Ernie Miller)
Infolaw
Instapundit
International Economic Law and Policy Blog
IntLawGrrls
Jacob Levy
Jesus' General
Jurisdynamics
The Kitchen Cabinet
Mark Kleiman
Law Blog Central
Larry Lessig
Lawyers, Guns and Money
Liberal Oasis
Brian Leiter's Law School Reports
The Leiter Reports
Marginal Revolution
Megan McArdle
Memeorandum
Metafilter
Mirror of Justice
The New Republic
Newseum
No More Mister Nice Blog
Brendan Nyhan
Opinio Juris
Orcinus
The Originalism Blog
Pandagon
Passport (Foreign Policy)
Overcoming Bias
Political Animal (Washington Monthly)
Political Theory Daily Review
Political Wire (Taegan Goddard)
The Poor Man
Virginia Postrel
Prawfsblawg
Public Reason
Jonathan Rauch
Raw Story
Redstate
ReligiousLeftLaw.com
Reporters Committee For Freedom of the Press
Reproductive Rights

officer of the Constitution. Given the division of opinion, we ought not disqualify Donald Trump from holding any state or federal office.

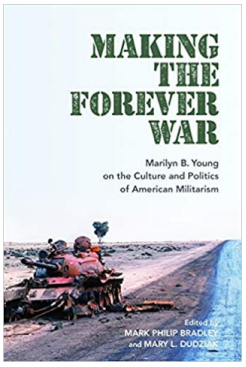
This is reporting of the worst sort. Powerful evidence exists that the persons responsible for Section Three of the Fourteenth Amendment believed the president was an "officer of" and an "officer under" the Constitution. If Donald Trump participated in an insurrection, he is not exempted from disqualification under Section Three because the only office he ever held was the presidency. No evidence exists that any member of Congress, member of a state legislature, political activist, journalist, or hopeless crank during the 1860s thought a president was not an officer of the United States or that a constitutional difference existed between an officer of the United States and an officer under the United States. History did not give Donald Trump a free "get out of disqualification card" unobtainable by any other president. That two members of the academy make that claim is evidence of a great many things, but not evidence about what persons were thinking when they drafted Section Three of the Fourteenth Amendment.

Posted 8:44 PM by Mark Graber [link]

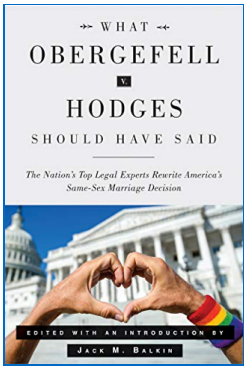
Older Posts
Newer Posts
Home



Mark Tushnet and Bojan Bugaric, Power to the People: Constitutionalism in the Age of Populism (Oxford University Press 2021).



Mark Philip Bradley and Mary L. Dudziak, eds., Making the Forever War: Marilyn B. Young on the Culture and Politics of American Militarism Culture and Politics in the Cold War and Beyond (University of Massachusetts Press, 2021).



Jack M. Balkin, What Obergefell v. Hodges Should Have Said: The Nation's Top Legal Experts Rewrite America's Same-Sex Marriage Decision (Yale University Press, 2020)