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ARTICLE: The Constitutional Limits to Impeachment and Its Alternatives.

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SUMMARY:

... Debates about impeachment in the United States are older than the Constitution itself. ... Part IV concludes that such a presumption not only expresses appropriate deference to a coordinate branch's constitutional interpretation of the impeachment clauses, but also should be standardized in related areas of constitutional law. ... Berger's misuse of history is evident in his analysis of two issues regarding impeachment: (1) what constitutes an impeachable offense and (2) whether impeachment is the exclusive means of removing federal judges. ... Although Berger acknowledges that the impeachable offenses listed in the Constitution are political crimes, he expresses disapproval of the Constitution's vesting of any removal power over the judiciary in a political (or legislative) body. ... Berger's general argument is that since the Constitution's language regarding the impeachment process is ambiguous, the Constitution does not commit consideration of this issue to only one branch. ... Critics also believe there are serious separation of powers and impeachment clause issues arising from the legislative attempt to authorize the judiciary to invoke disciplinary suspensions against individual members found guilty of "misconduct." ... It would be a different case if Congress had passed a law under which on its own initiative Congress could delegate to judicial councils the authority to investigate whether certain judges violated certain laws. ...

[I]mpeachment will be nearly the equivalent to a displacement, and will render the Executive dependent on those who are to impeach.

-- Gouveneur Morris n1

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n1. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64-65 (M. Farrand ed. 1966) [hereinafter CONVENTION RECORDS].

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What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in [which] he was not only deprived of his life but of the opportunity of vindicating his character. It [would] be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.

-- Dr. Benjamin Franklin n2

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n2. Id. at 65.

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TEXT:

[*2] I. Introduction

Debates about impeachment n3 in the United States are older than the [*3] Constitution itself. Prior to the drafting and adoption of the Constitution, there were vast differences in state constitutional provisions regarding the officials subject to, the timing of, the grounds for, and even the bodies empowered to conduct impeachments. n4 These differences carried over into the Constitutional Convention, where the debates primarily focused on whether granting Congress the impeachment power would make the President too dependent upon the legislature, n5 whether Congress or the federal judiciary was better suited to conduct impeachment hearings and trials, n6 and whether nonindictable offenses should be included among impeachable offenses. n7 Delegates also argued about what the proper vote for removal should be. n8

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n3. In the literature, impeachment has two meanings. First, impeachment refers to the particular process by which the United States House of Representatives may investigate, formulate, and direct charges of wrongdoing against certain officials of the federal government. Second, impeachment may be used as a shorthand reference to the general removal power of Congress, including the House's ability to charge an official with wrongdoing and the Senate's ability to remove and disqualify that official from holding any other office of the United States. Five constitutional provisions relate in some way to impeachment:

The House of Representatives shall . . . have the sole Power of Impeachment.

. . . .

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

. . . .

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

. . . .

The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

. . . .

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. I, § 2, cl. 5; id. art. I, § 3, cl. 6; id. art. I, § 3, cl. 7; id. art. II, § 4; id. art. III, § 1.

n4. See P. HOFFER & N. HULL, IMPEACHMENT IN AMERICA, 1635-1805, at 68-77 (1984) (surveying the drafting and testing of various impeachment provisions from state constitutions).

n5. See 2 CONVENTION RECORDS, supra note 1, at 53-54, 64-69, 551, 612.

n6. See id. at 159, 232, 238, 500, 551.

n7. See id. at 337, 550-52.

n8. See id. at 438, 493, 552.

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In the years after the Constitutional Convention, the debates on impeachment continued to focus on these same issues. In addition, there have been numerous calls, most recently by Senator Howell Heflin, n9 to amend the Constitution's impeachment procedure to make it more efficient and effective. n10 Recent congressional attempts to impeach three [*4] federal district judges, Harry Claiborne, Walter Nixon, and Alcee Hastings, have also reinvigorated debate over whether impeachment is the exclusive means for removing federal judges. These impeachment attempts also raise the additional questions whether indictment, prosecution, or imprisonment of federal judges should be prohibited prior to an impeachment, because these measures are tantamount to removal and to what extent

should conviction for a criminal offense satisfy the burden of the prosecution in an impeachment proceeding. n11

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n9. See Heflin, The Impeachment Process: Modernizing an Archaic System, 71 JUDICATURE 123, 123-25 (1987).

n10. See, e.g., Havighurst, Doing Away with Presidential Impeachment: The Advantages of Parliamentary Government, *1974 ARIZ. ST. L.J. 223, 224-29, 233-36* (suggesting that impeachment with its emphasis on politics and criminality is unworkable and that the United States should attempt instead a parliamentary style of government); Heflin, supra note 9 (calling for a constitutional amendment to allow Congress to create a Judicial Inquiry Commission to investigate charges against federal judges and a special Court of the Judiciary to try the impeachment); Linde, Replacing a President: Rx for a 21st Century Watergate, *43 GEO. WASH. L. REV. 384, 402 (1975)* (suggesting as an alternative to the existing impeachment procedure a joint resolution of Congress declaring failure to execute the office of the President or abuse of presidential power as a prerequisite to removal and a new election); Shartel, Federal Judges -- Appointment, Supervision, and Removal -- Some Possibilities Under the Constitution, *28 MICH. L. REV. 870, 898 (1930)* (asserting that the Constitution sets no limits on the ability of judges to remove other judges); Note, Removal of Federal Judges -- New Alternatives to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit, *13 UCLA L. REV. 1385, 1390 (1966)* (claiming that impeachment is ineffective and inefficient and citing the federal bribery statute, *18 U.S.C. § 201* (1982 & Supp. V 1987), and the then-proposed Judicial Disability Act, *28 U.S.C. § 372*(b) (1982), as methods other than impeachment for the removal of federal judges); Comment, The Limitations of Article III on the Proposed Judicial Removal Machinery: S. 1506, *118 U. PA. L. REV. 1064, 1067-70 (1970)* (arguing that judges have the power to remove other judges because the power is inherent in the theory of separation of powers and that congressional authority over jurisdiction of the federal courts gives it the power to create machinery to allow judicial removal of judges).

n11. The three most recent impeachment attempts have been against federal district judges Harry Claiborne, Walter Nixon, and Alcee Hastings. Judge Claiborne was convicted of income tax evasion in federal court and imprisoned prior to the House's vote to impeach on July 22, 1986, and the Senate's vote to remove and disqualify him from office on October 6, 1986. 132 CONG. REC. S15759-62 (daily ed. Oct. 9, 1986).

Judge Alcee Hastings was acquitted in a federal trial charging him with having taken a bribe of $ 150,000. See *Hastings v. Judicial Conference of the United States, 829 F.2d 91, 95 (D.C. Cir. 1987)* (giving factual background of Judge Hastings' impeachment, including his acquittal of criminal charges on February 4, 1983). On August 3, 1988, however, the House voted 413-3 to impeach Judge Hastings for using his office for personal gain and for committing perjury during his criminal trial. See H.R. Res. 499, 100th Cong., 2d Sess., 134 CONG. REC. H6179-93 (daily ed. Aug. 3, 1988). Throughout his removal proceedings in the Senate, Judge Hastings vigorously argued, inter alia, that the impeachment proceedings against him had been racially motivated and that the Senate's decision to give him a trial in front of a special committee of Senators instead of the full Senate violated fundamental requirements of due process. See Impeaching Federal Judges: Where Are We and Where Are We Going?, 72 JUDICATURE

359, 362-64 (1989) [hereinafter Symposium] (comments of Michael Davidson in the edited transcript of a panel discussion at the American Judicature Society meeting on February 4,); MacKenzie, The Virtue of Impeachment, N.Y. Times, July 28, 1988, at A26, col. 1 (suggesting that a unanimous vote to impeach by a subcommittee headed by Representative John Conyers, a civil rights champion, effectively answers Judge Hastings' allegations of political and racial persecution). Nevertheless, the special twelve-member committee of the Senate completed receiving testimony regarding Judge Hastings' removal in August 1989 and printed the record of its hearings in September. The full Senate was scheduled to hear closing arguments in October 1989.

Judge Walter Nixon was convicted of perjury in federal court. See *United States v. Nixon, 816 F.2d 1022, 1022 (5th Cir. 1987)*, cert. denied, *108 S. Ct. 749 (1988)*. After the Supreme Court denied review of his conviction for perjury, he announced that he would not resign. See Shenon, Impeachment of Judges: A "Cumbersome Tool," N.Y. Times, Apr. 2, 1986, at A16, col. 3 (quoting Judge Nixon's lawyer as saying that Nixon would not consider resignation). Nevertheless, the House moved forward with impeachment proceedings against Judge Nixon. See H.R. Res. 87, 101st Cong., 1st Sess., 135 CONG. REC. H1802 (daily ed. May 10, 1989) (approval of articles of impeachment). Although he has been impeached and is currently imprisoned, awaiting trial in the Senate, he has argued that Congress should allow him to challenge his federal conviction in the impeachment proceedings because he has alleged he has evidence that one of the principal witnesses against him at trial perjured himself. See Hastings v. United States Senate, No. 89-1602, slip op. (D.D.C. July 5, 1989); see also *Nixon v. United States, 703 F. Supp, 538, 560 (S.D. Miss. 1988)* (rejecting Nixon's motion to vacate the conviction on the grounds that, inter alia, there was no reasonable likelihood that the witness's testimony, even if deemed false, could have affected the judgment of the jury).

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Given all the attention and importance attached to the impeachment process from the inception of our Republic to the present, it is surprising [*5] that the literature on impeachment -- split primarily between the formalist and informalist approaches n12 -- is, with few exceptions, n13 unenlightening and unimpressive. n14 Scholarship on impeachment inevitably degenerates into political commentary, but scholars generally fail to explain or justify this result. In addition, scholarship on impeachment either inexplicably ignores relevant historical evidence or fails to explain its reliance on an incomplete or unclear historical record.

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n12. See infra subparts III (A), (B). Two student commentators also classify the literature on impeachment into two categories. See Note, Constitutional Judicial Tenure Legislation?-The Words May Be New, but the Song Sounds the Same, *8 HASTINGS CONST. L.Q. 843, 854-60 (1981)* [hereinafter Note, Constitutional Judicial Tenure Legislation?] (observing that exclusivists favor impeachment as the sole means for removing federal judges and nonexclusivists favor removal of federal judges through impeachment and other less formal proceedings); Note, In Defense of the Constitution's Judicial Impeachment Standard, *86 MICH. L. REV. 420, 434-38, 446-56 (1987)* [hereinafter Note, In Defense of Standard] (arguing that the literature on the exclusivity of

impeachment as a means for removing federal judges splits between those who follow original intent and those arguing from expediency or necessity).

n13. See C. BLACK, IMPEACHMENT: A HANDBOOK 2-4 (1974); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 289-96 (2d ed. 1988); Bestor, Impeachment (Book Review), *49 WASH. L. REV. 255, 259, 261-64, 266, 271, 281 (1973)*; Rotunda, An Essay on the Constitutional Parameters of Federal Impeachment, *76 KY. L.J. 707, 716, 720 (1987)*. Even these studies are not without problems. See C. BLACK, supra, at 3-4, 16, 19, 21, 32-33, 43 (ending each section of his impeachment study with the observations that no solution to the constitutional problem is readily apparent and that reasonable minds might disagree); L. TRIBE, supra, at 290 (merely asserting that members of Congress are not impeachable officials); Rotunda, supra, at 716, 720 (asserting with minimal support or explanation that legislators are impeachable and that judges are removable from office only through impeachment).

n14. Other commentators have made this same observation. See, e.g., R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 5 (1973) (observing that "impeach[ment] raises important questions . . . yet to receive satisfactory resolution"); Kurland, The Constitution and the Tenure of Federal Judges: Some Notes from History, *36 U. CHI. L. REV. 665, 668 (1969)* (commenting that "there is more literature than learning" regarding the removal of federal judges under the Constitution); Stolz, Disciplining Federal Judges: Is Impeachment Hopeless?, *57 CALIF. L. REV. 659, 660 (1969)* (referring to the "distinguished though partisan scholarship of about thirty years ago").

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Commentators fail to understand that the impeachment clauses n15 virtually defy systematic analysis precisely because impeachment is by nature, structure, and design an essentially political process. James Wilson, a Constitutional Convention delegate, Supreme Court Justice, and constitutional scholar, explained that impeachments are "proceedings of a political nature . . . confined to political characters," charging only "political crimes and misdemeanors," and culminating only in "political punishments." n16 Consequently, legal scholarship at best may only illuminate the contours of the various political questions that the Constitution entrusts to Congress through the impeachment process. n17

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n15. This Article refers to the five constitutional provisions relating in some way to the impeachment process as the impeachment clauses. See supra note 3.

n16. 1 J. WILSON, WORKS 426 (G. McClaskey ed. 1967) (quoted in Bestor, supra note 13, at 266).

n17. See *Baker v. Carr, 369 U.S. 186, 217 (1962)* (characterizing political questions as involving (1) "a textually demonstrable constitutional commitment . . . to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking

independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"); see also infra note 462 and accompanying text.

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[*6] Scholars may be reluctant to acknowledge the political nature of impeachment and to defer troublesome impeachment questions to the political branches of government because politics today may not be perceived as the noble and ennobling endeavor envisioned by the framers. n18 Relying in part on the republican conception of meaningful citizen participation in governmental or political decision making, n19 the framers crafted the Constitution to provide a political process in which the various branches of the federal and state governments as well as the citizenry could engage in dialogues on the critical political issues common to democratic societies. n20

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n18. Many of the delegates viewed participation in the political process as an ennobling experience. See Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), reprinted in THE PORTABLE THOMAS JEFFERSON 557-58 (M. Peterson ed. 1975); see also M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 11-12 (1988) (noting particularly Madison's belief in the benefits emanating from citizens' participation in local government); Michelman, Politics and Values or What's Really Wrong with Rationality Review?, *13 CREIGHTON L. REV. 487, 509 (1979)* (regarding politics as an indispensable process by which social beings choose the terms of coexistence -- both the rules of social cooperation and the "moral ambience" of the social world). Many commentators today, however, are more skeptical of the noble and ennobling nature of politics. See, e.g., M. TUSHNET, supra, at 314. (expressing concern that changes in the political structure will come only after "long and difficult periods of political organizing" and that these changes may not be beneficial once they are made).

n19. See, e.g., M. TUSHNET, supra note 18, at 11-12 (noting that republicans desired citizens to become civic minded by participating in local government); Michelman, The Supreme Court, 1985 Term -- Foreword: Traces of Self-Government, *100 HARV. L. REV. 4, 18-19 (1986)* (noting that republicanism emphasized direct citizen involvement in politics); Tushnet, Federalism and the Traditions of American Political Theory, *19 GA. L. REV. 981, 982-83 (1985)*. (noting that the civic republican tradition emphasized the social nature of human beings).

n20. See, e.g., Burt, Constitutional Law and the Teaching of the Parables, *93 YALE L.J. 455, 456 (1984)* (arguing that the legitimacy of the Supreme Court's adjudication ultimately depends on an underlying communal alliance between opponents); Coffin, Judicial Balancing: The Protean Scales of Justice, *63 N.Y.U. L. REV. 16, 24-25, 40-42 (1988)* (arguing that narrow judicial decision making that balances competing concerns promotes dialogue within the legal community); Fiss, The Supreme Court, 1978 Term -- Foreword: The Forms of Justice, *93 HARV. L. REV. 1, 10-15 (1978)* (construing the judicial function as the attempt to reveal or elaborate the meaning of constitutional values through the dialogue of

adjudication).

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Many modern commentators, however, mistakenly allow their distrust of and disrespect for politics to govern their interpretations of the Constitution. Politics is at times unseemly, vicious, and even dishonest, but the Constitution remains a political document, and politics is not, as many modern commentators seem to believe, the equivalent of illegitimacy. These commentators appear motivated by their unstated belief that constitutional law does not transcend politics. Constitutional law is [*7] by its nature, structure, and inception a peculiar form of politics, however, and there is no more vivid illustration of this proposition than the impeachment clauses. The challenge for modern commentators is, therefore, to acknowledge and to justify the political elements influencing their constitutional interpretations. In this way, they can avoid transforming the political issues entrusted by the Constitution to the political branches into mandates reflecting their own particular views and preferences regarding lawmaking and the Constitution.

Many modern commentators, however, are reluctant or unable to incorporate, or acknowledge the incorporation of, politics into their constitutional interpretations. Thus, not surprisingly, both of the dominant approaches to impeachment fail to adequately account for the fundamentally political nature of impeachment. Both the formalists and the informalists vainly try to apply to the impeachment clauses theories of constitutional interpretation that simply do not fit the nature of the impeachment process. First, the formalists, trying to interpret the impeachment clauses based on original intent, adhere to strict separation of powers and are reluctant to presume the constitutionality of alternatives to or deviatios from the allocation of powers as explicitly spelled out in the Constitution. n21 Formalists cannot evade or ignore the problems with [*8] constitutional historiography in general or with original intent in particular. The formalist approach fails to acknowledge that history is frequently susceptible to more than one interpretation. In addition, this approach fails to account for important changes in the institutions that are central to the impeachment process. Informalists, on the other hand, typically use ad hoc analysis to interpret the impeachment clauses. n22 They rarely articulate or follow any guiding principle of constitutional interpretation -- with the possible exceptions of convenience and efficiency, which are not determinative of constitutionality. Informalists do not recognize the usefulness of conventional tools of constitutional interpretation (such as history) for analyzing particular constitutional provisions, including the impeachment clauses. Furthermore, they do not justify, or even acknowledge, their abandonment of almost all systematic analysis of the impeachment clauses. Without explanation, they give different weight to different evidence or adopt congressional interpretation of the impeachment clauses as definitive. n23 Informalists also frequently ignore relevant historical and structural contexts. They fail to articulate fixed notions regarding the allocation of powers within the Constitution, fail to explain why deviations from the Constitution's explicit structure should be treated with a presumption of constitutionality, and fail to acknowledge the problems with using efficiency and convenience as starting points for constitutional analysis of the impeachment process. Finally, informalists, though possibly aware of the great changes in the [*9] institutions established by the Constitution, fail to explain how, if at all, these changes may affect or threaten the principles or values these

institutions were established to protect.

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n21. See, e.g., R. BERGER, supra note 14, at 5 (criticizing "assumptions that are at war with the intention of the Framers" and advocating instead "resort to the historical sources"); Corwin, Tenure of Office and the Removal Power Under the Constitution, *27 COLUM. L. REV. 353, 354, 398-99 (1927)* (criticizing the Supreme Court's opinion in *Myers v. United States, 272 U.S. 52 (1926)* (suggests that the President's power to remove executive officers is "not constitutionally susceptible of restraint by Congress," as an unwarranted intrusion by the Court into a purely political issue); Ervin, Separation of Powers: Judicial Independence, 35 LAW & CONTEMP. PROBS. 108, 122 (1970) (assailing proposed legislation intended to limit the nonjudicial activities of federal judges or to discipline federal judges as "a direct assault upon the principle of judicial independence"); Kurland, supra note 14, at 668 (asserting that the Constitution's framers intended to make impeachment the sole means of removing federal judicial officers and criticizing the idea that legislation might provide an alternative means); Note, In Defense of Standard, supra note 12, at 423 (arguing that the framers intended the impeachment provisions to be cumbersome and that the recent practice of criminal prosecution of judges before impeachment disregards the constitutional goal of judicial independence); Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, *94 YALE L.J. 1117, 1118 (1985)* [hereinafter Note, Unnecessary and Improper] (arguing that the Act violates the Constitution's allocation of powers by requiring federal judges to exercise a power of scrutiny over their colleagues that the Constitution grants solely to Congress). One commentator observes that:

> the last few years have seen a sharp rise of constitutional "formalism" in cases involving the separation of powers. Formalist decisions are premised on the beliefs that the text of the Constitution and the intent of its drafters are controlling and sometimes dispositive, that changed circumstances are irrelevant to constitutional outcomes, and that broader "policy" concerns should not play a role in legal decisions. . . . But the federal government and the executive branch in particular have changed so dramatically since the founding that "framers' intent" cannot be mechanically applied as if it settles the matter. . . . The modern presidency is so different from the entity contemplated by the framers that it is unrealistic simply to "apply" their choices to the present situation. At its inception, the American presidency was by modern standards weak, especially in domestic affairs. Its regulatory role was minimal.

Sunstein, Constitutionalism After the New Deal, *101 HARV. L. REV. 421, 493-94 (1987)*. But see Schauer, Formalism, *97 YALE L.J. 509, 510 (1988)* (suggesting that the concept "formalism" is susceptible to so many conflicting meanings that its use in place of more concrete ideas obscures the debate over the proper restraints to be followed in constitutional interpretation); Weinrib, Legal Formalism: On the Immanent Rationality of Law, *97 YALE L.J. 949, 954 (1988)* (rejecting the argument that law is essentially political and defending formalism as offering law an "'immanent moral rationality'").

n22. See, e.g., I. BRANT, IMPEACHMENT: TRIALS AND ERRORS 3-23 (1972) (arguing that the numerous references to crime and punishment in the Constitution represent an attempt, in light of the excesses that had marked the

use of the impeachment power in England, to restrict the bases for impeachment to criminal offenses and thus prevent misuse of the power); Firmage & Mangrum, Removal of the President: Resignation and the Procedural Law of Impeachment, *1974 DUKE L.J. 1023, 1030* (This study is the soundest of the informalist studies because of its far-reaching research, but it fails to support its own use of different kinds of authority to explain different aspects of impeachment.); Franklin, Romanist Infamy and the American Constitutional Conception of Impeachment, 23 BUFFALO L. REV. 313, 341 (integrating into contemporary thought omissions from the constitutional conception of impeachment) (1974); Havighurst, supra note 10, at 223-24 (comparing the English and American political systems and suggesting that the United States should adopt some parliamentary procedures for removing officials from office); Linde, supra note 10, at 385-89 (calling the constitutional form of impeachment "anachronistic"); Comment, supra note 10, at 1065-66 (examining the constitutional powers of Congress to create judicial machinery for the removal of judges).

n23. See, e.g., Thompson & Pollitt, Impeachment of Federal Judges: An Historical Overview, *49 N.C.L. REV. 87, 118-21 (1970)* (suggesting, without explanation, that "impeachable offenses" should mean offenses that Congress has accepted as impeachable).

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Unfortunately, few commentators acknowledge that the scholarship on impeachment tells us little about impeachment that is definitive, but a great deal about the problems of interpreting the Constitution in general and the impeachment clauses in particular. Accordingly, this Article seeks not only to clarify the law on impeachment but also to draw some general lessons on constitutional interpretation from an analysis of the scholarship on impeachment. Part II traces the origins of the Constitution's impeachment procedure, with particular attention to the persistent problems of impeachment.

Part III focuses on alternative methodologies for interpreting the impeachment procedure set forth in the Constitution, including a critique of the two general approaches -- the formalist and the informalist -- dominating the literature on impeachment. Part III also offers a more sound, intellectually honest approach to impeachment than that offered by either the formalists or informalists. This approach recognizes the limitations of the two dominant approaches to interpretation, but acknowledges the necessity of examining the historical and structural context of a particular constitutional provision before superimposing upon it a "grand" theory of constitutional interpretation. n24 In addition, this approach posits that very few constitutional provisions are self-explanatory and that the degree to which constitutional language, history, and structure aid constitutional interpretation varies among constitutional provisions.

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n24. Professor Mark Tushnet refers to theories of constitutional law as "grand" if they are unitary in nature, that is systematic or formal analyses of constitutional law dominated by some overarching principle or set of principles from which conclusions flow logically. See M. TUSHNET, supra note 18, at 181. See also id. at *179-87* (criticizing "grand" theories of constitutional law).

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Part IV provides a detailed analysis of each of the major issues arising under the impeachment clauses, focusing on the peculiar nature of the impeachment process itself. Although this process is thoroughly political, it is also a component of the Constitution's system of checks and balances. Insights into the meaning and purpose of the system's other components, therefore, may be helpful in interpreting the impeachment clauses. Checks and balances cases frequently trigger dialogues among the three branches regarding constitutional interpretation. There is such a dialogue in the area of impeachment, but for the most part it excludes the judiciary.

Part IV also addresses the constitutionality of congressional innovations [*10] in the impeachment process, including the Judicial Disability Act n25 and the Independent Counsel Act. n26 This Part analyzes such innovations on the basis of a presumption of constitutionality for congressionally enacted deviations from the Constitution's explicit structures. Such a presumption may not be overcome unless the deviation from explicit constitutional structure violates what the structure was erected to protect. Part IV concludes that such a presumption not only expresses appropriate deference to a coordinate branch's constitutional interpretation of the impeachment clauses, but also should be standardized in related areas of constitutional law.

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n25. *28 U.S.C.* §§ *331*, 332, 372, 604 (1982).

n26. *28 U.S.C.* §§ *591*-599 (1982 & Supp. V 1987).

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II. A Brief History of Impeachment

The impeachment procedure set forth in the United States Constitution has its origin in the states' experiences with impeachment prior to the Constitutional Convention. n27 These state procedures were in turn influenced by the English experience with impeachment from the thirteenth through the eighteenth centuries. n28 Since the ratification of the Constitution, there have been only seventeen federal impeachment attempts -- against thirteen federal judges, n29 two Presidents, n30 one United States Senator, n31 and one cabinet officer n32 -- resulting in only five convictions. n33 These [*11] experiences no doubt helped shape this Nation's understanding -- if not the structure -- of impeachment.

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n27. See P. HOFFER & N. HULL, supra note 4, at 68 (noting that "[d]elegates to the federal [constitutional] convention . . . supported by the voices and votes of other knowledgeable state leaders, fashioned national impeachment provisions along lines laid down in the states' constitutions").

n28. See R. BERGER, supra note 14, at 54, 87 n.160, 143 n.97, 170, 171 n.217 (tracing the links between impeachment in the federal constitution to the English experience with impeachment).

n29. Impeachment attempts have been made against the following thirteen federal judges: District Judge John Pickering (1803) (drunkenness and blasphemy), Associate Justice Samuel Chase (1804) (expression of political views to grand jury), District Judge James Peck (1830) (abusive treatment of counsel), District Judge West Humphreys (1862) (inciting revolt and rebellion against the nation), District Judge Mark Delahay (1873) (bringing ridicule to Congress), District Judge Charles Swayne (1903) (financial irregularities), Circuit Judge Robert Archbald (1912) (bribery), District Judge George English (1925) (favoritism), District Judge Harold Louderback (1932) (favoritism), District Judge Halsted Ritter (1936) (kickbacks and tax evasion), District Judge Harry Claiborne (1986) (tax evasion), District Judge Walter Nixon (impeached in 1988 and involved in pending Senate trial in 1989) (perjury), District Judge Alcee Hastings (impeached in August 1988, completed testimony before special Senate trial committee in August 1989, and scheduled for closing arguments before the full Senate in October 1989) (corruption and giving false testimony). There was also an investigation of impeachment charges against Justice William O. Douglas in 1970, but the charges were eventually dismissed by the House Judiciary Committee. See I. BRANT, supra note 22, at 201-02; HIGH CRIMES AND MISDEMEANORS 31-44, 51-55, 64-104 (Funk & Wagnalls 1973).

n30. Two Presidents have been the targets of impeachment attempts. In 1867, Andrew Johnson was charged with issuing an order for the removal of Edwin Stanton as Secretary of War in violation of a congressional act that regulated the tenure of certain offices. See I. BRANT, supra note 22, at 138. In 1973, Richard Nixon was charged with obstructing federal authorities and congressional committees in their investigation of the Watergate break-in. See J. LABOVITZ, PRESIDENTIAL IMPEACHMENT 90, 99 (1978).

n31. The only United States Senator against whom an impeachment attempt was made was William Blount in 1797. Cf. R. BERGER, supra note 14, at 214-15 (noting that the Senate dismissed the impeachment charges on the grounds that it "ought not to hold jurisdiction" and that this dismissal was subsequently construed by the Supreme Court to mean that a Senator is not an impeachable "civil officer").

n32. In 1876, Secretary of War William Belknap resigned from office two hours before the House voted to impeach him for bribery. Largely because many Senators believed Belknap's resignation deprived the Senate of any jurisdiction to remove him from office, the final Senate vote fell short of the two-thirds necessary for removal. See I. BRANT, supra note 22, at 155, 160.

n33. The only people convicted and removed from office by the Senate have been John Pickering, West Humphreys, Robert Archbald, Halsted Ritter, and Harry Claiborne. Interestingly, all five were federal judges. See Thirteen Impeachments Resulted in Four Convictions, CONG. Q., Mar. 1974, at 8, 8-9 (reporting the convictions of Pickering, Humphreys, Archbald, and Ritter); Note, In Defense of Standard, supra note 12, at 421 (noting Judge Claiborne's conviction by the Senate on October 9, 1986). In addition, as of the date of this Article, two other federal district judges, Walter Nixon and Alcee Hastings, have been impeached by the House and stand on the brink of conviction and removal from office by the Senate. See supra note 11.

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The traditional guides for understanding the impeachment clauses are the language and history of the impeachment clauses themselves. After exploring the language of a particular constitutional provision, commentators logically turn to history as a guide to interpretation. As with other parts of the Constitution, however, the historical background of the impeachment clauses is not always clear. n34 In fact, the record is relatively clear for only a handful of matters of current interest regarding impeachment. For example, all the delegates principally involved in the debates on impeachment at the Constitutional Convention were familiar with the various states' impeachment procedures, and the most influential spokesmen all had significant experiences with impeachment in their respective states. n35 In addition, from the outset of the Convention, the delegates agreed to deviate from the English impeachment procedure and to follow many of the state constitutional provisions in structuring the federal impeachment procedures. n36

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n34. See, e.g., Rotunda, supra note 13, at 709 (noting that "[i]t may be helpful and useful to refer to original intent . . . when it is read in context"); Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, *96 HARV. L. REV. 781, 793 (1983)* (noting the difficulty that historical ambiguity poses to locating clear and definite answers).

n35. See P. HOFFER & N. HULL, supra note 4, at 96.

n36. See, e.g., P. HOFFER & N. HULL, supra note 4, at 96 (discussing Edmund Randolph, James Madison, George Mason, William Paterson, James Wilson, Hugh Williamson, Elbridge Gerry, Rufus King, Gouverneur Morris, Alexander Hamilton, and Charles Pinckney).

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Only four major areas of controversy regarding impeachment arose at the Constitutional Convention. First, the delegates debated the proper forum for impeachment trials. n37 This debate was a part of the more general debate on the Virginia and New Jersey Plans. n38 Edmund Randolph made the first significant proposal regarding the proper court for impeachment [*12] trials by offering, as part of his Virginia Plan, the creation of a national judiciary with the power to impeach "[a]ny national officers." n39 Throughout June 1787, Randolph and James Madison, the Convention's reporter, both urged that the national judiciary have the power of impeachment. n40 In the middle of June, William Paterson proposed the alternative New Jersey Plan, which would have given the national judiciary "the authority to hear and determine in the first instance on all impeachments of federal officers." n41 This power was not intended to be either the equivalent of nor the substitute for impeachment. The New Jersey Plan also provided that the Congress could remove officers only upon the application of a majority of the state governors, but it could not impeach. n42 Shortly after the introduction of the New Jersey Plan, James Wilson contrasted the two plans' treatments of impeachment. n43 He noted that whereas the Virginia Plan provided for removal of officers upon impeachment and conviction by the federal judiciary, the New Jersey Plan neglected to include impeachment by the lower house, instead providing for removal only through application of a majority of the state governors. n44

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n37. See id. at 97-98.

n38. See id.

n39. 1 CONVENTION RECORDS, supra note 1, at 22.

n40. See P. HOFFER & N. HULL, supra note 4, at 98; see also 1 CONVENTION RECORDS, supra note 1, at 223-24 (adopting a resolution proposed on June 13, 1787, by Randolph and Madison, to give the judiciary the power of impeachment).

n41. Id. at 244.

n42. See P. HOFFER & N. HULL, supra note 4, at 98.

n43. See 1 CONVENTION RECORDS, supra note 1, at 252.

n44. See id.

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On June 18, Alexander Hamilton entered the debate on the proper forum for impeachments, proposing that, similar to the New York Constitution, the Constitution should provide that

[t]he Governour Senators and all officers of the United States [were] to be liable to impeachment for mal- and corrupt conduct; and upon conviction to be removed from office, [and] disqualified for holding any place of trust or profit -- all impeachments to be tried by a Court to consist of the Chief or Judge of the Superior Court of Law of each State, provided such Judge shall hold his place during good behavior, and have a permanent salary. n45

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n45. Id. at 292-93.

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While Madison still pushed for the national judiciary as the impeachment body, the Committee of Detail, n46 responsible for putting all [*13] resolutions and suggestions into draft form, proposed a compromise solution: trial "before the Senate and the judges of the federal judicial Court." n47 The convention postponed discussion of this and other suggestions regarding the proper trial body until September 4, at which time another committee of detail proposed that "[t]he Senate of the United States shall have power to try all impeachments, but no person shall be convicted without the concurrence of two-thirds of the Members present." n48 The Committee of Detail decided that the Senate should conduct removal trials because it had previously agreed that the President would be selected by a college of electors n49 rather than the Senate. The plan to use electors removed what the Committee perceived as the troublesome conflict of having the same body conducting trials and making appointments. n50 The delegates overwhelmingly agreed that the Senate presented the fewest problems of the various proposed trial courts. n51 Only Pennsylvania and Virginia dissented from the vote to adopt the proposal making the Senate the

court for removal trials. n52

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n46. The Convention appointed the Committee of Detail on July 26, 1787, in George Washington's words, to "draw into method and form the several matters which had been agreed to by the Convention as a Constitution for the United States." C. BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787, at 192 (1986). The Committee put "resol[utions], suggestions, amendments and propositions into workable arrangement." Id. The Committee's original members were Randolph of Virginia, Wilson of Pennsylvania, Gorham of Massachusetts, Ellsworth of Connecticut, and Rutledge of South Carolina. Id.

n47. 2 CONVENTION RECORDS, supra note 1, at 136.

n48. Id. at 493.

n49. See id. at 494.

n50. See id. at 500.

n51. See id. at 500-01.

n52. See id. at 552-53. Both James McHenry and Luther Martin of Maryland later recalled "that the Senate seemed to be the only body likely to view impeachments in a cool and dispassionate manner." P. HOFFER & N. HULL, supra note 4, at 99. Similarly, Alexander Hamilton defended the delegates' placement of the trial in the Senate. See THE FEDERALIST NO. 65, at 396-401 (A. Hamilton) (C. Rossiter ed. 1961). By contrast, Madison voted against the provision because he opposed the idea of trials in the Senate. See P. HOFFER & N. HULL, supra note 4, at 100.

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The second major impeachment controversy at the Convention concerned the impeachability of the President. Even though several state constitutions had provided for impeachment of governors, many delegates were troubled with impeachment as a check on the President. n53 For example, on July 19, Gouveneur Morris warned that the prospect of impeachment would make the President too dependent upon the legislature. The next day Charles Pinckney expressed agreement with Morris, but George Mason, James Wilson, Elbridge Gerry, and Benjamin Franklin argued in favor of presidential impeachment. Randolph and Madison added that it was unclear how to stop a President's misuse of power if he could not be impeached. n54 Rufus King and morris responded that the problem would be finding the proper forum to try the President, but Morris admitted that presidential impeachment was necessary to ensure that the President would not be above the law. n55 In the end, only South [*14] Carolina and Massachusetts voted against making the President impeachable. n56.

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n53. See P. HOFFER & N. HULL, supra note 4, at 100.

n54. See id.

n55. See id.

n56. See 2 CONVENTION RECORDS, supra note 1, at 69.

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The third impeachment controversy at the Convention concerned the definition of impeachable offenses. Early in the Convention the delegates agreed that officials of the new government would not have immunity from prosecution for common-law crimes. n57 The delegates also envisioned an overlapping, if not separate, body of offenses for which certain federal officials might be impeached. n58 In particular, they first referred to mal- and corrupt administration, neglect of duty, and misconduct in office as the only impeachable offenses, believing that common-law crimes such as treason, bribery, and felony should be heard in the courts of law. n59 Delegates Paterson, Randolph, Wilson, and Mason argued that impeachment should follow their respective state constitutions by applying only to misuse of official power. n60 As late as August 20, the Committee of Detail reported that federal officials "shall be liable to impeachment and removal from office for neglect of duty, malversation, or corruption." n61 Five years after the Convention, James Wilson explained that the delegates believed that

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n57. See P. HOFFER & N. HULL, supra note 4, at 101.

n58. See id.

n59. See id. at 101; see also 2 CONVENTION RECORDS, supra note 1, at 64-69 (debating whether the President should be subject to impeachment for malpractice or neglect of duty while in office).

n60. See P. HOFFER & N. HULL, supra note 4, at 101.

n61. 2 CONVENTION RECORDS, supra note 1, at 337.

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[i]mpeachments, and offences and offenders impeachable, [do not] come . . . within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims; and are directed to different objects: for this reason, the trial and punishment of an offence on an impeachment, is no bar to a trial and punishment of the same offence at common law. n62

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n62. Wilson, Lectures on the Law, No. 11, Comparison of the Constitution of the United States with that of Great Britain, in 1 THE WORKS OF JAMES WILSON 382, 408 (J. Andrews ed. 1896) quoted in P. HOFFER & N. HULL, supra note 4, at 101.

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Wilson characterized impeachable offenses as "political" because, as Alexander Hamilton later explained, they constituted a specific "abuse or violation of some public trust." n63

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n63. P. HOFFER & N. HULL, supra note 4, at 101; THE FEDERALIST NO. 65, at 396 (A. Hamilton) (C. Rossiter ed. 1961).

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Nevertheless, on September 8, the delegates substituted "bribery" and "other high Crimes and Misdemeanors" for the existing formula. n64 Asserting that the new phrase was too limiting, Mason moved to reintroduce "or maladministration" after "bribery" to permit impeachment [*15] upon less conventionally defined common-law offenses. n65 Although Gerry agreed with Mason, delegates Madison and Morris objected to the new proposal as too vague and too political in nature. Madison warned that under Mason's term the President would simply serve at the pleasure of the Senate. In compromise, Mason moved to substitute simply "high Crimes and Misdemeanors," which passed the Convention by a vote of eight to three. n66

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n64. See 2 CONVENTION RECORDS, supra note 1, at 545.

n65. See id. at 550.

n66. See id.

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The fourth debate over impeachment at the Convention focused on the number of votes necessary to convict and remove. As it turned out, this controversy was closely linked to the Convention's decision regarding the proper forum for impeachment trials. Resolving the fourth controversy required the delegates to consider the special qualities of the Senate, the Senate's special role in the impeachment process, and the Senate's constitutional role generally.

One of the first references to the concept of the two-thirds vote was on June 6, when North Carolina's Hugh Williamson urged the Convention to require that all congressional acts pass by a two-thirds vote of the Senate. n67 Shortly thereafter, the Committee of Detail restricted Senate treaty ratification and confirmation of appointments to two-thirds vote. n68 Williamson's inclusion of impeachment in this category was significant because the

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n67. See 1 CONVENTION RECORDS, supra note 1, at 140.

n68. See P. HOFFER & N. HULL, supra note 4, at 102.

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restriction of certain legislative issues to two-thirds vote was without parallel in pre-revolutionary constitutionalism. . . . Two-thirds requirements emerged as part of the revolutionary republican compromise between representative assemblies and deliberative councils. The association of impeachment with the two-thirds rule signified a final Americanization and republicanization of the impeachment process. n69

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n69. Id. at 102-03.

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The importance of the two-thirds vote is directly traceable to the Convention's special view of the Senate. n70 The delegates saw the Senate as composed of well-educated, wealthy, virtuous citizens who would be sure to have the Nation's welfare at heart. n71 The delegates viewed the House as more subject to factions and more prone to hasty and intemperate [*16] action than the Senate. n72 The Senate was structured to counterbalance the bad tendencies of the House and, when acting alone, to carefully deliberate the most important political questions. n73 The two-thirds vote was designed to ensure that the normally deliberate Senate would be most careful when considering issues of critical importance. n74 The Convention's sentiment was that

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n70. See id. at 103-06. See generally Note, The Senate and the Constitution, *97 YALE L.J. 1111, 1112 (1988)* (discussing the Senate's role in legislation, impeachment, appointment and amendment).

n71. See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 553-54 (1969).

n72. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 387, at 274 (R. Rotunda & J. Nowak eds. 1987); G. WOOD, supra note 71, at 557-58.

n73. See G. WOOD, supra note 71.

n74. See J. STORY, supra note 72, §§ 383-385, at 271-75.

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[t]he Senate sat to hear treaty ratification, executive appointments, and impeachment trials without the concurrence of the lower house for the same reason that all three types of business required two-thirds votes. These issues should not be "popular." The Constitution assigned this labor to the Senate because the delegates expected the upper house [the Senate] to rely upon its own wisdom, information, stability, and even temper. n75

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n75. P. HOFFER & N. HULL, supra note 4, at 106.

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With respect to the Senate's role in impeachment proceedings, Alexander Hamilton later confirmed that

[t]here was no occasion . . . upon which the Senate should be more deliberative and shielded from popular clamors than when it sat to hear impeachments. . . . [I]mpeachment hearings were not trials in which the senators were jurors, despite the fact that they sat upon oath or affirmation, so much as deliberative sessions, when they decided whether an official had betrayed his public trust. The American impeachment trial, with its two-thirds requirement, was thus a hybrid of native origin, expressing truly republican compromises. n76

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n76. Id. at 106. See generally THE FEDERALIST NO. 65, at 396-401 (A. Hamilton) (C. Rossiter ed. 1961).

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In short,

[t]he two-thirds requirement for conviction in the Senate was the capstone in the republicanization of impeachment and trial procedure. It ensured that the Senate would be as thoughtful and deliberate in its hearing and determining of cases as the House of Lords, without any of the aristocratic trappings of that English body. n77

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n77. P. HOFFER & N. HULL, supra note 4, at 106.

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Even though many of the delegates were familiar with the English experience with impeachment, including the contemporary impeachment of the former Governor-General of India, the delegates' deviation from English impeachment is noteworthy because it signals that, from the outset of the Convention, the delegates put a uniquely American stamp on the Constitution's impeachment clauses. For example, the delegates strenuously debated the precise definition of impeachable offenses, [*17] whereas Parliament had always refused to constrain its jurisdiction over impeachments by restrictively defining impeachable offenses. n78 The delegates also agreed to limit impeachment to officeholders, but in England, anyone, except members of the royal family, could be impeached. n79 Whereas the English House of Lords could convict upon a bare majority, the American delegates required a two-thirds vote of the Senate members present. n80 In addition, although the House of Lords could order any punishment upon conviction, the delegates limited the punishments in the Constitution to those typically found in the state constitutions. n81 Thus, contrary to the view of some historians, n82 the Constitutional Convention and ratification campaign confirm that the Constitution's impeachment process is, in important respects, uniquely American.

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n78. See id. at 97.

n79. See id.

n80. See id.

n81. See id.

n82. See, e.g., R. BERGER, supra note 14, at 142 (arguing that old English procedures of removal by courts for misbehavior defined the framers' intent); see also infra subpart III(A)(2) (Raoul Berger asserts that the Constitution's impeachment procedures may be explained by examining the English experience with impeachment.); subpart III(B)(2) (Irving Brant summarily rejects the colonial experiences with impeachment, the Constitutional Convention, and the ratification campaign.).

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The debates over impeachment at the Constitutional Convention must, however, be put into perspective. The delegates themselves recognized that their views on the meaning of the Constitution mattered less than the views of the ratifiers. n83 The delegates understood that the Constitution would have effect only if the people accepted it, and the people's only opportunity to review and debate the Constitution took place during the ratification campaign. Those considering whether to ratify the new Constitution had no access to any of the notes on the Constitutional Convention, which were not published until many years after the Convention and the ratification campaign. n84 The ratifiers' understandings of what happened at the Constitutional Convention and of the meaning of particular constitutional language was limited to personal reports regarding the Convention, pamphlets urging acceptance or rejection of the proposed Constitution, n85 and their own readings of the Constitution. Nevertheless, the few reports from the ratification campaign regarding [*18] impeachment indicate that the ratifiers generally shared the delegates' views on impeachment issues. n86

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n83. See Amar, Our Forgotten Constitution: A Bicentennial Comment, 97 *YALE L.J. 281, 281 (1987)* (emphasizing that the Constitution and its amendments became effective only through ratification by "We the People of the United States" and that what the people considered and reviewed during the ratification process is, therefore, critical for an understanding of the meaning and nature of the Constitution itself); Rotunda, supra note 13, at 708-14 (emphasizing the importance of the ratification process for constitutional interpretation).

n84. See Rotunda, supra note 13, at 710 & n.13.

n85. See generally THE FEDERALIST at viii (C. Rossiter ed. 1961) ("The Federalist is essentially a collection of eighty-five letters to the public, over the pseudonym of Publius, that appeared at short intervals in the newspapers of New York City beginning on October 27, 1787."); THE ESSENTIAL ANTI-FEDERALIST (W. B. Allen & G. Lloyd eds. 1985) (expressing reasons for refusing to support the newly drafted Constitution).

n86. See P. HOFFER & N. HULL, supra note 4, at 109; Rotunda, supra note 13, at 710.

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Significantly, there were numerous questions that the delegates and the ratifiers did not answer or even address. Although the delegates discussed the general need for judicial independence, n87 they failed to consider the exclusivity of impeachment as a means for removing federal judges. After the Convention, however, Alexander Hamilton argued that impeachment was the sole means for removing federal judges, thus protecting federal judges from rash or intemperate retaliation by the President or Congress for any controversial judicial actions. n88 Convention delegates did discuss the appropriate forum for impeachment hearings and trials, n89 but neither the delegates nor the ratifiers focused on these procedural concerns. In addition, neither the delegates nor the ratifiers directly considered judicial review of impeachments. n90 While the delegates envisioned impeachment and criminal trials as separate, but not mutually exclusive proceedings, n91 they did not clearly voice any preference regarding the order of these proceedings. n92 Likewise, the delegates intended to make the President and federal judges impeachable n93 but never directly addressed whether members of Congress were also impeachable. Finally, the delegates expressed their intent to limit punishments in the impeachment process to removal and disqualification from office. n94 They failed to discuss, however, whether the two punishments could be imposed separately or whether impeachment could proceed even though an official had resigned.

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n87. See R. BERGER, supra note 14, at 153-55.

n88. See THE FEDERALIST NO. 79, at 474 (A. Hamilton) (C. Rossiter ed. 1961); id. NO. 78, at 469-70. Interestingly, Raoul Berger rejects Hamilton's understanding as controlling because Berger regards Hamilton as having had only a marginal role in the Constitutional Convention. See R. BERGER, supra note 14, at 137.

n89. See P. HOFFER & N. HULL, supra note 4, at 97-100.

n90. R. BERGER, supra note 14, at 112-14 (noting the scant remarks of the framers on the exclusivity of the Senate as the trial court for impeachments).

n91. See R. BERGER, supra note 14, at 78-85.

n92. Professor Burbank argues that Hamilton's views in The Federalist No. 65 and the ratification debates do not resolve this issue. He observes, for example, that Hamilton "contemplated removal before criminal prosecution" but never indicated whether the Constitution mandated such an order. See Burbank, Alternative Career Resolution: An Essay on the Removal of Federal Judges, *76 KY. L.J. 643, 668 (1987).*

n93. See 1 CONVENTION RECORDS, supra note 39, at 78, 236, 292; 2 id. at 52-53, 64-69.

n94. See U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States . . . .").

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[*19] III. Methodological Problems with Current Approaches to Impeachment

Several issues arising under the impeachment clauses have persistently divided scholars, including (1) is impeachment the only constitutionally permissible means of removing federal judges; (2) for what kinds of offenses may federal officials be impeached; (3) what is the proper procedure for impeachment and trial of federal officials (including the appropriate burden of proof for establishing an impeachable offense, the applicability of presidential privilege to impeachment proceedings, the governing rules of evidence, and the acceptability of the Senate's use of special trial committees to receive evidence for removal proceedings); (4) is it permissible to impeach someone who has already resigned; and (5) is judicial review of impeachment permissible under the Constitution. Unfortunately, these issues remain unresolved because commentators insist on applying theories of constitutional law insufficient for resolving the unique problems raised by the impeachment clauses. n95

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n95. See, e.g., Tushnet, Conservative Constitutional Theory, *59 TUL. L. REV. 910, 925 (1985)* (asserting that although conservative commentators criticize liberal judges' judicial activism, they have been unable to develop an alternative theory of judicial review, possibly because no constitutional theory can be coherent); Tushnet, supra note 19, at 993 (concluding that although the liberal tradition "provides an unstable solution to the problem of securing ordered liberty," we cannot simply return to the federalism of the framers, but must effect "substantial changes" in society to revitalize federalism).

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A. Problems with Constitutional Historiography

1. The General Problems with Original Intent. -- Formalists tend to use history and particularly original intent as their sole guide in interpreting the impeachment clauses. n96 Yet there are unavoidably serious problems with constitutional historiography in general and with following original intent in particular as a theory of constitutional interpretation. Although the general problems with original intent have received considerable attention in recent constitutional scholarship, n97 the brief review that follows provides a background for the discussion of the inadequacies of formalist scholarship in the context of impeachment.

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n96. See infra notes 108-40, 146.

n97. See, e.g., M. TUSHNET, supra note 18, at 21-45 (criticizing originalists as too limited by history and being unable to account for new

developments in society); Powell, The Original Understanding of Original Intent, *98 HARV. L. REV. 885, 886-88 (1985)* (discussing the problems with deciding constitutional questions based on the original intent of the framers).

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Original intent is one of the two theories of constitutional interpretation that rely primarily on history as a guide to the meaning of constitutional [*20] provisions. n98 As with most theories of constitutional law, original intent is designed to constrain illegitimate or unjustified judicial displacement of majoritarian decisions -- judicial tyranny. n99 Original intent is often equated with interpretivism, which asserts that judges "should confine themselves to enforcing norms that are stated or clearly implied in the written Constitution." n100 "Such norms are found by interpreting the text with recourse when necessary to the original intent of the framers." n101 Interpretivism seeks to restrain both legislators and judges from distorting or manipulating the Constitution by restricting them, as much as possible, to the language, the structure, and the framers' original understanding of the Constitution. n102 Interpretivists claim that we may avoid legislative and judicial tyranny only if we view the Constitution as a contract defining the boundaries of majoritarian power. n103

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n98. The other theory is neutral principles. Neutral principles provides that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved[,] . . . [resting] on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply.

M. TUSHNET, supra note 18, at 21-22 (quoting H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 21 (1961)). Judges following neutral principles must be committed to the rule of law and trained to identify and apply neutrally the principles in history, precedent, and the Constitution by which decisions must be guided. No commentator has yet purported to follow neutral principles in analyzing the impeachment clauses, perhaps because (1) judges rarely decide issues of impeachment; (2) neutral principles cannot accommodate congressional practices as precedent because those practices are politically charged or driven and, therefore, not neutral in character; and (3) history and the Constitution offer little definitive (much less neutral) guidance on questions of impeachment.

n99. See M. TUSHNET, supra note 18, at 23-45 (identifying the primary aim of constitutional theory as restraining judicial tyranny, the displacement of majoritarian decisions by an unelected elite); see also id. at 10 (suggesting that the framers attempted to offset judicial tyranny with legislative power and legislative tyranny with judicial review).

n100. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980).

n101. M. TUSHNET, supra note 18, at 22.

n102. See id. at 23.

n103. See id.

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The major limitation of original intent is its primary reliance on history -- some ill-defined notion of our collective past -- as a clear guide to constitutional interpretation. Interpretivists cannot elude the interrelated problems that the historical record may be cloudy or incomplete, n104 it may be impossible to understand or recreate accurately the framers' world of experience, n105 and institutions may mean something different to [*21] us than they did to the framers. n106 In addition, this approach is intrinsically flawed because the framers may have failed to follow any general or specific theory of interpretivism or may have intended certain constitutional provisions to be interpreted in a nonoriginalist manner. n107

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n106. See id.; Sunstein, supra note 21, at 493-94. For example, each of the major institutions involved in the impeachment process has changed in significant ways. First, the House is much larger and busier than the framers anticipated. The delegates to the Constitutional Convention perceived no problem in having the House conduct initial investigations into impeachments, but today the House cannot expend the same effort investigating and conducting impeachment hearings as could the original House. See Heflin, supra note 9, at 123-24. Similarly, the Senate is much larger and busier than the original Senate. The ways in which public officials may commit impeachable abuses against the state have increased since the days of the Constitutional Convention, and it is unrealistic to assume that the Senate may delay its busy schedule to sit in its entirety as a body to deliberate on an impeachment trial. Third, the President's office has also changed in certain dramatic ways from the days of the Constitution's founding. The President is more powerful and busier than originally envisioned. As foreign affairs become more complicated and the stakes increase, there is a strong reluctance on the part of Congress to distract a sitting President with an impeachment proceeding unless the evidence is overwhelming. Fourth, more than any other branch, the federal judiciary has been subjected to impeachment proceedings over the years. The federal judiciary's size and responsibility has also changed, requiring and complicating greater monitoring. Accordingly, the need to protect the independence of judges against each other and other branches has increased. See Symposium, supra note 11, at 359-60 (comments of Professor Ronald Rotunda).

n107. See M. TUSHNET, supra note 18, at 25-26, 28-29 (arguing that the framers may have failed to follow any theory of original intent, that they did not always understand the potentials within the Constitution for legislative and judicial tyranny, and that there were times that the framers intended terms to be interpreted in a nonorginalist context); see also J. ELY, supra note 100, at 22-30 (citing the privileges and immunities clause of the fourteenth amendment as a provision intended by its drafters to be interpreted in a nonoriginalist manner); Laycock, Taking Constitutions Seriously: A Theory of Judicial Review (Book Review), *59 TEXAS L. REV. 343, 349-53 (1981)* (pointing to the ninth amendment as an example of a constitutional provision licensing nonoriginalist interpretation).

Another problem with the theory of original intent is that the founders may not have addressed certain problems. See M. TUSHNET, supra note 18, at 35-36. For example, in the area of impeachment, they did not address (1) whether removal and disqualification may be imposed jointly or separately; (2) the proper standard of proof in an impeachment proceeding; (3) the exclusivity of impeachment as a means for removing federal judges; (4) whether there may be judicial review of any aspect of an impeachment proceeding; and (5) the specifics of the proper procedure for impeachment hearings and removal trials. Formalists become confused and uncertain when confronted by the fact that the framers may have failed to address something. See, e.g., R. BERGER, supra note 14, at 100-01 (raising questions not answered by the framers because of their preoccupation with impeachment of the President).

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2. Specific Problems with Original Intent in the Impeachment Context. -- The problems that plague constitutional historiography in general also plague interpretative theories relying on history, including original intent. Indeed, prominent impeachment studies by Raoul Berger and Philip Kurland illustrate these problems. Interestingly, although both Berger and Kurland purport to be interpretivists applying original intent, they reach different conclusions regarding several major issues arising under the impeachment clauses. n108 A close examination of Berger's and [*22] Kurland's studies also shows that history can confuse and divide analysis on impeachment and that commentators can use the past to cloak their own partisan views with historical legitimacy.

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n108. Compare R. BERGER, supra note 14, at 70-72, 141-45, 103-21 (concluding that impeachment is not the exclusive means for removing federal judges; that judicial review of impeachment is constitutionally permissible, and that impeachable offenses can be easily categorized) with Kurland, supra note 14, at 668, 697 (concluding that impeachment is the exclusive means of removing federal judges; that judicial review of impeachments is not authorized by the Constitution; and that the scope of impeachable offenses cannot be clearly defined).

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Berger's misuse of history is evident in his analysis of two issues regarding impeachment: (1) what constitutes an impeachable offense and (2) whether impeachment is the exclusive means of removing federal judges. Berger's reading of "high crimes and misdemeanors" as referring to seven specific categories of crimes against the state has two major problems. n109 First, Berger's historical research is seriously incomplete. Berger does not acknowledge or discuss certain aspects of the historical record. Inexplicably, he relies on the English experience with impeachment to define "high crimes and misdemeanors" rather than on the extensive colonial experience. n110 Contrary to Berger's assertion that the Constitution's impeachment procedure may be explained by examining the English experience with impeachment, n111 more recent studies on the history of impeachment in the United States emphasize that the Constitutional Convention delegates and the ratifiers consciously chose to put a uniquely American stamp on impeachment and meant to deviate from the English experience in significant ways. n112

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n109. See R. BERGER, supra note 14, at 70-71 (listing "high crimes and misdemeanors" as "misapplications of funds . . ., abuse of official power . . ., neglect of duty . . ., encroachment [upon] or contempts of Parliament prerogatives[,] . . . 'corruption', . . . betrayal of trust, . . . [and] giving pernicious advice to the Crown . . . .").

n110. See P. HOFFER & N. HULL, supra note 4, at 268 ("Berger has written a brief, not a history. Missing from his work is an appreciation of American colonial and state precedents, the latter of which were far more important in influencing federal law than English examples.").

n111. Berger cites English history and the common law to define "high crimes and misdemeanors," see R. BERGER, supra note 14, at 70-71; to define judicial good behavior, see id. at 125-35; and to determine whether legislators could be impeached, see id. at 217-18.

n112. See, e.g., P. HOFFER & N. HULL, supra note 4, at 268 (discussing the framers' "deliberate divergence from English law"); Bestor, supra note 13, at 261 (claiming that Americans changed the English meaning of treason and adopted only its most restrictive view).

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Second, Berger's specific assertions regarding what constitutes impeachable offenses are frequently contradicted by the historical record, including the actual English and colonial experiences with impeachment, the debates at the Constitutional Convention, and the ratification campaign. n113 Berger argues that the delegates understood the constitutional language "high crimes and misdemeanors" to refer to seven specific categories of crimes against the state in English impeachments. n114 This argument, however, contradicts Berger's own historical commentary that [*23] impeachments in England were essentially political proceedings and that impeachment developed in England as a method of punishing those who were too great and powerful to be brought to justice before the common-law courts. n115

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n113. See Bestor, supra note 13, at 262-66 (suggesting that Berger "glimpses . . . but then shies away from" the historically correct reading of "high crimes and misdemeanors" as political acts injurious to the state or sovereign).

n114. See supra note 109.

n115. See R. BERGER, supra note 14, at 71-72.

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Berger's exclusive reliance on English justifications for impeachment to explain the impeachment procedure in the Constitution is misplaced, because the English categorizations of impeachable offenses are only tenuously related to the colonial understanding of impeachable offenses and because the Constitution changed much of the English impeachment practice. n116 As a general matter,

Berger does not satisfactorily explain how much the English experience with impeachment actually influenced the understanding of impeachment in the colonies prior to 1787, at the Constitutional Convention, or during the ratification campaign -- particularly in light of the significant differences between the Constitution's and the English treatment of impeachment.

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n116. On the one hand, "a categorization of the English precedents prior to 1787 is of limited usefulness for defining the proper scope of impeachment today: the categories are simply tied too closely to bygone times." Book Note, *25 STAN. L. REV. 908, 913 (1973)* (reviewing R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973) and I. BRANT, IMPEACHMENT: TRIALS AND ERRORS (1972)). On the other hand, the framers deviated from the English experience with impeachment in at least seven ways: (1) in England anyone could be impeached, whereas the Constitution limits impeachment to "civil officers;" (2) in England impeachment implied criminal proceedings whereas the Constitution expressly separates impeachment from the traditional criminal process; (3) in England the sanction for conviction would be loss of life or property or imprisonment, whereas the Constitution limits the sanctions to removal from office and disqualification from future office; (4) in England the King could pardon anyone convicted after impeachment, whereas the Constitution expressly provides that the President can pardon for crimes, except for impeachments; (5) although the King could not be impeached, the Constitution expressly provides that the President may be impeached; (6) in England officers and judges could be removed from office by means other than impeachment, whereas the Constitution explicitly recognizes only one means for removal of federal judges; and (7) the English system allowed the category of impeachable offenses to grow as new cases were brought, whereas the Constitution limits the scope of impeachable offenses to "Treason, Bribery, and other high Crimes and Misdemeanors." See Broderick, Citizens' Guide to Impeachment of a President: Problem Areas, *23 CATH. U.L. REV. 205, 217-18 (1973)*.

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Berger also fails to support his assertion that the framers intended to formalize impeachments by limiting impeachable offenses to the seven categories in the English experience. n117 Berger suggests that the framers intended the President to be impeachable only for so-called "great" offenses, which he construes as being narrower than the categories of English [*24] "political" offenses, as not including any misconduct outside office, and as making the President unimpeachable for some types of misconduct that would expose lesser officials to impeachment proceedings. n118 But Berger fails to prescribe a method for determining which presidential misconduct would or would not be a "great" offense and never justifies making private conduct of the President unimpeachable. Finally, Berger concludes that impeachable conduct must be "political," n119 so that the actor and the forum are important determinants of whether a specific official may be impeached for a specific offense. Berger's attempts to define "political," however, are inconsistent and lack any clear link to the historical record. n120

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n117. See R. BERGER, supra note 14, at 67-73 (providing a detailed

categorization of impeachable offenses in England, but failing to establish that the framers were familiar with or relied on them in drafting the impeachment clauses). In an earlier article, Berger sought support for his view that indictment and trial may precede removal by resorting to the English practice in which "[o]n several occasions the Parliament preferred to refer the case to the courts." Berger, The President, Congress, and the Courts, *83 YALE L.J. 1111, 1128 (1974)*. As Professor Burbank notes, however, this is not helpful, because, as Berger recognizes, in English practice "criminal prosecution and removal were wedded in one proceeding, whereas the framers made an informed decision to divorce them." *Id. at 1124*, quoted in Burbank, supra note 92, at 667.

n118. See R. BERGER, supra note 14, at 88-93, 196-97.

n119. See R. BERGER, supra note 14, at 62 n.32 (citing Blackstone for the claim that political crimes were impeachable offenses and describing impeachment as a "political weapon" Parliament used to make ministers accountable to it, where "political" was used by the English in conjunction with crimes to distinguish impeachable conduct in office from criminal offenses).

n120. For example, Berger first defines "political" offenses as misconduct in office. One sentence later he expands this definition to include all acts "against the State," id. at 62 & n.32, and he notes that several impeachments were directed against persons who held no office. See id. at 71 n.92. He later includes conduct by officials in their private capacities, even if the conduct does not comprise an act against the state. See id. at 195-96. It is difficult to ascertain meaningful limits to "political" as Berger has defined it; it has grown to include all misconduct except acts not directed against the state by those who do not hold office.

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The underlying explanation for Berger's reading of "high crimes and misdemeanors" is his partisan desire to protect the federal judiciary from congressional overreaching as opposed to any search for an accurate understanding of the historical nature of impeachment. Although Berger acknowledges that the impeachable offenses listed in the Constitution are political crimes, he expresses disapproval of the Constitution's vesting of any removal power over the judiciary in a political (or legislative) body. Berger's disapproval is demonstrated by his repeated criticisms of then-Congressman Gerald Ford's comment, during the attempted impeachment of Justice Douglas, that an impeachable offense is whatever a majority of the House of Representatives may say it is. n121 However,

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n121. See id. at 53, 86, 94, 103; see also id. at 96, 123, 155 n.156, 159, 298 (criticizing Ford for his almost unabashed partisanship in invoking the impeachment process and for his assumption that the implied constitutional power to remove judges for lack of good behavior was vested in Congress in the form of the impeachment procedure).

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[t]his coldly cynical threat to the independence of the judiciary seems to block off for Berger any further consideration of the possibility that the

framers did in fact contemplate . . . "proceedings of a political nature" if . . . "confined to political characters," directed against "political crimes and misdemeanors" and eventuating only in "political punishments." n122

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n122. Bestor, supra note 13, at 266 (quoting 1 J. WILSON, supra note 16).

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In the area of impeachment, the most that constitutional interpretation [*25] can do is identify the purely political questions that Congress must decide as part of the impeachment process. Attempts to influence those political decisions through constitutional interpretation derive either from a misunderstanding of the structure of the impeachment clauses or from poorly veiled efforts to offer political judgments or preferences under the guise of constitutional mandates. The colonial experience with impeachment, the Constitutional Convention, and the ratification campaign indicate that impeachment was designed primarily as a check on the usurpations of executive officials, but Berger shies away from this conclusion out of his respect for judicial independence and distrust of political trials. n123

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n123. See id. at 267.

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There are also problems with Berger's conclusion that judicial review of impeachment is permissible. These problems derive from Berger's dominant desire to protect the judiciary from congressional overreaching. First, Berger is fundamentally inconsistent in his approach. He accepts the assumption that during the last two centuries congressional impeachment determinations have been final, but he argues that the framers must have wanted -- as opposed to actually desired -- judicial review of impeachments, because the framers sought to prevent congressional excesses against the judiciary. n124

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n124. See R. BERGER, supra note 14, at 103 (observing that "[f]rom Story onward it has been thought that in the domain of impeachment the Senate has the last word; that even the issue whether the charged misconduct constitutes an impeachable offense is unreviewable, because the trial of impeachments is confided to the Senate alone" (footnotes omitted)).

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Second, there is no historical support for Berger's view that judicial review of impeachment is constitutionally permissible. Berger's methodology on this point is mystifying: he acknowledges that there is little, if any, historical evidence indicating the framers desired judicial review of impeachments but then argues that the absence of any expressed desire by the framers against judicial review should be construed as original intent in favor of such review. n125 This argument is even more confusing [*26] because it is irreconcilable with

Berger's later assertion that some of the delegates' comments at the Constitutional Convention are consistent with judicial review of impeachments. n126 For example, Berger asserts that the framers considered Congress the most dangerous branch of government, and out of concern for the independence of the federal judiciary, the framers would (or must) have wanted to prevent any imbalance between the respective powers of the Congress and the judiciary. Judicial review of impeachments, therefore, must have been among the Constitution's numerous checks and balances. n127 This reading of history makes little sense because it suggests that the framers sought to solve the potential problem of an imbalance of power between the Congress and the judiciary by creating just such an imbalance in favor of the judiciary. Berger's view of judicial review of impeachments cannot be sensibly squared with the considered judgment of the Constitutional Convention and the ratifiers when they excluded the judiciary from adjudicating impeachment matters to avoid the impropriety of the judiciary's reviewing charges against either the President who appointed them or their fellow judges. n128

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n125. See id. at 112-13, 117-18. Berger's argument that the framers paid little attention to the problem of removing federal judges undercuts his other argument that the framers intended to allow judicial review of impeachments. Moreover, neither the discussions at the Constitutional Convention nor during the ratification campaign indicate any support for the view that there should be judicial review of impeachments. Indeed, the most prominent commentary at the time rejected the idea. See THE FEDERALIST NO. 79, at 474 (A. Hamilton) (C. Rossiter ed. 1961) ("[Impeachment] is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges."); see also Bestor, supra note 13, at 267 (arguing that Berger's view is "unhistorical and extraconstitutional").

Berger also finds no historical support for the political question doctrine and, therefore, believes in referring even the most difficult constitutional issues to the courts. See R. BERGER, supra note 14, at 108-09. Even if Berger is correct that there is no historical support for the political question doctrine, there is no historical support for the opposite conclusion. The Supreme Court has for well over a century invoked the political question doctrine to avoid deciding questions that are either clearly committed to the competence or discretion of another branch or that require the Court to extend its own authority under article III. See, e.g., *Gilligan v. Morgan, 413 U.S. 1 (1973); Coleman v. Miller, 307 U.S. 433 (1939); Luther v. Borden, 48 U.S. (7 How.) 1 (1849)*. See generally L. TRIBE, supra note 13, at 96-107 (discussing the confusion that surrounds the political question doctrine).

n126. See R. BERGER, supra note 14, at 118 (citing the framers' rejection of "unfettered removal by Address" and of removal for "maladministration" as evidence of a strong desire to limit the impeachment power and arguing that it is therefore unlikely that the framers intended to rely on the Senate's self-restraint in exercising this power).

n127. See R. BERGER, supra note 14, at 117-19.

n128. See 2 CONVENTION RECORDS, supra note 1, at 551; see also THE FEDERALIST NO. 51, at 321 (J. Madison) (C. Rossiter ed. 1961) ("[T]he permanent

tenure by which the [judicial] appointments are held . . . must soon destroy all sense of dependence on the authority conferring them.").

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Third, Berger misreads the relevant constitutional language as supporting judicial review of impeachments. Berger's general argument is that since the Constitution's language regarding the impeachment process is ambiguous, the Constitution does not commit consideration of this issue to only one branch. In the constitutional mandate -- "The Senate shall have the sole Power to try all Impeachments" n129 -- Berger focuses on the word "try," which he asserts, was limited in eighteenth century usage to the fact-finding stage of a judicial proceeding. n130 Berger argues further that the word "try" normally implies an appeal to a review process by a court of law. No doubt, the framers may have envisioned a trial-like proceeding as the means by which the Senate would effect impeachments and removals, but this fact hardly justifies the inference [*27] of an appeal to a court of law, particularly because the Constitution explicitly directs the Chief Justice to preside over presidential impeachments and because the framers specifically rejected having judges serve as the impeachment or removal tribunal. n131

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n129. U.S. CONST. art. I, § 3, cl. 6.

n130. See R. BERGER, supra note 14, at 111-12.

n131. See id. at 112-13; see also supra notes 41-52 and accompanying text (discussing the Convention's choice of the Senate as the impeachment trial body).

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Fourth, Berger confuses constitutionality determination with judicial reviewability of an action. Specifically, Berger argues that the fifth amendment allows redress in courts for any due process violation, even in an impeachment proceeding. n132 The problem with Berger's argument is that it assumes the conclusion: the determination of constitutionality is separate from the determination of reviewability. The fact that Congress may do something unconstitutional as part of an impeachment proceeding does not mean that reviewability of that proceeding by the federal judiciary is then automatic or permissible. Furthermore, Berger's implicit assumption that all determinations of constitutionality must be made by the federal judiciary is incorrect both as a historical matter and as a jurisdictional principle. n133

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n132. See R. BERGER, supra note 14, at 80-81, 120.

n133. See P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISION MAKING 903-28 (2d ed. 1983) (discussing the historical authority, conceptual basis, and scope of the political question doctrine -- that some constitutional questions are, as a function of the separation of powers, committed to nonjudicial agencies); L. TRIBE, supra note 13, at 15-17, 34-35, 39, 67-68

(arguing that courts are not equipped to address all constitutional issues)..

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Professor Philip Kurland's study of impeachment does not purport to be as wide ranging as Berger's study, focusing primarily on how each of the three branches of government has dealt with the question whether the constitutional guarantee that federal judges may serve "during good Behaviour" n134 provides a basis for removal of federal judges in addition to the impeachable offenses listed elsewhere in the Constitution. Kurland spends little or no time discussing the original intent of the framers regarding impeachment as the exclusive means of removing federal judges, because he believes "it has been made pellucidly clear by Martha Ziskind that the [framers'] intention was to make impeachment the sole means of removal of federal [judges]." n135 After reviewing the history of impeachments through the late 1960s, Kurland concludes (1) "that it would be unconstitutional for the Congress to attempt, by legislation, to establish a fixed term of office for [federal] judges" because the constitutional guarantee that federal judges may serve "during good Behaviour" has been regarded by each branch as granting judges life tenure; (2) "that [*28] the greater weight of authority lies on the side of lack of [any existing power, short of the amendment process] to establish a mode of trial other than by impeachment for the removal of federal judges"; and (3) "that legislative action spelling out the content of 'good behavior' for such trials would also be invalid, [because] those words are either [a] to be derived from the definition of high crimes and misdemeanors, or [b] to be left to the discretion of the Senate when sitting as a court of impeachment." n136 When it comes to defining "high crimes and misdemeanors," however, Kurland admits that "no one should claim certainty." n137

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n134. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

n135. Kurland, supra note 14, at 668.

n136. Id. at 697.

n137. Id.

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Kurland's argument has two major flaws. First, Kurland's reliance on Ziskind's study is misplaced. Even though both Berger and Ziskind purport to follow original intent to resolve the issue whether impeachment is the exclusive means for removing federal judges, Berger harshly rejects Ziskind's reading of the relevant original intent. n138 For instance, Ziskind believes the framers rejected the English practice of scire facias, n139 which allowed judges to remove other judges for misbehavior. Ziskind maintains that before the Constitutional Convention "'in all but a few states, judges held office during good behavior and could be removed only by impeachment.'" n140 According to Berger, however, Ziskind's view lacks historical support. n141 He criticizes her

for ignoring the fact that:

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n138. See R. BERGER, supra note 14, at 141.

n139. See R. BERGER, supra note 14, at 141-43. See generally Shartel, supra note 10, at 880-98. Professor Shartel makes several observations about whether the Constitution was meant to include the English practice of scire facias. He explains that, historically, "[j]udges . . . holding [office] 'during good behavior' by patent from the King, were removable on scire facias in the King's Bench." Id. at 882 (footnotes omitted). Persons holding lower offices or without patent from the king were subject to removal by a quo warranto type proceeding, which was in the nature of a forfeiture and required a directive of ouster. It is unclear whether the English Act of Settlement of 1700 or later statutes abolished these means of removal. See id. at 882 n.33, 900 n.82; see also id. at 887-89 (discussing use of scire facias as preexisting at common law and not ruled out by the Constitution); Note, Constitutional Judicial Tenure Legislation?, supra note 12, at 855-60 (concluding that the framers intended impeachment to be the method of judicial removal based on a study of colonial practice and the debates in the Constitutional Convention and the ratification campaign).

n140. Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, *1969 SUP. CT. REV. 135, 152,* quoted in R. BERGER, supra note 14, at 145. There are lesser but still troublesome problems raised by the methodology of original intent, including (1) that because people born in the United States automatically become citizens subject to our existing Constitution, no one today has had the opportunity to enter into a contractual relationship governed by the Constitution in the same manner as the framers (and members of their generation) and (2) that we may need to abandon original intent to deal with forms of unimagined and unaddressed tyranny (particularly legislative). See M. TUSHNET, supra note 18, at 25-27.

n141. See R. BERGER, supra note 14, at 142 (pointing out that because judicial appointments in the colonies were terminable at the king's will, the absence of provisions for scire facias in colonial constitutions should be viewed not as a rejection of that process, as Fiskind suggests, but as a simple reflection of colonial powerlessness to interfere with judicial tenure).

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[*29] [t]he States were pretty evenly divided between impeachment and removal by Address [a variation of the English practice under which both Houses of Parliament made a formal request that the King perform a particular act]: four States provided for Address and a fifth, Georgia, provided for a variant; six states provided for impeachment and four of these supplied an alternative, removal for misbehavior or maladministration, which suggests that impeachment may have been reserved for special cases. The Delaware and Maryland provisions for court removal upon misbehavior preclude an inference that there was total ignorance of judicial forfeiture. If the writ of scire facias was not expressly mentioned [in the Constitution], it is not the function of a Constitution to detail the relevant writs. n142

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n142. *Id. at 145* (footnote omitted); see also *id. at 145 n.104* (noting that "[i]n England an Address was a formal request made by both Houses of Parliament to the King, asking him to perform some act[, and that by] the Act of Settlement (1700), judges were made removable by the Crown only upon an Address by both Houses").

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Ziskind regards the framers' failure to expressly include scire facias as a rejection of that practice, whereas Berger reaches the opposite conclusion by interpreting the framers' failure to exclude the practice as an express acceptance. n143 Although Berger maintains that the framers paid little attention to the problem of how to remove judges, he insists their few remakrs on the subject indicate that the phrase "during good Behaviour" grants life tenure to federal judges and provides a method for removal in addition to impeachment. n144 Thus, Ziskind's study is hardly as authoritative as Kurland suggests.

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n143. See *id. at 145-47*.

n144. See *id. at 177-80*.

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Second, both Ziskind's and Kurland's readings of history exclude one major piece of legislation, the Act of 1790, n145 which undermines their singular view that original intent indicates impeachment was the exclusive means for removing federal judges. Indeed, almost without exception, commentators arguing that impeachment is the exclusive means the First Congress itself rejected any notion that impeachment was intended as the sole means of removing federal judges. n146 In the Act of [*30] 1790, the First Congress provided that upon conviction in federal court for bribery, a judge shall "forever be disqualified to hold any office." n147 Berger himself relies on this Act as providing the strongest case for the view that impeachment is not the exclusive means for removing federal judges. He argues that:

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n145. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (1847). For a discussion of the Act's subsequent history, see infra note 147.

n146. See, e.g., Broderick, supra note 116, at 205 (arguing that impeachment is the exclusive means of removal and urging that citizens should become more involved in the political process, including impeachment); Burbank, supra note 92, at 674-94 (noting that impeachment is the exclusive means of removal of federal judges for misconduct, although not for disability, because of the need to protect the independence of the judiciary); Catz, Removal of Federal Judges by Imprisonment, *18 RUTGERS L.J. 103, 112-14, 118 (1986)* (arguing that imprisonment before impeachment is de facto removal of a judge and is therefore unconstitutional); Fenton, The Scope of the Impeachment Power, *65 NW. U.L. REV. 719, 745-47* (suggesting that impeachment is exclusive and only for serious

crimes); Kurland, supra note 14, at 668, 697-98 (noting that impeachment is exclusive and that any change in the procedure set forth in the Constitution requires a constitutional amendment); Stevens, Reflections on the Removal of Sitting Judges, *13 STETSON L. REV. 215, 215-20 (1984)* (noting that impeachment of federal judges for high crimes and misdemeanors was the only means of protecting judicial independence); Stoltz, supra note 14, at 659-70 (calling impeachment exclusive but also calling for improvements in the impeachment process); Ziskind, supra note 140, at 147-51 (concluding that the framers intended to have the independence of the judiciary limited only through the impeachment process); Note, In Defense of Standard, supra note 12, at 460-63 (arguing that the Judicial Disability Act of 1980 is unconstitutional because it allows the judiciary to strip judges of their office by refusing to assign them cases and that imprisonment prior to impeachment strips judges of their offices and is, therefore, unconstitutional). But see Ervin, supra note 21, at 114-27 (rejecting argument of nonexclusivity of impeachment based on the Act of 1790 by noting that the Act was never enforced); Note, Unnecessary and Improper, supra note 21, at 1131 n.86 (rejecting argument of nonexclusivity of impeachment based on the Act of 1790, which provided for disqualification of judges upon conviction of bribery, because "the issue is removal and not disqualification").

n147. Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112 (1845). Even though, in 1793, the preface to the statute on crimes of the United States stated that the Act of April 30, 1790, was deemed repealed, the statutory language remained the same. In the 1878 codification and revision of the United States statutes, the language of the Act of 1790 remained essentially the same as it always had been, but the fine for accepting a bribe was set at three times the amount of the bribe, and imprisonment was limited to three years. Rev. Stat. § 5501 (2d ed. 1878). In 1909, Congress again amended the statute. Act of Mar. 4, 1909, ch. 321, § 117, 35 Stat. 1109-10 (1909). In 1948 Congress amended *18 U.S.C. §§ 201*-223 again to make the fine $ 20,000. Act of June 25, 1948, ch. 645, § 207, 62 Stat. 692-93 (1948). These provisions were amended again in 1962. Act of Oct. 23, 1962, P.L. 87-849, § 201(e), 76 Stat. 1119 (1962). The current statute, *18 U.S.C. § 201*, applies to all government officials. Today the sanctions for violating the Act include "[fines of] not more than three times the monetary equivalent of the thing of value, or imprison[ment] for not more than fifteen years, or both, and [offenders] may be disqualified from holding any office of honor, trust, or profit under the United States." *18 U.S.C. § 201*(b)(4) (Supp. V 1987).

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[s]ince the impeachment clause provides for disqualification upon impeachment and conviction, the Act is unconstitutional if the clause indeed provides the "exclusive" method of disqualification. The First Congress will scarcely be charged with misconstruing the Constitution; hence the 1790 statute must be regarded as a construction that the impeachment clause does not constitute the "only" means for the disqualification of judges. As with "disqualification" so with "removal," for the two stand on a par in the impeachment provision. And the statute also illustrates the familiar proposition that broad dicta . . . respecting a situation not presented for determination cannot be conclusive when the situation is actually presented. What the First Congress did when it had to deal with "disqualification" of judges thus speaks against reliance upon some earlier utterances by a few of its members when the removal of judges was not involved. n148

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n148. R. BERGER, supra note 14, at 150 (footnotes omitted).

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It is difficult to understand how Kurland and Ziskind can question the relevance or authority of the Act of 1790 in light of the fact that interpretivists [*31] as well as the Supreme Court have expressed the view that actions relating to constitutional decision making by the First Congress -- many of whose members attended the Constitutional Convention or participated in the ratification campaign -- are highly probative of the framers' intent. n149

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n149. See *Bowsher v. Synar, 478 U.S. 714, 724 n.3 (1986)* (listing 20 members of the First Congress who were also delegates at the Constitutional Convention); *Marsh v. Chambers, 463 U.S. 783, 790-91 (1983)* (holding that legislative chaplaincy does not violate the establishment clause because the First Congress appointed a chaplain for itself); *J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 411-12 (1928)* (holding that the actions of the First Congress support the power of Congress to lay import taxes for the purpose of protecting domestic industry); *McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 424 (1819)* (upholding the constitutionality of the national bank in part because the First Congress had carefully considered the issue prior to creating a national bank). But see *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803)* (holding unconstitutional a portion of the Judiciary Act of 1789, passed by the First Congress, because it increased the original jurisdiction of the Supreme Court beyond what was expressly provided by the Constitution).

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Yet, Berger fails to address an important issue raised by the Act of 1790. The Act speaks explicitly only of "disqualification" not of "removal." In light of the rule of interpretation that each and every word of the Constitution and congressional enactments must be given meaning, one commentator argues that the Act should not be cited as authority for the proposition that the Congress provided for both removal and disqualification of federal judges upon their conviction for bribery, because the Act expressly provides only for disqualification and, thus, says nothing about whether impeachment is the exclusive means of removing federal judges. n150 This commentator argues that, at most, the Act indicates that impeachment is not the sole means of disqualifying federal judges from holding future offices. n151

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n150. See Note, Unnecessary and Improper, supra note 21, at 1131 n.86.

n151. See id.

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What this commentator fails to do, however, is identify the practice under

that statute and the necessary implications of its language. First, the Act was construed during the time of its operation as both removing and disqualifying federal judges convicted of bribery. n152 Second, the Act, which explicitly applies only to sitting federal judges, directs unambiguously that once convicted, they are disqualified from ever holding office in the future. n153 This directive implies that a federal judge, once convicted of bribery, is also necessarily removed from office. Giving meaning to each word of a statute or the Constitution also requires not interpreting the statute or Constitution to mandate absurd results. If [*32] someone is disqualified from ever holding office in the future, the plain implication is that the person may no longer occupy the office presently held; in short, the person is effectively removed.

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n152. See R. BERGER, supra note 14, at 150; see also Note, supra note 10, at 1390, 1396 n.44 (arguing that the Act of 1790 proved impeachment is not the only means of removing federal judges since disqualification necessarily includes removal). But see Ervin, supra note 21, at 118 & n.43 (claiming that impeachment is the exclusive means of removing federal judges and dismissing the Act of 1790 because it was never invoked).

n153. See supra note 147.

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B. Problems with Informalist Approaches to Impeachment

1. General Problems with Informalism. -- Informalists have two distinguishing characteristics as a group: (1) rejecting history as the primary guide to interpreting the impeachment clauses and (2) failing to suggest any substitute arguably more legitimate or reliable than history as a guide to interpreting the impeachment clauses. n154 The one way in which the informalists resemble the formalists, however, is that neither group can reach any consensus on how its approach to constitutional interpretation may be applied to the impeachment clauses.

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n154. See, e.g., I. BRANT, supra note 22, at 3-23 (selectively relying on history and structural indications and personal preferences to conclude that impeachment is the only alternative); Fenton, supra note 146, at 745-74 (using historical arguments without explaining their methodological soundness to conclude that impeachment is the exclusive means of removal); Firmage & Mangrum, supra note 22, at 1102-08 (applying informal method of analysis to impeachment of the President); Franklin, supra note 22, at 339-41 (arguing that Berger's formalist approach is flawed); Havighurst, supra note 10, at 223-37 (applying informalist arguments to support a parliamentary form of government as an alternative to impeachment); Linde, supra note 10, passim (rejecting historical interpretation and applying informal arguments to support a joint congressional resolution as an alternative to the present system of impeachment); Thompson & Pollitt, supra note 23, at 118-21 (relying without explanation on congressional practices to argue that impeachment is an effective tool); Note, supra note 10, at 1391-407 (arguing that impeachment is ineffective and inefficient); Comment,

supra note 10, passim (using informalist arguments to support the proposition that federal judges have the power to remove other federal judges).

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The ad hoc analysis applied to the impeachment clauses by the informalists has two interrelated problems. First, informalists articulate no guiding or organizing principle for interpreting the impeachment clauses. Such an approach runs contrary to the notion that constitutional interpretation normally makes sense only if, in those circumstances in which it must depart from the language or structure of the Constitution, it does so with reference to something generally recognized or accepted as legitimate or authoritative. As a general matter, theories of constitutional law are helpful because they make constitutional interpretation predictable through the systematic use of some guiding or organizing principle. n155 By failing to posit any point of reference other than the non-self-defining language of the Constitution and by failing to articulate any guiding principle for constitutional interpretation, informalists propose no standard [*33] or theory by which to judge their own work. Their studies provide no helpful guide for making their interpretation of the impeachment clauses or other constitutional provisions predictable or even understandable.

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n155. See Sandalow, Constitutional Interpretation, *79 MICH. L. REV. 1033, 1068* (arguing that constitutional law is "a process by which each generation gives formal expression to the values it holds fundamental in the operations of government"); Simon, The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation, *58 S. CAL. L. REV. 603, 630-36* (arguing that without normative theories about the source and nature of constitutional authority, we have to justification for ascribing any particular set of meanings to the Constitution).

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This lack of an organizing principle to govern their constitutional interpretation includes a failure to articulate any systematic justification for their limited use of history or other evidence in their analyses of the impeachment clauses. Informalists fail to explain how their use of a patchwork of historical and other kinds of evidence to explain impeachment, including their choices to give different pieces of evidence different weight, is any more legitimate than the formalists' strict adherence to history as a primary guide. n156 In addition, when informalists do turn to history, their reading of history is often either incomplete or incorrect. n157

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n156. See, e.g., Havighurst, supra note 10, at 223-37 (arguing for parliamentary government as an alternative to impeachment without legitimizing informalist arguments); Shartel, supra note 10, at 884-91 (concluding that, despite the fact that jurisdiction to oust federal judges for misconduct or neglect of duty has never been exercised by any federal court or statutorily conferred by Congress on any judicial tribunal, the supervisory nature and justiciable character of such a proceeding make it a logical and necessary extension of the judicial power granted by the Constitution); Note, supra note

10, at 1397-98 (seeking to establish the propriety of judicial removal of federal judges by arguing that such authority is implicit in the notions of due process and separation of powers).

n157. See, e.g., Havighurst, supra note 10, at 229-33 (claiming that the framers were most concerned with having a strong executive); Shartel, supra note 10, at 889-909 (arguing that there is no limit to congressional ability to define what constitutes "good Behaviour"); see also Stevens, supra note 146, at 215-17 (recounting that prior to the Constitution the King could simply remove any judges who disagreed with him); Comment, supra note 10, at 1164-90 (stating that presidential removal of impeachable officials violates the congressional power to impeach); cf. Stoltz, supra note 14, at 662 (refuting Shartel's reading of the "good Behaviour" clause as a reminder that judges did not serve simply at the King's pleasure, as they had done before the Act of Settlement in 1700).

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Second, the unarticulated starting point for many informalists is often the inconvenience of or dissatisfaction with the constitutional procedure they are analyzing. n158 The problem with this approach is that, as the Supreme Court once warned,

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n158. See, e.g., Havighurst, supra note 10, at 224-29 (discussing the political difficulty of impeachment); Linde, supra note 10, at 384 (discussing the difficulty of proof as a barrier to impeachment).

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[c]onvenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government.

. . . [P]olicy arguments supporting even purposeful "political inventions" are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised. n159

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n159. *INS v. Chadha, 462 U.S. 919, 944 (1983);* see also Note, Unnecessary and Improper, supra note 21, at 1141 (applying the Court's admonition against convenience to the congressional short-cut procedure for impeaching federal judges).

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Part of the unarticulated disagreement between the formalists and the informalists is the extent to which politics is or should be a part of constitutional decision making. Informalists proceed as if there is no problem with incorporating politics, either because of efficiency or convenience, [*34] into their analysis of constitutional law. Formalists, on the other hand, want to limit the role that politics may play in constitutional decision making. Formalists implicitly view constitutional law as transcending politics, which they understand as petty, self-serving, and, ultimately, an illegitimate guide to constitutional interpretation.

Both the informalists and the formalists fail to recognize that constitutional law is itself a peculiar form of politics. The Constitution is, above all else, a political document that reflects the political choices the framers elevated to the status of law. Contemporary debates about the meaning of the Constitution are conducted, as they always have been, in and through the political process. It is naive to separate politics artificially from constitutional law. As Justice Frankfurter observed, constitutional law is not at all a science, but "applied politics, using the word in its noblest sense." n160 Neither the informalists nor the formalists attempt to answer the critical question: Where does constitutional mandate end and political judgment begin?

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n160. Bickel, Applied Politics and the Science of Law: Writings of the Harvard Period, in FELIX FRANKFURTER: A TRIBUTE 164, 166 (W. Mendelson ed. 1964).

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No fine line exists between constitutional mandate and politics, precisely because constitutional law derives from and is shaped and informed by politics, as that term is broadly understood. Certain constitutional provisions blend the constitutional and the political more clearly than others, and the impeachment clauses may be the clearest example of a constitutional procedure structured to accommodate political dialogue. Even though informalists may accept this proposition, they fail to acknowledge that they are incorporating politics in the form of either convenience or efficiency into their constitutional interpretations. Formalists may reject informalist interpretations because they view convenience as having no relevance to or value in making determinations of constitutionality, or they may reject convenience merely as an unseemly basis for constitutional decision making. In other words, formalists may view as illegitimate the inclusion of anything smacking of the political as a guide to constitutional interpretation. Formalists fail to understand, however, that convenience is not the equivalent of illegitimacy; convenience is simply a less authoritative (less persuasive) basis for constitutional decision making, a process that formalist political decision makers, including judges, prefer to ground in something that appears more noble or more ennobling. n161

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n161. See infra note 166.

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This debate over convenience or something grander as a guide to constitutional interpretation is central to constitutional law, because constitutional [*35] interpretation frequently requires commentators to go beyond the language, structure, or history of the Constitution to give meaning to or to explain a particular constitutional issue. n162 Indeed, theory enters the picture at this juncture. Constitutional theory is most useful as a guide to understanding a constitutional question not readily answered by the language, structure, or history of the Constitution.

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n162. See Simon, supra note 155, at 603-04 (noting that although for some constitutional provisions the meaning is clear, for others "the language . . . is so vague, ambiguous, and open-textured that they might be understood to mean almost anything").

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Modern theories of constitutional interpretation suffer, however, from a variety of problems, including their implicit reinforcement of the values or biases of the theorists employing them and the natural elusiveness and difficult interpretative problems of the Constitution's history and language. n163 Theories are desirable because most provisions of the Constitution are not self-defining; they require the interpreter to look beyond the language of the Constitution for the key to their particular meaning. n164 Theories are also desirable because they impose limitations on and provide guidance to both judges and legislatures in construing the Constitution. n165 Such uses of theory, however, are inevitably linked to certain theorists' desires for constitutional interpretation to move in directions dependent on the theorists' undisclosed political or personal preferences.

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n163. See generally M. TUSHNET, supra note 18, at 179-80, 313 (discussing general problems with liberal theories of constitutional law).

n164. See supra note 162; see also George & Porth, Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause, *90 W. VA. L. REV. 109, 120 (1987)* (recognizing that "the meanings of various elements of the Constitution are not immediately plain and that, . . . courts are required to make authoritative choices").

n165. See George & Porth, supra note 164 (noting that "certain constitutional theories usefully guide the choice and action of the constitutional interpreter").

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Ultimately, the real test of the legitimacy and effectiveness of a theory of constitutional interpretation is the degree to which it is methodologically sound and coherent. A viable theory must also be compatible with the constitutional provisions to which it is applied. In addition, the theory must be faithful to what society regards as legitimate and controlling, including the language, structure, purposes, and history of the Constitution, as well as to public values for which there is general societal consensus. n166

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n166. See Fiss, supra note 20, at 10-13 (conceiving of the judicial function as an attempt to reveal or elaborate the meaning of constitutional values through the dialogue of adjudication); Michelman, supra note 19, at 18-19 (characterizing proponents of republicanism as favoring participatory politics wherein "civic virtue" develops from citizen dialogue in pursuit of values that should control public and private life); Michelman, supra note 18, at 509

(regarding politics as an indispensable process by which social beings choose the terms of coexistence -- both the rules of social cooperation and the "moral ambience" of the social world); Monaghan, Third Party Standing, *84 COLUM. L. REV. 277, 279-80 (1984)* (observing that "the process of constitutional adjudication now operates as one in which courts discharge a special function: declaring and enforcing public norms"); Seidman, Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law, *96 YALE L.J. 1006, 1007 (1987)* (commenting that "instead of offering reconciliation, constitutional law allows us to live with contradiction by establishing a shifting, uncertain, and contested boundary between distinct public and private spheres within which conflicting values can be separately nurtured"); Sunstein, Public Values, Private Interests, and the Equal Protection Clause, *1982 SUP. CT. REV. 127, 165* (concluding that, according to the Supreme Court, the equal protection clause aims at the evil of classifying groups of people for disparate treatment without a view to promoting a public value).

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[*36] Constitutional theories are nothing more than points of reference that theorists use to resolve ambiguities, gaps, or conflicts in constitutional language or history. The legitimacy of these points of reference, however, ultimately depends on the degree to which they are themselves derived from other legitimate points of reference. n167 While legitimacy may be a malleable concept, dependent more often than not on the preferences and values of the decision maker, it may nevertheless be reflected for the purposes of constitutional law either in the values or freedoms protected by the Constitution or in the public values defining a community. n168

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n167. See Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, *41 MD. L. REV. 563, 581 (1982)* (arguing that the pervasive presence of "gaps, conflicts, and ambiguities" in contract and tort law enable practitioners and judges to manipulate those areas according to personal, political, or economic preference). As Professor Kennedy well knows, the presence of "gaps, conflicts, and ambiguities" is not restricted to contract and tort law, but extends throughout other areas of law, including constitutional law, whose "gaps, conflicts, and ambiguities" practitioners, judges, and commentators may manipulate to further their own personal or political preferences. The critical point is that in constitutional law the "gaps, conflicts, and ambiguities" should be resolved in terms of public values. See supra note 166 and accompanying text.

n168. See supra note 166; see also Sandalow, supra note 155, at 1054-55 (remarking that constitutional law "emerges not as exegesis, but as a process by which each generation gives formal expression to the values it holds fundamental in the operations of government").

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2. Specific Problems with Informalism. -- A critical analysis of specific informalist attempts to interpret the impeachment clauses illustrates the problems of informalism. For example, Irving Brant, an informalist, rejects the

history of impeachment in England and original intent as guides to defining impeachable offenses and to determining the permissibility of judicial review of impeachments. n169 Brant construes the phrase "high crimes and misdemeanors" as making criminality a requirement for an impeachable offense, but concludes, somewhat confusingly, that indictable offenses as well as violations of the oath of office constitute impeachable offenses. n170

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n169. See I. BRANT, supra note 22, at 21-23.

n170. See id. at 180-81.

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Brant's reading of "high crimes and misdemeanors" is problematic for three reasons. First, making the oath of office a standard limiting impeachable conduct is an invention out of whole cloth. There simply is [*37] no support in the structure, language, or history of the impeachment clauses for Brant's inclusion of violations of oaths as impeachable offenses. Like Berger, Brant is concerned that a broad definition of impeachable offenses would enable Congress to abuse the impeachment process to invade judicial independence. Consequently, Brant substitutes his own partisan preferences for a narrow range of impeachable offenses instead of interpreting the impeachment clauses. In addition, the language of the oath taken by the civil officers of the United States is so broad that "limiting" impeachable offenses to violations of the oath neither clarifies nor effectively narrows the range of impeachable offenses. n171

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n171. See id. at 181 (Brant asked, with respect to identifying possible violations of oath of office, "what is 'serious dereliction from public duty' unconnected with office, as presented in [Congressman] Ford's concept? It is anything that can be conjured up, imagined, or falsely charged, or anything that conflicts with prevailing ideas of decorum.").

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Second, the language in the Constitution regarding impeachable offenses is not as clear as Brant believes. Based on the language setting forth the impeachment procedure, Berger rejects Brant's inference that the Constitution makes impeachment a criminal process. n172 Unlike Brant, Berger acknowledges that only some of the impeachment procedure set forth in the Constitution resembles actual criminal process. For example, the absence of criminal penalties as punishment for impeachment undermines Brant's assertion that impeachment is essentially a criminal procedure. n173

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n172. See R. BERGER, supra note 14, at 78-85.

n173. See, e.g., U.S. CONST. art. I, § 3, cl. 6-7 (referring to the ability of the Senate "to try" impeachments and that "no Person shall be convicted

without the concurrence of two thirds of the Members present"); id. at art. II, § 2, cl. 1 (providing that the President shall have the power to pardon except in the case of impeachment); id. at art. II, § 4 (providing that "the President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery or other high Crimes and Misdemeanors"); id. at art. III, § 2, cl. 3 (referring to "[t]he trial of all Crimes, except in Cases of Impeachments"). Brant argues that the Constitution's repeated use of words most often used in the criminal context to describe or to refer to impeachment indicates that impeachment was intended to be used only for criminal offenses. See I. BRANT, supra note 22, at 23.

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Third, Brant ignores a great deal of relevant history, particularly when it undermines his view of impeachment. Brant bases his understanding of the scope of impeachable offenses solely on the structure of the Constitution. In doing so, Brant not only summarily rejects the English precedents but also ignores the colonial experiences with impeachment, the Constitutional Convention, and the ratification campaign. n174 For example, Brant agrees with Berger that impeachment was a criminal process in England, yet ignores the fact that in England people could be impeached for noncriminal acts. Although Brant rejects the history of [*38] impeachment in England as a relevant or meaningful inquiry, he substitutes nothing for it other than his own personal preference to protect the federal judiciary by "criminalizing" impeachable offenses.

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n174. I. BRANT, supra note 22, at 11-13; see also Book Note, supra note 116, at 916.

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Brant fails to acknowledge even the critical historical fact that, during the Constitutional Convention and the ratification campaign, the framers did not limit their comments regarding acts they considered impeachable to acts that would have been criminal under existing statutes. n175 Brant's preference for characterizing impeachment proceedings as criminal can be traced not to history or even to the language or structure of the impeachment clauses in the Constitution but rather to Brant's personal concern that the federal judiciary needs heightened protection against the possibility that Congress may overzealously exercise the impeachment process against federal judges. n176 That the Constitution's impeachment process has only some characteristics resembling criminal trials and that the delegates at the Constitutional Convention cited non-criminal examples as impeachable offenses plainly suggest that impeachment is not strictly a criminal proceeding. Instead, it is a unique hybrid of civil and criminal proceedings for use against certain political officials.

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n175. See notes 44-50 and accompanying text. Further, Madison indicated that the President would render himself impeachable if he summoned only a few Senators to ratify a treaty. See R. BERGER, supra note 14, at 89. Moreover, bribery, a specifically enumerated impeachable offense, was not made a statutory

offense until 1790, two years after the Constitution's ratification. See id. at 76 n.118 (citing Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112 (1845)).

n176. Brant feared that the judiciary may be subject to legislative tyranny through congressional power to impeach. See I. BRANT, supra note 22, at 11-23. He also feared congressional attempts to pass bills of attainder under the guise of impeachment. See id. at 188-200; infra notes 177-78.

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Brant's analysis of the propriety of the judicial review of impeachment fares no better than his reading of "high crimes and misdemeanors." His primary argument for judicial review of impeachment is that of the defenders of President Andrew Johnson during his impeachment: when impeachment exceeds its constitutional bounds, it becomes a bill of attainder n177 and at that point, just as with a bill of attainder, it should be subject to judicial nullification. n178 This analysis has two flaws. First, Brant's characterization of an unconstitutional impeachment as a bill of attainder confuses the natures of the two procedures. Bills of attainder are enactments by a legislature passed for the purpose of punishing one individual; n179 they are expressly prohibited because they deprive the target of a fair hearing. n180 By their nature, impeachments are directed only [*39] at a certain class of individuals and have only some of the characteristics of trials. The fact that an impeachment may exceed its constitutional boundaries does not, by itself, transform it into a bill of attainder. Once an impeachment exceeds its bounds, it becomes neither more nor less than an unconstitutional impeachment. Second, Brant confuses the determination of constitutionality with the determination of reviewability. The Constitution sets forth impeachment as a political procedure for removing certain federal officials. Although impeachment has its constitutional boundaries, it is a mistake to assume that any movement beyond those boundaries transforms impeachment into a judicially reviewable question of political decision making.

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n177. U.S. CONST. art. I, § 9, cl. 3 provides that "No bill of Attainder or ex post facto Law shall be passed."

n178. See I. BRANT, supra note 22, at 133-54, 181-200; see also U.S. CONST. art. I, § 9, cl. 3.

n179. See *United States v. Lovett, 328 U.S. 303, 315 (1946)* (noting that bills of attainder apply either to named individuals or to easily ascertainable members of a group).

n180. See *United States v. Brown, 381 U.S. 437, 442, 445 (1965); Lovett, 328 U.S. at 315.*

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Former Representative Frank Thompson and Professor Dan Pollitt, also informalists, rely exclusively on congressional practices to define impeachable offenses. n181 They argue that only indictable offenses constitute impeachable offenses, basing their conclusion solely on the observation that, as of the date

of their study, the only examples of successful impeachment and removal from federal office involved indictable offenses. n182 Thompson and Pollitt never explain why congressional practices should dominate our understanding of impeachable offenses, even though their methodology is at least consistent with the view once espoused by Justice Brandeis that a "persistent legislative practice which involves a delimitation of the respective powers of Congress and the President, and which has been so established and maintained, should be deemed tantamount to judicial construction, in the absence of any decision by any court to the contrary." n183

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n181. See Thompson & Pollitt, supra note 23, at 107-08, 117-18.

n182. See id. at 106, 117-18.

n183. *Myers v. United States, 272 U.S. 52, 283 (1926)* (Brandeis, J., dissenting) (citing *United States v. Midwest Oil, 236 U.S. 459, 469 (1915)*).

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Accepting past congressional practice as authoritative is problematic because there is no sound reason to equate what Congress consistently does with what is constitutional. Simply because Congress consistently does something does not, in and of itself, mean that the practice is constitutional. Thompson and Pollitt fail to understand that the most past congressional impeachment practices indicate is that it is easier to obtain a conviction from the Senate in a removal trial if the offense was indictable. The recent impeachment proceedings against Judge Alcee Hastings confirm that it is easier to impeach a person for committing an indictable offense even though he has been acquitted of the underlying crime for which the impeachment has been brought. n184

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n184. Interestingly, the House overwhelmingly voted to impeach Judge Hastings for conduct underlying the misconduct for which he was previously acquitted in federal court. Although Judge Hastings argued that general notions of fairness should have led the House and the Senate to give some deference to the jury's decision not to convict him on some of the same evidence presented against him during his impeachment proceedings, the Senate appointed a special trial committee to receive evidence pertaining to Judge Hastings' removal and consider any evidence it deemed relevant to the charges against Judge Hastings in his removal proceedings. See Edwards, Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges, *87 MICH. L. REV. 765, 768-69 (1989)* (noting that "Hastings was impeached by the House of Representatives on seventeen articles of impeachment, covering, among other things, the bribery and perjury charges of which he was acquitted in 1983").

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[*40] Professors Edwin Firmage and R. Collin Mangrum are also informalists who propose applying general notions of due process to impeachment trials. n185 Even though they acknowledge that the fifth amendment's guarantee of due process applies only to court and agency adjudications, Firmage and Mangrum argue that a

general notion of due process inherent in the American system of justice should pervade all trial-like proceedings, including impeachments. n186 These commentators undoubtedly want fairness to be part of an impeachment proceeding, but they lack any constitutional authorization for its inclusion. Although the Constitution does require that Senators participate in impeachment proceedings only upon "oath or affirmation," n187 this provision requires at most that individual Senators be prepared to deliberate carefully during an impeachment trial. The "oath or affirmation" requirement is a safeguard included in the Constitution to encourage Senators to take removal proceedings seriously and to prevent the Senate from acting hastily or intemperately. n188 Careful consideration of an issue is an element of fairness, but it is not the sole component.

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n185. See Firmage & Mangrum, supra note 22, at 1073, 1076.

n186. See id. at 1073-75.

n187. "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation." U.S. CONST. art. I, § 3, cl. 6.

n188. See Rotunda, supra note 13, at 730.

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Although Firmage and Mangrum acknowledge that impeachments are essentially political proceedings with few constitutional constraints, they fail to confine their own constitutional interpretation within these constraints. n189 They fail to understand that while the Constitution does not require fairness to be part of impeachment proceedings, prudent politics cautions Senators to conduct impeachments as fairly as possible. Indeed, the Senate's accountability to the people (through the seventeenth amendment n190) constrains the Senate, as a matter of politics but not constitutional [*40] law, to make impeachment proceedings as fair as possible.

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n189. See Firmage & Mangrum, supra note 22, at 1051 (acknowledging that "[o]n balance . . . American precedent reflects the basic understanding that the impeachment process is fundamentally political").

n190. The seventeenth amendment provides in pertinent part that "[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years. . . ." U.S. CONST., amend. XVII, cl. 1. Prior to the enactment of the seventeenth amendment, Senators were selected by their respective state legislatures.

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C. Beyond Formalism and Informalism

Very few constitutional interpretation cases are easy, n191 and many fear

that unprincipled constitutional interpretation -- particularly by courts -- leads to unprincipled results. The central problem with constituional interpretation is a need for systematic approaches, which are not themselves inherently flawed or politically motivated. n192 The impeachment clauses, however, make systematic analysis difficult. The first step in sound analysis is to identify the particular characteristics that make a certain constitutional provision difficult to interpret and apply. For example, the constitutional provision designating impeachable offenses as including "other high Crimes and Misdemeanors" n193 is not self-defining, nor does it indisputably invoke, imply, or trigger any contemporary concepts. The delegates at the Constitutional Convention debated the inclusion of this phrase in the Constitution but failed to categorize the offenses that it would include. Only after isolating those characteristics making interpretation of a particular provision difficult is it appropriate to assess the compatibility of that provision with a particular theory of constitutional law.

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n191. Compare M. TUSHNET, supra note 18, at 52-56, 68-69 (on the difficulty of avoiding judicial over-involvement) with Schauer, Easy Cases, *58 S. CAL. L. REV. 399, 408-10, 427 (1985)* (on distinguishing hard and easy cases).

n192. Professor Tushnet argues that:

> the liberal tradition makes constitutional theory both necessary and impossible. It is necessary because it provides the restraints that the liberal tradition requires us to place on those in power, legislators and judges as well. It is impossible because no available approach to constitutional law can effectively restrain both legislators and judges: If we restrain the judges we leave legislators unconstrained; if we restrain the legislators we let the judges do what they want.

M. TUSHNET, supra note 18, at 313.

n193. U.S. CONST. art. II, § 4.

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A useful goal is to find a middle ground between historical and ad hoc interpretation of the impeachment clauses. A more sensible and less manipulative approach to impeachment than either formalism or informalism consists of three steps: (1) identifying the linguistic and historical limits of the impeachment clauses, (2) understanding how the Constitution may accommodate innovations and deviations from the allocation of powers within the Constitution, and (3) understanding what the interpretation of the impeachment clauses suggests about constitutional interpretation in general.

The first step in interpreting the impeachment clauses is to identify the limits of what logically defines the contexts of those clauses -- language and history. Unfortunately, the Constitution offers very few self-defining [*42] clauses. The language in the Constitution often raises but fails to answer questions about the scope of a provision. n194 Consequently, commentators frequently face the formidable task of resolving ambiguities, gaps, or conflicts in constitutional language or structure. n195 Commentators may not be confined

by particular constitutional language, but they are confined to the language. For example, interpreting the constitutional language "other high Crimes and Misdemeanors" requires looking outside the Constitution itself for definition, but that search is limited to the clarification of those particular terms. To identify which concepts are consistent or compatible with particular constitutional language, commentators may turn to history, which, within certain limits, provides a perspective to aid in understanding constitutional provisions -- such as the impeachment clauses -- that do not explain themselves to the modern commentator. Although the meaning of "other high Crimes and Misdemeanors" is not readily apparent, history helps provide a frame of reference that gives the phrase meaning. The goal is to use history not as an end in itself but only as an additional guide in the search for the meaning of an ambiguous constitutional provision.

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n194. See, e.g., id. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); id. art. I, § 3, cl. 3 ("No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); id. art. II, § 1, cl. 1 ("[The President] shall hold his Office during the Term of four Years . . . ."). But see id. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States."); id. art. I, § 8, cl. 18 ("The Congress shall have Power [:] . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). Compare M. TUSHNET, supra note 18, at 68-69 (on the defects of textualism) with Schauer, supra note 191, at 408-10 (on finding an "easy case").

n195. See supra note 167.

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The first step also requires identifying the limits to our knowledge of the meaning of the impeachment clauses. On the one hand, certain aspects of impeachment are beyond reasonable dispute. For example, the language of the impeachment clauses suggests that impeachment is a hybrid of both civil and criminal proceedings: the House and the Senate have separate responsibilities regarding impeachment, there are unique punishments for impeachments, only certain officials in the federal government are impeachable, and there is a set of offenses that are not self-defining but may nevertheless serve as the bases for impeachments. In addition, it is undisputed that the First Congress sought to automatically disqualify, through the Act of 1790, any federal judges convicted of bribery. Such an enactment suggests that at least under certain circumstances n196 [*43] the First Congress did not regard impeachment as the sole means of removing federal judges. It is also largely undisputed that Constitutional Convention delegates, primarily concerned with removal of the President through impeachment as opposed to removal of any other officers of the United States, proceeded as if impeachable offenses were not limited to

indictable offenses. Further, the delegates regarded the Senate as the appropriate body to conduct removal trials because of its purportedly unique capabilities to appreciate the political implications of impeachments and to deliberate carefully on important political issues.

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n196. It may be constitutional for Congress to combine its powers under the necessary and proper clause and the impeachment clauses to disqualify federal judges once they have been convicted of bribery. See R. BERGER, supra note 14, at 150-53.

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On the other hand, the impeachment clauses virtually defy systematic analysis, because the framers designed impeachment primarily as a political proceeding but did not address all the issues now raised under these clauses. Neither the delegates at the Constitutional Convention nor the ratifiers definitively addressed whether impeachment is the exclusive means of removing federal judges, which specific procedures should be followed during impeachment hearings and trials, whether nonindictable offenses should be included as impeachable offenses, whether impeachments of federal judges must precede their prosecutions and imprisonment, and whether an official may be impeached even after resignation from office. The interpretive problem that remains is to determine what to do once language and history have been exhausted or demonstrated as inconclusive.

The second step in interpreting the impeachment clauses is to understand how the Constitution may accommodate innovations to or deviations from the Constitution's allocation of powers. This step consists of two parts. First, commentators should identify those aspects of our constitutional separation of powers scheme that are immutable in the absence of constitutional amendments. Second, commentators should define and explain how the three branches of government may deal with the mutable aspects of separation of powers.

In defining the immutable aspects of separation of powers, one should remember that separation of powers is a subset of checks and balances, a system that limits the three branches to their assigned responsibilities so that no branch may grow too powerful or infringe on individual liberties. n197 The actual scheme of checks and balances in the [*44] Constitution, however, is incomplete. History reveals that the framers defined the checks and balances for each branch of government only at its apex. The framers left the task of structuring the lower parts of branches to subsequent generations because they understood that the demands on government would change over time and realized that an immutable structure of government from top to bottom would hinder progress. n198

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n197. See, e.g., Ervin, supra note 21, at 113-19 (claiming that the essence of the doctrine of separation of powers is a part of the framers' plan for balanced government); Shartel, supra note 10, at 893-94 (arguing that the framers intended impeachment to be a legislative check on other branches of the government).

n198. See Koukoutchos, Constitutional Kinetics: The Independent Counsel Case and the Separation of Powers, *23 WAKE FOREST L. REV. 635, 666-67 (1988)*.

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Any deviations from the immutable allocation of powers within the Constitution are plainly unconstitutional. Not surprisingly, the major debates in separation of powers cases are over the scope of the so-called immutable allocation of powers within the Constitution. n199 The three branches may, however, tinker with the mutable aspects of separation of powers. Any deviations from the Constitution's mutable allocation of power are not unconstitutional per se; they do, however, raise the question whether they should be treated with a presumption of constitutionality by the other branches.

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n199. When the Supreme Court finds that the Constitution forbids an encroachment by one branch on the powers of another, it does not hesitate to forbid the encroachment. See, e.g., *Bowsher v. Synar, 478 U.S. 714, 734 (1986)* (holding that Congress could not hold the power of removal except by impeachment over an officer exercising purely executive functions); *INS v. Chadha, 462 U.S. 919, 959 (1983)* (holding that Congress violated the presentment and veto clauses of the Constitution in enacting a one house veto over the decision of an executive officer); *Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 76 (1982)* (holding that Congress could not assign article III powers in the Bankruptcy Act to judges who did not have life tenure and protection against salary diminution); *Buckley v. Valeo, 424 U.S. 1, 143 (1976)* (holding that Congress violated the appointments clause when it retained the power to appoint members of the Federal Election Commission); *Myers v. United States, 272 U.S. 52, 176 (1926)* (holding that Congress could not condition the removal of a purely executive officer without violating the appointments clause). However, when actions are not specifically forbidden in the Constitution or do not impinge upon the ability of a branch to carry out its constitutionally assigned functions, the Court will uphold the constitutionality of the action. See, e.g., *Morrison v. Olson, 108 S. Ct. 2597, 2611 (1988)* (holding that Congress could delegate appointment of an independent counsel to the judiciary since the counsel was a minor official and the removal power remained to a significant degree within the executive branch, thereby not seriously impinging upon the power of the President to carry out his constitutionally assigned functions); *United States v. Nixon, 418 U.S. 683, 713 (1974)* (holding that the President could not claim executive privilege over nonmilitary and nondiplomatic documents without impinging upon the powers of the judiciary under article III and criminal defendants under the sixth amendment); *Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935)* (holding that Congress could place conditions on the removal power of the President when the officer performed quasi-legislative and quasi-judicial functions).

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Congressional innovation with constitutionally mutable allocation of power is not boundless, because innovation may still violate values or principles that the original allocation of powers was structured to protect and preserve. For example, assuming arguendo that impeachment is not the sole constitutional means

for removing federal judges, any other means for such removal must still preserve both individual and collective [*45] judicial independence -- the goals of the constitutional guarantees of life tenure and undiminished compensation for federal judges. n200 Consequently, congressional innovations with the Constitution's mutable allocation of powers should be entitled to a presumption of constitutionality. This presumption may be rebutted only when the congressional deviation from the mutable checks and balances contravenes values or principles that the original structure was erected to protect. n201 This approach allows for deference by the President and the judiciary to the constitutional interpretations of Congress and for experimentation in government precisely where the innovation does not undermine values or principles that the original checks and balances were erected to protect. A rebuttable presumption of constitutionality avoids constitutional inertia by preventing the structure at the top from blinding constitutional interpretation to the realities of government and to the possibilities of change not envisioned or addressed by the framers but still consistent with their handiwork. Finally, the presumption avoids unbounded congressional deviations by delineating the outer limits of permissible tinkering with the structure of government short of the amendment process.

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n200. See infra notes 274-91 and accompanying text.

n201. See generally Strauss, Formal and Functional Approaches to Separation-of-Powers Questions -- A Foolish Inconsistency?, *72 CORNELL L. REV. 488, 492, 499 (1987)* (focusing on the overall framework of relationships between branches of government, rather than on particular relationships, because administrative agencies perform all three constitutional functions); Strauss, The Place of Agencies in Government, Separation of Powers and the Fourth Branch, *84 COLUM. L. REV. 573, 667 (1984)* (same).

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The third step in interpreting the impeachment clauses is to understand what, if anything, such interpretation suggests about constitutional interpretation in general. Interpreting the impeachment clauses demonstrates the limits of superimposing certain theories on particular constitutional provisions. Common sense suggests that before manipulating a particular constitutional provision to fit a particular theory of constitutional interpretation, it is better first to assess whether a particular constitutional provision is compatible with any preexisting theory of constitutional interpretation. If a theory does not fit or cannot explain the nuances of a particular constitutional provision, then that theory should not be used to explain that particular provision. Commentators should interpret each constitutional provision on its own terms, recognizing the provision's particular historical and structural contexts. Such contextual interpretation requires the use of different techniques to interpret different constitutional provisions. n202 Although this methodology [*46] will not make constitutional interpretation as predictable or as easy as it is under a theory attempting to organize the entirety of constitutional law, the virtue of this approach is that it reduces the possibilities of distortion or manipulation through constitutional interpretation by treating constitutional provisions on their own terms as opposed to the terms of an unrelated or inappropriate theory. Thus, the important thing to ask with respect to each

provision of the Constitution, including the impeachment clauses, is whether there is an appropriate guiding principle for its particular interpretation.

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n202. See, e.g., C. BLACK, DECISION ACCORDING TO LAW 65-66, 71-76 (1981) (arguing that originalism will work for first amendment analysis but that something more is needed for privacy and gender discrimination); J. ELY, supra note 100, at 76 (arguing that "interpretivism is incomplete: there are provisions in the Constitution that call for more"); Shiffrin, The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, *78 NW. U.L. REV. 1212, 1251-53 (1984)* (defending balancing methodology in first amendment cases); Shiffrin, Liberalism, Radicalism, and Legal Scholarship, *30 UCLA L. REV. 1103, 1211 (1983)* (arguing that the "wisdom" of judicial balancing requires that legal scholars expose complexity and "clarify intuitions" in advocating accommodation of diverse values). But see M. TUSHNET, supra note 18, at 182-87 (criticizing balancing as failing to restrain judicial tyranny, as providing no criteria by which to evaluate judicial decisions, and as allowing the worst political decisions to be validated).

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IV. Making Sense of Impeachment

A. The Nonexclusive Nature of Impeachment as a Means of Removal

Perhaps the single most troublesome question under the impeachment clauses is whether impeachment is the exclusive means for removing "all Civil Officers of the United States," n203 including federal judges. This question raises a series of interrelated problems. First, which federal officials may be impeached? While it is clear that the constitutional provision that "all Civil Officers of the United States" includes the President and federal judges, commentators split on whether this provision also includes legislators. n204

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n203. U.S. CONST. art. II, § 4.

n204. See, e.g., R. BERGER, supra note 14, at 215 n.10, 220-23 (arguing that legislators may be impeached but not for their legislative acts); Rotunda, supra note 13, at 715-16 (arguing that the term "all civil Officers" excludes only military officers and, therefore, that "judges, . . . legislators and all executive officials, whether in 'the highest or in the lowest departments' of the national government, are subject to impeachments" (quoting J. STORY, supra note 72, § 402, at 285-86)). But see L. TRIBE, supra note 13, at 290 (concluding without any supporting citation that members of Congress are not civil officers of the United States).

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The second problem is to determine the extent to which other branches' powers to discipline and remove their members should influence whether the judiciary should be able to discipline and remove its own members. To answer this

question, one must determine whether the basis for allowing the other branches to discipline and remove their officers is equally applicable to the judiciary. This inquiry should help to illuminate the constitutionally permissible ways for removing impeachable [*47] officials, particularly with respect to the exclusivity of impeachment as a means of removing federal judges.

Interestingly, the judiciary has the least power of any of the three branches to discipline and remove its own members. n205 The Constitution expressly grants Congress the power to expel its own members. n206 Although the Constitution provides for impeachment and removal of certain federal officials by Congress, there is little doubt that officers without life tenure may be removed in other ways. For example, under the doctrine of Myers v. United States n207 and Humphrey's Executor v. United States, n208 the President, incident to his power to appoint and to his constitutional duty to faithfully execute the laws, may remove subordinate officers who perform executive functions and who are also subject to impeachment. Other executive or quasi-executive officers who are not appointed by the President are removable by the person or agency n209 entrusted with their appointment, subject to the regulations of Congress. n210

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n205. See Note, The Exclusiveness of the Impeachment Power Under the Constitution, *51 HARV. L. REV. 330, 332 (1937)*.

n206. "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5, cl. 2.

n207. *272 U.S. 52 (1926)*.

n208. *295 U.S. 602 (1935)*.

n209. [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

U.S. CONST. art. II, § 2, cl. 2.

n210. See *Humphrey's Ex'r, 295 U.S. 602, 629; Reagan v. United States, 182 U.S. 419, 425 (1901); United States v. Perkins, 116 U.S. 483, 485 (1886)*.

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The third problem is whether any deviation from the Constitution's explicit procedure for removing federal judges by impeachment violates the principles or values the procedure was erected to protect. This problem underscores the system of checks and balances as the context for discussions regarding removal of federal judges. To evaluate the permissibility of deviation, one must understand how the allocation of removal power within and between certain branches relates to the protections that the allocation was intended or structured to achieve. The constitutional allocation of removal power is a critical element of the structural relationships established by the Constitution

to protect certain values or functions; therefore, any deviation from the structure erected by the Constitution, including a deviation in the removal power, implicates what the structure was designed to protect.

The fourth problem is explaining the proper relationship between [*48] the constitutional provisions governing the impeachment process and the constitutional clause concerning judges' good behavior. n211 The question is whether the provision that federal judges "shall hold their Offices during good Behaviour" n212 merely defines the length of their tenure or creates an additional basis for removal. Analyzing the good behavior clause also leads to an evaluation of the constitutionality of the Judicial Disability Act, which empowers judges to monitor other judges for possible impeachable offenses and, thereby, raises questions about whether such innovations in the impeachment procedure violate separation of powers.

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n211. See U.S. CONST. art. III, § 1.

n212. Id.

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If impeachment is the exclusive means for removing federal judges, then a fifth problem arises: whether indictment, prosecution, and imprisonment of sitting federal judges may precede an impeachment, even though such practices may be tantamount to removal. This problem requires determining whether federal judges are entitled to special immunity from criminal prosecution unless and until they are removed from office by impeachment.

1. The Limits of Analogizing Legislative and Executive Removal Power to Judicial Removal Power. -- In determining whether impeachment is the exclusive means for removing federal judges, one must first understand whether impeachment serves different purposes, depending upon the officials against whom the power is exercised. The first step in this analysis is to determine which officials are subject to impeachment. The major difficulty presented by the constitutional provision making "all Civil Officers of the United States" subject to impeachment is whether it includes legislators as well as the President and all federal judges. This interpretive problem, however, rarely receives serious attention from scholars. For example, Professor Ronald Rotunda relies on an unexplained citation to Justice Story to support his otherwise bald assertion that all executive officials, federal judges, and legislators are impeachable, n213 whereas Professor Laurence Tribe makes the contrary assertion without any explanation or support. n214

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n213. See Rotunda, supra note 13, at 716 & nn.39-40 (suggesting that only military officers are excluded from the term "civil officers" and, therefore, that legislators may also be impeached (citing J. STORY, supra note 72)); see also R. BERGER, supra note 14, at 215 n.10 (suggesting that the use of "civil Office" in article I, section 6 was intended not to exclude members of Congress from the scope of that phrase but to draw a line that would bar members of other governmental branches from membership in Congress).

n214. See L. TRIBE, supra note 13, at 290.

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Three clauses of the Constitution suggest that legislators are not officers of the United States and are, therefore, not subject to removal by [*49] impeachment. First, article II, section 3 provides that the President is to commission "all the officers"; and members of Congress are obviously not so commissioned. n215 Second, article I, section 6 -- the incompatibility clause -- provides that "no Person holding any Office under the United States, shall also be a Member of either House during his Continuance in Office." n216 This clause suggests that legislators and officers of the United States are mutually exclusive for constitutional purposes. Third, article I, section 5 provides that "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members . . . . Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." n217 It would have been illogical for the framers to have given Congress two separate methods to expel its own members. n218 Therefore, the expulsion power given to Congress seems to be the congressional analogue to impeachment for the purpose of removing its own members.

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n215. In pertinent part, the President "shall Commission all the Officers of the United States." U.S. CONST. art. II, § 3.

n216. U.S. CONST. art. I, § 6.

n217. Id. art. I, § 5.

n218. But see Rotunda, supra note 13, at 717 (discussing the impeachment proceeding against former Senator William Blount in 1797). Senator Blount's lawyer argued that no jurisdiction existed, because the Senate had already expelled Blount for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator." Id. Nevertheless, the House still impeached him. Although the Senate ultimately dismissed the charges against Blount, it is unclear whether dismissal occurred because there was no jurisdiction or because no impeachable offense existed even if jurisdiction had existed. See id.

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The expulsion power of Congress over its own members also provides important insights into the limits of relying on an analogy to congressional or presidential power to remove members within a branch as the basis for arguing for judicial power to remove judges. First, if legislators are not impeachable officers, then the fact that Congress has the power to expel its own members sheds no light on the propriety of allowing judges to remove other judges. The Constitution grants the federal government only one method for the removal of legislators. Therefore, the relevant inquiry, addressed in the next section, is whether the reasons for granting the President power to remove impeachable officials within the executive branch apply to the federal judiciary.

Second, one may infer that if the framers intended members of one branch to have the power to remove other similarly situated or equally powerful members within the same branch, then the framers would have made this desire explicit. The most that the power of Congress to expel its own members suggests is that Congress may discipline its members through a procedure analogous (but not identical) to impeachment. Explicitly [*50] granting Congress expulsion power further suggests Congress would not have this power absent a constitutional grant. Similarly, the absence of any grant of expulsion power to the judiciary at least raises the inference that federal judges do not have an impeachment-like power to remove each other because the Constitution fails to grant this power. The President's removal power extends to subordinates, who help the President to discharge constitutional duties; n219 however, in a branch without unified power, each official wields the same power as every other member of the branch. In such nonunified branches, the Constitution appears to grant monitoring power only explicitly. In short, the framers may have felt that a grant of such removal power to some members of Congress over equally powerful members of the same branch was so unusual and potentially divisive that it required explicit language.

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n219. See *Myers v. United States, 272 U.S. 52, 119 (1926).*

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Third, judges differ from the President, Congress, and other members of their respective branches, because only the judiciary has life tenure. Of course, life tenure alone does not suggest that federal judges are removable only by impeachment. It does suggest, however, that federal officials with radically different tenure from the President and members of Congress may well have to be treated differently for removal purposes. The question is whether popularly elected and life-tenured officials should be treated the same under the Constitution for purposes of removal. In other words, do the differences in selection and tenure of popularly elected and life-tenured officials support exclusivity of impeachment as a means of removing federal judges? The answer, spelled out in the next section, suggests that allowing federal judges to remove themselves or even to participate formally in the process of removal would most likely undermine the Constitution's attempts to make judicial status unique.

2. Separation of Powers, Removal, and the Exclusivity of Impeachment as a Means of Removing Executive Officials. -- Understanding removal power, wherever it may be located, requires an understanding that it may be the most critical element of the separation of powers. Whoever exercises the power to remove may also have control over the actions of the officials subject to that power. The impeachment power of Congress arguably enables it to exercise extraordinary influence over the President, federal judges, and certain other officials. Similarly, the President's ability to remove executive officials enables the President alone to direct them in the exercise of their executive functions. The specter raised by [*51] allowing federal judges to remove other federal judges is that such removal power may include the potential to control the exercise of article III judicial power.

From a separation of powers standpoint, a major difficulty with allowing the federal judiciary to remove its own members is fashioning a principled approach

to innovations or deviations in the allocation of the removal powers, including impeachment, set forth in the Constitution. If congressionally enacted deviations from the Constitution's explicit structure are treated with a presumption of constitutionality, rebuttable only if the deviation violates the value or principle the structure was erected to protect, then removal as well as the role of impeachment within the context of separation of powers makes surprising sense.

The presumption in favor of constitutionality serves two purposes. First, the presumption is not a device to undermine the Constitution by making it easier for Congress to aggrandize itself at the expense of the other branches or, more particularly, to gain an undue advantage over the other branches on questions regarding the separation of powers. n220 Rather, the presumption allows Congress some flexibility in interpreting the Constitution as an inevitable aspect of the discharge of its own constitutional duties. The authority and competence of Congress to engage in constitutional interpretation is supported by the constitutional requirement that members of Congress take the same oath as the judiciary, n221 and by the ability of Congress to engage in fact-finding central to constitutional decision making and determinations of judicially unreviewable political questions, and the special resources available to congressional committees and individual congressmen. n222 Whether Congress is proficient at constitutional interpretation is a separate question from whether Congress must, at least occasionally, render an interpretation. n223

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n220. The argument is that the presumption makes it too easy for Congress and the federal courts to manipulate and undermine the Constitution's original allocation of powers.

n221. In pertinent part, article VI states: "The Senators and Representatives . . . and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ." U.S. CONST. art. VI, cl. 3. As specified by statute, members of Congress

solemnly swear . . . [to] support and defend the Constitution of the United States against all enemies, foreign and domestic; [to] bear true faith and allegiance to the same; [to] take this obligation freely, without any mental reservation or purpose of evasion; and [to] well and faithfully discharge the duties of [their] office.

5 U.S.C. § 3331 (1982). See also Fisher, Constitutional Interpretation by Members of Congress, *63 N.C.L. REV. 707, 718-722 (1985)* (arguing that the oath of office members of Congress must take is partial evidence of the authority and competence of members of Congress to interpret the Constitution).

n222. See Fisher, supra note 221, at 718-22.

n223. See Mikva, How Well Does Congress Support and Defend the Constitution?, *61 N.C.L. REV. 587, 590 (1983)* (arguing that Congress does not have the institutional and political capacity to engage in the same kind of intensive and thorough constitutional deliberation as federal courts).

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[*52] Second, the presumption preserves judicial review, which is the judiciary's power to measure the consistency and compatibility of congressional enactments with the language, spirit, and structure of the Constitution. The major difficulty with judicial review is conceding Chief Justice John Marshall's pronouncement in Marbury v. Madison n224 that federal judges have a broad constitutional power to interpret the Constitution, n225 and that the other two branches are also charged as a practical matter with interpreting the Constitution in discharging their own particular constitutional duties. Members of the judiciary are not necessarily any more qualified, gifted, or knowledgeable than Congress or the President to say what the Constitution means. n226 History suggests, contrary to Justice Jackson's assertion that Supreme Court justices "are not final because [they] are infallible, but [they] are infallible only because [they] are final," n227 that no one branch has any final say regarding the meaning of the Constitution. n228 As a practical matter, the three branches frequently engage in dialogues regarding constitutional interpretation. n229 As this dialogue unfolds, each branch inevitably tries to aggrandize itself at the expense of the other branches. An effective way to guard against judicial aggrandizement (or judicial tyranny) and to protect judicial review is the use of a presumption that requires the judiciary to respect congressional innovations in the allocation of powers unless those innovations violate what the structure was erected to protect. n230 The political question doctrine may serve the same ends by requiring the Supreme Court to abstain from interfering with or answering questions entrusted to the sole discretion of some other branch.

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n224. *5 U.S. (Cranch) 137 (1803)*.

n225. See *id. at 162-68*.

n226. See M. TUSHNET, supra note 18, at 112, 147, 160, 164-66. James Madison stated:

[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.

THE FEDERALIST NO. 51, at 321-22 (J. Madison) (C. Rossiter ed. 1961).

n227. *Brown v. Allen, 344 U.S. 443, 540 (1953)* (Jackson, J., concurring).

n228. See Fisher, supra note 221, at 746.

n229. See id.

n230. See supra note 200 and accompanying text.

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The Supreme Court most recently explored the relationship between impeachment and presidential removal power in Morrison v. Olson. n231 In [*53] upholding the constitutionality of the Independent Counsel Act, n232 the Supreme Court did not adhere to a notion of unalterable, strict separation of powers that arguably dominated the Court's decisions in certain significant separation of powers and removal cases from the early twentieth century through the 1980s. n233 Instead, demonstrating deference to congressional deviations from the separation of powers set forth in the Constitution, the Court balanced the important purposes underlying the Independent Counsel Act against what the Court perceived as the inconsequential inroads the Act made on presidential control over prosecutions.

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n231. *108 S. Ct. 2597, 2599 (1988)*. Morrison involved an investigation of Theodore Olson, by Independent Counsel Alexia Morrison, former head of the Office of Legal Counsel in President Reagan's Justice Department. Ms. Morrison had been duly appointed Independent Counsel pursuant to the Independent Counsel Act to investigate whether Olson had perjured himself before a House subcommittee investigating the Justice Department's role in a decision by the Administrator of the Environmental Protection Agency to withhold certain documents regarding the Agency's enforcement of the Superfund statute (Comprehensive Environmental Response, Compensation, and Liability Act of 1980, *42 U.S.C. § 9601-9675*) (establishing complex legislation authorizing the federal government to investigate, enforce, and supervise the cleanup of the most dangerous toxic waste sites in the United States) on the basis of executive privilege. During Independent Counsel Morrison's investigation, Olson refused to comply with certain subpoenas from the Independent Counsel partly on the basis that the Independent Counsel Act itself was unconstitutional.

n232. Ethics in Government Act, *28 U.S.C. § 591-599* (Supp. V 1987). The Act was first enacted in 1978 and has been reenacted twice, most recently in 1987. See Independent Counsel Reauthorization Act of 1987, P.L. 100-191, 101 Stat. 1293 (1987).

The constitutional challenges to the Independent Counsel Act turned on the Act's operation. Passed in the aftermath of the Watergate scandal, Congress designed the act to allow an independent counsel to prosecute certain high-level executive branch officials. The act is triggered "whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law." *28 U.S.C. § 591*(a) (Supp. V 1987). The enumerated officials include the President, the Vice President, the Attorney General, assistant attorneys general, various people working in the Executive Office of the President, the director and deputy director of the Central Intelligence Agency, and the Commissioner of Internal Revenue. See id. § 591(b).

If the Attorney General finds "no reasonable grounds to believe that further investigation is warranted," id. § 592(b)(1), the matter is terminated. If the Attorney General conducts such an investigation and finds "reasonable grounds to believe that further investigation is warranted," id. § 592(c)(1)(A), then the Attorney General must apply to a special district court to appoint a special prosecutor. The special court is also authorized to define the prosecutorial jurisdiction of the special prosecutor. The special prosecutor in turn has

"with respect to all matters" in his or her "prosecutorial jurisdiction . . ., full power and independent authority to exercise all investigative functions and powers of the Department of Justice [and] the Attorney General." Id. § 594(a). The special prosecutor may be removed by impeachment or by the Attorney General "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." Id. § 596(a)(1).

n233. See *Bowsher v. Synar, 478 U.S. 714, 726 (1986)* (holding that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment"); *INS v. Chadha, 462 U.S. 919, 948-51 (1983)* (holding that Congress could not bypass the constitutional requirement of a bicameral veto by reserving a unicameral veto over the decisions of an agency of the executive branch); *Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935)* (holding that Congress could limit for good cause the President's power of removal of an official of a quasi-judicial, quasi-legislative agency); *Myers v. United States, 272 U.S. 52, 107 (1926)* (holding that Congress could not participate in the removal of a postmaster, an executive official).

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Morrison is significant for at least two reasons. n234 First, it gave the [*54] Court a rare opportunity to comment on the role of impeachment. Since no court has permitted judicial review of an impeachment, the Supreme Court has had few opportunities to interpret the impeachment clauses. n235 Second, and even more important, the Court adopted an informal approach to the separation of powers cases that may simplify and clarify the analysis applicable to future disputes between the branches regarding congressional innovations in separation of powers.

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n234. Morrison is also significant for other reasons, including but not limited to its discussion of "inferior officers" for purposes of appointments pursuant to the appointment clause. The Court held that Morrison was an "inferior" officer because (1) she was subject to removal by a higher executive branch official (the Attorney General), (2) she was confined to limited duties (the investigation and prosecution of a certain executive branch official), (3) her office was limited in jurisdiction (only to certain officers and as specifically instructed by the special court), and (4) her office was limited in duration (only as long as the investigation and prosecution necessitated). *Morrison, 108 S. Ct. at 2608-11.*

n235. See, e.g., *Ritter v. United States, 84 Ct. Cl. 293, 300 (1936)*, cert. denied, *300 U.S. 668 (1937)* (dismissing suit of a judge who contended that the Senate had tried him for nonimpeachable offenses: "the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final").

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The Court in Morrison addressed impeachment because the Solicitor General argued, inter alia, that the Independent Counsel Act is unconstitutional because it enables Congress to assert pressure on the President -- pressure that the

Constitution permits only through the impeachment power. n236 According to the Solicitor General, the Act was a congressional [*55] attempt "'to bypass the impeachment process that the Framers designed to [ensure] that high officers of government could be investigated and removed from power.'" n237 In the same vein, Justice Scalia remarked "[h]ow much easier for Congress, instead of accepting the political damage attendant to the commencement of the impeachment proceedings against the President on trivial grounds . . . simply to trigger a debilitating criminal investigation of the Chief Executive under this law." n238

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n236. In fact, Olson, the Reagan Justice Department, and several amici directed five major arguments against the Independent Counsel Act. First, they argued, the Act deprived the President of supervisory authority over inherently executive functions. They argued that prosecution is a core element of the President's constitutional duty to enforce the laws faithfully. Without the ability to control all prosecutions, the President is essentially stripped of critical article II powers and hindered in discharging his constitutional duty. They argued further that this defect was not eliminated by the Act's grant of authority to the Attorney General to conduct an investigation and to request appointment of a special prosecutor assuming the existence of a reasonable ground for further investigation.

Second, Olson and others argued that the Act impermissibly interjected the judiciary into the performance of executive functions. According to the Act's critics, the case-or-controversy requirement of article III necessarily excludes any general judicial authority to supervise the execution of the laws. Olson and others argued that the Act itself contravened this limiting principle by assigning to the special court the power to demand from an independent counsel an accounting of his conduct in office, to determine whether the counsel has completed the assigned duties, and, most importantly, to assign the special prosecutor duties in the first place through the nonjudicial acts of defining or redefining the jurisdiction or of assigning new matters to investigate.

Third, those challenging the Act argued that the Act impermissibly granted supervisory authority over executive functions to the legislative branch. Given that the Constitution, with few explicit exceptions, grants Congress only the authority to legislate upon specified subjects, they argued that the Act's provisions granting the House and the Senate Judiciary Committee a role in the initiation of the independent counsel process, as well as requiring independent counsel to report to Congress and to cooperate with congressional oversight, impermissibly assigned an executive role to Congress.

Fourth, Olson and others argued that the appointment of an independent counsel by a court violated both the appointments clause and the separation-of-powers principles it embodies. On the one hand, they argued that the Act's appointment procedure violated the appointments clause because the court's appointment of the independent counsel is permissible only if the counsels are "inferior officers," which, they argued, they are not. The major reason counsels are not inferior officers is that they have no superior. On the other hand, those opposing the Act argued that even if independent counsels could be classified as inferior officers it would not necessarily follow that their appointment properly could be vested in a court. They referred to the Court's earlier decision in *Ex Parte Siebold, 100 U.S. 371 (1879)*, suggesting

that congressional decision to vest the appointment power in the courts would be improper if there were some "incongruity" between the functions normally performed by courts and the performance of their duty to appoint. See *id. at 398*. They argued that the appointment clause's proviso that the appointment of inferior officers be vested "in the Courts of Law" should not be construed to contradict the framers' admonition that the separation of powers would be compromised if the other branches could appoint executive officers. See *id. at 397-98*.

Lastly, Olson and others argued that the statutory provisions concerning the removal of independent counsels impermissibly interfered with executive prerogatives. First, the opponents argued that the Act unconstitutionally restricted the President's removal power, reasoning that an unfettered removal power is the essential trump card that enables the President to maintain sway over those executing the laws. *Myers, 272 U.S. at 122*. Second, the opponents argued that the Act vested the judicial branch with unprecedented removal powers over an executive officer, reasoning that legislation placing removal power over executive officials outside the executive branch creates subservience to the court making the appointment and, thus, creates a serious separation of powers problems. One such problem is that the independence of the executive branch is seriously undermined by allowing another branch to have the potential of using removal power to thwart the execution of executive powers.

n237. Brief of the United States as Amicus Curiae Supporting Appellees 47, *Morrison, 108 S. Ct. at 2597* (No. 87-1279), quoted in Koukoutchos, supra note 198, at 710.

n238. *Morrison, 108 S. Ct. at 2630* (Scalia, J., dissenting).

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Characterizing the Act as an illegitimate bypass of the impeachment process, however, is inaccurate for three reasons. First, Congress has no power under the Act to "trigger" an investigation by a special prosecutor. n239 The Act gives the Attorney General unreviewable discretion to deny any request by Congress to initiate an investigation. n240 Indeed, Congress has the same power under the Act to request an investigation by the Attorney General as it would have in the absence of the statute to informally pressure the Attorney General to commence an investigation. In addition, although the Act requires that the special prosecutor turn over evidence that Congress could then use as grounds for an impeachment, the Act is not an expansion of congressional power to impeach because it is merely a reporting device rather than a substitute for an impeachment proceeding.

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n239. The Judiciary Committee of the House or Senate, a majority of the majority party members of either House, or a majority of all majority party members of either such committee, may request (but not require) in writing that the Attorney General apply for the appointment of an independent counsel. See *28 U.S.C. § 592*(g) (Supp. V 1987).

n240. See id. § 592(b)(1).

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Second, the provisions in the Act authorizing investigation and prosecution of impeachable executive officials are neither novel nor unique. Federal prosecution of impeachable officials within the executive [*56] branch did not begin with the Independent Counsel Act. Federal prosecutors in the Department of Justice have prosecuted impeachable officials for years. In addition, prior to enactment of the Independent Counsel Act, the President and the Attorney General frequently named special prosecutors pursuant to regulations or statutes that put constraints on the President's removal powers. n241 In short, the Independent Counsel Act does not interfere with the impeachment process any more than "these more mundane law enforcement regimes," n242 whose constitutionality has never been seriously challenged.

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n241. See Koukoutchos, supra note 198, at 711 & nn.430-31 (noting prosecutions of two former Attorneys General, federal judges, and the ABSCAM prosecution of legislators); see also Government and Gen. Research Div., Congressional Research Serv., Library of Congress, Historical Uses of a Special Prosecution: The Administrations of Presidents Grant, Coolidge and Truman (Nov. 23, 1973) (D. Logan) (unpublished manuscript on file with the Texas Law Review) (discussing the St. Louis Whiskey Ring and Teapot Dome prosecutions and the scandal-induced prosecutions of various officers of the Reconstruction Finance Corporation and the Internal Revenue Bureau).

n242. Koukoutchos, supra note 198, at 711.

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Third, the Independent Counsel Act and impeachment are not directed at the same class of individuals. The class subject to independent counsel investigation is both broader and narrower than the class of officers subject to impeachment. The Act covers a broader range of officials than the range of officials subject to impeachment because the Act requires the appointment of an independent counsel to investigate former senior administration officials, senior officials of the President's political campaign, and any other person with respect to whom the Department of Justice has a conflict of interest. Conversely, only certain high-ranking executive officials are impeachable. The scope of the Act is narrower in the sense that, absent an extraordinary finding of a conflict of interest, it does not apply to the vast majority of government officers, including those in the executive branch, whereas the impeachment power by its terms applies to "all Civil Officers of the United States," including federal judges.

In addressing the separation of powers, the Court in Morrison used a balancing test to resolve the dispute between Congress and the President over the Act's usurpation of certain executive power from the President. n243 The Court focused on whether the Act's restrictions on the Attorney [*57] General's ability to remove the independent counsel unduly interfered with the President's exercise of his constitutionally designated duties and on whether the Act violated the separation of powers by limiting the President's control over the independent counsel's prosecution powers.

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n243. Significantly, the Court rejected two important constitutional challenges to the Independent Counsel Act. First, the Court rejected the argument that the special prosecutors were not inferior officers and that even if they were inferior there was an incongruity between the court's appointment power and the functions of cort. Without explaining the differences between superior and inferior officers, the Court found that the special prosecutors are inferior officers because (1) they are subject to removal by a higher executive official (the Attorney General, except in cases involving the investigation of the Attorney General); (2) special prosecutors have only limited duties under the Act, consisting primarily of investigating alleged violations of federal laws; (3) the office of special prosecutors is limited in jurisdiction; and (4) the special prosecutor's "office is limited in tenure." *Morrison, 108 S. Ct. at 2608-09*. On the other hand, the Court found that even if the special prosecutor were an inferior officer there was no incongruity in the interbranch appointment in light of the Court's earlier decision, in *Young v. United States ex rel. Vuitton, 481 U.S. 787, 793 (1987)*, allowing appointment of private attorneys by courts to investigate contempt charges and in light of congressional objective to eliminate conflicts of interest from certain investigations.

Second, the Court refused to find that article III absolutely prevented Congress from vesting certain powers to a nonjudicial nature to the courts of law. In particular, the Court observed that most of the powers given to the courts under the Act were "ministerial" in nature and did not include any supervisory power over the special prosecutor's investigation. See *Morrison, 108 S. Ct. at 2612-13*. The Court also found that the special court's ability to terminate the special prosecutor did not constitute an impermissible encroachment by the courts on executive power, because the power to terminate would only be triggered when the special prosecutors completed their duties. See *id. at 2614-15*. The Court further found that the special court's powers did not seriously threaten the traditional function of the courts to adjudicate fairly and impartially any claims arising from the investigation because the Act not only failed to give the special court jurisdiction for judicial review, but specifically prohibited the special court from exercising any power to review legal questions arising from an investigation. See *id. at 2615*.

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The Court gave three reasons why the restrictions on the Attorney General's ability to remove the independent counsel did not unduly interfere with the President's ability to discharge his constitutional duties. n244 First, the Court observed that the constitutionality of limitations on the President's removal power depends on the extent to which the limitations interfere with the President's ability to perform his constitutional duties rather than on the particular functions performed by the official subject to the removal power. n245 Second, the Court "d[id] not see how the President's need to control the exercise of [the special prosecutor's] discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." n246 Third, the Court found that the Act permitted the President to retain sufficient authority over the special prosecutor's performance by being able to remove her for "good cause." n247

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n244. See *Morrison, 108 S. Ct. at 2619-20.*

n245. See *id. at 2619.*

n246. Id.

n247. Id.

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The Court also cited two reasons for rejecting the argument that the Act as a whole violated separation of powers by unduly interfering with the constitutional role of the executive branch. First, the Court did not read the Act as aggrandizing either Congress or the judiciary at the expense of the President. n248 Second, the Court found that, in light of the President's ability to discharge the independent counsel for "good [*58] cause," the Act did not significantly interfere with the President's general constitutional duty to faithfully execute the laws or with the President's control over prosecutions. n249

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n248. See *id. at 2620-21.*

n249. See *id. at 2621.*

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The major thrust of Justice Scalia's lone dissent, as summarized by one commentator, was that he preferred that separation of powers issues be

resolve[d not through the majority's balancing test but rather] by identifying particular acts or duties as partaking of no more than one of the three characteristic powers -- legislative, executive, or judicial -- and then denouncing any blending of these powers as a corruption, not necessarily of any particular express provision of the Constitution or even the text considered as a whole, but of the spirit of the separation of powers that [he and others] perceive as animating the structure created by that document. n250

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n250. Koukoutchos, supra note 198, at 640-41.

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Relying on a construction of article II, section 1, clause 1 of the Constitution n251 as vesting all executive power in the President, Justice Scalia argued that the lower court's opinion striking down the Act must be upheld only if criminal prosecutions constitute the exercise of purely executive power and if the Act deprives the President of exclusive control over criminal prosecutions. Justice Scalia answered each of these questions in the affirmative: he described a criminal prosecution as a "quintessentially executive activity" and found that the entire purpose of the Act was to take exclusive control over certain criminal prosecutions from the President, that

is, to usurp certain purely executive power. n252

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n251. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1.

n252. *Morrison, 108 S. Ct. at 2626-27* (Scalia, J., dissenting).

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After demonstrating that the Act violated strict separation of powers, Justice Scalia turned to a critique of the Court's methodology, which he viewed as striking at the heart of the President's removal power and thereby seriously undermining the President's ability to perform his constitutional duties. Unlike the majority, he read the Court's earlier decisions in Myers v. United States and Humphrey's Executor v. United States as establishing that the President has the power to remove federal officers performing purely executive functions. According to Justice Scalia, the doctrine set forth in these cases is consistent with the framers' attempt to allow "'ambition [to] counteract ambition'" through the allocation of separate powers to each of three distinct branches. n253 He characterized the majority's decision -- allowing Congress to deprive the President of [*59] some executive power as long as the President still retained sufficient ability to perform his constitutional duties -- as failing to identify the limits of judicial or congressional interferences with the President's removal powers and, more important as failing to appreciate "what the separation of powers . . . is all about." n254

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n253. *Morrison, 108 S. Ct. at 2627* (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 51, at 322 (J. Madison) (C. Rossiter ed. 1961)).

n254. *Morrison, 108 S. Ct. at 2637* (Scalia, J., dissenting).

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According to Justice Scalia, the framers constructed strict separation of powers and unified executive power within the President to ensure "efficient government" and to protect "individual freedom." n255 Justice Scalia explained that the strict allocation of powers streamlines governmental exercise of power by ensuring that each branch knows with absolute certainty the scope of its particular responsibilities and by requiring as a matter of practice that each branch perform one primary function. Justice Scalia explained that a unified executive ensures that there is uniform application of all laws and that the President, as the unified executive, is accountable for executing the laws under the Constitution. For Justice Scalia, the appropriate check on execution of the laws is not through special enforcement of the criminal law but rather through the political process, so that the President remains responsible for all decisions regarding prosecution or nonprosecution. Based on his view of separation of powers, Justice Scalia rejected the balancing test the majority used to uphold the Act as an exercise of its own ad hoc judgment. According to Justice Scalia, the majority's unpardonable and unjustifiable error was its rejection of the framers' judgments to vest all executive power in the President

and to allocate powers among the branches in a strict, unalterable fashion that would protect individual liberties and ensure efficient government.

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n255. Id.

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Justice Scalia's criticisms of the majority's separation of powers methodology are misplaced. n256 First, Justice Scalia overstated the novelty [*60] of the majority's use of a balancing test to address the Act's asserted threat to the presidency. The Court has applied a balancing test in a long line of separation of powers decisions, including the steel seizure case, Youngstown Sheet & Tube Co. v. Sawyer, n257 and continuing through more recent decisions upholding limitations on both presidential and judicial authority. n258 Moreover, within one year of Morrison, the Court used the same balancing test in another separation of powers decision, United States v. Mistretta, n259 to uphold the constitutionality of a congressional delegation of authority to draft sentencing guidelines and to determine the composition of and presidential removal power over the United States Sentencing Commission. n260

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n256. Justice Scalia leveled two criticisms at the majority that do have merit. First, the justices failed to stress a primary aim of the Act. In particular, the Act addressed "a fundamental, institutional conflict of interest that would otherwise undermine even the most incorruptible [President's] enforcement of the law." Koukoutchos, supra note 198, at 677. The Act sought to eliminate the appearance and the reality of conflicts of interest both motivating and hindering certain prosecutions. Such conflicts are inevitable as long as the President controls the removal of the very officers deciding whether to investigate. Unfortunately, the majority mentioned the conflicts problem only once, *Morrison, 108 S. Ct. at 2611,* and even Justice Scalia "shunned both the phrase and the problem, so that he might praise a regime wherein a presidential aide suspected of breaking the law could be assured that his conduct would be reviewed in a 'sympathetic forum . . . attuned to the interest and policies of the Presidency.'" Koukoutchos, supra note 198, at 677 (quoting *Morrison, 108 S. Ct. at 2611* (Scalia, J., dissenting)). As one commentator observed, the Act was designed to eliminate "conflicts of interest before they tainted the [presidency]" and, by doing so, facilitate rather than hinder the President's ability to execute the law. Id. at 678.

Second, the majority failed to articulate a standard for determining "inferior officers." The majority's list of the special prosecutor's attributes making her inferior are of little help to future courts trying to distinguish superior from inferior officers. For example, the majority notes that the special prosecutor's tenure is limited in duration; however, almost every arguably superior federal officer serves with limited duration. Thus, it is unclear how this attribute, among others, should be used to distinguish superior from inferior officers.

Unfortunately, the majority missed the opportunity to adopt a bright line test for making the distinction between superior and inferior officers: defining

as "inferior" any federal officer not defined in the Constitution as superior. See id. at 687. The only problem with this approach is that Congress has the power under the Constitution to make new offices, but this problem may be resolved by simply analogizing the new office to those the Constitution already treats as superior.

n257. *343 U.S. 579, 585-89 (1952)*.

n258. See, e.g., *CFTC v. Schor, 478 U.S. 833, 857 (1986)* (limiting the jurisdiction of the Commodity Futures Trading Commission to counterclaims arising from violations of the CEA or CFTC regulations); *Nixon v. Administrator of General Services, 433 U.S. 425, 484 (1977)* (placing limits on the executive branch); *United States v. Nixon, 418 U.S. 683, 713 (1974)* (placing limits on the exercise of executive privilege).

n259. *109 S. Ct. 647 (1989)*.

n260. See *id. at 659*. According to Justice Blackmun,

Justice Jackson summarized the pragmatic, flexible view of differentiated governmental power to which we are heir: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny -- the accumulation of excessive authority in a single branch -- lies not in a hermetic division between the branches, but in a carefully crafted system of checked and balanced power within each Branch.

Id. (citations omitted) (quoting *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)* (Jackson, J., concurring)).

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Second, Justice Scalia was mistaken in charging that the majority's approach in Morrison represents an unauthorized departure from the Court's arguably more rigid and formalistic approaches to separation of powers issues in INS v. Chadha and Bowsher v. Synar. Those rulings struck down statutes permitting Congress to interfere with executive functions by vetoing administrative regulations n261 or by participating in the removal of executive officers. n262 Justice Scalia read those opinions as [*61] indicating that the President retained near absolute authority over executive officers. The plain implication of this reading is that any legislation conditioning presidential removal power over executive branch personnel would be unconstitutional, including the Civil Service Act. n263 The Court, however, seems to have rejected any such reading by reaffirming and restating in Morrison the Court's earlier holding in Humphrey's Executor that inroads on presidential control over executive officers are permissible so long as they do not unduly restrict presidential power and do not involve the direct assumption of executive authority by Congress. n264

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n261. See *INS v. Chadha, 462 U.S. 919, 969 (1983).*

n262. See *Bowsher v. Synar, 478 U.S. 714, 726-27 (1986).*

n263. See *5 U.S.C.* §§ *4311*-4313 (1982) (establishing a special system for appraisal for persons in the Senior Executive Service); id. § 7542 (setting forth the procedure for removal of executive branch employees).

n264. Not only is Justice Scalia mistaken about the compatibility of the Court's analysis in Morrison with the Court's prior analyses in separation of powers cases, but there are also four reasons that support the majority's rejection of Justice Scalia's strict adherence to separation of powers cases, his understanding of the purposes underlying the structure of the executive branch, and the connection between the structure of the executive and the protection of civil liberties. First, Justice Scalia's view of separation of powers is inconsistent with the eighteenth century understanding of separation of powers. For example, Justice Scalia began his opinion by quoting article XXX of the Massachusetts Constitution, which embodied the strict separation of powers that he believed the Congress violated by taking the power to appoint a special prosecutor away from the President and giving it to the courts. This quote is consistent with Justice Scalia's view "characteristic of the mystical tradition [to] judge the manifestation [for example, the Independent Counsel Act] by the degree to which it reflects the higher reality." Koukoutchos, supra note 198, at 650. Yet the more appropriate paradigm for understanding the structure of the Constitution is the "mechanical tradition," id. at 641-42, which envisioned machinery in general and human machinery in particular as "liberating." Id. at 651. The framers' real purpose in establishing a system of checks and balances was not, as viewed by Justice Scalia, to create three hermetically sealed departments of government, but rather,

> [to] devise[] a means by which the personalities of office-holders would be the very impetus that would keep the entire apparatus moving, and . . . they left sufficient play in the joints of the machine so that its substructures could be returned without resort to the amendment process for a complete overhaul.

Id. at 653.

Justice Scalia failed, however, to acknowledge that the Constitution only reflects the framers' design of the top of the new federal government. The framers left the substructures of government to be shaped by subsequent generations so that "as times change, so must the understanding of the congressionally-created institutions that are necessary and proper for 'carrying into Execution' the powers ceded by the people to the government of the United States." Id. at 668 (footnote omitted); see also C. BLACK, supra note 13, at 2 (observing that the framers "put in place only a very general framework, leaving it to the future to fill in details, and leaving many questions open to honest difference of opinion."). The point is not to assume, as Justice Scalia seems to do, that the Constitution sets forth the limits to both the top and the substructure for the entire federal government. Rather,

> the separation of powers established by the Constitution speaks primarily, if not exclusively, to the President, not to the executive branch. The separation and equilibration of powers may well be implicated by congressional tinkering

with the organs of federal law enforcement, but the interpretive rules and standards that apply to the President, whatever they may be, do not necessarily apply with the same rigor to all the President's men.

Koukoutchos, supra note 198, at 669.

Second, there is little historical support for Justice Scalia's articulated understanding of the unified executive. In fact, history points to a different understanding. Justice Scalia does not acknowledge the large number and variety of congressional attempts prior to the Independent Counsel Act to eliminate conflicts of interest in law enforcement. For example, the First Congress addressed the problem of conflicting interests in federal law enforcement by vesting power to appoint certain "executive" officials in the courts of law. See id. at 681. Anticipating the problem of occasional conflicts of interest on the part of United States marshals appointed with the advice and consent of the Senate, the Judiciary Act of 1789 empowered the federal courts to "specially appoint" a temporary marshal whenever "the marshal or his deputy is not an indifferent person or is interested in the event of the cause." Judiciary Act of Sept. 24, 1789, ch. 20, § 29, 1 Stat. 88 (1789).

Similarly, there is little, if any, historical support for Justice Scalia's view that all executive power should be under the complete control of the President. See Koukoutchos, supra note 198, at 681. The long history of congressional control over the appointment of inferior officers also indicates that it has not at all been uncommon to find shared exercises of power below the apex of government. See id. at 692-93.

Third, there is little, if any, support for Justice Scalia's view that there should not be any presumptions of constitutionality for congressional enactments affecting presidential powers. According to Justice Scalia, Congress is not entitled to the "benefit of the doubt" in separation of powers cases because Congress is no less interested than the President in the constitutionality of its intrusions on presidential power. Justice Scalia's view on this point is wrong for two reasons. First, there is an explicit commitment in the Constitution to Congress to delegate, if it so chooses, appointment power of inferior officers to the courts of law. At the very least, this language suggests that a court of law should show some deference to congressional delegations of such appointments to the courts. Second, the Court has long operated with the understanding that congressional enactments even in the area of separation of powers should be treated with a presumption of constitutionality. See *United States v. Mistretta, 109 S. Ct. 647, 661 (1989)* (describing the flexible approach the Court has frequently used in separation of powers cases). Justice Scalia stands alone without any precedents to support his attempt to aggrandize the judiciary at the expense of Congress in a matter in which Congress itself has nothing less than explicit authority to operate under the Constitution.

Lastly, there is an odd contradiction between Justice Scalia's strict adherence to original intent in Morrison and other constitutional cases, see *Mistretta, 109 S. Ct. at 682-83* (Scalia, J., dissenting), and his critique of strict adherence to conventional legislative history in statutory interpretation cases. Cf. *Edwards v. Aguillard, 472 U.S. 578, 625-26 (1987)* (Scalia, J., dissenting). Interestingly, Justice Scalia has argued elsewhere that it is futile to identify any definitive legislative history on a particular enactment

because, for example, it is unclear how many legislators must agree on the purpose of an enactment in order to make that consensus controlling, many enactments are the product of compromise, legislators may often make statements about an enactment that are self-serving and do not necessarily reflect their real intent, and it may be difficult to distinguish real from apparent purpose. Cf. *id. at 625-26*. Justice Scalia has urged statutory construction should be restricted to the language, structure, and purpose of particular legislation, even though this inquiry requires some search into the history of legislation and, at the same time, aggrandizes the judiciary at the expense of the legislature by freeing the judiciary from confining its statutory construction to the historical context of particular legislation. Yet he never has explained how these and other problems with conventional legislative history, see *id. at 619*, are avoided in constitutional cases in which he inconsistently advocates strict adherence to the understanding of the framers as well as the language, structure, and purpose of the Constitution. See, e.g., *Mistretta, 109 S. Ct. at 683* (Scalia, J., dissenting) (arguing that Madison "would be aghast" to discover that the Supreme Court has disregarded the "carefully designed structure" of the three branches of the federal government); *Morrison, 108 S. Ct. 2597, at 2622-23, 2637-38, 2641 (1988)* (Scalia, J., dissenting) (discussing the purpose of the framers and advocating reliance on the "judgment of the wise men who constructed our system"). It seems likely that the same problems plague both legislative and constitutional historiography; Justice Scalia, however, is content to denounce them in legislative history but to ignore (or discount) them in constitutional interpretation.

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[*62] Those criticizing Morrison by relying on Bowsher and Chadha also miss an important principle that unifies the Court's removal decisions from Myers through Morrison and Mistretta. Those cases may each be explained by the principle that congressional innovations are presumed constitutional unless they violate what the structure was erected to [*63] protect. n265

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n265. See *Fullilove v. Klutznick, 448 U.S. 448, 472 (1980); Rostker v. Goldberg, 453 U.S. 57, 64 (1981)*.

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For example, in Morrison, the Independent Council Act did not violate what Justice Scalia argued the unified executive was originally structured to protect. n266 First, the Act does not undermine the Executive's central responsibility to enforce the laws uniformly. Justice Scalia failed to acknowledge the principal reason for the Act: Congress established the Act to ensure uniform application of the laws by eliminating certain conflicts of interest arising in investigations or prosecutions of high level executive officials -- conflicts that prevented the executive branch from uniformly applying the laws in those investigations or prosecutions. n267 Congress passed the Act in large part to ensure uniform application of the laws even in those sensitive situations in which high level executive personnel are investigated by their own branch.

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n266. See *Morrison, 108 S. Ct. at 2637* (Scalia, J., dissenting) (arguing that the unitary Executive was designed to preserve individual freedom). There are, however, two reasons undermining Justice Scalia's understanding of the structure of the executive branch, including what it was intended to protect. First, there is little historical support for Justice Scalia's view that all executive power was intended to be unified only in the President. From the beginning of the Republic, there has been considerable shared power among the substructures of the three branches. See *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)* (Jackson, J., concurring); THE FEDERALIST No. 47, at 300-08 (J. Madison) (C. Rossiter ed. 1961). Second, Justice Scalia overstated the extent to which the structure of the presidency was designed to protect civil liberties. As a matter of fact, courts have historically been the principal forum under the Constitution for the vindication of civil liberties. See L. BAUM, THE SUPREME COURT 167, 180-83 (1985).

n267. See *Morrison, 108 S. Ct. at 2621-22.*

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Second, the Attorney General's power under the Act to remove a special prosecutor for "good cause" n268 protects the individual liberties of those being investigated by an independent counsel. Surely there is no better cause for removal than prosecutorial misconduct that seriously threatens individual liberties. Those being investigated by an independent counsel also have their individual liberties protected under the Act in the same way as any criminal defendant: they may challenge in court the decisions of the prosecutor.

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n268. *28 U.S.C. § 596*(a)(1).

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Third, the Act does not threaten the individual liberties of the general citizenry. These liberties remain protected through the President's constitutional duties to apply the laws uniformly and to enforce the laws faithfully and through access to the courts for vindication. n269

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n269. Chadha and Bowsher may be analyzed in the same fashion. For example, in Chadha, the Court specifically held that Congress may not bypass constitutional requirements for lawmaking in order to make laws that strike down executive actions. See *Chadha, 462 U.S. at 944-45.* The main problem with the legislative veto was that in bypassing the requirements of the bicameral and presentment clauses, both of which must be satisfied in order for a congressional act to become law, Congress aggrandized itself at the expense of the President and the people. See *id. at 951, 954-55.* The reason this aggrandizement is unconstitutional is that by bypassing the constitutional structure erected for making laws, the Congress -- considered the most dangerous branch -- did not make itself accountable to either the President or the people for its actions. See *id. at 957-58.* The presentment and bicameral clauses ultimately protect the people because compliance with lawmaking

procedure signals to the people when laws have been made and when the people may begin to hold their elected representatives accountable for lawmaking actions. See *Chadha, 462 U.S. at 957* (noting that the presentment and bicameral clauses were intended to protect the people by "mandating certain prescribed steps"). If Congress may act outside constitutionally prescribed legislative procedures, then the people correspondingly have less protection from the proliferation of laws made without proper deliberation and consensus.

Similarly, in Bowsher, the Court specifically held that Congress may not delegate executive functions to an official over which Congress itself has removal power. *Bowsher, 478 U.S. at 726-27*. Through the Gramm-Rudman bill, Congress once again aggrandized itself at the expense of the President despite constitutional provisions making the President accountable to the people when he makes certain budgetary decisions. Congress simply took executive power for itself, thereby encroaching upon and arrogating to itself particular matters for which the Constitution makes the President accountable. The danger of such encroachment is that it violates the carefully designed procedure set forth in the Constitution for the resolution of budgetary matters. One central purpose of the new Constitution was to finance a national government, and the framers structured the Constitution to ensure that neither Congress nor the President have disproportionate power over budgetary decisions. See *Buckley v. Valeo, 424 U.S. 1, 122 (1976)* (describing the checks and balances created by the Constitution as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

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[*64] In summary, Morrison suggests several important lessons for the interpretation of the Constitution in general and of the impeachment clauses in particular. First, it is not a bypass of the impeachment process to establish a mechanism for special enforcement of certain criminal laws against otherwise impeachable officials as long as the mechanism is not designed to be nor operates as a substitute for impeachment and as long as Congress has no meaningful opportunity to control the prosecution process.

Second, Morrison demonstrates the limitations of constitutional historiography. Both the majority and the dissenting opinions rely on statements by the framers to support their understanding of the constitutionality of the Independent Counsel Act, n270 but such statements only take the justices so far. The majority reaches beyond such statements to rely on its readings of prior Court decisions and the structure of the Constitution, n271 while Justice Scalia tries to confine his analysis to the views of the framers and to his own reading of constitutional structure and purposes. n272 Neither opinion adequately explains the limits of the other's historiography. In addition, Justice Scalia never explains in his dissent why he does not apply his own criticisms of conventional legislative history to constitutional historiography as well. n273

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n270. See, e.g., *Morrison, 108 S. Ct. at 2610-11, 2622-23* (Scalia, J., dissenting).

n271. See *id. at 2608, 2620*.

n272. See *id. at 2637-39* (Scalia, J., dissenting).

n273. See supra note 264.

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Third, the decision demonstrates that the rationale for presidential removal of otherwise impeachable officers in the executive branch does [*65] not apply to judicial removal of judges. Although the President needs removal power to ensure uniform application of the laws, to protect the civil liberties of all citizens, and to ensure the laws are faithfully executed, the judiciary does not need removal power to discipline its own members or to discharge its particular constitutional duties.

Fourth, Morrison suggests that a balancing test may resolve disputes between Congress and the President regarding possible inroads by Congress on the President's prosecution power. This balancing test reflects deference to congressional innovations with the mutable allocation of powers set forth in the Constitution.

Finally, the decision indicates that the constitutionality of congressional innovations with mutable allocation of powers within the Constitution may be judged by whether they violate what the original allocation was structured to protect. Ultimately, it is possible to determine the extent to which impeachment is the exclusive means for removing federal judges only by determining whether allowing the federal judiciary to discipline and remove its own members in addition to or as an alternative to the impeachment procedure violates any of the fundamental principles or values the third branch was structured to protect.

3. Reading the "Good Behaviour" and the Impeachment Clauses Together.

(a) The meaning of life tenure. -- The first step in determining what the judiciary was specifically structured to protect is determining how to read the impeachment clauses in conjunction with the constitutional provision that federal judges "shall hold their Offices d ring good Behaviour." n274 Constitutional commentators have read these clauses two ways. First, some commentators maintain that the good behavior clause does not create a basis for removal other than those specified in the impeachment clauses. n275 To these commentators, the good behavior clause simply provides federal judges with the special status of life tenure. n276 These commentators then read the impeachment clauses as adding that the life tenure of a federal judge may be prematurely interrupted or ended only by removal for an impeachable offense, not misbehavior. Second, [*66] other commentators argue that the good behavior and impeachment clauses make sense only if they are collectively read as providing that federal judges may serve for life subject to removal for an impeachable offense or for having engaged in misbehavior. n277 Essentially, these commentators maintain that federal judges are subject to a loose impeachment standard because they are removable for misbehavior while all other impeachment officials are removable -- by impeachment -- only for "Treason, Bribery, or other high Crimes and Misdemeanors." n278

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n274. U.S. CONST. art. III, § 1. The phrase "during good Behaviour" appeared in various state constitutions as well as the first draft of the federal constitution. See R. BERGER, supra note 14, at 147-49, 152 n.137.

n275. See R. BERGER, supra note 14, at 159-65.

n276. See id. at 161; cf. Kramer & Barron, The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior," *35 GEO. WASH. L. REV. 455, 458-59 (1967)* (summarizing the opinions of several commentators that "[i]mpeachment is the only means by which a Federal judge can be got rid of").

n277. See, e.g., 116 CONG. REC. 11913 (1970) (statement of then-Congressman Gerald Fort, in connection with the attempted impeachment of Justice Douglas, that "an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history"); M. OTIS, A PROPOSED TRIBUNAL: IS IT CONSTITUTIONAL? 37 (1939) (asserting that "[a] judge may be impeached for any misbehavior or misconduct which terminates his right to continue in office").

n278. For example, the President and other executive officers may not be removed simply for misconduct or misbehavior; they may only be removed for having committed one of the serious impeachable offenses specified in the Constitution. See U.S. CONST. art. II, § 4.

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The major problem with the second reading of the good behavior and impeachment clauses is that it is inconsistent with the historical and structural contexts of these clauses. First, history indicates that the framers included the phrase "during good Behaviour" in the Constitution to contrast the unlimited term of federal judges with the fixed terms of the President, Vice President, and members of Congress. n279 Under the more historically accurate view of the good behavior clause, both federal judges with unfixed terms and high-level officials with fixed terms may have their terms of office ended prematurely if there is a Senate conviction for "Treason, Bribery, or other high Crimes and Misdemeanors." As one commentator explains, "no evidence exists that the framers desired to compromise the independence of federal judges by making it easier to remove them." n280

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n279. Although the Constitution provides that federal judges may serve during good behavior, the Constitution puts limits on the terms of the President and the Vice President and members of Congress: the President may serve no more than two terms of four years each and must be elected separately for each term he serves. See U.S. CONST. art. II, § 1; id. amend. XXII. The Vice President serves for only four year terms at the pleasure of the President who chooses him. See id. Members of the House of Representatives must run for re-election every two years, see id. art. I, § 2, and members of the Senate must run for re-election every six years, see id. art. I, § 3. In contrast to all of these, federal judges, once they are confirmed by the Senate, are allowed to serve for life. See id. at art. III, § 1.

n280. Rotunda, supra note 13, at 720.

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Second, there was never any serious dispute before, during, or after the Constitutional Convention about whether federal judges would have life tenure or whether life tenure was crucial to the independence of the federal judiciary. n281 At the Constitutional Convention, the framers never [*67] wavered from their desire to eliminate the problem they had experienced in the colonies of having judges who simply did what the king told them to do and who lacked the courage or latitude to do what was right or just. In article III, the framers solved this problem by giving federal judges life tenure and a guarantee of undiminished compensation, measures that the framers considered integral to preserving the judiciary's place in the new government's system of checks and balances. n282 The framers recognized that life tenure and irreducible compensation were necessary if federal judges were to have the freedom and power to exercise judicial review as intended. As Alexander Hamilton later explained, the federal judiciary should serve as a necessary bulwark against legislative aggrandizement and majoritarian tyranny. n283 The framers envisioned the federal courts as a safe haven for people trying to protect their civil liberties against actions by either the President or Congress. In short, there was never any serious question at, during, or after the Constitutional Convention that the federal judiciary's role in the new system of checks and balances was to protect the people from the excesses of other branches.

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n281. See U.S. CONST. art. III, § I. See also Garvey, Foreword: Judicial Discipline and Impeachment, *76 KY. L.J. 633, 637 (1988)* (observing that "judicial independence is first and foremost an aspect of separation of powers. The tenure and compensation provisions of Article III protect federal judges against Congress and the President, because that is where the danger lies.").

n282. See THE FEDERALIST No. 78, at 464-72 (A. Hamilton) (C. Rossiter ed. 1961).

n283. See id. at 467-70.

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The relevance of article III's guarantees of an independent judiciary and the impeachment clauses to the judiciary's removal of its members for misconduct has been vigorously debated for years. n284 The key to identifying the relevance is determining (1) whether the constitutional guarantees of life tenure and undiminished compensation protect the independence of federal judges both individually and collectively and (2) if the constitutional guarantee of independence was meant to protect judges individually, whether protecting federal judges from discipline or removal by their peers is necessary for judicial independence. The constitutional guarantees of life tenure and undiminished compensation plainly pertain to individual judges. Judicial independence must be protected from internal as well as external attack; otherwise, the external protections the judiciary enjoys could be easily undermined from within. As Judge Harry Edwards has observed, "it seems obvious that judicial independence may 'just as easily be eroded by powerful hierarchies

within the judiciary itself as by outside pressures from the legislative and [*68] executive branches of the government.'" n285

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n284. See *Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1106 & n.10 (D.C. Cir. 1985)* (Edwards, J., concurring) (discussing arguments for and against the proposition that the judiciary may constitutionally discipline its own members).

n285. *Id. at 1107* (Edwards, J., concurring) (quoting Ervin, supra note 21, at 125).

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Even though the language, structure, and history of the impeachment clauses arguably support the view that impeachment is the sole means for removing federal judges, this conclusion must somehow be squared with the Act of 1790, which automatically disqualified any federal judge convicted of bribery. The Act of 1790 aimed to achieve at least three objectives. First, it sought to streamline the Constitution's impeachment procedure by automatically disqualifying from office a judge convicted of a listed impeachable offense -- bribery. In effect, Congress tried to save itself the time and trouble of conducting impeachment trials and removal proceedings for federal judges convicted of bribery when Congress was convinced that it would have removed and disqualified such judges. Congress may streamline impeachment in this manner by combining its powers under the necessary and proper clause n286 and the impeachment clauses. n287

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n286. The necessary and proper clause provides that the Congress shall have the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8 (18).

n287. See L. TRIBE, supra note 13, at 301. Professor Tribe observed that the necessary and proper clause

remains important as an explicit incorporation within the language of the Constitution of the doctrine of implied power: The exercise by Congress of power ancillary to an enumerated source of national authority is constitutionally valid, so long as the ancillary power does not conflict with external limitations such as those of the Bill of Rights and of federalism.

Id.

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Second, in the Act, Congress partially delegated its impeachment authority to criminal juries. This delegation, however, actually worked to the advantage of federal judges. The framers took great pains to distinguish impeachment proceedings from criminal trials, n288 and Congress declared through the Act of

1790 that only federal judges found beyond a reasonable doubt to have violated the bribery laws would be automatically removed and disqualified from office. In a typical impeachment proceeding, there is no reason to believe that impeachable officials are entitled to a standard of proof as high as beyond a reasonable doubt and to a unanimous fact-finder. n289

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n288. See U.S. CONST. art. III, § 2, cl. 3.

n289. The Constitution provides for no specific burden of proof applicable to impeachment proceedings; the unusual nature of an impeachment proceeding, however, combining characteristics of both criminal and civil trials suggests that the burden of persuasion in a typical impeachment proceeding should be less than beyond a reasonable doubt. See C. BLACK, supra note 13, at 16-19.

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Third, the Act's delegation of impeachment authority is constitutional because it rests on the notion that judges are not immune from and must comply with the criminal law. The Act of 1790 did not threaten [*69] judicial independence because the Act was not directed at any essential judicial activity. Rather, the Act focused on specific criminal misconduct by federal judges. The Act did not threaten judicial independence, because it did not punish or prohibit any conduct central to the performance of a judge's constitutional obligations. The constitutional duties and responsibilities of a federal judge neither require nor necessitate any criminal misconduct. In short, the Act of 1790 demonstrated that carefully tailored legislation passed pursuant to the constitutional authority of Congress, directed at no essential judicial conduct, and preserving the independence of federal judges individually and collectively is an additional method of removing federal judges. Thus, impeachment is the traditional but not the only means for removing federal judges.

The good behavior clause meant to guarantee that federal judges receive life tenure, that they may not be removed from office under a looser standard than the President or other impeachable officials, and that they may not be removed simply for "misbehavior." Federal judges, however, may be removed from office on a different basis from other impeachable officials. The different responsibilities of various officials under the Constitution justify different reasons or bases for the impeachment and removal of those officials. n290 Impeachable offenses involve abuses against the state, but abuses against the state or serious misconduct in office are not necessarily the same for all impeachable officials. For example, a federal judge might be impeached and removed for lying about his law school performance, but an executive official probably would not be. n291 Although such behavior in a judge undermines respect for the office and the authority of the judge, the lie about law school performance does not have as serious an effect on an executive official. The differences in the officials' responsibilities and the degree to which [*70] the offensive conduct reflects a violation of those responsibilities explain the different results.

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n290. See Book Note, supra note 116, at 913-14.

n291. In 1803, District Judge John Pickering was removed from office for drunkenness and blasphemy, which the Congress found to be inappropriate for a federal judge. However, Congress has never impeached, much less removed, any executive official for such behavior. The difference may possibly be explained by the fact that such behavior (which included insanity in Judge Pickering's case) is particularly unseemly for a federal judge, who may be disciplined primarily through impeachment, while the executive official may be disciplined either by the President (who may fire him), the head of his department (if the person is not himself the head of a department), or impeachment, which is the most cumbersome of all the methods. The Senate's recent rejection of Senator John Tower as President Bush's Secretary of Defense was, no doubt, based in part on his prior history of drunkenness. See Church, Is This Goodbye? A Senate Committee Stuns Bush by Rejecting Tower's Nomination, TIME, Mar. 6, 1989, at 18. However, the Senate has an easier standard to meet for rejecting nominees than for removing officials after confirmation. Rejecting a nominee requires only a simple majority vote, whereas removing an executive official requires at least two-thirds of the members present. It is likely that had such behavior continued or manifested itself after Senator Tower had been confirmed he would have been subjected to considerable public (if not presidential) pressure to reform and remove himself that would have made use of the impeachment process unnecessary.

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(b) The constitutionality of alternatives to impeachment for removing federal judges

(i) Chandler. -- Even though the Act of 1790 suggested that impeachment is not the exclusive means for removing federal judges, it is unclear what other methods are available to remove federal judges. The answer depends entirely on whether the alternative means for removal threatens or violates the independence of the federal judiciary individually or collectively. With respect to judges disciplining or removing other judges, the question virtually suggests the answer: there is little doubt that giving judges this power threatens federal judges' independence not only from other branches but also from other federal judges.

Over the years, Congress has made many attempts to involve judges in monitoring, disciplining, and sometimes removing their peers. n292 More often than not, these attempts have involved the judicial councils, groups of sitting judges originally established by Congress to deal with administrative problems within the court system, which the judges properly administer. n293 The two major constitutional questions that have emerged regarding the judicial councils are, first, whether they constitutionally may monitor caseloads and discipline poor judicial performance as an administrative matter, n294 and second, whether they constitutionally may investigate, discipline, and make recommendations to Congress regarding impeachment for certain judicial misconduct. n295

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n292. See, e.g., S. 1506, 91st Cong., 1st Sess. (1969) (attempting to create a five-judge commission that would remove a judge after a formal hearing subject to Supreme Court review), noted in Kurland, supra note 14, at 665; Act of Feb.

13, 1801, ch. 4, 2 Stat. 89 (1850) (repealed by Act of Mar. 8, 1802, Ch. 8, 2 Stat. 132 (1850)) (creating an alternate means of removing a judge but raising questions of constitutionality that eventually led to repeal), noted in Kurland, supra note 14, at 670.

n293. Act of June 25, 1948, ch. 646, 62 Stat. 902 (1948) (codified at *28 U.S.C. § 332* (1982)) (setting forth the procedure to be followed in each circuit for the establishment and organization of a judicial council to make all necessary orders for the effective and expeditious administration of the courts within each circuit).

n294. See *Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 85 (1970)* (asserting that "if one judge in any system refuses to abide by such reasonable procedures [for conducting judicial business] it can hardly be that the extraordinary machinery of impeachment is the only recourse").

n295. See *28 U.S.C. § 372*(c) (1982).

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One of the first and most heated debates about the constitutionality of allowing judges to discipline other judges arose in Chandler v. Judicial Council of the Tenth Circuit. n296 Acting pursuant to a 1948 law empowering [*71] it to make appropriate rules for the proper administration of its court business, n297 the Judicial Council of the Tenth Circuit determined that Judge Stephen Chandler, then Chief Judge of the Western District of Oklahoma, was "unable or unwilling to discharge efficiently the duties of his office." n298 The Council ordered him to take no further action in any pending case, distributed his caseload to the remaining judges of the district, and directed that no new cases be assigned to him until further notice. n299 Judge Chandler challenged the Council's actions, but the Supreme Court denied his application for a stay of the Council's order, characterizing the Council's action as "entirely interlocutory in character" pending prompt inquiry by the Council into the administration of judicial business in the Tenth Circuit. n300 After a hearing, the Council ordered that Judge Chandler could retain some of his original caseload. On a second appeal, the Supreme Court decided that because Judge Chandler might have had other avenues of relief left open to him, the Court was relieved from having to review the merits of the Council's order. n301

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n296. *398 U.S. 74, 88 (1970)* (dismissing second appeal for lack of jurisdiction in light of the fact that Judge Chandler may have still had other avenues of relief available to him); see also *Chandler v. Judicial Council of the Tenth Circuit, 382 U.S. 1003, 1003 (1966)* (miscellaneous order) (characterizing the Judicial Council's initial order to suspend Judge Chandler temporarily until a full hearing as interlocutory and a basis for dismissing his first appeal).

n297. Act of June 25, 1948, ch. 646, § 332, 62 Stat. 902 (1948) (codified at *28 U.S.C. § 332* (1982)).

n298. *Chandler, 382 U.S. at 1004* (miscellaneous order) (Black, J., dissenting) (quoting the judicial council of the Tenth Circuit in its order

directing that Judge Chandler take no action in any case or proceeding now or hereafter pending).

n299. See id.

n300. *Id. at 1003.*

n301. See *Chandler, 398 U.S. at 86.*

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Dissenting, Justices Black and Douglas asserted that the Constitution established Congress, "acting under its limited power of impeachment," as the sole agency of government that may hold a federal judge accountable for the administration of his court and effectively deprive him of his office, even temporarily. n302 Providing only marginal support for their assertion, Justices Black and Douglas argued that full judicial independence could be maintained only by recognizing impeachment as the exclusive means of removing or disciplining individual federal judges. n303

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n302. *Chandler, 382 U.S. at 1006* (miscellaneous order) (Black, J., dissenting).

n303. See *Chandler, 398 U.S. at 136, 140* (Douglas, J., dissenting).

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The problem with the Chandler dissent is that claiming impeachment, with the exception of the Act of 1790 or like measures, to be the exclusive means for removing federal judges is not inconsistent with allowing the judicial councils broad power to deal with administrative matters within their jurisdictions. n304 No doubt, the judicial councils could [*72] rearrange or even reschedule much of a judge's caseload if the judge were either slow or critically ill. As a matter of American common law, as well as English common law -- which the framers never evidenced any intent to abrogate -- judges have historically had the power to make administrative decisions regarding the operation of the courts that they supervise. n305 It logically follows that if a judge suffers from some infirmity such as a heart attack, then the appropriate judicial council has the power to transfer that judge's caseload, at least temporarily, to someone else. For all practical purposes, the Judicial Council for the Tenth Circuit did just this by temporarily depriving Judge Chandler of his caseload because of his persistent failure to diminish his backlog.

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n304. See *id. at 89, 119* (Harlan, J., concurring).

n305. See R. BERGER, supra note 14, at 174-80.

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The key for reconciling Chandler with the Act of 1790 and for finding what the Judicial Council did in Chandler constitutional is to recognize what removal

means. Removal results in the permanent loss of the judge's power to decide cases or controversies and the forfeiture of any pension, benefits, and opportunity to serve on judicially related panels such as the Judicial Council. n306 Removing a caseload because of illness or a backlog is not the same as permanent removal and disqualification as the result of a successful impeachment and conviction. Acknowledging that judicial councils have the ability to make administrative decisions curtailing a judge's responsibilities does not mean that judges either lose their titles or have been rendered permanently disabled from discharging their constitutional duties as judges. Judicial councils simply have administrative responsibility for the smooth functioning of a court system, and the councils' administrative responsibilities must necessarily include the power to move caseloads and occasionally diminish them for the sake of orderly administration. Although it may be difficult to draw the line between administrative convenience and outright removal, it is clear that removal through impeachment has a precise meaning and that what happened to Judge Chandler was not, in intent or effect, removal through impeachment.

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n306. See U.S. CONST. art. III, § 1.

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Equally important, the administrative power wielded by the judicial councils does not threaten or violate judicial independence. Although the framers seemed to explicitly discuss only the problem of judicial independence from the other branches, real judicial independence also rests on freedom from coercion or intimidation by one's fellow judges. Undesirable coercion can come as easily from within as from without. Granting sitting judges the power to evaluate the suitability of allowing other judges to retain their offices injects an element of intimidation that, no [*73] doubt, would threaten not only collegiality among judges but also independent judicial decision making itself. n307 The point is that the power to remove or even the power to initiate a removal injects insecurity among those targeted by such power, and once those targeted feel compromised by the exercise of removal power, judicial independence is chilled, if not directly violated.

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n307. Collegiality should not be underestimated as something important to the orderly process of judicial decision making. After all, circuit judges and Supreme Court justices must serve together on the same respective panels, presumably for many years. Even federal district judges are aided by collegiality because they occasionally sit as designated judges on appellate panels and must work with other district judges either in conferences or in administering the affairs of their particular districts. See generally Kaufman, Chilling Judicial Independence, *88 YALE L.J. 681, 716 (1979)* (arguing that "[t]he only way to protect judicial independence is to provide judges secure tenure").

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An appellate court's power to review lower court rulings is quite different

from an appellate court's power to make decisions about whether a lower court judge can remain in office. The appellate court's review of lower court rulings merely directs lower courts on the proper application or interpretation of the law, but the appellate court's removal power inevitably suggests that it can retaliate for anything arguably improper the lower court judge has personally or professionally done. Consequently, the administrative action undertaken by the Tenth Circuit Judicial Council in Chandler was constitutional because the power wielded by the Council did not send a signal to other judges in the Circuit that personal animosity or disagreements might lead to disciplinary actions. The Council's action merely indicated that sometimes a drastic but temporary action must be taken to ensure the speedy, efficient, and timely disposition of a district's caseload.

(ii) The Judicial Disability Act. -- The passage of the Judicial Disability Act sparked considerable controversy over the constitutionally permissible role of the federal judiciary in investigating and disciplining its own members. The Act provides that anyone can file a complaint against a judge with the clerk of the appropriate court of appeals. n308 A special committee investigates complaints that cannot be resolved by the chief judge. n309 When the special committee concludes there is merit to a complaint, the judicial council n310 is then directed to take appropriate action, which may include censure, reprimand, temporary suspension, and transfer of cases, but not removal from office. n311 If the judicial council believes that it has uncovered grounds for impeachment, the council is empowered to report its findings to the Judicial Conference [*74] of the United States, which after an investigation, may report its findings to the House of Representatives. n312

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n308. See *28 U.S.C. § 372* (c)(1) (1982).

n309. See *28 U.S.C. § 372*(c)(4)-(5) (1982).

n310. See *28 U.S.C. § 372*(c)(6) (1982).

n311. See *28 U.S.C. § 372* (c)(6) (1982).

n312. See *28 U.S.C. § 372*(c)(7)-(c)(8) (1982).

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Opponents of the Act maintain that its primary constitutional defect is that it seriously threatens individual judicial independence. n313 The critics maintain that the judicial council's powers to investigate and discipline threaten independent decision making, which may only occur in an atmosphere in which the decision maker may act without fear of reprisal, coercion, or intimidation. n314

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n313. See, e.g., *Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1105-11 (D.C. Cir. 1985)* (Edwards, J., concurring) (expressing concern that the Act "might be misused to pressure or intimidate the nonconformist"); Kaufman, The Essence of Judicial Independence, *80 COLUM. L.*

REV. 671, 700 (1980); Kaufman, supra note 307, at 713.

n314. See Kaufman, supra note 307.

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Critics also believe there are serious separation of powers and impeachment clause issues arising from the legislative attempt to authorize the judiciary to invoke disciplinary suspensions against individual members found guilty of "misconduct." In addition, critics suggest that there may be serious due process questions raised by the Act's preclusion of judicial review of actions by the judicial councils and the Judicial Conference of the United States. n315 First, the critics maintain that the separation of powers doctrine and article III's guarantee of judicial independence preclude Congress from empowering judicial councils to temporarily suspend any judge "whose conduct is the subject of a complaint." n316 The separation of powers problem arises, they assert, when Congress "imposes its preferences on the judiciary's governance of its internal affairs." n317 Furthermore, the critics argue that the judiciary's inherent powers of self-regulation do not extend beyond purely administrative matters and that Congress exceeded its authority by telling the judicial branch how to deal with its own internal ethical problems. These critics equate a long suspension with removal. n318

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n315. See, e.g., *Hastings v. Judicial Conference of the United States, 829 F.2d 91, 103-08 (D.C. Cir. 1987)* (dismissing facial and as applied due process claims); *United States v. Claiborne, 765 F.2d 784, 790-96 (9th Cir. 1985)* (upholding Judge Claiborne's conviction against attacks on grand jury procedure).

n316. *28 U.S.C. § 372* (c)(6)(B)(iv) (1982).

n317. *Hastings, 770 F.2d at 1108* (Edwards, J., concurring).

n318. See *id. at 1108-09*.

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Second, the critics maintain that the Act does not provide for judicial review of bias on the part of the judicial councils' investigators or decision makers. n319 The critics point out that judicial councils have the authority to investigate and to discipline, but consolidation of such powers within the judicial councils may preclude fair and impartial decisions. [*75] Without judicial review, the target of an investigation must hope that the judicial council is not motivated by prejudice or personal animosity.

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n319. See supra note 315.

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Those who defend the Act argue that, because the judicial councils lack the power to remove the target of an investigation, the Act provides at most "a method of controlling judicial ethics without curbing judicial independence in a way that threatens judicial review." n320 They argue that, as far as impeachment and removal are concerned, the Act does not provide for anything that would not exist in the absence of the Act. Even if there were no Act, judges still would have the power available to any citizen to complain to the House of Representatives that there are grounds for impeachment against a particular judge. Thus, the defenders argue, if the Act merely codifies something that would otherwise exist without constitutional infringement, then the Act in no way violates the Constitution. Moreover, they maintain that the Constitution does not require that the House alone perform all investigatory work regarding an impeachment. n321 As with the Independent Counsel Act's provisions, the Judicial Disability Act simply provides a reporting mechanism rather than a substitute for impeachment.

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n320. Garvey, supra note 281, at 638.

n321. See Tuttle & Russel, Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the "Blending" of Powers, *37 EMORY L.J. 586, 610 (1988)* (arguing that judicial participation in investigation merely takes advantage of "the Framers' blending of governmental powers"); Note, Unnecessary and Improper, supra note 21, at 1140 (asserting that the impeachment process can be greatly streamlined by having subcommittees perform preliminary functions subject to approval by the full House or Senate).

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Defenders also dismiss the particular constitutional challenges against the Act. For example, they argue that the investigatory tasks given to the judges under the Act, including the subpoena power, are administrative -- not executive -- in nature; therefore, Chandler controls disposition of any constitutional claims against the Act's delegation of investigatory power to the judiciary. n322 Defenders also dismiss the claim that the complaint procedure threatens judicial independence because (1) Congress could have reasonably determined that granting federal judges the power to investigate complaints against fellow judges was in the public interest and helped to maintain the independence of the judiciary, (2) judges are likely to be particularly respectful of other judges' independence because they are in a position to appreciate the meaning of judicial independence, and (3) many of the actions under the Act depend upon the voluntary compliance of the judge and do not, therefore, include or promote coercion within the judiciary. n323

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n322. See *Hastings, 783 F.2d at 1504-05*.

n323. See *id. at 1507-08*.

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Notwithstanding the arguments of the Act's defenders, by delegating [*76]

the House's constitutional power to investigate impeachments to the judiciary, the Act impermissibly threatens the independence of judges both individually and collectively. Article III's guarantees of life tenure and undiminished compensation protect the independence of the federal judiciary from the other branches. n324 At the same time, the guarantee of independence runs to individual judges. As Judge Harry Edwards has observed, the constitutional

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n324. See, e.g., THE FEDERALIST NO. 78, at 466 (A. Hamilton) (C. Rossiter ed. 1961); id. NO. 79, at 472-74; see also 2 CONVENTION RECORDS, supra note 1, at 34 (noting the delegates' interest in maintaining judicial independence). See generally Fratcher, The Independence of the Judiciary Under the Constitution of 1787, *53 MO. L. REV. 1 (1988)*.

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assurances of life tenure and undiminished salaries pertain directly to individual judges. . . [H]ow could the underlying purpose of those assurances -- to foster independent decisionmaking -- be achieved other than by protecting the independence of individual decisionmakers? Even when judges sit in panels, our confidence in their collective decisionmaking is predicated on the assumption that each judge will make an independent and reasoned evaluation of the issues. n325

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n325. *Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1107 (D.C. Cir. 1985)* (Edwards, J., concurring). But see Edwards, Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges, *87 MICH. L. REV. 765, 785 (1989)* (qualifying Judge Edwards' earlier view to acknowledge his current "belie[f] that individual judges are subject to some measure of control by their peers with respect to behavior or infirmity that adversely affects the work of the court and that does not rise to the level of impeachable conduct."). The problem with Judge Edwards' revised view that judges should monitor themselves with respect to misconduct falling short of impeachable conduct is that there is no clear line between what constitutes impeachable conduct and misbehavior falling short of it. The process of such line-drawing is better left to the branch entrusted by the Constitution to define impeachable conduct -- Congress. See infra notes 361-397 and accompanying text.

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In other words, to be meaningful, article III's guarantees must protect judges not only collectively from other branches, but also individually from harassment by other judges (even for misconduct that may arguably be the basis for an impeachment). Absent protection for the independence of individual federal judges from coercion from within as well as from without the judiciary, judicial independence becomes highly unlikely. By empowering federal judges to initiate complaints and investigations against other federal judges and by formalizing the complaint procedure, the Act increases the potential for some federal judges to intimidate and harass others. Indeed, many sitting judges have expressed their concern "that the provisions of the Act might be subject to abuse -- that they might be misused to pressure or intimidate the nonconformist,

the judge whose judicial style or legal philosophy are [sic] repugnant to the majority of his or her colleagues." n326

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n326. *Hastings, 770 F.2d at 1107* (Edwards, J., concurring).

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The Act allows judges to initiate investigations against other judges [*77] for misconduct that does not approach specific violations of laws. It would be a different case if Congress had passed a law under which on its own initiative Congress could delegate to judicial councils the authority to investigate whether certain judges violated certain laws. This Act, however, rests on the unrealistic assumption that judges can complain against, investigate, make disciplinary recommendations, and discipline other judges without risking the independence each judge must have in order to make decisions without fear of reprisal or harassment. n327 The Act, thus, impermissibly violates the independence guaranteed to individual federal judges by article III. Informal complaints by some federal judges against others, however, do not run the risk of stigmatizing or lending the kind of prestige or aura of impartiality that normally attaches to formal, collective judicial decision making.

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n327. See *id. at 1105-11.*

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4. The Permissibility of Allowing Prosecution, Indictment, or Imprisonment of Federal Judges Prior to Impeachment. -- On three occasions, federal appellate courts have rejected arguments that impeachment of federal judges must precede their indictment, n328 prosecution, n329 or imprisonment. n330 The unsuccessful arguments rest on the belief that indictment, prosecution, or imprisonment of federal judges should be prohibited prior to an impeachment because the targeted judges are effectively removed in violation of the constitutional principle that impeachment is the exclusive means of removing federal judges.

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n328. See *United States v. Isaacs, 493 F.2d 1124, 1142* (7th Cir.), cert. denied, *417 U.S. 976 (1974).*

n329. See *Hastings v. Judicial Conference of the United States 829 F.2d 91, 99-100 (D.C. Cir. 1987); United States v. Claiborne, 727 F.2d 842, 848-49* (9th Cir.), cert. denied, *469 U.S. 829 (1984); Isaacs, 493 F.2d at 1124.*

n330. See *Claiborne, 727 F.2d at 842.*

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United States v. Isaacs n331 was the first case in which a defendant asserted

that indictment and prosecution prior to impeachment were tantamount to removal without an impeachment conviction. Denying Judge Otto Kerner's application to stay his prosecution for conspiracy, tax evasion, and perjury, the Seventh Circuit in Isaacs held that federal judges could be indicted and prosecuted before impeachment because the Constitution did not expressly forbid the criminal prosecution of federal judges and because precedent established that Senators could be criminally prosecuted prior to their expulsion from the Senate. n332 The Seventh Circuit found no justification for disparate treatment for Senators [*78] and federal judges with respect to indictment and prosecution. n333

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n331. *493 F.2d 1124* (7th Cir.), cert. denied, *417 U.S. 976 (1974)*.

n332. *Id. at 1143-44*.

n333. See *id. at 1144*.

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In the more recent case of United States v. Claiborne, n334 the Ninth Circuit rejected Judge Harry Claiborne's claim that conviction and impending imprisonment prior to his impeachment were unconstitutional because they violated the constitutional prohibition against removal of federal judges through any means other than impeachment. n335 Judge Claiborne buttressed his claim with two major arguments. First, he relied on article I, section 3, clause 7, which provides that "the Party convicted [by the Senate] shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to law." n336 Judge Claiborne suggested that the "Party convicted" language presupposes that any disruption of an article III judge's life tenure should occur first through impeachment and only subsequently through criminal prosecution; otherwise, the past tense "convicted" has no meaning. n337

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n334. *765 F.2d 784 (9th Cir. 1985)*, appeal denied, *781 F.2d 1327* (9th Cir.), stay of execution denied, *790 F.2d 1355 (9th Cir. 1986)*.

n335. *United States v. Claiborne, 727 F.2d 842, 846* (9th Cir.), cert. denied, *469 U.S. 829 (1984)*.

n336. U.S. CONST. art. I, § 3, cl. 7.

n337. See *Claiborne, 727 F.2d at 845-46*.

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The problem with Judge Claiborne's first argument is that it ignores both history and the plain meaning of the relevant constitutional language. The Constitution suggests through unambiguous language and structure that impeachment and criminal prosecution are separate proceedings and thus are not mutually exclusive. n338 Constitutional language and structure indicate that the framers included the "Party convicted" language to preclude the argument that

the doctrine of double jeopardy saves the offender from an impeachment or removal trial. n339 Nothing in the Constitution mandates impeachment before criminal prosecution or prohibits criminal prosecution prior to or after impeachment; rather, the Constitution reflects the framers' vision of separate proceedings unfolding in no particular order. As Professor Steven Burbank has explained,

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n338. See U.S. CONST. art. I, § 3, cl. 7; id. art. III, § 2, cl. 3.

n339. See Burbank, supra note 92, at 667-70.

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the impeachment process and the criminal process serve different purposes, albeit the jurisdictions sometimes overlap. In such a scheme, principles of double jeopardy have no role to play. Just as conduct need not be criminal to justify impeachment and removal, so the fact that conduct does not justify impeachment and removal does not mean that it is not criminal. It is inconceivable to me, as it was to Justice Story, that the framers intended to bar the prosecution of one impeached but not convicted and thus inconceivable that the Constitution should be read to require removal before [*79] prosecution. n340

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n340. Id. at 669-70 (footnotes omitted); see also *Claiborne, 727 F.2d at 846* (construing the relevant constitutional language as "assur[ing] that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy").

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Judge Claiborne's second, more powerful argument was that imprisoning him while he was still an article III judge amounted to depriving him of his office. n341 He argued that depriving him of his office before impeachment not only skirted the constitutionally mandated procedural safeguards for removal, but also created a "constitutional . . . collision between two branches of our government" by compelling a sitting article III judge "to surrender to the custody of the Attorney General, an officer of the executive branch; . . . [and to] be confined outside his district, disenabled from performing judicial functions." n342 To Judge Claiborne, life tenure meant that "a judge has judicial authority unless and until that power is stripped by congressional impeachment." n343 In his view, the legislature, not the Executive, has been charged with removing judges; therefore, the Attorney General's bypass of the impeachment process violated separation of powers principles. n344 Judge Claiborne concluded that because criminal prosecution necessarily presupposes the potential for imprisonment (a de facto removal from office), prosecution before impeachment must be prohibited. n345

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n341. See *Claiborne, 727 F.2d at 846*.

n342. *Claiborne, 790 F.2d at 1360* (Kozinski, J., dissenting).

n343. Catz, supra note 146, at 109.

n344. See *Claiborne, 727 F.2d at 846-47*.

n345. See id.

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The Ninth Circuit found an unusual basis on which to reject Judge Claiborne's second argument that impeachment of federal judges must precede their prosecution and imprisonment. Maintaining that "federal judges [can] be removed from office only by impeachment," the court reasoned that because the Supreme Court had ruled in Isaacs that criminal prosecution and conviction of a Senator does not ipso facto "vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment," neither were judges automatically removed "by force alone of the judgment." n346

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n346. *Id. at 846*.

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Critics of Claiborne find this analogy unpersuasive because they do not believe the analogy definitively answers the question whether imprisonment (as opposed to conviction) prior to impeachment is constitutionally permissible. n347 In addition, they argue, the analogy disregards the key protections uniquely conferred upon the judiciary collectively and individually. Claiborne critics contend that the protections accorded by [*80] article III to ensure judicial independence require that judges must be treated differently for purposes of criminal prosecution and imprisonment. In sum, these critics argue that in the area of criminal prosecution and imprisonment, Senators are not analogous to judges, because Senators lack an equivalent of judicial independence.

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n347. See, e.g., Note, In Defense of Standard, supra note 12, at 457.

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Both the Claiborne critics' understanding of the analogy to senatorial prosecution and their general argument that separation of powers requires that federal judges be impeached prior to imprisonment are flawed. First, just as judges are protected in their official capacity by article III's guarantees of judicial independence, Senators enjoy the broad protections of the speech and debate clause. n348 Neither judicial independence nor the speech and debate clause, however, protect judges or Senators, respectively, from prosecutions for violations of the criminal law. n349 In effect, the Claiborne critics maintain that judges are entitled to a special immunity from criminal prosecution until

they are impeached, but there is no textual support for such an argument, and the concept of judicial independence protects judges only as judges. n350 Judges may have the power to interpret the criminal law, but their official status does not and should not ever immunize them from complying with it. n351

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n348. U.S. CONST. art. I, § 6, cl. 1 provides in pertinent part that

[t]he Senators and Representatives shall . . . in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

n349. See *United States v. Lee, 106 U.S. 196, 220 (1882)* (holding that "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it"); *Claiborne, 727 F.2d at 847* (holding that "Article III protections, though deserving utmost fidelity, should not be expanded to insulate federal judges from punishment for their criminal wrongdoing"].

n350. See Burbank, supra note 92, at 672.

n351. However, Professor Alexander Bickel believed that the President should have a special immunity from certain criminal prosecutions, because otherwise it would be too easy to hinder through harassing criminal prosecutions the President's ability to discharge his constitutional duties. See Bickel, The Constitutional Tangle, THE NEW REPUBLIC, Oct. 6, 1973, at 14-15. The problem here is that neither history nor general separation of powers principles favor making the President immune from criminal prosecution. First, the framers never showed any intention to allow any public official, including the President, to be above the law. Second, there is the practical political reality that only grave criminal actions would actually be allowed to proceed against a sitting President. Petty criminal offenses would either be settled out of court or at least would not require the President's personal involvement. More serious offenses might require the President's personal attention, in which case there is a classic conflict between the impartial administration of criminal justice and the need for the President to fulfill his constitutional duties. Since one of the President's constitutional duties is to enforce the law, it would seem to make sense that a criminal prosecution is but one means of ensuring that the President himself comply with some law he was otherwise obliged to enforce even against himself.

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Second, the Claiborne critics fail to understand the relationship between removal and impeachment. Assuming arguendo that, with the exception of measures such as the Act of 1790, impeachment is the exclusive means for removing federal judges, imprisonment is not the **[*81]** same as removal. An imprisoned judge retains his title, salary, pension, benefits, and, most important, the capacity to return to the bench with full authority to decide cases and controversies. In fact, Judge Claiborne continued to receive his salary as a federal judge during his incarceration. n352 No doubt, imprisonment is an impediment to being a federal judge, but it does not have the same effects as removal and

disqualification through impeachment conviction. As Professor Burbank has observed,

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n352. See *Claiborne, 765 F.2d at 788.*

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[i]n the case of "removal from office," the framers had in mind the formal termination of a commission or of tenure in office. Yes, they were very concerned about judicial independence and yes, the Constitution should be interpreted so as to accommodate situations unforeseen and unforeseeable in 1787. But criminal proceedings were not a threat to judicial independence unknown to the framers, and . . . they were not a threat the framers deemed serious enough to foreclose. n353

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n353. Burbank, supra note 92, at 671-72 (footnote omitted).

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Third, the Claiborne critics ignore a particularly significant piece of evidence undermining their view, the Act of 1790. That Act automatically disqualified federal judges once they had been convicted of bribery. n354 It was obviously premised on the idea that a prosecution and imprisonment might precede impeachment. Thus, the Act indicates that the First Congress anticipated and accounted for criminal prosecutions preceding impeachments as well as allowed for removal other than by formal impeachment and conviction.

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n354. See supra text accompanying notes 285-91.

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Finally, the inconvenience and unseemliness of having a federal judge waiting for impeachment while sitting in prison may be resolved without misinterpreting the Constitution as requiring that impeachment of federal judges must precede their prosecution. For example, suitable amendments to title 18 would allow postponing sentences in cases involving convicted impeachable officials until the official is impeached and removed. n355 In addition, prosecution before impeachment can produce a record that may be used to expedite an impeachment. As Professor Burbank has suggested,

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n355. See id. at 670-71.

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[i]f Congress did not view the conduct undergirding the conviction as an impeachable offense, the judge could go free -- as free as anyone who escapes

confinement but not the rigors of the process that may lead to it -- and prosecutors would know that not every confirmed peccadillo of a federal judge would result in an empty [*82] bench, even temporarily. n356

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n356. Id. at 671.

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Claiborne critics' analysis derives from two attitudes about impeachment, neither of which has any place in constitutional interpretation. First, the Claiborne critics are disturbed by the embarrassing picture of a federal judge sitting in jail collecting his salary while Congress is trying to speed up its impeachment procedure to keep pace with the criminal justice system. Second, they are reacting to what they perceive as the inefficient and cumbersome impeachment process. Ironically, the First Congress suggested a solution to both these problems. Following the lead of the First Congress in passing the Act of 1790, Congress could pass a law automatically disqualifying federal judges convicted of impeachable offenses. Such a law, clearly constitutional, would not only allow prosecution to precede impeachment, but would also permit convictions to facilitate removal by impeachment.

B. The Scope of Impeachable Offenses

In attempting to persuade the House of Representatives to impeach Justice William O. Douglas in April of 1970, then-Congressman Gerald Ford observed that an impeachable offense is whatever a majority of the House of Representatives at any particular moment in time says it is. n357 Numerous commentators have taken issue with Ford's statement, which candidly reveals that impeachments may be both motivated and resolved by politics. n358 Ford's statement expresses the practical reality of impeachment far more closely than his critics' allegedly impartial analyses of impeachable offenses; therefore, it is not surprising that his statement spawned numerous attempts to circumscribe the scope of impeachable offenses to reduce the influence of politics in initiating or propelling an [*83] impeachment. But attempts to limit the scope of impeachable offenses have rarely proposed limiting impeachable offenses only to indictable offenses. n359 Rather, the major disagreement among commentators has been over the range of nonindictable offenses for which someone may be impeached. n360

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n357. In April of 1970, then-Congressman Gerald Ford proposed initiating impeachment proceedings against Justice William O. Douglas. Ford catalogued various "offenses" Justice Douglas allegedly committed, including associating with publishers of obscene publications and members of the "new left." In addition, Ford suggested that Justice Douglas had failed to recuse himself in several cases in which recusal would have been proper. 116 CONG. REC. 11,912 (1970). Ford concluded

what then is an impeachable offense? The only honest answer is that impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office.

Id. at 11,913.

n358. See, e.g., R. BERGER, supra note 14, at 159-65 (discussing the extent of misbehavior historically required as grounds for impeachment); Thompson & Pollitt, supra note 23, at 107 (criticizing Ford's statements and showing a series of unsuccessful attempts at politically motivated impeachment); Note, In Defense of Standards, supra note 12, at 444 n.135 (noting that the impeachment proceedings called for by Ford were in retaliation for the rejection of two Nixon appointees to the Supreme Court).

n359. See, e.g., R. BERGER, supra note 14, at 70-73 (discussing the boundaries of impeachable misconduct in eighteenth century England); I. BRANT, supra note 22, at 180-81 (dividing impeachable offenses into two categories: criminal conduct and dereliction of public duty). But see Thompson & Pollitt, supra note 23, at 107, 108 (asserting that the House is reluctant to impeach unless an official is accused of a serious crime).

n360. Cf. R. BERGER, supra note 14, at 70-71 (discussing the eighteenth century English political practice of impeaching the king's favorites for giving him bad advice); Kurland, supra note 14, at 697 (asserting the unconstitutionality of legislation aimed at defining the limits of good behavior).

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The language and the history of the impeachment clauses provide some useful insights into the scope of impeachable offenses. First, the Constitution offers a brief definition of the range of impeachable offenses by providing that "all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." n361 The Constitution defines treason as "consist[ing] only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort." n362 "Bribery" has also been understood as encompassing an indictable crime, even though Congress did not make it an indictable crime until 1790. n363 The Constitution does not, however, define any of the other impeachable offenses. Thus, the operative constitutional language is subject to at least two different interpretations: one may argue either that the term "high" modifies traditional categories of criminal offenses or that the inclusion of some indictable crimes such as treason and bribery as impeachable offenses does not limit impeachable offenses to indictable crimes. n364

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n361. U.S. CONST. art. II, § 4.

n362. Id. art. III, § 3, cl. 1.

n363. See id. art. II, § 4; *18 U.S.C.* §§ *201*-203 (1982 & Supp. V 1987); see also Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112 (1845) (establishing bribery for the first time as a federal criminal offense).

n364. See R. BERGER, supra note 14, at 53-59.

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Second, in the English experience impeachment was primarily a political proceeding, and impeachable offenses were political crimes. For instance, even though he ultimately shied away from the implications of his research, Raoul Berger observed that in the English experience "[h]igh crimes and misdemeanors were a category of political crimes against the state." n365 Berger supports this observation with quotations from relevant periods in which the speakers used terms equivalent to "political" and "against the state" to identify the distinguishing characteristics [*84] of an impeachable event. n366 In England, the critical element of injury in an impeachable offense was injury to the state. n367 Blackstone traced this distinction to the ancient law of treason that distinguished "high" treason, which was disloyalty against some superior, from "petit" treason, which was disloyalty to an equal or an inferior. n368 Professor Arthur Bestor has explained further that "[t]his element of injury to the commonwealth -- that is, to the state and to its constitution -- was historically the criterion for distinguishing a 'high' crime or misdemeanor from an ordinary one." n369 In summary, the English experience reveals that there was a

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n365. Id. at 61.

n366. Id. at 59-61.

n367. See Bestor, supra note 13, at 264.

n368. See id. (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 75 (1765-1769)). Blackstone commented that

[t]reason . . . in it's [sic] very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith . . . [T]reason is . . . a general appellation, made use of by the law, to denote . . . that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, . . . and the inferior . . . so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord. . . . [T]herefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance, of private and domestic faith, are denominated petit treasons. But when disloyalty so rears it's [sic] crest, as to attack even majesty itself, it is called by way of eminent distinction high treason, alta proditio; being equivalent to the crimen laesae majestatis of the Romans.

Id.

n369. Bestor, supra note 13, at 263-64.

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difference of degree, not a difference of kind, separat[ing] "high" treason from other "high" crimes and misdemeanors [and that] [t]he common element in [English impeachment proceedings] was obviously the injury done to the state and its constitution, whereas among the particular offenses producing such injury some might rank as treasons, some as felonies and some as misdemeanors, among

which might be included various offenses that in other contexts would fall short of actual criminality. n370

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n370. Id. at 265.

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Third, both the delegates to, and the ratifiers of, the Constitutional Convention understood impeachment as a political proceeding and impeachable offenses as essentially political crimes. n371 The delegates at the Constitutional Convention were intimately familiar with impeachment in colonial America, which, like impeachment in England, had basically been a political proceeding. Although the debates at the Convention primarily focused on the offenses for which the President could be both impeached and removed, there was general agreement that the President could be impeached only for so-called "great" offenses. n372 Drawing in [*85] part upon their understanding of impeachable offenses in England, individual delegates also gave examples of the types of conduct that they felt justified impeachment. For instance, in an exchange at the Constitutional Convention between George Mason and James Madison, Mason objected to limiting impeachment to treason and bribery, because he thought impeachment should reach "attempts to subvert the Constitution." n373 He recommended that the delegates include "maladministration" as an impeachable offense. n374 Illustratively, Mason referred approvingly to the contemporary English impeachment of Warren Hastings -- formerly the Governor-General of India -- as being based on an attempt to "subvert the Constitution." n375 Madison responded that "maladministration" was "so vague a term [as to] be equivalent to tenure during the pleasure of the Senate." n376 Madison preferred the phrase "high Crimes and Misdemeanors" as an alternative n377 that would encompass attempts to subvert the Constitution and other similarly dangerous offenses. The debates at the Convention confirmed that impeachable offenses were not limited to indictable offenses, but included abuses against the state. Neither the debates nor the Constitution's language, however, identifies the specific offenses that constitute impeachable abuses against the state.

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n371. See id. at 266.

n372. See R. BERGER, supra note 14, at 88 (observing that "James Iredell, later a Supreme Court Justice, told the North Carolina convention [during the ratification campaign] that the 'occasion for its exercise [impeachment] will arise from acts of great injury to the community'").

n373. 2 CONVENTION RECORDS, supra note 1, at 550.

n374. Id.

n375. Id.

n376. Id.

n377. Id. According to Blackstone, "high misdemeanors" in British usage

included "mal-administration of such high officers, as are in public trust and employment." Rotunda, supra note 13, at 723 (quoting 4 W. BLACKSTONE, supra note 368, at 121).

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The ratification campaign also supports the conclusion that "other high Crimes and Misdemeanors" were not limited to indictable offenses, but rather included great offenses against the federal government. For example, delegates to state ratification conventions often referred to impeachable offenses as "great" offenses (but not necessarily as criminal), and they frequently spoke of how impeachment should lie if the official "'deviates from his duty'" n378 or if he "'dare to abuse the powers vested in him by the people.'" n379

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n378. Rotunda, supra note 13, at 723 (quoting 4 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 47 (J. Elliott ed. 1836) (quoting A. MacLaine of South Carolina)).

n379. Id. (quoting 2 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 47 (J. Elliott ed. 1836) (quoting S. Stillman of Massachusetts)).

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Alexander Hamilton echoed such sentiments in The Federalist, observing that

[t]he subject [of the Senate's] jurisdiction [in an impeachment trial] are those offenses which proceed from the misconduct of public [*86] men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. n380

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n380. THE FEDERALIST NO. 65, at 396 (A. Hamilton) (C. Rossiter ed. 1961).

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Viewing it as unwise to submit the impeachment decision to the Supreme Court because of "the nature of the proceeding," n381 Hamilton argued that the impeachment court could not be "tied down" by strict rules, "either in the delineation of the offense by the prosecutors [the House of Representatives] or in the construction of it by the judges [the Senate]." n382 He added that "[t]he awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons." n383

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n381. Id. at 398.

n382. Id.

n383. Id.

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Justices James Wilson and Joseph Story agreed with Hamilton's understanding of impeachment as a political proceeding and impeachable offenses as political crimes. Immediately after his appointment to the Supreme Court, Justice Wilson provided a series of lectures on the new Constitution, in which he commented that "[i]n the United States . . . impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments." n384 Justice Wilson essentially understood the term "high" to mean "political." Similarly, Justice Story recognized the political nature of impeachment:

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n384. 1 J. WILSON, WORKS, supra note 16, at 426.

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The jurisdiction is to be exercised over offenses, which are committed by public men in violation of their public trust and duties. Those duties are, in many cases, political . . . . Strictly speaking, then, the power partakes of a political character, as it respects injuries to the society in its political character. n385

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n385. J. STORY, supra note 72, § 385, at 272-73.

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Justice Story also viewed the penalties of removal and disqualification as "limiting the punishment to such modes of redress, as are peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries." n386 Justice Story understood "political injuries" to be "[s]uch kind of misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust." n387

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n386. Id. at 290.

n387. Bestor, supra note 13, at 263 (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 788, at 256 (Boston 1833)).

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In much the same manner as Hamilton, Justice Story understood [*87] that the framers proceeded as if there would be a federal common law of crimes from which future Congresses could draw a list of offenses for which federal officials may be impeached and removed. Justice Story explained that "no previous statute is necessary to authorize an impeachment for any official

misconduct." n388 Nor, in Justice Story's view, could such a statute ever be drafted because "political offenses are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it." n389 The implicit understanding shared by both Hamilton and Justice Story was that subsequent generations would have to define on a case-by-case basis the political crimes serving as contemporary impeachable offenses to replace the federal common law of crimes that never developed.

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n388. J. STORY, supra note 72, § 405, at 288.

n389. Id. at 287 (citations omitted).

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The remaining problem is how to identify those nonindictable offenses for which certain high-level government officials may be impeached. Given that certain federal officials may be impeached and removed for committing serious abuses against the state and that these abuses are not confined to indictable offenses, the challenge is to find contemporary analogues to the abuses against the state that authorities such as Hamilton and Justices Wilson and Story viewed as suitable grounds for impeachment. On the one hand, these abuses may be reflected in certain statutory crimes. Violations of federal criminal statutes, such as the bribery statute, n390 represent abuses against the state sufficient to subject the perpetrator to impeachment and removal, because bribery demonstrates serious lack of judgment and respect for the law and because bribery lowers respect for the office. In other words, there are certain statutory crimes that, if committed by public officials, reflect such lapses of judgment, such disregard for the welfare of the state, and such lack of respect for the law and the office held that the occupant may be impeached and removed for lacking the minimal level of integrity and judgment sufficient to discharge the responsibilities of the office. On the other hand, Congress needs to be prepared, as then-Congressman Ford pointed out, to explain what nonindictable offenses may be impeachable offenses by defining contemporary political crimes. The boundaries of congressional power to define such political crimes defy specification because they rest both on the circumstances underlying a particular offense (including the actor, the forum, and the political crime) and on the collective political judgment of Congress.

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n390. *18 U.S.C. § 201* (1982).

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[*88] Nevertheless, constitutional safeguards apply to the impeachment process and should circumscribe congressional efforts to define those political crimes. The Constitution includes several safeguards to ensure that Congress will deliberate carefully prior to making any judgments in an impeachment proceeding: (1) when the Senate sits as a court of impeachment, "they shall be on Oath or Affirmation," n391 (2) at least two-thirds of the Senators present must favor removal for the impeachment to be successful, n392 and (3) in the

special case of presidential removal, the Chief Justice must preside so that the Vice President, who normally presides, is spared from presiding over the removal trial of the one person who stands between him and the presidency. n393 Two other safeguards are political in nature. First, members of Congress seeking re-election have a political incentive to avoid any abuse of impeachment power. The knowledge that they may have to account to their constituency may cause them to deliberate cautiously on impeachment questions. Second, the cumbersome impeachment process makes it difficult for a faction guided by base political motives to both impeach and remove. Thus, these structural and political safeguards help ensure that the House and the Senate conduct impeachment proceedings only if warranted: "[s]ome type of wrongdoing must exist in order for an impeachment to lie -- there can be no impeachment for mere policy difference . . . ." n394

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n391. U.S. CONST. art. 1, § 3, cl. 6.

n392. See id.

n393. See id.

n394. Rotunda, supra note 13, at 726.

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The last problem in defining the scope of impeachable offenses is determining whether an official may be impeached for conduct unrelated to his office or committed before assuming office. Resolving this problem depends on understanding why political crimes or abuses against the state are impeachable offenses. The answer seems to be that someone who holds office also holds the people's trust, and an officeholder who violates that trust effectively loses the confidence of the people and, consequently, must forfeit the office. n395 Of course, the ways in which impeachable officials may violate the people's trust vary from case to case. n396 For example, wrongdoing committed before a person assumes office may relate to the person's capacity and worthiness to hold office, and to that person's ability to protect and deserve the people's trust. [*89] Similarly, conduct technically unrelated to the responsibilities of a particular office may still relate to an official's capacity to fulfill the functions of that office and to hold the people's trust.

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n395. See Bestor, supra note 13, at 263 (citing 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 810, at 278, § 788, at 256 (Boston 1833)) (commenting that the penalties for impeachment were designed to "secure the public against political injuries," and defining political injuries as "such kind of misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust.")

n396. See Book Note, supra note 166, at 913.

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For example, if the people elected a President and the media later revealed

him to have been a Ku Klux Klan member who had committed numerous civil rights violations in private life, then Congress could in good faith determine that such conduct reflects the kind of disdain for the law that no President should have. n397 The same concept holds true for a President who, during his term and for personal reasons, murders someone. Even if such a crime were unrelated to the President's constitutional duties, the President's commission of a murder considerably cheapens the presidency and demonstrates disdain for the law, warranting a congressional determination that the President is no longer fit to preserve the people's trust. The situation is more complicated if incriminating information relating to embarrasing or even illegal conduct has already been made public prior to the election. As a matter of common sense and good policy -- but not constitutional law -- Congress may wish to take this circumstance into consideration during its deliberation on impeachment, because its efforts to impeach the President for violation of the public trust presume that Congress is acting in the best interests of the people, who may already have indicated tacit approval of the President's prior conduct.

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n397. Shortly after Justice Hugo Black had been confirmed to the Supreme Court, it was revealed that during his younger days he had been a member of the Ku Klux Klan. Justice Black addressed this issue only once in a short public statement after there was a public uproar over his earlier membership in the Klan. His statement consisted of a short acknowledgement that he had been a member of the Ku Klux Klan only for a short while during his youth. It took a while for the uproar to die down. Even though there were threats of impeachment leveled against Justice Black, nothing became of them. See H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 47-48 (2d ed. 1985); V. HAMILTON, HUGO BLACK: THE ALABAMA YEARS 275, 278-79, 285, 291-92, 294-98 (1972). In all probability, reports of affiliation with the Ku Klux Klan would not only defeat any future nominations to the federal bench but would also bring forth retaliation in the form of impeachment proceedings against any sitting federal judges or the President.

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C. The Proper Procedure for Impeachment

Impeachment raises four major procedural questions: (1) whether an impeachment is a criminal or civil proceeding; (2) whether any presidential privilege is applicable; (3) what rules of evidence, if any, should be applicable; and (4) whether the Senate may appoint special trial committees to receive evidence for removal proceedings. n398 The debate over [*90] whether impeachment is a civil or criminal proceeding centers on the burden of proof that should govern impeachment proceedings. n399 If impeachment is considered a criminal proceeding, then those presenting the charges must persuade the Senate beyond a reasonable doubt that the charged official committed each impeachable offense. If impeachment is considered only a civil proceeding, then the burden of proof for establishing the guilt of the charged official is simply a preponderance of the evidence. n400

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n398. Less difficult questions include (1) whether the federal official

being impeached has had reasonable notice that the offense he allegedly committed was, in fact, an impeachable offense and (2) whether impeachment proceedings should be public. See C. BLACK, supra note 13, at 18-20. First, the problems encountered in defining impeachable offenses may sometimes result in situations in which the impeached official may not be aware or certain that a particular offense, if committed, is, in fact, impeachable. Under such circumstances, "all we can say is that a conscientious senator ought to insist upon being quite clearly convinced that the impeached official knew or should have known the charged act was wrong, before he votes for conviction." Id. at 19. Second, it would seem that an impeachment proceeding should typically be public, because, after all, the public has an enormous concern about the removal of someone who has been duly elected or who otherwise holds his office after satisfying constitutional appointment procedures. However, it is not hard to envision an impeachment proceeding of a President in which serious and sensitive questions requiring confidentiality arise. In such a case, it is reasonable for the House or the Senate to convene in executive session, holding confidential hearings on the sensitive subject matter. Once it has conducted its executive session, the House or the Senate may use its discretion to determine whether any of the information may be shared with the public. In all probability, the kind of information Congress should be reluctant to divulge should relate to national security or foreign relations interests, including but not limited to the protection of American and allied military personnel, as opposed to issues relating solely to the integrity or reputation of the official under impeachment. Other sensitive matters include, for example, attorney-client privileges, which are considered in the subsection on the applicability of presidential privilege to impeachment proceedings.

n399. Professor Black identifies the real question as what "things in the impeachment process . . . should be treated like the same things in a criminal trial, and what things need not be." Id. at 15.

n400. See id. at 15. Interestingly, much of Professor Black's analysis is political advice. He frequently speaks of what Senators "ought" to do or what would be a "reasonable" solution to a particular dilemma. See id. at 16-17. While his caution in constitutional interpretation should be both commended and emulated, he never explains where the line between constitutional interpretation and political advice should be drawn -- where constitutional interpretation ends and political advice or wise policy begins.

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Both the language and the structure of the Constitution indicate that impeachment is not strictly either a criminal or a civil proceeding. The Constitution expressly limits the punishments for impeachment to removal and disqualification from office, which are unavailable in any other proceeding in our legal system. n401 In addition, the target of an impeachment has no right to a jury, n402 the President may not pardon a person convicted by impeachment, n403 the federal rules of evidence do not apply to an impeachment, n404 and the Constitution does not require unanimity among any of the members sitting in judgment in an impeachment or removal proceeding. n405 But the impeachment clauses do include at least two serious crimes, treason and bribery, as impeachable offenses. n406 [*91] Further, impeachment is lumped together with other criminal proceedings in other sections of the Constitution. n407

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n401. See U.S. CONST. art. I, § 3, cl. 7.

n402. See id. art. I, § 2, cl. 5 (committing impeachments to the "sole Power" of the House); id. art. I, § 3, cl. 6 (committing removal trials to the "sole Power" of the Senate).

n403. See id. art. II, § 2, cl. 1.

n404. See infra notes 417-19 and accompanying text.

n405. See U.S. CONST. art. I, § 2, cl. 5 (implying impeachments by the House require at least a majority vote); id. art. I, § 3, cl. 6 (requiring a vote of at least "two thirds of the Members present" in the Senate for a removal conviction).

n406. See id. art. II, § 4.

n407. See id. art. I, § 3, cl. 7; id. art. III, § 2, cl. 3.

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If impeachment is, as the constitutional language and structure suggest, a hybrid criminal and civil proceeding, then the burden of proof required for an impeachment need not be the same as the criminal or civil burden of proof. In addition, a hybrid of the criminal and civil burdens of proof may be desirable, because neither a "preponderance of the evidence" standard nor a "beyond a reasonable doubt" standard neatly fits the impeachment setting. Too lenient a proof standard would allow the Senate to impose the serious punishments for impeachment "even though substantial doubt of guilt remained." n408 Too rigid a standard might allow an official to remain in office even though the entire Senate was convinced she had committed an impeachable offense. n409

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n408. C. BLACK, supra note 13, at 17.

n409. See id. at 17.

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The solution to this dilemma is to balance these concerns. Professor Charles Black has recommended that:

[t]he essential thing is that no part whatever be played by the natural human tendency to think the worst of a person of whom one generally disapproves, and the verbalization of a high standard of proof may serve as a constant reminder of this. Weighing the factors, I would be sure that one ought not to be satisfied, or anything near satisfied, with the mere "preponderance" of an ordinary civil trial, but perhaps must be satisfied with something a little less than the "beyond reasonable doubt" standard of the ordinary criminal trial, in the full literal meaning of that standard. "Overwhelming preponderance of the evidence" comes perhaps as close as present legal language can to denoting the desired legal standard. n410

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n410. Id.

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In short, the standard of proof in an impeachment should be a hybrid of the standards of proof in civil and criminal trials to accommodate the hybrid nature of impeachment proceedings.

The debate over whether the President should be allowed to invoke any special privileges in an impeachment proceeding typically turns on whether a strong or weak President is desirable. For example, Professor Black suggests that even in an impeachment proceeding the President should enjoy an absolute "privilege of withholding from other branches of government the tenor and content of his own conversations with his close advisors in the White House." n411 Professor Black explains that the [*92] President should have an absolute executive privilege applicable even to an impeachment proceeding because "its upholding [is] essential to the efficacious and dignified conduct of the presidency and to the free flow of candid advice to the President." n412 He explains further that such a privilege would also allow the President to protect himself from overreaching by either of the other two branches.

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n411. Id. at 20.

n412. Id. at 20-21.

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Yet history and common sense suggest that an impeachment proceeding is precisely the context in which the President may not assert superiority over Congress. The framers never evidenced any intent that the President have the power to thwart an impeachment proceeding. More importantly, meaningful separation of powers does not support an absolute executive privilege in an impeachment proceeding. There is no reason to suppose that executive privilege should operate differently in congressional and judicial contexts. In United States v. Nixon, n413 the Supreme Court held that in a judicial proceeding the executive privilege is qualified by the basis on which the President is asserting it. n414 The privilege becomes stronger as the basis for the privilege becomes more central to national security or the effective and efficient operation of the executive branch. For example, as Professor Black concedes, a President will be on stronger ground in an impeachment proceeding resting his claim for privilege on the imminent dangers that would result from the disclosure of international or national security information rather than on the possible impediment of uninhibited and energetic consultation with the President. n415

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n413. *418 U.S. 683 (1974).*

n414. *Id.* at 713.

n415. See C. BLACK, supra note 13, at 22.

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In an impeachment hearing, the critical question is often whether the President has the capacity, integrity, or competency to continue to occupy the office, and there is no harm in expecting the President to facilitate disposition of the proceeding by sharing with Congress or the Chief Justice even the most sensitive information regarding the executive branch. The President's concerns for national security and excessive congressional oversight of the presidency may be alleviated by requiring a showing of relevance prior to the President's divulging certain information. If the President declines to share information after Congress shows relevance, he then risks being impeached for refusing to comply with a congressional request or subpoena. If the President lacks confidence in congressional procedures for maintaining the confidentiality of certain information, he can ask Congress to adopt a different procedure. But the [*93] President's lack of confidence in congressional ability to preserve confidential information is not a compelling reason for withholding information that Congress is entitled to consider in discharging its constitutional duties to investigate and conduct impeachments.

By its very nature, the impeachment process is reserved for Congress to demand an accounting from the President regarding alleged abuses of his powers. Allowing the President to assert an unsubstantiated claim of privilege is nonsense, particularly if Congress uses its best efforts to maintain absolute secrecy. If the President is not above the criminal law, n416 there is no sound reason for exempting him from accountability, especially in the impeachment process. The American Revolution and the Constitution mean nothing if the President retains office without a meaningful accounting authorized by the Constitution. The high stakes of any clash between executive privilege and congressional impeachment power demand nothing less than the parties' working out a suitable arrangement regarding any assertedly sensitive information.

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n416. See generally L. TRIBE, supra note 13, at 268-74 ("In general, there is no executive immunity -- common law or otherwise -- from criminal prosecution.").

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There is no reason for making any particular rules of evidence applicable to impeachment proceedings. n417 Both state and federal courts require special rules of evidence to make trials more efficient and fair or to keep certain evidence away from a jury, whose members might not understand or appreciate its reliability, credibility, or potentially prejudicial effect. n418 The concerns leading to the use of special rules of evidence in state and federal courts do not apply to impeachment proceedings. An impeachment proceeding is not a typical trial, nor does it involve a typical jury. Rather, impeachment is an extraordinary hearing, whose success and effectiveness depend on the wisdom and judgment of a sophisticated and politically savvy body, the Congress of the United States. As Professor Black suggests,

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n417. For example, the House or Senate might choose to follow the federal rules of evidence.

n418. See C. BLACK, supra note 13, at 18.

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[b]oth the House and the Senate ought to hear and consider all evidence which seems relevant, without regard to technical rules. Senators are in any case continually exposed to "hearsay" evidence; they cannot be sequestered and kept away from newspapers, like a jury. If they cannot be trusted to weigh evidence, appropriately discounting for all the factors of unreliability that have led to our keeping some evidence away from juries, then they are not in any way up to the job, and "rules of evidence" will not help. n419

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n419. Id.

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[*94] Finally, the recent impeachment and removal trials of Judges Alcee Hastings and Walter Nixon have raised the issue whether it is constitutional for the Senate to hear closing arguments and to vote on removal, after appointing a special trial committee to receive evidence and to report a neutral summary of the evidence to the full Senate, whose members have had the opportunity to hear tape recordings of the hearings at any time prior to the removal vote. n420 There is little doubt such a procedure is constitutional. The Constitution specifies only a few details of what is required for the removal trial, including (1) an oath or affirmation, n421 (2) a two-thirds vote, n422 (3) the permissible punishments, n423 and (4) the official who presides when the President is tried. n424 The gap that is left as to the rest of the specifics of the Senate's trial is to be filled according to the discretion of the Senate, as provided in article I, section 5 that "[e]ach House may determine the Rules of its Proceedings." n425 Moreover, as Judge Gerhard Gesell pointed out in rejecting Judge Hastings' and Judge Nixon's challenges to the Senate's special trial committee, the Senate's use of such a committee is a settled practice in this country and in England, and the framers had a more restrictive understanding of the term "try" than that dominating modern criminal due process. n426

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n420. The Senate appointed a special trial committee to receive evidence for the removal proceedings of Judges Hastings and Nixon pursuant to Rule XI of the Rules of Procedure and Practice When Sitting on Impeachment Trials. Adopted by the Senate in 1935, Rule XI authorizes the appointment of a special committee "to receive evidence and take testimony" and "to report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee." S. Doc. No. 101-3, 101st Cong., 1st Sess. 15

(1989); see also Symposium, supra note 11, at 362-64 (comments by Michael Davidson describing the removal procedure authorized by Rule XI, including its provisions that the committee submit a neutral summary of the evidence introduced rather than specific recommendations to convict or acquit on each article, that the entire committee hearing will be taped and broadcast to each Senator's office, that Senators may replay the tape at any time for any purpose, and that Senators have ample time to digest evidence introduced to the committee prior to the Senate removal vote).

n421. See U.S. CONST. art. I, § 3, cl. 6.

n422. See id.

n423. See id. art. I, § 3, cl. 7.

n424. See id. art. I, § 3, cl. 6.

n425. Id. art. I, § 5, cl. 2.

n426. See *Hastings and Nixon v. United States Senate, No. 89-1602, 716 F. Supp. 38, 39-43 (D.D.C. 1989)* (rejecting, inter alia, arguments that the application of Rule XI in Judge Hastings' and Judge Nixon's removal proceedings deprived them of due process).

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D. The Possibility of Impeachment After Resignation

When read together, article II's inclusion of "all civil Officers" as impeachable officials and article I's limitation of the punishments for impeachment to removal and disqualification raise the question whether the resignation of an impeachable officer precludes either the initiation or [*95] continuation of an impeachment. Although Congress has never conducted a successful impeachment against someone after resignation, n427 there is a surprising consensus among commentators that resignation does not necessarily preclude impeachment and disqualification. n428 Upon closer inspection, there are several reasons that the prevailing practice in Congress "has no substantial historical foundation and is not supported by a single authoritative and unequivocal decision of recent times." n429

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n427. But see Bestor, supra note 13, at 280 (summarizing the Belknap case concerning the impeachment of the Secretary of War after his resignation); Rotunda, supra note 13, at 717 (describing the Blount case concerning the impeachment of an expelled Senator).

n428. Compare J. STORY, supra note 72, § 400, at 283-84 (arguing that officers subject to impeachment may not be impeached after resignation) with Rotunda, supra note 13, at 716-18 (arguing that resignation does not preclude impeachment and disqualification) and Firmage & Mangrum, supra note 22, at 1091-92 (same).

n429. Bestor, supra note 13, at 277.

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First, impeachment in the English experience was not limited to officials still in office. For example, several Constitutional Convention delegates, including George Mason, acknowledged that in April of 1787 the House of Commons had voted articles of impeachment against Warren Hastings, two years after he had resigned as the Governor-General of India. n430

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n430. See id.

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. Second, prior to the Constitutional Convention, several states allowed impeachment of officials even after they left office. For example, in 1776, Virginia and Delaware adopted constitutions that expressly allowed impeachment against their governors after they left office. n431 The delegates at the Constitutional Convention indicated no intention to abandon English practice or state constitutional provisions, which allowed post resignation impeachments.

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n431. See id.

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Third, the Constitution does not restrict the time at which an impeachment proceeding may be brought and includes language consistent with impeachments after departure from office. Although article II of the Constitution refers to all civil officers, that language means only that those who are still civil officers when convicted of the impeachment must be removed. Article I does not refer to all civil officers and provides a limitation on only the penalty in an impeachment proceeding rather than a limitation on jurisdiction. n432 According to the conventional rule of constitutional interpretation to give meaning to each word of the Constitution, the inclusion of both present removal and future disqualification as penalties for impeachment suggests that they are two separate penalties, [*96] which may be separately applied. If the punishments may be levied apart, there is no logical barrier for Congress in disqualifying, whenever it chooses, someone who was a civil officer of the United States.

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n432. See Rotunda, supra note 13, at 716.

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Fourth, the delegates at the Constitutional Convention understood that impeachment may take place after departure from office. On the only occasion when the timing of impeachment was discussed at the Convention, most delegates proceeded as if the President would be impeachable after leaving office. n433 The question that preoccupied the delegates was whether the President should

also be impeachable while in office. By a vote of eight to two, the Convention made the President impeachable while in office, without giving the slightest indication that this action constituted any grant of immunity after leaving office. n434

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n433. See Bestor, supra note 13, at 278-79.

n434. See 2 CONVENTION RECORDS, supra note 1, at 64-69.

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Shortly after the Convention, two prominent commentators confirmed that resignation or departure from office did not preclude impeachment. In The Federalist No. 39, James Madison compared the impeachment provisions of Virginia and Delaware with those in the new Constitution, stressing that the latter extended rather than curtail .d the liability of the President by denying him immunity "during his continuance in office." n435 Similarly, in 1846, long after he had left the White House, John Quincy Adams declared on the floor of Congress that "I hold myself, so long as I have the breath of life in my body, amenable to impeachment by this House for everything I did during the tim. I held any public office." n436

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n435. THE FEDERALIST NO. 39, at 242 (J. Madison) (C. Rossiter ed. 1961).

n436. CONG. GLOBE, 29th Cong., 1st Sess. 641 (1846) (statement of J. Q. Adams), quoted in Bestor, supra note 13, at 279.

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The critical element guiding the timing of impeachments is that the checks on impeachment are political, not constitutional. No doubt, there are numerous reasons not to move for impeachment of an official after resignation, but none of these are mandated by the Constitution. For example, Congress may barely have sufficient support to impeach and remove an official in office, and after the person resigns, Congress may decide it would be futile to pursue a postresignation disqualification. Congress may also conclude that healing political divisions after a controversial resignation is more important than its need for vindicating the laws or principles violated by the resigned official. n437

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n437. See Rotunda, supra note 13, at 717 ("Congress . . . may not wish to initiate or to complete impeachment of an officer who has resigned, but that decision is more a matter of prosecutorial discretion than a constitutional lack of jurisdiction").

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Justice Story made perhaps the best argument in favor of "confining [*97]

the impeaching power to persons holding office," n438 but his argument was misplaced. In context, Justice Story appeared to be concerned primarily with distinguishing American impeachment practice from contemprorary British impeachment practice, which allowed impeachment against private citizens, including all peers and commoners. n439 Moreover, one can accommodate Justice Story's concern without going so far as to argue that impeachment after resignation is impermissible. The Constitution's language makes clear that the framers rejected impeachment against private citizens for engaging in offenses against the federal government, n440 but accepted impeachment of private citizens for committing impeachable offenses while they held office. n441

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n438. J. STORY, supra note 72, § 400, at 284 (explaining that the United States, unlike England, confined impeachment to officeholders because citizens, who are relatively defenseless against the government's impeachment power, should be secure from reprisal "for their conduct in exercising their political rights and privileges").

n439. See Rotunda, supra note 13, at 717.

n440. Id.

n441. See Franklin, supra note 22, at 313 (documenting that the framers wanted to reject impeachment infamy -- impeachment primarily to taint someone's reputation -- in favor of impeachment triggered by misconduct either related to or committed while in office). In addition, there is no sound basis for arguing that there should be a statute of limitations on impeaching someone after resignation. The timing of an impeachment is simply not a problem turning on constitutional law. The timing of an impeachment rests solely within the political judgment of the Congress.

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E. Judicial Review of Impeachments

Commentators generally agree that federal courts may not review any aspect of impeachment proceedings because the proceedings present political questions. n442 A significant minority of commentators, however, persist in arguing that there should be judicial review of impeachments because there is no historical basis for the political question doctrine and because prevailing concepts such as due process and judicial independence require judicial review of impeachment proceedings. n443

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n442. See, e.g., Rotunda, supra note 13, at 728 (noting that impeachment raises issues that satisfy each of the elements of a political question as defined in *Baker v. Carr, 369 U.S. 186, 217 (1962)*).

n443. See R. BERGER, supra note 14, at 103-21; I. BRANT, supra note 22, at 183-87; Feerick, Impeaching Federal Judges: A Study of the Constitutional Provisions, *39 FORDHAM L. REV. 1, 57 (1970)*.

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On balance, there are several reasons why the political question doctrine applies to the problem of impeachment. First, the Constitution's language supports such a view. Article I states that the House "shall have sole Power of Impeachment" and that the "Senate shall have the sole power to try all Impeachments." n444 The speech or debate caluse, n445 in another section of article I, has been interpreted by the Supreme Court to protect from judicial review the legitimate activities of legislators acting [*98] within their prescribed functions, including impeachment. n446 Although Raoul Berger argues that none of this language in article I forecloses the possibility of appeals from impeachment trials, n447 "[t]he most natural reading of this language appears to be a 'textually demonstrable constitutional commitment of the issue to a coordinate political department.'" n448

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n444. U.S. CONST. art. I, § 2, cl. 5; id. art. I, § 3, cl. 6 (emphasis added).

n445. See supra note 348.

n446. See *Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501-05 (1975); Gravel v. United States, 408 U.S. 606, 625 (1972); United States v. Johnson, 383 U.S. 169, 180 (1966); In re Request for Access to Grand Jury Materials, 833 F.2d 1438, 1446 (11th Cir. 1987).*

n447. See R. BERGER, supra note 14, at 116-21.

n448. Rotunda, supra note 13, at 728 (quoting *Baker v. Carr, 369 U.S. 186, 217 (1962)).*

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Second, treating impeachments as nonreviewable is consistent with the explicit decision of the delegates at the Convention to exclude any role for the courts in an impeachment other than providing that the Chief Justice would preside at the impeachment trial of the President. n449 For a variety of reasons, the framers preferred some body other than the judiciary to make impeachment and removal decisions. n450 The framers believed, for example, that the judiciary might be influenced by the difficult conflicts of interest of impeaching and removing either the person who had appointed them or a fellow judge. In addition, allowing the judiciary to sit both as part of the impeachment body and as the reviewing body would be inefficient and counterproductive, particularly if the controversy involved a federal judge. The framers also substituted the controversy involved a federal judge. The framers also substituted the Chief Justice for the Vice President in the impeachment proceeding against a President to avoid the appearance of a conflict of interest of the Vice President presiding over the removal trial.

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n449. See 2 CONVENTION RECORDS, supra note 1, at 500, 551.

n450. See THE FEDERALIST NO. 65, at 398 (A. Hamilton) (C. Rossiter ed. 1961).

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Justice Story explained that the framers regarded Congress better equipped than the judiciary to deal with the difficult political issues raised by an impeachment proceeding. In particular, he noted that the framers rejected the judiciary as the impeachment body because they believed that impeachment required "a very large discretion [that] must unavoidably be vested in the court of impeachments." n451 According to Justice Story, the framers understood the power of impeachment as political in nature and vested the power solely with the House of Representatives, "where it should be, in the possession and power of the immediate representatives of the people." n452 Justice Story also regarded the sanctions available to the Senate in impeachment proceedings as "peculiarly fit[ting] for a political tribunal to administer, and as will secure the public [*99] against political injuries." n453

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n451. J. STORY, supra note 72, § 396, at 280.

n452. Id. § 407, at 290.

n453. Id.

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Third, the decision to impeach involves issues that are not judicially discoverable or that are difficult for judges to apply. For example, both the House and the Senate eventually must agree, usually independently of each other, on what constitutes an impeachable offense. Yet, as Justice Story observed, impeachable offenses are "purely of a political nature" n454 and defy definition or classification by statute. No statutes or common law doctrines set forth the impeachable offenses that courts may then interpret or apply. Thus, "[t]he very nature of an impeachable offense demonstrates that it fails another independent and alternative test to determine when a legal question is justiciable; there are 'a lack of judicially discoverable and manageable standards for resolving' the issue." n455

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n454. Id. § 406, at 289.

n455. Rotunda, supra note 13, at 729 (quoting *Baker v. Carr, 369 U.S. 186, 217 (1962)*).

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Fourth, judicial review of impeachments might lead to embarassing conflicts between the Congress and the federal judiciary. Allowing the Chief Justice to participate in the judicial review of a President's impeachment after the Chief Justice had presided over it would be awkward. Moreover, it would be confusing and embarassing if the Senate voted to remove the President and then a federal court countermanded that decision. In short, "[b]ecause the framers placed the sole power of impeachment in two political bodies -- the House and the Senate --

it would certainly appear that such an issue remains a political question." n456

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n456. Rotunda, supra note 13, at 732.

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The Supreme Court's decision in Powell v. McCormick n457 also indicates that there may be judicial review of any aspects of an impeachment proceeding. In Powell, the Supreme Court held that whether the House of Representatives followed the proper procedure in excluding Adam Clayton Powell from taking his seat in the House was not a political question. n458 The Powell Court also held that although Congress has the dual powers to expel and to exclude its members, Congress is not empowered to apply expulsion standards in proceedings to exclude a representative. n459

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n457. *395 U.S. 486 (1969).*
n458. *Id. at 549.*

n459. *Id. at 511-12.*

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The lesson of Powell is that the Supreme Court may use judicial review to determine whether Congress followed the proper procedure for making the political decision committed to it by the Constitution. Powell does not allow overly intrusive judicial review, but rather allows review **[*100]** solely to ensure that Congress made the particular kind of political decision entrusted to it by the Constitution. In Powell, the Court could not have interfered with the decision by Congress to expel Representative Powell if Congress had followed the constitutional standards for an expulsion; n460 however, the Court could step in where Congress used a procedure to accomplish impermissible ends. Powell indicates that while Congress has full, complete, and sole power to exclude, it does not have the power to change expulsion into exclusion -- to turn one constitutional procedure into another. Also, under Powell the federal courts may decide whether Congress has chosen the correct procedure to accomplish its asserted purposes. Thus, Powell indicates, first, that whether the matter is a political question depends on the fit between the actual procedure chosen by Congress and the circumstances to which Congress attempts to apply the procedure, and second, that the choice and application of a procedure by Congress are reviewable by the federal courts to ensure that Congress has done no more than the Constitution allows.

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n460. The Court framed the issue as the scope of the House's powers under article I, section 2, cl. 2, which describes the three qualifications that must be met by a Representative, and article I, section 5, cl. 2, which provides that "each House shall be the Judge of the . . . Qualifications of its own Members." The Court essentially reviewed the merits of and ultimately rejected the House's argument that its power to judge the qualifications of its members included the

power to "exclude [Powell] from its membership" on grounds of misconduct. *Id. at 550.* Although the Court saw itself as merely deciding the parameters of the House's power to exclude, this Article proposes the decision be viewed more precisely as upholding the Court's power to distinguish the scope of the House's dual powers to exclude and to expel, the latter of which is set forth in U.S. CONST. art. I, § 5, cl. 2.

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This interpretation of Powell clarifies at what points, if any, there may be judicial review of any part of an impeachment proceeding. For example, Professor Rotunda has asked whether federal courts may intervene if Senators violate the Constitution by participating in a removal trial without being on oath or affirmation. n461 This question turns on the critical distinction, made in all political question cases, between the constitutionality and the reviewability of an action. Although the Senate's action in Professor Rotunda's hypothetical example is plainly unconstitutional, that determination does not answer whether the action is also judicially reviewable. In the context of impeachment, which, by nature, presents political questions, reviewability is limited to determining whether Congress chose one procedure to accomplish something constitutionally permissible only in some other proceeding. Obviously, Congress made no such choice in Professor Rotunda's hypothetical. Instead, Congress chose a procedure but did not follow all of its particular dictates. Under Powell, the latter situation is a classic political question and, as such, is not reviewable by any federal court. Instead, its remedy rests [*101] with the Senate. n462 By contrast, if the House tries to remove or if the Senate tries to impeach, federal courts may review the procedure, because in this case either the House or the Senate is trying to transform one constitutional procedure into another.

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n461. See Rotunda, supra note 13, at 730-31.

n462. See L. TRIBE, supra note 13, at 97-98, 106-07 (discussing the rationale for the political question doctrine's leaving the decision as to the constitutionality of certain governmental actions to branches other than the judiciary); see also *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803)* (expressly contemplating that some seemingly "constitutional" issues would be committed to political discretion).

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V. Conclusion: The Future of Impeachment

Impeachment is both awesome and perplexing. When Congress conducts an impeachment hearing and trial, the Constitution's vitality is reaffirmed, and when Congress exercises its removal powers, the high stakes are apparent. Yet it is mystifying, given the volume of literature on impeachment and the attention focused on Congress each time it tries to exercise its impeachment power, that our understanding of impeachment has not advanced much from the first days of the Constitutional Convention. Scholarship on impeachment, with too few exceptions, leaves much to be desired.

In the face of the inadequate scholarship on impeachment, this Article argues that impeachment may be understood and may remain vital as long as we recognize the real nature of impeachment and the limitations of "grand" or formal theories of constitutional analysis. Impeachment was conceived as a political proceeding involving certain political officials charged with political crimes and, if necessary, culminating in certain political punishments. Commentators often misunderstand or ignore impeachment's political nature which makes the impeachment clauses virtually immune to systematic analysis because politics itself is difficult to analyze systematically. n463 Nevertheless, impeachment may make sense if we (1) use history only as the starting point for analysis, (2) consider the structural role of impeachment in checking and balancing the three branches, (3) appreciate the changes that have occurred within the institutions responsible for impeachment, (4) presume the constitutionality of additions to or deviations from the impeachment procedure (so long as those additions do not violate the values or principles impeachment and the federal judiciary were intended to protect), and (5) bar judicial review of political questions except for judicial determinations of the contours of the political questions themselves.

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n463. See M. TUSHNET, supra note 18, at 70-72, 94, 99-107 (discussing the "complexity of modern American politics").

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As a solution to its current inefficiency, the impeachment process [*102] may be streamlined in at least three ways without requiring constitutional amendment. First, the Act of 1790 demonstrated that Congress could, if it combined its powers under the necessary and proper and the impeachment clauses, provide for automatic removal and disqualification of impeachable officials upon conviction for the specific offenses listed in the impeachment clause. Such a law would not threaten judicial independence. For example, Congress could, if it chooses, pass a law that automatically disqualified federal judges or other impeachable officials once they have been convicted of bribery or other crimes demonstrating similar intent or culpability. However, Congress could also choose to forego such legislation based on fairness, prudent political judgment, or an interest in hearing all evidence relevant to impeachment or removal.

Second, both the Senate and the House could streamline fact-finding procedures for impeachment, impeachment hearings, and impeachment trials. n464 For example, the House and the Senate might agree that automatic removal upon conviction may be constitutional but not desirable for political reasons. They could give certain convictions preclusive effect in impeachment hearings by providing that once there has been a conviction, both chambers would defer to the factual findings already resolved under the high standard of proof necessary for conviction. The convicted official would then have the opportunity to attack his conviction collaterally during an impeachment proceeding, as he would on a typical criminal appeal, or through the introduction of certain limited evidence not introduced for good reason at trial, but he could not argue for de novo review or claim a right to a new trial. n465 By relying on prior convictions as creating rebuttable presumptions, Congress could reduce the possibility of any embarrassing situations and also shorten the time and manpower necessary for its thorough deliberations on the impeachment questions.

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n464. See Burbank, supra note 92, at 671-73 (arguing for adoption of House rules that accord substantial preclusive effect to factual findings necessary to a criminal conviction once that conviction is affirmed on appeal).

n465. An impeachment tribunal could treat the fact-finding from a federal or state court conviction with the same deference as state court findings are given in a federal habeas corpus proceeding, see *28 U.S.C. § 2254*(d) (1982), or findings by administrative law judges are given on appeals in federal court under *5 U.S.C. § 706*(2)(A).

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Third, Congress could, as it does now, create committees for the reception and distillation of information. n466 Nothing in the Constitution precludes the House from relying on information gathered outside the [*103] impeachment process to initiate an impeachment proceeding, as long as the noncongressional investigation does not require the Congress to accept the facts or the findings of the investigation or force the investigating branch to go beyond its own constitutional limitations. No doubt, Congress would stand on firmer constitutional ground if it at least initially directed some outside agency to investigate the alleged commissions of particular impeachable offenses in certain limited circumstances. The Senate has already demonstrated in the removal trials of Judges Harry Claiborne and Alcee Hastings that it is possible to streamline receipt of evidence regarding removal through special trial committees that provide the full Senate with tapes of hearings and neutral summaries of submitted evidence. n467

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n466. See Stoltz, supra note 14, at 667 (arguing for an extensive revision of the impeachment process, including "(1) [c]reation of a bipartisan House Committee on Judicial Fitness; (2) creation of a permanent professional staff as an adjunct to the Committee; (3) use of a master or masters to conduct formal evidentiary hearings for the Senate and to prepare proposed findings of fact and conclusions of law which would be the basis of argument and decision in the Senate").

n467. See supra note 420.

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In the final analysis, three important lessons regarding constitutional interpretation can be learned from the debates on impeachment. First, no simple theory of constitutional interpretation answers all the problems regarding the meaning of each and every constitutional provision. Impeachment is not one of the few self-defining constitutional provisions. With respect to ambiguous constitutional language or gaps in the Constitution, constitutional theories may raise but do not definitively answer important questions about the meaning of the Constitution.

Second, constitutional provisions grant each branch special power. This power may include the responsibility to use creativity and common sense to

exercise the power-granting provision in the contemporary world. Constitutional commentators should not forget that the judiciary is not the only branch empowered to interpret the Constitution and that the judiciary is no more capable or constitutionally compelled than the other branches to give the Constitution meaning.

Third, constitutional law explicates what is permissible, but politics dictates what should be done. We should recognize that simply because some course of action is constitutional does not mean either that it is prudent or that it must be pursued. Constitutional commentators spend so much time debating the outer limits of constitutionally permissible behavior by the different branches that they sometimes lose sight of the important issues included within those limits -- issues that must be resolved by making prudent political judgments. n468 Unless and until our [*104] notions of politics are elevated, however, constitutional commentators will continue to tell the different branches of government -- as they have in the area of impeachment -- what they must do as opposed to what they may do after careful and thorough deliberation.

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n468. The point is that constitutional interpretation sets the outermost boundaries on the exercise of federal power but sets a minimum standard or floor for states. For example, Congress may regard a measure such as the Act of 1790 as constitutional, but choose to forego it out of a sense of fairness or to avoid any political difficulties its use might entail. It is important not to confuse these limits with prudent politics, which sometimes may suggest stretching a particular branch's power to its outermost limits or perhaps even beyond. It is also important not to lose sight of the constitutional interpretations branches other than the judiciary must make. Commentators spend far too little time analyzing the constitutional interpretations other branches must make as a function of their own constitutional responsibilities. One purpose of this Article is to indicate that the Congress must interpret the impeachment clauses as part of its impeachment power and that much of the constitutional commentary on the meaning of the impeachment clauses is not so much constitutional interpretation as it is recommendations to Congress on how to resolve the political problems endemic to impeachment.

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