CONSTITUTIONAL FETISHISM AND THE CLINTON IMPEACHMENT DEBATE

Michael J. Klarman*

THE United States has just completed an extraordinary debate over the impeachment and removal from office of its President. A large proportion of that debate was conducted in constitutional terms. This is an opportune moment to reflect upon the episode and what it reveals about the nature of constitutional interpretation and the function of constitutional rhetoric in political debate.

One striking feature of the impeachment debate was the certitude with which politicians and academics espoused a wide variety of constitutional interpretations, notwithstanding the thinness of the constitutional law governing impeachment. Extraordinary claims were made on both sides of the aisle about what the United States Constitution requires and prohibits regarding various impeachment issues about which the traditional sources of constitutional law—text, original intent, and precedent—rather plainly have little to say. After showing that the Constitution does not resolve most of the disputed issues raised during the Clinton impeachment, this Essay will consider the consequences of conducting a transparently political debate in constitutional terms.

The constitutional text says surprisingly little about impeachment. Article II, § 4 provides 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.” Article I provides that the House of Representatives “shall have the sole Power of Im-

* James Monroe Professor of Law and F. Palmer Weber Research Professor of Civil Liberties and Human Rights, University of Virginia School of Law. I have benefited from the comments of Michael Gerhardt, Daryl Levinson, Mike McConnell, Larry Sager, Mike Seidman, David Strauss, Bill Stuntz, and Mark Tushnet. Thanks to Jay Carey and Cecelia Walthall for able and timely research assistance.

1 U.S. Const. art. II, § 4.
peachment”² and that the Senate “shall have the sole Power to try all Impeachments.”³ The Chief Justice presides over the President’s impeachment trial.⁴ Finally, “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.”⁵ The text does not resolve the permissibility of alternatives to removal from office, such as censure or findings of fact. It says nothing about whether the Senate is required to hold a trial whenever the House impeaches or what that trial must look like if there is to be one. It also is silent on the question of whether a lame-duck session of Congress may impeach or whether impeachment and conviction must occur within a single Congress. Finally, the text fails to illuminate the standard for impeachable offenses beyond the spare description of “high crimes and misdemeanors.” It is not clear from the text, for example, whether an indictable offense is necessary for impeachment.

Notwithstanding the sparseness of the text, politicians and pundits propounded with great confidence a variety of claims regarding what the Constitution required or forbade in connection with the Clinton impeachment. I shall briefly consider here several of the more prominent examples. One esteemed liberal commentator, Professor Bruce Ackerman, argued that the Constitution frowns upon impeachments by a lame-duck session of Congress.⁶ The basis for this claim was the Twentieth Amendment, which

² Id. art. I, § 2, cl. 5.
³ Id. § 3, cl. 6.
⁴ See id.
⁵ See id.
⁶ Id. cl. 7.
shortens the terms of lame-duck Presidents and Congresses. Yet that amendment says absolutely nothing about limiting the constitutional powers of lame ducks. Perhaps it is unwise policy for a lame-duck Congress or President to make important decisions. But unconstitutional? It is hard to believe such a contention could have persuaded those who believed, on the merits, that President William Jefferson Clinton should have been removed from office.

Recognizing the implausibility of the lame-duck argument as a matter of constitutional interpretation, Professor Ackerman piggy-backed it on the claim that impeachment is like legislation: It must be initiated and concluded within a single Congress. It is a well-established rule, though not one plainly derivable from the constitutional text, that legislative bills die with the end of a congressional term, and thus must be reenacted by both houses of a new Congress before they can become law. Combining the Twentieth Amendment's penumbral aversion to lame-duck exertions of power with the general requirement that the House and Senate act within the same Congress, Professor Ackerman argued that the Senate could try the President only if the 106th House, convening in January 1999, first reimpeached him. The White House ini-

7 U.S. Const. amend. XX, §§ 1–2.
8 Ackerman makes a strong case that supporters of the Twentieth Amendment believed that it would eliminate lame-duck sessions of Congress, barring extraordinary circumstances. See Ackerman, Case Against Lameduck Impeachment, supra note 6, at 24–31. He also makes the important point that they explicitly intended to end the lame-duck House's role in selecting Presidents when the electoral college failed to produce a majority victor. See id. at 33–38. But even Ackerman concedes that it is one thing for supporters of the Amendment not to contemplate future lame-duck sessions and another for the Amendment actually to forbid them. See id. at 30–31. Thus, Ackerman in the end concedes that lame-duck impeachments are not unconstitutional, just a bad idea. See id. at 39–40. His constitutional claim, on the other hand, is limited to lame-duck impeachments that are not acted on by the Senate during the same Congress. See id. at 40–41.
9 See id. at 9–10, 31–32.
10 See id. Ackerman endeavors to extricate himself from a difficult position with characteristic ingenuity. The logic of his Twentieth Amendment argument condemns all lame-duck sessions of Congress, not just lame-duck impeachments. Obviously Ackerman does not wish to challenge this widely accepted a practice. Similarly, Ackerman's argument against separate Congresses impeaching and convicting the President would seem applicable even to non-lame-duck impeachments. But this interpretation would require Ackerman to reject the constitutionality of three prior Senate impeachment trials, which is more of a load than he wishes to carry. Acke-
tially considered endorsing this constitutional argument. The difficulty with it is that impeachment by the House can be seen as an act complete in itself in a way that one house’s passage of legislation cannot be. Under British practice, which was followed by Thomas Jefferson in his influential *Manual of Parliamentary Practice*, impeachments carried over from one Parliament to the next, unlike ordinary legislative bills. Indeed, three of the Senate’s previous fourteen impeachment trials involved “carryover” impeachments. The “same Congress” argument thus is no more persuasive than the lame-duck contention; neither has any support in the constitutional text.

man thus combines the lame-duck point with the “same Congress” argument, yielding a constitutional rule that has the virtue of cohering with existing practice: After the Twentieth Amendment, lame-duck impeachments lose their force with the end of a Congress. Yet by struggling so mightily to cohere his rule with existing practice, Ackerman unintentionally weakens its constitutional foundations. It seems more plausible to argue, for example, that the Twentieth Amendment forbids all lame-duck sessions of Congress, as many of its supporters seemed to contemplate, than that it forbids only lame-duck impeachments, which is a subject to which not one of them apparently gave any thought. See id. at 39–40. Ackerman’s rule also has the anomalous effect of legitimizing a lame-duck Senate conviction—a result that should give Ackerman pause in light of his aversion to lame-duck exercises of power.


13 See id. at 313. Ackerman concedes that this was the British practice, but denies that Jefferson plainly intended to incorporate it into American congressional practice. See Ackerman, Case Against Lameduck Impeachment, supra note 6, at 47–51.

14 See Ackerman, Case Against Lameduck Impeachment, supra note 6, at 42–66. Ackerman seeks to distinguish each of the prior carryover impeachments, though it seems doubtful that critics of his argument would be convinced. For example, Ackerman notes that during the Judge Alcee Hastings impeachment in 1988, it was Judge Hastings himself who asked for the delay in his Senate trial that resulted in its postponement until the next Congress. See id. at 43–44. Ackerman does not explain how an individual waiver can cleanse an otherwise unconstitutional structural arrangement. Likewise, Ackerman argues that the new House’s reappointment of managers for the impeachment trial of Judge Harold Louderback in 1933 indicates a perception of constitutional doubts regarding carryover impeachments. See id. at 60–61. One might conclude, however, that precisely the opposite inference is more plausible: If the House did reappoint managers for Judge Louderback’s trial but did not bother to reimpeach him, this would seem to indicate support for the constitutionality of carryover impeachments.
On the other side of the aisle, the Republicans' principal constitutional arguments were every bit as unpersuasive. Some impeachment proponents claimed that the Constitution denied Congress the discretion not to impeach the President if he was found to have committed high crimes and misdemeanors. This is hard to fathom. The relevant constitutional text provides that "The President . . . shall be removed from Office on Impeachment for, and Conviction of, . . . high Crimes and Misdemeanors." This language seems to suggest that a conviction requires removal from office; it does not indicate that the House lacks discretion not to impeach if a high crime or misdemeanor has been committed. Nor is it obvious why, as a policy matter, one would wish to deprive the House of discretion in this regard. Prosecutors ordinarily are vested with enormous discretion over which crimes to prosecute.

Equally strained was the argument advanced by numerous Republican Senators that once the House impeached the President, the Senate had no choice but to conduct a trial on that impeachment. Article I, § 6 says that "[t]he Senate shall have the sole Power to try all Impeachments." It says nothing about the Senate being required to conduct a trial whenever the House impeaches. It may be that a proper regard for the judgment of a coordinate legislative branch should counsel Senators against readily dismissing impeachments without trial. But does the Constitution forbid the Senate from doing so if a majority deems that course appropriate? Of course not. It is unsurprising that few if any Democrats were convinced by this fanciful constitutional argument. Nor was

---


18 U.S. Const. art. I, § 3, cl. 6.
there any basis for the claim asserted by numerous Republicans that the Constitution proscribed Democratic attempts to terminate the trial without an up-or-down vote on the articles of impeachment. The Constitution says nothing whatsoever about the Senate's being compelled to carry an impeachment trial through to its bitter end, notwithstanding an indisputable showing on an early motion to dismiss that the requisite supermajority for conviction is lacking.

One of the most important constitutional debates surrounding impeachment addressed the viability of alternatives short of removal from office. Specifically, voluminous debate transpired regarding the constitutionality of censure and findings of fact. It is difficult to believe that any of these arguments persuaded anyone, since the Constitution simply does not answer these questions. Two intersecting constitutional provisions supply the relevant text. Article I, § 7 provides that "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 ...." Article II, § 4 says that "The President ... shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The former provision seems to leave open the possibility of punishments that do not go as far as removal from office, such as censure. The latter seems to require removal from office for all impeachment convictions. Some commentators have argued that the best way to reconcile the two provisions is to require removal from office for conviction of "Treason, Bribery, or other high Crimes and Misdemeanors" but to allow lesser punishments for lesser of-

---


20 U.S. Const. art. I, § 3, cl. 7 (emphasis added).

21 Id. art. II, § 4.

fenses. Others have responded that a better reconciliation of the two clauses treats the first as limiting additional punishments beyond removal rather than as inviting alternative punishments short of removal. Neither textual interpretation seems obviously superior to the alternative. More importantly, though, the Constitution plainly says nothing about what Congress can do with regard to a President who has not been convicted on an impeachment. Specifically, the Constitution is silent on the subjects of congressional censure and findings of fact in the course of an impeachment trial. One can argue, of course, that because the Constitution does not specifically authorize Congress to censure the President, it lacks the power to do so. But one might respond with equal plausibility that because the Constitution does not specifically bar Congress from censuring the President, it has the power to do so. A censure resolution that carries no legal consequences is plausibly an exception to the Article I notion that Congress can act only via enumerated powers; Congress passes such resolutions all of the time.

On all of the impeachment-related issues just canvassed, the constitutional text provides little guidance and certainly no clear answers. Seeking to flesh out this spare text with evidence of the

Framers' intent turns out to be of little assistance. There are several difficulties that, taken together, illustrate the pitfalls with an originalist approach to constitutional interpretation.

First, it is not obvious why the Framers' intent should be any more dispositive in the impeachment context than in the many other areas of constitutional interpretation where it is routinely ignored or discounted. The deadhand objections to an originalist methodology are famous, and they seemingly are just as applicable in defining "high crimes and misdemeanors" as in delimiting Congress's power to regulate "interstate commerce" or "freedom of speech." One hears little about original intent when the United States Supreme Court is deciding whether Congress can forbid possession of firearms near schools or regulate smut on the Internet. Moreover, even those conservative Justices who purport to subscribe to an originalist methodology are inconsistent in their embrace of originalism. Thus, for example, Justices Antonin Scalia or Clarence Thomas cease to speak originalist language when the subject is the constitutionality of affirmative action, campaign finance reform, or regulatory takings. Nor are most constitutional commentators originalists. For these reasons, it is more than mildly surprising that most of the debate over defining high crimes

---

32 See, e.g., Adarand Constructors v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (holding affirmative action subject to strict scrutiny); id. at 240 (Thomas, J., concurring); Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 626 (1996) (Kennedy, J., concurring, joined by Rehnquist, C.J., and Scalia, J.) (invalidating campaign finance restrictions under the First Amendment); id. at 631 (Thomas, J., concurring, joined by Rehnquist, C.J., and Scalia, J.); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (Scalia, J., writing for the Court) (ruling that certain regulatory taking must be compensated). It seems plausible to assume that the explanation for this mysterious absence of originalist argument is the fact that the best historical accounts of the Framers' intent in these areas would not justifying the conservative outcomes these Justices favor. See Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 Geo. L.J. 491, 548 & n.275 (1997) (citing sources).
and misdemeanors, of which there was a great deal, implicitly assumed that originalism was the appropriate interpretive methodology.33

A great deal about the world has changed since 1787 that one might consider relevant in defining impeachable behavior. For example, the Framers of the Constitution did not contemplate the existence of political parties;34 our entire political system today revolves around their existence. The Framers assumed that Presidents generally would be “nominated” by the electoral college and then chosen by the House of Representatives,35 this in fact has happened only twice in the nation’s history (in 1800 and 1824).36 The Framers assumed that Congress would be the most powerful, and most feared, branch of the national government;37 we live in an era of the imperial presidency. The Framers disparaged popular participation in politics;38 for two centuries our political system has be-


Professor Turley likewise noted the oddity of the consensus among liberals and conservatives that originalism was the appropriate methodology for defining high crimes and misdemeanors. See Jonathan Turley, High Crimes and Misdemeanors, According to the Framers, Wall St. J., Nov. 9, 1998, at A23 [hereinafter Turley, High Crimes and Misdemeanors]; see also Cass R. Sunstein, Impeaching the President, 147 U. Pa. L. Rev. 279, 281 (1998) [hereinafter Sunstein, Impeaching the President] (noting that a “striking aspect of the debate over impeachment between 1997 and 1999 has been its insistently originalist character”).


36 See Ackerman, Case Against Lameduck Impeachment, supra note 6, at 34–35 & n.22.

37 See, e.g., The Federalist No. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961); id. No. 51, at 350 (James Madison); id. No. 71, at 483–84 (Alexander Hamilton); Rakove, supra note 34, at 281–83.

38 See, e.g., Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America 260–79, 305 (1988); Rakove, supra note 34, at 139; Gordon S. Wood, Interests and Disinterestedness in the Making of the Constitution,
come increasingly more inclusive and populist. These changes are meant to be illustrative, not exhaustive. All of them seem potentially relevant to what the standard for presidential impeachment should be. For example, it seems plausible that the impeachment standard should vary according to which branch is more powerful and thus more dangerous.

It might be possible, of course, to “translate” the meaning of high crimes and misdemeanors to reflect these changes in circumstance. That is, one might seek to ascertain the principle suffusing the Framers’ notion of impeachable offenses and then calculate how that principle would apply in the changed circumstances of today. Unfortunately, the translation enterprise is beset with apparently insurmountable obstacles. For one thing, it seems impossible to devise a nonarbitrary basis for determining which background facts to treat as variables in the translation and which as constants. Yet if all background facts are incorporated into the translation, the Framers are simply converted into us, thus nullifying the quasi-originalist purpose of the enterprise. Moreover, the question of what the Framers would have thought in our “translated” circumstances seems completely indeterminate. For example, many of the Framers had in mind as the quintessential impeachable offense the President’s betrayal of the nation’s interests to a foreign power for a bribe. For the founding generation, this was a salient concern, but it hardly seems like a pressing problem today. Yet trying to figure out what the Framers would have deemed the analogous paradigmatic impeachable offense under today’s very different circumstances seems hopeless. Since we disagree today over what the standards for presidential impeachment should be, it seems certain


See Klarman, Antifidelity, supra note 29, at 394–412.

that the Framers transplanted into our present circumstances would have likewise disagreed.

Let us now set aside this deadhand objection to originalism. Assume that originalist evidence is and should be relevant to constitutional interpretation. An additional set of originalist difficulties still remains: ascertaining original intent on issues that were not confronted by the Framers, figuring out the collective intent when individual Framers disagreed, and selecting the appropriate level of generality at which to ask the originalist query. I shall consider these difficulties in turn.

On many of the constitutional issues surrounding the Clinton impeachment, there simply is no original intent because the Framers did not consider the matter. There was no discussion in Philadelphia of, and apparently no consideration given to, subjects such as what the Senate trial of an impeachment should look like or whether alternative sanctions such as censure or findings of fact are permissible. Asking what the Framers would have thought about these issues had they considered them—if that is the correct originalist inquiry, which is debatable—seems obviously indeterminate. How could one possibly know?

The Framers did discuss and voice opinions on the important issue of impeachment standards—the meaning of high crimes and misdemeanors. But here we run into the difficulty of ascertaining collective intent when individuals disagreed. First, it is important to recognize that relatively little attention was paid in Philadelphia to this question of impeachment standards; there was far more discussion, for example, of whether the Senate was the appropriate body to try impeachments. Only a relative handful of convention delegates spoke on this (or, for that matter, any other) question. We have no way of knowing whether their views were representative of the thirty-nine delegates who ultimately signed the Constitution on September 17, 1787. The records we have of the state

---


44 See 2 Federal Convention, supra note 42, at 64–69; The Federalist Nos. 65, 66 (Alexander Hamilton); see also Gerhardt, supra note 43, at 5–7; Turley, High Crimes and Misdemeanors, supra note 33.
ratifying conventions reveal even fewer delegates speaking to the question of impeachment standards. Thus, historians of impeachment, out of necessity, have lavished great attention on the views of a literal handful of persons. While James Iredell of North Carolina and James Wilson of Pennsylvania were impressive figures, there is no reason to believe that their interpretations of "high crimes and misdemeanors" were representative, and they certainly were entitled to no more weight than anyone else's. Similarly, Alexander Hamilton's pronouncement on impeachment standards in the Federalist Papers has received great attention, but it is questionable how much weight it should bear (even setting aside the problem that Hamilton's statement is too vague to settle the Clinton controversy). Hamilton was just one of the Framers, and he was not even present in Philadelphia when the principal debate on impeachment standards took place. Moreover, given Hamilton's unorthodox perspective on executive power, it is doubtful how much weight his views regarding presidential removal should receive. Hamilton thought the President should serve for life, and thus it hardly would be surprising if his preferred standard for removal differed from that of the less monarchist delegates in Philadelphia. In sum, examining the fairly sparse originalist record can, at most, provide a sense of the range of views held regarding the impeachment standard; it cannot tell us where the consensus lay, if indeed it is meaningful to speak of a consensus on an issue that was of relatively minor concern to the drafters and ratifiers and thus garnered relatively little of their attention.

Yet the originalist dilemma grows even more severe. Those Framers who did voice an opinion on the question of impeachment standards plainly disagreed among themselves. The Philadelphia convention had, according to Madison's notes, one lengthy debate on this subject, and it revealed a variety of conflicting views. A

45 See, e.g., Impeachment Inquiry, supra note 6, at 14–15 (testimony of Nicholas Katzenbach); id. at 21 (testimony of Sean Wilentz); Gerhardt, supra note 43, at 18–19.


47 For similar conclusions as to the indeterminacy of the originalist record, see Gerhardt, supra note 43, at 64–65; Turley, High Crimes and Misdemeanors, supra note 33.
couple of delegates opposed any removal of the President except through elections, worrying that a provision for impeachment would make the President too dependent on his “judges” in the Senate.\textsuperscript{48} Other delegates evinced less concern about executive dependency and more about executive malfeasance in office.\textsuperscript{49} This latter group ultimately carried the day, though there was disagreement among these delegates as to what the removal standard should be. A proposal that the impeachment formula include “maladministration” was rejected as setting too low a threshold and was replaced by “other high crimes and misdemeanors.”\textsuperscript{50} Yet given disagreement among the Framers as to whether the greater evil was presidential dependency or malfeasance in office, the vague standard of high crimes and misdemeanors almost certainly meant different things to different delegates. Ultimate agreement on the verbal standard only concealed continued disagreement on how it should be applied.

Finally, even were it possible to ascertain the collective intent of the Framers regarding the impeachment standard, the question would remain at what level of generality the original intent question is appropriately formulated. One possibility would be to ask the question at the most specific level: Would the Framers have thought that President Clinton’s behavior, described in its loathsome detail, was sufficiently egregious to warrant his removal from office? But this cannot possibly be the right question. In some deep sense, the Framers would have been unable to comprehend such a query. They knew nothing of independent counsels, civil lawsuits against sitting Presidents, or White House interns. Perhaps more significantly, lying under oath and sex outside of marriage almost surely had different moral connotations for the Framers. It is entirely plausible, for example, that the Founders would have deemed adultery or sodomy to be impeachable behavior. Yet even the Republican House managers conceded that President Clinton’s sexual relationship with Monica Lewinsky was

\textsuperscript{48} See 2 Federal Convention, supra note 42, at 64, 66 (Charles Pinckney); id. at 66–67 (Rufus King); id. at 103–04 (Gouverneur Morris).

\textsuperscript{49} See id. at 65 (George Mason); id. at 65–66 (Madison); id. at 66 (Elbridge Gerry); id. at 67 (Edmund Randolph).

\textsuperscript{50} Id. at 550 (Mason).
not an impeachable offense.51 Even those most committed to an originalist interpretive methodology appreciate the need for some “translation.” Congress has the power to regulate airplane travel whether or not the Framers had the vision to foresee this technological advance, and President Clinton could not be impeached for adultery whether or not the Framers thought such conduct sufficiently egregious.

So any sensible originalist inquiry must be conducted at some higher level of generality. One must abstract from the most detailed description of President Clinton’s behavior some more general characteristics and then ask what the Framers would have thought about that category of conduct. The difficulty here, though, is that there is no “natural” level of generality at which to conduct the inquiry.52 There are an infinite number of levels of generality at which conduct can be described, and posing the originalist query at different levels may well yield different answers.53 For example, it is an equally accurate description of the President’s conduct to say that he behaved immorally, that he lied, that he lied under oath, that he lied under oath about a sexual affair, that he lied under oath about a sexual affair that was not material to the proceedings in which the question was asked, and so on. None of these descriptions is less accurate than the others; they simply proceed at different levels of generality. The lower the level of generality at which the question is asked, the less relevant the Framers’


53 The levels of generality problem is precisely the same as the translation problem, though considered from the opposite angle. Specifying a particular level of generality determines which changed circumstances are relevant to the translation (to be treated as variables) and which are not (to be treated as constants). Posed either way, the question has no “natural” answer. See Klarman, Antifidelity, supra note 29, at 408.
answer seems to us today, because so much about the world has changed. The higher the level of generality, the less determinate the Framers’ answer becomes. Who knows whether the Framers would have thought “immoral” behavior was impeachable?

For the sake of argument, though, suppose we arbitrarily select an intermediate level of generality at which to ask the question: Would the Framers have thought it an impeachable offense to “lie under oath and obstruct the course of justice in connection with a private matter not involving abuse of office.” While we cannot know for sure, it seems quite likely that the Framers would have disagreed among themselves, just as we disagree among ourselves, as to whether such behavior should be impeachable. The examples of impeachable conduct cited by many Framers involved abuse of official power, such as a President receiving bribes from a foreign nation to negotiate a treaty unfavorable to American interests. President Clinton plainly did not abuse his office in that way. But other Framers spoke of “abuse or violation of some public trust,” and a bald-faced, finger-wagging lie told to millions of Americans on national television arguably would qualify as such. Thus, to the extent the Framers’ intentions regarding the impeachment standard are relevant and knowable, they probably also are contradictory.

The other conventional source of constitutional interpretation—precedent—also turns out to be of little use in fleshing out the contours of impeachment. Precedents on impeachment are scarce—just fourteen Senate trials in over 200 years. And just one of those previous impeachment trials involved a President. It is perfectly plausible that “high crimes and misdemeanors” should mean different things when a President and a federal judge are being im-

---

54 See supra note 42 and accompanying text.
57 See Gerhardt, supra note 43, at 23.
peached. Arguably, a higher standard should apply to presidential impeachments, both because the consequences of removal seem greater for the nation and because electoral accountability provides an alternative mechanism for removal.\textsuperscript{58} Conversely, one might argue that because the President's job is so much more important, transgressions that might be overlooked in a federal court judge must be noticed and addressed when committed by the nation's chief executive.\textsuperscript{59}

Moreover, it is not obvious that precedent should have the same binding effect on the United States Senate sitting as a court of impeachment as it supposedly does on ordinary courts. Nobody thinks that Members of Congress are bound by "precedent" when engaged in their lawmaking functions; one of Congress's jobs is to change the law. If impeachment is a mixed operation of law and politics, the appropriate role of "precedent" is uncertain.

Finally, even courts are free to overturn their own precedents, and the United States Supreme Court frequently does so, especially in constitutional cases.\textsuperscript{60} A court that is free on any given occasion to overrule its own precedents, and has no law-like formula defining when it is appropriate to do so,\textsuperscript{61} is not in any sense bound by precedent. Rather, it makes political choices to adhere to precedent on certain occasions and to repudiate it on others. The Senate likewise has been, at most, selectively committed to precedent in its conduct of impeachment trials. For example, for the first 150 years of American constitutional history, the Senate conducted impeachment trials before the entire body. In 1935, as a result of poor attendance by Senators at recent impeachment trials of


\textsuperscript{59} See, e.g., Chairman Hyde Draws Issues Before the Senate, Wall St. J., Jan. 25, 1999, at A18 (citing comments made by House Judiciary Committee Chairman Henry Hyde during President Clinton's impeachment trial).


\textsuperscript{61} The Court purported to supply such a formula in Planned Parenthood v. Casey, 505 U.S. 833, 866–67 (1992) (plurality opinion), but to describe it as "law-like" would be a stretch.
federal judges, the Senate changed its rules to permit a bifurcated trial process, under which initial fact-finding was conducted by a committee of Senators who then made a report to the entire body, which heard abbreviated arguments and then voted. In three impeachment trials of federal judges in the 1980s, the Senate implemented this bifurcated trial procedure. If past Senate precedent were relevant to constitutional interpretations regarding impeachment, this truncated trial format should have been of dubious constitutionality. Yet the Senate concluded otherwise, and the Supreme Court ruled the matter a nonjusticiable political question, which may be the same thing as holding it constitutional. Apparently, then, Senate precedent is, at most, selectively relevant to constitutional interpretations regarding impeachment. This, however, is just another way of saying that precedent serves as a form of justificatory rhetoric, rather than as an actual guide to constitutional interpretation.

Nevertheless, both sides in the Clinton impeachment debate presented arguments from precedent. Republican politicians and commentators invoked precedent in support of their claim that the Constitution prohibited truncating the Senate trial; all of the Senate’s fourteen previous impeachment trials had been carried through to their conclusion. But how persuasive is that evidence? In all of those previous trials, it seemed likely—or at least plausible—that the votes necessary for removal from office were attainable. Those precedents hardly demonstrate that the Senate lacks discretion to abbreviate an impeachment trial after the vote on a motion to dismiss has conclusively revealed the absence of the requisite super-majority for conviction.

Likewise, presidential censure is not unprecedented. Those favoring this sanction against President Clinton pointed to the Senate’s censure of President Andrew Jackson in 1834 for ordering his

---

64 See, e.g., Garre, supra note 17, at A22; Pianin & Dewar, supra note 19, at A1 (statement of Sen. Phil Gramm).
65 The ultimate verdict was foreordained at least as early as the vote on the motion to dismiss, which 44 Democrats supported. See Peter Baker & Helen Dewar, Senate Votes to Subpoena Three Witnesses, Wash. Post, Jan. 28, 1999, at A1.
Secretary of the Treasury to remove federal government deposits from the national bank. But Jackson’s defenders argued at the time that censure was unconstitutional because it was not explicitly contemplated by the Constitution, and the censure resolution was rescinded three years later, once Jackson’s supporters regained control of the Senate. What is one to make of this precedent? The fact that the Senate once censured a sitting President over strong constitutional protests, and soon changed its mind and rescinded the censure resolution, hardly proves that this constitutional power exists. But it hardly proves the opposite either. Moreover, even if one found this precedent compelling support for the constitutionality of censure in the 1830s, 150-year-old precedents rarely are treated as dispositive sources of constitutional interpretation. Circumstances have changed a great deal in the intervening years; perhaps censure was constitutional at one point in time and not at another. Certainly this has been the case for a wide variety of contested social practices—school segregation, sedition laws, minimum wage laws, poll taxes, and legislative malapportionment, just to mention a few prominent examples.

Senate findings of fact, on the other hand, would have been unprecedented. Yet that hardly proves their unconstitutionality. Probably there was no effort to pass findings of fact in earlier impeachment trials because it was not obvious on those occasions that the votes necessary for conviction were lacking. Moreover, courts interpreting the Constitution frequently overrule even consistent bodies of precedent. When the Supreme Court invalidated public

---


school segregation in Brown v. Board of Education,\textsuperscript{70} it repudiated an almost unbroken line of dozens of state and federal court precedents, including its own.\textsuperscript{71} The Court has done the same thing on numerous occasions, including the revolutionary commerce clause decisions of the early 1940s, its rulings incorporating various Bill of Rights provisions against the states in the 1960s, and its decisions extending heightened scrutiny to sex classifications in the 1970s.\textsuperscript{72} Clearly the Supreme Court has considered itself free to repudiate even consistent bodies of precedent in its constitutional interpretations. So why should the Senate have been barred from making findings of fact with regard to the President’s misconduct simply because such a practice would have been unprecedented?

The point is that precedent did not resolve the constitutionality of censure and findings of fact any more than text or original intent did. Thus, unsurprisingly, the constitutional argument on these issues was opportunistic and unpersuasive. Republicans who wanted the President tried and convicted argued that censure was unconstitutional.\textsuperscript{73} Democrats who wanted to avoid impeachment by the House or quickly to end the Senate trial endorsed the constitutional—

\begin{footnotes}
\item[70] 347 U.S. 483 (1954).
\item[71] On the near-unanimity with which nineteenth century courts sustained the constitutionality of school segregation, see Michael J. Klarman, The Plessy Era, 1998 Sup. Ct. Rev. 303.
\end{footnotes}
ality of censure. Late in the Senate trial, when it became obvious that conviction was unattainable, most Republicans (including those who earlier had condemned censure as unconstitutional) endorsed findings of fact, while virtually all Democrats condemned them as unconstitutional. Once it became apparent that findings of fact could secure no significant Democratic support, and thus would lend credibility to Democratic charges of a partisan vendetta against the President, Republicans lost their enthusiasm for this alternative, often justifying their change of heart in terms of constitutional doubts regarding findings of fact. After the articles of impeachment failed, Republicans blocked a censure resolution because they did not wish to provide political cover for Democrats who had opposed removal, though they justified their opposition to censure in terms of its unconstitutionality. Because the Constitution simply does not resolve the issues of censure and findings of fact, it is hard to believe that minds were changed by any of these constitutional arguments.


The combination of sparse text, ambiguous original intent, and scarce precedent of dubious relevance means that Congress was confronted with little "law" governing the Clinton impeachment. When law is this indeterminate, one inevitably finds some other factor—namely politics, broadly defined—determining outcomes. Nevertheless, the impeachment debate was conducted largely in constitutional terms, and one is entitled to wonder about the consequences of constitutionalizing what was, in reality, a thoroughly political debate. One possibility is that there were no significant consequences. If the various constitutional arguments surrounding impeachment were as completely unpersuasive as I have suggested, one wonders if they had any effect whatsoever. For example, no Republicans evidently were convinced by the argument that a lame-duck session of the House could not impeach the President, and no Democrats by the contention that the Senate was constitutionally obliged to hold a trial once the House impeached.

While virtually all the constitutional arguments surrounding impeachment were unpersuasive, they still may have had two deleterious consequences. First, debating impeachment questions in constitutional terms enabled politicians to evade responsibility for their actions. This happened on both sides of the aisle. Democrats should have concentrated on the argument that the President's transgressions were not sufficiently serious to render the country better off by abbreviating his term of office. Instead, they mainly argued that the Constitution did not permit his removal because his misdeeds failed to satisfy the Framers' conception of "high crimes and misdemeanors." That argument was a distraction. Whether

---

79 But cf. Sunstein, Impeaching the President, supra note 33, at 315 (arguing that "[t]ext, history, and long-standing practice" converge on a very high standard for presidential impeachment). One potential difficulty with Professor Sunstein's conclusion regarding the clarity of the "law" governing the impeachment standard is that it seems to imply that the vast majority of Republicans who favored Clinton's impeachment were either ignorant or hypocritical.


or not the Framers in 1787 would have deemed Clinton’s behavior impeachable, he should have been removed from office if most people in 1999 deemed his conduct sufficiently egregious. Democrats should not have been permitted to avoid confronting that issue by pleading that the Framers had resolved it for them.

Conversely, Republicans should have stuck with the argument that the President’s conduct was sufficiently serious to justify his removal, rather than contending that the Constitution deprived Representatives of discretion not to impeach him if he had committed high crimes and misdemeanors, that Senators lacked discretion not to try him once the House had impeached him, or that both houses lacked discretion to adopt a lesser sanction such as censure. The Constitution forbids none of these things, and politicians who insisted that it does were simply evading responsibility for their actions. All that the Constitution required of Members of Congress was a judgment on this straightforward question: Were the President’s misdeeds, judged not by an originalist standard of 1787 but by the standards of today, sufficiently serious to warrant his removal from office?

In answering that question, one might be forgiven for thinking that the views of the American public should have been highly relevant, if not dispositive. It is here that we see the second insidious consequence of the pervasive constitutionalization of the impeachment debate. A large component of American constitutional law is the protection of minority rights and certain basic structural safeguards from majoritarian tampering. For example, popular majorities are not permitted, simply by virtue of their majority status, to impose racial segregation on public schools or to authorize the federal government to exceed its enumerated powers.82

---

Advocates of President Clinton's impeachment and removal traded on this antimajoritarian aspect of constitutionalism. Claiming the moral high ground, they invoked the "minority rights" conception of constitutionalism to justify ignoring opinion polls and congressional election results that revealed a substantial majority of Americans opposing the President's removal from office. Yet sometimes the Constitution does require that we follow election returns. Popular majorities do get to elect Representatives and Senators, and with the slight complication of the electoral college, Presidents as well. If after the 1992 presidential election, Republicans had tried to block Clinton's assumption of office, arguing that they were following the moral high ground by ignoring the election returns, their actions rightly would have been perceived as revolutionary rather than praiseworthy. This is because one's entitlement to hold office in a democratic system is based, generally speaking, on majority support.

The pressing question in the Clinton controversy was whether impeachment is more like issues where we protect minority rights from majoritarian oppression or issues where we award popular majorities the fruits of their electoral triumphs. By invoking constitutional rhetoric, Republicans implicitly tapped into the antimajoritarian strand of constitutional law—the safeguarding of minority rights from majoritarian oppression. It is difficult, however, to fathom why impeachment is an issue upon which minorities warrant protection from majoritarian decisionmaking. If popular majorities get to elect a President, it is hard to see why they should be ignored on the question of whether he remains fit to hold office.

---

83 See, e.g., Peter Baker & Helen Dewar, Prosecutors Allege Scheme by Clinton; House Managers Ask for Trial Witnesses as Arguments Begin, Wash. Post, Jan. 15, 1999, at A1 (statement by House Manager Rep. James Rogan); William J. Bennett, Editorial, A Day of Justice, Wall St. J., Dec. 18, 1998, at A14 (arguing that opinion polls are no more relevant to the impeachment issue than to the issues of school prayer or flag burning); Dewar, Democrats Step Up Push for Censure, supra note 76 (statement of House Judiciary Committee Chairman Henry Hyde); Editorial, Don't Let the President Lie with Impunity, Wall St. J., Dec. 10, 1998, at A22 (discussing a letter to the House Judiciary Committee from 96 scholars, lawyers, and former government officials which argued, in part, that "[i]f we would not allow polls to silence unpopular speech, neither must we allow polls to excuse and ratify impeachable offenses"); Men, Not Angels, supra note 81 (statement by Rep. J.C. Watts).
In a democratic society, how can it make sense to remove from office a popularly elected President whose transgressions are not deemed sufficiently serious to justify removal by roughly two-thirds of the electorate? Republicans never offered an argument for why this was a reasonable way to approach impeachment. Their use of constitutional rhetoric enabled them to avoid explaining why the public sentiment that plainly opposed their objectives was irrelevant.

* * * * *

The constitutional debate surrounding impeachment confirms what we already should have known about constitutional interpretation. On many (perhaps most) pressing questions of social policy, constitutional law—text, original intent, precedent, moral values, or whatever else one thinks constitutional law consists of—is relatively indeterminate. In light of this legal indeterminacy, it

---

84 See, e.g., Dan Balz & Claudia Deane, Poll: Most Oppose Continuing Trial, Wash. Post, Jan. 31, 1999, at A21 (noting that only 33% of people polled supported the conviction and removal from office of President Clinton, while 64% believed the Senate should not convict the President); Washington Post Poll: The Senate Calls Witnesses (last modified Jan. 31, 1999) <http://www.washingtonpost.com/wp-srv/politics/polls/vault/stories/data0131999.html> (reporting fairly consistent poll results from early December 1998 through the end of January 1999 showing that nearly two-thirds of those interviewed opposed removal of the President from office).

85 I do not mean to suggest that in all impeachment cases, the only legitimate method for Members of Congress to decide how to vote is to poll their constituents. Given the vagaries of opinion polling, in a close case this probably would not be a sensible way to proceed. But President Clinton’s was not a close case, at least not according to public sentiment. Even Republican opponents of the President did not contend that the public favored impeachment; they argued instead that public opinion was irrelevant. When roughly two-thirds of the electorate favors retaining the President in office, it is hard to fathom the argument for why he should be removed, no matter how strongly the opposition party feels he has transgressed.

Nor does my argument necessarily entail lowering the threshold for impeachment when the President’s approval ratings have bottomed out. Ours is not a parliamentary system featuring votes of no confidence to remove Executives before expiration of their elected terms; the virtues and vices of such a system are beyond the scope of this Essay. Our constitutional system requires that the President do something seriously wrong, rather than just a bad job, before impeachment and removal is authorized. This said, I see no reason why in close cases public opinion should not be relevant to determining whether an unpopular President’s transgressions arise to the level of high crimes and misdemeanors.

86 For numerous examples, see Klarman, Fidelity, supra note 80, at 1740–44.
is natural and perhaps inevitable that the personal values of the inter-
preters will determine legal outcomes. Constitutional argument in such contexts is principally a form of rhetoric deployed to en-
hance the status of those political values.87

This is not to say that the Constitution is always equally inde-
terminate. One important constitutional facet of the impeachment debate was the unanimity with which both sides adhered to the ex-
licit textual requirement that Senate conviction be by two-thirds majority. This supermajority requirement plainly disadvantaged Republicans who quite likely would have removed President Clin-
ton from office if only a simple majority had been required.88 Yet this constitutional provision was too plain to be evaded. The impor-
tance of having unambiguous ground rules should not be minimized. Without a clear antecedent decision rule to govern removal, it likely would have been impossible to derive a consensus norm during the impeachment controversy; all participants in the dispute would have been too influenced by the knowledge of the concrete conse-
quences of the various decision rules that might have been pro-
posed. One shudders to imagine the consequences of such a scenario: strict party line divisions as to whether a Democratic President should be removed from office by a Republican Senate, and no clear decision rule to govern the process. Thus, the recent impeachment controversy confirms certain virtues both of constitu-
tional originalism—which establishes rules in advance of the con-
troversies they are called upon to resolve89—and of constitutional clarity—which fosters consensus even in the face of strong partisan disagreement.90

But, of course, this is just one side of the story; originalism and clear constitutional rules have obvious vices as well as virtues. For

---

87 See, e.g., Louis Michael Seidman & Mark V. Tushnet, Remnants of Belief: Con-
88 The impeachment article charging the President with obstruction of justice se-
cured 50 votes in the Senate. See, e.g., Moderate GOP Senators Align with Demo-
crats, Wash. Post, Feb. 13, 1999, at A29. It is difficult to believe that a majority could not have been secured had this been sufficient to remove the President from office. See id.
example, it is exceedingly difficult in an era of "one person, one vote" to justify Article V's unamendable requirement that no state be deprived of equal Senate representation without its consent. Thus, Wyoming today enjoys equal Senate representation with California, which has sixty-six times the former's population. Yet this deadhand rule, devised by the Philadelphia convention simply as a political inducement to the small states to acquiesce in the new constitutional regime, is too clear to be evaded. We seem stuck with it, no matter how ridiculous the consequences.

Most of the Constitution, of course, is not nearly so determinate, as the recent impeachment controversy has reminded us. The impeachment standard of "high crimes and misdemeanors" is sufficiently indeterminate, and President Clinton's conduct was sufficiently serious, but not obviously so serious, that Republicans and Democrats divided almost precisely along partisan lines in their conclusions as to whether that standard had been satisfied. Similarly, with regard to other impeachment-related issues—such as the constitutionality of findings of fact or the Senate's discretion to truncate the trial—constitutional interpretations followed partisan lines with stunning regularity. In the face of legal indeterminacy, it seems natural that political factors will determine constitutional interpretations. Thus, for example, in 1860 both southerners and northerners were equally convinced that the Constitution supported their conflicting views on secession, just as one hundred years later they were equally confident that it supported their diametrically opposing views on the permissibility of school segregation. It is no great surprise that when the Justices of the

91 U.S. Const. art. V. On the "stupidity" of this provision, see William N. Eskridge, Jr., The One Senator, One Vote Clause, 12 Const. Commentary 159 (1995).
93 See, e.g., Rakove, supra note 34, at 66–69.
95 White southerners after Brown v. Board of Education, 347 U.S. 483 (1954), reaffirmed their "reliance on the Constitution as the fundamental law of the land," while denouncing the Court's decision as a "clear abuse of judicial power" because the
Supreme Court today take up issues of abortion, affirmative action, minority voting districts, school prayer, and federalism, they tend to divide along predictable political lines. The Constitution is relatively indeterminate on these issues; thus it seems inevitable that political differences will reappear in the guise of constitutional interpretations.

Many people find this phenomenon disconcerting, perhaps because most issues of constitutional interpretation involve judges deciding whether to invalidate legislative or executive action. To the extent constitutional interpretation involves judges supplanting the political judgments of elected officials with their own, serious questions of democratic legitimacy arise. Federal judges are unelected and, at most, indirectly accountable; moreover, they tend to reflect the values of the socioeconomic elite from whose ranks they are drawn. This countermajoritarian difficulty is not present, however, when elected politicians are performing the constitutional interpretation. Then, the use of constitutional rhetoric simply masks political preferences rather than substituting the preferences of one set of actors for those of another. Since the constitutional rhetoric is transparent to most participants, it is not obvious that constitutionalizing a political debate like impeachment alters it in any significant way. Only when Republican Members of Congress came to believe their own constitutional rhetoric and concluded that their constituents' preferences were irrelevant to the question of whether the President should have been removed from office did constitutionalizing the impeachment debate become pernicious.

Making the constitutional standard for impeachment more definite probably would render the outcome of any future impeach-

Constitution consistently had been interpreted to permit racial segregation. 102 Cong. Rec. 4515–16 (1956) (Southern Manifesto).


ment proceedings less partisan. If the Constitution provided that Presidents shall be impeached and removed from office for committing particular specified offenses (in addition to treason and bribery, which already are enumerated), the clarity of the rule probably would constrain partisan disagreements. Yet it seems doubtful whether such a gain in clarity would be worth the costs. If the Constitution provided that Presidents shall be impeached and removed from office for committing particular specified offenses (in addition to treason and bribery, which already are enumerated), the clarity of the rule probably would constrain partisan disagreements. Yet it seems doubtful whether such a gain in clarity would be worth the costs.99 Some Presidents (and judges) who committed the specified offenses might be better left in office, and others who committed nonspecified offenses possibly should be removed. Standards generally are preferable to rules for achieving outcomes sensitive to diverse factual contexts.100 But standards inevitably require the exercise of discretion, and discretion invites the interpreter to apply his or her own values.101 The critical question in the impeachment context is whether or not such discretion is a good thing. A vague (and thus discretionary) impeachment standard probably boils down to this: Setting aside cases where the President’s conduct is either so egregious or so trivial that both sides will agree on the propriety of removal, intermediate cases likely will result in partisan splits.102 Thus, Presidents will be removable from office either when the objectionable conduct meets a threshold standard and the impeaching party has a two-thirds majority in the Senate, or when the conduct is sufficiently egregious that bipartisan support for impeachment exists. The former scenario is extraordinarily rare; the President’s party almost never holds fewer than one-third of the Senate’s seats. Andrew Johnson was the only President in American history to fit that scenario;103 he had been nominated for

---

99 Cf. Story, supra note 55, § 795, at 264 (arguing against trying to enumerate impeachable offenses in advance).
102 Cf. The Federalist No. 65, at 440 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting the danger that impeachment decisions “will be regulated more by the comparative [sic] strength of parties than by the real demonstrations of innocence or guilt”).
the vice-presidency by a party to which he did not then belong and whose principles he had thoroughly repudiated by the time of his impeachment. Richard Nixon fit the latter scenario. President Clinton fit neither and thus predictably was acquitted. It is hard to quarrel with that result when a clear majority of Americans endorsed it. Only an unreflective invocation of constitutional rhetoric disabled some participants in the impeachment debate from appreciating this.