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## BOOK REVIEW

### TO END A (REPUBLICAN) PRESIDENCY

TO END A PRESIDENCY: THE POWER OF IMPEACHMENT. By Laurence Tribe & Joshua Matz. New York, N.Y.: Basic Books. Pp. xxii, 281. \$28.00.

*Reviewed by Michael Stokes Paulsen\**

#### I. THE PERNICIOUS PROBLEM OF PARTISANSHIP

Alexander Hamilton foresaw it perfectly: impeachments of Presidents are by their nature political proceedings, conducted by political institutions exercising political judgment about the public wrongfulness of a President's asserted misconduct. And built into that reality is the danger that presidential impeachments can become more about partisan loyalties than the merits of whether a President has engaged in serious wrongful conduct meeting the Constitution's impeachment standard.

Writing as Publius in *The Federalist No. 65*, Hamilton observed that the "jurisdiction" of impeachment extends broadly to offenses that "proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."<sup>1</sup> This includes wrongs "of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."<sup>2</sup> The power of impeachment is not confined to criminal-law wrongs (though it certainly can include ordinary criminality). But the remedy of impeachment is limited to political punishments — in Hamilton's words, "dismissal from a present and disqualification for a future office."<sup>3</sup>

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\* Distinguished University Chair & Professor of Law, The University of St. Thomas. My thanks to John Nagle for comments on an early draft and to the entire *Harvard Law Review* staff. The ideas presented here were framed by conversations with friends and colleagues too numerous to mention individually, yet too important to go totally unrecognized: my thanks to all. Special thanks to my fellow "fellows" at the James Madison Program in American Ideals & Institutions, Princeton University, with whom I shared many of these ideas in the spring semester of 2018. All views and blunders remain my fault. I have elaborated more fully on some of the ideas presented here in a series of essays on the power of impeachment for *Law and Liberty*. See, e.g., Michael Stokes Paulsen, *Taking Impeachment Seriously*, LAW & LIBERTY (June 28, 2018), <https://www.lawliberty.org/2018/06/28/taking-impeachment-seriously/> [<https://perma.cc/ES7P-FDR9>].

<sup>1</sup> THE FEDERALIST NO. 65, at 394 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>2</sup> *Id.* at 394–95.

<sup>3</sup> *Id.* at 397. Criminal-law punishment, if also appropriate, is something to be considered and determined separately, Hamilton noted. *Id.* Hamilton appeared to have assumed that impeachment typically would precede any criminal prosecution in the usual course of things. *Id.* Though

Political crimes and punishments require a political, not a strictly legal, process, Hamilton observed. The power of impeachment thus “can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security.”<sup>4</sup> The “awful discretion which a court of impeachments must have to doom to honor or to infamy the most confidential and the most distinguished characters of the community”<sup>5</sup> dictated the Framers’ choice to assign the power of impeachment to quintessentially political bodies — the House of Representatives in bringing charges and the Senate in trying them.<sup>6</sup>

But impeachment proceedings thereby run the risk of degenerating into partisan affairs. Impeachment, Hamilton prophesied:

[W]ill seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.<sup>7</sup>

That, I submit, is the core dilemma embedded in the constitutional power of impeachment: How can impeachment function as a designedly political check on serious executive (or judicial) misconduct without becoming merely a matter of low-political animosities, partialities, and interests?

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Professor Laurence Tribe and attorney Joshua Matz have reinvented a 230-year-old wheel: Hamilton’s insight that impeachments can tend to become mere low-partisan political affairs rather than faithful applica-

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neither the Constitution’s text nor Hamilton’s discussion clearly resolves the point, the better conclusion is that nothing in the existence or terms of the impeachment power itself precludes a criminal indictment, and even a trial, of a sitting federal officeholder, including the President, *if* such a proceeding is otherwise authorized by law and consistent with the Constitution’s structural arrangements (a debatable proposition as a matter of first principles, but one supported by modern Supreme Court decisions). See Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1370–74 (1999). Impeachment, however, remains the exclusive means of *removing* Presidents, Vice Presidents, and federal judges from office. To the extent a criminal-law *punishment* (like incarceration) functionally would remove an offender from office, impeachment and conviction (constitutionally effectuating removal) must precede such criminal-law punishment. *Id.* at 1371–72.

<sup>4</sup> THE FEDERALIST NO. 65, *supra* note 1, at 396.

<sup>5</sup> *Id.*

<sup>6</sup> See *id.* at 395–97.

<sup>7</sup> *Id.* at 395.

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tions of a principled (if broad) constitutional standard calling for principled (if political) judgment. Ironically, Tribe and Matz not only reinvent this wheel: they demonstrate it in operation.

*To End a Presidency: The Power of Impeachment* has much to commend it and gets a lot of things right; I will not fail to give those points their due. This is a serious book on a serious constitutional issue, addressed to a popular audience at a serious moment in U.S. history: the explosive presidency of Donald Trump. It has the virtues of very good timing, some good insights, and a powerful case for the constitutional propriety of impeaching President Trump. The discussion of Trump's wrongdoings, and why he is properly subject to the Constitution's impeachment standard, is effectively done — carefully crafted, clear, not greatly overstated, and mostly persuasive. Those parts of the book rank among its best features. So too, the book's treatment of the practical political unlikelihood of impeaching Trump is for the most part well done: Tribe and Matz make a convincing (if demoralizing) case for the political futility of impeachment as a meaningful check on Presidents' wrongdoing today, a futility attributable to entrenched partisanship.

But the book suffers from two major flaws: First, it is itself rather badly partisan. Second, it is predominantly strategic. The book's constitutional analysis serves chiefly as prelude to an essentially *realpolitik* account of what can be done with respect to the goal of removing Trump from office: be realistic about the slim prospects for success, hold your fire, wait for your moment, don't endanger Democratic seats in Congress, and remember that premature talk of impeachment can backfire. But don't wait *too* long, or the world might end.<sup>8</sup>

The first problem is acute and pervasive. While the authors purport to offer a "neutral" set of criteria for presidential impeachments — and purport to decry partisanship — the book is partisan in ways large and small. Not only is Trump deserving of impeachment (a conclusion with which many Republicans might agree, with which I agree, and one that can be defended on politically neutral terms)<sup>9</sup> but so too has nearly *every* Republican President since Richard Nixon likely engaged in impeachable wrongdoing deserving of at least serious investigation.<sup>10</sup> On the other hand, Bill Clinton's impeachment for perjury and obstruction of justice — arising out of allegedly false sworn testimony in judicial proceedings and subsequent efforts to cover up that falsity — was "contemptible" (p. xvi) and explainable only as an act of merciless partisan and personal spite (pp. 21, 103, 177, 239). In other words, Tribe and

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<sup>8</sup> See *infra* section III.D, pp. 716–17.

<sup>9</sup> See *infra* pp. 723–24.

<sup>10</sup> See *infra* pp. 713–14.

Matz contend that it was not fairly possible that anyone could have supported impeachment of Clinton in good faith.

It is possible (as I will argue below) to draw lines between various offenses and between various offenders; the Constitution's impeachment standard cuts a broad swath, and affords a considerable range of judgment.<sup>11</sup> It is also possible to disagree in good faith about what does and does not fairly fall within that range, or about the exercise of judgment concerning such matters. But it is harder credibly to maintain that the charges against Clinton lie *outside the bounds* of the Constitution's impeachment standard and that the actions of Presidents Ronald Reagan, George H.W. Bush, and Gerald Ford all plausibly fit within it. The authors' criteria will strike many fair-minded persons as reverse-engineered — gerrymandered, as it were — to produce a desired set of results, tracking preexisting political commitments, loyalties, and agendas.

That is pretty much exactly the problem that Hamilton described. Put these two problems together — partisan bias and strategic emphasis — and you have a recipe for exactly what Hamilton predicted: impeachment judgments that divide the community along lines of “pre-existing factions” animated by “partialities, influence, and interest” and impeachment proceedings determined by such low-political considerations rather than by merit.<sup>12</sup>

In the remainder of this Review, I build on the themes and problems of Tribe and Matz's analysis to address two larger questions concerning the relationship between the constitutional power of impeachment and the constitutional politics of its application.

First, what is the proper scope of the *constitutional power* of impeachment? What is the full range of meaning, the sweep, of the term “high Crimes and Misdemeanors”?<sup>13</sup> To what types of misconduct by executive (and judicial) officers does it properly extend?<sup>14</sup>

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<sup>11</sup> See *infra* pp. 700–02.

<sup>12</sup> THE FEDERALIST NO. 65, *supra* note 1, at 395.

<sup>13</sup> U.S. CONST. art. II, § 4.

<sup>14</sup> I have discussed elsewhere the propriety of a vigorous understanding of the impeachment power as a congressional check on misuse of judicial power. Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 67–90 (2016) [hereinafter Paulsen, *Checking the Court*]; Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2729–30 (2003) [hereinafter Paulsen, *Myth of Marbury*]. In this Review, I will focus — as the authors do — on *presidential* impeachments, setting the question of judicial impeachments largely to one side except insofar as it bears on the correct understanding of the impeachment power generally. As noted below, however, the authors' decision to omit discussion of judicial impeachments may have important substantive implications: the constitutional *standard* for impeachment applies equally to Presidents and judges and cannot mean different things as to each. The authors' reformulation of the impeachment standard for Presidents has troubling implications when applied to judges, suggesting that few federal judges ever could be impeached — because their wrongful conduct or

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My thesis is that a careful consideration of the original, objective public meaning of the Constitution's impeachment standard yields the conclusion that the impeachment power is extraordinarily broad, falling just short of plenary. Impeachment was regarded as an integral part of the Constitution's system of separation of powers — a vital check in the hands of the legislative branch on believed executive and judicial misconduct. The Constitution's original meaning supports a sweeping power of the two houses of Congress to remove officials for conduct *they* judge to be: in serious violation of the Constitution; an abuse or misuse of power lawfully possessed; a serious failure to perform the duties of office faithfully and responsibly; a betrayal of the public trust or compromise of vital national interests; corrupt conduct of any of a number of possible varieties; a serious criminal-law offense incompatible with continuance in public office; or other serious non-criminal personal misconduct.<sup>15</sup>

In much of this, I occupy common ground with Tribe and Matz. But the constitutional bounds of the impeachment power extend further than the authors are willing to go. I will take issue, in particular, with their "Clinton Carve-Out" — the ways in which the authors deliberately depart from the Constitution's original meaning to *limit* the scope of the impeachment power. The scope of that power is strikingly broad. Not all that it permits necessarily will be congenial to all political points of view or circumstances. But that does not mean we should jigger the meaning of a constitutional grant of power to reduce it to more desirable political proportions.

The second question builds on Hamilton's concern: Given the breadth of the constitutional power of impeachment, what factors properly inform the *constitutional judgment* on the part of the House and Senate as to its proper exercise? How does one avoid the problem Hamilton anticipated — that of the political process of impeachment deteriorating into bare partisanship?

Here I will stake out an aggressively naïve position in even sharper disagreement with Tribe and Matz. Far from taking into account such considerations as whether a President retains popular support (pp. 21, 80, 102, 142–45); whether he is judged to pose an ongoing or prospective "danger of grave harm" (pp. 23, 42); the believed domestic or foreign policy implications of impeachment (pp. 100–02); the political or policy advantages or disadvantages of retaining the President (pp. 70–71, 80, 238); the believed partisan motives of one's political opponents (pp. 70, 177); a tactical assessment of the likelihood that an impeachment will

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crimes did not pose ongoing danger to society — and that several impeached judges were wrongfully forced from office. See *infra* note 50.

<sup>15</sup> For a fuller elaboration of these categories, see *infra* pp. 701–02.

succeed in conviction and the dangers posed by failure (pp. 80, 191–99, 236–38); and who would be the removed President’s successor (p. 149), I submit that the impeachment judgment is properly concerned with none of these things but solely with the question whether the wrongs committed are themselves sufficiently serious wrongs as to warrant exercise of the impeachment power.<sup>16</sup>

The remainder of the Review is structured as follows. In Part II, I engage Tribe and Matz on the question of original meaning and its centrality to a proper understanding of the impeachment power. I then critique Tribe and Matz’s decision to *abandon* the Constitution’s original meaning, selectively, and craft a standard of their own in its place — a move that enables their apparent gerrymander. In Part III, I situate this departure in the broader context of the book’s most serious problem: the partisanship that pervades the presentation. Part IV then concludes by attempting a preliminary answer to the conundrum identified by Hamilton: How *does* one reconcile impeachment, as a political process of imposing political punishment for political offenses, with the desire to avoid low partisanship in carrying out that remedy? To what extent, and in what sense, is impeachment properly and unavoidably “POLITICAL”?

## II. THE CONSTITUTIONAL POWER OF IMPEACHMENT

To begin with the good: when it comes to the scope of the impeachment *power*, Tribe and Matz get quite a few important things right. First, the Constitution’s language specifying proper grounds for impeachment — a civil officer’s commission of “Treason, Bribery, or other high Crimes and Misdemeanors”<sup>17</sup> — is broad, indefinite, and by no means limited to commission of criminal offenses. Rather, it embraces a potentially sweeping range of culpable misconduct, both criminal and non-criminal, committed in official or in non-official capacities (pp. 44–53).<sup>18</sup> Second, the application of this broad language is committed to

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<sup>16</sup> I explain below what all might contribute to a judgment concerning the seriousness of the wrongful conduct — including such familiar considerations as the harm (specific or systemic) resulting from it, whether the conduct was willful and intentional, whether it was done in perceived bad faith, and whether the conduct consisted of an isolated event or transaction or instead reflected a pattern of recurrent misconduct. *See infra* pp. 719–21. But a “good” President who has committed impeachable wrongs, judged to be themselves of a serious nature — willful, culpable, harmful — should not be exonerated or excused because of his or her (*otherwise*) good qualities, policies, or politics.

<sup>17</sup> U.S. CONST. art. II, § 4.

<sup>18</sup> Tribe and Matz acknowledge that acts in violation of criminal laws can constitute impeachable offenses and need not have involved misuse of the powers of office. Murder and perjury are paradigmatic “terrible” criminal-law wrongs that “would surely warrant removal” if committed by a President (p. 51). Even pre-officeholding misconduct (which by definition could not involve misuse of the powers of office) can be impeachable, they note, employing an example commonly used

the constitutional judgment and discretion of the two houses of Congress, not the judiciary (pp. 109–50).<sup>19</sup> Third, the power of impeachment, vigorously applied in a principled fashion, is not a *threat* to the Constitution’s separation of powers but an *application* of that paradigm (pp. 3–8, 102). Fourth, the power of impeachment, though broad, is not unlimited. It presumes culpable, wrongful conduct, not mere errors of judgment or policy disagreement (pp. 39–40). It is not rightly the equivalent of a modern parliamentary vote of “no confidence” and should not be allowed to degenerate into one (pp. 18, 39, 102).<sup>20</sup> For similar reasons, Presidents cannot rightly be impeached for blameless incapacity, disability, or insanity. (Other provisions of the Constitution exist for these situations.) Impeachment is addressed to *acts* of wrongdoing and wrongful failures to act, not to personal capacities or medical conditions apart from wrongful deeds or patterns of misconduct (pp. 221–31).

All of these points are correct, and all are important. And each of these conclusions is fully supported by the best evidence of the original meaning of the Constitution’s text.<sup>21</sup> For reasons — and with conse-

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by the Framers: corrupt behavior to attain office (pp. 5, 60). (The authors do not *apply* this principle consistently, however: as noted below, they adopt different principles for Bill Clinton. *See infra* section III.B, pp. 708–12.) Tribe and Matz also emphasize that impeachment is not *limited* to ordinary criminality (p. 45). As I set forth presently, the evidence of the original meaning of the term “high Crimes and Misdemeanors” clearly supports this conclusion. Nonetheless, as Tribe and Matz colorfully note, the notion that impeachment is limited to criminal-law offenses, despite “having died a thousand deaths,” “staggers on like a vengeful zombie” (p. 45). Tribe and Matz’s position contrasts sharply with the irresponsible (and seemingly unresearched) position of Tribe’s former Harvard colleague, Professor Alan Dershowitz, who argues in a recent book that Presidents can be impeached only for defined, statutory criminal-law wrongdoing. ALAN DERSHOWITZ, *THE CASE AGAINST IMPEACHING TRUMP* 11–18 (2018).

<sup>19</sup> That said, in a sufficiently egregious hypothetical case of an impeachment violating a specific rule of law established by the Constitution — for example, a purported “conviction” in the Senate resting on a simple majority vote, rather than the required two-thirds majority — it is not clear that the Constitution forecloses judicial jurisdiction. *But see* CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 23–24, 53–63 (1974) (overstating the intuition that “‘judicial review’ has no part to play in impeachment proceedings,” *id.* at 62).

<sup>20</sup> The authors seemingly stray from this premise, too, when they allow considerations of electoral political support to enter into impeachment as it were by the back door: while an official should not be *removed* merely for ordinary political reasons, Tribe and Matz argue that a President who has engaged in otherwise impeachable misconduct should be *retained* if he has not “so lost the confidence of the citizenry that he could not govern effectively” (p. 21). *See infra* section III.D, pp. 716–17.

<sup>21</sup> The academic consensus on this point is strikingly universal, uniting the best serious scholarly books on impeachment over the last fifty years and scholars across the ideological spectrum. *See generally* RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 53–102 (1973); BLACK, *supra* note 19, at 25–40; ELEANORE BUSHNELL, *CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS* 18–21 (1992); MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 1–22 (1996); PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635–1805*, at 90–106 (1984). The chief areas of academic *disagreement* focus on how clear the evidence of original meaning is and needs to be; how

quences — that I discuss below, Tribe and Matz ultimately disavow reliance on such evidence. But as even these authors acknowledge, “we have to start somewhere” and the historical record can at least “shed some helpful light” (p. 37). I would put it more strongly: the originalist case for an expansive understanding of the impeachment power is almost overwhelming. Essentially *all* the evidence from text, history, and structure points toward a broad meaning of the phrase “high Crimes and Misdemeanors.” The significance of such evidence cannot readily be disregarded. It establishes, at minimum, a baseline of proper constitutional understanding — a baseline from which Tribe and Matz depart.

### A. *Original Meaning*

To compress the case drastically, but not unfairly<sup>22</sup>: The term “high Crimes and Misdemeanors” had been employed in the English practice of impeachment for more than four centuries at the time of the Constitution’s framing.<sup>23</sup> Impeachment was a device whereby Parliament sought to check the powers of the Crown by impeaching officers (other than the King himself, whose person was inviolable) whom Parliament believed had engaged in abuse of power; violated the constitution or laws; subverted the rights of Parliament or the system of government; failed to perform the duties of office faithfully and competently; engaged in self-dealing behavior or misuse of funds; or were guilty of oppression, corruption, or other mal-administration.<sup>24</sup> In short, the term embraced

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much emphasis should be placed on such evidence as opposed to other types of constitutional argument; and whether, irrespective of evidence of original textual meaning, the power of impeachment should be thought to be more limited for reasons of policy, practice, or particular political circumstances. For example, Professor Black characteristically emphasizes the Constitution’s structural logic and gently downplays history, BLACK, *supra* note 19, at 49–52; Gerhardt focuses on political processes in a descriptive way, GERHARDT, *supra*, at 12–21; Bushnell highlights the experience of prior impeachment proceedings, BUSHNELL, *supra*, at 1–8; Hoffer and Hull present an analysis of early American constitutional history, including colonial and early state practice and usage, *see* HOFFER & HULL, *supra*. And Berger powerfully marshals the evidence of historical understanding, but argues, idiosyncratically, that the impeachment power is not the exclusive means of removing judges. BERGER, *supra*, at 159–80.

<sup>22</sup> The respected 1974 House Judiciary Committee Report, *see* STAFF OF THE IMPEACHMENT INQUIRY, H.R. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, H.R. DOC. NO. 28-959 (2d Sess., Comm. Print 1974) [hereinafter 1974 JUDICIARY REPORT], contains a valuable distillation of much of the historical evidence. For a treatment of some of the historical evidence in my previous writing, *see* Paulsen, *Checking the Court*, *supra* note 14, at 67–85. I have recently presented a more complete version of the historical evidence in a series of essays for *Law and Liberty*. *See, e.g.*, Michael Stokes Paulsen, *The Original Meaning of “High Crimes and Misdemeanors,” Part I*, LAW & LIBERTY (Aug. 8, 2018), <https://www.lawliberty.org/2018/08/08/the-original-meaning-of-high-crimes-and-misdemeanors-part-1/> [<https://perma.cc/6PJN-WSFS>].

<sup>23</sup> Paulsen, *supra* note 22.

<sup>24</sup> *Id.*



a broad range of political offenses, as well as wrongs that might otherwise be punishable by the criminal law. The phrase, and the corresponding practice, had become well established by the seventeenth and eighteenth centuries. At the time of the framing of the Constitution, a prominent impeachment proceeding was taking place in Great Britain: the impeachment of Warren Hastings, Governor-General of India, for “high crimes and misdemeanors” consisting of “gross maladministration, corruption in office, and cruelty toward the people of India.”<sup>25</sup> The proceedings against Hastings were notorious and well known to the Framers; indeed, the delegates at Philadelphia made specific reference to the Hastings situation in deliberating over the proposed language for the impeachment power under the U.S. Constitution.<sup>26</sup>

The records of the debates at the Constitutional Convention in 1787 reveal — much as Hamilton observed in *The Federalist No. 65* a few months later — that the Framers consciously borrowed the concept of impeachment, and eventually the specific terminology of “high Crimes and Misdemeanors,” from this British practice.<sup>27</sup> The delegates went around the block a few times over the wording of the impeachment standard and what institution would have authority to apply it before returning to the model of Great Britain in both respects. A power of impeachment was present in all early proposals submitted to the Convention.<sup>28</sup> The Convention agreed early on to a resolution making the executive authority — the exact form of which had not yet been

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<sup>25</sup> 1974 JUDICIARY REPORT, *supra* note 22, at 7.

<sup>26</sup> Tribe and Matz acknowledge this history (pp. 39–41, 45–46) but completely discount its importance. They write: “While ‘high Crimes and Misdemeanors’ was a term of art dating to 1386, and had thus accumulated centuries of intellectual baggage, there’s no reason to think the Framers had all that in mind” (p. 40). Thus, “[u]nlike some scholars,” the authors choose not to “assign any further meaning to this choice of language” (p. 40). As shown presently, however, the Framers of the U.S. Constitution in fact plainly *did* have the English impeachment standard and practice in mind.

<sup>27</sup> THE FEDERALIST NO. 65, *supra* note 1, at 395 (“The model from which the idea of this institution has been borrowed pointed out that course to the convention.”). The debates at Philadelphia were not public and formed no part of the official exposition of the Constitution as debated and ratified by state conventions. They are nonetheless highly instructive evidence of the *meaning* the words and phrases used in the Constitution would have had to informed speakers and readers of the English language, at that time and in that political community. For a methodological defense, see generally Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113 (2003).

<sup>28</sup> See James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17, 22 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (ninth resolution of Virginia Plan providing for national judiciary jurisdiction over “impeachments of any National officers”); James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 FARRAND’S RECORDS, *supra*, at 242, 244 (fifth resolution of New Jersey plan); James Madison, Notes on the Committee of the Whole (June 18, 1787), in 1 FARRAND’S RECORDS, *supra*, at 282, 292 (proposal IX of Hamilton plan).

settled — subject to impeachment for “mal-practice or neglect of duty.”<sup>29</sup> In subsequent debates, delegates defending the Executive’s impeachability spoke variously of the need to be able to impeach the Executive for “corruption,”<sup>30</sup> bribery, obtaining office by improper means, betraying his trust to a foreign power, “negligence,” “perfidy” (dishonesty),<sup>31</sup> “peculation” (self-dealing), or “oppression.”<sup>32</sup>

The Committee of Detail draft of August 6 listed “treason, bribery, or corruption” as grounds for impeachment.<sup>33</sup> The Committee of Eleven draft of September 4 dropped, seemingly without explanation, “corruption,” leading to the notable floor debate of September 8 that resulted in the inclusion of the term “high Crimes and Misdemeanors.”<sup>34</sup> George Mason objected that limiting impeachment to “treason and bribery” did not capture the full range of offenses for which impeachment might be warranted. (It certainly did not match the breadth of impeachable misconduct mentioned in the earlier rounds of the Convention’s debates.):

COL. MASON. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined.<sup>35</sup>

The reference to “Hastings” obviously was to the pending impeachment of Warren Hastings — a hot topic, as it were, apparently familiar to all as an illustration.<sup>36</sup>

<sup>29</sup> Journal (June 2, 1787), in 1 FARRAND’S RECORDS, *supra* note 28, at 76, 78 (motion of Hugh Williamson).

<sup>30</sup> James Madison, Notes on the Constitutional Convention (July 20, 1787), in 2 FARRAND’S RECORDS, *supra* note 28, at 63, 65 (statement of George Mason).

<sup>31</sup> *Id.* (statement of James Madison).

<sup>32</sup> *Id.* at 65–66 (statement of James Madison); *see also id.* at 64–66 (statement of George Mason) (“No point is of more importance than that the right of impeachment should be continued” for “great crimes.” *Id.* at 65.); *id.* at 65–66 (statement of James Madison) (impeachment appropriate for “incapacity, negligence or perfidy,” *id.* at 65, perverting executive administration “into a scheme of peculation or oppression,” *id.* at 65–66, or if the Executive were to “betray his trust to foreign powers,” *id.* at 66); *id.* at 68–69 (statement of Gouverneur Morris) (impeachment of Executive appropriate for corruption, “bribery,” *id.* at 68, betraying his trust or being in foreign pay, “treachery,” “[c]orrupting his electors,” and “incapacity,” *id.* at 69); *id.* at 67 (statement of Edmund Randolph) (impeachment necessary to guard against Executive “abusing his power”).

<sup>33</sup> James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), in 2 FARRAND’S RECORDS, *supra* note 28, at 177, 186.

<sup>34</sup> James Madison, Notes on the Constitutional Convention (Sept. 8, 1787), in 2 FARRAND’S RECORDS, *supra* note 28, at 547, 550.

<sup>35</sup> *Id.* (statement of George Mason).

<sup>36</sup> After a long, drawn out investigation and proceedings over the course of many years, Hastings eventually was acquitted by the House of Lords in 1795 — long after the Constitutional Convention had deliberated over the impeachment standard and long after the Constitution was adopted. *See* Sketch of the Proceedings of the House of Commons Against Him Previous to His Impeachment and Trial, in THE HISTORY OF THE TRIAL OF WARREN HASTINGS, ESQ. v, ix–xiv (London, J. Debrett 1796); Record of the Proceedings of Thursday, April 23, in THE HISTORY OF THE TRIAL OF WARREN HASTINGS, ESQ., *supra*, at 265, 265–71.

Mason therefore moved to add “or maladministration” as a further general category of impeachable offenses. James Madison objected that “maladministration” was too “vague” and might reduce the President to service at the “pleasure of the Senate.” Mason thereupon proposed the substitute “other high crimes & misdemeanors <agst. The State>,” the more familiar term of art drawn from longstanding English practice.<sup>37</sup> That evidently bridged the differences. It apparently met Mason’s concern that the description of impeachable offenses embrace acts subverting the Constitution; abusing official authority; or involving self-dealing, corruption, and other types of wrongdoing. Yet it was arguably more specific than “maladministration,” given its familiar history of practice and usage, going at least part of the way to addressing James Madison’s concern. At all events, Madison did not renew his objection to vagueness. (He later objected to the *Senate* being the forum for trying impeachments — in part because the standard remained broad — but not to the standard itself.<sup>38</sup>) Mason’s amendment passed handily: “On the question thus altered,” Madison reported in his Notes, the vote was eight states in favor and three opposed.<sup>39</sup>

The ratification debates confirm a uniformly broad understanding of “high Crimes and Misdemeanors.” First, there is Hamilton in *The Federalist*, instructive as much for the clarity of his exposition — for displaying intelligent contemporaneous understanding — as for any direct relevance it may have had in securing ratification.<sup>40</sup> As noted, Hamilton embraced, unequivocally, a sweeping understanding of the impeachment power. Impeachment encompassed offenses of a “political” nature, including the “abuse or violation of some public trust.”<sup>41</sup> More than that, the power of impeachment was “a bridle in the hands of the legislative body upon the executive servants of the government”<sup>42</sup> — an “essential check” analogous to the President’s veto as a check on the legislature.<sup>43</sup> As such, impeachment “can never be tied down” by strict rules either in the “delineation of the offense” by the House or trial by the Senate.<sup>44</sup> Hamilton’s illustrations of impeachable misconduct further reinforce this sense of breadth: a President rightfully

<sup>37</sup> Madison, *supra* note 34, at 550 (internal quotation marks omitted).

<sup>38</sup> *Id.* at 550–53. Madison continued his objection that trial by the Senate would make the President “improperly dependent,” in part because impeachment would lie “for any act which might be called a misdemeanor.” *Id.* at 551.

<sup>39</sup> *Id.* at 550.

<sup>40</sup> See Kesavan & Paulsen, *supra* note 27, at 1144–48, 1150–59 (discussing relevance and weight of *The Federalist* as second-best evidence of original linguistic meaning of the Constitution, not because authoritative “legislative history” inducing reliance but primarily because an intelligent “topical concordance” of the usage and understanding of the document’s terms, *id.* at 1147–48).

<sup>41</sup> THE FEDERALIST NO. 65, *supra* note 1, at 394.

<sup>42</sup> *Id.* at 396.

<sup>43</sup> THE FEDERALIST NO. 66, *supra* note 1, at 400 (Alexander Hamilton).

<sup>44</sup> THE FEDERALIST NO. 65, *supra* note 1, at 396.

might be impeached for “a corrupt or perfidious execution” of the treaty-making power or for “betraying the interests of the nation” in foreign dealings.<sup>45</sup>

Hamilton’s position here was hardly idiosyncratic, but reflected the broad consensus of views expressed during the ratification era. Indeed, *all* prominent statements made concerning impeachment in the state debates over ratification of the Constitution are in agreement on these points. There was disagreement over whether the impeachment power *should* be so broad, and whether such a broad power should be reposed in the Senate specifically. But no one ever doubted — all in the ratification debates consistently affirmed<sup>46</sup> — that the impeachment standard vested extraordinarily broad discretion in the two houses of Congress,

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<sup>45</sup> THE FEDERALIST NO. 66, *supra* note 1, at 403. (Hamilton made these observations in passing, in discussing the propriety of the Senate serving as a court of impeachments for such offenses, notwithstanding its constitutional role in the treaty-making process.) Hamilton’s *Federalist* essays on the judiciary similarly confirm a broad understanding of the impeachment power — in ways many today might find surprising. Hamilton referred to “the important constitutional check” of impeachment as a “complete security” against the “danger that the judges” might abuse constitutional power “by a series of deliberate usurpations of the authority of the legislature.” THE FEDERALIST NO. 81, *supra* note 1, at 484 (Alexander Hamilton). In such a case, he argued, the legislature would act properly in “punishing their presumption by degrading them from their stations.” *Id.*

<sup>46</sup> In Virginia, Edmund Randolph suggested a President could be impeached if he “misbehaves” (and later offered the example of receiving gifts or emoluments from foreign powers in violation of the Constitution’s prohibition), but not for errors of judgment, opinion, or policy. Edmund Randolph, Address to the Virginia Convention (June 10, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 194, 201 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 1836) [hereinafter ELLIOT’S DEBATES]; Edmund Randolph, Statement in the Virginia Convention (June 14, 1788), *in* 3 ELLIOT’S DEBATES, *supra*, at 400, 401; Edmund Randolph, Statement in the Virginia Convention (June 15, 1788), *in* 3 ELLIOT’S DEBATES, *supra*, at 485, 486. George Mason, opposing ratification, worried that a President might “pardon crimes which were advised by himself” or grant pardons “to stop inquiry and prevent detection.” George Mason, Statement in the Virginia Convention (June 18, 1788), *in* 3 ELLIOT’S DEBATES, *supra*, at 496, 497. James Madison responded that, were a President to do so, the President could and should be impeached for such misconduct. James Madison, Statement in the Virginia Convention (June 18, 1788), *in* 3 ELLIOT’S DEBATES, *supra*, at 498, 498. Replying to a different concern, Madison stated that if a President were to call senators of only a few states to secure consent to a proposed treaty he rightly “would be impeached and convicted” for such “atrocious . . . misdemeanor.” James Madison, Statement in the Virginia Convention (June 18, 1788), *in* 3 ELLIOT’S DEBATES, *supra*, at 500, 500. John Rutledge made the same point in South Carolina: were the President to convene a rump Senate satisfying the minimum for a two-thirds vote of a quorum, he would be liable to impeachment and removal. John Rutledge, Statement in the South Carolina Convention (Jan. 16, 1788), *in* 4 ELLIOT’S DEBATES, *supra*, at 267, 268. In a similar vein, James Iredell of North Carolina noted that a President could be impeached for the “misdemeanor” of “giving false information to the Senate” to secure its assent to a treaty. James Iredell, Statement in the North Carolina Convention (July 28, 1788), *in* 4 ELLIOT’S DEBATES, *supra*, at 125, 127. And South Carolina’s Charles Cotesworth Pinckney stated that impeachment would reach officials who “behave amiss, or betray their public trust.” Charles Cotesworth Pinckney, Statement in the South Carolina Convention (Jan. 17, 1788), *in* 4 ELLIOT’S DEBATES, *supra*, at 277, 281. In none of these examples would the conduct at issue necessarily have fallen into the category of ordinary criminal offenses.

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for better or worse, and that this extended to non-criminal, “political” misconduct.

The structure and logic of the Constitution’s other provisions referencing impeachment confirm the historical evidence that the meaning of “high Crimes and Misdemeanors” confers a broad range of choice on legislators. The Constitution grants to the House of Representatives the “sole Power of impeachment”<sup>47</sup> and to the Senate the “sole Power to try” impeachments<sup>48</sup> — reinforcing the understanding that the term “high Crimes and Misdemeanors” does not have a fixed, determinate, limited meaning, but instead constitutes a broad grant of interpretive power and practical judgment to the two houses. Indeed, that would seem to be the simple logic of the Constitution’s structure. The Framers adopted a known historical term bearing an indeterminate range of meaning — the precise scope of which was committed to legislative judgment — and vested the power to interpret and implement that standard in the House and Senate, which in the exercise of their respective roles would parallel those of the House of Lords and the House of Commons in the British Parliament.<sup>49</sup>

It follows, I submit, that Congress rightfully possesses power to impeach and remove Presidents (and other executive officials and judges) for a wide range of misconduct as judged, ultimately, by legislators themselves. The impeachment power properly can be employed to punish or remedy what Congress determines to be:

1. Serious, persistent violation of the Constitution or substantial departure from sworn constitutional duty;
2. Serious misuse or abuse of constitutional powers actually possessed;
3. Willful failure to perform the duties of office faithfully and responsibly (a category embracing failures to act as well as affirmative wrongs); culpable negligence or incompetence;
4. Betrayal or compromise of the national interest, disloyalty, or an intolerable conflict of interest between an officer’s personal interests and faithfulness to the duties of office;
5. Violation of the public trust, or breach of good faith, by dishonesty or lack of integrity in public behavior or by self-dealing or corruption;
6. Serious, willful criminal-law violations of a nature that Congress judges incompatible with continuance in important national office, including (but not limited to) treason, bribery, obstruction of justice, perjury, corruption, and other criminal

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<sup>47</sup> U.S. CONST. art. I, § 2, cl. 5.

<sup>48</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>49</sup> See Paulsen, *Checking the Court*, *supra* note 14, at 71–72.

wrongdoing involving intentional dishonesty, moral turpitude, or serious injury to others; and

7. Serious non-criminal misconduct or misbehavior judged incompatible with the function, purpose, or dignity of the office (which might include such things as use of office for personal gain, self-benefit, or personal entertainment, or engaging in intolerable sexually predatory or harassing conduct, or other grossly unacceptable behavior).

Each of these subcategories of wrongful, culpable misconduct fits within the range of original meaning of the Constitution's term "high Crimes and Misdemeanors." (Only the last, "catch-all" category pushes the boundaries of historical understanding in the slightest.)

To be sure, this is a broader understanding of the scope of the impeachment power than is conventionally and popularly recognized. It is also fair to observe that this understanding reaches further than has the nation's actual experience and practice of impeachment.<sup>50</sup>

But it is not clear why this should matter. The meaning of the Constitution itself is not altered — the full scope of the constitutional power of impeachment is not waived, forfeited, or lost — by its failure

<sup>50</sup> This is especially true with respect to judicial impeachments — a topic I have addressed elsewhere. *See id.* at 67–90; Paulsen, *Myth of Marbury*, *supra* note 14, at 2729–30. Briefly summarized: The Constitution's standard of "high Crimes and Misdemeanors" applies in the same terms to Presidents and judges. If impeachment properly may be employed to remove Presidents for serious violations of the Constitution, departures from duty, or willful misuse of authority, it is difficult to deny a power to remove judges on the same grounds. Prominent defenses of the Constitution did not deny the propriety of such a use of impeachment, but affirmatively embraced it. Alexander Hamilton, as noted, affirmed the use of impeachment as a check or remedy for judges who commit "a series of deliberate usurpations" of authority. THE FEDERALIST NO. 81, *supra* note 1, at 484. While it is possible to argue that judgments concerning application of the impeachment power are affected by the nature of the office, it is harder to argue that the scope of the power itself differs for executive and judicial officers. And while the idea of impeaching judges for misuse of constitutional power challenges modern notions of judicial supremacy (at least in extreme forms), it is appropriate to accept that challenge — to reexamine assumptions about judicial supremacy and complete interpretive freedom — rather than adopt an atextual understanding of the power of impeachment. *See* Paulsen, *Myth of Marbury*, *supra* note 14, at 2730.

The relevance of judicial impeachments to presidential impeachments may flow in the reverse direction as well. Several federal judges have been impeached, several removed, and others induced to resign for commission of offenses involving dishonesty — including obstruction of justice, perjury, lying to federal investigators, and filing false tax returns — and for acts of sexual assault, exploitation, or serious harassment. *See* BARBARA A. RADNOFSKY, A CITIZEN'S GUIDE TO IMPEACHMENT 50–54, 65–70, 77–84 (2017) (describing impeachment charges against Halstead Ritter (1936), Harry Claiborne (1986), Alcee Hastings (1989), Walter Nixon (1989), Samuel Kent (2009), and G. Thomas Porteous, Jr., (2010) on one or more of these grounds); *cf.* Matt Zapotosky, *Judge Who Quit over Harassment Allegations Reemerges, Dismaying Those Who Accused Him*, WASH. POST (July 24, 2018), <https://wapo.st/2AaMJ2O> [<https://perma.cc/JNF2-9V5V>] (recounting the resignation of Judge Kozinski from the Ninth Circuit in the wake of sexual harassment allegations). If such misconduct supplies a valid basis for removal of judges, it is hard to see why it should not in principle supply a similar basis for impeachment of executive branch officers.

to have been exercised to its full extent in the past, or by a specific instance when impeachment was not sought, or by an acquittal. There is no *stare decisis* force to the results of prior impeachment proceedings (or their absence). Given the breadth of the constitutional standard and the room for congressional choice and judgment this standard admits, it would be odd to accord meaningful precedential weight to prior impeachment decisions (and non-decisions) as against any later impeachment judgments that fit within the breadth afforded by the Constitution's original meaning.<sup>51</sup>

Indeed, the better conclusion is not that the power of impeachment has been repealed by popular perceptions or by practice but that the constitutional power of impeachment simply has been *underutilized* relative to what the original scope of the power would permit — that the nation's constitutional practice has fallen short of the Framers' expectations. Our practice has been (to coin a phrase) one of *under-impeachment*. That practice might well merit changing: the power of impeachment arguably deserves to be reinvigorated and restored to its rightful place in our constitutional order.

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<sup>51</sup> It is unclear why an *acquittal* should be entitled to any precedential force at all. Unlike a *conviction*, which necessarily constitutes a determination by both houses that the constitutional standard has been satisfied, an acquittal might rest on a number of grounds: a judgment that the conduct alleged, even though constituting an impeachable offense in theory, was not satisfactorily proven; an application of discretion or lenity in applying the standard; or a raw political act of partisan "jury nullification." The asymmetry of impeachment determinations is further magnified by the two-thirds majority requirement to convict in the Senate. A majority of the Senate might conclude that the impeachable misconduct occurred and merits removal, but conviction nonetheless might fail for want of a supermajority. In such a case, it seems especially troubling to treat acquittal as entitled to any interpretive force. (Indeed, a case can be made in the opposite direction: that a majority vote of the Senate to convict on a given charge is a more reliable gauge of congressional understanding than the fact that conviction failed due to the supermajority rule.) Tribe and Matz appear to agree, at least in general: "[W]e're skeptical that so-called 'impeachment precedent' commands deference apart from its power to persuade future generations. Congress isn't bound by its own prior decisions" (p. 35). Nonetheless, they make the strange suggestion that the failure of the House to impeach Vice President Aaron Burr in 1804 for killing Alexander Hamilton in a duel constitutes some sort of precedent for the proposition that "not all crimes by federal officials have been seen as impeachable" (p. 44). The authors immediately retreat, arguing that if Vice President Mike Pence were today to shoot and kill Treasury Secretary Steven Mnuchin, "he would surely be impeached, removed from office, and charged with murder" (p. 44). The explanation for the odd treatment of Burr may be that Professor Tribe had written, at the time of the Clinton proceedings, that the Burr example tended to show that "felonies involving the administration of justice" are not necessarily impeachable if they do not involve "abuse of the official powers entrusted to the alleged criminal" or "threaten the Nation and its system of government." Laurence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 GEO. WASH. L. REV. 712, 721 (1999). For a defense of the constitutional propriety of impeaching Burr, as well as plausible historical explanations for why Burr was not impeached, see Michael Stokes Paulsen, *Could Aaron Burr Have Been Impeached for the Duel?*, LAW & LIBERTY (July 11, 2018), <https://www.lawliberty.org/2018/07/11/could-aaron-burr-have-been-impeached-for-the-duel/> [<https://perma.cc/ZG85-KK0D>].

*B. Original Meaning as Inconvenience*

Tribe and Matz take a different tack. Though the evidence above is not seriously in dispute, treating such evidence as controlling does not line up with their general jurisprudential approach to constitutional interpretation: “Now and always, the Constitution belongs to the living,” they aphoristically (but ambiguously) quip (p. 16).<sup>52</sup> We should be “modest” (p. 36) about basing constitutional interpretation on original meaning, because it doesn’t tell us much of importance and because much such discussion is “originalist hokum” “meant to make a disputed judgment sound neutral and objective” (p. 37). For Tribe and Matz, constitutional interpretation is all about making “*judgments*” (p. 42).<sup>53</sup> And such judgments cannot rest simply on historical and linguistic evidence of the Constitution’s original textual meaning. They require instead “a nuanced view of current circumstances” (p. 42).

This is a fundamental and long-running methodological disagreement, of course: Does the Constitution’s meaning as an authoritative written text vary with time and circumstances? Or does written constitutionalism imply that the meaning of the text is determined by the objective public meaning its words and phrases had at the time and in the context in which they were adopted (and accounting for specialized usages and terms of art)? Where constitutional terms are thought open-ended, indeterminate, or vague, does that imply that they can be treated as malleable, subject to whatever reading one thinks best today? Or does it mean that the Constitution leaves policy choices admitted by the breadth or indeterminacy of its language to the decisions of the people made through representative institutions?

I will not attempt to settle that long-running debate here,<sup>54</sup> but note that Tribe and Matz are clearly on the “living constitution” side of it —

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<sup>52</sup> Of course the Constitution belongs to the living! But that does not tell you much at all about the *sense* in which the Constitution so “belongs”: one can acknowledge that the Constitution “belongs to the living” in the sense that the decision to be bound by this particular Constitution is always a political decision extrinsic to the text of the Constitution itself and must be made by each generation. That differs, however, from saying that the document’s *meaning* as a text is a function of current generations’ political preferences or opinions. See Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 916–19 (2009). Such a view (which appears to be what Tribe and Matz mean by their use of the phrase) is inconsistent with the very idea of written constitutionalism — the political theory that decisions made in a written constitution constrain the choices of subsequent actors exercising government power under that constitution. See Paulsen, *Myth of Marbury*, *supra* note 14, at 2739–42.

<sup>53</sup> Emphasis has been added.

<sup>54</sup> In other writing, I have taken the position that original-objective-textual-meaning is the single correct approach to *constitutional interpretation* — that is, to the project of ascertaining the *meaning* of an authoritative written text, adopted at a particular time in a particular social and political context, as distinct from the question whether that meaning is good or bad policy. See generally Kesavan & Paulsen, *supra* note 27; Paulsen, *supra* note 52; Michael Stokes Paulsen, *The Text, the*



and that this is critical to their overall project. It is the move that enables them to craft, and to adjust, “living” standards of their own for when impeachment is or is not constitutionally proper. Methodological disagreements have substantive consequences. The answers supplied by “originalist” methodologies may not be perfectly determinate, but original-meaning textualism supplies reasonably clear methodological rules that make manipulation more detectable and supply a more objective standard for criticism of deviation.<sup>55</sup> An approach to constitutional interpretation not constrained by text, structure, and history, on the other hand, tends to yield a malleable standard capable of (seemingly) political manipulation depending on the circumstances.

The authors argue that the term “high Crimes and Misdemeanors” is vague; that evidence of original meaning and understanding is contestable, uncertain, and incomplete; and that, therefore, the proper understanding of the constitutional power of impeachment is a matter of essentially political, prudential, and policy judgments.

What emerges from this stew is not entirely clear; Tribe and Matz offer different formulations of their standard at different points in the book.<sup>56</sup> The simplest statement, probably, is the suggestion that “high Crimes and Misdemeanors,” like treason and bribery,

involve corruption, betrayal, or an abuse of power that subverts core tenets of the US governmental system. They require proof of intentional, evil deeds that risk grave injury to the nation. Finally, they are so plainly wrong by current standards that no reasonable official could honestly profess surprise at being impeached. (p. 42)

Restating the point, Tribe and Matz emphasize that the President must have “done something so awful that we must seriously consider removing him without waiting for the next election” because he “has lost legitimacy and viability as our leader” and “we fear he’ll inflict further damage to our polity if he remains in power” (p. 42). And while the authors vary this definition slightly throughout, they are consistently careful to include additional elements beyond commission of serious, wrongful acts. Depending on the page, the President, in addition to engaging in what otherwise would constitute impeachable misconduct, *also* must (1) have used “the formal powers of . . . office” in engaging in

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*Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar’s Unwritten Constitution*, 81 U. CHI. L. REV. 1385 (2014) (book review).

<sup>55</sup> See Paulsen, *supra* note 52, at 914–16, 916 n.179.

<sup>56</sup> For instance, impeachment is a “last resort for avoiding genuine catastrophe” appropriate when “the nation faces clear peril” for which there is “no other plausible exit” other than impeachment (p. 23); reserved for conduct “so awful” and “so disturbing a signal of future conduct[] that allowing the president to remain in office poses a clear danger of grave harm” (p. 23); limited to “dangerous offense[s] against the nation” when viewed “with a forward-looking and preventive focus” (p. 47); and guided by the question “whether [the President] poses a continuing danger if he remains in office” (p. 198).

the alleged wrongdoing (p. 21), (2) have lost public confidence and political support, rendering him “unviable as a national leader” (p. 10), or (3) pose a prospective danger of grave harm for which there is no alternative short of removal (pp. 23, 47, 198).<sup>57</sup>

This is a strict standard indeed — stricter, certainly, than commission of “high Crimes and Misdemeanors.” One might argue that such a higher threshold is sensible as a policy matter (in some respects), that the Constitution’s expansive impeachment standard permits too broad a latitude of judgment, sweeps too much into its grasp, and threatens too much disruption of political leadership too readily. One might also argue the opposite: that the authors’ stricter standard, taken seriously and applied consistently, would allow too much misconduct and excuse too many miscreants. It is not clear that Nixon, or any other President, would satisfy this far stricter test on its own terms. But the more important point is that these addenda appear, in a sense, out of nowhere. They are not supported by the text of the Constitution or by the best historical evidence; there is no hint of a future-harm inquiry, or a political-viability inquiry, in either the records of the Convention or the ratification debates. And so the question becomes: Why tack them on?

I submit that the answer is political, and for that matter partisan: the authors’ standard allows them to reach the conclusion that President Trump is impeachable, and that President Clinton was not.

And that, after all, is the point, isn’t it? In the end, Tribe and Matz are far less concerned with method than with madness: at heart, this is a book about Donald Trump. *To End a Presidency* is primarily about ending a *particular* presidency — but the goal has to be accomplished without too much friendly fire. And it is precisely such partisanship that undermines the book’s effectiveness and persuasive force.

### III. A PARTISAN GUIDE TO IMPEACHMENT

#### A. *Trump, Trump, Trump*

*To End a Presidency* is part of a growing cottage industry in quickly produced books about impeachment that are, really, centrally about Trump.<sup>58</sup> Tribe and Matz’s is the best of this new bunch — more serious

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<sup>57</sup> Tribe and Matz are unclear about whether *all* of these three additional conditions must be satisfied for impeachment to be allowed or whether *one* or some combination is sufficient: “This may all sound a bit vague. Fair enough. Impeachment requires good judgment amid uncertainty, not a preprinted checklist of relevant considerations” (p. 23).

<sup>58</sup> See CHARLES L. BLACK, JR. & PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK* (2d ed. 2018); JEFFREY A. ENGEL ET AL., *IMPEACHMENT: AN AMERICAN HISTORY* (2018); RON FEIN ET AL., *THE CONSTITUTION DEMANDS IT: THE CASE FOR THE IMPEACHMENT OF DONALD TRUMP* (2018); MICHAEL J. GERHARDT, *IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW* (2018); ALLAN J. LICHTMAN, *THE CASE FOR IMPEACHMENT* (2017); RADNOFSKY, *supra* note 50; CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* (2017). The outlier of the bunch in terms of viewpoint is DERSHOWITZ, *supra* note 18.

in its treatment, more scholarly in its aims — but it shares in common with the others the features of partisanship and the manipulation of impeachment criteria to fit partisan goals. It is nominally *also* about the power of impeachment generally. But it is no exaggeration to say that the book is more about impeaching Trump in particular than about impeachment in general. From start to finish, the book is about the prospects for impeaching and removing Trump — its desirability, its constitutional defensibility, and (to the authors' evident despair) its practical impossibility. The Preface's (awful) first sentence reads: "Impeachment haunts Trumpland" (p. xi). The authors continue: "Never before has an American leader so quickly faced such credible, widespread calls for his removal" (p. xi).<sup>59</sup> Trump's is the face that launched a thousand impeachment ships and the gale force that blew this one to sea: "If you're reading this book in 2018, you're probably thinking about Trump," Tribe and Matz write. "So are we" (p. xxi). And despite some half-hearted protestations to the contrary — "[b]ut this book is *not* a brief for removing Trump," the authors say at one point (p. xxi) — the book really *is* a brief for removing Trump.

That is not necessarily all bad. The conceit of academic objectivity is often a pretense, which Tribe and Matz, to their credit, drop.<sup>60</sup> The book features dozens of pages detailing Trump's potentially impeachable misconduct. As noted, the materials dedicated to Trump's alleged wrongdoing, and how it might satisfy the Constitution's impeachment standard, are among the best, most carefully formulated parts of the book.

The authors' thesis on this point is relatively straightforward: Trump is a menace (pp. 19, 218–20), a miscreant (pp. 58–68, 185–93), and a moron (p. 225). He *deserves* to be impeached, and the Constitution's impeachment standard easily permits this result.<sup>61</sup>

But Trump *won't* be impeached, largely because of Republican partisan political loyalties. Moreover, an effort to impeach him probably shouldn't even be attempted, the authors say — at least not as of the book's spring 2018 publication date — because doing so would likely

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<sup>59</sup> The focus on Trump continues all the way to the book's closing "Acknowledgements," where the authors say that "[w]riting about impeachment is an exhilarating and maddening experience — especially in the Age of Trump" (p. 243).

<sup>60</sup> "Lawyers specialize in thinking about things while pretending not to," they write (p. 58). But "it would be strange to pretend we can discuss 'high Crimes and Misdemeanors' today without *any* reference to Donald Trump" (p. 58). *But cf.* SUNSTEIN, *supra* note 58, at 15 ("With the goal of neutrality in mind, I am not going to speak of any current political figure. I am going to focus on the majesty, and the mystery, of impeachment under the U.S. Constitution.")

<sup>61</sup> The authors emphasize the factual plausibility of charges of collusion by Trump campaign officials and family members with a foreign nation in order to affect U.S. election results, the plausibility of charges of impeachable obstruction of justice arising from Trump's efforts to conceal and to obstruct official investigations into such possible collusion, and the plausibility of impeachment based on an endemic pattern of public lies and misrepresentations (pp. 58–65).

prove not only futile but counterproductive. A failed impeachment attempt might actually consolidate Trump's power by firing up his political base and costing Democrats congressional seats (p. 238). (Much of the latter two-thirds of the book is devoted to a strategic calculation of prospects and pitfalls, risks and rewards, opportunities and hazards, as I discuss presently.)

### B. *The Ghost of Clinton Past*

But if the prospect of impeaching Trump is the book's main theme, the book features several secondary themes that serve as counterpoints. The most obtrusive of these is the claimed constitutional illegitimacy of the impeachment of President Bill Clinton.

Like generals refighting the last war, the authors are nearly as obsessed with Clinton as with Trump. The impeachment of Clinton was "contemptible" (p. xvi). It was "[b]orn of partisan spite and rejected on partisan lines" (p. 177). It consisted of "merciless examination of Clinton's extramarital affairs" (p. 21) — "trysts" and "sexual escapades" (p. 97) — that did no harm to the nation. The perjury and obstruction of justice charges against Clinton were "correctly perceived" as based on "political (and personal) animus" (pp. 21, 103, 239) and provided no legitimate basis for impeachment. Such charges "dragged impeachment down into the mud" and led to the "degradation of presidential impeachment" (p. 177). Indeed, of all the forces that have contributed to the "partisan civil war" that cripples effective use of the impeachment power today, "none looms larger than the Clinton proceedings" (p. 177). The impeachment of Bill Clinton was "implausible," "perverse and profoundly irresponsible," and worked to "destabilize democracy" (p. 239).

These are loud claims. Tribe and Matz appear to take the extreme position that Clinton's impeachment was *constitutionally* unjustifiable, not just that it was unwise.<sup>62</sup> They offer four reasons. It is worth pausing to consider each carefully, as the authors' arguments here contribute greatly to their general formulation of impeachment criteria. First, Clinton "did not abuse the formal powers of his office" when he "used his position to seduce an intern" (p. 21). Tribe and Matz focus here on

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<sup>62</sup> The authors are not perfectly precise as to whether they view the charges against Clinton as constitutionally unjustifiable because *outside any plausible view of the scope of the Constitution's text* — "high Crimes and Misdemeanors" — or because *outside the range of good constitutional judgment*. Their discussion sometimes elides any distinction between these two. Compare p. 21 ("[T]he case for impeaching Clinton was a weak one . . ."), with p. 103 (stating that the Clinton acquittal confirms views of when impeachment is not "justified under the Constitution"). The strong characterizations of "contemptible" (p. xvi) and "profoundly irresponsible" (p. 239) would seem to suggest the authors think Clinton's impeachment constitutionally, and not just pragmatically or morally, unjustifiable. (It is also possible, as discussed above, that the authors' constitutional jurisprudential ideology simply does not draw any such distinction — that constitutional analysis, for Tribe and Matz, is *all* a matter of sound prudential or political judgment.)

Clinton's sexual liaisons rather than on Clinton's alleged perjuries, obstruction of justice, and lies to the public in an attempt to cover up those liaisons. (The latter were the subject of the actual impeachment articles brought against Clinton.<sup>63</sup>) Second, while Clinton may have committed wrongs against his marriage and against the system of justice, his misconduct "hardly broke faith with the nation as a whole or foreshadowed grave peril if he remained in office" (p. 21). Third, Clinton had not "lost the confidence of the citizenry" (p. 21) but instead maintained high public-opinion-poll "approval" ratings and personal "likability" scores (p. 144). Fourth, Congress possessed "ordinary checks and balances," like censure, that it could have employed instead of impeachment (p. 21).

None of these arguments works. The first three factors would seem inapposite to the question of whether conduct constitutes a constitutionally impeachable offense. First, as Tribe and Matz elsewhere concede, use specifically of the powers of office is *not* constitutionally required for impeachment. Serious ordinary criminality, including criminality having nothing to do with the exercise of the formal powers of office, can suffice as a valid ground for impeachment. And as noted, the authors use murder and perjury as illustrations of criminal acts "terrible" enough that they would "surely warrant removal if committed by the chief executive" (p. 51).<sup>64</sup>

Second, the fact that allowing Clinton to remain in office might not have "foreshadowed grave peril" seems *constitutionally* irrelevant. A requirement of likely further, or prospective, wrongdoing — or a judgment of future dangerousness — appears to be no part whatsoever of the constitutional textual standard, but a pure add-on.<sup>65</sup> At best, it seems a (debatable) prudential argument for *not exercising* the power of impeachment even where it applies; it is not an argument limiting the scope of the constitutional power itself. And once more, this additional requirement seems to contradict the authors' deployment of murder and

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<sup>63</sup> For the text of the charges, see Articles of Impeachment Against William Jefferson Clinton, H.R. Res. 611, 105th Cong. (1998) (enacted) [hereinafter Clinton Articles of Impeachment].

<sup>64</sup> See *supra* note 18. It is also not at all clear that Clinton did not use his office in the course of the actions for which he was impeached. The counts on which the House of Representatives voted to impeach Clinton included conduct specifically concerning his actions as President, and arguably implicating his standing as the nation's highest federal law enforcement official, though not specifically involving use of formal powers. See Clinton Articles of Impeachment, *supra* note 63, at 1 (alleging that Clinton acted "through his subordinates and agents" — that is, through White House employees or officials — in obstructing justice).

<sup>65</sup> The authors' formulation is especially hard to square with impeachment of judges and most other executive officials. It is hard to imagine judicial misconduct so severe in its consequences as to "risk grave injury to the nation," threaten "catastrophe," or create "peril." See *supra* pp. 705–06 and note 56. So too it would seem nearly impossible to remove a *Vice* President from office, including for acts of corruption that did not themselves threaten grave national injury or peril. (Under the authors' standard, Vice President Spiro Agnew could not have been impeached for bribery while he was Governor of Maryland. See Paulsen, *supra* note 51.) One might plausibly argue that there *should* be different, easier-to-satisfy impeachment standards for different officers. But the current text of the Constitution surely does not support such a view.

perjury as crimes that would “surely warrant removal” (p. 51). Often, the crimes of murder and perjury are situation-specific; in many cases, they would not likely be repeated. That surely does not count against their seriousness or wrongfulness.

Third, whether an official has committed constitutionally impeachable wrongs would seem to have nothing to do, one way or the other, with public approval polls, or public “faith” or “confidence” in the official generally. Impeachment is not a vote of “confidence” or “no confidence” — a point the authors embrace elsewhere in their analysis (pp. 18–19, 102, 114). To argue that impeachability should depend on political unpopularity is to allow precisely the same “no-confidence vote” considerations in, through the back door, that supposedly play no proper role in such a proceeding.

The fourth observation — the fact that other checks and reprimand devices might exist — might be true, but seems beside the point. Whether particular conduct does or does not fit the Constitution’s definition of impeachable offenses is its own distinct constitutional inquiry. The fact that misconduct might be checked or punished in other ways does not logically imply that it lies outside the impeachment power.

A possible fifth factor, not explicitly included in the authors’ list of reasons why Clinton’s impeachment was illegitimate, but which they invoke repeatedly in connection with the Clinton impeachment, is the neo-Hamiltonian point that impeachment ought not to be “partisan.” The Clinton impeachment votes, the authors argue, fell “[a]lmost entirely along partisan lines” (pp. 20–21); Clinton’s impeachment was “[b]orn of partisan spite and rejected on partisan lines” (p. 177). Assuming both points to be true, in Clinton’s case or in any other — that an impeachment reflects impure partisan motives and that votes fall along partisan lines — it is not clear why this should in any way affect the answer to the question of *whether particular misconduct constitutes an impeachable offense*. The fact that an impeachment was rejected “on partisan lines” says nothing about which side acted properly and which improperly; *that* is a question that can only be answered with reference to the merits of the underlying charges.

Likewise as to partisan “motivation.” If partisan motives spurred the bringing of *meritorious* charges of high crimes and misdemeanors, it is hard to fault the charges because of the motives. It is doubtless true that a President’s political opponents might, out of political motives, be more sympathetic to pursuing meritorious impeachment charges than would be the President’s defenders. But it is hard to say that it is the *opponents* who are acting improperly in such a situation. Indeed, one can make the argument that partisan motives in opposition to a particular President might in some cases even be a positive thing, in that such a disposition might make partisans less inclined to overlook or dismiss serious wrongful acts by a President than would be the President’s par-

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tisan supporters. (And, conversely, partisan motives might supply a useful incentive for a President's supporters to resist a doubtful effort to impeach.) In that respect, to borrow a Madisonian phrase, partisan incentives might be useful in "supplying, by opposite and rival interests, the defect of better motives."<sup>66</sup>

The larger problem — the direction in which each of the above weaknesses points — is that the authors' concern to absolve Clinton in the strongest terms (to render the charges against him not just imprudent but constitutionally out of bounds), but without absolving other Presidents, leads the authors to devise a severely distorted impeachment standard. The test employed must ensnare Nixon and Trump, but it must also be crafted so as to render the charges against Clinton "irresponsible" (p. 239).

That is a tough line to maintain in terms of constitutional principle. It is not impossible to craft, but it takes a fair bit of work: It requires drawing distinctions among supposed different types or subcategories of conduct amounting to obstruction of justice (in order to distinguish the Nixon and Clinton situations). It requires drawing a line between official-capacity wrongdoing and "private" wrongdoing, adjusting that line to make an exception for certain very serious criminal wrongs, like murder and perjury, but then crafting a further distinction among different types of such private-capacity crimes or the circumstances leading to their commission: an awkward "sexual escapades" exception-exception-exception.

More to the point, however, the line *feels* "crafted." While it is possible to distinguish the two cases and, with ingenuity, devise a rule set justifying the distinction, the distinction and the criteria that generate it ring false.

They will definitely so strike many Republicans, conservatives, and independents. This works against the authors' objectives. Such persons form a crucial part of the audience the authors say must be won over — converted to principle — if impeachment of Trump is to have any chance of success. One would think that one of the more persuasive arguments that could be directed at such persons would be that they should embrace, as to Donald Trump, the same standards of conduct and impeachability they sought to impose on Bill Clinton; that a President's repeated public dishonesty, lies, attempted cover-up of his own wrongdoing (or the wrongdoing of friends and associates), and obstruction of justice with respect to inquiries into the same, is *per se* impeachable misconduct. Tribe and Matz forfeit that argument.<sup>67</sup>

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<sup>66</sup> THE FEDERALIST NO. 51, *supra* note 1, at 319 (James Madison).

<sup>67</sup> There is of course plenty of political hypocrisy to go around. If Tribe and Matz can be accused of crafting a politically gerrymandered impeachment standard that ensnares Trump and excuses Clinton, it seems equally true that many Republicans labor to thread the impeachment needle in the opposite political direction: the standard adopted needs to justify the impeachment of Clinton

Alas, Professor Tribe vigorously defended President Clinton against impeachment in the late 1990s along the same lines as the argument made in this book. He might feel in some way “stuck” with that position; or, more likely, he simply remains convinced of its correctness. One cannot help thinking, however, that the book might have been more persuasive — and certainly would have made more of a splash — had Tribe chosen this occasion to repent of his earlier defense of Clinton and for Tribe and Matz to have embraced a consistently broad, principled impeachment standard as, upon reflection, the better conclusion.<sup>68</sup> True, doing so might have risked a charge of hypocrisy, opportunism, or insincere foxhole conversion. (It might even be fair to observe that a critical reviewer might then simply have exploited a different angle for a critical book review.) But it also might have enabled them to embrace a telling insight: that the decline in the vigor, rigor, and seriousness of impeachment as a meaningful constitutional check on misconduct by Presidents — and the decline in the standards of conduct expected of persons holding the office of President of the United States — may be traceable in modern times to the impeachment *acquittal*, along partisan lines, of President Clinton.<sup>69</sup>

### C. A Partisan Analysis of Partisanship

Instead, the authors attribute the decline of impeachment’s viability as a check to *partisanship generally*. The authors are certainly right in

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but exclude grounds for impeaching Trump other than proven criminal-law felonies. See Michael Stokes Paulsen, *Taking Impeachment Seriously*, LAW & LIBERTY (June 28, 2018), <https://www.lawliberty.org/2018/06/28/taking-impeachment-seriously/> [<https://perma.cc/ES7P-FDR9>].

<sup>68</sup> Some prominent Democrats have engaged in just this kind of reconsideration. In late 2017, Senator Kirsten Gillibrand stated that Clinton should have resigned the presidency over his sexual relationship with Monica Lewinsky. See Jennifer Steinhauer, *Bill Clinton Should Have Resigned over Lewinsky Affair, Kirsten Gillibrand Says*, N.Y. TIMES (Nov. 16, 2017), <https://nyti.ms/2hGKxYL> [<https://perma.cc/3L6M-DG9V>]; see also Matthew Yglesias, *Bill Clinton Should Have Resigned*, VOX (Nov. 15, 2017, 9:15 AM), <https://www.vox.com/policy-and-politics/2017/11/15/16634776/clinton-lewinsky-resigned> [<https://perma.cc/WDD4-AF4L>] (arguing that, even more so than perjury in a sworn civil deposition, Clinton’s use of the “power of the Oval Office to seduce a 20-something subordinate” was “morally bankrupt” conduct that should have forced Clinton’s resignation).

<sup>69</sup> I made a suggestion along these lines in other writing, twenty years ago:

Time will tell, ultimately, but it seems hard to avoid the conclusion that the consequence of the Clinton impeachment and acquittal will be both a general weakening of the impeachment power and a ratcheting down of the standards of conduct expected of men and women holding the office of President of the United States. . . . [T]he Clinton precedent doubtless increases the likelihood that a future President who has committed crimes in office, or otherwise abused the public trust, will fight impeachment, using the Clinton acquittal as something of a constitutional benchmark: the President’s offenses are arguably no worse than President Clinton’s; obstruction of a legal investigation should not be impeachable (he might argue) if a plausible argument exists that the investigation ought not to have been conducted in the first place; in any event the President ought not to be removed if the nation could survive his continuance in office for the remainder of his term; and a President should not be impeached if he retains the support of his own political party.

Paulsen, *supra* note 3, at 1402.



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the basic insight: partisanship is rampant and entrenched; the nation is perhaps more divided culturally along lines of political identity than by any other measure; these divisions are fueled and magnified by competing media and information sources, filtered by politically self-segregated audiences; the competing sides view each other with almost unparalleled levels of hostility and distrust; and they see the stakes of political victory or defeat as almost cataclysmically high (pp. 200–05). “Warring partisan tribes now define a dysfunctional system,” the authors rightly observe (p. 200). This reality — especially when combined with partisan-dominant congressional districts, basic red-state-blue-state political differences, and the two-thirds Senate majority requirement — has “gone a long way toward undermining the preconditions for a prudent, successful exercise of the impeachment power” (p. 205).

To repeat: Tribe and Matz are right on this score. Partisanship has created an abhorrent impeachment vacuum. But this is a somewhat ironic conclusion in several respects. First, the authors’ own partisanship goes beyond the tendentious defense of Clinton. Indeed, Tribe and Matz suggest that every Republican President since Nixon might rightfully have been impeached — or at the very least been subjected to serious investigation as a prelude to possible impeachment. Ronald Reagan “deserved” to face a serious risk of impeachment for Iran-Contra (p. 174). Reagan’s asserted negligent supervision of subordinates justified “a vote on articles of impeachment — especially given hints of a cover-up and doubts about Reagan’s complete honesty” (p. 73). Further, Reagan committed “extraordinary violations of the separation of powers” that “posed a direct threat to the constitutional system” (p. 73).<sup>70</sup> Reagan’s successor, George H.W. Bush, also warranted impeachment investigation because of “evidence that he had known about some illegal aspects of Iran-Contra” as Vice President and then, as President, issued a “self-interested pardon” to six Reagan Administration officials, which the authors treat as intended to thwart an independent counsel’s efforts “to reveal the full scope of executive branch misconduct” (p. 74). Even Gerald Ford does not escape the authors’ innuendo: Ford’s decision to pardon Nixon was viewed as “outrageous” by “many Americans” (Tribe and Matz appear to concur), but unfortunately there was “no proof [Ford] had entered into a corrupt bargain with Nixon” (p. 170). A nation “exhausted” by Watergate accepted Ford’s word and the issue “drifted away” (p. 170). Oddly enough, only George W. Bush, whose wartime

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<sup>70</sup> The authors’ treatment of separation of powers concerns involving the Reagan Administration contrasts markedly with their treatment of President Truman’s unilateral seizure of the nation’s steel mills by executive order (held unconstitutional in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)), where the authors write that “[i]mpeachment is not meant to function as an all-purpose tool for enforcing the Constitution” (p. 167) and that Truman did not deserve calls for his impeachment (pp. 161–69, 174).

policy the authors single out for scathing criticism, dodges an explicit charge that an impeachment inquiry was deserved.<sup>71</sup>

With all due respect, this is simply not credible. One can make a case for a broad understanding of the impeachment power (as I already have). One can even make a case, albeit a somewhat strained one, that that understanding might reach Reagan's mistakes, misstatements, or negligent supervision of subordinates. One can also make a strong case that the impeachment power reaches believed misuse of the pardon power for corrupt or self-serving purposes — though, again, it seems a factual stretch to tar George H.W. Bush and Gerald Ford with such charges.<sup>72</sup> But what does not seem at all credible — what seems nakedly partisan — is to reach such conclusions with respect to Republican Presidents while casting Bill Clinton's impeachment as the insubstantial product of mere Republican partisan spite. The authors elsewhere warn of a “boy-who-cried-wolf” problem: that indiscriminate calls for impeachment lose their punch over time, and that warnings of real wolves might then go unheeded (p. 194). It is a similar problem when boys cry wolf at every Republican but reflexively cry sheep if a Democrat appears. Who is to believe them when a *real* Republican wolf comes along?

Partisanship also shows up in the authors' *analysis of partisanship*. This is true in connection with the Clinton impeachment and elsewhere. The authors repeatedly emphasize that Clinton's impeachment was the product of “partisan spite” and was “rejected on partisan lines” (p. 177). But it does not seem to have occurred to them that the on-partisan-lines point runs in two directions — that perceived partisan “spite” on one side might have its flipside in blind party loyalty on the other. Every Senate Democrat voted to acquit Clinton.<sup>73</sup> Tribe and Matz do not acknowledge the possibility that some might have done so for partisan reasons. But is it really plausible that all Republican senators were unprincipled partisans and all Democrats impartial paragons? Is it not

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<sup>71</sup> They write that “Bush had built his case for war on faulty intelligence,” and that “[his] popularity declined amid revelations of torture, black sites, extraordinary rendition, and illegal surveillance” (p. 178). But the authors pull back from arguing that George W. Bush should have been impeached, noting that neither he nor President Barack Obama deserved impeachment even though in each case more than thirty percent of the electorate and “a clear majority of the opposition party” came to believe otherwise (p. 217).

<sup>72</sup> I believe Tribe and Matz are correct in maintaining that a President's believed misuse of the pardon power — or of any other constitutional power actually possessed — can constitute impeachable misconduct (pp. 60–64). See Michael Stokes Paulsen, *The President's Pardon Power Is Absolute, but so Is Congress's Impeachment Power*, NAT'L REV. (July 25, 2017, 7:30 PM), <https://www.nationalreview.com/2017/07/donald-trump-pardon-power-congressional-impeachment/> [<https://perma.cc/Y6AW-MNQK>]. Tribe and Matz argue that Trump is impeachable on such ground (pp. 63–64). The persuasive force of the claim with respect to Trump, however, is weakened by the suggestions that George H.W. Bush and Gerald Ford committed the same wrongdoing.

<sup>73</sup> 145 CONG. REC. S1458–59 (daily ed. Feb. 12, 1999).

even possible that partisan motivations might have been present on both sides?<sup>74</sup>

Similarly, in analyzing the destructive forces of “[w]arring partisan tribes” (p. 200) on politics generally and impeachment specifically, Tribe and Matz cannot resist being a bit tribal themselves. Both sides are at fault to some extent, but partisanship is mostly a problem with Republicans.<sup>75</sup> Finally, the authors’ partisanship shines through in other, incidental respects as well. The book contains long, seemingly gratuitous asides making strident ideological points about matters that seem to have little to do with the authors’ main arguments, but reflecting a consistent partisan slant.<sup>76</sup>

The authors bemoan the fact that “‘Americans have moved into ideological echo chambers,’ where ‘everything they read or hear reinforces their predispositions and makes them more intolerant of opposing views’” (p. 204).<sup>77</sup> But this book seems to live in just such an echo chamber. The authors seem to have no sense of the extent to which the sum of their positions undermines their critique of partisanship, and with it the credibility of their case against Trump. Tribe and Matz are right that entrenched partisanship plagues the viability of impeachment as a meaningful check on Presidents’ misconduct. But this book simply digs the trenches a little bit deeper.

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<sup>74</sup> The authors do make this point about Republican defenders of President Trump: Republicans “have yet to find a principle they won’t sacrifice” in defense of Trump, and “it is solely by virtue of continuing support from congressional Republicans that Trump remains in office” (p. 193). Again, this point may be correct. But its persuasiveness is undercut by the authors’ sacrifice of principle to accommodate Clinton.

<sup>75</sup> Partisan tribalism exists on both sides but is “especially true of the Republican Party under Trump” (p. 200). Conservative media outlets are particularly bad (pp. 203–05, 210–12). In “right-wing echo chambers” (p. 211) — apparently there are no left-wing ones — truth is treated as subjective and context-dependent. Facts are appraised “not against standards of consistency or evidence,” but “with an eye to whether” they further “the party’s short-term objectives” (p. 212). This may well be a correct observation, but it is equally applicable to partisans on both sides. (Treating truth as contextual and facts as dependent on circumstances and political needs would seem apt characterizations of Bill Clinton and his defenders.)

<sup>76</sup> There are any number of these: The book contains passages condemning Republicans for not holding confirmation hearings for Supreme Court nominee Merrick Garland in 2016 (pp. 75–76); a supremely irrelevant attack on the Supreme Court’s decision in *Bush v. Gore*, 531 U.S. 98 (2000), as an act of judicial activism (pp. 109–12); a critique of partisan gerrymandering of election districts and of voter ID laws (p. 119); a digression to criticize the Electoral College for “failing to achieve any worthwhile purpose” other than to “skew the course and outcome of elections” (pp. 118, 116–19); and a page condemning President George W. Bush’s war-on-terror policies (p. 178). One might agree with some or all of these points. In aggregate, however, they contribute to the overall impression of partisanship.

<sup>77</sup> The authors quote Charles E. Cook, Jr., *The Urgent Need to Repair Our Broken Politics*, COOK POL. REP. (Sept. 15, 2017), <https://www.cookpolitical.com/analysis/national/national-politics/urgent-need-repair-our-broken-politics> [<https://perma.cc/4GXA-PLFN>].

*D. Ready, Aim, Don't Fire*

You might think all this would lead to a crisp, clear statement that President Trump should be impeached. But on this point the authors will frustrate nearly everyone. The book's ultimate tone is perhaps best characterized as one of strategic caution, watchful waiting — and contradictory warnings.

Impeachment of a President is a “*very big deal*,” the authors tell us sternly (p. xiii). There are risks of “moving too quickly” to impeach (p. 91). “Shooting from the hip” is “dangerous because it can short-circuit public deliberation” (p. 93). “Mustering two-thirds of the Senate is no easy task” (p. 93). To avoid backlash, there needs to be “a relatively durable bipartisan consensus” supporting removal (p. 93). There is also a risk that in striking early, Congress “might fail where it should succeed” (p. 94). Impeachment is “not a bullet that can be readily fired twice” at the same target (p. 94). “If Congress shoots and misses, the president will be practically untouchable” (p. 94).

On the other hand, there's a danger “of moving too slowly, or not at all,” in the face of impeachable misconduct (p. 95). The risks of inaction “range from very bad consequences to the destruction of the nation and the death of millions” (p. 95). The merely bad consequences include encouraging future bad acts not only by the un-impeached President but also by future Presidents: “Decisions not to impeach signal to future chief executives that they, too, can cross whatever bridge proved safe for a predecessor” (p. 98). A “worst-case scenario” is that “by sitting on our hands and not impeaching, we destroy civilization itself,” a risk the authors insist “isn't intended as hyperbole” (p. 99). Short of “global Armageddon,” not impeaching a President who flouts the Constitution “risks the end of our constitutional order” (p. 99).

Yet, with respect to Trump specifically, the authors strangely pull back. Even though they make a strong case for his impeachability on a number of familiar grounds (pp. 58–68, 186–88), Tribe and Matz argue that practical realities might counsel *against* attempting to impeach Trump, suggesting that for many types of misconduct “it's very difficult to find a smoking gun,” that “right-wing hacks” seek to undermine the necessary inquiries (p. 192), and that congressional Republicans have been willing to defend Trump no matter what (p. 193). We must “proceed with caution” (p. 195). “[V]irtuous statecraft is a lost art” (p. 197), and in a climate of partisan warfare, “finding sixty-seven votes to convict a president would be a Herculean task” (p. 218). There are always “more than thirty-four senators at any given point from deep blue or deep red states” (p. 218). Never has it been harder to surmount partisan resistance to impeachment in the Senate.

Then again, perhaps we cannot afford to wait. We “must now assign overriding significance to the threat posed by democratic decline” (pp. 218–19). Trump's conduct is “lifted straight from banana republics” (p.

219). While there might be no “immediate danger” of “a sudden declaration of martial law,” the enduring threat is that “the norms, institutions, and culture that support democracy will erode, allowing a president with autocratic tendencies to consolidate power” (p. 219).

But then the authors tack back once again. The concern for preserving democratic norms “can cut both ways” (p. 220). “In some circumstances, a desire to protect democracy may ultimately cut *against* promoting or pursuing impeachment” because impeachment “turbocharges forces of dysfunction and despair in our democracy” (p. 220). There thus might be cases in which the better strategy is to retreat — to recognize that “the best way to combat an out-of-control executive is to resist frequent public use of the ‘i-word’” (pp. 238–39).

One more turn: on the other hand, these same risks “may ultimately cut *in favor* of impeachment” (p. 220). Deciding not to impeach, in the face of democratic decline, “is *exceptionally* risky. Now more than ever, we must defend our constitutional order and resist authoritarian drift” (p. 220). This is because “[a]llowing abuse, corruption, or betrayal in the White House is always a dangerous proposition” (p. 220). If we do nothing, “we may eventually find that our politics are too broken and too divisive for impeachment — or any other power — to stop a president who threatens all we hold dear” (p. 221).

Well, which is it? To describe the authors’ waffling accurately is to criticize it severely. Once one is finished wading through the hyperbole, the clichés, the furious but seemingly empty-of-resolve rhetoric, the hand-wringing, and the despair, one is left with . . . what, exactly? Tribe and Matz seem to lack the political courage of their own constitutional convictions. If Trump deserves impeachment, why not call for it explicitly? Their prescription — condemn, wait, despair — seems wildly out of whack with their diagnosis. If the danger of not impeaching is really nuclear Armageddon or the demise of the American constitutional order, is it really right to just wait and see?

All of this leaves *To End a Presidency* depressing and unsatisfying. What was the point, exactly, of writing this book?

In the next section, I propose what I think is a better path. The road to a solution lies neither in despair nor in partisanship, but in reclaiming the full constitutional power of impeachment and defending its principled enforcement. The practical goal of popular scholarship on impeachment should be to *shift the ground of public understanding* concerning the breadth of the impeachment power and the need for its vigorous and consistent application, setting aside the politics of partisan interest.

## IV. THE CONSTITUTIONAL POLITICS OF IMPEACHMENT

Hamilton's problem remains. Impeachment is a political process designed to impose political punishments for misconduct that includes offenses fairly characterized as political. The Constitution's impeachment standard is one of extraordinary breadth, conferring a broad range of discretion to the two houses of Congress. Given that breadth, the range of choice it affords, and the institutions making the choices, how does one avoid the problem Hamilton anticipated — and which this book displays, even as it laments — of impeachment descending into bare partisanship? What factors *properly* inform the *constitutional judgment* necessarily involved in the exercise of the impeachment power?

With all due respect, I believe Tribe and Matz get the answer to this important question entirely wrong. Their take on the practical constitutional politics of impeachment leads them to consider, as affirmatively and rightly relevant to the impeachment decision, matters that ought to be rendered as irrelevant as possible in a frankly political world. Tribe and Matz would consider whether the President retains popular support as measured by public opinion polls (pp. 102, 144–45). Indeed, they even consider a President's popular standing relevant to the question of whether the President's acts should be considered impeachable wrongs at all (p. 21). At the level of practical, tactical judgment, Tribe and Matz would consider whether a President's political popularity, or partisan political support for him by congressional allies (whether justified or not), makes it unlikely that an impeachment would succeed as a practical, political matter irrespective of the merits of a charge (pp. 191–95, 198–99). Tribe and Matz would consider, as a legitimate factor in the impeachment judgment, whether an otherwise merited impeachment might be disruptive of the national (or international) political scene, weaken the President's standing as Commander in Chief, or adversely affect other policies believed important (p. 102). Tribe and Matz would consider whether impeachment would overturn an elected, democratic choice when a President poses no other or further "danger of grave harm" (pp. 23, 42) apart from having committed impeachable offenses. Tribe and Matz would consider whether impeachment might produce a political backlash (pp. 236–38), whether it would affect a political party's electoral fortunes generally (p. 238), and even the political or personal merits or demerits of the person who would succeed the President if removed (p. 149).

There is a certain practicality to such considerations, to be sure. But I submit that the impeachment judgment is properly concerned with *none* of these things. Quite the contrary, indulging such considerations contributes to the problem Hamilton identified — the reality that *low*-political considerations will corrupt the constitutional political judgment involved in impeachment. It would be naïve to think that, as a descriptive matter, such factors will never play a role. They inevitably will;

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that was Hamilton's point. But it is destructive of the desired end — the stated goal of “principled impartiality” (pp. 139, 141) — to suggest as a normative matter that such factors *rightly* play such a prominent role, and to build so much of a book about impeachment around attention to such considerations.

Impeachment involves judgment, but of a particular sort. It was not meant to be a partisan affair in which judgment depends on political loyalties rather than an official's culpability. Rather, impeachment was understood to be “political” in the rather different sense that culpability could include official misconduct and misdoings not necessarily of a criminal-law nature — “political” offenses; that judging such offenses necessarily involved a form of high-political judgment; and that impeachment was a political-process remedy limited in its effect to removal of an officer from power.

Impeachment involves constitutional judgment *about the nature and character of the allegedly wrongful acts committed and about how serious and wrongful such acts are*. The decision to impeach entails judgment not about collateral considerations of politics, policy, or party, but about the seriousness of the believed wrongdoing.

That assessment properly can take into account a number of things: it necessarily involves a judgment as to whether the claimed wrongful act *really was* wrong, considered in its context. An action that in the abstract might be thought a high crime or misdemeanor might not be such in the specific circumstances. For example, wartime exigency or dangerous emergency might be thought, in some instances, to justify or excuse acts otherwise thought constitutionally impeachable.<sup>78</sup> An assessment of the seriousness of believed wrongdoing validly might take into account the degree of *harm* resulting from the wrong (whether to specific persons, to the constitutional order, to the system of administering justice, or to national well-being generally). It validly might take into account whether the acts were done *willfully* and intentionally — and whether or not with explicit or implicit “notice,” or common knowledge, of their wrongfulness — or are more fairly characterized as mistakes or errors in judgment. And it might validly take into account whether the wrongs were isolated or reflect instead a *pattern* of recurrent, persistent misconduct.

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<sup>78</sup> For a general discussion, see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004). Some of President Lincoln's actions as President, otherwise constitutionally questionable, might well be eminently defensible on such grounds, either as a matter of constitutional law or as taken in mitigation of their arguable legal impropriety. *Id.* at 1264–71, 1277–83. President Roosevelt's Japanese internment policy is harder to defend on the merits — even though all three branches of the national government endorsed it at the time. *Id.* at 1294. FDR's culpability might be thought mitigated by believed wartime exigency, incomplete and misleading information from military officials, congressional and judicial endorsement, and FDR's resulting plausible good-faith (if badly mistaken) belief that the action was necessary and justified.

But note well: the relevant constitutional judgment is as to the seriousness of the wrong committed, not an overall assessment of the merits of a President's (or other official's) record in unrelated respects, a prediction of future behavior, or an assessment of political costs and benefits, risks and rewards. An otherwise "good" President, who, in the judgment of the House and Senate, in fact has committed serious offenses worthy of impeachment in their own right, *should be* impeached and removed. The President's other merits or virtues (or lack thereof) should be beside the point. Thus, for example, the relevant judgment with respect to Presidents Abraham Lincoln, Franklin Delano Roosevelt, and Ronald Reagan is whether they committed *great wrongs*, and not whether these men were otherwise "*great*" Presidents. If these notable Presidents were guilty of serious, impeachable wrongs, they should not have been maintained in office.<sup>79</sup> Ordinary political judgments collateral to the question of the wrongfulness and seriousness of the President's impeachable misconduct should be disregarded entirely, even if that might sometimes lead to undesired results or seemingly unnecessary disruption.

All the more clearly, presidential popularity, political-party support, or resulting policy implications should not matter to impeachment, in either direction: such considerations should not negate an otherwise justified impeachment, just as they would not justify an otherwise unwarranted one. A representative or senator should not vote for impeachment or conviction out of nothing more than hostility to a President's policies or personal pique. And a representative or senator likewise should not vote against an otherwise merited impeachment out of party loyalty, support for a President's policies in other respects, or public opinion polls.

So too, the real or imagined "partisanship" or impure motives *of the other side* should not matter to the impeachment judgment. If a President has committed "high Crimes and Misdemeanors" within the meaning of the Constitution, and a representative or senator otherwise would judge the commission of such acts sufficiently serious to warrant the official's impeachment and removal from office, why should the allegedly partisan motives of those bringing the impeachment proceeding — the believed unworthy motivations of one's political opponents — be a sufficient basis for voting for the President's *undeserved acquittal*? That would be to vote against constitutional principle because that is what one believes the other guy is doing or would do. But the fact that the President's natural political enemies are enthusiastic — delighted

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<sup>79</sup> Likewise, the relevant question with respect to Chief Justice Roger B. Taney is the wrongfulness, willfulness, and atrocity of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), as a seemingly deliberate misuse of constitutional authority, not whether Taney was an otherwise skilled or accomplished jurist. See Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1011–13 (2003).



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even — about the prospect of impeachment is neither a principled nor a legitimate reason to excuse a President’s manifest misconduct.

In like fashion, the fact that one’s political opponents might not adhere to this principle — that they are inconsistent, unprincipled, or hypocritical — is *also utterly irrelevant* to the question of the constitutional propriety of any impeachment. One should not refuse to support the impeachment and conviction of a President of one’s own party — if otherwise merited — because of the failure of the opposite political party to have acted in a principled fashion with respect to a President of *their* party. Turnabout might be fair play, in some sense. But the stronger claim of justice is that two wrongs simply do not make a right. It is not right to resist a justified impeachment on the ground that the other side cravenly resisted a justified impeachment of one of “their” guys.

Taking the above criteria seriously, I submit that the three most serious efforts at presidential impeachments in our nation’s history — the efforts to remove Andrew Johnson, Richard Nixon, and Bill Clinton — were all justifiable, both as fitting the Constitution’s categories of impeachable misconduct and as a matter of appropriate constitutional judgment in applying those categories. A complete treatment of each situation would require an essay of its own (or maybe three essays). But in brief:

Johnson merited impeachment and removal, not on the contrived pseudo-legal ground of his violation of the Tenure of Office Act of 1868 (concerning which he had by far the better of the argument), but on the true underlying grounds that motivated Radical Republicans: that Johnson had engaged in culpable incompetence and willful obstruction of the laws (including civil rights legislation and Reconstruction Acts passed over his veto), accommodated and essentially sided with the Union’s former enemies against the interest of the nation, abused the pardon power, and failed to protect the lives and liberty of recently freed former slaves, abandoning them to the racist mercies of Southern whites.<sup>80</sup> The Johnson situation poses sharply the question whether such perceived grave *political* offenses and failings — not consisting of criminal offenses — constitute “high Crimes and Misdemeanors” to justify impeachment. The better answer is that they do. Congress’s judgment that a President’s performance of the duties and responsibilities of his office is so egregious as to constitute a willful failure of faithful execution of his office, and a violation of his sworn oath, is a sufficient basis for impeachment and removal.<sup>81</sup>

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<sup>80</sup> See Michael Stokes Paulsen, *The Constitutional Propriety of Impeaching the President*, LAW & LIBERTY (Feb. 23, 2018), <https://www.lawliberty.org/2018/02/23/the-constitutional-propriety-of-impeaching-the-President-andrew-johnson-150-anniversary/> [<https://perma.cc/ZQ9Y-ABZ8>]. Tribe and Matz’s analysis of Johnson’s impeachment agrees with my own (pp. 53–57).

<sup>81</sup> See Paulsen, *supra* note 80.

Richard Nixon seems an even easier case. He resigned the presidency in August 1974 rather than face almost certain impeachment by the House of Representatives and the significant likelihood of conviction by the Senate, on charges of obstruction of justice and abuse of presidential power flowing (mainly) from his actions while President, in connection with efforts to cover up illegal activities by subordinates and by persons associated with his 1972 re-election campaign. There seems little room for doubt that the charges against Nixon fit within the Constitution's standard of "high Crimes and Misdemeanors" and that those charges had factual merit. This is not merely because obstruction of justice is a defined statutory crime, but because *the conduct that constitutes* such an ordinary criminal offense fairly can be judged by Congress to be impeachable misbehavior, whether or not the formal requisites of criminal-law criminality are satisfied. For the President of the United States to engage in a sustained pattern of deliberate obstruction of justice, deception, public misrepresentations, and outright lies in order to protect criminal wrongdoing from detection and punishment is, I submit, *per se* serious misconduct constitutionally warranting impeachment and removal.<sup>82</sup>

The essence of the case against Bill Clinton is that his conduct — perjury and obstruction of justice — was constitutionally and ethically indistinguishable from Nixon's: that conduct constituting obstruction of justice, including a sustained pattern of public lies and misrepresentations (and, in Clinton's case, deliberately false and misleading sworn testimony in judicial proceedings), undertaken in order to thwart official investigation of other potentially wrongful acts by oneself or others, falls within the range of constitutional judgment committed to Congress by the broad standard of "high Crimes and Misdemeanors."

The disagreement at the time was between Republicans, most of whom viewed perjury, obstruction of justice, and public dishonesty as *objectively, per se* systemically wrong and harmful — particularly so when engaged in by the nation's chief law enforcement officer — and Democrats, who did not.<sup>83</sup> Judgments can differ. I believe the Republicans' judgment to be eminently defensible, and indeed correct. At all

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<sup>82</sup> Tribe and Matz concur with the propriety of impeaching Nixon for obstruction of justice (pp. 57–58).

<sup>83</sup> Tribe and Matz lead off Chapter Three (*To Impeach or Not To Impeach*) with an extended discussion of Senator Robert Byrd's speech explaining his vote to acquit Clinton, notwithstanding Byrd's certainty that Clinton had committed serious and important offenses that constituted "high Crimes and Misdemeanors" otherwise warranting impeachment, essentially for reasons of politics and policy (pp. 69–71). Revealingly, the authors treat Byrd's vote as paradigmatic, and even exemplary. I believe that exactly the opposite conclusion is correct: for a senator to vote against conviction of a President he is persuaded has committed high crimes and misdemeanors of a serious and unjustifiable nature, out of partisan and policy motivations of supposed overriding "wisdom," is a

events, it seems plainly to fall within the scope of the power of impeachment under the Constitution's original meaning.<sup>84</sup>

Finally, it is appropriate to observe, forthrightly, that, under the standards outlined above, several aspects of President Donald Trump's conduct would appear easily to fall within the range of meaning of the Constitution's standard of "high Crimes and Misdemeanors." It follows from the propriety of impeaching Johnson, Nixon, and Clinton that Trump, too, rightfully could be impeached for any of a variety of offenses that satisfy the Constitution's standard, if Congress is persuaded Trump has committed such acts. A President who, in the ultimate judgment of Congress, culpably fails to perform the duties of office responsibly and competently; a President Congress judges to have compromised the interests of the nation, revealed sensitive intelligence to adversaries, encouraged foreign interference with American constitutional and electoral processes, or sided with hostile interests; a President Congress judges to have obstructed justice (whether or not a provable criminal-law offense), misused power or process to cover up other wrongdoing by himself or others, violated the public trust, or engaged in other forms of corrupt conduct is, certainly, fairly subject to impeachment and removal from office.

This is not the place for an exhaustive examination of the facts supporting each potential charge.<sup>85</sup> The point here is simply that each of these types of offenses falls within the scope of the original meaning of

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classic, egregious example of the corruption of impeachment by low politics against which Hamilton warned.

<sup>84</sup> As noted above, it is not clear why allegedly partisan motivations of persons favoring — or opposing — impeachment matter at all to the question of an impeachment's constitutional propriety, if the text's standard is otherwise satisfied. *See supra* pp. 710–11. Nor would partisan motivations seem an appropriate ground on which to base the exercise of judgment with respect to impeachment: an impeachment vote should not rest on either one's own partisan interests or an assessment of one's opponents' partisanship — or on its anticipated consequences. This is what some Republican representatives said they were doing in pursuing the impeachment of Bill Clinton notwithstanding the overwhelming probability that Clinton would be acquitted, on partisan lines, in the Senate. *See, e.g.*, 144 CONG. REC. 28,058–59 (1998) (statement of Rep. Canady) (arguing that it would be in derogation of the independent constitutional duty and responsibility of the House of Representatives for its decision whether to impeach to turn on "a guess about how the proceedings would turn out in the Senate," *id.* at 28,058, or an attempt "to count noses in the Senate," *id.* at 28,059). Thus, what Tribe and Matz uncharitably attribute to "partisan spite" might have been a sincere effort to act in a principled fashion concerning impeachment, despite political risks, costs, and unlikelihood of success. Indeed, Republicans' willingness to bring impeachment charges against a popular President, despite the political risks of doing so, might more appropriately be seen as exemplifying the stance Tribe and Matz (otherwise) generally commend: that "a block of legislators must prioritize their conscience over their prospects for reelection" and be "willing to take action against presidents who violate" principled constitutional and legal standards of conduct (p. 199).

<sup>85</sup> As noted, Tribe and Matz supply considerable discussion of the evidence supporting many such charges against Trump (pp. 58–68), even as they hedge their analysis with the caution that the results of investigations are incomplete. *See supra* note 61 and accompanying text.

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the Constitution's standard of "high Crimes and Misdemeanors." If Congress is persuaded that actions of such types occurred, this would clearly warrant the judgment that President Trump should be impeached and removed from office.<sup>86</sup>

What about the *realpolitik* argument that impeachment should not be pursued where it is unlikely to succeed, because of probable (unprincipled) partisanship on the other side? This is admittedly a somewhat more difficult question. It is difficult not to accede to the position that impeachment should not be sought where it is likely to prove an exercise in futility. But I submit that the correct answer is the same — that this should provide no bar to pursuing an otherwise merited impeachment. If we are to press toward the goal of decision on the basis of consistent principle, we should not accommodate the Constitution's impeachment standard or practice to such low-political considerations. Instead, we should seek to shift the ground of public understanding of the impeachment power, and to change the terms of debate over its exercise, *against* the forces of low partisanship.

*To End a Presidency* does not do that. Indeed, it does pretty much the opposite: it constructs a partisan gerrymander for its impeachment standard; it applies that standard to reach partisan outcomes; it emphasizes considerations of strategy, practicality, and partisan politics as appropriate to the impeachment judgment; and it even disparages efforts to separate partisan politics from impeachment decisions (p. 197). And then, finally, it decries partisanship in impeachment, denounces those who engage in it, and despairs of the demise of the impeachment power and its failure to end a presidency when it really needs to. In all this, the authors are their own worst enemies — well, maybe *second*-worst — and a near-perfect example of the problem Hamilton foresaw.

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<sup>86</sup> Who else? What other Presidents might properly have been impeached under these criteria? Johnson, Nixon, and Clinton present by far the strongest historical cases for presidential impeachment, each for the slightly different reasons noted. A full discussion of other prospects for impeachment would take me far afield. For present purposes, I merely note that a plausible case certainly can be made against James Buchanan, and perhaps a few others. (The floor is open for nominations.) Tribe and Matz do not argue for President Wilson's impeachment, but their brief discussion of Wilson's willful violation of civil liberties and retaliatory criminal investigations of persons urging Wilson's impeachment begins the outlines of a surprisingly strong case against Wilson (pp. 16, 160). Among Vice Presidents, Aaron Burr and Spiro Agnew stand out as obvious prospects for deserved impeachment. *See supra* notes 51, 65.

Given the breadth of the impeachment standard outlined above, and the range of judgment it legitimately affords, it must be conceded that some otherwise well-regarded Presidents might plausibly — but seemingly unfairly — be subjected to impeachment proceedings. But this is arguably intrinsic to the nature of the impeachment power. It highlights the point that the question of constitutional power to impeach is distinct from the question of appropriate judgment in the exercise of such power. And it highlights the point that power of *any* sort can be abused or misapplied — a fact that does not alter the *existence* of a constitutional power. Indeed, the truth of this last observation supplies (and supplied at the time of the framing) one of the strongest arguments for a vigorous impeachment power, precisely because it is an essential check against abuse of executive power.