Presidential Impeachment in Tribal Times: The Historical Logic of Informal Constitutional Change

Stephen M. Griffin

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation
https://opencommons.uconn.edu/law_review/417
Essay

Presidential Impeachment in Tribal Times: The Historical Logic of Informal Constitutional Change

STEPHEN M. GRIFFIN

The unconventional presidency of Donald Trump has made presidential impeachment once again an issue of national concern. But existing legal scholarship does not fully reflect what happened in past presidential impeachments with respect to the meaning of the constitutional standard (“high crimes and misdemeanors”). In this Essay, I argue that prior scholarship has largely ignored the historical context and thus the useful lessons of the three most prominent instances in which Congress attempted to impeach and convict a president: those of Andrew Johnson, Richard Nixon, and Bill Clinton. The Essay then goes beyond these episodes to contribute to the ongoing debate in constitutional theory over theories of informal constitutional change.

Impeachment scholarship is predominantly originalist. There is a large measure of consensus on the meaning of the “high crimes and misdemeanors” standard, which I call the “Hamiltonian vision.” The Hamiltonian vision is that impeachment can be used for a broad category of “political” offenses. Most scholars agree that impeachment does not require an indictable offense or other violation of law. Despite this scholarly consensus, the reality of the Johnson, Nixon, and Clinton impeachments was quite different. Contrary to prior legal scholarship, I argue that a party-political logic overwhelmed the Framers’ design and created a situation in which the position that impeachment is limited to indictable offenses could not be effectively discredited.

I then use the example of impeachment to generalize about the process of informal constitutional change to grasp what I call its “historical logic.” The Essay goes beyond a simple reaffirmation of living constitutionalism to advocate the value of an alternative methodology called “developmental”
analysis. Developmental analysis makes explicit what is implicit in most work on living constitutionalism—that it rests on a historicist approach in which institutional changes such as political parties establish new constitutional baselines which are the practical equivalent of constitutional amendments. These baselines form the new context going forward for evaluating the constitutionality of official action.
**ESSAY CONTENTS**

INTRODUCTION ...........................................................................................................................................417

I. THE HAMILTONIAN VISION OF PRESIDENTIAL IMPEACHMENT
........................................................................................................................................................................420

II. THREE PRESIDENTIAL IMPEACHMENTS .................................................................................................425
   A. THE IMPEACHMENT (AND NEAR-CONVICTION) OF ANDREW JOHNSON ...........................................426
   B. THE PRESUMED IMPEACHMENT AND CONVICTION OF RICHARD NIXON .......................................431
   C. THE IMPEACHMENT AND SURVIVAL OF BILL CLINTON .................................................................435

III. PRESIDENTIAL IMPEACHMENT AND THE HISTORICAL LOGIC OF CONSTITUTIONAL CHANGE .................................................................439
   A. VIEWING PRESIDENTIAL IMPEACHMENTS THROUGH AN EIGHTEENTH-CENTURY LENS ..................440
   B. UNDERSTANDING THE HISTORICAL LOGIC OF INFORMAL CONSTITUTIONAL CHANGE ................443

CONCLUSION ..................................................................................................................................................449
Presidential Impeachment in Tribal Times: The Historic Logic of Informal Constitutional Change

STEPHEN M. GRIFFIN *

INTRODUCTION

Once again there is talk of impeaching a President.1 Although many aspects of the Trump administration are surprising or even shocking,2 the prospect that opposing members of Congress might introduce articles of impeachment is not among them. In fact, this process has become almost a standard feature of presidencies since Richard Nixon was nearly impeached and convicted before resigning in August of 1974.3


2 For an early assessment of Trump’s transgressions against constitutional norms, see Neil S. Siegel, Political Norms, Constitutional Conventions, and President Donald Trump, 93 IND. L.J. 177, 178 (2018).

3 In addition to the Clinton impeachment sponsored by Republicans, there were impeachment resolutions filed by Democrats against George W. Bush and Donald Trump. See Kucinich Offers Impeachment Articles Against Bush, CBS NEWS (June 9, 2008), https://www.cbsnews.com/news/kucinich-offers-impeachment-articles-against-bush/ (reporting that a Democratic Representative introduced thirty-five articles of impeachment against President Bush); Maegan Vazquez, House Dems Introduce Impeachment Against Trump, CNN POLITICS (Nov. 26, 2017), https://www.cnn.com/2017/11/15/politics/cohen-articles-of-impeachment/index.html (reporting on the decision to bring five articles of impeachment against Trump). Impeachment was also actively considered by Democrats during the Iran-Contra scandal in the Reagan administration. See STEPHEN W. STATHIS ET AL., CONG. RESEARCH SERV., 98-763 GOV, CONGRESSIONAL RESOLUTIONS ON PRESIDENTIAL IMPEACHMENT: A HISTORICAL OVERVIEW at CRS-19 (1998) (“Representative Henry B. Gonzalez ... introduced a resolution impeaching President Ronald W. Reagan ... includ[ing] six articles pertaining to ... the Iran-Contra matter ... .”); see also Michael Wines, A Populist from Texas Who Bows to No One, N.Y. TIMES (Mar. 24, 1994), https://www.nytimes.com/1994/03/24/us/a-populist-from-texas-who-
Yet the party-political constitutional order that structures presidential impeachment continues to elude legal scholars. In this Essay I argue that scholars have largely ignored or misunderstood the historical context of presidential impeachment. There are significant lessons in the three most prominent instances in which Congress attempted to impeach and convict a President: the impeachments of Andrew Johnson, Richard Nixon, and Bill Clinton. This is somewhat surprising because in separation-of-powers law, close attention to what “practice” teaches is ordinarily de rigueur. I argue this lack of attention to context is part of a broader failure to recognize the relevance of theories of informal constitutional change. Such theories attempt to explain and account for significant legal-constitutional changes that occur outside the Article V amendment process.

Impeachment scholarship is predominantly originalist. To determine the meaning of the Constitution, scholars focus on the Framers and the

bows-to-no-one.html (discussing the life of Henry B. Gonzales, the Democrat who demanded the impeachment of Reagan).

4 For valuable studies of impeachment by jurists and legal scholars, see AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 198-204 (2005) (discussing the safeguards provided by the impeachment process); RAOUl BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 1 (1973) (explaining the main role of the impeachment process); CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 1 (1974) (discussing the possibility of presidential impeachment in 1974); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 1 (1996) (noting the number of scholars that have studied the history of the impeachment process); MICHAEL J. GERHARDT, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW 1 (2018) (describing the terminology of the impeachment process, or the usage of the term); JOHN R. LABOVITZ, PRESIDENTIAL IMPEACHMENT 252–53 (1978) (discussing the future of the impeachment process in light of past attempts to impeach presidents); RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 95 (1999) (detailing the rules of impeachment); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 26–27, 83 (1992) (discussing specific instances of impeachment); CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN’S GUIDE 83 (2017) (explaining the first attempt at impeachment and emphasizing that impeachment is not a criminal prosecution); LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 22–23 (2018) (discussing the need for the impeachment process as a last resort).

5 There was also an attempt to impeach President John Tyler. SUNSTEIN, supra note 4, at 80–85.


7 For citations to recent theories of change, see Stephen M. Griffin, Understanding Informal Constitutional Change 1–2, 5–8 (Tul. Univ. Sch. of Law, Pub. Law and Legal Theory Working Paper Series, Working Paper No. 16-1, 2016) (describing the informal changes that have been made to the Constitution).

8 This was certainly true of the Clinton impeachment. See John O. McGinnis, Impeachable Defenses, Pol’y REV. (June 1, 1999), https://www.hoover.org/research/impeachable-defenses (detailing that despite the usual rhetoric of law professors, due to extenuating circumstances, most base their comments on impeachment on the theory of originalism). The constitutional scholars called to testify before the House Judiciary Committee largely focused on understanding the meaning of “high crimes and misdemeanors” through the lens of the writing and adoption of the Constitution. See Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. 234–36 (1998) (statement of Susan Low Bloch, Professor of Constitutional Law,
English and American precedents the Framers relied on. During President Clinton’s impeachment, for example, originalists were in clover as the inquiry into the “high [c]rimes and [m]isdemeanors” standard concentrated overwhelmingly on the eighteenth century evidence. These inquiries have been repaid in that there is a large measure of consensus on the meaning of this standard, a consensus I call the “Hamiltonian vision.” The Hamiltonian vision is that impeachment can be used for a broad category of “political” offenses. Specifically, most scholars agree that the grounds for impeachment are not limited to indictable offenses or other violations of law.

Despite this impressive scholarly consensus on the original meaning or understanding of the Constitution, the historical reality of the Johnson, Nixon, and Clinton impeachments is quite different. Contrary to previous legal scholarship, I argue that a party-political logic overwhelmed the Framers’ design and created a situation in which the position that impeachment is limited to indictable offenses could not be effectively discredited. In promoting this understanding, Presidents and their able defenders argued that the impeachment process should be understood in legalistic terms, and the grounds for impeachment should be construed in the narrowest possible way. The Hamiltonian vision was displaced by a constitutional order in which Presidents could be impeached only when the opposing party controlled Congress, and then only for committing indictable crimes, or at least significant violations of law. Understanding how this happened requires appreciating the relevance of what I call the “historical logic” of informal constitutional change.

---

9 See AMAR, supra note 4, at 199 (noting that British law had no clear process for removing a king); BERGER, supra note 4 (explaining the role of the impeachment process in England); BLACK, supra note 4, at 25 (detailing the punishment for treason under English law); GERHARDT, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW, supra note 4, at 125 (explaining the influence of English law on the formation of the impeachment process); SUNSTEIN, supra note 4, at 19–23 (explaining the effect that previously being under English rule had on the framers). For information on whether the framers were fully informed of the English precedents, see Jack N. Rakove, Statement on the Background and History of Impeachment, 67 GEO. WASH. L. REV. 682, 684. For an innovative perspective on the “high crimes” standard, see Josh Chafetz, Impeachment and Assassination, 95 MINN. L. REV. 347, 349 (2010).


11 See McGinnis, supra note 8 (noting that professors have failed to give weight to important evidence from the Framers’ era).

12 AMAR, supra note 4, at 200–01; BERGER, supra note 4, at 56; BLACK, supra note 4, at 33; GERHARDT, supra note 4, at 103; GERHARDT, supra note 4, at 59–60; LABOVITZ, supra note 4, at 27; POSNER, supra note 4, at 98; SUNSTEIN, supra note 4, at 154; TRIBE, supra note 4, at 26–27.


14 See SUNSTEIN, supra note 4, at 56 (describing the Hamilton view of impeachment); id. at 85 (explaining the role partisanship plays in impeachment efforts); TRIBE, supra note 4, at 26 (discussing the idea that impeachment is defined by the Congress at the time).
The approach I take here suggests the usefulness of looking to historical practice and a “living constitutionalist” approach to constitutional interpretation. It shows how someone faithfully applying an originalist perspective would not be able to explain or properly evaluate what happened in the Johnson, Nixon, or Clinton impeachments. This Essay, however, goes beyond a simple reaffirmation of living constitutionalism. It demonstrates the value of an alternative methodology I have advanced in prior work called “developmental” analysis. Developmental analysis makes explicit what is implicit in most work on living constitutionalism: that it rests on a historicist approach in which institutional changes, such as political parties, establish new constitutional baselines that are the practical equivalent of constitutional amendments, which are thereafter used in evaluating the constitutionality of official action.

All this, of course, is preliminary. This Essay is mainly concerned with showing that the Framers’ “Hamiltonian vision” of impeachment could not be realized in a constitutional order run by political parties. The party-political alternative to their anachronistic vision continues to structure our contemporary constitutional reality. I describe the Hamiltonian vision in Part I. Part II examines what happened to this vision in the Johnson, Nixon, and Clinton impeachments. Then, I discuss the implications for understanding the historical logic of informal constitutional change in Part III.

I. THE HAMILTONIAN VISION OF PRESIDENTIAL IMPEACHMENT

Briefly stated, the Hamiltonian vision is that Presidents can be impeached for “political” offenses that violate the public trust. Impeachment exists to provide a check on Presidents who fall short in exercising the unique powers, duties, and responsibilities of their office. Impeachable offenses are therefore not limited to the class of indictable crimes or other violations of law.

I call this the “Hamiltonian” vision because one of the most quoted statements on the meaning of the Constitution’s impeachment standard is found in Alexander Hamilton’s Federalist No. 65.

16 See id. at 1209–22. Bruce Ackerman’s work is of obvious relevance here, as he discusses how constitutional conclusions of the American people have varied across centuries. In his most recent work, 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014), he discusses the cycles of constitutional history.
17 For a relevant work, see DAVID R. MAYHEW, PARTISAN BALANCE: WHY POLITICAL PARTIES DON’T KILL THE U.S. CONSTITUTIONAL SYSTEM 166 (2011).
18 See SUNSTEIN, supra note 4, at 56 (explaining the Hamiltonian vision).
19 THE FEDERALIST NO. 65 (Alexander Hamilton).
impeachments,” he comments:

The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.

Hamilton then remarks that it is highly likely that impeachments will animate the “passions of the whole community,” a point to which I will return.

Legal scholars have treated Hamilton’s commentary as definitive of the impeachment standard in Article II, Section 4 of the Constitution, which provides: “The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

We should notice that both here in Article II and elsewhere, the Constitution uses terms describing the impeachment process ordinarily associated with criminal matters. Hamilton does the same. The provision of Article II just quoted refers to “[c]onviction” and of course identifies the crimes of treason and bribery. Moreover, in the clause specifying the Senate’s role, the Constitution uses words such as “try” and “convicted,” and further provides that Senators “shall be on [o]ath or [a]ffirmation,” suggesting the Senate assumes a judicial role during impeachments.

Nonetheless, there has long been a consensus among constitutional scholars that the phrase “high crimes and misdemeanors” is not limited to indictable crimes. Indeed Michael Gerhardt, the leading scholar on the impeachment process, describes the matter as so settled that “[t]he major disagreement is not over whether impeachable offenses should be strictly limited to indictable crimes, but rather over the range of nonindictable

21 Id.
22 Id.
24 Id.
25 Id.
26 “The Senate shall have the sole Power to try all Impeachments.” U.S. CONST. art. I, § 3, cl. 4.
27 U.S. CONST. art. I, § 3, cl. 7.
29 For a recent example of the view that this language suggests a criminal standard, contrary to the Hamiltonian vision, see Nikolas Bowie, High Crimes Without Law, 132 HARV. L. REV. F. 59, 66-71 (2018).
30 For an incisive recent discussion, see TRIBE & MATZ, supra note 4, at 44-47.
31 See the works by Professor Gerhardt. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS, supra note 4; GERHARDT, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW, supra note 4.
offenses on which an impeachment may be based.”

Thus, the prevailing understanding, based on many scholarly studies, is that “high crimes and misdemeanors” is a term of art. It is a specialized phrase adopted to connote that impeachable offenses can include ordinary crimes, violations of law (including the Constitution), and other, presumably serious, non-criminal offenses. As well stated by Cass Sunstein, a prominent theme in recent commentary is that this standard can be met by an “egregious violation of the public trust.”

This interpretation of “high crimes and misdemeanors” is further supported by what has been termed “structural reasoning” or examining the logic of how the Constitution apportions responsibilities to the different branches. As Charles Black argues in his influential short book on impeachment, the Constitution gives the President certain unique powers and duties, such as the commander-in-chief power and the duty to “faithfully execute[]” the laws. Black poses the question of what the remedy would be if the President fails to perform these duties. He offers the examples of a President who moves to Saudi Arabia and proposes to conduct presidential business remotely or who announces an unconstitutional religious test for employment in his administration. Although these are not crimes, a number of scholars agree with Black’s argument that impeachment would be the appropriate remedy. That means that high crimes can include misfeasance in office—something that is not an ordinary or indictable crime. A further implication is that impeachment can be appropriate for matters that do not involve violating any law, whether the law specifies criminal penalties or not. This point is worth restating: according to the Hamiltonian vision, Presidents do not have to be lawbreakers to be placed in jeopardy of impeachment.

32 GERHARDT, THE FEDERAL IMPEACHMENT PROCESS, supra note 4, at 103 (footnotes omitted).
34 This was the argument of the House Judiciary Committee staff during Watergate. STAFF OF H. COMM. ON THE JUDICIARY, supra note 33, at 23.
35 SUNSTEIN, supra note 4, at 55.
37 BLACK, supra note 4, at 43 (emphasis omitted).
38 Id. at 33.
39 Id. at 33–34.
40 See AMAR, supra note 4, at 200; TRIBE & MATZ, supra note 4, at 50.
41 See id. at 34–35 (providing an example of misfeasance that could amount to a high crime).
42 See THE FEDERALIST, supra note 20, at 439 (explaining that impeachments are offenses that are “political” in nature, but making no mention that a law need be broken for a president to be impeached).
My thesis is that although the Hamiltonian vision points away from limiting impeachable offenses to indictable crimes or other violations of law, changes to the American constitutional order in the nineteenth century that are very much still with us—notably the advent of the party system—made it difficult to implement. In each of the three presidential impeachments discussed in Part II, those advocating impeachment found themselves forced to argue in terms of whether the President had committed a crime or other violation of law. At the same time, because of the constraints imposed by the prevailing constitutional order, they were unable to make the Hamiltonian vision persuasive to those skeptical of impeachment. To appreciate this change of fortune, it is useful to develop the logic of Hamilton’s vision a bit further.

Hamilton’s commentary is often used in a negative way, that is, to rebut the argument that impeachable offenses are limited to indictable crimes. Suppose we turn our attention to the positive side. What sort of non-criminal offenses might be implicated by Hamilton’s vision? Any answer will be necessarily speculative, as Hamilton and the other Framers did not address this question in detail. I suggest we can make progress if we keep in view Hamilton’s contention that impeachable offenses concern violations of the public trust.

To move forward, we must enrich the rather sparse historical context concerning the eighteenth century, often employed in debates about presidential impeachment.

According to historian Gordon Wood, Hamilton and the founding generation thought of themselves as civilized “gentlemen of leisure,” who perhaps treasured their honor above all else. Recall Hamilton’s commentary in Federalist No. 65 begins by referring to “the misconduct of public men.” In the eighteenth century, such gentlemen fought their political battles through the artful use of rhetoric, pamphleteering, and even

---


44 See infra text accompanying notes 73, 116–20, and 144.

45 Id.


47 See THE FEDERALIST, supra note 20, at 439 (noting that the subject of an impeachment court’s jurisdiction is “violation of some public trust”).

48 GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 14–15, 22–23 (2006). One note of explanation: they were—or aspired to be—“gentlemen of leisure” in the sense that they were not dependent on others for employment or income. Id. at 16–17. On the importance of honor to the founding generation, see JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC xvi (2001).

49 THE FEDERALIST, supra note 20, at 439.
by fighting duels such as the one that famously led to Hamilton’s demise. Wood remarks that in this world, “important offices of government were supposed to be held only by those who had already established their social and moral superiority.”

Hamilton may have believed that it was unlikely any member of the founding generation would commit an impeachable offense. If you thought that George Washington would be the first President and similar paragons of virtue would be elected in the future, your attention would not be drawn to further detailing the nature of impeachable offenses. Notice, however, how these historical conjectures lead us away from the position that impeachable offenses must be concerned primarily with crimes or other violations of law. Gentlemen who take a code of honor seriously would be unlikely to commit such offenses and, indeed, the record of the early Republic is noticeably free from convictions for corruption for those officials covered by the impeachment standard.

If we understand the Hamiltonian vision as centering on the concept of the public trust, then impeachable offenses presumably have to do with evaluating the President’s conduct in sustaining that trust with respect to the powers and duties of the office. But it is much easier to perform this evaluation if we all share the same norms of how to behave in office. For the Founders, this was not difficult because they believed that only gentlemen were fit to serve their country. We can therefore make sense of Hamilton’s concept of the public trust if we assume a consensus about how Presidents ought to behave in office. In fact, for Hamilton and his contemporaries, how public officials were expected to behave in office was no different from how they were expected to behave in general. How they were to behave in office was simply an extension of how they behaved in society. The founding generation believed that their leaders would emerge from this class of gentlemen.

But suppose society changes? What if changes to the social order and political life make it more difficult for gentlemen to be elected? The consensus on what constitutes proper behavior in office and thus, the scope

50 Wood, supra note 48, at 248. See also Burr Slays Hamilton in Duel, HISTORY (Nov. 24, 2009), https://www.history.com/this-day-in-history/burr-slays-hamilton-in-duel (highlighting the duel that killed Hamilton).

51 Id. at 267.

52 See Nicol C. Rae & Colton C. Campbell, Impeaching Clinton: Partisan Strife on Capitol Hill 23–24 (2004) (explaining that the Founders did not believe a corrupt person would ever become president and that Hamilton thought only qualified men would be elected).

53 See Wood, supra note 48, at 15 (“Being a gentleman was the prerequisite to becoming a political leader . . . . It meant, in short, having all those characteristics that we today sum up in the idea of a liberal arts education.”).

54 Id.

55 Id.

56 See id. at 17 (explaining that public office was a responsibility required of certain gentlemen as a result of their faculties, independence, and prominence in society).
of impeachable offenses, might well break down. There is no doubt that each of the presidential impeachments discussed in Part II occurred in a much different political world from that of the early Republic. Nevertheless, for each impeachment I will speculate about the implications of the Hamiltonian vision for the presidential conduct at issue. What the evidence suggests is that to mediate between the substantive differences between Hamilton’s world and the nineteenth century party-political world, advocates of presidential impeachment emphasized the apparent clarity provided by the criminal law model. Put broadly, instead of violations of an eighteenth century gentlemen’s code of honor, Presidents were nearly uniformly accused of committing indictable offenses or other violations of law. The focus of attention became less a political judgment of whether the President had performed his duties honorably in a way that preserved the public trust, and more on issues of criminality and due process—all accompanied by appropriate lawyerly arguments.

It turns out that the Hamiltonian vision is hard to maintain in a constitutional order dominated by nationally-organized political parties. In such an order, interactions between the President and Congress are “party-political,” that is, deeply influenced by partisan allegiances and the always-pressing need to advance party interests. As we noted above, it is true that Hamilton refers to partisan passions in his discussion of impeachment. But it is well known that the Framers were not supportive of and did not anticipate the development of political parties. Hamilton cannot be construed as commenting on a nationally-organized party system in The Federalist because it did not come into existence until later in the nineteenth century. This ruthlessly partial and deliberately oppositional way of organizing politics was alien to the esteemed gentlemen who wrote and ratified the Constitution.

II. THREE PRESIDENTIAL IMPEACHMENTS

When transiting from the Hamiltonian vision to the real world of presidential impeachment, we should take note initially of one significant difference made by the introduction of party politics. Whatever we think of the conduct of Johnson, Nixon, or Clinton, the fact is that each of these party-aligned Presidents inevitably had defenders in Congress searching for plausible ways to get them out of trouble. No matter how low their conduct might have ranked in the estimation of the eighteenth century gentry, and

57 See THE FEDERALIST, supra note 20, at 439–40 (explaining the “political” nature of impeachments).
60 See infra text accompanying notes 100 (Johnson), 121 (Nixon), and 171–72 (Clinton).
for that matter, regardless of how troubled members of their own party were by their actions, none of these Presidents were ever completely abandoned (although Nixon came close). This party-logic had important implications for whether the impeachment standard favored by the Framers could be implemented effectively.

A. The Impeachment (and Near-Conviction) of Andrew Johnson

Historical records show that Andrew Johnson was impeached by “radical” Republicans for violating the Tenure of Office Act, but the effort to remove him fell just short of the two-thirds required for conviction by the Senate. It is still regarded today as an unfortunate example of the use of the impeachment process for purely political ends.

Well, no. This is regrettably the story still told by jurists and legal scholars but not by historians who have studied the Johnson case closely. There may be reasons why—for constitutional scholars at least—Andrew Johnson’s impeachment remains a hard case, relating to the dubious constitutionality of the Tenure of Office Act, which Johnson was accused of violating. Legal scholars continue to refer to the Johnson impeachment as “ill-advised” and “highly politicized.” It is often described as being instituted by “radicals in Congress as part of the battle over control of Reconstruction.”

This conventional account is highly problematic considering the transformation in Reconstruction historiography. Yet influential legal commentaries give no sign that the broader history of Reconstruction is even relevant to assessing the Johnson impeachment. Ever since the publication of Michael Les Benedict’s path-breaking book, for example, historians have known that there is a plausible case that Johnson deserved removal

---

61 Tenure of Office Act, §§ 1, 2 (1867) (repealed 1887).
62 See Erin Blakemore, 150 Years Ago, a President Could Be Impeached for Firing a Cabinet Member, HISTORY (May 16, 2018), https://www.history.com/news/andrew-johnson-impeachment-tenure-of-office-act (explaining how Johnson violated the Tenure of Office Act and was impeached by the House, but ultimately evaded impeachment by one vote).
63 See, e.g., POSNER, supra note 4, at 101.
64 See, e.g., id. (presenting the old story).
67 Id.
68 For more information on this topic, see the sources cited in MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA 233 n.13 (2006).
69 For a valuable discussion of the Johnson impeachment and Reconstruction history, see KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 113–57 (1999).
from office. For some reason, the boundaries between disciplines have proved unusually impermeable with respect to understanding the Johnson impeachment. Benedict’s analysis has been mostly ignored by legal scholars.

Taking into consideration the studies of Reconstruction by Benedict and other historians, the more accurate short version is that Congress wanted to impeach Johnson for abusing his constitutional powers to obstruct the enforcement of federal laws. Although what I have termed the Hamiltonian vision would have permitted this, the prevailing interpretation of the Constitution did not. This meant Republicans opposed to Johnson’s reckless and racist course of action had to create a situation in which Johnson was forced to violate a law—the Tenure of Office Act—to trigger the impeachment process. Once the impeachment process began in earnest, Johnson retreated, sending signals that he would no longer obstruct the progress of Reconstruction. As a practical matter, this made removal unnecessary and the effort to convict Johnson foundered in the Senate.

One of Benedict’s most important contributions was to show that the immediate reason for Johnson’s impeachment in 1868—his removal of Secretary of War Edwin Stanton—was simply the final straw in a long list of constitutional transgressions against Congress. Indeed, saying the Johnson impeachment was about “removal” is uncomfortably similar to saying the Civil War was about “states’ rights.” Understanding the impeachment solely through the flawed lens of removal obscures the historical context of Johnson’s actions.

It is sometimes said that the dispute between Johnson and congressional Republicans concerned Reconstruction “policy,” as if the freighted end of an immensely destructive civil war could be treated as just another issue. But there was a crucially important constitutional context. Reconstruction posed fundamental issues in terms of the legal position of the former

---

71 E.g., WHITTINGTON, supra note 69, at 136–37.
72 Keith Whittington, a political scientist, suggests this is due to the Clinton impeachment having “served to bury a whole generation of scholarship on the Johnson episode that had helped rehabilitate the Reconstruction-Era Congress and explain the impeachment.” Keith E. Whittington, Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments, 2 U. Pa. J. Const. L. 422, 424 (2000) (footnote omitted).
73 See BENEDICT, supra note 70, at 26–36 (explaining the narrow and broad views of the law of impeachment).
74 Id. at 137–39.
75 Id. at 137–39.
76 Id. at 39–40, 42–49, 53, 58–59, 75–78, 89–90, 92, 130.
77 See id. at 58–60 (demonstrating that Stanton’s removal was not the sole reason for Johnson’s impeachment).
78 See, e.g., BERGER, supra note 4, at 262 (arguing that a President “is not to be removed merely for differing with Congress”).
79 TRIBE & MATZ, supra note 4, at 55–56; Whittington, supra note 72, at 425.
Confederate states: whether the new legal status of the freedmen would be respected and whether intransigent southern whites would be successful in using unlawful means—including systematic violence—to frustrate the building of a new political and constitutional order ultimately based on Lincoln’s promise of a “new birth of freedom.”

Benedict argued that the entire Republican party, not just “radicals,” became alienated from Johnson because his “mild restoration policy” of presidential reconstruction served as a strong signal to southern whites that they could evade the consequences of the war. If left unchecked by Congress, this meant a restoration of white supremacy in the South, a state of affairs that would lead to the new Thirteenth and Fourteenth Amendments becoming mere parchment barriers. And Johnson’s signals were received loud and clear. The South grew more resistant to efforts to promote racial equality and with every failure by the Republicans to advance impeachment, Johnson’s policy grew more tolerant of the necessarily violent effort to restore white supremacy.

By 1866, the incessant conflict between Johnson and Congress created a brewing crisis in Washington. Yet Johnson had his defenders, and when the question of impeachment was raised, they argued that a President could be impeached only for violating a criminal statute. As we have seen, this is directly contrary to the Hamiltonian vision. Certainly the commission of a crime can count as an impeachable offense. But the Hamiltonian vision allows Congress to go beyond the commission of crimes to consider political offenses against the public trust. Yet it is just this broader reading of “high crimes and misdemeanors” that had trouble getting traction in the Johnson impeachment. As recounted by Benedict, many eminent Republicans in the House of Representatives “voted to impeach Johnson only when satisfied that he was guilty of a criminal violation of a congressional statute.” This understanding, common enough at the time, ran counter to the constitutional design. Yet it nonetheless came to structure the entire impeachment effort.

---

81 President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863). See also Whittington, supra note 72, at 427–31 (describing Johnson’s actions regarding the former Confederate states).
82 BENEDICT, supra note 70, at 8.
83 Id. at 21.
84 Id. at 21–22.
85 Id. at 71, 75–78, 89–90, 130.
86 Id. at 27.
87 See supra notes 8–12 and accompanying text (explaining that under the Hamiltonian vision, impeachment can be used for a broad range of “political” offenses).
88 See supra notes 30–34 and accompanying text (noting that the Hamiltonian vision would find a broad range of crimes as impetus for impeachment).
89 Whittington’s careful analysis generally supports the argument here. WHITTINGTON, supra note 69, at 145–52.
90 BENEDICT, supra note 70, at 141.
91 For a description of how this argument was made in the Johnson impeachment, see Bowie, supra note 29.
In his magisterial history of Reconstruction, Eric Foner summarizes the problems with the case the House made against Johnson:

[From the outset, the case against the President was beset with weaknesses. Of the eleven articles of impeachment, nine hinged on either the removal of Stanton or an alleged attempt to induce Gen. Lorenzo Thomas to accept orders not channeled through Grant. Two others, drafted by Butler and Stevens, charged the President with denying the authority of Congress and attempting to bring it ‘into disgrace.’ Nowhere were the real reasons Republicans wished to dispose of Johnson mentioned—his political outlook, the way he had administered the Reconstruction Acts, and his sheer incompetence. In a Parliamentary system, Johnson would long since have departed, for nearly all Republicans by now agreed with Supreme Court Justice David Davis, who described the President as ‘obstinate, self-willed, combative,’ and totally unfit for his office. But these, apparently, were not impeachable offenses. Despite the changes made by Butler and Stevens, the articles as a whole implicitly accepted what would become the central premise of Johnson’s defense: that only a clear violation of the law warranted a President’s removal.]92

The assumptions concerning the meaning of the “high crimes and misdemeanors” standard that structured the Johnson impeachment is a good example of a serious and pervasive problem with the project of perpetuating a constitutional design over many generations. The Hamiltonian vision permitted a President to be impeached for non-criminal actions.93 In addition, as Benedict argues, there was strong support for the Hamiltonian vision in nineteenth century legal commentary.94 None of that seemed to help Johnson’s accusers. The Hamiltonian vision foundered without a clear way to implement it in the new party-political constitutional order.

By eighteenth century standards, it should have been possible to impeach Andrew Johnson for what, after all, he had actually done.95 As summarized by Benedict, “it was plain by the winter of 1867–68 that the President of the United States was consciously and determinedly following

93 See supra notes 8–12 and accompanying text (explaining the theories of the Hamiltonian vision).
94 See Benedict, supra note 70, at 26–36 (discussing the strong legal commentary of Hamiltonian vision interpreters at the time).
95 Whittington relevantly comments: “While his impeachment was a partisan affair, congressional Republicans understood Johnson to be a threat to the constitutional order itself.” Whittington, supra note 72, at 450.
a program designed to nullify congressional legislation through the exercise of his power as chief executive.”96 It could be added that there was strong evidence Johnson was acting from racist motives for possibly racist ends, including the maintenance of white supremacy.97 Moreover, his official actions had the foreseeable effect of abrogating the civil rights of blacks and loyalist whites in the South and fomenting violence against them. This would constitute quite a bill of indictment.

Yet consider what happened as party-political logic took hold in the impeachment process. Party politics meant that Johnson had defenders, and they searched for legalistic ways to slow down the process and retain him in office. As noted in Part I, some of what the Constitution says about impeachment works against a clear understanding that it is not centrally focused on the commission of crimes.98 The Constitution appears to contemplate a full judicial trial in the Senate, for example.99 Appeals to fairness and due process are part of the American constitutional tradition.100 And so in the Johnson impeachment, senators thought they were serving as a court and that the rules and procedures of common law trials therefore applied, despite objections by the House managers.101 This delayed a vote to convict by weeks, although there was no real dispute concerning the facts.102

The main effect of party-political logic was paradoxically to obscure that it would be legitimate to remove Johnson for non-criminal, “political” offenses. Johnson’s defenders, including influential Republicans like Senator Fessenden, argued that a high burden of proof was appropriate because the results of an election and the future of the Presidency were at

---


97 FONER, supra note 92, at 179–81, 190–91. We should not overlook the significance of Johnson’s racism in assessing his impeachment. Normally we think it is relevant whether our leaders advocate for policies from racist motives and for racist purposes. Yet somehow, legal scholarship has not fully caught up with this aspect of Johnson’s conduct as president.

98 For an account of how this argument was used in the Johnson impeachment, see Bowie, supra note 29.

99 See U.S. CONST. art. I, § 3, cl. 4. (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”).

100 See David Resnick, Due Process and Procedural Fairness, 18 NOMOS 206, 206 (explaining that due process is a fundamental constitutional principle); Edward L. Rubin, Due Process and the Administrative State, 72 CAL. L. REV. 1044, 1060 (stating that fairness is a fundamental concept of due process).

101 See BENEDICT, supra note 70, at 153 (showing that the majority of Senators refused to admit testimony, while Republican Senators dissented); REHNQUIST, supra note 4, at 240, 245 (stating that Senators wrote opinions after hearing the case and well-known Republicans voted to acquit Johnson).

102 See REHNQUIST, supra note 4, at 226–27, 234 (noting that the vote originally scheduled for May 11 did not occur until May 26 and explaining how the lack of dispute over the facts rendered the evidence presented unnecessary).
stake (never mind that Johnson was an accidental President). Indeed, Fessenden stated that any offenses must be “free from the taint of party,” something difficult to accomplish when parties controlled the government. Given such an atmosphere, we can appreciate the appeal of accusing the President of committing a serious crime or other similarly serious violation of law. If strictly legal (as opposed to Hamilton’s “political”) offenses were alleged, then presumably the machinery of the law could be deployed to fairly assess Johnson’s guilt. Attention thus turned to constraining Johnson through the legal tripwire of the Tenure of Office Act. This helps explain the tremendous Republican excitement—the sense that a dam was breaking—when Johnson finally removed Stanton from office. Surely this was the clear and significant violation of the law needed for an impeachment conviction. Thus, the impeachment drama lurched into forward gear without any adequate consideration of the eighteenth century standards written in the Constitution that Hamilton faithfully glossed in The Federalist. In legalizing the impeachment process, Republicans had succeeded in defanging it of the “taint of party.” They had also frustrated the original constitutional design.

B. The Presumed Impeachment and Conviction of Richard Nixon

Inextricably caught in the coils of Watergate, Richard Nixon resigned from office in August 1974. Just prior to his resignation and after lengthy deliberation, the House Judiciary Committee adopted three articles of impeachment. Given the strength of the evidence against him at that time, and the evidence that emerged immediately after the vote, everyone assumed Nixon would have been impeached and convicted on a bipartisan vote in the Democratic-controlled House and Senate.

103 BENEDICT, supra note 70, at 178–79. For a modern version of this view, see Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. 235 (1998) (statement of Susan Low Bloch, Professor of Constitutional Law, Georgetown University Law Center).

104 BENEDICT, supra note 70, at 179.

105 See REHNQUIST, supra note 4, at 218, 222–23, 240, 245 (illustrating that Congress turned to a legal procedure in an effort to avoid political party motivations in evaluating Johnson’s guilt).

106 SUNSTEIN, supra note 4, at 105.

107 FONER, supra note 92, at 334.


109 BENEDICT, supra note 70, at 179.


111 Id. at 516–26.


113 KUTLER, supra note 110, at 522.
Scholars differ over how to describe the articles of impeachment against Nixon, but Article I rather plainly accused him of a serious federal crime — obstruction of justice to cover up White House involvement in the June 1972 break-in of Democratic National Committee headquarters. Article II became known as the “abuse of power” article, but in fact featured allegations of multiple counts of violations of law. For example, the Committee concluded that Nixon had “repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.” Article III defended the prerogatives of the House by accusing Nixon of having failed to produce evidence when required to do so by subpoenas issued by the Committee. It is uncertain whether this last Article would have served as a bipartisan basis for impeachment in the full House and Senate.

Much like Andrew Johnson’s defenders, President Nixon’s attorneys argued that impeachment could be based only on criminal offenses. Anticipating this line of argument, the House Judiciary Committee’s staff produced an important report that summarized the case for not so limiting impeachment. It remains a common impression of Watergate that the articles of impeachment rejected the notion that impeachment had to be based on “serious acts which would be indictable as criminal offenses.” While some Democrats probably believed this, a review of the historical record shows that the most persuasive articles of impeachment were based on evidence that Nixon committed the crime of obstruction of justice. This is ultimately the reason Nixon lost political support among members of his

---

115 Id. at 3–4.
116 Id. at 3.
117 Id. at 4.
118 Kutler, supra note 110, at 529–30.
119 Id. at 477–78.
120 See Staff of the Impeachment Inquiry, H. Comm. on the Judiciary, 93d Cong., Constitutional Grounds for Presidential Impeachment 22–25 (Comm. Print 1974) [hereinafter Staff of the Impeachment Inquiry] (arguing that impeachment should not be confined to cases involving criminal conduct and stating that “[t]he American experience with impeachment . . . reflects the principle that impeachable conduct need not be criminal.”).
121 See, e.g., Kathleen M. Sullivan & Noah Feldman, Constitutional Law 421 (18th ed. 2013) (“[T]he staff of the Judiciary Committee insisted that the scope of impeachable offenses and of criminality are not synonymous, and that the impeachment route may reach serious abuses of office or breaches of trust even when they do not constitute criminal acts.”).
122 See H.R. Rep. No. 93-1305, at 1–3 (1974) (noting that President Nixon “has prevented, obstructed, and impeded the administration of justice” and listing nine “means used to implement this course of conduct”).
own party and had to resign from office. To understand the dynamics of the Nixon impeachment, we should understand that it did not occur in a hyper-partisan or tribal atmosphere when party loyalty was expected to govern no matter what occurred. To be sure, many Republican members of the House Judiciary Committee were indeed loyal to Nixon and could barely tolerate the thought that some members of their party might vote for his impeachment. It was certainly appreciated at the time that the Republican minority members held the key to a legitimate—that is, bipartisan—impeachment process. In explaining impeachment procedures in the House, for example, prominent constitutional scholar Charles Black assured his audience that the Democratic majority would strive to avoid “a close vote along party lines—a vote whereby Republicans and Democrats divide as such.” In that case, Black felt that the taint of “party motives” would undermine the legitimacy of the impeachment. He postulated that this dynamic would lead to “some compromise” calculated to win the support of the minority members of the Judiciary Committee and similarly in the full House and Senate. Black well-anticipated what happened on the Committee in the Nixon impeachment, although—as I will argue below—his insights did not carry over to the far more partisan tenor of the Clinton impeachment.

What Black may not have anticipated was that the party compromise necessary for a legitimate impeachment would turn the Committee’s inquiry in the direction of relying on allegations of criminality. The path of the House Judiciary Committee’s impeachment inquiry was strongly influenced by the ongoing investigation conducted by the Watergate grand jury, led by special prosecutor Leon Jaworski after the October 1973 “Saturday Night massacre” firing of Archibald Cox. Michael Gerhardt insightfully argues that federal prosecutors have exerted an increasing influence over recent impeachments, including the Nixon and Clinton impeachments. Michael J.

---

123 See, e.g., James M. Naughton, Nixon Slide From Power: Backers Gave Final Push, N.Y. TIMES (Aug. 12, 1974), https://www.nytimes.com/1974/08/12/archives/nixon-slide-from-power-backers-gave-final-push-former-defenders.html (noting that after Senate Republican Whip Robert P. Griffin learned of President Nixon’s attempts “to persuade the Federal Bureau of Investigation to abandon crucial early clues as to the scope of the Watergate scandal,” Griffin stated “[t]here was no doubt in my own mind then that the President should resign, had to resign”).
124 KUTLER, supra note 110, at 479, 499.
125 Id. at 504.
126 BLACK, supra note 4, at 8.
127 Id. at 8–9.
128 Id.
129 Id. at 9.
130 See discussion infra Section II.C.
Committee’s effort was greatly enhanced when it received a trove of evidence from the grand jury in early 1974.\textsuperscript{132} As summarized by historian Melvin Small, this material was “essential to the proceedings—800 pages of documents, 13 tape recordings, and a 60-page report or ‘road map’ to the evidence.”\textsuperscript{133} In fact, Judiciary Committee chief counsel John Doar was more deeply indebted to Jaworski’s staff attorneys than anyone appreciated at the time. Doar had to have this voluminous record and how it related to the criminal charges against Nixon and his subordinates explained to him in multiple sessions.\textsuperscript{134} Considering the relative expertise of Doar and Jaworski’s able crew of lawyers, this is understandable. Jaworski’s staff had been examining the evidence, including Nixon’s famed tapes, intensively for months prior to the beginning of the Committee’s inquiry.\textsuperscript{135} Yet this meant that the grand jury’s exclusive focus on criminal offenses would influence the Committee’s inquiry and thus the eventual articles of impeachment. And why not? Everyone agreed that serious criminal offenses could be grounds for impeachment.

The submission of information from the grand jury was also important because the Committee lacked the time and inclination to pursue its own independent inquiry. Besides, as a practical matter, such an inquiry was unnecessary. As Stanley Kutler describes, by summer 1974, much of the relevant evidence had already been aired—in public by the Senate Select Committee on Watergate the previous summer,\textsuperscript{136} by the grand jury in its closed sessions, and through Nixon’s public submission of transcripts of taped conversations.\textsuperscript{137}

Focusing on criminality had other advantages. An inquiry based on evidence that Nixon had committed crimes solved the political problem faced by the conservative southern Democrats and independent-minded Republicans who held the bipartisan balance of power on the Committee.\textsuperscript{138} It is understandable that Republicans especially were torn between party loyalty and the relentless accumulation of evidence against Nixon. Evidence of criminality provided the best possible protection against charges by their voters that they had abandoned their president. As Kutler remarks, “no member dared vote for impeachment without effective certainty of the

\textsuperscript{132} Melvin Small, \textit{The Presidency of Richard Nixon} 291 (1999).
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} Kutler, \textit{supra} note 110, at 482.
\textsuperscript{135} \textit{Id.} at 480 (noting that Doar did not have his staff hired until March 1974).
\textsuperscript{136} The official name was the Select Committee on Presidential Campaign Activities. \textit{Select Committee on Presidential Campaign Activities}, U.S. Senate, https://www.senate.gov/artandhistory/history/common/investigations/Watergate.htm (last visited Sept. 6, 2018).
\textsuperscript{137} Kutler, \textit{supra} note 110, at 493.
\textsuperscript{138} \textit{Id.} at 498–99.
President’s guilt.”\textsuperscript{139} This made the proof of criminal actions offered by the Watergate grand jury quite attractive. In the end, most of the members who provided the essential bipartisan imprimatur to impeachment were persuaded that Nixon had committed the crime of obstruction of justice and had abused his power by violating the law.\textsuperscript{140} In fact, the bipartisan coalition that provided the necessary votes to impeach saw articles I and II “as different sides of the same coin.”\textsuperscript{141} This is because they both rested ultimately on issues of criminality and violations of the law.

Finally, Nixon did not resign merely because plausible articles of impeachment were filed against him, but rather because his political support vanished once clear evidence emerged that he had committed a serious crime.\textsuperscript{142} Like any good politician in a party-based democracy, he measured success in terms of what political support he had from his own party (and southern Democrats, de facto Republican party affiliates).\textsuperscript{143} But any chance that his party might protect him against conviction in the Senate disappeared in the wake of the revelation of the June 23, 1972 tape in which Nixon was heard to order the use of the CIA to shut down the FBI investigation into the Watergate burglary.\textsuperscript{144} In the ensuing overwhelmingly negative political reaction, which included members of his own party castigating him and calling for his resignation, Nixon was forced to resign.\textsuperscript{145} It is emblematic of the Nixon impeachment that this tape was viewed as the long-awaited “smoking gun” that definitively proved Nixon’s guilt. That his impeachment became so focused around the question of guilt shows the dominance of the criminal model in presidential impeachments.

C. The Impeachment and Survival of Bill Clinton

So far, I have argued that the Johnson and Nixon impeachments occurred within a party-political framework or constitutional order which had a profound effect on how the Constitution was interpreted and thus on notions about what constituted a legitimate impeachment.\textsuperscript{146} Although the participants knew in a sense that removing a President for non-criminal conduct was an option, they were impelled by the logic of the constitutional order to focus overwhelmingly on allegations of criminality and violations of the law.\textsuperscript{147} With the historical context of these two impeachments firmly

\textsuperscript{139} Id. at 481.
\textsuperscript{140} Id. at 497–504, 519–20, 525–28.
\textsuperscript{141} Id. at 528.
\textsuperscript{142} Id. at 544.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 536.
\textsuperscript{145} Id.
\textsuperscript{146} See discussion supra Sections II.A, II.B.
\textsuperscript{147} See id. (noting the appeal of impeaching based on criminal charges in both the Nixon and Johnson impeachment processes).
grasped, certain similarities and asymmetries with the Clinton impeachment should now be in view.

Even more so than with Nixon, the Clinton impeachment was totally dominated by the question of Clinton’s criminal guilt. This was partly due to institutional developments which should be of interest.148 In contemporary times, the House Judiciary Committee has had trouble doing the job on its own. Once again, the Committee followed the lead of a special prosecutor (now “independent counsel” Kenneth Starr)149 in charge of a grand jury whose mission was, of course, to focus on the commission of crimes.150 The report Starr submitted to Congress focused nearly exclusively on allegations that President Clinton had committed the federal crimes of perjury and obstruction of justice.151 The Republican-led Committee transmuted Starr’s report into four articles of impeachment submitted to the full House, all but one of which focused on allegations that Clinton had committed crimes. Specifically, Article I charged Clinton with having committed perjury before a federal grand jury,152 Article II with perjury in the process of discovery in the civil action brought against him by Paula Jones,153 and Article III that he had obstructed justice in the Jones case.154 Article IV charged Clinton with failing to respond and making false statements to the House Judiciary Committee.155 Clinton was impeached by the House by a mostly party-line vote on Articles I and III.156

At the same time, there was an obvious and highly consequential asymmetry between the Nixon and Clinton impeachments. By the late
1990s, the shift to a more partisan or tribal form of politics was well underway. Republicans in the House and especially on the Judiciary Committee made little effort to assure bipartisanship in the impeachment process. As I discuss below, partly for this reason one can question whether the lengthy Republican impeachment effort was “rational,” at least in the specific sense of being likely to result in Clinton’s removal from office. Republicans focused inward, making little effort to secure bipartisan support. Because Republicans lacked the two-thirds majority necessary for conviction in the Senate, the impeachment took on a quixotic quality.

The Starr Report and the proceedings before the Judiciary Committee had an oddity that was perhaps insufficiently remarked on at the time. As described earlier, in the Nixon impeachment, the Judiciary Committee staff released a report that reviewed the standards for judging whether the president had committed a high crime or misdemeanor. The staff presented a competent argument that impeachable offenses were not limited to indictable crimes. But this naturally raised the question of how best to articulate the constitutional standard. They advocated no one formulation but remarked that “the framers who discussed impeachment in the state ratifying conventions, as well as other delegates who favored the Constitution, implied that it reached offenses against the government, and especially abuses of constitutional duties.” This was at least somewhat helpful in evaluating Nixon’s conduct. Yet the Starr Report contained nothing similar concerning the meaning of the Constitution with respect to the scope of impeachable offenses. What was going on?

---


158 See Peter Baker, The Breach: Inside the Impeachment and Trial of William Jefferson Clinton 418 (2000) (arguing that the heavy partisanship displayed during President Clinton’s impeachment hurt both Republicans and Democrats).

159 See infra text accompanying note 169.

160 See Whittington, supra note 72, at 453 (noting the partisan backdrop of the Clinton impeachment).

161 Nicol Rae and Colton Campbell argue that over time, the House Judiciary Committee became “a bastion of each party’s ideological core rather than a consensus-oriented bipartisan panel.” Rae & Campbell, supra note 52, at 53–54, 85–91.

162 See Staff of the Impeachment Inquiry, supra note 120 and accompanying text.

163 Id. at 22–25.

164 Id. at 14–15.

165 See Whittington, supra note 72, at 453–54 (discussing the “strictly legal focus” of Starr’s criminal investigation at the expense of the broader constitutional question).

166 Somewhat strangely, Judge Posner contended that this omission by Starr was appropriate because “no one knows what an impeachable offense is.” Posner, supra note 4, at 78. This is not only inaccurate and unhelpful considering the record of past impeachments, it represents an abdication of how constitutional analysis is done. Posner could have looked back to the arguments during Watergate, for
I suggest the relative lack of interest in articulating standards for impeachment is telling. As we have seen, this was considered a critically important issue in prior impeachments. Its failure to even make an appearance in the Clinton impeachment suggested the existence of a norm or constitutional convention that impeachments should be about criminality rather than evaluating Clinton’s public conduct as president. I have suggested that this norm evolved to handle the transition from a Constitution based on a gentleman’s code of honor—the constitutional order of the early republic—to the fractious world of organized party politics.

Republicans may have outsmarted themselves in taking an aggressively partisan path toward impeachment. Indeed, it is worth asking whether the Republican effort to remove Clinton was rational, albeit in a very specific sense. Of course, I am not suggesting a lack of mental competence on the part of House Republicans. But there is a reasonable sense in which we may ask: did Republicans in the House, especially those on the Judiciary Committee, really want Clinton removed from office? Removal from office requires a two-thirds vote in the Senate and although Republicans controlled the Senate, they did not have two-thirds of the votes. Removing Clinton necessarily required Democratic votes, and this meant the impeachment effort had to be bipartisan. Yet it is not obvious that the House Republican strategy was well-suited to providing a strong basis for Democrats to remove Clinton from office. I suggest the reason they ignored the need for bipartisan support is they were convinced that clear evidence of federal crimes would be sufficient to guarantee impeachment. That is, they may have been misled by their own overly narrow understanding of the “high crimes and misdemeanors” standard. Once again, the party-political nature of the process led to a focus on criminality.

As for the Senate, while the evidence supports the inference that some Democrats were willing to vote for censure or some other confected example, but he avoided looking to our constitutional history or practice to elucidate the meaning of the “high crimes” standard.

---

167 See discussion supra Sections II.A, II.B.
168 Id.
169 For further discussion, see Gerhardt, supra note 131, at 364.
170 U.S. CONST. art. I, § 3, cl. 6.
172 See Gerhardt, supra note 131, at 366–67 (discussing generally the role of partisanship in impeachment charges and specifically the Clinton impeachment).
173 RAE & CAMPBELL, supra note 52, at 63.
sanction, they were not about to remove Clinton from office, especially for misconduct (even including federal crimes) arising out of a dubious private lawsuit that had nothing to do with the performance of his official duties. In addition, because Republicans had taken such a partisan path, they never devoted much attention to persuading the public at large. Bereft of the backing of a broad majority of the American people, Republicans advanced their impeachment effort into the headwinds of democratic legitimacy.

As with Clinton, so with Trump. The focus of impeachment talk with respect to President Trump fits a now-familiar pattern: it revolves once again around an investigation by a special prosecutor and allegations of federal crimes, especially obstruction of justice. The notion that Trump should be judged by a standard independent of the criminal process is rarely discussed. It seems the Hamiltonian vision has receded from our sight.

III. PRESIDENTIAL IMPEACHMENT AND THE HISTORICAL LOGIC OF CONSTITUTIONAL CHANGE

The shift in impeachment standards we have traced from the eighteenth century Hamiltonian vision to the contemporary party-political constitutional order is a good example of informal constitutional change. As I understand it, informal constitutional change is meaningful alteration of the Constitution outside the Article V amendment process and, as illustrated by the example of impeachment, it can be outside judicial interpretation of the Constitution as well. What happened to the “high crimes and misdemeanors” standard illustrates that the Supreme Court does not do all the work of adapting the Constitution to match the times.

The Hamiltonian vision was that impeachments should focus on official misconduct that amounts to abuse of the public trust. As we have seen,

---

174 The account of the Clinton impeachment by Peter Baker is helpful here. See Baker, supra note 158, at 380–94 (detailing the politicking employed to defeat the bipartisan plan to censure President Clinton).

175 The Supreme Court itself suggested the validity of the distinction between official duties and private conduct in Clinton v. Jones, 520 U.S. 681, 694–95 (1997).

176 The polls and expressions of public support ran consistently in Clinton’s favor and Republicans suffered losses in the 1998 congressional elections, probably in part because of their quest to remove Clinton from office. See Jeffrey Toobin, A VAST CONSPIRACY 258, 304, 320, 338–40 (1999) (discussing the publics’ growing distaste for the Republican-led invasion of the President’s private life); Gerhardt, supra note 131, at 362 (“[A] majority of Americans throughout the [impeachment] proceedings steadily opposed the President’s removal.”).


178 Griffin, supra note 7, at 3.

179 STAFF OF THE IMPEACHMENT INQUIRY, supra note 120, at 13.
what the Johnson, Nixon, and Clinton impeachments actually focused on were questions of criminal guilt and sometimes dubious efforts at trying to catch the President in a clear violation of law. To summarize how distant our constitutional order is from that envisioned by the framers, I will first speculate about how each presidential impeachment might have gone had the Hamiltonian vision prevailed. I then turn to drawing lessons from the impeachment experience for a broader understanding of the process of informal constitutional change.

A. Viewing Presidential Impeachments Through an Eighteenth-Century Lens

Let’s begin with Cass Sunstein’s recent nuanced review of the eighteenth century precedents concerning the interpretation of “high crimes and misdemeanors.” Sunstein insightfully captures the original meaning of that standard as follows: “impeachable conduct . . . usually involved serious abuses of the authority granted by public office, or, in other terms, the kind of misconduct in which someone could engage only by virtue of holding such an office.” Notice that the emphasis is not on criminality per se, but rather toward making a judgment about the president’s performance of his or her official duties.

This is another version of the standard I have dubbed the Hamiltonian vision. Any attempt to apply this somewhat amorphous “public misconduct” or public trust standard to the historical cases of presidential impeachment is a speculative enterprise. In what follows, I am not trying to imagine what Hamilton or other members of the founding generation would have thought about the Johnson, Nixon, and Clinton impeachments. Rather, taking Hamilton’s premises as seriously as I can, I am illustrating the gap between his eighteenth century order and the party-political order we inhabit. Faithful application of the Hamiltonian vision to the Johnson, Nixon, and Clinton impeachments not only might have led to different outcomes, but perhaps to a substantially different decision-making process.

The Johnson impeachment provides the easiest case. As we have seen, Johnson abused his powers to frustrate a congressional policy of the highest national importance, including obstructing the enforcement of laws passed over his veto. In doing so, he stripped citizens who were counting on his help for their protection from lawless retaliation and violence. He violated

---

180 See discussion supra Sections II.A, II.B, II.C.

181 SUNSTEIN, supra note 4, at 34-37 (summarizing English precedents).

182 Id.

183 See Whittington, supra note 72, at 438–39 (noting Johnson’s belief that the President exercises judgment to determine “whether legislation was constitutional” and “unconstitutional legislation could not be binding on the President”).

184 See discussion supra Section II.A.
his oath of office in literal terms and thus betrayed the public trust.\footnote{\textit{Id.}} On Hamiltonian grounds, Johnson should have been thrown out of office on his ear and richly deserves the obloquy of history.

The Nixon impeachment is harder because much of what Nixon did was hidden from the public.\footnote{See discussion \textit{supra} Section II.B.} Relatively late in the impeachment process, the House Judiciary Committee began publishing accurate transcripts of the White House tapes which finally enabled the American people to judge for themselves whether Nixon had lied and obstructed justice.\footnote{\textit{Kutler, supra} note 110, at 493–94.} However, if our focus is Nixon’s public conduct in office, it is unnecessary to wait for confirmation of criminal guilt. What matters is whether Nixon took actions that were inconsistent with the public trust. Here the “Saturday Night Massacre” looms large.\footnote{See Anita S. Krishnakumar, \textit{How Long Is History’s Shadow?}, 127 YALE L.J. 880, 916 (2018) (noting that public pressure was an important factor in forcing Congress to investigate and ultimately impeach President Nixon).} It is noteworthy that many Americans shifted their opinion of Nixon after this episode and the impeachment process began in earnest.\footnote{\textit{Kutler, supra} note 110, at 405–14.} On the Hamiltonian understanding, Nixon could well have been impeached for this action alone, as it clearly undermined public trust in the conduct of his office, as well as obstructing justice in a lay sense.\footnote{See \textit{id.} at 406 (explaining that firing Cox damaged Nixon’s credibility with the public, and that the conduct from the White House following Cox’s dismissal “shocked and frightened the nation”).} Furthermore, throughout the Watergate investigation, Nixon misled the public in a way that showed he had a fundamental contempt not only for his Democratic opponents, but for the American people as a whole.\footnote{See \textit{id.} at 413 (suggesting that Nixon’s lies had betrayed his oath to the American people).} This is surely inconsistent with the “public trust” understanding, which is at the heart of the Hamiltonian vision.

With respect to the Clinton impeachment, consider an episode from the middle of the Senate trial. Senator Robert Byrd, a moderate Democrat considered a key vote by both sides, posed a question that cuts right to the heart of my argument. Byrd asked the president’s lawyers to put aside the legal arguments about perjury and obstruction of justice and focus on “the charge that, by giving false and misleading statements under oath, such ‘misconduct’ abused or violated ‘some public trust.’”\footnote{\textit{Baker, supra} note 158, at 334.} In asking this question, Byrd directly invoked what I have termed the Hamiltonian vision. From the perspective of the eighteenth century, this should have been the central issue of the Clinton impeachment. Instead, Republicans were so confident that the evidence in the Starr Report spoke for itself that they neglected to make a case to the public that Clinton could no longer
effectively serve as President.\textsuperscript{193}

To be sure, the gap between the original meaning of “high crimes and misdemeanors” and later developments can be overstated. I do not mean to suggest the framers were against removing a President for committing criminal acts—at least criminal acts related to official duties.\textsuperscript{194} What happened is that over the course of constitutional development, what could be an impeachable offense was restricted de facto to a small subset of what is allowed by the Constitution. Nonetheless, this restriction amounts to a material alteration in the constitutional plan, given the sound reasons reviewed in Part I for granting a check to Congress not limited to criminal acts, both with respect to the president’s official actions and potential failures to execute constitutional duties. Further, the issue is not that Congress has been following a mistaken interpretation of the Constitution but that, in some sense, it could not do otherwise without restructuring the contemporary constitutional order (including the elimination of political parties).

The record of these past impeachments suggests what was lost. During the Johnson impeachment, the position taken by noted Senator Charles Sumner showed what could have been had Congress been able to adhere to the Hamiltonian vision. Sumner contended that the relevant standard was whether, all things considered, Andrew Johnson should be permitted to remain in office given his obstruction of Congress’ reconstruction laws.\textsuperscript{195} As summarized by Chief Justice Rehnquist, “[t]he overriding issue for [Sumner] was not whether Andrew Johnson had violated the Tenure of Office Act, but whether Andrew Johnson should continue to be president in view of his repeated obstruction of the reconstruction policies of the Radical Republicans.”\textsuperscript{196} If one is concerned to adhere to the Hamiltonian vision, Sumner’s view strikes me as exactly right.\textsuperscript{197} Yet it is noteworthy that it struck Rehnquist as dangerously “political,”\textsuperscript{198} tending toward a parliamentary system in treating impeachment as a mere vote of confidence rather than as a quasi-judicial determination of guilt.\textsuperscript{199} It is ironic that the approach Rehnquist believed “political” was in fact much closer to the Hamiltonian vision than the party-political path Rehnquist apparently favored, with its consistent resort to sometimes strained charges of

\textsuperscript{193} See Whittington, \textit{supra} note 72, at 453 (noting that the Starr report almost “single-handedly provided the evidentiary support” for the House Republican’s effort to impeach Clinton).

\textsuperscript{194} See SUNSTEIN, \textit{supra} note 4, at 39 (explaining that in the colonies, violations of criminal law were grounds for impeachment, but criminality was not a requirement for impeachment).

\textsuperscript{195} \textit{REHNQUIST, supra} note 4, at 244–45, 268.

\textsuperscript{196} \textit{Id.} at 245.

\textsuperscript{197} For a contrary view that supports Rehnquist’s argument, see Chafetz, \textit{supra} note 9, at 410–13.

\textsuperscript{198} \textit{REHNQUIST, supra} note 4, at 245–46.

\textsuperscript{199} \textit{Id.} at 245–46, 268–69.
presidential criminality and violations of law.\textsuperscript{200}

B. Understanding the Historical Logic of Informal Constitutional Change

What happened to the “high crimes and misdemeanors” standard over time is a microcosm of informal constitutional change. The same process has been at work altering the constitutional meaning of, for example, presidential war powers,\textsuperscript{201} national regulatory power under the Commerce Clause,\textsuperscript{202} and, speaking broadly, the course of developments in the doctrines of federalism and separation of powers. We can use the case study of impeachment to inform a deeper understanding of what I am calling the historical logic of informal constitutional change.\textsuperscript{203}

What follows is a rough outline of this logic. The baseline for assessing informal change is the self-understanding of the founding generation concerning the design or plan of the Constitution and the expectations they had for how it would work. Compared to, for example, ordinary criminal law, constitutions generally are self-enforcing in the sense that there is no agency external to the Constitution that can reliably assure its terms will be respected. The Framers’ design thus had to be enforced through institutions established by the Constitution itself. These institutions are effective at this task if they are “built out” through state building in a way that enables them to operationalize the design of the Constitution. A constitutional order is then the totality of the design of the Constitution as implemented through institutions in a given historical era. The Constitution’s status as an effective supreme law depends on the ability of Americans and their institutions to reproduce this order across time.

Institutionalization or state building is thus key to constitutional enforcement. We should notice three details about the process of institutionalization in the early republic. First, this process obviously works more smoothly if there is substantial agreement coming out of the Federal Convention and the ratification process as to the purposes and design of the Constitution. Otherwise, the implementation of the Constitution and its effective enforcement will fall prey to endless political disputes. Second, although the judiciary can certainly play a role in ensuring the Constitution is enforced, given its roots in the common law and thus its dependence on specific cases, it cannot be expected to be solely responsible or even to

\textsuperscript{200} Id. at 269–70.

\textsuperscript{201} I addressed informal constitutional change with respect to presidential war powers in Stephen M. Griffin, Long Wars and the Constitution 1–10 (2013) [hereinafter Long Wars].


\textsuperscript{203} In what follows, I am presenting an argument developed partly in a prior work. See Griffin, supra note 7, 16–19 (advocating for a historicist approach to constitutional change, focused on state building and creating institutions).
necessarily have the lead role.\textsuperscript{204} Finally, changes in circumstance can pose additional challenges. Such changes can be disagreements over the meaning of the Constitution fueled by new political and policy controversies; unanticipated problems that are difficult to address under the plan; and institutional changes that alter the ability of the original constitutional order to reproduce itself.\textsuperscript{205}

The rise of nationally-organized mass political parties in the nineteenth century is an example of this last kind of change.\textsuperscript{206} Parties are the way society organizes itself for politics, and by the 1830s, American society was very different from that of the Federalist early republic. Running government based on a gentlemanly consensus was no longer possible (if it ever was).\textsuperscript{207} Parties changed the way the Constitution could be enforced and thus, the way presidential impeachment was understood. Because of the new status of the President as party leader (rather than, say, patriot king),\textsuperscript{208} the President would always have enthusiastic partisan defenders. As we have seen, by the Johnson impeachment there was a widespread belief that presidents could be impeached only for violations of the law.\textsuperscript{209} This was a substantial alteration of the original constitutional order. From a practical point of view, it was as if the Constitution had been formally amended. Yet few were willing to admit this change.

This suggests another important feature of understanding informal change under the American Constitution. Because of reverence for the Constitution, Americans tend to resist the idea of formal amendment, even when it is arguably necessary.\textsuperscript{210} At the same time, as changes amounting to formal amendments occurred, everyone tended to behave as if the constitutional order remained the same. This was as true in the early republic as it is today.\textsuperscript{211} This feature requires some further explanation.

The antebellum debate over internal improvements is helpful in showing the pervasiveness of this way of thinking.\textsuperscript{212} This seemingly never-ending

\begin{footnotes}
\footnote{GRiffin, supra note 108, at 42–45.}
\footnote{Id. at 45–46.}
\footnote{See Levinson & Pildes, supra note 43, at 2322–23 (explaining that the “mass-scale” Democratic Party, created by Andrew Jackson and Martin Van Buren, established competition between Congress and the President, which the original constitutional design failed to deliver).}
\footnote{See Woody, supra note 48, at 251–55, 257–62 (describing how American politics transformed in the late 1700s from revolving around the opinions of the elite to interests of the public).}
\footnote{See, e.g., Ralph Ketcham, Presidents Above Party: The First American Presidency, 1789–1829 at 61, 65–66 (1984) (defining a “patriot king” as one free from party influence to better serve the people).}
\footnote{Benedict, supra note 70, at 27.}
\footnote{GRiffin, supra note 108, at 39.}
\footnote{Id. at 38–39, 45–46.}
\footnote{See John Lauritz Larson, Internal Improvement: National Public Works and the Promise of Popular Government in the Early United States 1–7 (2001) (introducing the debate in the early republic over whether private industry or public government should handle internal improvement projects).}
\end{footnotes}
conflict involved the assertion of federal power to construct roads, canals, and other infrastructure of benefit to the nation. But proponents of these improvements could not escape the charge, consistently pressed by fearful opponents, that they were expanding federal power beyond that permitted by the Constitution. Of course, amending the Constitution would cure the difficulty. Or would it? The problem with asking for an amendment to address a general question of power is that it concedes to the opposition party that your proposal is contrary to the Constitution. Furthermore, asking for an amendment might bring into question other issues thought settled. That would mean recycling disputes such as the constitutionality of the national bank.

For these reasons, historian Michael Vorenberg argues that prior to the Civil War, Americans did not regard Article V as offering a reasonable way to resolve their constitutional disputes. They saw the Constitution as appropriately static and unchanging, consistent with the insightful argument James Madison made in *The Federalist* No. 49. The controversy over slavery illustrates this point. Even the tremendous political stresses caused by the nullification crisis in the 1830s or *Dred Scott v. Sandford* in the 1850s, did not cause Americans to turn to amendments as solutions.

Notice that the amendment avoidance stance of antebellum America cuts across the standard debate over whether the framers made it too difficult to amend the Constitution. Scholars have debated this issue by focusing on the number of voting steps necessary for any amendment under Article V. But as Vicki Jackson has pointed out, arguments asserting the general difficulty or “impossibility” of amendment are typically underspecified given the undoubted ratification of twenty-seven amendments, including some that everyone agrees are of great importance as well as a few that were ratified quickly. In this light, the supposed problem posed by Article V

213 Id. at 3.
214 See GRIFFIN, supra note 108, at 39 (stating that Roosevelt remained ambiguous on the issue of amending the Constitution during his campaign, fearing that Republicans would cast him and other Democrats as destroyers of the Constitution).
216 See id. (discussing Madison’s argument that frequent amendments might endanger the nation by “disturb[ing] the public tranquility by interesting too strongly the public passions” and “depriv[ing] the government of that veneration which time bestows on everything”).
218 See Vorenberg, supra note 215, at 124–25 (noting that even Anti-Federalists turned away from creating formal amendments and instead turned toward strengthening the power of the states).
220 Id. at 577–83.
221 Id. at 577–78 (citing examples of the 24th and 26th Amendments).
needs to be recast.

The difficulty of formal amendment that is most relevant is a product of the founding generation attempting to achieve two conflicting goals at the same time—enforcing constitutional limitations on government amid changing circumstances, while also keeping the Constitution free of ordinary political entanglements to preserve its stability. This conflict was heightened by the intense suspicion of the opposition that pervaded antebellum politics. Faced with this choice, Americans opted for political stability above all else. As a consequence, the early American constitutional order had a pronounced aversion to making changes through formal amendment. As I have argued in prior work, this forced a significant amount of constitutional change off-text.

Highlighting the issue of amendment difficulty is consistent with a living constitutionalist perspective. But my analysis goes beyond living constitutionalism in significant respects—I term it “developmental.” Focusing on the specific case of presidential impeachment allows us to better understand that difference. For example, the status of fundamental changes, such as the advent of political parties, is left unclear in forms of living constitutionalism that conceptualize change in incremental common law terms. Sometimes change is more rapid and substantial. Further, developmental analysis does not treat such changes as “extraconstitutional” or exogenous to the Constitution. Rather, to the extent that political parties became responsible for enforcing the Constitution, they were absorbed by and became internal to the constitutional order.

One practical implication of this approach is that if we admire the Hamiltonian vision or think it constitutionally required by originalism, we can then appreciate that restoring it is not a matter of simply correcting a

---

222 See Larson, supra note 212, at 4 (discussing the tension between the different underlying visions about the nature of liberty and the role of government as each side sought to determine the future of the republican experiment).
223 Griffin, supra note 108, at 40.
224 Besides the differences with living constitutionalism discussed in the text, another difference is that developmental analysis does not suppose that it is up to contemporary Americans to remake the Constitution as they see fit. Contemporary Americans are constrained by the routines and structures imposed by the fundamental institutions the Constitution created, as well as later developments like political parties. Changing a constitutional order is not a matter of shifting interpretations, but rather changing the institutions themselves.
225 See, e.g., David A. Strauss, The Living Constitution 119 (2010) (“Similarly, there are principles in the living Constitution—important principles—that never find their way into court. They are traditions and understandings—on fundamental issues, of the kind that the written Constitution addresses—that grow up in our society and become solidly entrenched, without ever having been added to the written Constitution and without being enforced by the courts.”).
226 Once political parties are understood as endogenous, for example, we are forced to ask how this altered the balance of power among the branches and thus the design of the framers. See, e.g., Levinson & Pildes, supra note 43, at 2320 (observing that political competition organized around issues had the potential to cut through the constitutional boundaries between the branches).
mistaken interpretation or making an effort of will to return to original meaning. It would require a fairly radical restructuring of the contemporary constitutional order to reduce or eliminate the role of political parties. If this sounds farfetched (which it is), it is also a more accurate qualitative measure of how far the contemporary constitutional order is removed from that of Hamilton and his contemporaries.

In saying that the rejection of the Hamiltonian vision was a constitutional change, I introduced the idea that it amounted to making a de facto amendment outside Article V. But how does it make sense to say that a change amounting to a formal amendment occurred? Let us provisionally define an amendment as a consequential change to the Constitution that in some sense cannot or should not be made through ordinary common law interpretation. Understanding what changes count as de facto amendments is then a matter of specifying an initial qualitative baseline against which subsequent developments are measured. Observe that I specified the initial baseline in terms of the design or expectations of the Framers. This certainly differs from recent forms of originalism—such as original public meaning—which rule out such reliance. Although it is not my purpose to argue against originalism here, I should state the case for using the Framers’ actual plans and expectations as the baseline.

The issue is not what is a sound originalist approach to understanding change in the early republic—but what is a sound historical approach. They are not necessarily the same. I contend that the baseline for assessing change must be historicist. For my purposes, historicism is centrally concerned with the context in which human action takes place, taking into consideration the contingency of events and the causal relationships between past and present. Context can be thought of as the situatedness of historical actors in their own time. This is presumably the result of many factors, including geography, climate, language, religion, culture, ideology, race, gender, economic and social class, and so on. What is most crucial for understanding the political and legal phenomenon we call constitutionalism is the self-understanding of historical actors—the way they perceive their own state of affairs—especially with respect to the meaning of the Constitution.

In studying impeachment, for example, rather than relying solely on the

---

227 See supra text accompanying note 178.
228 See, e.g., Jack M. Balkin, Living Originalism 6–7 (2011) (explaining the original meaning theory of constitutional interpretation and how the meanings of words in the Constitution are not isolated in time).
229 See Griffin, supra note 15, at 1205–06 (describing a “historic” baseline as a perspective focusing on the contexts in which historical events took place and how those contexts changed).
230 Id. at 1205.
231 This is the perspective I brought to studying change in presidential war powers in Long Wars, supra note 201, at 14–15.
original public meaning of “high crimes and misdemeanors,” we looked to how impeachment fit into the plan or design of the Constitution. We also examined what Hamilton might have expected about the standards for public officials given his background as an eighteenth century gentleman. We then reviewed the very different understanding of this standard during the Johnson impeachment and drew the conclusion that the meaning of the standard had shifted dramatically. Our judgment that there was a shift in meaning is thus based on the self-understanding the relevant historical actors had with respect to the impeachment standard.

As may be apparent, this method is intended to track the approach used by historians. Unlike originalists, I see no reason to reinvent the wheel. One way to view my general project is that it tries to improve contemporary constitutional analysis by taking more seriously the stance historians assume toward the past. By contrast, the original public meaning approach appears to license departing from the self-understanding of eighteenth century historical actors. This may be hard to believe given the emphasis in original public meaning scholarship on providing concrete evidence concerning what the words and phrases in the Constitution meant in the eighteenth century. It turns out that, as a practical matter, this approach decouples semantic meaning from historical meaning as self-understanding. To put it more bluntly, the original public meaning approach makes it possible to come up with meanings for constitutional clauses that probably did not occur (or even could not have occurred) to anyone at the Federal Convention or in the ratification debates. That cannot be a sound approach to understanding the meaning of a historical document like the Constitution.

232 See discussion supra Part I.
233 Id.
234 See discussion supra Section II.A.
235 For a highly useful and critically adept review of those methods, see RICHARD J. EVANS, IN DEFENCE OF HISTORY 17 (1997) (describing the historian’s approach of “understand[ing] the past as the people who lived in it understood it”).
236 For an in-depth example, see LONG WARS, supra note 201, at 8 (advancing an argument based on a more thorough assessment of historical literature and collection of key primary sources than any previous work on war powers with respect to the post-World War II period). With respect to impeachment, consider the relative neglect of Michael Les Benedict’s work. See BENEDICT, supra note 70, at 1–3 (arguing that to understand the spirit of the Reconstruction crisis—the kindling for the impeachment crisis—one must recognize that a generation of Americans actually lived in a situation where “countrymen killed countrymen” and where “political power involved more than the simple control of administration”).
238 I criticize this tendency in a critique of John Yoo’s originalist work on presidential war powers in LONG WARS, supra note 201, at 41–42.
239 See, e.g., id. at 43–44 (criticizing Yoo’s position that the eighteenth century understanding of executive power included the power to initiate war under the “declare war” clause).
The shift in the understanding of the “high crimes and misdemeanors” impeachment standard shows that informal constitutional change follows a historical and historicist logic, rather than an originalist or legalist logic. As the institutions responsible for constitutional enforcement change, so does the meaning of the Constitution. Substantial informal change amounting to an amendment can occur outside Article V because the Constitution is self-enforcing. There is no agency external to the constitutional order that can somehow compel it (and us) to adhere to the eighteenth century design. \[240\] Once meaningful institutional change occurs, such as the rise of organized political parties, that design cannot be recovered. \[241\] And perhaps we would not want to, even if we could.

**Conclusion**

We are now in a better position to appreciate that if President Trump is seriously threatened by an impeachment effort, for the Democrats to control the House of Representatives will not be enough. They will have to produce compelling evidence that he has committed a federal crime (such as obstruction of justice), or at least a clear violation of a significant federal law. Absent such strong evidence, history suggests they stand little chance of removing him through the impeachment process.

Perhaps that is as it should be. This review of the Nation’s experience with impeachment suggests that it is looking more and more as if the widely esteemed Nixon impeachment effort was a one-off—something the constitutional order could accomplish only under highly unusual conditions. In any case, the meaning of the impeachment standard can be appreciated only in light of our entire historical experience \[242\] because it is that experience that has meaningfully changed the original design of the Constitution. Impeachment is one example of many \[243\] in which changes to the structure of the institutions responsible for constitutional enforcement have created a different constitutional order—one which the Framers could not anticipate.

---

\[240\] Griffin, supra note 15, at 1204.

\[241\] Id. at 1208.

\[242\] See Missouri v. Holland, 252 U.S. 416, 433 (1920) (“The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”).

\[243\] For an exhaustively documented example of treaty supremacy, see the important study by David L. Sloss, *The Death of Treaty Supremacy: An Invisible Constitutional Change* 5–6 (2016).