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Impartial Justice: Restoring Integrity to Impeachment Trials

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Abstract

In recent decades, we have witnessed the diminution of the impeachment process by various actors—especially political parties. But the Founders envisioned a vastly different process, one that was insulated from partisanship. In Alexander Hamilton's words, impeachment trials were assigned to the Senate because the Senate is "a tribunal sufficiently dignified [and] sufficiently independent." Examples from the most recent impeachment trials of President Donald J. Trump reflect the Senate's loss of dignity and independence, with Senator McConnell pledging to work with the White House throughout the first impeachment process and senators from both parties conceding that they made up their minds before the trials even began.

After identifying the permeation of partisanship into the impeachment process, this Article draws attention to the senatorial impeachment oath—the oath taken by senators to "do impartial justice"—as one avenue for reform. The oath has been overlooked in much of the secondary literature about impeachment, receiving as little as two sentences in one of the most prominent books about the subject, Charles Black's Impeachment: A Handbook*. After canvassing the history of the senators' oath and comparing that oath to other prominent oaths in American law, this Article explores two possible reforms: (1) a perjury-like law criminalizing oath-breaking by senators and (2) Senate rule changes designed to amplify the force of the oath. Ultimately, Senate rule changes are both more practical and more likely to survive constitutional scrutiny, but by considering both paths, this Article presents the comparative strengths and weaknesses of the two modes of reform.*

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I. INTRODUCTION

With all else that occurred around the world in 2020 and 2021, it would be easy to overlook the significance of the fact that the United States House of Representatives *twice* impeached President Donald Trump.[1] Indeed, the outcomes of the two trials were largely foreordained. Frank Bowman, one of the country's leading impeachment scholars, observed that the President's "lawyers could don clown suits and sing endless rounds of 'Happy Birthday[,]' and it wouldn't affect [the] outcome."[2] Notwithstanding the predictability of President Trump's acquittal after each trial, the two impeachments are ripe with constitutional significance. They brought into focus not only a chief defect in impeachment proceedings—the permeation of partisanship into the process—but also potential avenues for reform. The partisan defect and possible reforms are the subjects of this Article.

On December 18, 2019, the House of Representatives charged President Trump with abuse of power and obstruction of Congress, claiming that both offenses constituted "high crimes and misdemeanors."[3] The Senate trial began on January 16, 2020. At least ostensibly, the charges stemmed from accusations that President Trump withheld military aid to Ukraine in order to pressure Ukrainian President Volodymyr Zelensky to investigate President Trump's political rivals.[4] It was—and remains—difficult to disentangle the particular grievances alleged in the House's articles of impeachment from the more general complaints against President Trump that began almost immediately after his election in 2016, including those that led Deputy

1. *See* Tessa Berenson, *Donald Trump Impeached a Second Time in Historic House Vote*, TIME (Jan. 13, 2021, 4:43 PM), https://time.com/5928988/donald-trump-impeached-second-time/.

2. Frank Bowman (@FOBowman3), TWITTER (Feb. 8, 2021, 11:27 AM), https://twitter.com/FOBowman3/status/1358859958142517248; *see also Professor Bowman's Impeachment Expertise Sought by National & International Media*, U. MO. SCH. L. (Feb. 5, 2021), https://law.missouri.edu/news/impeachment/.

3. Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019).

4. *See* Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (Feb. 10, 2021), https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html; Nicholas Fandos, *Trump's Ukraine Call Was 'Crazy' and 'Frightening,' Official Told Whistle-Blower*, N.Y. TIMES (July 29, 2021), https://www.nytimes.com/2019/10/08/us/politics/trump-ukraine-whistleblower.html.

Attorney General Rod Rosenstein to appoint a special counsel in May 2017.[5] President Trump and other Republicans quickly labeled the Democrat-controlled House's actions a witch hunt,[6] setting the stage for the President's ultimate acquittal in the Republican-led Senate.[7]

Not even a year later, after President Trump lost his bid for reelection, he and his supporters engaged in a campaign to delegitimize and undermine the certification of President-elect Joe Biden's election win.[8] That campaign culminated in a rally on January 6, 2021—the day on which Congress met to certify the election results—at which President Trump publicly urged his supporters to "fight like hell" to defend his presidency.[9] After his speech,

5. *See, e.g.*, Quinta Jurecic, *DAG Rosenstein Appoints Robert Mueller as Special Counsel*, LAWFARE (May 17, 2017, 6:33 PM), https://www.lawfareblog.com/dag-rosenstein-appoints-robert-mueller-special-counsel. For a more detailed discussion of the circumstances surrounding Special Counsel Robert Mueller's appointment and the outcome of his investigation, see Abby Johnston & Leila Miller, *The Mueller Investigation, Explained*, PBS (Mar. 25, 2019), https://www.pbs.org/wgbh/frontline/article/the-mueller-investigation-explained-2/.

6. *See* Quint Forgey, *Trump: Impeachment Process Worse than Salem Witch Trials*, POLITICO (Dec. 17, 2019, 10:03 PM), https://www.politico.eu/article/trump-impeachment-process-worse-than-salem-witch-trials/. For an example of another Republican lamenting the witch hunt nature of the articles of impeachment, see Jody Hice, *Impeachment Democrats Will Regret Spearheading the Political Witch Hunt: Rep. Jody Hice*, USA TODAY (Dec. 20, 2019, 11:59 AM), https://www.usatoday.com/story/opinion/2019/12/18/impeachment-democrats-regret-political-witch-hunt-jody-hice-editorials-debates/2692474001/.

7. *See* Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html.

8. *See, e.g.*, Peter Baker & Lara Jakes, *Fighting Election Results, Trump Employs a New Weapon: The Government*, N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2020/11/10/us/politics/trump-election-results.html. For a sample of the facets of the campaign to delegitimize and undermine the results of the 2020 presidential election, see generally *id.* (cataloging President Trump's influence on the government); Ann Gerhart, *Election Results Under Attack: Here Are the Facts*, WASH. POST (Mar. 11, 2021, 7:10 PM), https://www.washingtonpost.com/elections/interactive/2020/election-integrity/ ("[Former President Trump] spent weeks uttering baseless allegations of election fraud that have been amplified by allies and conservative media outlets."); Sam Levine, *How the Republican Voter Fraud Lie Paved the Way for Trump To Undermine Biden's Presidency*, GUARDIAN (Jan. 18, 2021, 6:02 AM), https://www.theguardian.com/us-news/2021/jan/18/trump-republican-voter-fraud-lie-biden-presidency ("Trump . . . accelerated this dangerous moment . . . ."); Lisa Mascaro & Mary Clare Jalonick, *Republicans Condemn 'Scheme' To Undo Election for Trump*, A.P. NEWS (Jan. 3, 2021), https://apnews.com/article/election-2020-joe-biden-donald-trump-elections-coronavirus-pandemic-e8862b01f07347e7b560a8d6c873d476 ("The unusual challenge to the presidential election, on a scale unseen since the aftermath of the Civil War, clouded the opening of the new Congress and is set to consume its first days.").

9. *See, e.g.*, Kimberly Dozier & Vera Bergengruen, *Incited by the President, Pro-Trump Rioters Violently Storm the Capitol*, TIME (Jan. 7, 2021, 11:16 AM), https://time.com/5926883/trump-supporters-storm-capitol/.

many of those supporters marched to the U.S. Capitol (where certification was in progress) and, after clashing with Capitol Police, stormed into the building.[10] The ensuing mayhem left five people dead and dozens, if not hundreds, injured.[11] The violence also jeopardized the country's long tradition of peaceful transitions of power.[12] Seven days later, on January 13, the House of Representatives again voted to impeach President Trump, this time for incitement of an insurrection.[13]

That being the third failed presidential impeachment trial in the span of just over two decades (the other being that of President Bill Clinton in 1999), some may wonder whether impeachment is becoming just a routine performance at which political parties air their grievances to the American electorate.[14] Those who are accustomed to legislative decision-making mirroring partisan preferences will not be surprised by such performative realpolitik. Indeed, statements made before President Trump's first impeachment trial foreshadowed the partisanship of the process. Prominent Republican senators promised they would vote to acquit, while at least one Democratic senator admitted she had already made up her mind to convict.[15] Senate Majority Leader Mitch McConnell assured his Republican constituents that he was in constant communication with the White House—including the staff of the very President subject to impeachment charges—as the trial

10. *Id.*

11. *See* Kenya Evelyn, *Capitol Attack: The Five People Who Died*, GUARDIAN (June 17, 2021, 8:03 AM), https://www.theguardian.com/us-news/2021/jan/08/capitol-attack-police-officer-five-deaths.

12. *See* David S. Cloud & Eli Stokols, *Trump Is Throwing a Wrench into What Is Usually a Seamless Transfer of Power*, L.A. TIMES (Jan. 20, 2021, 3:00 AM), https://www.latimes.com/politics/story/2021-01-20/trump-disrupts-seamless-transfer-of-power.

13. *See* Impeaching Donald John Trump, President of the United States, For High Crimes and Misdemeanors, H.R. Res. 24, 117th Cong. (2021).

14. *See, e.g.*, Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 162 (2007). For earlier efforts at tracing partisan influence in the impeachment process, see *id.* (describing the increased use, since 1968, of impeachment as a "partisan political weapon"); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 1 (1999) (describing the history of impeachment as "a history of factional or partisan disputes over legitimacy").

15. Mazie Hirono (@MazieHirono), TWITTER (Dec. 19, 2019, 9:17 AM), https://twitter.com/maziehirono/status/1207711526666358784 ("The fact is @realDonaldTrump shook down the Ukrainian President for his personal, political gain with a taxpayer-funded bribe. He has yet to present a defense, which leaves us with the overwhelming evidence that he committed impeachable offenses.").

approached.[16]

Trump's second trial followed a similar pattern.[17] In the midst of the trial, prominent senators met with the President's defense team.[18] The ultimate vote—acquitting President Trump for the second time—was again mostly along party lines.[19] That seven Republicans voted to convict the President made the vote the "most bipartisan in history"; the bar was apparently quite low.[20] Such senatorial behavior and statements are inconsistent with the constitutional obligation that senators impartially weigh all evidence presented to them at impeachment trials. Partisanship risks destroying the integrity of that crucial remedy for misbehavior by public officials.[21] If senators make up their minds beforehand, impeachment trials are at best shams and at worst expensive and time-consuming political spectacles.

In light of the blatant partisanship of the most recent impeachment trials, it might surprise some that the Founders envisioned something vastly different. The relegation of the impeachment trial to the Senate—rather than to the judicial branch, where most trials take place—was premised on the Founders' calculation that the Senate was "a tribunal sufficiently dignified

16. Steve Benen, *On Impeachment, McConnell Vows 'Total Coordination' with Team Trump*, MSNBC (Dec. 13, 2019, 5:00 AM), http://www.msnbc.com/rachel-maddow-show/impeachment-mcconnell-vows-total-coordination-team-trump. Against this partisan backdrop, although not necessarily in direct response to it, Justice John Roberts—whom the Constitution assigns to preside over presidential impeachments—admonished the House managers and the President's counsel after a bitter exchange between the two sides: "I think it is appropriate at this point for me to admonish both the House managers and [the P]resident's counsel in equal terms to remember that they are addressing the world's greatest deliberative body . . . . Those addressing the Senate should remember where they are." Marianne LeVine, *Chief Justice John Roberts Admonishes House Managers and White House Counsel*, POLITICO (Jan. 22, 2020, 6:21 AM), https://www.politico.com/news/2020/01/22/roberts-admonishes-house-managers-wh-counsel-101990. Justice Roberts's admonishment further evidences some of the undignified conduct that occurred during the trial. *See id.*

17. *See* Sam Levine & Lauren Gambino, *Donald Trump Acquitted in Second Impeachment Trial*, GUARDIAN (Feb. 13, 2021, 7:12 PM), https://www.theguardian.com/us-news/2021/feb/13/donald-trump-acquitted-impeachment-trial.

18. *See* Manu Raju & Alex Rogers, *Three GOP Senators Meet with Trump's Lawyers on Eve of Impeachment Defense Presentation*, CNN (Feb. 11, 2021, 7:55 PM), https://www.cnn.com/2021/02/11/politics/gop-senators-trump-impeachment-lawyers/index.html.

19. *See* Levine & Gambino, *supra* note 17.

20. Li Zhou, *7 Senate Republicans Vote To Convict Trump—The Most Bipartisan Impeachment Trial Verdict Ever*, VOX (Feb. 13, 2021, 3:57 PM), https://www.vox.com/policy-and-politics/2021/2/13/22279879/7-senate-republicans-convict-trump-romney-collins-murkowski-sasse-cassidy-burr-toomey.

21. *See* Neumann, *supra* note 14.

[and] sufficiently independent" to handle that serious process.[22] Writing in *The Federalist Papers: No. 65*, Alexander Hamilton argued that the Senate must be insulated against the influences of political parties, among others.[23] If the examples from the most recent impeachment trial are more than merely anecdotal, impeachment no longer plays its constitutionally envisioned role.[24]

This Article draws attention to an often overlooked impeachment procedure—the taking of the senatorial impeachment oath—and considers the viability of reforming the impeachment process through that oath.[25] Article I of the Constitution provides that "[w]hen sitting for" the purpose of impeachment, the Senate "shall be on Oath or Affirmation."[26] Since 1798, senators have commenced impeachment trials by taking oaths to "do impartial justice according to the Constitution and laws."[27] Impeachment trials were designed to be insulated from legislative politics; the taking of the oath initiates that categorically different type of congressional activity.[28]

Although one of the very few constitutionally mandatory impeachment procedures, the oath receives only limited attention in the secondary literature on impeachment. In Charles Black's famous *Impeachment: A Handbook* (described recently as the "most important book ever written on presidential impeachment"),[29] the oath is mentioned in just two sentences.[30] Black

22. THE FEDERALIST NO. 65 (Alexander Hamilton).

23. *See id.*

24. *See* S. Res 479, 99th Cong. (1986). This Article evaluates partisanship in the narrow context of impeachment. Even within that context, it examines only limited manifestations of partisanship—namely those that appear to reflect senators' violations of their oaths to do "impartial justice." There may be (and likely are) ways in which political parties benefit democratic politics, both generally and specifically in the context of impeachments. *See generally, e.g.*, SETH MASKET & HANS NOEL, POLITICAL PARTIES (Peter Lesser et al. eds., 2021) (discussing the roles of political parties in the American political system). This Article is not intended to critique all aspects of parties and does not take a position on the virtues or vices of the American party system.

25. *See infra* Part IV.

26. U.S. CONST. art. I, § 3, cl. 6.

27. S. Res. 479, 99th Cong. (1986). The impeachment oath has evolved over time. *See* discussion *infra* Section II.C.

28. Jessica Taylor, *Fractured into Factions? What the Founders Feared About Impeachment*, NPR (Nov. 18, 2019, 5:01 AM), https://www.npr.org/2019/11/18/779938819/fractured-into-factions-what-the-founders-feared-about-impeachment.

29. Jane Chong, *To Impeach a President: Applying the Authoritative Guide from Charles Black*, LAWFARE (July 20, 2017, 2:00 PM), https://www.lawfareblog.com/impeach-president-applying-authoritative-guide-charles-black.

30. *See* CHARLES L. BLACK JR., IMPEACHMENT: A HANDBOOK 9–10 (Yale Univ. Press ed. 1974). Philip Bobbitt recently coauthored a new edition of that classic, updating it with developments since

recognized that the oath symbolizes the Senate's assumption of a "different role from its normal legislative one" but then moved on.[31] Other impeachment scholarship similarly gives the oath limited attention, if any at all.[32] I argue that the senators' oath is significant and, if reformed, provides a much-needed mechanism for restoring impeachment to the role envisioned for it by the Founders.

In Part II, I briefly describe impeachment. First, I first focus on the normative ideals undergirding impeachment.[33] Hamilton envisioned a dignified and impartial Senate, capable of setting aside the influences of public opinion and political parties and deliberating about impeachment charges.[34] Since the Founding, the Senatorial Impeachment Oath Clause has been understood to require that, during impeachment trials, senators "do impartial justice."[35] Then, I explore statements from some of the most recent impeachment trials.[36] Those statements—by senators from both political parties—suggest that impeachment has failed to achieve its oath-embodied ideals. Finally, I briefly introduce the senatorial impeachment oath, as it has developed through history.[37]

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the original was published in 1974, but the new edition does not add anything more about the possible role of the impeachment oath. *See* CHARLES L. BLACK JR. & PHILIP BOBBITT, IMPEACHMENT: A HANDBOOK, NEW EDITION (Yale Univ. Press ed. 2018) (noting that the earlier edition of the book "had been published before any definitive action was taken to remove President Nixon").

31. BLACK, *supra* note 30, at 10.

32. *See, e.g.*, RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (Harv. Univ. Press ed. 1973) (offering insight on the power of impeachment without considering the role of the senatorial impeachment oath); FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP 92 (Cambridge Univ. Press ed. 2019) (mentioning briefly the senatorial impeachment oath as one of the two procedures mandated by the Constitution); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (3d ed. 2019) (discussing the constitutional and legal issues raised in impeachment proceedings without considering the role of the senatorial impeachment oath); Neumann, *supra* note 14, at 316 n.1089 (noting only that "each [s]enator must take an oath or affirmation to try the case faithfully"). Other recent books targeted at a more general audience include Neal Katyal and Sam Koppelman's *Impeach* and Cass Sunstein's *Impeachment: A Citizen's Guide*, but neither mention the senatorial impeachment oath. *See* NEAL KATYAL & SAM KOPPELMAN, IMPEACH: THE CASE AGAINST DONALD TRUMP (Houghton Mifflin Harcourt Publ'g Co. ed. 2019); CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN'S GUIDE (Harv. Univ. Press ed. 2017).

33. *See* discussion *infra* Section II.A.

34. *See* discussion *infra* Section II.A.

35. S. Res. 479, 99th Cong. (1986).

36. *See* discussion *infra* Section II.B.

37. *See* discussion *infra* Section II.C.

Part III describes several other oaths in the American legal system.[38] Oaths have ancient origins and occupy many important roles today. I offer three examples, each of which illuminates different potential features of the senatorial impeachment oath.[39] First, juror oaths demand of jurors the same sort of impartiality that is demanded of senators during impeachment trials.[40] Second, I describe oaths of public office—those taken by all public officials: presidents, congresspeople, judges, and more.[41] Like oaths for public office, the senatorial impeachment oath is ostensibly *unenforceable*.[42] Third, I offer an example of an *enforceable* oath: witness oaths.[43] When witnesses in court testify falsely *under oath*, they may be prosecuted for perjury.[44]

Finally, Part IV presents two avenues for reform.[45] First, I consider a *legal* proposal: the possibility of making the senatorial impeachment oath more like a witness's oath, rendering the senatorial impeachment oath legally enforceable.[46] Such a law would require (1) executive power and (2) independent authority to ensure that it would not be abused by persons—especially presidents—facing impeachment.[47] One possible model for such an independent authority is the independent counsel, first established by the Ethics in Government Act.[48] Other laws regulating the conduct of senators—such as those criminalizing bribery—demonstrate the workability of an independent counsel-like law for impeachment trials.[49] But such a law may run afoul of the concerns over impeachment trials articulated by the Supreme

38. *See* discussion *infra* Section III.A.
39. *See* discussion *infra* Part III.
40. *See* discussion *infra* Section III.B.
41. *See* discussion *infra* Section III.C.
42. *See* Joel Cohen, *INSIGHT: The Senate Impeachment Oath—Is Impartiality Even Possible?*, BLOOMBERG LAW (Jan. 16, 2020, 1:01 AM), https://news.bloomberglaw.com/us-law-week/insight-the-senate-impeachment-oath-is-impartiality-even-possible (questioning the effectiveness of the senatorial impeachment oath in light of senators' blatant partisanship). It is true that the oath is indirectly enforceable, as are other oaths taken by congresspeople, through elections. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 24 n.115 (2018). This Article does not regard elections as a sufficient enforcement mechanism for the senatorial impeachment oath. *See* discussion *infra* Section III.C.
43. *See* discussion *infra* Section III.D.
44. 18 U.S.C. § 1621 (2018).
45. *See* discussion *infra* Sections IV.B, IV.C.
46. *See* discussion *infra* Section IV.B.
47. *See* discussion *infra* Section IV.B.
48. *See infra* Part IV.
49. *See* 18 U.S.C. § 201(b) (2018).

Court in *Nixon v. United States*.[50] According to the *Nixon* Court, any legal reform may be unconstitutional to the extent that it threatens the finality of impeachment judgments or the separation of powers.[51]

If a perjury-like law is ultimately unworkable, a second avenue for reform is available: amending the Senate's rules.[52] Rule changes reflect the reasoned judgment of the Senate (the body empowered to conduct impeachment trials), and they were expressly endorsed by the Court in *Nixon*.[53] I offer four recommendations that would, if adopted, bolster the integrity of the impeachment process: (1) prohibiting senators from discussing impeachment trials with the prosecution (the House managers) or the defense (the party subject to impeachment or her staff) outside of the trial setting; (2) allowing for the for-cause removal of senators with obvious partial or partisan motives; (3) expressly providing for the censure of senators who violate their oaths; and (4) having senators vote anonymously using a secret ballot.[54] Unlike a perjury-inspired law, Senate rule changes would not be judicially enforceable—a potentially serious weakness.[55] Nonetheless, even if rule changes only have the effect of bolstering the psychological impact of the senatorial impeachment oath on senators, that might be enough to restore the impeachment process to its constitutional pedestal.

Both the statutory and the rule-based proposals are only politically feasible if politicians set aside partisan priorities in considering such proposals. Given the importance of impeachment, and the fact that (as the examples described in Part II will show) senators from both parties are guilty of oath-breaking, both parties have vested interests in reform.[56] If senators consider reform proposals *ex ante*, behind something akin to John Rawls's "veil of ignorance," either proposal described above will be politically achievable.[57]

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50. *See* Nixon v. United States, 506 U.S. 224, 236 (1993).

51. *Id.*

52. *See* discussion *infra* Section IV.C.

53. *Nixon*, 506 U.S. at 250 ("In short, textual and historical evidence reveals that the Impeachment Trial Clause was not meant to bind the hands of the Senate beyond establishing a set of minimal procedures.").

54. *See* discussion *infra* Section IV.C.

55. *See Nixon*, 506 U.S. at 236.

56. *See* discussion *infra* Section II.B.2.

57. *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 15 (Erin Kelly ed., 2001). Rawls uses the "veil of ignorance" to hypothesize about what political order reasonable people would consider just if those people were stripped of identifying characteristics—race, ethnicity, sex, etc. *See*

There is an important caveat to note at this point. Even if adopted, the proposals considered in this Article will not guarantee that impeachment trials are perfect, only that those trials are *better*. These proposals will not protect against other undesirable behavior during impeachment trials (such as senators falling asleep),[58] and they will not guarantee that senators reach the "right" result from the evidence presented at those trials (even if we can agree what "right" means).[59] They also do not target any abuses of impeachment that may take place in the House of Representatives or elsewhere.[60]

The senatorial impeachment oath articulates an ideal: impartiality.[61] Some, if not all, senators will personally know the subject of an impeachment trial, especially if the subject is the President. In contrast to jurors, senators will thus come to impeachment trials with far more preconceptions and biases.[62] These realities make that ideal all the more difficult to achieve, but they do not justify its abandonment. We expect jurors to set aside biases when they sit in judgment; we should expect as much, if not more, from our elected officials.

II. IMPEACHMENT

This Article explores "impartial justice" in the impeachment context. This Part briefly describes that context in general terms and then discusses a specific dysfunction observable in some of the most recent impeachment trials: the apparent permeation of party loyalties. Partisanship reflects not just a breach in the *spirit* but also in the *letter* of the impeachment process.[63] I thus conclude this Part by describing the history of the senatorial impeachment oath, which instantiates the nonpartisan spirit—that of impartial

id.

58. *See, e.g.*, Ewan Palmer, *GOP Senator James Risch Appears To Fall Asleep During Opening Day of Trump's Impeachment Trial*, NEWSWEEK (Jan. 22, 2020, 5:06 AM), https://www.newsweek.com/trump-impeachment-rial-james-risch-asleep-1483363 (noting that at least one senator apparently fell asleep during the impeachment trial of President Trump).

59. *See* discussion *infra* Section III.A.

60. It is possible—perhaps likely—that partisanship will influence whether the House brings articles of impeachment. The proposals in this Article target such partisanship in the Senate without addressing it in the House.

61. *See* Cohen, *supra* note 42.

62. *See* discussion *infra* Section II.B.2.

63. *See* Cohen, *supra* note 42.

justice—in the process.[64]

Even at the Founding, impeachment was not a novel concept.[65] Frank Bowman shows that the Founders were intimately familiar with the impeachment process from several high-profile colonial impeachments,[66] and by 1787, ten states already included impeachment provisions in their postrevolutionary constitutions.[67] Against that background, the following was included in the closing lines of Article II of the Constitution: "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."[68]

As its placement in Article II suggests, and as records show, "[a]lmost all the discussion about impeachment in the Constitutional Convention concerned the presidency."[69] (Impeachment is also described in Article I, principally as a power to be exercised by Congress.)[70] Bowman and others have written extensively about these debates, especially over the meaning of "high Crimes and Misdemeanors," and this Article will defer much of the historical discussion to them.[71] But insofar as it bears on the American impeachment experience, it is worth emphasizing the extent to which

64. *See* discussion *infra* Section II.C.

65. *See, e.g.*, Neumann, *supra* note 14, at 167–68 (describing the precolonial English use of impeachment).

66. *See* BOWMAN, *supra* note 32, at 50–65.

67. *See id.* at 50. Prior to the insertion of impeachment provisions into postrevolutionary state constitutions, however, "many of the colonists had retained only a vague sense that their legislatures possessed the power." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 141 (Univ. of N.C. Press ed. 1998). "Hence writing the impeachment process into the Revolutionary constitutions was understandably confused, not only in the designation of the officials liable to impeachment but in the determination of the body trying the impeachment." *Id.* at 142.

68. U.S. CONST. art. II, § 4.

69. BOWMAN, *supra* note 32, at 89.

70. U.S. CONST. art. I, §§ 2–3.

71. *See* BOWMAN, *supra* note 32, at 89–111; *see also* BERGER, *supra* note 32, at 53–102 (discussing meaning of "high Crimes and Misdemeanors"); H. LOWELL BROWN, HIGH CRIMES AND MISDEMEANORS IN PRESIDENTIAL IMPEACHMENT 1–34 (Palgrave Macmillan ed. 2010) (same); GERHARDT, *supra* note 32, at 105–13 (same). One of the most extreme positions about impeachable crimes is taken by Joseph Isenbergh, who argues that Congress is affirmatively obligated to impeach a president for "[t]reason, [b]ribery, or other [h]igh [c]rimes and [m]isdemeanors." Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 63–64 (1999). Isenbergh focuses on the preceding language, "shall be removed," which requires congressional impeachment. *Id. But see* MICHAEL J. GERHARDT, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW 71–72 (Oxford Univ. Press ed. 2018) (disputing Isenbergh's argument).

impeachment was apparently designed primarily to address executive misconduct.[72]

From its constitutional inception, impeachment has been a serious and important process.[73] Chief Justice William Rehnquist characterized it as a "wild card" in the Constitution because it could disrupt the constitutional system of checks and balances.[74] As further support, Josh Chafetz showed that, during the Constitutional Convention, impeachment was contemplated as a desirable alternative to assassination for removing "obnoxious" presidents.[75]

A. Ideals of Impeachment

Though not discussed in much detail at the Convention,[76] the impeachment provisions received greater attention during the ratification of the Constitution.[77] In *Federalist No. 65*, for example, Alexander Hamilton defended the idea of empowering the Senate—rather than some other body—to conduct the impeachment process.[78] Hamilton claimed that impeachable

72. *See* Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 348 (2010) ("[Benjamin] Franklin, recognizing that presidents might sometimes 'render [themselves] obnoxious,' recommended [impeachment as] a formal, constitutional mechanism for bringing them to justice . . . ." (second alteration in original)).

73. *But see* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 109 (J.P. Mayer ed., George Lawrence trans., 1969) (claiming that, in America, impeachment "is both less formidable and less effective"). It is true that impeachment in the precolonial European context was likely far more powerful and far deadlier. *See, e.g.*, SUNSTEIN, *supra* note 32, at 36 ("The House of Commons would make the decision whether to impeach, and if it chose to do so, a trial would be held in the House of Lords. The penalty for conviction could be severe; it could even include execution."). Even if the American impeachment power is relatively less potent than was its British ancestor, it is undeniably a powerful and important component of American constitutionalism.

74. William H. Rehnquist, *Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 903–04 (1991); *see also* Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 281 (1998) (observing that "[t]he prospect of impeachment can be highly destabilizing to government").

75. *See* Chafetz, *supra* note 72, at 347–48 ("[I]mpeachment was an attempt to domesticate, to tame, assassination."); *see also* Jason J. Vicente, *Impeachment: A Constitutional Primer*, 3 TEX. REV. L. & POL. 117, 121 (1998) (recognizing the same historical relationship between impeachment and assassination).

76. *See* Neumann, *supra* note 14, at 174.

77. *See* THE FEDERALIST NOS. 65, 66, 69 (Alexander Hamilton).

78. THE FEDERALIST NO. 65 (Alexander Hamilton). James Madison, by contrast, preferred the Supreme Court, which Madison thought would be better able to exercise impartiality. *See, e.g.*, PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635–1805, at 70–75 (Yale Univ.

offenses "may with peculiar propriety be denominated [political]."[79] Hamilton did not mean by this that impeachable offenses were *partisan*; instead, as he makes clear, they are political in the sense of being "injuries done immediately to the society itself."[80]

Federalist No. 65 is important because it clarifies the role that the Senate was expected to play in the impeachment process.[81] Hamilton appeals to the Senate in its "judicial character," and he suggests that the Senate may be the only institution with sufficient political capital and integrity to conduct impeachment trials with the requisite independence.[82] He thus validated Gouverneur Morris's claim, made during the Convention, that "there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes"[83]—a claim, as we will see in the next Part, perhaps more hopeful than accurate. Half a century later, Alexis de Tocqueville described the "judicial . . . form" of the Senate in impeachments: "[T]he senators are bound to conform to the solemn formalities of procedure."[84]

But the judicial role of the Senate was not merely procedural; it was not just about *appearing* independent.[85] The impeachment process demands of senators that they assume a fundamentally different role from that of legislators.[86] In perhaps the most illuminating passage of *Federalist No. 65*, Hamilton asks rhetorically,

> Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel CONFIDENCE ENOUGH IN ITS OWN SITUATION, to preserve, unawed

Press ed. 1984). Madison was ultimately unsuccessful in his efforts to persuade others at the Convention, but many early drafts of the Constitution assigned impeachment to the judiciary. William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 236 (2012) (showing that earlier drafts of the Constitution assigned impeachment to the "supreme tribunal"). It was not until late in the Convention that the trial power was shifted to the Senate. *See* BLACK, *supra* note 30, at 10.

79. THE FEDERALIST NO. 65 (Alexander Hamilton).

80. *Id.*

81. *See* THE FEDERALIST NO. 65 (Alexander Hamilton).

82. *Id.*

83. SUNSTEIN, *supra* note 32, at 49 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 551 (Max Farrand ed., 1911)).

84. TOCQUEVILLE, *supra* note 73, at 108.

85. *See* THE FEDERALIST NO. 65 (Alexander Hamilton).

86. *See id.*

> and uninfluenced, the necessary impartiality between an INDIVIDUAL accused, and the REPRESENTATIVES OF THE PEOPLE, HIS ACCUSERS?[87]

Far from being a political process, Hamilton suggests that impeachment trials ought to be "independent," "uninfluenced," and "impartial[]."[88] He also expressly identifies three groups whose influence should not intrude into impeachment trials: (1) the "community," (2) the "representatives of the people," and (3) political parties.[89] It is the last group that receives the most sustained attention.[90] Hamilton was concerned about "parties more or less friendly or inimical to the accused," worrying that impeachment "decision[s] [would] be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt."[91] At the time he was writing, political parties—today, mainly Democrats and Republicans—were less coherently organized.[92] But even then, parties threatened the integrity of political decisions.[93] Hamilton argued that vesting the impeachment power in the Senate would be sufficient to insulate impeachment trials from the influence of parties.[94]

The belief that the Senate could conduct impartial impeachment trials was

87. *Id.* Hamilton thought the Supreme Court lacked the political authority to be a "substitute for the Senate." *Id.*; *see also* BERGER, *supra* note 32, at 119 ("[T]he trial by the Senate would draw much of the lightning[,] and as the lawyers among the Founders knew from their own law practice, appellate tribunals generally do not operate in a superheated atmosphere."). Hamilton also rejected the possibility of forming a hybrid of the Court and the Senate for impeachment trials. *See* THE FEDERALIST NO. 65 (Alexander Hamilton).

88. THE FEDERALIST NO. 65 (Alexander Hamilton); *see also* Turley, *supra* note 14, at 3–4 ("The Senate function is . . . 'political' in a uniquely Madisonian sense. The Senate trial serves as a unique forum for resolving highly divisive questions over the legitimacy of a [p]resident or judge to continue to exercise constitutional authority.").

89. THE FEDERALIST NO. 65 (Alexander Hamilton).

90. *See id.*

91. *Id.*

92. *See, e.g.*, MARTY COHEN, DAVID KAROL, HANS NOEL & JOHN ZALLER, THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM 47–65 (Univ. of Chi. Press ed. 2008) (describing the early American development of political parties).

93. *See* THE FEDERALIST NO. 10 (James Madison). James Madison famously worried about the related role of factions in American democracy. *See id.* For Madison, factions were a specific but common type of association "united and actuated by some common impulse of passion, or of interest, adverse[] to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.*

94. *See* THE FEDERALIST NO. 65 (Alexander Hamilton).

rooted in a more general faith in that institution.[95] Gordon Wood, for example, describes the Founders' vision of the "exalted Senate" as composed of social and political elites who would behave as had aristocrats under the old European monarchies.[96] The Antifederalists feared the Senate for just the reason that the Federalists lauded it: "[I]ts very structure and detachment from the people would work to exclude any kind of actual and local interest representation and prevent those who were not rich, well born, or prominent from exercising political power."[97] The features of the Senate that made it so desirable to the Federalists—its dignity, its removal from pedestrian interests, its natural elitism—also made it the institution that the Founders thought most capable of securely conducting impeachment trials.[98]

Many more recent scholars echo the sentiments expressed in *Federalist No. 65*. Akhil Amar urges senators to "damn the polls" and follow the law;[99] Charles Black describes the Senate as functioning "much like . . . a judicial court";[100] and Cass Sunstein argues that senators of both parties should engage in a "mutual arms control agreement" to use impeachment only in the "most extreme cases."[101] John McGinnis adds that the constitutional design of impeachment—empowering the legislative branch—reflects the Founders' commitment to impartiality: "By forcing the House and Senate to act as tribunals rather than merely as legislative bodies, the Framers infused the process with notions of due process to prevent impeachment from becoming

95. *See id.*

96. WOOD, *supra* note 67, at 515.

97. *Id.* at 516.

98. *See* THE CLINTON SCANDAL AND THE FUTURE OF THE AMERICAN GOVERNMENT 142, 146 (Mark J. Rozell & Clyde Wilcox eds., 2000). For more recent validation of the Founders' decision to vest the impeachment trial power in the Senate, see *id.* at 144 (noting that the Clinton impeachment illustrates "the vulnerability of the federal judiciary to political retaliation" because "some of the most important factors that helped Clinton survive the threat of removal (i.e., public support and media scrutiny) are absent from lower federal judges' impeachment proceedings. . . . [A]bout which the public is largely indifferent").

99. Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 307 (1999) ("Sometimes, the rule of law does require a [s]enator to damn the polls. If in her heart a [s]enator thinks the President is innocent in fact (he actually did not do it) or in law (even if he did it, it is not a 'high crime or misdemeanor'), then she *must* vote not guilty—even if she thereby offends her constituents, who want the man's head.").

100. BLACK, *supra* note 30, at 10; *see also* Philip C. Bobbitt, *Impeachment: A Handbook*, 128 YALE L.J.F. 515, 556 (2018) ("The Senate . . . sits as a law court.").

101. Sunstein, *supra* note 74, at 305. Sunstein worried that, in the Clinton impeachment, the House had set "a precedent that could threaten to turn impeachment into a political weapon." *Id.* at 309.

a common tool of party politics."[102] McGinnis links impartiality to broader separation of powers concerns.[103]

Today, the Hamiltonian faith in the Senate is preserved in the oath taken by senators before impeachment trials. As will be discussed in greater detail below, senators take an oath to do impartial justice, committing themselves to the Founders' vision for proper impeachment procedures.[104] That commitment is not a mere paean to history. Impartiality is a living and perpetual feature of impeachment, reaffirmed through the oath at the start of every impeachment trial. The perennial reiteration of the oath makes it all the more tragic when senators fail to satisfy the obligation it imposes.

B. The Diminution of Impeachment Ideals

Unfortunately, Hamilton's defense of the Senate's role in impeachment trials rested on a potentially naïve optimism about senators' integrity and ability to remain impartial. History quickly exposed the extent of his naïveté. In his important review of American impeachments, Richard Neumann shows that "[b]eginning soon after the formation of the federal government, impeachment was used as a partisan political weapon."[105] As the young republic began to develop the norms and institutions that were supposed to insulate the American legal system from the whims of raw partisan power, impeachment was quickly adopted as a weapon in partisan warfare.[106]

1. Early American Impeachments

The first attempted impeachment of Senator William Blount in 1798 exemplifies Neumann's position.[107] Acting as a private citizen, Blount

102. John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 663 (1999).

103. *See id.* ("The structure that confines legislative response to executive misconduct to removal upon impeachment and conviction also serves essential constitutional values—the promotion of impartial deliberation and the protection of the separation of powers."); *see also* Keith E. Whittington, *An Impeachment Should Not Be a Partisan Affair*, LAWFARE (May 16, 2017, 9:03 PM), https://www.lawfareblog.com/impeachment-should-not-be-partisan-affair (lamenting the political systemic implications of purely partisan impeachments).

104. *See* discussion *infra* Section II.C.

105. Neumann, *supra* note14.

106. *See id.* at 177.

107. *See id.* at 175.

entered into a complicated scheme, the main object of which was to take the land that later became Louisiana from the Spanish (in part with the aid of the British, who were at war with the Spanish in Europe).[108] So heinous was Blount's alleged scheme that then-First Lady Abigail Adams lamented that there was no guillotine in Philadelphia to punish him adequately.[109] But Blount had already been expelled from Congress when the articles of impeachment reached the Senate, so impeachment was unnecessary, as a practical matter, to remove him from government.[110] Instead, Neumann suggests, some in the Federalist-dominated Congress sought to weaponize impeachment—which is not limited by the Constitution to only criminal acts—to "disqualify from federal office any citizen whose politics Congress did not like."[111] As further evidence, Neumann notes that the impeachment took place contemporaneously with the passage of the Sedition Act, which "criminalized the Federalists' adversaries by turning criticism of the Federalists into a crime."[112]

Partisanship also manifested in the second federal impeachment—that of John Pickering, a federal judge in the district of New Hampshire.[113] At that time, federal power had shifted to President Thomas Jefferson and the Jeffersonian Republicans.[114] Part of the Jeffersonian Republican project involved an assault on the federal judiciary, and Judge Pickering was a prime target for the Jeffersonian Republicans' attacks.[115]

By most accounts, Pickering should not have remained on the federal bench, politics aside; by the time of his impeachment, he was showing signs of mental deterioration on the bench and was developing a reputation for drunkenness.[116] According to one historian, "The unfortunate old man had been an insane drunkard for some time and was clearly unable to perform his duties as a federal judge. His removal could be defended on the unassailable

108. *See id.*

109. *See* WILLIAM H. MASTERSON, WILLIAM BLOUNT 318 (1954).

110. *See* Neumann, *supra* note 14, at 177.

111. *Id.* at 181. *But see id.* ("Universal impeachment was probably only a strategy preferred by a faction within the Federalist Party. The Federalist Party was not monolithic. Like most political parties, it had both extremist and moderate elements.").

112. *Id.* at 178.

113. *See id.* at 185.

114. *See id.* at 186.

115. *See id.* This was the context in which *Marbury v. Madison* was decided. 5 U.S. (1 Cranch) 137 (1803); *see also* Neumann, *supra* note 14, at 183.

116. *See* Neumann, *supra* note 14, at 185.

ground of concern for the purity of the judiciary."[117] But even equipped with apparently legitimate concerns about Judge Pickering's suitability for continued judicial service, the impeachment process became politically charged.[118] Partisanship appeared in congressional debates over the nature of impeachable offenses: Federalist senators defended Pickering by arguing for a narrower definition of high crimes and misdemeanors, while Jeffersonian Republicans defended a more expansive one.[119] The more expansive definition served a broader function that demonstrates why Pickering may have been targeted for impeachment.[120] He was low-hanging fruit; if Judge Pickering could be successfully removed from office, Jeffersonian Republicans would be able to remove other Federalist judges as well.[121] "[B]oth parties saw him as first blood in a campaign to oust Federalists from the judiciary."[122]

At the conclusion of his trial, the Senate voted strictly along party lines to convict and remove Judge Pickering from office.[123] And so, Judge Pickering's impeachment case "became a political rather than a legal issue," and "[i]nstead of standing in American history as the correct precedent for all future cases of judicial impeachment, it became a tragic blunder which reflected discredit upon everyone connected with it."[124]

As the examples of Blount and Pickering make clear, early impeachments were not free from partisanship.[125] They were sites of "vitriolic pitched battle" between still-nascent American political parties vying for control.[126] Eventually, though, partisanship in the impeachment process receded, and the country saw a century-long period of nonpartisan impeachments.[127] With just a few exceptions, Neumann persuasively demonstrates that between 1868 and 1968, impeachments were nonpartisan.[128] Only since the 1980s, according to

117. Lynn W. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 487 (1949).
118. *See id.*
119. *See id.*
120. *See id.*
121. *See id.*
122. Neumann, *supra* note 14, at 187.
123. *See id.* at 186.
124. Turner, *supra* note 117; *see also* Neumann, *supra* note 14, at 186 (describing the political facets of Pickering's impeachment trial).
125. *See* Neumann, *supra* note 14, at 187.
126. *Id.*
127. *See* Neumann, *supra* note 14, at 227.
128. *See id.* at 162.

Neumann, has partisanship returned to the impeachment stage.[129]

2. Modern American Impeachments

Before the first impeachment charges against President Donald Trump had even reached the Senate, Senate Majority Leader Mitch McConnell announced that he had made up his mind about the quality of the House's evidence[130] and claimed to be in "total coordination with the White House counsel" as the impeachment trial neared.[131] McConnell told reporters, "I'm not an impartial juror. This is a political process. There's not anything judicial about it . . . . I'm not impartial about this at all."[132] Senator Lindsey Graham stated that he would not even "pretend to be a fair juror."[133] While McConnell and Graham pledged to acquit, Senator Mazie Hirono suggested she was ready to convict even before the trial began.[134] And some questioned whether the six senators competing for the Democratic nomination to run against President Trump—Kamala Harris, Cory Booker, Amy Klobuchar, Elizabeth Warren, Bernie Sanders, and Michael Bennett—were capable of impartially deciding the impeachment matter.[135]

129. *See id.* Neumann makes the case that political usage of impeachment has been largely one-sided: "[S]ince 1968, some elements in the Republican Party have been willing to use impeachment as a partisan weapon; to inflict political damage on their opponents and as part of a campaign to control the Supreme Court and the lower federal courts." *Id.* In this Article, I focus on the bipartisan abuse—by both parties, but not by both parties *together*—of impeachment. *See* discussion *infra* Section II.B.2.

130. *See McConnell Remarks on House Democrats' Impeachment of President Trump*, SENATE.GOV NEWSROOM (Dec. 19, 2019), https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-remarks-on-house-democrats-impeachment-of-president-trump-.

131. Benen, *supra* note 16. Based on McConnell's public statements, Public Citizen filed a complaint against McConnell with the Senate Ethics Committee. *See* Craig Holman et al., *Violation of Oath of Office by Sen. Mitch McConnell (R-Ky.): Senate Ethics Committee Needs To Restore Impartiality in Impeachment Proceedings*, PUBLIC CITIZEN, https://www.citizen.org/article/violation-of-oath-of-office-by-sen-mitch-mcconnell-r-ky/?eType=EmailBlastContent&eId=c340cdb6-bcc8-4a33-9075-49043c6ebe0e (last visited Sept. 9, 2021).

132. Ledyard King & Maureen Groppe, *Can Senators Who Have Already Voiced Opinions Do 'Impartial Justice' at Trump Impeachment Trial?*, USA TODAY (Jan. 18, 2020, 9:33 AM), https://www.usatoday.com/story/news/politics/2020/01/16/impeachment-senators-pledge-impartial-justice-trump-trial/4488539002/.

133. Colby Itkowitz, *Sen. Graham: 'Not Trying To Pretend To Be a Fair Juror'*, WASH. POST (Dec. 14, 2019), https://www.washingtonpost.com/politics/lindsey-graham-not-trying-to-pretend-to-be-a-fair-juror-here/2019/12/14/dcaad02c-1ea8-11ea-b4c1-fd0d91b60d9e_story.html.

134. *See* Mazie Hirono (@MazieHirono), TWITTER (Dec. 19, 2019, 9:17 AM), https://twitter.com/maziehirono/status/1207711526666358784.

135. *See* Jason Smith, *Presidential Candidates Serving in the Senate Must Recuse Themselves from*

The ultimate vote count from the impeachment trial further reflects the lack of impartiality.[136] With just one exception (Senator Mitt Romney), all Republican senators voted to acquit President Trump, and all Democratic senators voted to convict—suggesting that partisanship, rather than objective analysis of evidence presented, dictated the outcome of the trial.[137] Republican Senator Marco Rubio, after voting to acquit, said that even if a president's actions "meet a standard of impeachment," it might not be "in the best interest of the country to remove a [p]resident from office."[138] Rubio defended his vote as resulting from his "political judgment" about the best outcome of the trial.[139]

What to many was so remarkable about the second impeachment trial—that seven Republicans voted to convict now-former President Trump—only compounds the concern that partisanship shapes impeachment trials.[140] Unsurprisingly, charges of partisanship were made by President Trump's

Impeachment Proceedings, HILL (Dec. 9, 2019, 12:30 PM), https://thehill.com/blogs/congress-blog/politics/473674-presidential-candidates-serving-in-the-senate-must-recuse.

136. *See* Ian Millhser, *Mitt Romney Just Did Something That Literally No Senator Has Ever Done Before*, VOX (Feb. 5, 2020, 4:25 PM), https://www.vox.com/2020/2/5/21125118/mittromney-impeachment-vote-history.

137. *See id.*; *see also* Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349, 356 (1999) (noting the party-line votes to convict President Clinton in the 1999 impeachment trial).

138. Marco Rubio, *My Statement on the President's Impeachment Trial*, MEDIUM (Jan. 31, 2020), https://medium.com/@SenatorMarcoRubio/my-statement-on-the-presidents-impeachment-trial-9669e82ccb43. Rubio's comments raise a separate issue as well: the proper burden of proof to be applied in impeachment trials. *See id.* What standard to apply—whether "by a reasonable doubt," as in criminal trials, by a "preponderance of the evidence," as in civil trials, or something else—is an open question. *See* GERHARDT, *supra* note 32, at 114; Neumann, *supra* note 14, at 316 (footnote omitted) ("The Senate has never held itself to any particular evidentiary burden of persuasion, and the result is that each [s]enator applies whatever burden of persuasion the [s]enator prefers—or no burden at all.").

139. Rubio, *supra* note 138. Some, such as John McGinnis, have noted the importance of political judgment in the impeachment process. *See* McGinnis, *supra* note 102, at 657 ("[Impeachment] requires *political* judgment of the highest order; weighing both the short and the long-term risks to the [r]epublic of permitting such an official to remain in office against the damage that might be done by removing him."). But McGinnis was referring to the judgment exercisable by members of the House of Representatives, where such judgment is appropriate. *See id.* Rubio, as an oath-bound Senator, is not in a similar position to exercise such judgment. *See id.*

140. Although the articles of impeachment were approved in the House of Representatives while President Trump was in office, the Senate declined to receive them until after President Trump left office. *See* U.S. News Staff, *READ: McConnell Speech After Trump's Impeachment Trial Acquittal*, U.S. NEWS (Feb. 14, 2021, 11:36 AM), https://www.usnews.com/news/politics/articles/2021-02-14/read-mcconnell-speech-after-trumps-impeachment-trial-acquittal.

defense team before and during the second trial. David Schoen (one of the President's attorneys), for example, complained, "This is nothing less than the political weaponization of the impeachment process."[141] In the closing lines of its defense brief, the team claimed, "[I]ndulging House Democrats[']hunger for this political theater is a danger to our [r]epublic, democracy[,] and the rights that we hold dear."[142] More significantly, after voting (again) to acquit Mr. Trump, Senator McConnell lambasted the former President for his "practical[] and moral[] responsib[ility]" for the violence on January 6, 2021.[143] McConnell's speech received widespread attention; while some praised his bravery for speaking out against the former President, others criticized McConnell for his unwillingness to convict the President, whose responsibility was beyond question.

Republicans, including McConnell, defended their votes in the second trial on procedural grounds.[144] Although conceding that the House's articles of impeachment were adopted before the end of President Trump's term, Republican senators claimed the Senate could not try a *former* official.[145] Before the trial, Senator Rand Paul led an unsuccessful effort to declare the proceedings unconstitutional.[146] (Although five Republican senators voted against Paul's proposal, all the remaining Senate Republicans—and no Democrats—supported it.)[147] Such procedural efforts were in spite of the majority consensus that such proceedings were constitutional.[148] Those

141. *Republicans Pan Trump Lawyer's Rambling Case: Impeachment Update*, BLOOMBERG NEWS (Feb. 9, 2021, 3:07 PM), https://www.bloomberg.com/news/articles/2021-02-09/trump-trial-starts-with-constitutional-fight-impeachment-update.

142. *Read Trump's Impeachment Defense Memo*, N.Y. TIMES (Feb. 8, 2021), https://www.nytimes.com/interactive/2021/02/08/us/trump-defense-impeachment-trial.html.

143. U.S. News Staff, *supra* note 140; *see also* Lexi Lonas, *GOP Sen. Cassidy: 'I Voted To Convict Trump Because He Is Guilty*,*'* HILL (Feb. 13, 2021, 5:14 PM), https://thehill.com/homenews/senate/538774-gop-sen-cassidy-i-voted-to-convict-trump-because-he-is-guilty.

144. *See* U.S. News Staff, *supra* note 140.

145. *See, e.g.*, *id.* (claiming that "former President Trump is constitutionally not eligible for conviction").

146. *See* Jordain Carney, *Just Five GOP Senators Vote Trump Impeachment Trial Is Constitutional*, HILL (Jan. 26, 2021, 3:27 PM), https://thehill.com/homenews/senate/535925-senate-rejects-paul-effort-to-declare-trump-impeachment-trial.

147. *See id.*

148. *See* JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., LSB10565, THE IMPEACHMENT AND TRIAL OF A FORMER PRESIDENT 1–2 (2021) (observing that "most scholars who have closely examined the question have concluded that Congress has authority to extend the impeachment process to officials who are no longer in office"); Natasha Bertrand, *Constitutional Law Scholars on*

efforts exemplify a bad faith attempt to conceal what was ultimately a partisan process; Republican senators did not want to convict their Republican President.[149]

The 1999 impeachment trial of President Bill Clinton was also permeated by politics, albeit to a lesser extent.[150] At that time, Senator Chuck Schumer (who had voted against impeachment as a Representative in 1998 and was subsequently elected to the Senate in time to participate in the trial) said of the Senate trial that it would be "quite different than a jury" trial, and of impeachment generally, "The standard is different. It's supposed to be a little bit judicial and a little bit legislative–political."[151] Philip Bobbitt blames the "fiasco of the Clinton impeachment" for the contemporary loss of confidence in the ability of Congress to properly conduct impeachment.[152] Bobbitt worried after the failed impeachment of President Clinton that,

> [O]wing to the zeal of some (and perhaps the self-absorption of others), we have compromised the habits of decorum, fastidious withholding of judgment, impartial procedures, detachment from partisanship, and insistence on

Impeaching Former Officers, POLITICO (Jan. 21, 2021, 2:01 PM), https://www.politico.com/news/2021/01/21/legal-scholars-federalist-society-trump-convict-461089 (citing a public letter from roughly 150 law professors concluding that former presidents can be impeached); *see also* Frank O. Bowman, III, *The Constitutionality of Trying a Former President Impeached While in Office*, LAWFARE (Feb. 3, 2021, 12:42 PM), https://www.lawfareblog.com/constitutionality-trying-former-president-impeached-while-office (arguing that it is constitutional to impeach a former president); Jed Handelsman Shugerman, *Impeach an Ex-President? The Founders Were Clear: That's How They Wanted It*, POLITICO (Feb. 11, 2021, 6:31 PM), https://www.politico.com/news/magazine/2021/02/11/donald-trump-impeachment-ex-president-founders-468769 (same). *But see, e.g.*, Robert A. Levy, *Impeachment of an Ex-President Is Unconstitutional*, CATO INST. (Jan. 22, 2021, 10:59 AM), https://www.cato.org/blog/impeachment-ex-president-unconstitutional (arguing that former presidents cannot be impeached); U.S. News Staff, *supra* note 140 ("Brilliant scholars argue both sides of the jurisdictional question. The text is legitimately ambiguous.").

149. *See* Mike DeBonis & Seung Min Kim, *Nearly All GOP Senators Vote Against Impeachment Trial for Trump, Signaling Likely Acquittal*, WASH. POST (Jan. 26, 2021, 6:17 PM), https://www.washingtonpost.com/politics/gop-senators-to-question-basis-for-trump-impeachment-signaling-likely-acquittal/2021/01/26/cd7397dc-6002-11eb-9061-07abcc1f9229_story.html.

150. *See* Neumann, *supra* note 14, at 273–300 (discussing the political and partisan circumstances surrounding President Clinton's impeachment).

151. Andrew Kaczynski & Em Steck, *Schumer Said in 1999 Senate Wasn't Like a Jury Box and Was 'Susceptible to the Whims of Politics,'* CNN (Dec. 27, 2019, 4:19 PM), https://www.cnn.com/2019/12/27/politics/chuck-schumer-impeachment-1999-kfile/index.html.

152. Bobbitt, *supra* note 100, at 519.

> fundamental fairness that [Charles] Black thought necessary to the due process of impeachment. We are more inclined to treat impeachment as a political struggle for public opinion, waged in the media, and less like the grand inquest envisioned by the Constitution's Framers.[153]

Nonetheless, the partisanship in 1999 was perhaps less extreme.[154] Nina Totenberg—who reported on all three recent impeachment trials—claims that "[i]n contrast to Senator McConnell, both [then-Senate Majority Leader Trent] Lott [(a Republican)] and [then-Senate Minority Leader Tom] Daschle [(a Democrat)] sought to preserve the notion of neutrality at the trial and tried to separate themselves from the White House."[155] The Senate also agreed unanimously on the initial rules that would govern the process.[156] Finally, the final vote to acquit President Clinton was less rigidly partisan, with ten Republican senators voting with their Democratic colleagues to acquit.[157]

And yet, hope is not lost. As President Trump's first trial showed, not all senators disregard the obligations of impartiality.[158] Before the start of President Trump's first impeachment trial, Senator Tim Kaine urged his colleagues to take their oaths seriously: "As individuals, we may have biases, but that special oath implies profound trust that we will remove ourselves from the partisan passion of the moment and exercise judgment with sole regard for impartial justice."[159] Likewise, Senator Mitt Romney cited the oath of impartiality when defending his vote to convict President Trump on one of the impeachment charges.[160]

Notwithstanding such outlier virtue signaling by Senators Kaine and

153. *Id.*

154. *See* Nina Totenberg, *How the Senate Tried Clinton in a 'Respectable Way*,*'* NPR (Dec. 19, 2019, 7:22 AM), https://www.npr.org/2019/12/19/789355645/how-the-senate-tried-clinton-in-a-respectable-way.

155. *Id.*

156. *See id.*

157. *See* Gerhardt, *supra* note 137, at 357–58.

158. *See, e.g.*, Tim Kaine, *Sen. Tim Kaine: My Colleagues Must Be Impartial in Donald Trump's Impeachment Trial*, USA TODAY (Jan. 7, 2020, 2:17 PM), https://www.usatoday.com/story/opinion/2020/01/06/sen-tim-kaine-colleagues-constitution-impartial-impeachment-column/2796612001/.

159. *Id.*

160. *See Full Transcript: Mitt Romney's Speech Announcing Vote To Convict Trump*, N.Y. TIMES (Feb. 5, 2020), https://www.nytimes.com/2020/02/05/us/politics/mitt-romney-impeachment-speech-transcript.html.

Romney, the preceding examples call into question whether impeachment functions as intended—as a "dignified" and "independent" adjudication of "injuries done immediately to the society itself."[161] If impeachment trials are no longer conducted (and, perhaps never have been) with appropriate seriousness, insulated from political allegiances and partisan alignments, then impeachment will not serve the constitutional role it was assigned.

Again, the permeation of partisanship into the impeachment process is not wholly new.[162] It has been a staple of interbranch rivalries since early American history.[163] But partisan impeachments should be concerning—even more so if, as Neumann observes and the examples above confirm, the role of partisanship in impeachments is growing.[164]

Concern over partisanship in the impeachment context is consistent with other views about the role of impeachment trials in democratic governance as well.[165] Jonathan Turley, for example, argues that:

> In crafting the American legislative process, Madison sought to address the destabilizing effects of factional disputes within democratic systems. Madison believed that leaving such disputes unaddressed would create intrigue and instability within a political system. For that reason, the Madisonian process does not seek to suppress, but to transform factional interests. This emphasis on resolving factional disputes gives the system the ability to withstand crushing pressures during periods of enormous social, political, and economic turmoil. Presidential impeachment

161. THE FEDERALIST NO. 65 (Alexander Hamilton).

162. *See* Neumann, *supra* note 14, at 164–65.

163. *See id.* ("Historically, there have been four great confrontations between or among branches of the federal government: (1) the struggle between the Federalist-dominated judiciary on one hand[] and the Jefferson Administration and Jeffersonian Congress on the other in the early years of the nineteenth century; (2)[] from 1865 to 1869, the confrontation between President Andrew Johnson and the Radical Republican Congress over Reconstruction; (3) the conflict, which peaked in 1937, between the [a]dministration of Franklin D. Roosevelt and a Supreme Court that repeatedly struck down his New Deal legislation as unconstitutional; and (4) the on-going struggle, which began in 1968, in and between the two elected branches on several issues but, most particularly, over the composition of the Supreme Court. Impeachment as a highly partisan exercise of legislative power, in which one branch of government attacks another, played a central role in all of these confrontations except the struggle between Roosevelt and the Supreme Court.").

164. *See id.* at 162.

165. *See* Turley, *supra* note 14, at 1–2.

> cases constitute the most extreme and the most dangerous form of factional dispute in the legislative branch. When a [p]resident is impeached, the House certifies not only that impeachable conduct may have occurred but that a majority of House members question the legitimacy of the [p]resident to govern. Such cases will often arrive at the Senate with the support and the opposition of large and passionate factional groups. As will be shown, the history of impeachment is largely a history of such factional or partisan disputes over legitimacy. This history, however, also shows how factional interests can be transformed under the catalytic influence of a full Senate trial.[166]

Turley envisions impeachment as normatively fruitful beyond the Hamiltonian adjudication of public misconduct.[167] He conceives of impeachments as serving a specific political function as "Madisonian device[s]."[168] At first glance, he seems to be endorsing partisanship in the impeachment process as a means of exhausting partisan (factional) energies.[169] But upon closer examination, Turley's reasons for praising impeachment trials would not accommodate the examples of partisanship described above.[170] He writes that "[t]o serve a Madisonian function in resolving factional disputes, the central obligation of the Senate trial must be a faithful presentation of the allegations, evidence, and witnesses in the case."[171] To the extent that partisanship detracts from substantive debates, it precludes the political discourse underlying Turley's position. Recent impeachments, in which the substance of impeachment charges is buried in the flurry of partisan charges and counter-charges, evidence the extent to which Turley's conception of factionalism-exhausting impeachment trials has been unrealized in recent decades.[172] The exhaustion of factional energies cannot take place when substantive debates are subordinated to bad faith partisanship. If anything is exhausted, it is the capacity of the impeachment

166. *Id.* at 4–5.
167. *Id.* at 143–44.
168. *Id.* at 4.
169. *See id.* at 4, 6.
170. *See id.* at 6.
171. *Id.* at 5.
172. *See supra* text accompanying notes 161–85.

process to check misconduct.

So far, we have discussed the constitutional vision of impeachment and its denigration. But there are two wrinkles in the story sketched above that, while not impacting the conclusions to be drawn from that story, render it a bit more complex. First, the Senate's role in impeachment was altered by the Seventeenth Amendment. That amendment provides for the direct election of senators, rather than election by state legislatures.[173] As a result of that change, as Stephen Presser notes, "the Senate is no longer insulated from popular election."[174] On its face, shifting senators' selection processes and the group(s) to which they are directly accountable might seem to recast the role they would be expected to play in impeachment trials.[175] But the Seventeenth Amendment likely had no effect on the constitutional role senators were expected to play in impeachment trials.[176] The amendment perhaps made the senators' role in impeachment trials more difficult by reducing the distance between them and the people against whose influence they must insulate themselves.[177] Nothing about the text or history of that amendment, though, suggests it was designed to affect senators' roles or responsibilities. In fact, as Presser argues, the change makes it "doubly important" that senators "try to approach the impeachment of the President as objectively as possible."[178] To the extent that the Seventeenth Amendment was about increasing democratic accountability of the legislative branch, partisanship appears to stand in the way of the ideals that amendment sought to realize.

The second wrinkle in the impeachment story told above has to do with the bases of impeachment—the charges brought in the articles of impeachment by the House of Representatives. The Constitution states that impeachment may be for "Treason, Bribery, or other high Crimes and Misdemeanors"—a category potentially broader than merely indictable

173. *See* U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

174. Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666, 673 (1999).

175. *See, e.g.*, Jane Chong, *This Is Not the Senate the Framers Imagined*, ATLANTIC (Jan. 21, 2020), https://www.theatlantic.com/ideas/archive/2020/01/not-senate-framers-imagined/605017/.

176. *See* Turley, *supra* note 14, at 125.

177. *See generally* THE FEDERALIST NO. 65 (Alexander Hamilton).

178. Presser, *supra* note 174.

criminal offenses.[179] According to Michael Gerhardt, who has written extensively about impeachment, the real debate today is "over the range of nonindictable offenses on which an impeachment may be based."[180] Is it possible that discretion is a necessary feature of impeachment trials because of the open-ended category of impeachable offenses? And, if so, can discretion legitimately manifest as partisanship without running afoul of impeachment's constitutional ideal?

In order to address that issue, we must disentangle *substance* from *procedure*.[181] This Article does not address the deep and contentious literature on the substance of impeachment—those "high Crimes and Misdemeanors" that may legitimately be described in the articles of impeachment submitted by the House to the Senate.[182] Instead, it focuses on the procedures of impeachment. Such procedures include the operational mechanisms by which senators participate in impeachment trials—for example, who oversees the trial and how it is conducted.[183] It is true that we cannot fully disentangle substance from procedure; the choice of rules in the impeachment context, for example, impacts the outcome of impeachment trials. But to completely collapse procedure into substance also goes too far. We *can* disaggregate the rules governing impeachment from the substance of impeachment. Hamilton rightly recognized the "political" nature of impeachment (its substance) *and* the ability of senators to resist the "strength of parties" (the procedures).[184] Likewise, we can conceive of rules that regulate senators' conduct during impeachment trials that allow both political parties—and through them, the American people those senators represent—to better evaluate the substance of specific impeachment charges. Specifically, taking a cue from Senators Kaine and Romney and drawing on scholarship in recent years that has stressed the importance of oaths, this Article suggests the senatorial impeachment oath as an avenue through which to promote the integrity of impeachment process.

179. U.S. CONST. art. II, § 4.

180. GERHARDT, *supra* note 32, at 105. Recall that, in *Federalist No. 65*, Hamilton reports that the category of impeachable offenses includes those causing "injuries . . . to the society itself." THE FEDERALIST NO. 65 (Alexander Hamilton).

181. *See* GERHARDT, *supra* note 32, at 105, 114.

182. *See* sources cited *supra* note 71.

183. *See* GERHARDT, *supra* note 32, at 33–35.

184. THE FEDERALIST NO. 65 (Alexander Hamilton).

C. The Senatorial Impeachment Oath

The Senatorial Impeachment Oath Clause provides that "[w]hen sitting for" the purpose of impeachment, the Senate "shall be on Oath or Affirmation."[185] Other than the rule that convictions require a "[c]oncurrence of two thirds of the [m]embers present,"[186] taking the oath is the only procedural requirement for impeachment expressly mentioned in the Constitution.[187] That oath instantiates in the Constitution's text many of the ideals of impeachment described above.[188] In practice, the taking of the oath marks an important shift, when the oath-taking senator transitions from a politician to something altogether new.[189]

The first attempted impeachment of George Turner (a judge in a territorial supreme court) in 1796 did not reach the Senate because of assurances that Turner would be prosecuted in territorial courts.[190] But perhaps anticipating future impeachments, the Senate adopted rules for impeachment in February 1798.[191] On February 9, 1798, the Senate resolved:

> That the oath or affirmation required by the Constitution of the United States to be administered to the Senate, when sitting for the trial of impeachment, shall be in the form following, viz:
>
> "I, A B, solemnly swear, (or affirm, as the case may be,) that in all things appertaining to the trial of the impeachment of ____ ____, I will do impartial justice, according to law."[192]

The oath was first administered just a few months later in the impeachment trial of Senator Blount.[193]

185. U.S. CONST. art. I, § 3, cl. 6.
186. U.S. CONST. art. I, § 3.
187. *See* BOWMAN, *supra* note 32.
188. *See* discussion *infra* Section II.A.
189. *See* BLACK, *supra* note 30, at 10 (noting the "different role" initiated by the oath).
190. *See* 1 GUIDE TO CONGRESS 394 (CQ Press ed., 6th ed. 2008).
191. *See* 7 ANNALS OF CONG. 503 (1798).
192. *Id.*
193. 8 ANNALS OF CONG. 2196 (1798) ("After the oath has been administered to the President and Senate . . . [t]he defendant, William Blount, shall be called to appear and answer the articles of impeachment exhibited against him."); *see also* Vicente, *supra* note 75, at 133 ("Senator William Blount has the ignominious distinction of being the first person to face impeachment charges.").

It makes sense to read the oath's requirement of "do[ing] impartial justice" in light of Hamilton's arguments in *Federalist No. 65*.[194] Oath-taking senators were understood to be setting aside partisan loyalties, loyalties to the House of Representatives, and even the influence of the "community," in deliberating about articles of impeachment.[195]

Seventy years after it was first adopted, the language of the oath was amended in preparation for the impeachment of President Andrew Johnson in 1868.[196] The oath taken by senators before the 1868 trial, and in every trial since, reads, "I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of _____, now pending, I will do impartial justice according to the Constitution and laws: So help me God."[197]

The changes from the original oath may have increased rhetorical weight—adding references to the Constitution as well as to God—but those changes did not clearly impact the practical or legal significance of the oath. Both versions impose one, and only one, clear obligation on the oath-taker: doing impartial justice.

Today, senators are administered the oath by the presiding officer (the Chief Justice, in cases of presidential impeachment) at their desks in the Senate chamber.[198] They then "sign an official oath book, which serves as the permanent record of the administration of the oath."[199]

Given its constitutional basis and the fact that the senatorial impeachment oath has been a constant feature of impeachment trials since the Founding, it is surprising how little attention the oath has received from impeachment scholars.[200] Charles Black, for instance, treats it as serving little more than a

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Blount's case was ultimately dismissed by the Senate for lack of jurisdiction. *See* Vicente, *supra* note 75, at 134; *see also supra* text accompanying notes 108–10. For greater discussion of Blount's impeachment, see Neumann, *supra* note 14, at 175–87.

194. *See* 7 ANNALS OF CONG. 503 (1798); THE FEDERALIST NO. 65 (Alexander Hamilton).

195. *See* THE FEDERALIST NO. 65 (Alexander Hamilton).

196. *See* S. Res. 479, 99th Cong. (1986); *Impeachment Trial of President Andrew Johnson, 1868*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm (last visited Sept. 9, 2021).

197. S. Res. 479, 99th Cong. (1986).

198. *See id.*

199. ELIZABETH RYBICKI & MICHAEL GREENE, CONG. RSCH. SERV., R46185, THE IMPEACHMENT PROCESS IN THE SENATE 7 (2020).

200. *See supra* text accompanying notes 30–32.

symbolic function.[201] Neither Neal Katyal and Sam Koppelman nor Cass Sunstein mention the oath in their recent books about impeachment.[202] And Gerhardt, who has perhaps written more about the impeachment process than any other scholar, does not mention it in the third edition of his otherwise exhaustive *The Federal Impeachment Process*.[203] These oversights may be related to what Richard Re describes as the "underappreciated tradition of promissory constitutionalism."[204] Re's call to take oaths "more seriously" is premised on the fact that others, including those cited above, fail to take oaths seriously enough.[205]

The inattention to the impeachment oath is probably even more pronounced in the general public.[206] Those not familiar with the impeachment process might fail to notice the momentous transition marked by the taking of the oath.[207] As a result, they may expect that senators will retain their political and partisan allegiances.[208] To label the Senate's proceedings as "trials" is, to many, little more than mere embellishment of politics as usual.

Despite being long overlooked and underappreciated, the senatorial impeachment oath is an integral part of the impeachment process. It is also unique in our constitutional–legal tradition.[209] As we will see, the oath blends features of at least two other common oaths: like the juror's oath, the senatorial impeachment oath demands impartiality, and like other oaths for public office, the senatorial impeachment oath is ostensibly *unenforceable*.[210] In the next Part, I briefly survey those other oaths and introduce a third type

201. *See* BLACK, *supra* note 30.

202. *See* KATYAL & KOPPELMAN, *supra* note 32; SUNSTEIN, *supra* note 32.

203. *See* GERHARDT, *supra* note 32, at 33–34. Gerhardt skips over the taking of the oath in his description of the impeachment process in the Senate. *Id.*

204. *See* Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 299 (2016).

205. *See id.* at 302.

206. *See, e.g.*, Sonam Sheth & Walt Hickey, *Most Americans Say They Understand What Impeachment Is, but Fewer Than a Third Can Actually Define It Correctly*, BUS. INSIDER (June 13, 2019, 2:06 PM), https://www.businessinsider.com/most-americans-dont-understand-impeachment-poll-2019-6 (finding that only about "30% of [survey] respondents correctly defined [impeachment] or its implications," and concluding that the general public is uninformed about impeachment process and procedures).

207. *See, e.g.*, Amber Phillips, *About That Oath of 'Impartiality' Senators Just Took*, WASH. POST (Jan. 16, 2020), https://www.washingtonpost.com/politics/2020/01/16/about-that-oath-impartiality-senators-will-take/.

208. *See id.*

209. *See* JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., R46013, IMPEACHMENT AND THE CONSTITUTION 4–5 (2019).

210. *See* discussion *infra* Sections III.B, III.C.

of oath that might offer a model for reforming the impeachment process: the witness's oath.

III. OATHS

The senatorial impeachment oath has features like several more common oaths, and it is possible that the impeachment oath-taking process could be reformed to resemble others more closely. In this Part, I describe the role of oaths generally and then examine three specific oaths: (1) juror oaths, (2) oaths taken for public office, and (3) witness oaths. The oath taken by senators prior to impeachment trials is supposed to function similar to juror oaths—it is supposed to ensure that senators are impartial.[211] In practice, it functions much more like oaths taken for public office insofar as it is not (currently) enforceable.[212] In the next Part, I explore avenues to make the impeachment oath more enforceable—in other words, more like the witness oath.

A. Oaths in American Law

Oaths have ancient roots.[213] Helen Silving traces them back to "pre-religious, . . . pre-animistic period of culture," when oaths operated as a "self-curse, . . . guaranteeing that a promise would be performed."[214] Frederick Jonassen finds oath-taking, among other places, in Homer's *Iliad*, St. Augustine's *City of God*, and early biblical writings.[215] Oaths in the American legal system are thus nothing new.

A bit closer to home, oath-taking bears a "symbiotic relationship" with the development of the English legal tradition out of which the American legal system was born.[216] In theory, oaths are the basis of constitutional legal

211. *See generally* S. Res. 479, 99th Cong. (1986).

212. *See* STEPHEN MICHAEL SHEPPARD, I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS 6 (Cambridge Univ. Press ed. 2009).

213. *See* Patrick O. Gudridge, *The Office of the Oath*, 20 CONST. COMMENT. 387, 389 (2003); Frederick B. Jonassen, *Kiss the Book . . . You're President . . . : "So Help Me God" and Kissing the Book in the Presidential Oath of Office*, 20 WM. & MARY BILL RTS. J. 853, 899–906 (2012); Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1, 6–15 (2009); Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1330 (1959).

214. Silving, *supra* note 213.

215. *See* Jonassen, *supra* note 213, at 900–02.

216. *See* M.R.L.L. Kelly, *Common Law Constitutionalism and the Oath of Governance: "An Hieroglyphic of the Laws,"* 28 MISS. C. L. REV. 121, 122 (2008).

authority.[217] According to M.R.L.L. Kelly, oaths are the "well-spring of all power necessary and sufficient to govern."[218] John Locke, who explicitly and implicitly influenced the shape of the American Constitution, thought that "[p]romises, covenants, and oaths" were the "bonds of human society."[219] Both the ancient roots of oaths and the role of oaths in shaping Anglo–American law further justify the focus in this Article on oaths as a remedial tool for the broken impeachment process.

The Founders thought oaths were sufficiently important to warrant two mentions in the original Constitution. First, Article II requires the President to take an oath of office to "faithfully execute the Office of President of the United States."[220] Second, Article VI of the Constitution (the Supremacy Clause) requires an oath or affirmation to "support this Constitution" by all senators, representatives, "Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States."[221] The Article VI oath requirement is followed by a prohibition against religious tests as a qualification for public office, suggesting that the oath was understood as a substitute for obligations stemming from public officials' religious commitments.[222]

The first law passed by Congress enacted the Article VI oath requirement.[223] The oath formulated in the "Act to regulate the Time and

217. *See* McGinnis, *supra* note 102, at 655 ("[P]rominence of oaths in the Constitution as well as the Fifth Amendment shows that the Framers recognized that taking a civil oath was an important ingredient of the cement that holds a civil society together. Previous societies had depended on established religions or fixed hierarchies for social cohesion, but the United States was a bold experiment that depended on the rule of law to protect the rights of each citizen.").

218. Kelly, *supra* note 216.

219. JOHN LOCKE, TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 212 (Charles L. Sherman ed., 1937).

220. U.S. CONST. art. II, § 1.

221. U.S. CONST. art. VI.

222. *See id.*; Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 18 (1984) (arguing that "the Framers considered the constitutional oath a *substitute* for the religious tests the colonists were familiar with under the English established church"); SANFORD LEVINSON, CONSTITUTIONAL FAITH 55 (Princeton Univ. Press ed. 1988) (showing that "some of the ratifiers considered the oath to be a genuine *religious* oath"). Steve Sheppard, by contrast, claims that the Founders saw oaths as creating obligations distinct from religious commitments. *See* Steve Sheppard, *What Oaths Meant to the Framers' Generation: A Preliminary Sketch*, 2009 CARDOZO L. REV. DE NOVO 273, 280 (2009). He claims, as evidence, that "Blackstone saw the Oath as a way of bringing religion to bear in enforcing an independent obligation, arising from the acceptance of office, not from the oath itself." *Id.*

223. *See* Act of June 1, 1789, ch. 1, § 1.

Manner of administering certain Oaths" was simple: "I, A.B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States."[224] The law required that the oath be administered to all members of the First Congress within three days.[225]

A few years later, Chief Justice John Marshall reiterated the significance of constitutional oaths in *Marbury v. Madison*.[226] While defending the Constitution as "paramount law," Marshall asked rhetorically, "Why otherwise does [the Constitution] direct the judges to take an oath to support it?"[227] He took almost for granted the significance of oaths to preserving the Constitution.[228] Justice Joseph Story echoed a similar sentiment, promising that he would "never hesitate to do [his] duty as a [j]udge, under the Constitution and laws of the United States, . . . be the consequences what they may."[229] He continued, "That Constitution I have sworn to support, and I cannot forget or repudiate my solemn obligations at pleasure."[230] And in his *Commentaries on the Constitution*, Story recognized the "solemn obligation" imposed on officials "who feel a deep sense of accountability to a [s]upreme being."[231]

Oaths create, at least, "personal moral obligations" on those who take them.[232] In this sense, they obligate public officials both in their personal capacities and in their institutional capacities.[233] "Institutional obligations," which can arise out of oaths of office, compound the "implied moral expectation that one who accepts a role within an institution will exercise that role with loyalty to the institution and fidelity to its purposes."[234]

More significantly, oaths may create affirmative fiduciary relationships

224. *Id.*
225. *See id.*
226. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).
227. *Id.* at 177–78, 180.
228. *See id.*
229. R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 377 (Univ. of N.C. Press ed. 1986).
230. *Id.*
231. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 702 (1833).
232. Re, *supra* note 204; *see also* Evan D. Bernick, *The Morality of the Presidential Oath*, 47 OHIO N.U. L. REV. 33, 35 (2021) (arguing "that the [presidential oath of office] imposes a moral obligation on the President to fulfill a set of legal obligations").
233. *See* Re, *supra* note 204.
234. SHEPPARD, *supra* note 212, at 168.

between government officials and the public.[235] Richard Re urges scholars to take oaths "more seriously" as a way to translate the legal demands of the Constitution into personal moral duties of public officials.[236] And Stephen Sheppard appeals to oaths to argue that "[o]fficials must be moral, not just legal."[237] For Re and Sheppard, oaths transcend the merely personal, even if they do not import all the characteristics (especially enforceability) of legal obligations.[238]

Not everyone agrees about the obligations imposed by the Constitution. Michael Seidman, for example, urges his readers to give up the "pernicious myth" that the Constitution requires obedience to "the commands of people who died several hundred years ago."[239] On his account, the oath imposes no obligations on constitutional actors.[240] Larry Alexander similarly claims that "oaths to enforce law" create no obligations when other factors—in Alexander's words—"all-things-considered-but-law"—"militate against" law enforcement.[241] But the most extreme position—that oaths do not matter at all—is rare. Even Seidman concedes that his is a minority position.[242]

Others argue that certain oaths are illiberal and antidemocratic. Geoffrey Stone worries that loyalty oaths, such as those that gained notoriety during the McCarthy Era, stifle speech: "Loyalty oaths reverse the essential relationship between the citizen and the state in a democratic society. As the framers of our Constitution understood, the citizens of a self-governing society must be free to think and talk openly and critically about issues of governance."[243] To

235. *See, e.g.*, Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2119 (2019) (grounding a fiduciary obligation in the Take Care and Presidential Oath Clauses).

236. Re, *supra* note 204, at 302–03; *see also* JOSEPH RAZ, THE AUTHORITY OF LAW 239 (Oxford Univ. Press ed., 2d ed. 2009) ("[A]n oath may impose a moral obligation to obey (e.g., when voluntarily undertaken prior to assuming an office of state which one is under no compulsion or great pressure to assume).").

237. SHEPPARD, *supra* note 212, at xv.

238. *See* Re, *supra* note 204, at 304; SHEPPARD, *supra* note 212, at 107.

239. LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 9 (2012).

240. *See id.* at 10.

241. LARRY ALEXANDER, WAS DWORKIN AN ORIGINALIST? 14, 15 n.31 (Oxford Univ. Press ed. 2015); *see also* David Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178, 192 (1984) (considering some of the limits on judges' obligations "of fidelity to law").

242. *See* SEIDMAN, *supra* note 239, at 139 ("[A]s things stand now, there is minimal political support for constitutional skepticism.").

243. Geoffrey R. Stone, *Loyalty Oaths Fail the Test of Democracy*, L.A. TIMES (Mar. 11, 2008, 7:00 AM), https://www.latimes.com/archives/la-xpm-2008-mar-11-oe-stone11-story.html. *But see*

the extent that oaths generally curb citizens' abilities to exercise constitutional freedoms, it is true that they limit constitutionally provided freedoms.[244] That was especially true when coupled with the social pressures accompanying such oaths taken during the McCarthy Era.[245] But Stone's concern should not be overstated; not all oaths threaten democratic freedoms. Constitutional oaths, in particular, are supposed to limit the sorts of behaviors by government—abuses of power, governmental overreach, and arbitrary control, to name a few—that have presented the gravest threat to citizens' freedoms throughout history.[246] Insofar as those oaths require loyalty to the Constitution, Stone's concerns are misplaced. (Again, Stone had in mind the more pernicious, non-constitutional loyalty oaths of the McCarthy Era.)[247]

Notwithstanding any concerns that have been raised about the power and desirability of oaths, the fact is that they do play a role in American constitutionalism. Whether specifically derived from the text of the Constitution or found more generally within our constitutional history and tradition, oaths permeate American law. The following examples reveal some of oaths' diverse features.

B. Juror Oaths: Impartiality

First, the juror's oath binds the oath-taker to *impartiality*.[248] Jurors are obligated to set aside their biases and prejudices for the purpose of considering evidence presented in the courtroom.[249] One of legal cinema's classics, *12 Angry Men* is about a jury wrestling to decide the fate of a man accused of killing his father.[250] Juror #8 (played by Henry Fonda) spends the duration of the movie persuading the rest of the jurors that their initial reactions to the evidence presented by the prosecution are wrong.[251] Though not often thought

John Kness, *The Long History of 'Loyalty Oaths*,*'* L.A. TIMES (Apr. 2, 2008, 12:00 AM), https://www.latimes.com/opinion/la-oew-kness2apr02-story.html (challenging Stone's account of the role of oaths in American history and law).

244. *See* Stone, *supra* note 243.

245. *See id.*

246. *See* discussion *infra* Section III.C.

247. *See* Stone, *supra* note 243.

248. *See* Patton v. Yount, 467 U.S. 1025, 1036 (1984).

249. *See id.* (recognizing the obligation of an oath-taking juror to "set aside any opinion he might hold and decide the case on the evidence").

250. *See* 12 ANGRY MEN (Orion-Nova Productions 1957).

251. *See id.* (portraying jurors considering evidence and elements of the law, including burden of

of as such, the movie is as much about those jurors' quests to live up to the obligations of their oaths as it is about their efforts to decide the particular case before them.[252] Juror #8's efforts to whittle away at the prejudices of his fellow jurors solidified his legacy as a hero in the American legal mind.[253]

Unlike other oaths, the juror's oath has resisted standardization.[254] At the federal level and in many states, juror oaths are "simply an old tradition judges have made up."[255] Especially in jurisdictions where oaths are not required by law, it can be difficult to evaluate jurors' oaths because they are frequently not even transcribed by court reporters.[256] In those states that do standardize juror oaths, there is some variance in oath language, but oaths almost all include appeals to God and promises to deliver a "true" verdict.[257] Consider, for example, Pennsylvania's oath: "You do solemnly swear by [a]lmighty God . . . that you will well and truly try the issue."[258]

Juror oaths are not mentioned in the Constitution, but oath-taking may nonetheless be required by the Constitution's promise of an "impartial jury."[259] As the Supreme Court emphasized in *Lockhart v. McCree*, the

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proof, to reach a decision).

252. *See id.*

253. *See* Austin Sarat, *Fathers in Law: Violence and Reason in 12 Angry Men*, 82 CHI. KENT L. REV. 863, 864 (2007) (describing how "heroic Juror #8 . . . earns the admiration of the film's imagined audience by . . . unquestioningly adhering to law's existing rules and conventions and submitting to the image of the good judge as one who separates public and private, reason from emotion").

254. *See generally* Kathleen M. Knudsen, *The Juror's Sacred Oath: Is There a Constitutional Right to a Properly Sworn Jury?*, 32 TOURO L. REV. 489, 495–500 (2016) (describing some of the variation among state and federal courts in the administration of juror oaths).

255. James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, 22 LITIG. 6, 12 (1996).

256. *See* CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 239 (1998).

257. *See, e.g.*, MASS. GEN. LAWS ch. 278 § 4 (2020) ("You shall well and truly try the issue . . . so help you God."); OHIO REV. CODE ANN. § 2945.28 (West 2005) ("Do you swear or affirm that you will diligently inquire into and carefully deliberate all matters between the State of Ohio and the defendant (giving the defendant's name)? Do you swear or affirm you will do this to the best of your skill and understanding, without bias or prejudice? So help you God."); 234 PA. CODE § 640 (2021) ("You do solemnly swear by [a]lmighty God . . . that you will well and truly try the issue . . . ."); TEX. CODE CRIM. PROC. ANN. art. 35.22 (West 2021) ("You and each of you do solemnly swear that in the case . . . you will a true verdict render according to the law and the evidence, so help you God."). California is an example of a state not affirmatively requiring any appeal to God. *See* CAL. CIV. PRO. CODE § 232(b) (West 2019) ("Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court.").

258. 234 PA. CODE § 640 (2021).

259. *See* U.S. CONST. amend. VI; Knudsen, *supra* note 254, at 490–91. Juror oath-taking serves

impartiality of a jury is premised on jurors having taken an oath to "conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case."[260] A few years after *Lockhart*, Justice Kennedy observed that "[a] juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath."[261]

Insofar as it promotes juror impartiality, the juror's oath functions like many other rules regulating juries: the fair cross-section requirement;[262] the standard for evaluating for-cause removals;[263] the ability of defendants to request a change of venue;[264] and more.[265] Justice Cardozo, in stressing the importance of the voir dire process, observed that a juror whose "answers to the questions [in voir dire] are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham."[266] On Justice Cardozo's account, the oath enforces the impartiality function of voir dire.[267]

The Supreme Court recently expanded the impartiality requirement from a procedural safeguard to a substantive protection.[268] Like other rules regulating the jury, impartiality was long treated as procedural; all that was

other functions in the criminal justice process as well: it is only after the jury is empaneled and sworn that jeopardy attaches. *See* Downum v. United States, 372 U.S. 734, 737–38 (1963).

260. Lockhart v. McCree, 476 U.S. 162, 184 (1986).

261. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 153 (1994) (Kennedy, J., concurring).

262. *See* Taylor v. Louisiana, 419 U.S. 522, 526 (1975) ("[T]he presence of a fair cross-section of the community on venires, panels, of lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions.").

263. *See* Wainwright v. Witt, 469 U.S. 412, 424 (1985) (holding that "the proper standard for determining when a prospective juror may be excluded for cause . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'" (quoting Adams v. Texas, 448 U.S. 38, 45 (1980))).

264. *See* FED. R. CRIM. P. 21(a). The *Federal Rules of Criminal Procedure* establish that the defendant may move to transfer his or her trial to another district because of "prejudice against the defendant . . . in the transferring district [such] that the defendant cannot obtain a fair and impartial trial there." *Id.*

265. *See* Remmer v. United States, 350 U.S. 377, 382 (1956) (holding that evidence of "extraneous influences" that disturb a juror and restrict the juror's ability to freely decide a case can constitute grounds for a new trial).

266. Clark v. United States, 289 U.S. 1, 11 (1933).

267. *See id.* at 11–12 (discussing how sworn jurors are restrained by their role and therefore must be impartial rather than partisan).

268. *See* Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 713 (2019).

required was "certain prophylactic procedures that secure a jury that is more likely to reach verdicts impartially."[269] But in *Peña-Rodriguez v. Colorado*, the Court held that evidence of extreme bias by a juror could justify postconviction relief.[270] Specifically, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment . . . permit[s] the trial court to consider the evidence of the juror's statement and any resulting denial of the [impartiality] guarantee."[271] Impartiality is thus, at least sometimes, a substantive guarantee.

The *Peña-Rodriguez* Court observed that violations of substantive impartiality should be rare: "*Jurors are presumed to follow their oath[s]*."[272] The examples presented in Part II suggest such a presumption is not necessarily warranted with respect to senators preparing for, or engaging in, impeachment trials.

C. Oaths for Public Office: Unenforceability

The second example of oaths, already mentioned in several places above, are those taken for public office.[273] All public officeholders—whether elected or appointed, federal or state—are required to take an oath.[274] Even civil service officers must take oaths.[275] Consider the oaths taken by the three main groups of federal officeholders.

1. The President. The President's oath is the only one expressly presented in the Constitution.[276] Article II requires that, before entering office, the President take the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[277] That oath is the lynchpin in recent arguments for constraining the

269. *Id.*
270. *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).
271. *Id.*
272. *Id.* at 868 (emphasis added).
273. *See* discussion *supra* Sections II.C, III.A.
274. *See* U.S. CONST. art. VI.
275. *See* 5 U.S.C. § 3331 (2018).
276. *See* U.S. Const. art. II, § 1, cl. 8.
277. *Id.*

power and authority of presidents.[278] Andrew Kent, Ethan Leib, and Jed Shugerman, for example, argue that the Presidential Oath Clause obligates the Executive to *faithfully* execute the law.[279] And Evan Bernick claims that the Presidential Oath Clause proscribes the President from enforcing unconstitutional laws: "[I]f the President were obliged by the Take Care Clause to take care that unconstitutional statutes be executed, he would arguably be obliged to violate the Presidential Oath Clause as well as the Supremacy Clause."[280]

2. Congresspeople. All congresspeople, before assuming office, must take an oath to "support and defend the Constitution."[281] As former-Representative Vic Snyder observes about that "special" oath, congresspeople will not get paid until they take it.[282] Like the President's oath, the congressional oath has been used to argue for limits on congressional power.[283] Like Bernick in the executive context, Anant Raut and J. Benjamin

278. *See, e.g.*, Saikrishna Bangalore Prakash, *The Executive's Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1631–33 (2008) (appealing to the Faithful Execution Clause, Supremacy Clause, and Presidential Oath Clause to implicitly prohibit the President from executing unconstitutional laws); Kent et al., *supra* note 235, at 2119 (describing the Faithful Execution and Presidential Oath Clauses as "substantial textual and historical commitments to what we would today call fiduciary obligations of the President"); Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1, 33 (2019) (arguing that the Presidential Oath Clause, Take Care Clause, and Supremacy Clause require the President to follow the "Constitution rather than . . . unconstitutional statutes"); MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR THE PRESIDENT'S CONSTITUTIONAL OATH: ITS MEANING AND IMPORTANCE IN THE HISTORY OF OATHS 243 (1999) ("The prescribed oath can be . . . a vital restraint on our [p]residents. . . . It is a self-restraint, to be sure, but a restraint certainly as important as impeachment or the threat of electoral defeat.").

279. *See* Kent et al., *supra* note 235, at 2113.

280. Bernick, *supra* note 278 (footnote omitted).

281. 5 U.S.C. § 3331 (2018).

282. *See* Vic Snyder, *You've Taken an Oath To Support the Constitution, Now What? The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897, 897–98 (2001). Several other congresspeople responded to Representative Snyder's article similarly reflecting on the importance of the congressional oath. *See generally* Dale Bumpers, Bob Filner, J. Dennis Hastert, Blanche Lambert Lincoln & David E. Price, *The Congressional Oath of Office: Responses to Congressman Vic Snyder*, 24 U. ARK. LITTLE ROCK L. REV. 803, 803–816 (2002) (responses by Senator Dale Bumpers, Representative Bob Filner, Speaker of the House J. Dennis Hastert, Senator Blanche Lambert Lincoln, and Representative David E. Price). Senator Russ Feingold argues that the oath should influence legislators' votes on specific issues, such as campaign finance and laws affecting constitutional rights. *See* Russ Feingold, *Upholding an Oath to the Constitution: A Legislator's Responsibilities*, 2006 WIS. L. REV. 1, 4 (2006).

283. *See, e.g.*, Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593, 635 n.178 (2006) (noting that "the congressional oath requires that members

Schrader argue that the oath obligates representatives and senators "*not* to vote for legislation they believe to be unconstitutional."[284] Their argument accords with the constitutional mandate that "[s]enators and [r]epresentatives . . . shall be bound by [o]ath or [a]ffirmation, to support th[e] Constitution."[285] Meanwhile, Quinta Jurecic claims that the legislators' oath obligated House members to open an impeachment inquiry into President Trump after publication of the Mueller Report.[286] Though admitting that the oath did not create a "*justiciable* obligation," Jurecic argues that the congressional "oath imposes some basic level of constitutional responsibility in certain circumstances."[287] Jurecic's position seemingly accords with Justice Rehnquist's claim in *Cole v. Richardson* that constitutional oaths "assure that those in positions of public trust [are] willing to commit themselves to live by the constitutional processes of our system."[288]

3. Federal Judges. Finally, the full oath required to be taken by all federal judges is as follows:

> I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.[289]

Judge Diane Wood and others root judicial obligations of impartiality in the judge's oath[290]: "The term '. . . persons' in that oath means exactly what it

uphold the Constitution").

284. Anant Raut & J. Benjamin Schrader, *Dereliction of Duty: When Members of Congress Vote for Laws They Believe To Be Unconstitutional*, 10 CUNY L. REV. 511, 511 (2007) (emphasis added).

285. U.S. CONST. art. VI, cl. 3.

286. *See* Quinta Jurecic, *Impeachment Proceedings and the Congressional Oath*, LAWFARE (July 29, 2019, 9:00 AM), https://www.lawfareblog.com/impeachment-proceedings-and-congressional-oath.

287. *Id.*

288. Cole v. Richardson, 405 U.S. 676, 684 (1972).

289. 28 U.S.C. § 453 (2018).

290. *See* Diane P. Wood, *Reflections on the Judicial Oath*, 8 GREEN BAG 2D 177, 186 (2005); William H. Pryor Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL'Y REV. 347, 352 (2006) ("As a judge in a government of laws, not men, I have a special moral duty to obey and enforce the law in accordance with my oath.").

says: all human beings, regardless of race, sex, citizenship, age, disability, belief system, or wealth. All these persons are entitled to impartial, dignified consideration of their cases before the courts."[291]

Chief Justice Earl Warren likewise recognized that he was "oath-bound to defend the Constitution."[292] And recall Chief Justice John Marshall's assertion in *Marbury* that the "oath certainly applies" to judges' "conduct in their official character": "How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?"[293]

The judge's oath has garnered special attention in recent years from originalist scholars. Randy Barnett and Evan Bernick, for example, argue that the oath obligates judges to faithfully respect the "fixed communicative content of the Constitution's text."[294] The fact that judges voluntarily assume their positions is key for Barnett and Bernick.[295] Once they voluntarily take the oath, judges become obligated "morally and legally to ascertain and 'faithfully' give effect to the Constitution's original meaning."[296]

The various oaths taken for public office—only briefly sketched above—are united by one common feature: *unenforceability*.[297] Oaths for public office are practically symbolic because there are no obvious ways to enforce them in the law.[298] Officeholders may be removed from office through elections or impeachment, but removal through those means has rarely—if ever—been

291. Wood, *supra* note 290.

292. PAULEY, *supra* note 278, at 189.

293. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

294. Barnett & Bernick, *supra* note 42, at 25; *see also* Christopher R. Green, "*This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1674 (2009) ("Those who swear the Article VI oath should therefore be textualist semi-originalists who take the historic textually expressed sense as interpretively paramount.").

295. *See* Barnett & Bernick, *supra* note 42, at 24 ("Once officials do [take the oath,] they are entrusted with power that they would not otherwise possess, a power that has moral implications.").

296. *Id.* at 26. Though Barnett and Bernick assert a legal obligation of judges, they concede that the obligation is practically unenforceable. *See id.* at 24 n.115, 26.

297. *See* James S. Bowman & Jonathan P. West, *Pointless or Powerful: The Case for Oaths of Office*, RESEARCHGATE (Nov. 27, 2019), https://www.researchgate.net/publication/337594072_Pointless_or_Powerful_The_Case_for_Oaths_of_Office (describing oaths of office as "not self-enforcing" and dependent on "voluntary adherence").

298. *See* Allan W. Vestal, *Regarding Oaths of Office*, 37 PACE L. REV. 292, 311 (2016) (discussing the symbolic role of oaths of office and how they should be a kind of ritual where officers "pledge themselves to a common set of principles, beliefs, or values").

expressly premised on oath-breaking.[299] It is for that reason that Matthew Pauley describes the President's oath as only a "self-restraint,"[300] and Edward Dumbauld characterizes it as "a ceremonial formality."[301]

Perhaps the unenforceability of these oaths is a good thing. Representative Snyder worries that enforcement of oaths might produce a "caustic" environment in which accusations of "disloyalty" would be used to target political opponents.[302] Snyder may be right: colonial–American loyalty oaths were often enforced "by social ostracism, economic pressure, and physical terrorism"[303]—none of which are desirable features of a well-functioning legal system.

There are other potentially undesirable consequences of enforcing oaths as well. Consider the instability that would accompany transitions of power if there was disagreement about the obligations imposed by constitutional oaths: a "new [p]resident [might] have to decide whether to undertake enforcement actions against those members of prior administrations whose actions, in the view of the new administration, violated the Constitution or laws of the United States."[304] Political instability, like ostracism and terrorism, is undesirable.

In summary, whether for good or for ill, oaths for public office—such as those taken by presidents, members of Congress, and judges—are practically unenforceable in their current form.

D. Witness Oaths: A Model of Enforceability

The third and perhaps the most well-known example of an oath—portrayed in movies and on television shows such as *Law & Order*—is that taken by witnesses in court. The *Federal Rules of Evidence* require only that a witness give an oath to "testify truthfully" in a manner "designed to impress

299. *See* SHEPPARD, *supra* note 212, at 6 ("The most significant remedy [for breaking moral obligations] is for those aware of moral breaches by an official to interfere with the advancement or reappointment of that official. . . . This is the moral basis for the exercise of the vote by the people governed by officials.").

300. PAULEY, *supra* note 278.

301. EDWARD DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 275 (1964).

302. Snyder, *supra* note 282, at 923.

303. HAROLD M. HYMAN, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 65 (1959).

304. Paul Horwitz, *Honor's Constitutional Moment: The Oath and Presidential Transitions*, 103 NW. U. L. REV. COLLOQUY 259, 265 (2008).

that duty on the witness's conscience."[305] Thus, as with juror oaths, there is no standard language for the oaths taken by witnesses.[306] The language most familiar to the American public is something like the following: "You do affirm that all the testimony you are about to give in the case now before the court will be the truth, the whole truth, and nothing but the truth; this you do affirm under the pains and penalties of perjury?"[307]

Like the juror's oath, the witness's oath obligates the witness to adhere to a standard of "truth."[308] But as a practical matter, the witness's standard is more stringent because witnesses give testimony or present evidence; they make positive assertions that may be objectively evaluated for their truth content. Jurors, by contrast, are truthful only passively.[309] Additionally, while the truth content of a witness's testimony may be evaluated independently, the truth content of an individual juror's verdict is filtered through the collective jury, rendering an individual juror's honesty more difficult to evaluate.[310]

The witness's oath is also unique because of its straightforward enforceability, a feature that distinguishes the witness's oath from oaths for public office. The giving of false testimony, as evidenced in Blackstone's *Commentaries*, was a common law misdemeanor punishable by up to six months imprisonment.[311] Today, federal perjury laws criminalize willfully (in the case of 18 U.S.C. § 1621) or knowingly (in the case of 18 U.S.C. § 1623)

305. FED. R. EVID. 603.

306. *See* United States v. Mensah, 737 F.3d 789, 806 (1st Cir. 2013) (stating that whether an oath has been given is "a question of substance rather than form").

307. Brendan Koerner, *Where Did We Get Our Oath?: The Origin of the Truth, the Whole Truth, and Nothing but the Truth*, SLATE (Apr. 30, 2004, 5:52 PM), https://slate.com/news-and-politics/2004/04/how-the-courtroom-got-its-oath.html.

308. *See* FED. R. EVID. 603.

309. Under early English common law, juror oaths were enforceable through a writ of attaint and jurors could be punished for delivering false verdicts. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *402. Today, no such writ or analogous legal device is available except in cases of extraordinary behavior by jurors. *See Dialogue on the American Jury, Part I: The History of Trial by Jury*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/public_education/resources/dialoguepart1.authcheckdam.pdf (last visited Sept. 12, 2021) (noting that writs of attaint were abolished in 1825).

310. *See* Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications for and from Psychology*, ASS'N FOR PSYCH. SCI., https://www.law.nyu.edu/sites/default/files/upload_documents/Jury-Decision-Making.pdf (last visited Sept. 12, 2021) (explaining how "actual verdicts are obviously a function of group processes" and "little [is known] about how individual [juror] preferences are translated into a group decision").

311. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *137.

giving false testimony or presenting false evidence where an oath has been properly administered.[312] The Supreme Court has lauded such laws for keeping "justice free from the pollution of perjury"[313] because "[p]erjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings."[314] Oath-taking is a legally essential element of the crime of perjury.[315]

Again, the three examples of oaths described in this Part are not exhaustive.[316] Rather, they serve to illustrate different features of American legal oaths upon which we may draw support in considering potential reforms to the impeachment process.[317]

IV. REFORMING THE SENATORIAL IMPEACHMENT OATH

Since at least as far back as 1798, the Senate has understood the constitutional impeachment oath requirement to obligate senators sitting for impeachment trials to "do impartial justice."[318] As Part III demonstrates, that oath has characteristics of several other oaths. For one thing, the impartiality requirement—literally, "do impartial justice"—resembles the impartiality requirement of the juror's oath.[319] That is why it is so straightforward to think about the Senate trial as a unique type of jury trial.[320] Hamilton emphasizes the jury-like function that senators would be called on to play in impeachment trials. In *Federalist No. 65*, he describes the "necessary impartiality" of senators, who would, like a jury, decide the conflict "between an [individual] accused, and the [representatives of the people, his accusers]."[321]

At the same time, to the extent that violations of the impeachment oath are not clearly enforceable, the senatorial impeachment oath resembles oaths

312. *See* 18 U.S.C. §§ 1621, 1623 (2018).

313. United States v. Williams, 341 U.S. 58, 68 (1951).

314. United States v. Mandujano, 425 U.S. 564, 576 (1976).

315. *See* United States v. Debrow, 346 U.S. 374, 376 (1953). *Debrow* makes clear that the oath must only have been "authorized by a law of the United States." *Id.* at 377.

316. *See, e.g.*, Federal Judicial Center, Benchbook for U.S. District Court Judges 265–70 (6th ed. 2013) (listing various oaths).

317. *See supra* text accompanying notes 211–12.

318. *See supra* Part II.C.

319. *See* discussion *supra* Section III.B.

320. *See* Turley, *supra* note 14, at 3–4 (discussing the Senate trial as being a "unique forum").

321. THE FEDERALIST NO. 65 (Alexander Hamilton).

taken for public office.[322] The lack of enforceability can be seen, for example, in the fact that an impeached public official cannot challenge his or her conviction on grounds of impartiality.[323] More generally, oath-breaking does not subject senators to any form of prosecutorial scrutiny.[324]

Despite the apparent unenforceability of the senatorial impeachment oath, one wonders whether the integrity of the impeachment process can be improved by reforming that oath. The easiest approach would be to draw greater public attention to the obligation it imposes.[325] During the first impeachment of President Trump, for example, a group of lawyers filed an open letter to the Senate urging senators to "do impartial justice."[326] Even just raising public awareness about the oath, as the group sought to do, might generate greater accountability by senators.[327]

More significantly, as I propose here, the senatorial impeachment oath could be rendered enforceable (1) by passage of a perjury-like impeachment law[328] or (2) by the Senate itself, through changes to its standing rules.[329] Both proposals would target senators who violate their oaths. Though such changes are politically infeasible—the Senate seems unlikely to endorse narrowing the power of senators during impeachment—neither is entirely unrealistic. Many other Senate rules and laws already target bad behavior by elected officials,

322. *See* discussion *supra* Section III.C.

323. *See supra* text accompanying notes 273–80.

324. *See* discussion *supra* Section III.C.

325. *Cf.* Julie Beck, *What Good Is 'Raising Awareness?,'* ATLANTIC (Apr. 21, 2015), https://www.theatlantic.com/health/archive/2015/04/what-good-is-raising-awareness/391002/ ("Awareness can be a first step toward changing behavior.").

326. *See* Staci Zaretsky, *All Rise: Hundreds of Lawyers Protest on Steps of Supreme Court To Demand 'Impartial Justice' in Trump's Impeachment*, ABOVE THE LAW (Jan. 31, 2020, 11:43 AM), https://abovethelaw.com/2020/01/all-rise-hundreds-of-lawyers-protest-on-steps-of-supreme-court-to-demand-impartial-justice-in-trumps-impeachment/.

327. *See* Daniel Schuman & Zach Graves, *To Make Congress More Accountable, Make It More Open*, HILL (Apr. 3, 2014, 10:00 AM), https://thehill.com/blogs/congress-blog/technology/202358-to-make-congress-more-accountable-make-it-more-open ("Bringing the lawmaking process out into the light of day serves to level the playing field with entrenched special interests, who otherwise benefit from privileged access and a more opaque process.").

328. Michael Gerhardt considers other possible statutory and constitutional amendments to the impeachment process, including to require automatic suspension, removal, or disqualification of federal judges convicted of felonies and to shift fact-finding responsibilities away from the Senate. *See* GERHARDT, *supra* note 32, at 161–73.

329. *See* RYBICKI & GREENE, *supra* note 199, at 2–3 (discussing changes the Senate has made to the rules).

including for election-related crimes,[330] bribery,[331] and receipt of illegal gratuities.[332] Moreover, as evidenced by the long history of perjury prosecutions, oaths are regularly enforced.[333] The fact that the senatorial impeachment oath is not yet enforced is a privilege extended to senators; having been abused, it is time to consider removing that privilege.

A perjury-like *law* would allow for the prosecution of oath-breaking senators and would perhaps be the most effective means of enforcing the senatorial impeachment oath. But such a law raises constitutional questions and might hinder impeachment trials. A more manageable proposal would be to reform the senate's impeachment *rules*.[334] Rule changes would not likely raise constitutional concerns and could still render the impeachment oath enforceable. Though rules are weaker than laws because rules allow only self-policing within the Senate, changes to the Senate impeachment rules could still be better than the status quo.

The viability of either proposal is partly a function of how Democrats and Republicans understand the political risks of enforcement.[335] But as demonstrated in Part II, the three most recent presidential impeachment trials featured oath-breaking by senators of both parties.[336] One model for the type of political neutrality necessary to enact either proposal is John Rawls's veil of ignorance.[337] Rawls develops his theory of justice by hypothesizing about the political system that would be developed by "free and equal persons" stripped of identifying information such as race, ethnicity, gender, and

330. *See generally* ELECTION CRIMES BRANCH - U.S. DEP'T OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES 2–5 (Richard C. Pilger ed., 8th ed. 2017).

331. *See* 18 U.S.C. § 201(b) (2018) (federal bribery statute).

332. *See* 18 U.S.C. § 201(c) (2018) (federal gratuities statute).

333. *See, e.g.*, Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts*, 24 AM. J. LEGAL HIST. 145, 145–70 (1980) (exploring the history of the English Perjury Statute of 1563 and demonstrating that oaths have been enforced regularly throughout history); Silving, *supra* note 213, at 1381–90 (tracing the concept of perjury through history from "biblical law" to the modern, common law).

334. *See* discussion *infra* Section IV.C.

335. *See* GERHARDT, *supra* note 32, at xiii (discussing how Congress members' undertaking of political risks may impact the future of the federal impeachment process).

336. *See* discussion *supra* Section II.B.2.

337. *See* RAWLS, *supra* note 57, at 15, 86–87. Sunstein similarly appeals to such a model in his most recent book about impeachment. *See* SUNSTEIN, *supra* note 32, at 14–15 ("Try to put yourself behind a veil of ignorance, in which you know nothing about the president and his policies. You have no idea whether he would win your vote or your support. All you know about are the actions that are said to be a basis for impeachment. *If that is all you know, would you think that he should be impeached?*").

perhaps political allegiances.[338] (Rawls does not list partisanship among such traits, but it is at least compatible with how he envisions the veil.) If Democratic and Republican political leaders stand behind a veil of ignorance and weigh the options described below, those leaders will be able to better realize the ideals of impeachment envisioned in the Constitution.

A. Defining Impartiality

Before turning to either proposal, it will be helpful to define oath-breaking more clearly. What does it mean for a senator to be influenced by his or her party? How do we know when a senator has ceased to be impartial? Unlike perjury, in which the veracity of a witness's statements may be measured against real-world facts, impartiality is not so easily measured against an objective standard.[339] Both reform proposals—a perjury-like law and changes to Senate rules—require a workable definition of "impartiality."[340]

Concerns about defining "impartiality" are serious but not insurmountable. We regularly identify impartiality in other contexts. In *Irvin v. Dowd*, for example, the Court considered whether a juror had formed a "positive and decided opinion" about the case, ruling that those citizens with such opinions should be kept off juries.[341] According to the Court, the proper inquiry is "whether the nature and strength of the opinion formed [by the juror] are such as in law necessarily . . . raise the presumption of partiality."[342] As with jurors, expressed opinions by Senators that suggest those Senators have already decided whether to convict or acquit before a trial would almost certainly call into question their impartiality.

338. *See* RAWLS, supra note 57, at 15, 86–87. Rawls writes that "[i]n the original position [from which he calls upon them to theorize a just political order], the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know persons' race and ethnic group, sex, or various native endowments such as strength and intelligence, all within the normal range." *Id.* at 15.

339. *See* Irvin v. Dowd, 366 U.S. 717, 724–25 (1961) ("Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." (quoting United States v. Wood, 299 U.S. 123, 145–46 (1936))).

340. *See, e.g.*, Kevin Graff, *To Be "Impartial" Must a Juror Reject His Own Life Experiences?*, 54 UIC J. MARSHALL L. REV. 627, 632 (2021) ("The definition of impartiality 'is not a static concept[] but can be defined only in relation to specific facts and circumstances.'" (quoting Farese v. United States, 428 F.2d 178, 179 (5th Cir. 1970))).

341. *Irvin*, 366 U.S. at 723.

342. *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 156 (1878)).

Impartiality, in the context of impeachment, can also be understood by what it lacks: prejudices and biases.[343] We might envision impartiality along a spectrum and focus our attention on the most brazen violations of that norm. At one extreme, when senators expressly indicate their biases before or during impeachment trials and indicate that their votes are functional on their partisan loyalties, they clearly violate rules of impartiality. Such behavior raises real questions about the abilities of those senators to "do impartial justice."[344] The other extreme—pure impartiality—exists only in theory. Imagine a hypothetical case in which, either by death or resignation, a Senate seat is vacant in the weeks before an impeachment trial.[345] At the very last minute, the seat is filled by an otherwise eligible senator who has no political background, partisan identification, or even knowledge of the facts surrounding the pending impeachment matter. Even if such a senator might make a poor congressperson generally, she would make a great juror in the impeachment trial.[346] The freshly appointed senator would embody the ideal of "impartial justice" that Hamilton envisioned.

Most impeachment trials will feature hard cases—those that lie along the spectrum between these two extremes.[347] Whether senators' statements and behavior imply unacceptable biases will not always be clear.[348] No senators will fit the hypothetical model of pure impartiality sketched above.[349] And

343. *See* BLACK'S LAW DICTIONARY 869 (Bryan A. Garner ed., 10th ed. 2014) (defining "impartial" as "[n]ot favoring one side more than another; unbiased and disinterested; unswayed by personal interest").

344. *See* Holman et al., *supra* note 131 ("Senators may enter the trial with predetermined views, but if they are to uphold their oaths, they cannot enter the trial with a locked-in conclusion based on partisanship, personal allegiance or political calculations.").

345. *See* Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 NW. L. REV. 1181, 1187 (2013) ("[T]he Seventeenth Amendment requires states to hold elections each time a seat becomes vacant. State legislatures may give governors permission to fill vacancies temporarily, but the people ultimately must elect a new senator.").

346. *See* Graff, *supra* note 340, at 632–33 ("A fair trial is generally interpreted as being conducted before unprejudiced jurors who are instructed by the judge as to the law and facts.").

347. *See, e.g.*, Totenberg, *supra* note 154 ("[Republican Senator] Lott and [Democratic Senator] Daschle sought to preserve the notion of neutrality at the trial and tried to separate themselves from the White House.").

348. *See* Graff, *supra* note 340, at 634 n.60 ("We have no psychic calibers with which to measure the purity of the prospective juror; rather, our mundane experience must guide us to the impartial jury promised by the Sixth Amendment." (quoting United States v. Nell, 526 F.2d 1223, 1230 (5th Cir. 1976))).

349. *See, e.g.*, *id.* at 628 ("[I]t is not possible for a court to erase the minds of each juror prior to trial or to instruct a juror to disregard their own life experiences.").

when the subject of impeachment is the President, almost all senators will have preexisting professional, if not also personal, relationships with that President.[350] But hard cases are nothing new in the American legal system.[351] Such cases require reasoned judgment.

Of course, not all biases or prejudices are problematic for the purpose of impeachment.[352] Meiring de Villiers draws a line between general and specific juror biases, only the latter of which are constitutionally proscribed.[353] General biases result from a person's background, including race, gender, religion, education, and more; those biases "exist independently of any specific knowledge of the case."[354] By contrast, specific biases—especially preconceived opinions about the outcome of a case—"violate the impartiality doctrine."[355] When senators import preconceived opinions about the validity of an impeachment, rather than weigh the evidence presented at the trial, those senators violate their impartiality oaths.[356] By tailoring impartiality in the impeachment context to focus primarily on the importation of preconceptions into impeachment trials, we avoid the need to assess other, contestable aspects of those trials.[357] The narrow focus on specific biases (especially those derived from party loyalties) enables us to target most accurately the behavior Hamilton derided in *Federalist No. 65*.

350. *See, e.g.*, Sean Sullivan & Seung Min Kim, *Trump and McConnell, Once Adversaries, Have Realized They Need Each Other*, WASH. POST (May 22, 2018), https://www.washingtonpost.com/politics/trump-and-mcconnell-once-adversaries-have-realized-they-need-one-another/2018/05/22/3a9aafb2-5aac-11e8-b656-a5f8c2a9295d_story.html (discussing President Trump and Senator McConnell's alliance and relationship formed well before President Trump's impeachment trial).

351. *See, e.g.*, Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Daniel Statman, *Hard Cases and Moral Dilemmas*, 15 L. & PHIL. 117 (1996).

352. *See, e.g.*, McGinnis, *supra* note 102, at 657 (claiming that senators must use political judgment in the impeachment process, which necessarily involves some bias or prejudice).

353. *See* Meiring de Villiers, *The Impartiality Doctrine: Constitutional Meaning and Judicial Impact*, 34 AM. J. TRIAL ADVOC. 71, 81–82 (2010).

354. *Id.* at 72, 82; *see also* James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 271 (1988) ("[A]ll adults have beliefs, values, and prejudices which make impartiality in the *tabula rasa* sense impossible.").

355. De Villiers, *supra* note 353, at 72–73.

356. *See* Holman et al., *supra* note 131 (claiming impartiality can only be achieved when "the trial is structured to air and evaluate all relevant evidence, without built-in favor for or prejudice against the president or impeached official").

357. *See, e.g.*, Bob Bauer, *The Trump Impeachment and the Question of Precedent*, LAWFARE (Jan. 16, 2020, 8:00 AM), https://www.lawfareblog.com/trump-impeachment-and-question-precedent (discussing the potential of a toxic precedent the House's impeachment of President Trump could establish).

Additionally, some aspects of "impartiality" are untenable in the context of impeachment trials. For example, although the impartiality of venire panels from which juries are drawn requires that potential jurors represent a fair cross-section of their communities,[358] the preselected nature of the Senate "jury" precludes such demographic representativeness for impeachment trials.[359] As a result, Senate impeachments will be conducted by a "jury" of old (64.3 years), white (88%) men (76%).[360] Likewise, we cannot expect the publicity of an impeachment trial to justify different treatment for the impeached party. In the federal criminal law context, publicity of an alleged crime is among the factors courts consider in evaluating requests for venue transfers.[361] By contrast, publicity is a hallmark of most impeachments—especially those of presidents—and the partiality concerns that publicity raises cannot be redressed through any constitutional mechanism. In short, to combat the partiality concerns raised by the unrepresentativeness of the Senate and the regular publicity of impeachment trials, we can rely only on the dignity and independence that Hamilton promised.[362] Those unresolvable defects amplify the importance of safeguarding the impartiality of the Senate during impeachment trials where possible; where specific biases can be checked, they should be.[363]

358. *See* Taylor v. Louisiana, 419 U.S. 522, 526 (1975) (ruling that "the presence of a fair cross[-]section of the community on venires, panels, of lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions").

359. *See* Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RSCH. CTR. (Jan. 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/ ("Although recent Congresses have continued to set new highs for racial and ethnic diversity, they have still been disproportionately [w]hite when compared with the overall U.S. population.").

360. JENNIFER E. MANNING, CONG. RSCH. SERV., R45583, MEMBERSHIP OF THE 116TH CONGRESS: A PROFILE (2020).

361. *See* FED. R. CRIM. P. 21 (providing for venue transfer under certain circumstances, including "prejudice against the defendant exist[ing] in the transferring district"). In *Skilling v. United States*, addressing the securities fraud prosecution of the former-CEO of Enron, the Supreme Court provided a set of factors to consider in evaluating change of venue motions: (1) "the size and characteristics of the community in which the crime occurred"; (2) whether news stories about the crime contained any "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"; (3) how much time had elapsed between the alleged crime and the trial; and (4), whether the jury's verdict indicated bias. Skilling v. United States, 561 U.S. 358, 382–84 (2010); *see also* United States v. Tsarnaev, 157 F. Supp. 3d 57, 59 (D. Mass. 2016) (showing an application of the *Skilling* factors).

362. *See* THE FEDERALIST NO. 65 (Alexander Hamilton).

363. *See id.* ("What other body would be likely to feel [confidence enough in its own situation], to

The focus in this Part is on impartiality at a conceptual level, not at the evidentiary level.[364] We might subsequently have to decide what standards to apply in deciding the *admissibility* of statements or other evidence of oath-breaking.[365] But at least at this stage, we have assumed that all relevant sources of evidence are valid to the extent that they evidence potential oath-breaking.[366]

Again, impartiality exists primarily as an ideal.[367] Because senators will often know the subject of impeachment, the risks of partiality are much higher—especially when dealing with impeachments of presidents. If we impose venire-like rules for the excusal of senators with prior knowledge of the party or case, we would be left with an empty Senate chamber.[368] But even if difficult to achieve, the ideal of impartiality should guide reforms to the impeachment process. Senators should aspire to set aside their partisan and personal biases when they participate in impeachment trials.

B. Changing the Law

Now, consider the *legal* proposal: a perjury-like law criminalizing oath-breaking by senators.[369] If the primary purpose of such a law is to deter violations of the oath—in other words, to encourage senators to impartially conduct themselves in impeachment trials—we might imagine it to have several features. First, such a law must be enforceable, requiring some role by the executive branch. Because the targets of the law would be legislators, it would not make sense to leave the enforcement power in Congress. The

preserve, unawed and uninfluenced, the necessary impartiality between an [individual] accused, and the [representatives of the people, his accusers]?").

364. *See id.*; *see also* Neumann, *supra* note 14, at 316 (noting that senators are not bound to a particular evidentiary burden of persuasion).

365. *See supra* text accompanying note 138.

366. *See* GERHARDT, *supra* note 32, at 117 ("[T]he House and the Senate ought to hear and consider *all* evidence which seems relevant, without regard to technical rules." (quoting CHARLES L. BLACK JR., IMPEACHMENT: A HANDBOOK 18 (1974))).

367. *See, e.g.*, 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 528 (1833) ("The great objects to be attained in the selection of a tribunal for the trial of impeachments are impartiality, integrity, intelligence, and independence.").

368. *See supra* notes 268–72 and accompanying text.

369. This proposal would have to take the form of a *statutory* law. Common law crimes (including perjury) cannot be prosecuted at the federal level. *See* United States v. Hudson, 11 U.S. 32, 34 (1812) (holding that "all exercise of criminal jurisdiction in common law cases" must be "derived from statute").

law would thus be more analogous to a criminal law than to an impeachment rule.[370] Alone, this feature should be uncontroversial. Most laws—whether criminal or civil—are enforced by the Executive, whose constitutional duty is to "take [c]are that the [l]aws be faithfully executed."[371]

Second, such a law would ideally grant independent authority to the enforcing body.[372] Many, though not all, impeachments involve the President.[373] Though the primary subjects of the law would be senators, there is a concern that a president facing an impeachment trial might use the law to launch an ancillary attack on the impeachment process.[374] As such, the law would be ineffective unless insulated from the White House.[375]

An independent counsel is one possibility. Use of an independent investigating body was upheld in *Morrison v. Olson*, in which the Court addressed the constitutionality of the Ethics in Government Act of 1978.[376] The Ethics in Government Act allowed for the appointment of independent counsel to prosecute statutorily defined parties.[377] Most importantly, the independent counsel could only be removed for "good cause," thus insulating her from political pressures.[378] Unlike the Ethics in Government Act, which conferred some discretion to the Attorney General as to whether to appoint an independent counsel, we might envision that the law proposed here would be triggered automatically anytime articles of impeachment were submitted to the Senate.[379] In such a case, a special court (as under the Ethics in

370. *See, e.g.*, 18 U.S.C. § 1621 (2018) (describing perjury and its criminal penalties).

371. U.S. CONST. art. II, § 3; *see* Kent et al., *supra* note 235, at 2113.

372. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 661–62 (1988) (providing a similar enforcing body, the independent counsel, an independent base of authority for its prosecutions).

373. *See Art.II.S4.1.1 Impeachment and Removal from Office: Overview*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S4-1-1/ALDE_00000282/ (last visited Sept. 12, 2021) ("Congress has most notably employed the impeachment tool against the President and federal judges, but all federal civil officers are subject to removal by impeachment.").

374. *See, e.g.*, William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1198 (1999) (describing how President Clinton implied the impeachment process was illegitimate by insinuating the independent counsel was "out to get him").

375. *See id.* at 1214 (observing that Article III jurisdiction depends on whether Congress has insulated a position "from direct presidential control").

376. *See Morrison*, 487 U.S. at 660.

377. *See id.* at 661–62.

378. *Id.* at 663. The Act also allows for removal for "physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.*

379. *See* Benjamin J. Priester, Paul G. Rozelle & Mirah A. Horowitz, *The Independent Counsel Statute: A Legal History*, 62 L. & CONTEMP. PROBS. 1, 12–13 (1999) (discussing the Attorney General's discretionary coverage powers under current law).

Government Act, such a court could consist of three judges of the U.S. Court of Appeals for the District of Columbia Circuit, appointed by the Chief Justice of the Supreme Court)[380] could be called on to appoint an independent counsel to monitor the impartiality of senators during the trial.[381]

An independent counsel would be well-equipped to enforce the senatorial impeachment oath.[382] William Treanor argues that "[t]he independent counsel is uniquely likely to investigate and prosecute high-level wrongdoing vigorously."[383] Both because of her mandate to specifically investigate senators during the impeachment trial and because of her safeguarded independence, an independent counsel would be especially qualified for the task of enforcing the oath.[384]

Historically, the institution of the independent counsel has faced criticisms.[385] Some, such as William Kelley, worry that the independent counsel "casts different components of the executive branch into the position of litigating against one another."[386] But when appointed for impeachment trials, the independent counsel functions as would any other check on one branch of government by another.[387] As long as the role of the independent counsel is to ensure "impartial justice" in an impeachment trial, there should be no litigation between the independent counsel and the President.[388]

Others, such as Michael Rappaport, have urged a shift away from independent counsels to greater use of congressional investigations.[389] Such a recommendation would be inappropriate here for the same reason that

380. *See* 28 U.S.C. § 593 (2018); Priester et al., *supra* note 379, at 12 (describing the process by which an independent counsel is appointed).

381. *See* 28 U.S.C. § 49 (2018) (describing the Ethics in Government Act's process for creating a special court).

382. *See* William Michael Treanor, *Independent Counsel and Vigorous Investigation and Prosecution*, 61 L. & CONTEMP. PROBS. 149, 149 (1998) (stating that an independent counsel, because not appointed by the President or Attorney General, will be able to "pursue potential criminality fearlessly," and thus enforce impartiality).

383. *Id.*

384. *See id.*

385. *See* Kelley, *supra* note 374, at 1199 (criticizing the use of independent counsels).

386. *Id.*

387. *See, e.g.*, *id.* at 1221 (discussing checks and balances in context of the Comptroller General).

388. *See, e.g.*, S. Res. 479, 99th Cong. (1986); *see also* Treanor, *supra* note 382, at 163 ("[T]he [i]ndependent [c]ounsel's institutional interest is simply with [their] own investigation, rather than with the full run of prosecutions brought by the government.").

389. *See* Michael B. Rappaport, *Replacing Independent Counsels with Congressional Investigations*, 148 U. PA. L. REV. 1595, 1595–96 (2000).

Kelley argued the independent counsel was inappropriate for investigating presidents. The practical difficulties of an intrabranch investigation—in this case, the investigation of Congress by Congress—make Rappaport's proposal unlikely to solve the problem. Moreover, if, as Rappaport suggests, the aim of congressional investigations would be to disclose information to the public, such investigations would do little more than highlight the flagrant oath-breaking by senators in recent impeachment trials.[390]

Still others, including Akhil Amar, lament the inability of independent counsels to actually function independently: "An ad hoc independent counsel must build an organization from scratch, and those who volunteer may have an ax to grind, since the target is known in advance."[391] The independence of the independent counsel is indeed of paramount importance.[392] Perhaps, however, such a concern would be lessened if the subject of the independent counsel's oversight were an impeachment trial. As the examples highlighted in Part II show, senators of both parties are prone to oath-breaking.[393] Unlike the investigation of a president, the target is *not* known in advance, and we might hope that there would be fewer people volunteering to aid the independent counsel for purely partisan reasons.[394] Additionally, the threat of judicial oversight (that judges might dispose of cases brought by a partisan or partial independent counsel) reduces the risk that independent counsels will succumb to partisan or personal loyalties.

Finally, and perhaps most importantly, the workability and desirability of a perjury-like law will partially depend on the constitutionality of such a law. After briefly proposing a constitutional basis for the law, I consider the two most likely constitutional hurdles: the Speech and Debate Clause and the Political Question Doctrine. While a perjury-like law would not clearly violate the Speech and Debate Clause, such a law would likely be struck down under the Court's current approach to political questions.[395]

The Constitutional Basis of a Perjury-Like Law. Text, structure, and history make clear that impeachment is a constitutionally protected process. Even the impeachment *oath* is expressly provided for in Article I.[396] The most

390. *Id.* at 1596.
391. Amar, *supra* note 99, at 296.
392. *See* Treanor, *supra* note 382.
393. *See* discussion *supra* Section II.B.2.
394. *Cf.* Amar, *supra* note 99, at 296.
395. *See* Nixon v. United States, 506 U.S. 224, 228–29 (1993).
396. *See* U.S. CONST. art. I, § 3, cl. 6.

obvious constitutional basis for a perjury-like law, therefore, is the Necessary and Proper Clause, which empowers Congress "[t]o make all [l]aws which shall be necessary and proper for carrying into [e]xecution . . . all other [p]owers vested by this Constitution in the [g]overnment of the United States."[397] As John Mikhail forcefully argues, that Clause's reference to those powers vested in the "[g]overnment of the United States" empowers Congress "to carry into execution all of the 'supreme *legislative*, executive, and *judicial* powers.'"[398] It is immaterial, for our purposes, whether we classify impeachment as a legislative or a judicial function; either way, Congress is authorized to protect that constitutional process.[399]

Despite an apparently clear constitutional basis, there are several objections that could be raised against such a law.

Objection 1: The Speech and Debate Clause. The Speech and Debate Clause states:

> [Congresspeople] shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their Respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.[400]

It serves to protect the independence and integrity of the legislative branch by protecting congresspeople from "executive or judicial intrusions into the protected sphere of the legislative process."[401]

A perjury-like impeachment law would not violate the Speech and Debate Clause for three reasons. First, both the text of the Constitution and surrounding records suggest that impeachment is different from regular congressional activity.[402] The Speech and Debate Clause applies only to

397. *Id.* at § 8, cl. 18.

398. John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1100 (2014) (emphasis added) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 163, 168 (Max Farrand ed., 1911)).

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

400. U.S. CONST. art. I, § 6, cl. 1.

401. TODD GARVEY, CONG. RSCH. SERV., R45043, UNDERSTANDING THE SPEECH AND DEBATE CLAUSE 1 (2017).

402. *Compare* U.S. CONST. art. I, § 3, cl. 6 (describing Senate impeachment proceedings as a trial), *with* U.S. CONST. art. I, § 7, cl. 1 (describing protections for speech and debate during congressional

congresspeople in "Attendance at the Session of their respective Houses,"[403] and impeachment is not a "session" of the Senate. The Constitution uses "session" to refer to Congress in its *legislative* function: in the Recess Appointment Clause, "session" refers to the next opportunity of the Senate to consider those presidential appointments made in the Senate's absence;[404] and in the Twenty-fifth Amendment, Congress is "required to assemble," in "session," to vote on whether the President is "unable to discharge the powers and duties of his office."[405] Impeachment, by contrast, is referred to as a trial: "[T]he Senate shall have the sole [p]ower to *try* all Impeachments," and the President is "*tried*."[406] This distinction accords with Hamilton's statement in *Federalist No. 65* that, for the purpose of impeachment, the Senate should take on a "judicial character."[407] Owing to the judicial function of the Senate during impeachment, statements made before and during an impeachment trial are not clearly protected by the Speech and Debate Clause in the same way as are statements made during the commission of the Senate's legislative functions.

Second, and relatedly, the Supreme Court has recognized clear limits to the congressional behavior protected by the Speech and Debate Clause. In *United States v. Brewster*, for example, the Court stated that those actions which are "political in nature rather than legislative" are not protected, including "news releases[] and speeches delivered outside the Congress."[408] A few years later, in *United States v. Helstoski*, the Court added that "[p]romises by a [m]ember to perform an act in the future are not [protected] legislative acts."[409] As both *Brewster* and *Helstoski* make clear, the behavior a perjury-like law would target—public statements demonstrating partiality; promises by senators (made outside the Senate chamber) to convict or acquit; and more—falls outside that which is protected by the Speech and Debate Clause. Such behavior is the type of "political . . . rather than legislative"

"sessions").

403. U.S. CONST. art. I, § 6, cl. 1; *see* Doe v. McMillan, 412 U.S. 306, 312 (1973) (noting that "[c]ongressmen and their aides are immune from liability for their actions within the 'legislative sphere'" (citing Gravel v. United States, 408 U.S. 606, 624–25 (1972))).

404. U.S. CONST. art. II, § 2, cl. 3.

405. U.S. CONST. amend. XXV, § 4.

406. U.S. CONST. art. I, § 3, cl. 6 (emphasis added).

407. THE FEDERALIST NO. 65 (Alexander Hamilton).

408. United States v. Brewster, 408 U.S. 501, 512 (1972).

409. United States v. Helstoski, 442 U.S. 477, 489 (1979).

conduct that may validly be criminalized.[410]

There is a third, even more obvious, solution to the problem presented by the Speech and Debate Clause. Even if we think senators' statements about an impeachment trial should be protected by that Clause, we can avoid that constitutional barrier by making the violation of the senatorial impeachment oath a felony. The Clause expressly excludes from its protection "[t]reason, *[f]elon[ies,]* and [b]reach[es] of the [p]eace."[411] If oath-breaking is a felony (and perhaps it should be, even for reasons beyond bolstering the law's constitutionality), the exception applies. Such an argument is complicated by the fact that the meaning of "felonies" has changed since the Founding.[412] As Justice Thurgood Marshall observed in 1976, "[A] felony at common law and a felony today bear only slight resemblance."[413] Common law felonies only covered "the most serious crimes," and perjury was not one.[414] But Marshall announced his position in a dissent, so if the Court's majority continues to adhere to a more expansive understanding of "felonies," a perjury-like law could survive as long as the law's threatened punishment exceeds one year.[415]

Objection 2: The Political Question Doctrine. A separate, and more serious, constitutional hurdle for a perjury-like law was set by the Supreme Court in *Nixon v. United States*.[416] In that case, the Court considered the impeachment of Walter L. Nixon, a federal district court judge in Mississippi.[417] After being criminally convicted for making false statements before a grand jury, Nixon was impeached by the House of Representatives and convicted by the Senate.[418] Nixon challenged the constitutionality of his conviction, arguing that the Senate's impeachment procedures—specifically, the rule allowing for a committee of senators (rather than the entire Senate) to

410. *Brewster*, 408 U.S. at 512 (clarifying the distinction between political and legislative behaviors and that those legislative behaviors should be protected, while political should not).

411. U.S. CONST. art. I, § 6, cl. 1 (emphasis added).

412. *See* United States v. Watson, 423 U.S. 411, 438 (1976) (Marshall, J., dissenting).

413. *Id.*

414. *Id.* at 439–40 (Marshall, J., dissenting); *see* Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 572–73 (1924) (describing perjury as a common law misdemeanor).

415. *See Watson*, 423 U.S. at 439 (Marshall, J., dissenting) (recognizing the contemporary definition of a felony as "[a]ny offense punishable by death or imprisonment for a term exceeding one year").

416. *See* Nixon v. United States, 506 U.S. 224 (1993).

417. *See id.* at 226 (considering Nixon's petition that the Court "decide whether Senate Rule XI . . . [violates] the Impeachment Trial Clause, Art I, § 3, cl. 6").

418. *See id.* at 227–29.

receive evidence in the trial—violated the Constitution.[419] But the Court did not even reach the merits of Nixon's challenge, holding instead that impeachment raises a nonjusticiable "political question."[420] Most relevant for this analysis is the Court's conclusion that the constitutional impeachment power was "textually committed" to the Senate.[421] As a result of that commitment, judicial review of the impeachment process is constitutionally limited.[422]

The Court wondered what sort of relief the judiciary could even offer in the impeachment context.[423] That concern may reflect the judiciary's perennial anxiety about intervening in political processes.[424] The Court's political and social capital is limited, and disruption of a high-profile impeachment conviction would certainly diminish much, if not all, of that capital.[425] Additionally, even if the Court's political and social capital was not at risk, it is not clear what remedies would be available in the impeachment setting. Even if the Court set aside a conviction and remanded the case back to the Senate for a new trial, the outcome of the trial would (likely) be the same.[426] Unlike in the normal criminal context, in which a new and different

419. *See id.* at 228.

420. *See id.* at 226, 228 ("[B]efore we reach the merits of such a claim, we must decide whether it is 'justiciable,' that is, whether it is a claim that may be resolved by the courts. We conclude that it is not.").

421. *Id.* at 228.

422. *See id.* at 228, 233.

423. *See id.* at 233.

424. *See* Baker v. Carr, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine.").

425. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 129–70 (1980) (discussing the limited political capital of the courts). Alexander Bickel's prudential formulation of the political question doctrine accounted for such practical concerns: "the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be" and "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 125–26, 184 (1962); *see* RICHARD H. FALLON, JR., JOHN MANNING, DANIEL MELTZER & DAVID SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 248–49 (Robert C. Clark et al. eds, 7th ed. 2015) (describing Bickel's prudential formulation of the political question doctrine).

426. *See* Geoff Drucker, Letters to the Editor, *What Role Does the Supreme Court Have in Impeachment?*, WASH. POST (Jan. 16, 2020), https://www.washingtonpost.com/opinions/what-role-

jury can be empaneled after a case is remanded, the impeachment jury is constitutionally fixed.[427]

The Court also worried that judicial review of impeachment rules and procedures would disrupt the finality of the impeachment process[428]: "[O]pening the door of judicial review to the procedures used by the Senate in trying impeachments would 'expose the political life of the country to months, or perhaps years, of chaos.'"[429]

The application of *Nixon* to the perjury-like law proposed here is not immediately obvious. On one hand, such a law would be an act of Congress and would thus accord with the *Nixon* Court's holding that impeachment was to be regulated *by Congress*.[430] Moreover, the finality of senatorial impeachment judgments would not be threatened by such a law: a perjury-like law would target oath-breaking senators, not the finality of the impeachment judgment itself.[431] We might imagine that only in extreme cases—for example, if a critical mass of senators were convicted of violating their oaths—would the finality of an impeachment trial actually be threatened.

But on the other hand, the creation of a parallel prosecutorial process, which would be ongoing before and during impeachment proceedings, might cast doubt on the outcomes of impeachment trials. To the extent that impeachment is most potent when quickly managed—while political will and public interest are highest—an independent counsel might unnecessarily delay the process.[432] Investigations and prosecutions can take months or

does-the-supreme-court-actually-have-in-regard-to-impeachment/2020/01/16/8a001454-3627-11ea-a1ff-c48c1d59a4a1_story.html (emphasizing that the "jury pool" would remain the same if "the Supreme Court could hypothetically reverse the decision of the Senate and remand with directions to hold a new trial"). Thus, "returning the case to the Senate would risk making a mockery of the court as the Senate might ignore the letter or spirit of [a hypothetical Supreme Court] decision." *Id.*

427. *See* U.S. CONST. art. I, § 2, cl. 6.

428. *See* Nixon v. United States, 938 F.2d 239, 245 (D.C. Cir. 1991), *aff'd*, 506 U.S. 224 (1993) (cautioning that "[t]he need for finality in impeachments" is "acute").

429. Nixon v. United States, 506 U.S. 224, 236 (quoting *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991)).

430. Part of the Court's holding that courts were not free to review impeachment procedures rested on the understanding that impeachment was "textually committed" to Congress, specifically the Senate. *Nixon*, 506 U.S. at 228. Passage of legislation accords with that textual commitment. *Id.*

431. *See Nixon*, 838 F.2d at 245 (discussing the paramount importance of protecting Congress's impeachment responsibilities textually committed to it by the Constitution and the "need for finality").

432. *See, e.g.*, Jeffrey Toobin, *Why the Mueller Investigation Failed*, NEW YORKER (June 29, 2020), https://www.newyorker.com/magazine/2020/07/06/why-the-mueller-investigation-failed (detailing how President Trump's lawyers "knew that Mueller's leverage, in political if not legal terms, would only dwindle with time").

years, lasting well beyond the public memory of the alleged wrongdoing that initiated the impeachment process.[433] The existence of an independent counsel would, at best, delegitimize the finality of impeachments by dragging the proceedings out for years. At worst, if allowed to pause or delay impeachment trials pending those separate investigations, such a law risks exacerbating existing impeachment problems by creating new avenues through which parties could disturb impeachment trials.[434] Looked at practically, a perjury-like law is prone to the very criticisms that made impeachment nonjusticiable in *Nixon*.[435]

In sum, although a perjury-like law might be constitutionally defensible as necessary to promoting the integrity of impeachment trials, and such a law would not run afoul of the Speech and Debate Clause, it would not likely survive scrutiny under the political question doctrine.

C. Changing Senate Rules

By contrast, changing the Senate's rules is more likely permissible under *Nixon*.[436] Rule changes reflect the reasoned judgment of the legislative branch and the Senate in particular—the body assigned the power to conduct impeachment trials—about how those trials should be regulated.[437] Any amendments to the Senate's rules would reflect the Senate's judgment about how to regulate the impeachment trial process, thus obviating the separation-of-powers concerns raised by Justice Rehnquist in *Nixon*.[438] Indeed, the *Nixon* Court expressly endorsed the Senate's rulemaking function in the impeachment context.[439]

433. *See, e.g.*, *id.*

434. For a discussion of other practical and legal barriers to what he calls "codifying constitutional norms" (a more general version of the legal proposal considered here), see Jonathan S. Gould, *Codifying Constitutional Norms*, 109 GEO. L.J. 703, 723–35 (2021).

435. *See* Nixon v. United States, 938 F.2d 239, 245–46 (D.C. Cir. 1991), *aff'd*, 506 U.S. 224 (1993).

436. *See* Nixon v. United States, 506 U.S. 224, 228 (1993) (noting that Article I, § 3 conferred sole power to the Senate to try impeachment proceedings).

437. *See* RICHARD S. BETH, CONG. RSCH. SERV., R42929, PROCEDURES FOR CONSIDERING CHANGES IN SENATE RULES 1 (2013) (noting that the "Constitution gives each house of Congress plenary power over its own rules," and thus confirming that rule changes are the avenue through which the Senate can express its political will).

438. *See Nixon*, 506 U.S. at 228 (describing the nonjusticiability standard under the political question doctrine, which stresses the importance of keeping the judiciary out of issues textually committed to other branches of the government).

439. *See id.* at 226, 238.

Senate rule changes might also resolve some of the temporal concerns presented by the law described above. If senators violate their oaths, they can be sanctioned relatively quickly.[440] Sanctions including, but not limited to, censure, removal from committee assignments, and reduction in staff resources can disincentive oath-breaking without requiring the more stringent procedural safeguards afforded to defendants that would prolong criminal prosecutions.[441]

In general, the Senate's ability to self-govern through rules is provided for in Article I of the Constitution, which guarantees that "[e]ach House may determine the [r]ules of its [p]roceedings."[442] It is through those rules (many of which are so technical and esoteric as to rarely register on the radars of even the most experienced Senate staffers) that the Senate conducts its day-to-day business. Current Senate rules govern everything from appointments of chairs to voting procedures.[443]

The Senate's impeachment rules are already quite robust.[444] They were amended as recently as 1986, although most of the rules still date back to the nineteenth century and were adopted in anticipation of the impeachment trial of President Andrew Johnson.[445] Current rules regulate, among other things, how the Senate receives and accepts articles of impeachment from House of Representatives managers and how senators can ask questions of witnesses during impeachment trials.[446] Senate rules also govern the administration of the senatorial impeachment oath—first to the "presiding officer" (usually the

440. *See, e.g.*, *About Censure*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/censure.htm (last visited Sept. 12, 2021) (noting that the Senate fully controls the sanctions process through which it may discipline a senator by formally censuring him or her for conduct that is "determined to be inappropriate or detrimental to the Senate").

441. *See United States Senate Election, Expulsion and Censure Cases*, U.S. SENATE, https://www.senate.gov/reference/reference_item/election_book.htm (last visited Sept. 12, 2021) (noting that a Senate censure requires a simple majority vote to reprimand a member); *see also* U.S. CONST. art. I, § 5, cl. 2 (providing that the Senate may "punish its Members for disorderly Behavior").

442. U.S. CONST. art. I, § 5, cl. 2.

443. *See generally* U.S. SENATE COMM. ON RULES & ADMIN., RULES OF THE SENATE, https://www.rules.senate.gov/rules-of-the-senate (last visited Sept. 12, 2021).

444. *See About Impeachment*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment.htm (last visited Sept. 12, 2021) (summarizing the impeachment trial procedure).

445. *See* S. Res. 479, 99th Cong. (1986); RYBICKI & GREENE, *supra* note 199, at 2–4 (describing the history of current impeachment trial rules); *see also* GERHARDT, *supra* note 32, at 33 (noting that the Senate's impeachment rules have "changed little since President Andrew Johnson's impeachment trial in 1866").

446. RYBICKI & GREENE, *supra* note 199, at 4–6.

Vice President or the President pro tempore), and then to the rest of the senators.[447]

Those rules, however, are quiet about the public conduct of senators before and during impeachment trials.[448] It is that conduct that has proven most problematic in recent decades, not only because the nature of congressional communications has shifted with the growth of television-based newscasting and the advent of social media but also because perceptions about partisanship have become especially pronounced.[449] When the Senate considered amendments to its impeachment rules in 1974, a committee appointed to make recommendations to the full body concluded that future amendments "should be proposed only *with the most valid justification*."[450] It is generally good that the Senate's rules are rigid and unchanging.[451] But as the preceding analysis in this Article demonstrates, the standard has been met and rule changes are warranted if those changes can successfully target the pernicious partisanship denigrating recent impeachment trials.[452]

Compared to the difficulty of passing a law—which requires majority votes in both houses of Congress and approval by the President—changing Senate rules is relatively simple.[453] Provided there is "one day's notice in writing,"[454] rules can be changed with a simple majority vote.[455] In *United States v. Ballin*, the Supreme Court affirmed that only the "presence of a

447. *See id.* at 6–7.

448. *See id.* at 7 (noting that, while senators take an oath to do "impartial justice," there are no other requirements that might temper a senator's behavior or speech related to an ongoing impeachment); *see also* Amar, *supra* note 99, at 307 (noting that senators are free to consult their constituents and often posture in the public forum).

449. *See* Domenico Montanaro, *Tracing the Roots of a Partisan Impeachment*, NPR (Dec. 19, 2019, 5:00 AM), https://www.npr.org/2019/12/19/789033023/tracing-the-roots-of-a-partisan-impeachment (comparing the more bipartisan impeachment of President Clinton to the more polarizing impeachment of President Trump).

450. RYBICKI & GREENE, *supra* note 199, at 4 (emphasis added) (quoting U.S. CONGRESS, SENATE COMMITTEE ON RULES AND ADMINISTRATION, AMENDING THE RULES AND PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS 20 (1974)).

451. *Cf.* Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646 (2014) (discussing some of the benefits of bright-line rules: "uniformity, predictability, and low decision costs").

452. *See supra* Section II.B.

453. *See* GERHARDT, *supra* note 32, at 152 (noting the ease with which the Senate may amend its rules).

454. SENATE COMM. ON RULES & ADMIN., *supra* note 443 (Rule V).

455. *See* RYBICKI & GREENE, *supra* note 199, at 10. The filibuster complicates this calculation. If a Senator filibusters a proposed rule change, a supermajority (two-thirds) of the Senate must vote to end that filibuster before the proposed rule can be voted on. *See* BETH, *supra* note 437.

majority" is constitutionally required for one House to "do [its] business."[456] Members of the first Senate in 1789 "approved 19 rules by a majority vote."[457] Though Senate norms have accommodated rules requiring greater-than-bare-majority votes to end filibusters (three-fifths requirement)[458] or to change the rules limiting filibusters (two-thirds requirement),[459] such higher vote requirements are apparently matters of convention rather than rigid rules.[460]

Even if a filibuster necessitates a two-thirds vote, such a vote should be attainable.[461] The integrity of the impeachment process is a bipartisan concern: presidents of both parties have faced impeachment trials in recent decades, and senators from both parties have exhibited the partial, oath-violating behavior that rule changes would be designed to address. While partisanship might be a problem during impeachment trials, it should not be with regards to setting the rules for trials *ex ante*, behind the Rawlsian veil of ignorance described above.[462] In short, both parties can benefit from rule changes.

To bolster the integrity of the impeachment process and ensure that senators "do impartial justice," the Senate's rules could be reformed in at least four ways. *First*, senators could be prohibited from ex parte interactions with the impeached party (and his or her staff) and the House impeachment managers concerning impeachment trials. Such a rule would prohibit the "total coordination with the White House counsel" that Senator McConnell promised before President Trump's first impeachment trial.[463] It would also proscribe interactions outside the trial setting with House impeachment managers. Such a rule would promote what Hamilton described as the "necessary impartiality between an [individual] accused[] and the

456. United States v. Ballin, 144 U.S. 1, 5–6 (1892); *see also* Martin B. Gold & Dimple Gupta, *The Constitutional Option To Change Senate Rules and Procedures: A Majoritarian Means To Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205, 209 (2004) ("[A simple] majority has exercised the Senate's constitutional rulemaking power to establish new precedents altering Senate procedure.").

457. 125 CONG. REC. 144 (1979) (statement of Sen. Byrd).

458. *See* SENATE COMM. ON RULES & ADMIN., *supra* note 443 (Rule XXII).

459. *See id.*

460. *See* James Wallner, *A Beginner's Guide to the Senate's Rules*, R ST. POL'Y STUDY 2 (Sept. 2017), https://www.rstreet.org/wp-content/uploads/2018/04/107-1.pdf.

461. *See* Lisa Mascaro, *EXPLAINER: What's the Senate Filibuster and Why Change It?*, AP NEWS (Mar. 17, 2021), https://apnews.com/article/joe-biden-politics-filibusters-f476940e279b6bc2a1bbfd7c5cc24f96 (observing that "[o]vercoming filibusters can take days, if not weeks, but . . . doing so is possible").

462. *See supra* text accompanying notes 342–43.

463. Benen, *supra* note 16.

[representatives of the people, his accusers]," limiting the interactions between senators and both groups.[464] And it would not preclude senators from discussing legislative matters—those unrelated to impeachment—with the impeachment party (such as a president) or House impeachment managers in their capacities as members of the House of Representatives.

A rule limiting senators' abilities to communicate with parties and their attorneys could mirror other rules designed to promote integrity in the Senate. Current conflict-of-interest rules prohibit retired senators who have become lobbyists from "lobby[ing] [m]embers, officers, or employees of the Senate for a period of two years after leaving office."[465] Other rules likewise regulate the abilities of senators to discuss confidential information—such as that received by the President or the head of an executive department.[466] Violations of confidentiality subject a senator to expulsion.[467] A rule limiting the ability of senators to engage with the parties to impeachment trials before and during such trials can be modeled on those other rules.[468]

Second, new procedures could expressly allow for the for-cause removal of senators violating the impartiality requirement.[469] Senators who make statements about their future votes *before* impeachment trials even begin—such as those by Senator Graham[470] and Senator Hirono[471]—are obvious contenders for removal. Senators do not have an inalienable right to participate in impeachment trials, nor do impeached parties have a right to trials by *all* senators; the Constitution commands only that "no Person shall be convicted without the Concurrence of two[-]thirds *of the Members present*."[472] If a senator, like a juror, were excused, she would not be counted

464. THE FEDERALIST NO. 65 (Alexander Hamilton).

465. SENATE COMM. ON RULES & ADMIN., *supra* note 443 (Rule XXXVII).

466. *See id.* (Rule XXIX).

467. *See id.*

468. *See supra* notes 448–50 and accompanying text.

469. During the impeachment of President Trump, Lawrence Lessig proposed the removal of partial Senators. *See* Lawrence Lessig, *Don't Allow McConnell To Swear a False Oath*, WASH. POST (Jan. 8, 2020), https://www.washingtonpost.com/opinions/dont-allow-mcconnell-to-swear-a-false-oath/2020/01/08/78bb70ae-3234-11ea-a053-dc6d944ba776_story.html; *see also* Jonathan Granoff, *Senator-Jurors Who May Not Be Impartial? Remove Them for Cause*, HILL (Jan. 21, 2020, 9:30 AM), https://thehill.com/opinion/judiciary/479095-senator-jurors-who-may-not-be-impartial-remove-them-for-cause (endorsing Lessig's removal proposal).

470. Itkowitz, *supra* note 133.

471. Mazie Hirono (@MazieHirono), TWITTER (Dec. 19, 2019, 12:17 PM), https://twitter.com/maziehirono/status/1207711526666358784.

472. U.S. CONST. art. 1, § 3, cl. 6 (emphasis added).

as "present," reducing the total number of votes necessary to convict the impeached party.[473] Just as jurors are removed for cause when they are clearly partial, senators should be removed if they make it clear that they will not be able to "do impartial justice" because of their biases or partisan loyalties.[474]

Third, either as an alternative or as an additional measure, the Senate can enable censure of oath-breaking senators.[475] Though censure does not remove a senator from office, it "can have a powerful psychological effect on a member and his [or] her relationships in the Senate."[476] As a result, throughout the history of the United States, only nine senators have been censured.[477] Expressly providing for the censure of oath-breaking senators would, one hopes, emphasize the gravity of senators' roles in impeachment trials and, separately, might provide a powerful deterrent to the most flagrant oath-breaking behavior.[478]

Finally, Senate impeachment trial votes could be conducted using a secret ballot.[479] There are obvious trade-offs to such a rule change, including the

473. *See* S. REP. No. 93–33, at 81 (1986) (noting that a vote of "two-thirds of the [m]embers present" is required to sustain an impeachment conviction).

474. *See* Lessig, *supra* note 469 (suggesting that the Chief Justice should forbid senators who make openly partisan comments from participating in an impeachment proceeding).

475. Censure is also available against impeached parties, such as the President. *See, e.g.*, Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 33–34 (1999) (defending the constitutionality of censuring presidents). Michael Gerhardt argues that "every conceivable source of constitutional authority—text, structure, original understanding, and historical practices—supports the legitimacy of the House's and/or the Senate's passage of a resolution expressing disapproval of the President's conduct." *Id.* at 34. During the impeachment trial of President Trump, Senator Joe Manchin proposed censuring the President. *See* The Hill Staff, *READ: Manchin's Proposed Senate Censure of Trump*, HILL (Feb. 3, 2020, 5:26 PM), https://thehill.com/homenews/senate/481268-read-manchins-proposed-senate-censure-of-trump. For an argument for the unconstitutionality of censure against presidents, see Jack Chaney, *The Constitutionality of Censuring the President*, 61 OHIO ST. L.J. 979, 979 (2000) ("[T]he use of censure as an alternative [to impeachment] is both dangerous and contrary to fundamental Constitutional principles.").

476. *Censure*, U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/Censure_vrd.htm (last visited Sept. 12, 2021).

477. *See id.*; *see also* Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 414 (1994) (noting that censure "has thus become a little used instrument for correction of legislative misconduct").

478. *See* JACK MASKELL, CONG. RSCH. SERV., RL75700, EXPULSION AND CENSURE ACTIONS TAKEN BY THE FULL SENATE AGAINST MEMBERS 26 (2008) ("Although there is no specific disability that automatically follows a censure by the Senate, the public reprobation and formal rebuke by one's peers in the Senate may have arguably contributed to the unsuccessful reelection efforts of Senators subject to censure in recent times.").

479. Douglas Kmiec defended this proposal around the times of both of President Trump's impeachment trials. *See* Douglas W. Kmiec, *Donald Trump Should Be Convicted Unanimously by*

reduction in the transparency of the process and the resulting loss of legitimacy.[480] But, especially where the person subject to impeachment commands substantial social or political capital, a secret ballot may better enable senators to vote according to their consciences—hopefully *impartially*—without fear of reprisal.[481] A secret vote (on a separate question) was held in the House of Representatives just days before the most recent impeachment trial, so such a mechanism is not entirely novel.[482]

Each of these proposed Senate rules would promote the integrity of the impeachment process by promoting the enforceability of the senatorial impeachment oath.[483] But rule changes are not a perfect solution. Senate rules are not enforceable through the courts, as would be a perjury-like law.[484] The judiciary promises independence that cannot be achieved through self-policing.[485] And just as the Senate can quickly change its rules to cure impeachment process defects, those rules can be reverted back to their

Secret Ballot, HILL (Feb. 8, 2021, 9:00 AM), https://thehill.com/opinion/white-house/537318-donald-trump-should-be-convicted-unanimously-by-secret-ballot; Douglas W. Kmiec, *Trump's Impeachment Trial Could Use a Secret Ballot*, HILL (Jan. 29, 2020, 9:15 AM), https://thehill.com/opinion/white-house/480294-trumps-impeachment-trial-requires-a-secret-ballot. Robert Reich defended the same general idea on Twitter. *See* Robert Reich (@RBReich), TWITTER (Jan. 25, 2021, 6:12 PM), https://twitter.com/RBReich/status/1353888482070913029.

480. *Cf.* Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, 26 J.L. & POL. 39, 39–45 (2010) (arguing that open voting by legislators is superior to secret voting because constituencies can observe those legislators' choices and hold them accountable).

481. *Cf.* Charles B. Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 MICH. L. REV. 181, 193–94 (1948) (observing that a voting-secrecy requirement may prevent reprisals against recalcitrant voters and, thus, may serve a social interest).

482. *See* Catie Edmonson & Nicholas Fandos, *House Republicans Choose to Keep Liz Cheney in Leadership Post After Her Vote To Impeach Trump*, N.Y. TIMES (Feb. 8, 2021), https://www.nytimes.com/2021/02/03/us/liz-cheney-vote.html.

483. *See* Benen, *supra* note 16; Granoff, *supra* note 469; Gerhardt, *supra* note 475; Kmiec, *supra* note 479.

484. Michael Gerhardt raises this concern after *Nixon*, wondering whether it would even be possible for the Senate to manufacture judicial enforceability through Senate rules. *See* Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After* Nixon, 44 DUKE L.J. 231, 267 (1994). As he observes, "[t]he settlement of this issue depends on whether the Senate has the power to waive its constitutional immunity from judicial review"—an unanswered question after *Nixon*. *Id.*

485. *See* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U PA. L. REV. 209, 212 n.9 (1993) (explaining that "even if judicial self-regulation is a permissible source of discipline, cumbersome procedures could drain judicial resources and outweigh any intended benefit, or substantive standards could encroach on the desired independence of the judiciary").

defective forms if the controlling party hopes to manipulate an impending impeachment trial.[486] As a result, allowing the Senate to self-police or requiring the Chief Justice to make decisions about enforcement during impeachments of presidents may not clearly change the status quo.[487] During the impeachment trial of President Trump, for example, Senator McConnell rebuffed calls to recuse himself.[488] It is not clear that a more formal removal proceeding, even one initiated by Chief Justice Roberts, would have yielded a different outcome.[489]

These proposals will also not address other deficiencies in the Senate's impeachment rules.[490] There are, for example, currently no clear rules of evidence or standards of proof for impeachment trials.[491] Some worry that senators "lack the requisite experience, expertise, or training to deal competently with impeachment matters"[492]—a clear rebuke of Hamilton's vision. But despite such apparent weaknesses, rule changes have the advantage of straightforward constitutionality, even after *Nixon,* and they are surely better than nothing.[493] Rule changes afford to senators the opportunities

486. *See, e.g.*, Turley, supra note 14, at 113 (explaining that "where factionalism has reigned in impeachment trials, such as the trial of President Clinton, it is notable that Senate trial rules were significantly altered to reduce open deliberation and debate").

487. *See generally* GERHARDT, *supra* note 32, at 266–69 (discussing Senate self-policing and rules enforcement).

488. *See* Zachary Evans, *Democratic Representative Calls on McConnell To Recuse Himself and Threatens Mistrial*, NAT'L REV. (Dec. 18, 2019, 8:51 AM), https://www.nationalreview.com/news/dem-rep-calls-on-mcconnell-to-recuse-himself-threatens-mistrial/. The chief advantage of a perjury-like law would be shifting enforcement and oversight to an independent authority.

489. *See* Frank Bowman, *The Role of the Chief Justice in an Impeachment Trial*, SCOTUSBLOG (Jan. 10, 2020, 11:18 AM), https://www.scotusblog.com/2020/01/the-role-of-the-chief-justice-in-an-impeachment-trial/ (explaining that, despite hopes that Chief Justice Roberts could transform Senate proceedings during the impeachment of former President Donald Trump "into a trial of the conventional judicial sort," such a transformation was highly unlikely).

490. These rule proposals would not target other areas of the impeachment process where greater clarity is needed. GERHARDT, *supra* note 32, at 114 ("The four most significant procedural issues raised in impeachment proceedings have been (1) whether a Senate impeachment trial is more like a criminal or civil proceeding for purposes of determining the appropriate burden of proof; (2) whether any special privileges apply to impeachment proceedings; (3) what rules of evidence, if any, should be applied in impeachment trials . . . ; and (4) the propriety of the Senate's using a special trial committee to take testimony and receive evidence.").

491. *See, e.g.*, *id.* at 42–44; Hilary Hurd & Benjamin Wittes, *Imagining a Senate Trial: Reading the Senate Rules of Impeachment Litigation*, LAWFARE (Dec. 2, 2019, 3:35 PM), https://www.lawfareblog.com/imagining-senate-trial-reading-senate-rules-impeachment-litigation.

492. GERHARDT, *supra* note 32, at 36.

493. *See* Nixon v. United States, 938 F.2d 239, 243–44 (D.C. Cir. 1991), *aff'd*, 506 U.S. 224 (1993)

and incentives to exhibit the independence, integrity, and dignity that the Founders envisioned.[494] The proposals above, and perhaps others, will enable future changes by promoting the "impartial justice" upon which impeachment trials must be premised.

The ambition of the above-described proposals—both the proposed law and the proposed Senate rules changes—is to deter oath-breaking by senators and thus to restore to the Senate the dignity and independence envisioned by the Founders. Just the prospect of being prosecuted or penalized would, one hopes, lead senators to "do impartial justice," as the oath demands.[495] The proposals, if enacted, would also help to insulate the impeachment process from outside pressures. Gerhardt concludes that the "principal challenge" for future impeachments will be overcoming the public, political pressures surrounding impeachment.[496] These proposals make it easier for senators to publicly justify their impeachment behavior, *and* they incentivize senators to conform their behavior to the gravity of impeachment.

The two proposals also address a separate concern that is often raised in the impeachment context: the preservation of due process for impeached parties.[497] The Fifth Amendment Due Process Clause promises that no one shall be "deprived of life, liberty, or property, without due process of law."[498]

("The rules clause provides at least indirect support for the view that the Senate's 'sole [p]ower to try all [i]mpeachments' includes the sole power to frame the rules it will follow in conducting such trials.").

494. *See* THE FEDERALIST NO. 65 (Alexander Hamilton) ("Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel [confidence enough in its own situation], to preserve, unawed and uninfluenced, the necessary impartiality between an [individual] accused, and the [representatives of the people, his accusers]?").

495. *See* S. Res. 479, 99th Cong. (1986); *see also* MASKELL, *supra* note 478.

496. *See* GERHARDT, *supra* note 32, at xiii ("[T]he principal challenge going forward with the impeachment process is that members of Congress are likely to feel tremendous pressure to forgo investigating a president with high approval ratings or substantial popularity. Likewise, members of Congress are likely to feel significant public resistance to forgo legislative business of concern to their constituents to address low-profile impeachable officials' misconduct. The future of the federal impeachment process depends on the resolve of members of Congress to treat their impeachment authority as one of their most important duties and to undertake some political risk for the sake of checking the most serious kinds of abuses by high-ranking executive and judicial officers who may not be meaningfully accountable through any other means.").

497. *See, e.g.*, Gene Healy, *Opinion: Trump's 'Due Process' Dodge on Impeachment*, L.A. TIMES (Oct. 25, 2019, 2:44 PM), https://www.latimes.com/opinion/story/2019-10-25/impeachment-donald-trump-due-process-inquiry (quoting President Trump's now-deleted tweet complaining that, "They can impeach the President without due process or fairness or any legal rights").

498. U.S. CONST. amend V.

The text of the Clause does not except impeachment trials from coverage,[499] and even if it did, the normative promise of due process—that all citizens should be procedurally safeguarded against arbitrary or capricious exercises of power—justifies its application. The promotion of impartiality is a modest step towards due process ideals. Even if not sufficient, the provision of a "neutral decision-maker" is necessary to the satisfaction of procedural due process.[500]

But it is possible that such proposals would have unintended consequences. Perhaps, for example, senators would become more discreet about their oath-breaking, refusing to speak publicly about impeachment trials to avoid prosecution or penalization. There are two possible responses to such a concern. First, silence by senators during impeachment might be a good thing, even if those senators are still quietly violating their oaths.[501] Even the *appearance* of impartiality would be a laudable objective if that appearance restores some legitimacy to the impeachment process. Second, and more significantly, if senators are being quiet about their partialities, one hopes that they will be able to more meaningfully discuss the substantive merits of the impeachment.[502] In this way, the law might indirectly foster more serious and solemn debate during impeachment trials by keeping the partisan considerations out of the conversation.

Another concern with the above proposals is that they may infringe on the protected rights of senators, as jurors, to vote according to their consciences. If senators believe an impeached party is guilty of the alleged misconduct but should not be removed from office, perhaps those senators *should* be allowed to nullify.[503] As a legal matter, jury nullification is derived from the jury's independence; the jury is revered and promoted as an institution *independent of* judges or legislatures.[504] Akhil Amar suggests that senators, like jurors, are

499. *See* GERHARDT, *supra* note 32, at 40 (noting that the Due Process Clause "makes no exceptions to its application to congressional actions; therefore the text appears to apply in *all* contexts, including impeachment").

500. *See id.*

501. *See generally* Cohen, *supra* note 42.

502. *See* Amar, *supra* note 99, at 314–15.

503. *See* Cohen, *supra* note 42 (considering whether senators might nullify their impeachment votes).

504. *See, e.g.*, Duane, *supra* note 255, at 6–7. Duane argues that this independence is a product of both the Sixth Amendment's "inviolable right to a jury determination" and the Fifth Amendment's Double Jeopardy Clause, which guarantees that "[e]ven where the jury's verdict of not guilty seems indefensible, that clause prevents the [s]tate from pursuing even the limited remedy of a new trial."

free to nullify: "Like any ordinary criminal juror, each [s]enator is free to be merciful for a wide variety of reasons—because she thinks the defendant has suffered enough, or because the punishment does not fit the crime, or because punishing the defendant would impose unacceptable costs on innocent third parties."[505]

But such a concern risks overstating the relationship between senatorial jurors and normal trial jurors.[506] Amar provides no basis—historical or otherwise—for such a relationship, and the senatorial jury is not derived from the same constitutional principles as the normal trial jury. In contrast to normal jury nullification, which is permissible (even if not encouraged), there is seemingly no basis for senatorial nullification.[507] There is no impeachment equivalent of the Double Jeopardy Clause and, as a result, no de facto senatorial independence to parallel the jury's traditional independence. The Senate's independence, described by Hamilton in *Federalist No. 65*, was intended to promote impartiality, not empower its avoidance.[508] In fact, the Senate was chosen to handle impeachments *rather than a jury* because the Senate was the institution most capable of "uninfluenced" judgment and "impartiality."[509] Nullification, or the exercise of senatorial "conscience," makes little sense as part of that constitutional scheme.

V. CONCLUSION

The constitutional impeachment process is broken. As envisioned, the Senate was expected to be the body "sufficiently dignified" and "sufficiently independent" to consider those serious charges brought against officers of the United States.[510] Since the early years of the republic, the Senate has imparted

Id.; *see also* CONRAD, *supra* note 256, at 7 ("The doctrine [of jury independence] states that jurors in criminal trials have the right to refuse to convict if they believe that a conviction would be in some way unjust.").

505. Amar, *supra* note 99, at 307.

506. *See* David Welna, *Are the Senators in the Impeachment Trial 'Jurors'—or Something Else?*, NPR (Jan. 22, 2020, 4:28 PM), https://www.npr.org/2020/01/22/798644714/are-the-senators-in-the-impeachment-trial-jurors-or-something-else (discussing the differences between senators in an impeachment trial and trial jurors).

507. *See generally* J. Richard Broughton, *Conviction, Nullification, and the Limits of Impeachment as Politics*, 68 CASE W. RSRV. L. REV. 275, 295 (2017) (discussing the legitimacy of senatorial nullification).

508. *See* THE FEDERALIST No. 65 (Alexander Hamilton).

509. *See id.*

510. THE FEDERALIST NO. 65 (Alexander Hamilton).

the importance of independence and dignity through the oath, taken at the beginning of every impeachment trial, to "do impartial justice."[511] Behavior by senators in recent impeachment trials demonstrates a willingness to break that oath.

This Article considers several avenues for reform. Drawing on literature and case law addressing other common oaths—juror oaths, oaths for public office, and witness oaths—I considered the constitutionality of a perjury-like law that would allow for the prosecution of oath-breaking senators. Though such a law would have the advantage of making the oath to "do impartial justice" judicially enforceable, it would not clearly survive constitutional scrutiny under the existing political question doctrine. I next recommend several possible Senate rules: prohibiting senators from discussing impeachment trials with the prosecution (the House managers) or the defense (the party subject to impeachment or her staff) outside of the trial setting; allowing for the for-cause removal of senators with obvious partial or partisan motives; expressly providing for the censure of senators who violate their oaths; and using a secret ballot for impeachment votes. While not judicially enforceable, such rules might be enough to restore the impeachment process to its constitutional pedestal.

511. *Id.*; *see* discussion *supra* Section II.C.