MISUNDERSTOOD PRECEDENT: ANDREW JACKSON AND THE REAL CASE AGAINST CENSURE

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Confronted with allegations of perjury, obstruction of justice, and other misconduct committed by President Clinton,[1] members of the 105th and 106th Congresses battled mightily over the constitutionality of not only impeachment, but also an alternative method of punishment: censure.

Unlike impeachment, however, censure has no obvious constitutional home. The debate over its legality thus centers primarily on historical practice, rather than constitutional text.[2] After all, in cases of constitutional ambiguity, a well-

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1. *See generally Referral to the United States House of Representatives Filed in Conformity with the Requirements of Title 28, United States Code, Section 595(c)*, H.R. DOC. NO. 105-310 (1998), *available at* http://thomas.loc.gov/icreport.

2. *See* Jack Maskell, *Censure of the President by the Congress*, Congressional Research Service 98-843A (1998); Sean Scully, *Congress Censured Three Sitting Presidents*, WASH. TIMES, Feb. 9, 1999, at A9, *available at* 1999 WL 3077572; 145 CONG. REC. S1665-66 (daily ed. Feb. 12, 1999) (statement of Sen. Feinstein). Each of the historical precedents cited therein is discussed and analyzed in this Article.

established pattern of historical practice involving deliberate actors operating conscious of their constitutional constraints may affect our understanding of what the Constitution requires, forbids, and allows. As the Supreme Court has often noted, we may look past our own skepticism and to historical practice if over time there has developed an accumulated wisdom as to what the Framers of the Constitution must have intended.[3]

Impeachment watchers thus will recall that censure supporters and opponents alike cited the 1834 Senate resolution against President Andrew Jackson[4] to bolster their

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3. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 790 (1983) (upholding state legislatures' use of chaplains against Establishment Clause challenge). The *Marsh* Court wrote:

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . [But] there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.

Id.; *see also* Myers v. United States, 272 U.S. 52, 136 (1926) (concluding that the Constitution gives the President authority to remove executive officers at will, without congressional approval, noting that "this was the decision of the First Congress, on a question of primary importance in the organization of the Government, made within two years after the Constitutional Convention and within a much shorter time after its ratification[,]" one that became "a final decision of the question by all branches of the Government."); McPherson v. Blacker, 146 U.S. 1, 27 (1892) (upholding appointment of presidential electors by district, stating that, "where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight"); Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (upholding practice of Supreme Court Justices riding circuit, for "practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature."). We generally do not defer to historical practice, however, when the requirements of the Constitution are easily discernible. For example, the Court in *INS v. Chadha*, 462 U.S. 919, 944-45 (1983), stated that

> the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies. . . . Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.

Id.; *cf.* Papachristiaon v. City of Jacksonville, 405 U.S. 156, 161, 168 (1972) (ruling that a Jacksonville ordinance and Florida statute, "derived from early English law," unconstitutionally vested "unfettered discretion" in government officials).

4. 10 REG. DEB. 1187 (1834).

constitutional arguments. Clinton allies who supported censure as a means of stemming the impeachment tide cited the Jackson episode as historical precedent.[5] Clinton detractors, perhaps out of fear that their adversaries' plan would work, cited the very same events as a lesson in what *not* to do, noting both the force of Jackson's arguments and his ultimate vindication when the Senate expunged the resolution three years later.[6]

Unnoticed by both sides, however, was the fact that the Senate did not actually censure Jackson. The resolution did describe the events in controversy and conclude that Jackson's act was improper, but it did not inflict any punishment. It did not remove him from office. It did not disqualify him from seeking future office. It did not fine him. And it did not condemn him with words of censure.

Throughout history Congress has commented on all manner of subjects through resolutions. The Senate was thus filling a well-established role—and nothing more—when it opined that Jackson had committed certain acts in violation of the Constitution and the laws of the United States: "*Resolved*, That the President, in the late executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both."[7] By approving this resolution senators simply recounted the events as they saw them and noted their disagreement with the legality of the President's actions, leaving it to others—historians, the American people—to determine Jackson's fate, and the state of his honor. The resolution merely described what the President had done; it did not indicate what, if anything, Congress would do in response, either in the form of words of condemnation and censure, or some other, more tangible disciplinary action.

By contrast, the resolutions contemplated by the 105th and 106th Congresses did not merely describe Clinton's actions and express congressional disapproval of them. Rather than restrict

5. *See, e.g.*, 144 CONG. REC. H12003 (daily ed. Dec. 19, 1998) (statement of Rep. Delahunt); *id.* at H12026 (daily ed. Dec. 19, 1998) (statement of Rep. Weygand).

6. *See, e.g.*, Thomas E. Baker, *There's No Basis for Censure*, L.A. TIMES, Sept. 16, 1998, at B7, *available at* 1998 WL 18874665; Bruce Fein, *Statesmanship or Gamesmanship?*, WASH. TIMES, Oct. 13, 1998, at A15, *available at* 1998 WL 3460806; Charles Krauthammer, *No Deal*, WKLY. STANDARD, Oct. 19, 1998, at 12; Victor Williams, *No Short Cut in Censure*, LEGAL TIMES, Sep. 21, 1998, at 32, 55.

7. 10 REG. DEB. 1187 (1834).

Congress to the role of commentator, the Clinton resolutions would have put members in the role of disciplinarian. Like the Jackson resolution, the Clinton resolutions recounted the various evil deeds committed by the President, such as "deliberately misle[ading] and deceiv[ing] the American people, and people in all branches of the United States government"[8] and numerous other wrongs. But the Clinton resolutions took a critical additional step by stating that "the United States Senate does hereby *censure* William Jefferson Clinton . . . and does condemn his wrongful conduct in the strongest terms."[9] Through those resolutions, members of Congress sought to inflict punishment upon the President, albeit with only words of condemnation and censure, rather than removal or fine.

The difference between commentary and disagreement on the one hand and condemnation and censure on the other is not merely a matter of expressive content; it has an important constitutional dimension as well. Unlike the descriptive resolution opposed by Jackson, the Clinton censure resolutions enjoy no historical pedigree. Thus, by allowing their adversaries to conflate the two, censure opponents squandered their strongest constitutional arguments. With no one pointing out the critical differences between censure and everyday congressional practice, the Washington political establishment had little trouble trivializing the legal objections to censure.[10] It is a subtle difference, and one of mere words to be sure, but it is an important difference nonetheless, between mere disagreement and discourse among public servants on the one hand, and an impugning of one's honor and integrity on the other.[11]

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8. 145 CONG. REC. S1666 (daily ed. Feb. 12, 1999).

9. *Id.* (emphasis added).

10. For example, during the House debate over the impeachment articles against President Clinton, Representative Joseph Moakley urged censure, arguing that "[t]he Republican-led House has considered numerous resolutions expressing its disapproval of individuals and their conduct." 144 CONG. REC. H12033 (daily ed. Dec. 19, 1998) (statement of Rep. Moakley); *see also* Laurie Asseo, *No Constitutional Basis for Split Impeachment Verdict*, ASSOCIATED PRESS, Jan. 28, 1999, *available at* 1999 WL 3112912 ("Congress can pass whatever resolutions it wants. It can declare National Pickle Week and it can censure the president."); Scully, *supra* note 2 ("Congress routinely expresses its opinion on foreign affairs and questions of policy in the form of 'sense of Congress' resolutions, which are not specifically authorized by the Constitution.").

11. *See* Bruce Fein, *When Events Breed Unwise Precedents,*, WASH. TIMES, Dec. 8,

This Article attempts to uncover the truth about the Jackson resolution and thereby recover the real constitutional case against censure. Part I analyzes the arguments from constitutional text and structure and concludes that there is no place in the Constitution for congressional censure of executive branch officials outside of an impeachment proceeding. Part II looks at the 1834 Senate resolution against President Jackson. Part III articulates the best approach to understanding what the Jackson episode does and does not stand for, and compares and contrasts it with previous and subsequent congressional practice. Finally, Part IV offers some parting thoughts, ultimately concluding that congressional censure of executive branch officials cannot be justified on the basis of constitutional text, structure, historical practice, or even policy, at least when conducted outside of an impeachment proceeding.

I. THE CONSTITUTION

We begin with the text of the Constitution. Article I, Section 7 of the Constitution expressly contemplates congressional authority to make resolutions.[12] Although the Constitution does not expressly give content to that power, throughout history Congress has used resolutions not only instrumentally to serve other, constitutionally enumerated purposes,[13] but also

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1998, at A14, *available at* 1998 WL 3465682.

> Many find authority for presidential censure in resolutions routinely voted by Congress voicing its opinion on current events, such as the need for free elections in Gabon or the contemptible slaying of James Byrd. But public policy resolutions do not specifically target the president; they do not stigmatize or cast aspersion on the incumbent; they do not directly seek to alter the political balance between the branches in favor of Congress (although some may do so in a minor degree).

Id.

12. U.S. CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").

13. Examples of instrumental uses of the resolution power include the Congressional Budget and Impoundment Control Act, 2 U.S.C. § 634 (1999) (concurrent budget resolutions to coordinate appropriations process), the War Powers Act, 50 U.S.C. §§ 1541-1548 (1996) (resolutions to restrain authority of President to engage military in hostilities without consultation of Congress), and resolutions of inquiry, *see* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS, 314-15 (4th ed. 1996) (resolutions to request factual information or documentation from executive branch).

to comment on various issues of the day.[14] Moreover, nothing in the Constitution expressly or implicitly forbids Congress from engaging in such commentary. This is not so with regard to censure resolutions, however.

The Constitution expressly authorizes Congress to punish federal officials. For example, each House is authorized to punish *its own members*.[15] On various occasions, Congress has exercised that power and punished individual members of Congress by approving censure resolutions.[16]

The only express authority to punish *executive and judicial officers*, however, is found in the impeachment clauses.[17] Therefore, if the Constitution allows congressional censure of executive branch officials at all, it is allowed only if the procedural requirements of impeachment are met. Under the traditional approach to impeachment, Article II, Section 4 of the Constitution, which requires removal from office upon "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors," operates as a limit on the scope of the impeachment power.[18] Professor Joseph Isenbergh and others, however, would read Article II, Section 4 as merely a mandatory minimum sentencing provision for the specified offenses. Under this view, the impeachment power

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14. *See* BLACK'S LAW DICTIONARY 1310 (6th ed. 1990) (defining resolution as a "formal expression of the opinion or will of an official body . . . ."). Though uncontested today, the congressional power to express opinion through resolutions was once the source of contention. *See* 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1569 (1907) (noting the 1809 House debate).

15. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

16. *See infra* note 84.

17. *See* U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6-7; *cf.* Joel B. Grossman & David A. Yalof, *The Day After: Do We Need a "Twenty-Eighth Amendment?"*, 17 CONST. COMMENTARY 7 (2000) (advocating a constitutional amendment explicitly conferring censure power upon Congress).

18. *See, e.g.*, CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 25 (1974); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 278-80 (1997); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 103-11 (1996); RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT ANDREW JOHNSON 98-100 (1992); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 99-100 (1992); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 794 (Cambridge, Mass., E.W. Metcalf and Co. 1833).

both permits impeachment for lesser offenses, and contemplates penalties lesser than removal, such as censure.[19]

To give censure proponents the benefit of the doubt, this Article shall, for purposes of argument, assume the validity of the Isenbergh position.[20] But even under that view, without the consent of a majority of the House *and* two-thirds of the Senate, Congress may not censure the President, any more than it can fine him.[21] Just as Article I, Section 7 implicitly forbids a single House from enacting legislation by requiring the agreement of both Houses and the President to do so,[22] the impeachment clauses forbid a single House from punishing an executive official by requiring the approval of both Houses.[23] The

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19. *See* Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 39 OCCASIONAL PAPERS L. SCH. (1998), *available at* http://www.law.uchicago.edu/Publications/Occasional/; Joseph Isenbergh, Note, *The Scope of the Power to Impeach*, 84 YALE L.J. 1316 (1975); Douglas W. Kmiec, *Convict, But Don't Remove, Clinton*, WALL ST. J., Jan. 29, 1999, at A14; *see also* BLACK, *supra* note 18, at 12-13 ("There may be a question whether [the penalty of removal under Art. II, § 4] is absolutely mandatory, with no possibility of distinctly lesser action, such as reprimand."). *But see* Robert H. Bork, *Read the Constitution: It's Removal or Nothing*, WALL ST. J., Feb. 1, 1999, at A21 ("If there were anything to the Isenbergh-Kmiec theory, it should have been mentioned in the history of the founding. But one looks in vain in the Federalist Papers, Farrand's Records of the Convention, the ratifying debates, or anywhere else for support for their unique hypothesis.").

20. Because of congressional immunity, it is unlikely that the federal courts will ever entertain the question. *See* Pietrangelo v. United States Senate, 210 F.3d 372 (6th Cir. 2000), *cert. denied*, 120 S. Ct. 2721 (2000) (dismissing suit for declaratory relief alleging that the Senate breached its duty to convict and remove President Clinton, on grounds of congressional immunity under Article I, Section 6).

21. Similarly, Congress derives the power to fine its own members and the power to censure them from the same constitutional clause. *See* U.S. CONST. art. I, § 5, cl. 2; *see also* 143 CONG. REC. H192 (daily ed. Jan. 21, 1997) (statement of Rep. Hobson).

22. U.S. CONST. art. I, § 7; *see also* INS v. Chadha, 462 U.S. 919, 954-56 (1983).

> Amendment and repeal of statutes, no less than enactment, must conform with Art. I. . . . [W]hen the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. . . . . Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms. These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified; none of them authorize [one-House congressional vetoes].

Id.

23. U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); U.S. CONST. art. I, § 3, cl. 3 ("The Senate shall have the sole Power to try all Impeachments . . . . When the President of the United

restrictive effect of applying such vote requirements to the censure power is plain. Indeed, had those requirements been imposed upon the 1834 resolution against President Jackson, that resolution would have failed at the hands of the Democratic majority in the House.[24]

Moreover, not only is there no textual defense for inter-branch censure (at least not outside of the impeachment process), the Constitution expressly forbids it through its prohibition against bills of attainder.[25] For, as the Supreme Court has recognized on numerous occasions, the rule against bills of attainder prohibits all forms of legislative punishment, even that which merely condemns and censures but does not inflict a more tangible form of punishment.[26] One might even

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States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present."). For early arguments that the House alone cannot censure because it only has an accusatory function in impeachment, and that the Senate cannot censure without the House's prior consent, nor without risking the appearance of prejudging the controversy, see 13 REG. DEB. 503-04 (1837); 10 REG. DEB. 98 (1834); 10 ANNALS OF CONG. 551-52, 555-56 (1800); 3 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 73-77 (Government Printing Office 1896).

24. *See* 1 ROBERT C. BYRD, THE SENATE 1789-1897, at 128 (Mary Sharon Hall bicentennial ed., 1988).

> When the Twenty-Third Congress met in December 1833, the Democrats had a comfortable majority of 147 members in the House as opposed to 113 members representing the National Republicans, the Anti-Masons, the Nullifiers, and the States' Rights parties (all of which would soon loosely combine to makeup the Whig Party). In the Senate, however, the Clay, Calhoun, and Webster combination counted 28 senators on their side, while the Democrats had only 20. With this margin behind him, the masterful Henry Clay rose *in the Senate* to challenge Jackson on the bank issue.

Id. (emphasis added); *see also* Scully, *supra* note 2 ("Whigs in the Senate were forced to turn to censure because Democrats controlled the House and made clear they would not consider articles of impeachment.").

25. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed.").

26. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 144 (1951) (Black, J., concurring) ("the classic bill of attainder was a condemnation by the legislature following investigation by that body . . . ."); United States v. Lovett, 328 U.S. 303, 315-16 (1946) ("[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."); *see also* 4 ANNALS OF CONG. 934 (1794) (Rep. Madison, arguing that censure of certain political groups constitutes unlawful attainder) (cited in *McGrath*, 341 U.S. at 144 n.1 (Black, J., concurring)).

The prohibition on bills of attainder cannot be avoided on the grounds that a censure resolution is not a "bill," *see McGrath*, 341 U.S. at 144-45 (Black, J., concurring) (holding that executive action can constitute attainder), as some have argued, *see, e.g.*, Joseph I. Lieberman, *The One Reasonable Solution*, N.Y. TIMES, Nov. 29, 1998, at D9 ("[C]ontrary to the arguments some have made against censure, a censure resolution would not qualify as a bill of attainder—a law that legislatively determines guilt and imposes punishment—because it would neither

argue that censure unconstitutionally interferes with the President's pardon power[27] by imposing punishment "beyond the reach of executive clemency."[28] (And contrary to conventional wisdom,[29] federal courts *do* have power under Article III to adjudicate claims of injury to personal reputation alone.[30])

Of course, not all constitutional powers are explicitly mentioned in the text; some may be structurally inferred from or read into the Constitution through the Necessary and Proper Clause.[31] For example, Congress has an implied power to investigate,[32] to hold individuals in contempt of Congress for failing to comply with congressional subpoenas,[33] and to publicize the results of congressional findings.[34] These powers, though not enumerated in constitutional text, are nevertheless conferred by the Constitution because they are employed instrumentally in exercise of an expressly enumerated power—whether that of impeachment or enacting legislation.

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be a law nor impose any specific punishment."); *cf.* Bruce Fein, *Will Senate Jurors Let Clinton Walk? Fie on Censure*, WASH. TIMES, Jan. 5, 1999, at A12, *available at* 1999 WL 3075053 ("The censure of President Clinton apparently contemplated by the Senate . . . would not be a 'law' under the necessary and proper clause."). After all, the First Amendment applies to resolutions and other state actions that do not directly constitute "lawmaking." *See* Barenblatt v. United States, 360 U.S. 109, 126 (1959); Watkins v. United States, 354 U.S. 178, 196-97 (1957); CURRIE, *supra* note 18, at 12.

27. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

28. *Ex parte* Garland, 71 U.S. (4. Wall.) 333, 381 (1866) ("It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency."). Of course, the Constitution expressly excepts "Cases of Impeachment" from the pardon power. *See supra* note 27.

29. *See* Fein, *supra* note 26 ("Congressional censure of a president has never confronted a constitutional test in the courts. The issue is probably nonjusticiable, but Congress is saddled, nevertheless, with an independent duty to decide the question.").

30. *See, e.g.*, Spencer v. Kemna, 523 U.S. 1, 23-25 (1998) (Stevens, J., dissenting); Meese v. Keene, 481 U.S. 465, 472-77 (1987); James D. Harmon, Jr., *The Record for an Impeachment Appeal*, N.Y. L.J., Feb. 8, 1999, at 2 ("The President would seem to have as much of a right as did Adam Clayton Powell to challenge removal or censure.").

31. U.S. CONST. art. I, § 8, cl. 18.

32. *See* Barenblatt v. United States, 360 U.S. 109, 111-12 (1959); Watkins v. United States, 354 U.S. 178, 187, 200 (1957); McGrain v. Daugherty, 273 U.S. 135, 160-76 (1927); CURRIE, *supra* note 18, at 20-21, 163-64, 167-68; Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647, 657 (1996).

33. *See McGrain*, 273 U.S. at 160-76; Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).

34. *See Watkins*, 354 U.S. at 200 n.33.

But because its function is exclusively that of punishment,[35] if there exists a power to censure, it can be fairly inferred only from the provisions permitting each House to punish its own members and those providing for impeachment.[36]

Furthermore, the separation of powers principles that underlie our constitutional structure erect a strong presumption against inferring congressional power to inflict punishment on executive officials outside of the impeachment process. As President Jackson explained in his *Protest of the 1834 Senate Resolution*, we infer from constitutional silence the absence of power in one branch to interfere with the business of another:

> Under the Constitution . . . the powers and functions of the various departments . . . and their responsibilities for violation or neglect of duty are clearly defined or result by necessary inference. The legislative power is, subject to the qualified negative of the President, vested in the Congress of the United States, composed of the Senate and House of Representatives; the executive power is vested exclusively in the President, except that in the conclusion of treaties and in certain appointments to office he is to act with the advice and consent of the Senate; the judicial power is vested exclusively in the Supreme and other courts of the United States, except in cases of impeachment, for which purpose the accusatory power is vested in the House of Representatives and that of hearing and determining in the Senate. But although for the special purposes which have been mentioned there is an occasional intermixture of the powers of the different departments, yet with these exceptions each of the three great departments is independent of the others in its sphere of action, and *when it deviates from that sphere is not responsible to the others further than it is expressly made so in the Constitution.* In every other

35. *See, e.g.*, 144 CONG. REC. H12,037 (daily ed. Dec. 19, 1998) (statement of Rep. Boucher) (arguing that censure resolution is germane to debate over impeachment, noting that "the articles of impeachment have a fundamental purpose that is both remedial and punitive. The punitive language of the censure resolution is, therefore, not inconsistent with the fundamental purpose of the articles of impeachment.").

36. *See* Fein, *supra* note 26 ("[C]ensure would not seem 'necessary and proper' for carrying into execution the Senate power to try articles of impeachment. Indeed, its proponents concede that its purpose would be to circumvent a full trial and verdict.").

Likewise, Congress may investigate *only* in pursuit of the enumerated purposes of impeachment or legislation; it may not investigate solely for the sake of exposure. *See Watkins*, 354 U.S. at 200; CURRIE, *supra* note 18, at 20-21, 167-68.

> respect each of them is the coequal of the other two . . . without power or right to control or censure each other in the service of their common superior, save only in the manner and to the degree which that superior has prescribed.[37]

Indeed, that very same Senate of 1834 actually relied on separation of powers principles to repel Jackson's Protest of the resolution. When Jackson demanded Senate acknowledgment and publication of his Protest in the official *Senate Journal*, the Senate refused on the grounds that the Protest constituted inappropriate executive interference with the Senate's business. In the Senate's view, the Protest

> assume[d] powers in relation to the Senate not authorized by the constitution, and calculated, in its consequences, to destroy that harmony which ought to exist between the co-ordinate departments of the General Government; to interfere with the Senate in the discharge of its duties . . . and, finally, to destroy its independence, by subjecting its rights and duties to the determination and control of the Chief Magistrate.[38]

Inter-branch censure thus raises special constitutional concerns that are not triggered by *intra*-branch censure. Just as Congress enjoys express constitutional authority to censure its own members, the federal judiciary possesses express statutory authority to discipline its own members short of removal, with censure predominant among the available sanctions.[39] Concededly, judicial intra-branch censure, like inter-branch congressional censure of the executive, lacks an explicit constitutional underpinning. But *intra*-branch censure is traditionally regarded as a legitimate tool of internal management and self-discipline.[40] *Inter*-branch censure, by

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37. 3 RICHARDSON, *supra* note 23, at 71 (emphasis added).

38. 10 REG. DEB. 1395 (1834). The resolution ultimately approved by the Senate was substantially similar. *See id.* at 1712.

39. *See* 28 U.S.C. § 372(c)(6)(B)(v)-(vi) (1994).

40. *See* Williams v. Mercer, 783 F.2d 1488, 1505 (11th Cir. 1986) ("[T]he judicial complaint procedures, being ancillary to the administration of the courts, are duties which the Congress could properly confer upon the *judicial* rather than the *executive* branch."); BLACK'S LAW DICTIONARY 224 (6th ed. 1990) (defining censure as a "formal resolution of a legislative, administrative, or other body reprimanding a person, *normally one of its own members* . . .") (emphasis added). For an example of censure as practiced by international organizations, see Colum Lynch, *China Averts U.N. Human Rights Censure; U.S.-Sponsored Resolution Fails on Procedural Vote*, WASH. POST, Apr. 19, 2000, at A18, *available at* 2000 WL 19604392.

contrast, directly threatens separation of powers, as courts upholding intra-branch judicial discipline have expressly recognized.[41] Members of Congress have no more business censuring executive branch officials than the President has censuring members of Congress.

Lacking a textual foundation in the Constitution, the congressional power to censure executive officials (at least as exercised outside the impeachment process) therefore can be justified, if at all, only on the basis of historical practice. The most commonly cited historical precedent is the 1834 Senate action against President Jackson. As we shall see, however, that was merely a descriptive resolution. It was not censure.

II. ANDREW JACKSON

Jackson hated the Bank of the United States. He believed the Bank to be a

> "hydra-headed" monster, a monster equipped with horns, hoofs, and tail and so dangerous that it impaired "the morals of our people," corrupted "our statesmen," and threatened "our liberty." It bought up "members of Congress by the Dozzen," he ranted, subverted the "electoral process," and sought "to destroy our republican institutions. . . ." Such a fearsome beast must not roam the country at will, he declared, at least not while Andrew Jackson sat in the White House. There was only one thing for him to do: kill the brute, and the sooner the better.[42]

By ordering William Duane to exercise his exclusive authority as Treasury Secretary to withdraw the government's deposits from the Bank, and then installing Taney to the post when Duane refused,[43] Jackson crippled the Bank. The

41. *See* McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States, 83 F. Supp. 2d 135, 155 (D.D.C. 1999) ("[N]o other Branch could perform this essential function without raising serious separation of powers objections."); *Williams*, 783 F.2d at 1505-06 ("[F]ar more serious separation of powers objections would have arisen had these same powers been conferred upon a permanent agency in the executive (or legislative) branch.").

42. ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR: A STUDY IN THE GROWTH OF PRESIDENTIAL POWER 15 (1967).

43. *See id.* at 122-24; Letter from Andrew Jackson to William Duane (Sept. 23, 1833), *in* 5 CORRESPONDENCE OF ANDREW JACKSON 206 (John Spencer Bassett ed., 1931) ("[F]rom all of your recent communications as well as your recent conduct your feelings and sentiments appear to be of such a character that . . . I feel myself constrained to notify you that your further services as Secretary of the Treasury

withdrawal succeeded in eventually denying the Bank substantial working capital and undermining its status as an effective political lobby.[44]

Senator Henry Clay, the prominent Bank ally who had hoped that the President's first-term veto of the Bank Re-Charter Bill[45] would help Clay unseat Jackson in his 1832 bid for reelection,[46] was infuriated. As Clay saw it, Jackson had unconstitutionally interfered with Congress's power of the purse when he fired Duane.[47] Known for his fiery rhetoric, Clay declared: "The premonitory symptoms of despotism are upon us; and if Congress do[es] not apply an instantaneous and effective remedy, the fatal collapse will soon come on, and we shall die—ignobly die—base, mean, and abject slaves; the scorn and contempt of mankind; unpitied, unwept, unmourned!"[48]

But the severity of Clay's rhetoric outstripped his actions. The resolution he submitted for the Senate's consideration contained no penalty, expressed no congressional intent or desire to penalize, and made no mention of censure, condemnation, reproach, reproof, or reprobation. To the contrary, Clay's resolution simply recounted the events as witnessed by the Senate. It stated, "*Resolved*, That the President, in the late executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both."[49]

Moreover, of great significance to our inquiry into historical practice[50] is the fact that Clay and his allies did not argue that the Senate had the power to punish the President outside of the impeachment process. Rather, they defended only the Senate's power to comment on important issues of the day and to opine

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are no longer required.").

44. *See* MARQUIS JAMES, ANDREW JACKSON: PORTRAIT OF A PRESIDENT 384 (1937).

45. Jackson vetoed the Re-Charter Bill on July 10, 1832, four months before the election. *See* 2 RICHARDSON, *supra* note 23, at 576-91. For discussion of the events leading up to the veto, see generally JAMES, *supra* note 44, at 283-303; JEAN ALEXANDER WILBURN, BIDDLE'S BANK: THE CRUCIAL YEARS 5-6 (1967).

46. *See* JAMES, *supra* note 44, at 288.

47. Clay's argument would later lose in the Supreme Court. *See* Myers v. United States, 272 U.S. 52 (1926).

48. 10 REG. DEB. 94 (1833).

49. 10 REG. DEB. 1187 (1834).

50. *See supra* note 3 and accompanying text.

that the President was wrong. As Clay himself proclaimed the day before the vote: "The resolution was not judicial, either in its form or purposes. . . . The resolution was no way hostile to the President. . . . It was the right and the duty of the Senate to express an *opinion*, and the resolution was *nothing more*."[51]

To be sure, Jackson and his allies called the resolutions "censure" to bolster their opposition campaign.[52] In their view, it was enough that Clay and company had *intended* the resolution to be *perceived* as censure, whether or not the word had actually been used.[53] This strategy paid off just a few years later. In 1837, the Senate approved a resolution described in Gales and Seaton's *Congressional Debates* as expunging censure.[54]

It is of course a common and effective rhetorical tactic to exaggerate the inappropriate acts of one's political opponents to obtain maximum advantage. Undoubtedly, Jackson did not appreciate the Senate's factual claim that he had violated the law. Nothing on the face of the resolution, however, indicated censure. It did not contain language of condemnation, and its supporters did not advocate congressional authority to punish outside of impeachment authority.

The resolution also did not constitute a form of "indirect censure"[55]—a statement of gentlemanly disagreement and

51. 10 REG. DEB. 1172 (1834) (emphasis added); *see also* 13 REG. DEB. 433-34 (1837). Clay did refer to "censure" when he characterized the opposition's argument as prohibiting the Senate from "expressing *any opinion* which would imply the innocence or the guilt of an impeachable officer," forbidding "praise and approbation" as well as "censure or difference of opinion." *Id.* at 434 (emphasis added). However, this was merely a general argument in support of the Senate's right to opine, and not an argument specifically in favor of censure. Most importantly, these arguments were made in support of a resolution that did not in fact effectuate censure.

52. *See* 10 REG. DEB. 236, 274 (1834); 3 RICHARDSON, *supra* note 23, at 70-71.

53. *See* 13 REG. DEB. 440, 447 (1837); 3 RICHARDSON, *supra* note 23, at 73-74.

54. *See* 13 REG. DEB. 428 (1837). That resolution triggered a debate over whether expunging violates the Senate's constitutional duty under Article I, Section 5, clause 3 to "keep a Journal of its Proceedings." *Compare* 13 REG. DEB. 435-37 (1837) (Sen. Clay, declaring the act unconstitutional), and *id.* at 499-501 (Sen. Webster, declaring the act unconstitutional), *with id.* at 450-56 (Sen. Buchanan, declaring the act constitutional). A later attempt to expunge a resolution against President Buchanan would fail, though not on constitutional grounds. *See* CONG. GLOBE, 36th Cong., 1st Sess. 3136 (1860).

55. CONG. GLOBE, 36th Cong., 1st Sess. 2939 (1860) (Rep. Bocock stating, "General Jackson, however, was in an eminent degree tenacious of his rights and sensitive to invasions of his honor. He and his friends . . . regarded it as an indirect censure upon him.").

discourse, but with a perception, purpose, and effect of genuine censure and dishonor. It failed to suggest any unlawful *intention* on the part of Jackson, presumably the *de minimus* for any reasonable inference of condemnation. As Clay himself acknowledged, "I never have said, and never will say, that personally I acquitted the President of any improper intention. I lament that I cannot say it. But what I did say was, that the act of the Senate of 1834 is free from the imputation of any criminal motives."[56]

Similarly, Senator Southard proclaimed it "a solemn duty in Congress to express its strong condemnation," but only "of the *act*," and not the President himself,[57] a distinction that cuts against any claim of "indirect censure."[58] But perhaps most notably, even Thomas Hart Benton—Jackson's lead defender in the Senate—recognized that the resolution declared the Administration's justifications for its conduct "to be insufficient and unsatisfactory; *but did not say what was to be done . . .*"[59]

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56. 13 REG. DEB. 447 (1837); *see also* 13 REG. DEB. 435 (1837); 10 REG. DEB. 1172 (1834); 10 REG. DEB. 75 (1833).

57. *See* 10 REG. DEB. 197 (1834) (emphasis added). Compare these statements with the Senate's 1999 resolution to censure President Clinton. *See* 145 CONG. REC. S1666 (1999).

58. A much closer call is found in later resolutions by the Senate against Attorney General A.H. Garland in 1886 and by the House against U.S. Ambassador to Great Britain Thomas F. Bayard in 1896. Not only was condemnation of the acts of each the purpose of those resolutions, such condemnation was found within the text of the resolutions themselves. Of Attorney General Garland, the House held:

> *Resolved*, That the Senate hereby expresses its condemnation of the refusal of the Attorney-General . . . to send to the Senate copies of papers called for by its resolution . . . as in violation of his official duty and subversive of the fundamental principles of the Government and of a good administration thereof.

CONG. GLOBE, 49th Cong., 1st Sess. 2810 (1886).

The Senate was equally explicit in its condemnation of Ambassador Bayard:

> Thomas F. Bayard, ambassador of the United States to Great Britain . . . has committed an offense against diplomatic propriety and an abuse of the privileges of his exalted position . . . . In one speech he affronts the great body of his countrymen who believe in the policy of protection. In the other speech he offends all his countrymen who believe that Americans are capable of self-government. Therefore, as the immediate representatives of the American people, and in their name, we condemn and censure the said utterances of Thomas F. Bayard.

Id. at 3034. Assuming that these resolutions constitute indirect censure, and that indirect censure is equally offensive to the Constitution as direct censure, these resolutions nevertheless targeted executive officers inferior to the President, and not the President himself, for whom the strongest constitutional ammunition is most often reserved. *See infra* note 90.

59. 10 REG. DEB. 104 (1834) (emphasis added).

III. UNDERSTANDING JACKSON

Having examined the 1834 resolution against Jackson, this Article now puts it into context by comparing and contrasting it with the controversies surrounding Presidents Clinton and Buchanan, as well as some noteworthy episodes in congressional history.

A. Clinton and Buchanan

The 1834 resolution merely commented on what allegedly awful deeds the *President* had done. It did not indicate what *Congress* would do in response. In contrast, the 1999 Senate resolution contemplated by the 106th Congress did not merely state that President Clinton had "deliberately misled and deceived the American people, and people in all branches of the United States government," among other wrongs.[60] If the language had ended there, it would have constituted mere commentary, not censure, and would have fallen within the same tradition upheld by the Jackson resolution. Instead, the Clinton resolution would also have brought the Senate into action, stating that "the United States Senate does hereby *censure* William Jefferson Clinton . . . and does condemn his wrongful conduct in the strongest terms."[61]

Ultimately, neither chamber would officially censure Clinton.[62] In 1860, however, the House had reached a more stringent conclusion. It actually approved a resolution that not only criticized the actions of President James Buchanan, but also declared that "the President and Secretary of the Navy . . . have set an example dangerous to the public safety, and deserving the *reproof* of this House."[63]

During both the Clinton and Buchanan controversies censure supporters dubiously looked to the Jackson episode for justification. As demonstrated, the Jackson resolution did not

60. 145 CONG. REC. S1666 (daily ed. Feb. 12, 1999).

61. *Id.* (emphasis added).

62. In the House, Majority Leader Dick Armey successfully prevented the House from setting aside the four articles of impeachment and considering censure as a substitute. *See* 144 CONG. REC. H12039 (daily ed. Dec. 19, 1998) (statement of Rep. Armey). In the Senate, Senator Phil Gramm successfully blocked Senator Dianne Feinstein from bringing her censure resolution to the floor shortly after the close of the impeachment proceedings. *See* 145 CONG. REC. S1462 (daily ed. Feb. 12, 1999) (statement of Sen. Phil Gramm).

63. CONG. GLOBE, 36th Cong., 1st Sess. 2951 (1860) (emphasis added).

commence a new historical practice, for it was not genuinely censure. Even had Clay and his allies argued for this power in the Jackson case, it would have constituted mere dictum at best.

The Buchanan resolution did constitute censure. But it was unaccompanied by the kind of constitutional debate necessary to carry any authentic weight in our legal analysis.[64] There are, after all, moments in history when the Constitution is thoughtlessly violated. Far from justifying future transgressions, past constitutional violations ought to serve as a cautionary tale.

In fact, the constitutional arguments during the Buchanan controversy ran squarely *against* censure and were simply ignored by an unwitting majority blindly reliant on the Jackson precedent. For example, Representative Bocock urged his colleagues, "[F]rom the beginning of this Government down to the present time, such power [of censure] has *never* been exercised."[65] To distinguish the Jackson affair specifically, he explained, "[I]n this resolution there is no direct declaration of censure, and no impeachment of the motives of the President. It was simply a declaration that his act was not in conformity with the Constitution and laws of the land."[66]

Not only did the Jackson resolution fail to constitute censure, but the Senate never attempted to defend it as such. Thus, Bocock asked about Jackson's antagonists:

> Did the other side admit the censure and maintain the right? If so, the issue was fairly joined. But this they did not do. The southern Opposition leaders, at least, did precisely the reverse. They denied the censure and, by fair inference, yielded the right. . . . It is true that they claimed the right of either branch of the legislative departments to express its *opinion* of executive acts, whether constitutional or unconstitutional; but they did not claim the right to *censure* and punish, as is here proposed.[67]

Bocock concluded that the Jackson episode, unaccompanied by constitutional deliberation over censure, offered little

64. *See supra* text accompanying note 3.
65. CONG. GLOBE, 36th Cong., 1st Sess. 2939 (1860) (emphasis added).
66. *Id.*
67. *Id.* (emphasis added).

foundation for the Buchanan debate.[68] Even Jackson's opposition to the 1834 resolution, Bocock explained, had not transformed the congressional wording from a descriptive pronouncement to a censure: "General Jackson, however, was in an eminent degree tenacious of his rights and sensitive to invasions of his honor. He and his friends . . . regarded it as an indirect censure upon him."[69] Jackson might have been offended, but without a denunciation of malicious intent (as Clay himself acknowledged), the resolution was not even an indirect censure.[70]

Significantly, the majority never responded to Bocock's arguments. Somewhat surprisingly, they also decided not to reference another act commonly mistaken for censure, the 1842 adoption of a House committee report critical of President Tyler (which resembled Clay's denunciation of Jackson in 1834).[71] The House simply approved the Buchanan resolution without addressing Bocock's constitutional analysis, ignorantly relying on Jackson's resolution as the sole precedent.[72]

B. The Earliest and Most Recent Sessions of Congress

Representative Bocock's arguments are not the only pieces of historical evidence that acknowledge the distinction between descriptive resolutions and censure. In 1793, Representative William Giles introduced statements merely concluding, absent explicit words of condemnation, that Treasury Secretary Alexander Hamilton had illegally used federal funds.[73] By contrast, in 1794 Representative Thomas Fitzsimons introduced a resolution to express the House's "reprobation" against "Democratic societies" for making critical statements against the government.[74] Similarly, in 1800 Representative Edward

68. *See supra* text accompanying note 3.

69. CONG. GLOBE, 36th Cong., 1st Sess. 2939 (1860).

70. *See supra* note 56 and accompanying text.

71. *See* HOUSE JOURNAL, 27th Cong., 2d Sess. 1347-52 (1842). Similarly, Nixon censure proponents cited the experiences of Buchanan and Jackson, but not of Tyler. *See* 120 CONG. REC. H26820 (1974).

There was no need to distinguish an 1848 declaration that President Polk had prosecuted an "unnecessar[y] and unconstitutional" war, because the House ultimately decided not to opine. CONG. GLOBE, 30th Cong., 1st Sess. 95, 304 (1848).

72. *See* CONG. GLOBE, 36th Cong., 1st Sess. 2947-51 (1860).

73. *See* 3 ANNALS OF CONG. 900 (1793). For the House's debate, see *id.* at 899-905, 907-63. *See generally* CURRIE, *supra* note 18, at 164-68.

74. 4 ANNALS OF CONG. 899 (1794). The watered-down, non-censorious

Livingston thought President John Adams deserved "reproach" for usurping judicial power during the Jonathan Robbins affair.[75]

The House ultimately rejected all three resolutions, but members used constitutional arguments against censure only against the last two.[76] In 1793, by contrast, Hamilton supporters argued merely for some measure of due process, specifically for notice of the charges and an opportunity to respond;[77] they did not question the House's power to disapprove of Hamilton's conduct. The Hamilton resolutions, like the Jackson ones, simply found a violation of constitutional and statutory law. They did not punish with words of censure. Indeed, they did not even impute criminal intent.[78] At most, some members construed the resolutions to suggest that President Washington should fire him.[79] It was strong medicine for certain, but not for *Congress* to administer. Like the Clay resolution against Jackson, and subsequent resolutions in which Congress requested an officer's removal,[80] the Hamilton resolution,

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language ultimately enacted appears *id.* at 945. *See generally* CURRIE, *supra* note 18, at 189-92.

75. *See* 10 ANNALS OF CONG. 532-33 (1800). The resolutions were ultimately defeated. *See id.* at 595 (Committee of the Whole); *id.* at 618-20 (House). *See generally* Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2D 367, 369-73 (1999); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 995-96 (1998) (describing the scope of the Adams debate).

76. *See* 10 ANNALS OF CONG. 551-52, 555-56 (1800); 4 ANNALS OF CONG. 934, 945 (1794); 3 ANNALS OF CONG. 899-963 (1793).

77. *See* 3 ANNALS OF CONG. 902-03 (1793). The Supreme Court has consistently enforced constitutional rights against congressional investigations. *See* Barenblatt v. United States, 360 U.S. 109, 111-12 (1959); Watkins v. United States, 354 U.S. 178, 188 (1957); McGrain v. Daugherty, 273 U.S. 135, 156-58 (1927); *see also* Harmon, *supra* note 30 ("In his response to the summons to answer the articles of impeachment and in his Senate trial memorandum, the President claimed that the articles of impeachment violated his constitutional right to due process."); *cf.* Nixon v. United States, 506 U.S. 224, 248 (1993) (White, J., concurring) (enforcing constitutional rights against Senate impeachment trials); Jenkins v. McKeithen, 395 U.S. 411, 428 (1969) (enforcing constitutional rights against state investigative commissions).

78. *See supra* note 56 and accompanying text.

79. The ninth resolution directed "[t]hat a copy of the foregoing resolutions be transmitted to the President of the United States." 3 ANNALS OF CONG. 900 (1793). As one member explained, "[t]he object of this resolution went clearly to direct the President to remove the Secretary from office; the foregoing were to determine the guilt, the last to inflict the punishment . . ." *Id.* at 902.

80. *See, e.g*, 65 CONG. REC. S2245 (1924) (requesting removal of Navy Secretary Edwin Denby); CONG. GLOBE, 40th Cong., 1st Sess. 394-95 (1867) (requesting removal of New York Port Collector Henry A. Smythe). President Coolidge responded to the removal resolution against Secretary Denby by asserting that removal—other than by impeachment—was an exclusively presidential

proprio vigore, imposed no penalty whatsoever.

More recently, just months after the conclusion of the Clinton impeachment proceedings, Republican members of Congress—having just opposed censure on constitutional grounds—advocated a series of resolutions "[d]eploring the *actions* of President Clinton regarding granting clemency to FALN [Armed Forces of National Liberation] terrorists."[81] Like Senator Southard in 1834,[82] these Republicans implicitly distinguished between disagreeing with the President's conduct and actually censuring him. Neither side bothered to even raise the censure question, despite the vigorous debate that had taken place just months earlier.

IV. UNDERSTANDING CENSURE

With the constitutional text and the historical record now presented, a number of observations can be made. First, there is an important and principled distinction between descriptive resolutions and censorious ones. Second, there is an extensive historical practice of the former, but not of the latter. Finally, even were we to ignore the Constitution and congressional history and instead concern ourselves exclusively with practical considerations and policy arguments, the argument for censure is still uncertain.

A. Commentary vs. Censure

The difference between censure resolutions and descriptive resolutions necessarily involves subtle linguistic distinctions. That should in no way undermine the case against censure, for such semantic differences often have constitutional implications.[83] Moreover, similar battles over words are often fought in the halls of Congress[84] and even in the international

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prerogative. *See* 65 CONG. REC. S2335 (1924) (quoted in Myers v. United States, 272 U.S. 52, 170 (1926)).

81. S.J. Res. 33, 106th Cong. (1999) (emphasis added).

82. *See supra* note 57 and accompanying text.

83. Consider, for example, the constitutional prohibition on titles of nobility. U.S. CONST. art. I, § 9, cl. 8; *see also* CURRIE, *supra* note 18, at 34-35. Such distinctions also hold weight in the Establishment Clause context. *See* Wallace v. Jaffree, 472 U.S. 38, 58-60 (1985).

84. Congress draws even finer lines than that between censure and commentary when it exercises its express constitutional authority to punish its own members. In this context, Congress has distinguished between "censure" and the lesser penalty of "reprimand." *See* Rep. David L. Hobson, *Rules and Precedents Regarding*

arena as well.[85]

Most importantly, however, we *should* recognize that there is a significant difference between merely expressing respectful disagreement with someone's policy position or constitutional argument and impugning that person's honor. It may be contended that honor's value has been diminished by modern materialist notions that only consider tangible consequences (fines, removal, or disqualification). If this is true, honor's perhaps antiquated value is well worthy of resuscitation. In this era of declining political discourse, the restoration of honor in public service and a corresponding recognition that its practice in the executive branch is not vulnerable to congressional opprobrium (at least not outside the procedural safeguards of an impeachment proceeding) might find a receptive audience.

B. Historical Practice

Once one is equipped with an appreciation of the moral difference between censure and commentary, the legal distinctions fall quickly into place. This Article has attempted to present a constitutional and historical framework for approaching the legality of censure. Forced to confront the important distinction between disagreement and condemnation, censure advocates, lacking a firm footing in the Constitution itself, typically search for other sources of historical authority. When undertaken, this endeavor has proven to be confusing and indeterminate. For example, during the Clinton impeachment debate, Republicans and Democrats each claimed the other party's founder had supported their own arguments regarding censure.[86]

But there simply is no real historical evidence to support censure. Buchanan's censure lacked stated justification (other

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Disciplinary Sanctions, reprinted in 143 CONG. REC. H192 (1997). Thus Speaker Newt Gingrich was reprimanded, *see* 143 CONG. REC. H197, H234-35 (1997), despite clamoring by members of the opposing party for censure, *see, e.g., id.* at H234. Rep. Barney Frank's controversy yielded similar results, *see* 136 CONG. REC. H5645-59 (1990).

85. *See supra note* 40 and accompanying text (regarding China's efforts to avoid censure by the United Nations).

86. *Compare* 144 CONG. REC. H12,037 (daily ed. Dec. 19, 1998) (statement of Rep. Barr) (citing Jackson's arguments against censure), *with id.* at H12003 (statement of Rep. Delahunt) (citing then-Rep. Abraham Lincoln's support of a "censure" of President Polk).

than bare recitals of the Jackson episode). Other attempts at presidential censure—Adams in 1800, a second attempt on Buchanan in 1862,[87] Nixon in 1974,[88] and finally Clinton in 1998 and 1999[89]—all were rebuffed.[90] Action without any explanation or authority cannot qualify as precedent, especially when taken in isolation. As the Supreme Court just recently reminded us, deference to "naked dicta" is "simply not the way that reasoned constitutional adjudication proceeds."[91]

C. Proportionality

Nor are policy arguments, that unstable refuge for constitutional scholars, sufficient to overcome both text and history.[92] Censure proponents, nonetheless, have tended to sing the praises of proportionality,[93] urging it as the intermediate

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87. *See* CONG. GLOBE, 37th Cong., 3d Sess. 101-02 (1862).

88. *See* 120 CONG. REC. H26820, H27549 (1974).

89. *See* 145 CONG. REC. S1462, S1664-66 (1999); 144 CONG. REC. H12031-39 (1998); *see also* notes 60-62 and accompanying text.

90. On occasion there have been actual censures against other executive officials. *See* 2 HINDS, *supra* note 14, § 1571 (House censure of Secretary of War Simon Cameron). But they are of only limited precedential value, for the Executive's constitutional lawyers reserve their strongest ammunition for defending the Commander-in-Chief. For example, just months after the 1834 Jackson episode, the Senate approved a resolution stating (absent words of censure) that the Postmaster General had illegally borrowed funds without congressional authorization, without triggering any executive branch complaint of unconstitutional censure. *See* 10 REG. DEB. 1914-15 (1834); *id.* at 2120.

91. United States v. Morrison, 120 S. Ct. 1740, 1757 (2000).

92. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 944-45 (1983).

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . . [P]olicy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

Id.; *see also id.* at 958-59 ("[I]t is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency").

93. This argument wasn't made until the Nixon and Clinton impeachment episodes. During earlier censure fights, members divided primarily along the lines of innocence and guilt, and censure supporters focused their attention on proving the underlying misconduct. The misconduct of Presidents Nixon and Clinton, by contrast, was largely conceded by the end. Reversing roles, it was the President's *allies* who sought censure, as a means of avoiding impeachment proceedings. *See supra* notes 88-89. This result put the constitutional question squarely at issue for censure supporters at last, for there was nothing else to fight about.

alternative to impeachment and removal from office, the "political equivalent of capital punishment."[94] But although proportionality may well be a legitimate policy consideration at times, it is far from a compelling constitutional mandate. While it is unquestionably the people's concern whether Congress should remove an official from office, it is not clear that Congress ought to spend taxpayer funds and public time debating whether or not an official should be condemned.

Proportionality may also diverge with the interests of accountability and good government. If an impeachment proceeding is warranted, then the prospect of censure is distracting. It provides timid members of Congress with the opportunity to shirk their moral duty in favor of political expediency.[95] Conversely, if it is not appropriate, censure simply causes unnecessary inter-branch friction and threatens to undermine the successful prosecution of government functions.[96]

Finally, even assuming the merits of the policy arguments for censure, the interests of proportionality do not need to offend constitutional norms. For example, we could simply incorporate censure into the impeachment process itself and allow the Senate to consider it among a variety of available sanctions after the official has been fairly tried and convicted.[97]

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94. 144 CONG. REC. H11976 (daily ed. Dec. 19, 1998) (statement of Rep. Schumer); *see also* BLACK, *supra* note 18, at 17 ("Removal by conviction on impeachment is a stunning penalty, the ruin of a life."); Krauthammer, *supra* note 6.

Nixon sympathizers similarly argued for proportionality. *See* 120 CONG. REC. H26755, H26820 (1974).

95. *See* Michelle Mittelstadt, *Texas Senators Craft Leading Roles on Censure, Final Deliberations*, ASSOCIATED PRESS, Feb. 8, 1999, *available at* 1999 WL 3115759 ("For his part, Sen. Phil Gramm is vowing to block a move toward censure of the president's conduct, dismissing such a resolution as an unconstitutional 'covering-your-fanny' strategy that could irrevocably muddle the separation of executive, legislative and judicial powers.").

96. *See id.* ("'Censure establishes a new precedent which will invite punishment through censure every time a Supreme Court justice's ruling displeases one party or another, or an administration official offends Congress . . .' [Sen. Gramm said], calling censure 'dangerous.'").

97. During the Clinton episode, some urged that the act of impeachment itself constituted a *de facto* censure. *See* 144 CONG. REC. H12016 (daily ed. Dec. 19, 1998) (statement of Rep. Hostettler); POSNER, *supra* note 18, at 195 (recommending impeachment as shaming penalty). *But see* Charles Babington, *Clinton Has 'No Interest' in a Pardon; Whitewater Probe Was a 'Lie,' President Says*, WASH. POST, Apr. 14, 2000, at A01, *available at* 2000 WL 2296864 (quoting Clinton: "I'm not ashamed of the fact that they impeached me. That was their decision, not mine, and it was

This process would be permitted under the theory of the impeachment clauses put forth by Professor Isenbergh, among others.[98]

Interestingly, late in the Senate impeachment trial of President Clinton, a coalition of senators recommended findings of fact to support the conclusion that the President was guilty as charged.[99] Many Clinton supporters opposed the proposal, notwithstanding their previous and subsequent endorsement of censure. One can fairly presume that the President's allies were hoping to repudiate the House impeachment via a hung jury.[100] They likely sensed that *any* action whatsoever against the President, if taken by the Senate sitting as a court of impeachment, might be interpreted as a redemption of the House action. In any event, the idea was quickly dropped.[101] In light of their previous and subsequent

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wrong.").

98. *See* 144 CONG. REC. H12003 (daily ed. Dec. 19, 1998) (statement of Rep. Hyde) (finding no censure power in House, though perhaps in Senate); *id.* at H12011 (statement of Rep. Castle); *supra* note 19.

This approach raises the question of voting rules, for the Constitution provides only that "no Person shall be *convicted* without the Concurrence of two thirds" of the Senate. U.S. CONST. art. I § 3, cl. 6. Presumably, if conviction and sentencing are indeed separate acts, only a majority is necessary either to censure or remove—a rule some might find absurd. *See* POSNER, *supra* note 18, at 197-98; The White House, Office of Communications, Press Briefing by Joe Lockhart (Jan. 28, 1999), *available at* 1999 WL 34711, *8 ("Well, let me ask you this: What would happen if they changed their mind between the votes and passed a new procedure through on a 55-45 that said, if you vote to convict you do remove. What about that? That would be a danger. That would be a problem for us."). *But see* Grossman & Yalof, *supra* note 17, at 12 (noting that, upon conviction by Senate, disqualification from holding future federal office "is now routinely done by majority vote").

But of course, nothing would stop a Senate majority from imposing on itself a supermajority requirement, just as it has done with respect to motions to end filibusters. *See* SENATE RULE 22.

99. *See* Neil A. Lewis, *A Suggestion of Conviction Minus Ousting*, N.Y TIMES, Jan. 26, 1999, at A17.

100. Some commentators pondered whether the Senate's hung jury vote constituted an "acquittal." *See* Todd Gaziano, *Hung Senate*, WASH. TIMES, Feb. 12, 1999, at A27, *available at* 1999 WL 3077869 ("The White House is almost certainly wrong in its claim that the president will be acquitted in his Senate impeachment trial. At this point, it is safe to predict that he will not be convicted by two-thirds of the Senate and removed from office, but that is not an acquittal as that term is used in any other context.").

101. *See* Bruce Fein, *Constitutional Stumbling*, WASH. TIMES, Feb. 9, 1999, at A14, *available at* 1999 WL 3077615.

> The highly esteemed senator from West Virginia, Democrat Robert C. Byrd, has earned a deserved reputation for constitutional learning and mastery of senatorial rules and prerogatives. His advice in these domains is characteristically received as gospel, not mere wisdom. Thus, when the learned senator preached against findings of fact in the impeachment trial

support for censure, however, the opposition of the President's allies to this alternative suggests that their proportionality argument was ultimately more opportunistic than sincere.

The constitutionality of censure is not merely an academic concern. President Clinton and his supporters deftly designed its consideration in 1998 to defuse an energetic campaign to coax or compel him from office.[102] Members of Congress ought not to have been able to distort the debate with talk of alternative punishments, because the Constitution vests Congress with nothing more than the instrument of impeachment. The historical record lacks support for the censure option as well. President Jackson was never truly given it, and President Buchanan's censure was devoid of adequate constitutional debate. Had these events been properly understood, President Clinton's supporters would have had to defend against impeachment without this tool to mollify public idolaters of moderation, and the affair might have concluded quite differently.[103]

> of President William Jefferson Clinton and in support of a post-trial censure resolution . . . the former initiative spearheaded by Maine's Republican Sen. Susan Collins instantly fell out of favor, like a book placed on the Pope's Index Liborum Prohibitorum.

Id.

102. *See, e.g.*, Editorial, *Our Turn: If Charges are True, Clinton Must Leave*, SAN ANTONIO EXPRESS-NEWS, Jan. 23, 1998, at 04B, *available at* 1998 WL 5074927 ("If all the allegations are true, Clinton should resign, vacate the White House and save the good people of this great nation the long ordeal of impeachment."); Editorial, *A Somber Prospect*, PHILA. INQUIRER, Jan. 22, 1998, at A16 (concluding that if new allegations of lying about sexual misconduct on part of Pres. Bill Clinton are true, he should resign); Editorial, *Too Serious to Ignore; If Explosive Allegations Are True, President Clinton Should Resign Immediately*, L.A. DAILY NEWS, Jan. 23, 1998, at N22, *available at* 1998 WL 3848902; Robert Scheer, *Clinton's Best Revenge: Give Gore the Helm*, L.A. TIMES, Jan. 27, 1998, at B7, *available at* 1998 WL 2392583 ("[I]f the accusations of sex with an intern and perjury are true, Clinton should resign.").

103. *See* Richard Morin, *Public Wants Punishment of President, Not Removal*, WASH. POST, Dec. 21, 1998, at A17, *available at* 1998 WL 22542481 (noting recent poll that 70 percent of Americans believe Clinton should be punished, with 40 percent favoring censure and 30 percent favoring removal). Of course, the proper resolution might have been censure (as an alternative to removal) by the Senate following conviction. *See supra* note 19 and accompanying text. But at least then the act of impeachment could not be repudiated as ineffectual or wasteful, nor the act of censure later questioned as unconstitutional. *See supra* note 96 and accompanying text.