

# IMPEACHING FEDERAL JUDGES: A COVENANTAL AND CONSTITUTIONAL RESPONSE TO JUDICIAL TYRANNY

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## I. INTRODUCTION

In August 1997, outgoing American Bar Association President N. Lee Cooper wrote his farewell column in the ABA Journal.<sup>1</sup> For his topic, he chose to address what he felt was an issue of vital importance to the very existence of the American legal system as we know it.

What was this threat to America's rich legal heritage? Was it the increasing moral bankruptcy of the legal profession and the concomitant decline in public confidence in legal practitioners? Was it the controversial, complex, and divisive tort reform movement, or any of its multiple emphases on, for example, the so-called litigation explosion, frivolous lawsuits, or astronomical punitive damages awards? Was it the increasingly discussed crisis in legal education? The answer to each of these questions is "no."<sup>2</sup> The threat to which Cooper dedicated his farewell epistle was far different. It was the movement to hold federal judges accountable through various means, including the Constitutional device of impeachment.<sup>3</sup>

Why did Cooper find this movement so alarming? According to him, it "[t]hreaten[s] the independence of the federal judiciary."<sup>4</sup> In defense of his assertion, Cooper quoted Alexander Hamilton from Federalist No. 78, wherein that usually prescient Founder claimed that

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1. N. Lee Cooper, *On Independence Once and For All*, A.B.A. J., Aug. 1997, at 8.

2. Cooper could have chosen from numerous crises in the legal field today. The following are among the most written about. See, e.g., James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781 (1997) (discussing the moral crisis in the legal profession); Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367 (1997) (discussing aspects of the crisis in legal education); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (discussing many aspects of tort reform).

3. Cooper, *supra* note 1, at 8.

4. *Id.*

the judiciary was the weakest of the three federal branches.<sup>5</sup> If Hamilton was ever right in this assertion, he clearly no longer is.<sup>6</sup>

Cooper found it particularly threatening that the majority whip of the United States House of Representatives, Congressman Tom DeLay, would actually name specific federal judges and threaten them with articles of impeachment.<sup>7</sup> Cooper alleged that DeLay's criteria were extraconstitutional and illegitimate. According to Cooper, DeLay

was clear on his reasons in seeking these judges' impeachment. It was not corruption; it was not that the judges were involved in illegal or unethical activities; it was not that the judges committed treason, accepted bribes, committed "high crimes and misdemeanors" as required by the Constitution as grounds for impeachment.

No, the reason the majority whip targeted these specific judges for impeachment was because he and other members of Congress disagreed with one specific decision rendered by each of the judges.<sup>8</sup>

Not only has Mr. Cooper misrepresented Congressman DeLay's reasons, he has also revealed his own ignorance of the constitutional grounds for impeachment.<sup>9</sup>

It is important to note that Messrs. Cooper and DeLay have not been the only well known combatants in this debate. Other members of the legal community have felt their ox being gored. During the run-up to the 1996 presidential election, President Clinton threatened to ask for the resignation of federal district Judge Harold Baer, Jr., and Bob Dole (joined by House Speaker Newt Gingrich) also threatened to pursue Baer's impeachment. Baer's offense involved suppressing 34 kilograms of cocaine, 2 kilograms of heroin, and a confes-

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5. *Id.* (quoting THE FEDERALIST NO. 78 at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

6. *See generally* Lino A. Graglia et al., *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L. J. 17 (1996).

7. *Id.* *See also* Ralph Z. Hallow, *Republicans Set to Impeach 'Activist' Jurists*, WASH. TIMES, Mar. 12, 1997, at A1.

8. Cooper, *supra* note 1, at 8.

9. *See infra* this Introduction and Section II. A.

sion to twenty drug running trips. In the process, Baer vilified police in his written opinion.<sup>10</sup> In response, the current Chief Judge of the Second Circuit Court of Appeals, Jon O. Newman, and three of his predecessors wrote letters to both the President and Senator Dole criticizing their remarks concerning Judge Baer.<sup>11</sup>

However, when DeLay called for the impeachment of federal judges, he was primarily echoing the call of various conservative groups, particularly from within the "Religious Right."<sup>12</sup> The current impeachment movement—at least from within the "Religious Right" community—was launched in response to the decision of the United States Supreme Court in the case of *Romer v. Evans*,<sup>13</sup> in which the Court ruled that the state of Colorado could not amend its constitution to prevent homosexuals from being granted special rights or minority status.<sup>14</sup> Certain Religious Right groups saw this decision as so

10. See generally *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996) (discrediting police efforts in the case).

11. Don Van Natta, Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1.

12. Representative DeLay received a copy of David Barton's book *IMPEACHMENT!: RESTRAINING AN OVERACTIVE JUDICIARY* (1996) during a meeting with Barton the day before he launched his impeachment campaign. DeLay was also informed of the research contained in a *Briefing* by the National Legal Foundation. Steven W. Fitchen, *IMPEACHMENT OF THE FEDERAL JUDICIARY: WHY THE 'ROMER 6' MUST GO—A CONSTITUTIONAL ANALYSIS* (1996) [hereinafter *Briefing*] (cited five times in Barton's book. BARTON, *supra* this note, at 56 nn.26-28, 57 n.74, 59 n.125). The fact that the current impeachment movement was dramatically impacted by the involvement of the Religious Right does not somehow "taint" it. As will be seen in Section I, Christians have a special reason for being interested in this issue. See *infra* text accompanying notes 18-20, 23-26, 34-38 for the role of the National Legal Foundation and David Barton's WallBuilders in the impeachment movement.

13. 116 S. Ct. 1620 (1996).

14. The amendment to the Colorado Constitution, known as Amendment 2, reads in its entirety:

NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the state of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST., Art. 2, § 30b

clearly unconstitutional and so dangerous to the fabric of society that they called for impeachment.<sup>15</sup>

In immediate response to *Romer*, two groups raised the specter of impeachment. On the day that *Romer* was announced, Will Perkins, Chairman of the Board of Colorado for Family Values, suggested that the American people might be so outraged that there would be a ground swell calling for the impeachment of the six Justices in *Romer*'s majority.<sup>16</sup> The National Legal Foundation, under the leadership of this author, went further and issued an explicit call for impeachment.<sup>17</sup>

By May 23, 1996, the influential think tank, Free Congress Foundation, had added its considerable weight to the fray. On that date, Free Congress' President, Paul Weyrich, citing the research of the National Legal Foundation,<sup>18</sup> called for the impeachment of the "Romer Six" during his *Direct Line Commentary* on National Empowerment Television.<sup>19</sup> Weyrich's commentary was in turn picked up and reproduced by Intercessors for America and a Focus on the Family fund appeal letter written by Dr. James Dobson, its Founder and President.<sup>20</sup> Thomas L. Jipping, also of Free Congress, began a steady barrage of op-ed pieces in the *Washington Times* warning of the dangers of judicial activism, including some pieces which advocated impeachment of federal judges.<sup>21</sup> Phyllis Schlafly of the Eagle Forum suggested impeachment as one of several remedies to

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15. See *infra* Section IV. A.

16. Press Release from Colorado for Family Values, *Regarding the Supreme Court Ruling on Evans v. Romer* (May 20, 1996) (on file with author).

17. Press Release from the National Legal Foundation, *Supreme Court Justices Must be Impeached, Says Law Firm that Helped Draft Colorado's Amendment 2* (May 24, 1996) (on file with author).

18. The research supplied to Free Congress was an early draft of what became the National Legal Foundation's *Briefing*, *supra* note 12.

19. *Direct Line Commentary* (NET broadcast, May 23, 1996) (transcript on file with author).

20. Paul M. Weyrich, *A Call for Impeachment of the Six Justices*, INTERCESSORS FOR AMERICA NEWSLETTER, July/Aug. 1996, at 3; Letter from Dr. James Dobson 4-5 (July 1996) (on file with author).

21. See, e.g., Thomas L. Jipping, *The Danger of More Activist Judges*, WASH. TIMES, Jan. 28, 1997, at A19; Thomas L. Jipping, *A History of Judicial Impeachment*, WASH. TIMES, March 25, 1997, at A17; Thomas L. Jipping, *Face the Facts Miss Reno*, WASH. TIMES, Aug. 7, 1997, at A17.

the problem of judicial tyranny in both her February 1997 and March 1997 newsletters.<sup>22</sup>

Another "Religious Right" group which weighed in at the beginning was WallBuilders, headed by David Barton. By September 23, 1996, WallBuilders had produced the book *Impeachment!: Restraining an Overactive Judiciary*,<sup>23</sup> which has received special criticism from those who oppose the impeachment movement.<sup>24</sup> Barton's book was especially influential. It broadened the emphasis beyond the *Romer* case by listing several other examples of federal court opinions that were suspect and suggesting broad categories of judicial usurpation which might constitute impeachable conduct.<sup>25</sup>

As a consequence of the discussion of impeachment, grassroots movements sprang up against federal judges John Nixon in Tennessee and Stewart Dalzell in Pennsylvania (in both cases because of the judges' handling of death penalty appeals). Liberal federal judge H. Lee Sarokin resigned from the Third Circuit Court of Appeals, and the heavily criticized Judge Baer reversed his controversial decision.<sup>26</sup> Then in May and July 1997, respectively, subcommittees of both the House and the Senate held hearings on judicial activism which

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22. Phyllis Schlafly, *Congress Must Curb the Imperial Judiciary*, PHYLLIS SCHLAFLY REP., Feb. 1997, at 1; (Eagle Trust Fund, Alton, Ill.); Phyllis Schlafly, *It's Time to Hold Federal Judges Accountable*, PHYLLIS SCHLAFLY REP., Mar. 1997, at 1 (Eagle Trust Fund, Alton, Ill.).

23. BARTON, *supra* note 12.

24. See, e.g., Letter from 104 law school deans to Speaker of the United States House of Representatives Newt Gingrich (May 13, 1997) (visited Feb. 9, 1998) <<http://www.abanet.org/media/ging1.html>>.

25. BARTON, *supra* note 12, at 6-8, 37-49.

26. It is not always possible to establish direct links between the reaction to the *Romer* decision and other calls for impeachment. However, there is certain evidence that the research on impeachment generated by the National Legal Foundation and WallBuilders was the spark that ignited or fueled (at least) some of the other impeachment efforts. See e.g., the photograph appearing on page A1 of the May 28, 1997 *Tennessean* of State Senator Tommy Burks holding a copy of David Barton's *Impeachment!* during the Tennessee House Judiciary Committee's hearings on the bill to memorialize the United States House to impeach Judge Nixon. The National Legal Foundation (through this author) has supplied its *Briefing*, *supra* note 12, to the key activists in Tennessee and Pennsylvania.

For a summary of Sarokin's reasons for his resignation and its link to the impeachment movement, see *Gavel-to-Gavel Politics*, THE NATION, July 1996, at 3.

Baer's original opinion is *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996). His second opinion, reversing the first, is *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996).

included discussions of impeachment.<sup>27</sup> In May 1997, the impeachment efforts against Judge Nixon in Tennessee resulted in both houses of the Tennessee legislature overwhelmingly passing a resolution calling upon the United States House of Representatives to investigate Judge Nixon for impeachment. Governor Sundquist signed the resolution and it was sent to the United States House of Representatives.<sup>28</sup>

Reaction to the impeachment movement has been vigorous. In addition to former ABA President Cooper and Chief Judge Newman, negative responses have come from 104 law school deans,<sup>29</sup> seventy-five bar association presidents<sup>30</sup> (both in the form of an open letter to House Speaker Newt Gingrich), and from two United States Supreme Court Justices—Chief Justice William Rehnquist and Justice Antonin Scalia.<sup>31</sup> The ABA set up a Commission, which issued a close-the-ranks rubber stamp of Cooper's position.<sup>32</sup>

The gist of the deans' letter is encapsulated in one of its sentences: "Impeachment was never intended to be used—and never should be used—against a judge who issues an opinion with which members of the other branches disagree."<sup>33</sup>

One may assume (or at least hope) that anyone who set his hand to a letter or column—such as those addressed to Speaker Gingrich or that issued by former ABA President Cooper—had critically eval-

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27. See Kirk Victor, *Bashing the Bench*, NAT'L J., May 31, 1997, at 1078; David Pace, *Alabama AG Says Impeachment Should be Option for Activist Judges*, AP, July 15, 1997 (1997 WL 2539454).

28. Kirk Loggins, *Panel Seeks Nixon Inquiry*, THE TENNESSEAN (Nashville), May 28, 1997, at A1.

29. Letter from 104 Law School Deans, *supra* note 24.

30. Letter from Seventy-five Bar Association Presidents to Speaker of the United States House of Representatives Newt Gingrich (March 26, 1997) (visited Feb. 9, 1998) <<http://www.abanet.org/media/impeach.html>>.

31. Richard Carelli, *Scalia Calls Move to Impeach Liberal Federal Judges a Nonstarter*, AP, May 20, 1997 (1997 WL 2527209); Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1997, at A4.

32. AMERICAN BAR ASSOCIATION, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997) (noting the commission's formation by Cooper in August 1997 and roundly condemning the impeachment movement using the same disingenuous mischaracterizations of its arguments and including the same specific criticisms of Barton and DeLay) (visited Feb. 9, 1998). <<http://www.abanet.org/govaffairs/judiciary/report.html>>

33. Letter from 104 law school deans, *supra* note 24.

uated the position he condemned. Yet this was demonstrably not the case. For example, the law school deans wrote:

We, the undersigned law school deans, write to convey our strong opposition to proposals to initiate impeachment proceedings against federal judges who have rendered politically unpopular decisions in cases or controversies properly before them.

Comments by various members of Congress and views expressed in *Impeachment!* by David Barton suggest that impeachment is an appropriate mechanism to restrain an “overactive” judiciary and that, even though it is unlikely that impeachment will result in conviction, bringing impeachment proceedings against certain federal judges will have a deterrent effect on the substance of their subsequent rulings from the bench. These rationales mischaracterize the purpose of impeachment and only encourage Congress to abuse its extraordinary power to remove a federal judge from office.<sup>34</sup>

Yet neither DeLay nor Barton has advocated impeaching judges because they believe that the judge’s opinion was politically unpopular or because they personally disagreed with them. What they have advocated is impeaching judges for rendering unconstitutional opinions, usurping legislative authority and introducing arbitrary power.

In that, DeLay and Barton are on solid ground—as this article will show—and the deans and former President Cooper are both wrong and misrepresenting their opponents. For example, Tom DeLay has stated “I am not suggesting that impeachment be used for partisan purposes, but when judges exercise power not delegated to them by the Constitution, impeachment is a proper tool.”<sup>35</sup> DeLay stated that he would pursue impeachment against a judge of who “obvious[ly] . . . violated his oath of office to uphold the Constitution of the United States. That is the criterion. If he tries to legislate and

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34. *Id.*

35. Victor, *Bashing the Bench*, *supra* note 27, at 1080.

goes beyond what the Constitution allows the judiciary to do, that is a great case” to pursue.<sup>36</sup>

In the very book that the law school deans condemned—*Impeachment!*—Barton wrote, impeachment is “*not a carte blanc* to persecute someone for partisan purposes.”<sup>37</sup> Furthermore, Barton maintains that, “[r]ather than violating the ‘independence’ of the judiciary, impeachment simply makes the judiciary an accountable branch by making individual judges more responsible for their decisions, thus preventing their usurping, misusing, or abusing power.”<sup>38</sup>

What DeLay, Barton, and others are really advocating—impeachment under proper constitutional criteria—has broad historical support. Once that is understood, it will be easy to understand (as this article will demonstrate) that the Framers also intended the very process of impeachment investigations to have a salutary effect on the federal judiciary, regardless of whether convictions are obtained. Once again, Cooper and those in his camp are mistaken.

This article will examine three issues. Section II will briefly explore why those in the Christian community have a unique vantage point on the propriety of impeaching rogue federal judges. Section III will make the case that although no federal judge has ever been impeached for rendering unconstitutional opinions, it is historically and constitutionally defensible to begin to do so. Finally, in Section IV, this article will examine specific judges that have been suggested as candidates for impeachment and evaluate whether they are, indeed, valid targets of impeachment inquiries under historical standards.

## II. COVENANT BREAKING

Christians have a special interest in the issue of removing rogue federal judges. It is no coincidence that the “Religious Right” was in the vanguard of the current impeachment movement. The unique perspective that gives Christians this special interest is the biblical concept of covenants.

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36. *Id.*

37. BARTON, *supra* note 12, at 26 (emphasis in original).

38. *Id.* at 31.



Consider this quotation: “Our Constitution is a covenant running from the first generation of Americans to us and then to future generations.” Who made that statement? Some member of the “radical Religious Right”? Although the statement would undoubtedly be embraced by most of the conservative individuals and advocacy organizations mentioned in the Introduction, that statement comes from United States Supreme Court Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter in their joint opinion in *Planned Parenthood v. Casey*.<sup>39</sup>

Unfortunately, the Justices who wrote the joint opinion did not understand covenant principles very well. Covenant is a religious concept, originating in the ancient Near Eastern religions.<sup>40</sup> Covenant is also a critical component of Christianity.<sup>41</sup> From Christianity, the idea of covenant was adopted by the American Founding Fathers:

Viewing the United States Constitution as the critical expression of the American constitutional tradition, we move back in time, seeking the less differentiated, more embryonic expression of what is in that document. Our search takes us to the earliest state constitution, then to colonial documents of foundation that are essentially constitutional such as the Pilgrim Code of Law, and then to proto-constitutions such as the Mayflower Compact. The political covenants written by English colonists in America lead us to the church covenants written by radical Protestants in the late 1500s and early 1600s, and these in turn lead us back to the Covenant tradition of the Old Testament. The American constitutional tradition derives much of its form and content from the Judeo-Christian tradition as interpreted by the radical Protestant sects to which belonged so many of the original European settlers of British North America.<sup>42</sup>

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39. 505 U.S. 833, 901 (1992).

40. See, e.g., PAUL KALLUVEETIL, *DECLARATION AND COVENANT: A COMPREHENSIVE REVIEW OF COVENANT FORMULAE FROM THE OLD TESTAMENT AND THE ANCIENT NEAR EAST* 3 (1982).

41. Indeed, the very salvation offered through Jesus Christ is called the New Covenant. See, e.g., *Luke* 22:20 (New American Standard).

42. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 6-7 (1982).

Thus Justices O'Connor, Kennedy, and Souter were correct to assert that the Constitution is a covenant even if they did not understand the full ramifications of the concept.

One covenant principle that we see plainly in scripture—and that Christians need to take seriously—is that a covenant may not be added to without mutual consent. We see God Himself revealing this principle in His covenant with Israel: “Do not add to what I command you.”<sup>43</sup> Any judge or justice who makes up out of whole cloth a new fundamental right, or arrogates to himself authority or power not granted by the Constitution, certainly adds to our national covenant, and thus becomes a covenant breaker.

One person who breaks a covenant can bring disaster on the entire nation. Christians would do well to recall the story of Achan. He stole some of the “devoted things,” that is, the spoils of war that God had commanded the Israelites to destroy.<sup>44</sup> His act was unknown to his fellow Israelites. But when they went to attack Ai, they were defeated and his sin cost the lives of others.<sup>45</sup> In this same passage from the Bible, God explains the relationship between *one* covenant breaker and the consequences to the entire nation (notice God says “they” not “he”):

Israel has sinned; they have violated my covenant, which I commanded them to keep. They have taken some of the devoted things; they have stolen, they have lied, they have put them with their own possessions. That is why the Israelites cannot stand against their enemies; they turn their backs and run because they have been made liable to destruction. I will not be with you anymore unless you destroy whatever among you is devoted to destruction.<sup>46</sup>

Our Constitution is not a covenant in which God is a party; that is, it is not a covenant between God and America. However, a covenant is implicitly an agreement in which God is invoked as a

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43. *Deuteronomy* 4:2 (New American Standard).  
44. *Joshua* 7:1 (New American Standard).  
45. *Joshua* 7:2-5 (New American Standard).  
46. *Joshua* 7:11-12 (New American Standard).

witness. Spiritual consequences result from its violation.<sup>47</sup> Thus, for Christians, removing covenant breakers from office takes on special significance.

A related, but analytically distinct issue, should also be of special significance to Christians. The Bible is replete with references to dire consequences for a nation when its leaders engage in unrighteous conduct. Chapter nine, verse twelve from the book of Daniel is illustrative. It states, “[a]nd He hath confirmed his words, which He spake against us, and against our judges that judged us, by bringing upon us a great evil: for under the whole heaven hath not been done as hath been done upon Jerusalem.”<sup>48</sup>

As just discussed, any federal judge who violates our national covenant is engaged in covenant breaking, which is in-and-of-itself unrighteous. However, many judicial actions may be unrighteous for a second, independent reason. *Romer v. Evans*,<sup>49</sup> is a case in point. In Justice Kennedy’s majority opinion, the Court not only held that the citizens of Colorado could not amend their state constitution to prohibit special rights for homosexuals; it also declared that the only possible explanation for why 800,000 Coloradans voted to deny such special rights was “animus.” In other words, these voters were full of hate.<sup>50</sup>

Clearly, such a declaration by the United States Supreme Court—which flouts the Word of God—is unrighteous conduct. The Bible is clear: Homosexuality is an abomination.<sup>51</sup> Christians—or anyone who accepts this part of our Judeo-Christian heritage—who take these biblical admonitions seriously are now declared to be hate-mongers

47. See KALLUVEETIL. *supra* note 40, at 1-4, 11-12, 102 for a discussion of various covenants to which God is a party and other to which He is a witness.

48. Even if the word used here as “judges” is better translated “rulers” as some other versions do, “judges” are certainly subsumed under “rulers.” The Hebrew is *וְהַיְהוָה אֱמַן אֶת־דְּבָרָיו*, that is, “our judges who judged us.” The basic meanings of the root word are “to act as a ruler . . . to decide cases of controversy as judge in civil, domestic, and religious cases . . . [and] execute [ ] or cause [ ] to be executed judicial decisions.” 2 THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT 2, 443-44 (R. Laird Harris et al. eds., 1980): *Cf.*, e.g., “our judges that judged us” (King James); with “our rulers who ruled us.” (New American Standard).

49. 116 S. Ct. 1620 (1996).

50. *Id.* at 1627.

51. *Leviticus* 18:22; *Deuteronomy* 23:18; *Romans* 1:27; *I Corinthians* 6:9 (New American Standard).

and bigots. The *Romer* decision actually constitutes multiple unrighteous acts. First, it gave a huge boost to the homosexual movement. Many of the issues subsumed under the rubric of "the homosexual agenda" relate to obtaining special civil rights status for homosexuals.<sup>52</sup> Second, it calls evil "good" and good "evil."<sup>53</sup>

These examples of unrighteous behavior by the Supreme Court majority in *Romer* are not isolated. The concerned Christian can evaluate the judges and cases that will be examined in Section IV for other examples of unrighteous behavior. All people who are concerned about constitutional violations will be equally interested in the discussion in Section IV. However, those readers of this Law Review who are especially interested in its mission to bring to bear biblical principles upon current legal issues will be doubly concerned that our national covenant is being violated. These violations have spiritual consequences. Impeachment is the only constitutional provision by which we may remove judicial covenant-breakers from office.

### III. THE CONSTITUTIONAL GROUNDS

#### *A. Defining the Grounds*

Ever since the ratification of the United States Constitution in 1788, there has been much concern about usurpation of power by the judicial branch of the federal government in general and by the United States Supreme Court in particular. In the early years of our Republic, impeachment was not seen as a radical response to that problem. That view is a modern-day phenomenon. As early as 1803, United States District Judge John Pickering was impeached and convicted, and in 1804, Supreme Court Associate Justice Samuel Chase was impeached and acquitted.<sup>54</sup>

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52. See, e.g., Platform of the 1993 March on Washington for Lesbian, Gay, and Bi Equal Rights and Liberation (on file with author); MARSHALL KIRK & HUNTER MADSON, *AFTER THE BALL* (1989).

53. Compare the warning of the prophet Isaiah: "Woe to those who call evil good, and good evil; Who substitute darkness for light and light for darkness; Who substitute bitter for sweet, and sweet for bitter! Woe to those who are wise in their own eyes. And clever in their own sight!" *Isaiah* 5:20-21 (New American Standard).

54. 8 ANNALS OF CONG. 319-22, 366-68 (1803-1804); 8 ANNALS OF CONG. 669, 728-31 (1803-1804).

Even in more recent history, there have been times when the actions of members of the federal judiciary have caused such outrage that the American people have clamored for impeachment. Recent examples include the public outcries for the impeachment of Chief Justice Earl Warren and the actual House resolutions calling for the impeachment of Associate Justices Abe Fortas and William O. Douglas.<sup>55</sup> From 1986 to 1989, after a fifty-year lull, three federal judges were impeached and convicted.<sup>56</sup>

As Table 1 shows, sixteen federal officials have been impeached in the history of our nation. Of these, thirteen have been members of the judiciary.<sup>57</sup> All seven officials who were convicted

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55. CONGRESSIONAL QUARTERLY, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 660-63 (1977).

56. 32 CONG. REC. 15,759-64, 17,294-95 (1986); 34 CONG. REC. 20,206-07 (1988); 35 CONG. REC. 25,330-35, 27,102-04, 8,814-15 (1989).

57. Various primary and secondary sources have been consulted for this article. For the most complex of the proceedings, an exhaustive list of the primary sources is up to several pages long. See, e.g., MARY L. VOLCANSEK, JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE 181-183 (1993) (listing nearly two pages of primary congressional sources and over a page of reported court decisions relating to the Claiborne, Hastings, and Nixon impeachments alone). Therefore, for reasons of space an exhaustive list of the primary sources will not be included here. However, an extensive list of some of the more important secondary sources will follow. The notes in these secondary sources, as well as the often-voluminous bibliographies in many of them, will serve as a ready starting point for locating primary sources. See, e.g., the bibliography in ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 365-67 (1992) which contains at least one easily identifiable primary source for every impeachment except that of Judge Delahay (which can be found at *Id.* at 327 n.2.); and BARTON, *supra* note 12, at 23-26 and notes thereto which similarly contain at least one primary source for every impeachment except Delahay's. In addition, many key primary sources are extensively excerpted or reprinted in several of these secondary sources.

However, footnotes within Table 1 will refer to sufficient primary sources to document the charges and the results of the impeachment proceedings.

See generally the following key secondary sources: THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE LAW OF PRESIDENTIAL IMPEACHMENT AND REMOVAL (1974); JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES (1833); BARTON, *supra* note 12; ELIZABETH B. BAZAN, RESEARCH SERVICE REPORT FOR CONGRESS, IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE (1995); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973) [hereinafter IMPEACHMENT]; RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK (1974); JOSEPH BORKIN, THE CORRUPT JUDGE (1962); GEORGE BOUTWELL, THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY (1895); IRVING BRANT, IMPEACHMENT: TRIALS & ERRORS (1972); CHARLES BURDICK, THE LAW OF THE AMERICAN CONSTITUTION (1922); ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS (1992); CLARENCE CANNON, CANNON'S

PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, 3 vols. (1935); COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, NINETY-THIRD CONGRESS, FIRST SESSION, IMPEACHMENT: SELECTED MATERIALS (1973); DAVID MILLER DEWITT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1903); Theodore Dwight, *Trial by Impeachment*, 6 AM. L. REG. (N.S.) 257 (1867); George Etridge, *The Law of Impeachment*, 8 MISS. L.J. 283 (1936); *The Exclusiveness of the Impeachment Power under the Constitution*, 51 HARV. L. REV. 330 (1937); John Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1 (1970); Paul Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV. 719 (1970); JOHN FINLEY & JOHN SANDERSON, THE AMERICAN EXECUTIVE AND EXECUTIVE METHODS (1908); ROGER FOSTER, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 2 vols. (1896); S. I. Friedland, *The Impeachment Process: Still Functional After All These Years?*, 15 U. DAYTON L. REV. 229 (1990); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and its Alternatives*, 68 TEX. L. REV. 1 (1989) [hereinafter *Limits to Impeachment*]; MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (1996); Warren S. Grimes, *Hundred-ton-gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, (1991); ASHER C. HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 5 vols. (1907); PETER CHARLES HOFFER & N. E. H. HULL, IMPEACHMENT IN AMERICA; 1935-1805 (1984); Louis Kunter, *The Plot to Impeach Justice Douglas: A Look Back and a Step Forward*, 24 U. WEST L.A. L. REV. 79 (1993); Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969); William Lawrence. *The Law of Impeachment*. 6 AM. L. REG. (N.S.) 641 (1867); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Melissa H. Maxman, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420 (1987); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (2d ed. 1829); *Removal of Federal Judges: New Alternatives to an Old Problem*, 13 UCLA L. REV. 1385 (1966); William Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*. 85 NW. U. L. REV. 903 (1991); WILLIAM REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); G. W. ROSS, "Good Behavior" of Federal Judges, 12 U. KAN. CITY L. REV. 119 (1944); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*. 142 U. PA. L. REV. 209 (1993); Burke Shartel, *Federal Judges: Appointments, Supervision, and Removal—Some Possibilities under the Constitution*, 28 MICH. L. REV. 870 (1930); Maria Simon, *Bribery and Other Not So "Good Behavior:" Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COL. L. REV. 1617 (1994); ALEXANDER SIMPSON, A TREATISE ON FEDERAL IMPEACHMENT (1916); ARTHUR J. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833); Preble Stoltz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 CALIF. L. REV. 659 (1969); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 2 vols. (5th ed., 1905); Jacobus ten Broek, *Partisan Politics and Federal Judgeship Impeachments since 1903*, 23 MINN. L. REV. 185 (1939); Frank Thompson and D. H. Politt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C. L. REV. 87 (1970); JOHN TUCKER, THE CONSTITUTION OF THE UNITED STATES (1899); Frederick Jackson Turner, ed., *Documents on the Blount Conspiracy, 1795-1797*. 10 AM. HIST. REV. 574 (1905); Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333 (1993); MARY L. VOLCANSEK, JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE (1993); Mary L. Volcansek, *British Antecedents for U.S. Impeachment Practices: Continuity and Change*, 14 JUS. SYS. J. 40 (1990); DAVID WATSON, THE CONSTITUTION OF THE UNITED

were judges. In addition, as of 1991, at least fifty-nine federal judges had been the subjects of House impeachment investigations.<sup>58</sup>

TABLE 1—IMPEACHED OFFICIALS

NAME	YEAR	OFFICE	CHARGE(S)	RESULT
William Blount	1797	Senator (Tenn.)	5 articles: conspiring with British and Indian forces against the Spanish <sup>59</sup>	In a separate proceeding, the Senate expelled Blount the day after the House impeached him. His lawyers argued both that Senators were not subject to impeachment and that he could not be impeached since he no longer held office. The impeachment was dismissed <sup>60</sup>
John Pickering	1803	U.S. Dist. Ct. Judge for Dist. of NH	4 articles: issuing an order which violated an act of Congress; refusal to hear witnesses in a case; refusal to allow an appeal of a case; and drunkenness and blasphemy <sup>61</sup>	convicted and removed from office <sup>62</sup>
Samuel Chase	1804	Assoc. Justice of the U.S. S. Ct.	8 articles: "highly arbitrary, oppressive, and unjust" treatment of attorneys, witnesses, grand juries and juries; violating the Sixth Amendment fair trial rights of defendants <sup>63</sup>	acquitted <sup>64</sup>
James H. Peck	1830	U. S. Dist. Judge for Dist. of Mo.	1 article: holding an attorney in contempt of court "arbitrarily, oppressively, and unjustly" <sup>65</sup>	acquitted <sup>66</sup>
West H. Humphreys	1862	U.S. Dist. Judge for E., M., & W. Dist. of Tenn.	7 articles: supporting the secession movement and acting as a Confederate judge <sup>67</sup>	acquitted on one sub-part; convicted on all other articles and sub-parts; removed from office and disqualified from further office holding <sup>68</sup>

STATES, 2 vols. (1910); W. W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929); Leon Yankwich, *Impeachment of Civil Officers under the Federal Constitution*, 26 *GEO. L. REV.* 849 (1938); Martha Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 *SUP. CT. REV.* 135 (1969).

58. GRIMES, *supra* note 57, at 1213.

59. JOURNAL OF THE HOUSE OF REPRESENTATIVES, 5<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 172-177.

60. 5 ANNALS OF CONG. 448-64 (1797-1799).

61. 8 ANNALS OF CONG. 319-22 (1803-1804).

62. *Id.* at 366-68.

63. 8 ANNALS OF CONG. 728-31 (1803-1804).

64. 5 CONG. DEB. 863, 869 (1830).

65. See ARTHUR J. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 338 (1833).

66. *Id.* at 474.

67. CONG. GLOBE, 37<sup>th</sup> Cong., 2<sup>nd</sup> Sess. pt. 3, 1,966 (1861).

68. *Id.*, pt. 4. 2,949-50.

Table 1 cont.

NAME	YEAR	OFFICE	CHARGE(S)	RESULT
Andrew Johnson	1868	President	11 articles: removing and replacing the Secretary of War <sup>69</sup>	acquitted on 3 articles; Senate then adjourned <i>sine die</i> <sup>70</sup>
Mark W. Delahay	1873	U.S. Dist. Judge for the Dist. of Kan.	no articles ever drafted; the investigating committee reported "personal habits [that] unfitted him for the judicial office," questionable financial dealings, and drunkenness <sup>71</sup>	Delahay resigned after being impeached and before articles could be drafted; the House took no further action <sup>72</sup>
William W. Belknap	1876	Secretary of War	5 articles: bribery <sup>73</sup>	Belknap resigned and the Senate acquitted on that ground <sup>74</sup>
Charles Swayne	1904	U. S. Dist. Judge for N. Dist. of Fla.	12 articles: falsifying expense accounts, unauthorized use of a railroad car in the possession of a receiver he had appointed; not residing in his district; and "unlawfully" holding attorneys in contempt <sup>75</sup>	acquitted <sup>76</sup>
Robert W. Archbald	1912	U.S. Commerce Ct. (Circuit) Judge	13 articles: influence peddling with litigants before him while a district and circuit judge <sup>77</sup>	acquitted on 8 articles (all but one relating to conduct while a District Judge, an office he no longer held); convicted on 5 articles; removed from office and disqualified from further office holding <sup>78</sup>
George W. English	1926	U.S. Dist. Judge for E. Dist. of Ill.	5 articles: disbaring lawyers; summoning state officials and members of the press to court to threaten them with jail or removal from office; threatening jurors; favoritism in appointing bankruptcy referees; allowing referees to also serve as attorneys in their cases; personally benefiting from collusion with referees; and use of profanity <sup>79</sup>	English resigned before Senate trial began; the House requested the Senate to terminate the proceedings; the Senate complied <sup>80</sup>
Harold Louderback	1933	U.S. Dist. Judge for N. Dist. of Cal.	5 articles (the 5th article was amended prior to the start of the trial); <sup>81</sup> setting up a false residence in anticipation of a divorce action by his wife; and impropriety relating to bankruptcy receiver <sup>82</sup>	acquitted <sup>83</sup>

69. CONG. GLOBE, 40<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1,616-18; 1,638-42 (1868).  
70. CONG. GLOBE, 40<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 412-15 (1868).  
71. CONG. GLOBE SUPP., 42<sup>nd</sup> Cong., 3<sup>rd</sup> Sess. 1,899-1,900 (1871).  
72. BUSHNELL, *supra* note 58, at 2 n.3.  
73. 4 CONG. REC. 414 (1876).  
74. 4 CONG. REC. APP. 342-57 (1876).  
75. 39 CONG. REC. 214-49 (1904-1905).  
76. 39 CONG. REC. 3,468-72 (1905).  
77. 48 CONG. REC. 8,904-34 (1912).  
78. *Id.*  
79. 67 CONG. REC. 6,283-87 (1926).  
80. 68 CONG. REC. 302, 348 (1926).  
81. 77 CONG. REC. 1,852-54 (1933).  
82. 76 CONG. REC. 4,914-16 (1933).



Table 1 cont.

NAME	YEAR	OFFICE	CHARGE(S)	RESULT
Halsted L. Ritter	1936	U.S. Dist. Judge for S. Dist. of Fla.	Originally 4 articles; <sup>84</sup> amended to 7 articles: corruption in a receivership case; practicing law while serving as a federal judge; and income tax evasion <sup>85</sup>	acquitted on first six articles which contained specific allegations; convicted on seventh article which merely recapitulated the prior six articles; removed from office; <sup>86</sup> sued in Court of Claims for salary on the basis that articles did not meet constitutional standards for impeachment and that Senate could not justifiably acquit on the first six articles and convict on the seventh; court ruled courts have no authority to review impeachments <sup>87</sup>
Harry E. Claiborne	1986	U.S. Dist. Judge for Dist. of Nev.	4 articles: the judge had been convicted of income tax evasion but as a convicted felon he refused to resign <sup>88</sup>	acquitted on one article; convicted on three articles; removed from office <sup>89</sup>
Alcee L. Hastings	1988	U.S. Dist. Judge for S. Dist. of Fla.	17 articles: taking a bribe; lying and submitting false evidence in his criminal trial; and revealing wire tap information <sup>90</sup>	acquitted on 3 articles; convicted on 8 articles; the Senate declined to vote on 6 articles; removed from office <sup>91</sup>
Walter L. Nixon, Jr.	1989	U.S. Dist. Judge for S. Dist. of Ms.	3 articles: perjury before a grand jury (for which he had been convicted in a criminal trial) <sup>92</sup>	acquitted on 1 article; convicted on two articles; removed from office; <sup>93</sup> sued to overturn conviction; Supreme Court ruled verdict unreviewable <sup>94</sup>

One of the most intriguing aspects of the history of impeachment in America is that no judge has ever been impeached for some of the behaviors that citizens are the most concerned about. As they are today, in the wake of the *Romer* decision, Americans have often been concerned about judicial activism, judicial tyranny, evolutionary jurisprudence, rendering unconstitutional opinions, and

83. 77 CONG. REC. 4,088 (1933).

84. 80 CONG. REC. 3,066-69 (1936).

85. *Id.* at 3,485.

86. *Id.* at 5,602.

88. *Ritter v. United States*, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1936).

88. 132 CONG. REC. 17,294-95 (1986).

89. *Id.* at 15,759-64.

90. 134 CONG. REC. 20,206-07 (1988).

91. 135 CONG. REC. 25,330-35 (1989).

92. *Id.* at 8,814-15.

93. *Id.* at 27,102-04.

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

the like.<sup>95</sup> Indeed, at least one opponent of the current impeachment movement, Bruce Fein, has made much of this fact.<sup>96</sup>

However, there are several historical reasons why impeachment has never been attempted for these offenses. In 1803-1805, President Thomas Jefferson attempted to use impeachment as a political weapon against Federalist judges.<sup>97</sup> Jefferson, and those pursuing impeachment in the House, properly understood that “high crimes and misdemeanors” was an elastic term, designed to encompass unindictable offenses.<sup>98</sup> However, they abused the process by attempting to circumvent the limits the Framers intended for the term.<sup>99</sup>

History is the best guide to understanding why the term “high crimes and misdemeanors” was chosen. History also demonstrates that Jefferson went beyond the Framers’ intent when he sought to use impeachment to remove federal judges simply because they belonged to the opposing political party. Anyone who seeks to do the same today would be guilty of the same error. However, anyone who seeks to remove tyrannical federal judges would use the tool of impeachment exactly as intended by the Framers.

Many who object to the current impeachment movement correctly point out that the Constitution prescribes an exhaustive list of reasons for which a federal official may be impeached. Those reasons are “treason, bribery, or other high crimes and misdemeanors.”<sup>100</sup>

These naysayers point out that the federal judges who are the target of impeachment efforts are not guilty of bribery nor (apparently)<sup>101</sup> of treason under the narrow definition provided in the Constitution.<sup>102</sup> These impeachment opponents fail to recognize what

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95. See generally sources cited *supra* note 58.

96. Statement of Bruce Fein Before the House Judiciary Subcommittee On Courts and Intellectual Property Regarding Judicial Misconduct and Discipline (visited Feb. 9, 1998) <<http://www.house.gov/judiciary/4175.html>> [hereinafter Statement of Bruce Fein].

97. BUSHNELL, *supra* note 58, at 43-87.

98. *Id.*

99. *Id.*

100. U.S. CONST. art. II, sec. 4.

101. *But see infra* text accompanying notes 106-07, 117-19.

102. “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” U.S. CONST. art. III, sec. 3.

the term “high crimes and misdemeanors” encompassed. This criticism of the impeachment movement comes in three basic forms. The first version is the bald assertion that impeachment was not meant to cover rendering opinions that Congress disagrees with.<sup>103</sup> As pointed out in the INTRODUCTION, this is a mischaracterization of the impeachment movement. The second version is a similarly bald assertion that impeachment will not lie for rendering unconstitutional opinions.<sup>104</sup> The third version is that impeachment will only lie for an indictable offense.<sup>105</sup>

A quick review of Table 1 is enough to dispel some of these mistaken beliefs. However, additional historical data will demonstrate in greater detail why those individuals behind the current impeachment movement—like Congressman DeLay, David Barton and this author—are in the right and those who oppose the current impeachment movement—like the ABA, seventy-five bar association presidents, and 104 law school deans—are in the wrong.

At the Constitutional Convention, George Mason suggested the term “mal-administration” as a needed grounds for impeachment because: “Treason as defined in the Constitution will not reach many great and dangerous offenses . . . . Attempts to subvert the Constitution may not be Treason as above defined.”<sup>106</sup> However, James Madison objected to the term because “so vague a term will be equivalent to a tenure during the pleasure of the Senate.” The Convention instead adopted the phrase “high crimes and misdemeanors.”<sup>107</sup> Thus, the Framers also included a powerful check on judicial tyranny, while being careful to protect the independence of the judiciary.

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103. This is essentially the position of former ABA President Cooper. See Cooper, *supra* note 1, at 8.

104. See, e.g., Statement of Bruce Fein, *supra* note 96. Fein clearly attacks the idea that federal judges can be impeached for unconstitutional opinions or opinions that representatives personally do not like. *Id.*

105. See, e.g., Kirk Loggins, *Attorneys Line Up for Nixon*, TENNESSEAN, May 25, 1997, at 1A (statements of U.S. Court of Appeals Judge Gilbert Merritt of Nashville, indicating that Judge Nixon could not be impeached for his opinions since every impeachment since 1805 has involved a crime).

106. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 550 (1911).

107. *Id.*

The Framers chose the term “high crimes and misdemeanors” for this dual purpose because it was a phrase that already had a long 400-year history.<sup>108</sup> The term is not derived from criminal law at all but was coined in the context of the 1386 impeachment of the Earl of Suffolk.<sup>109</sup> In fact, at that time there was no such crime as a misdemeanor. In those days, lesser crimes were prosecuted as “trespasses.”<sup>110</sup> The phrase “high crimes and misdemeanors” applied to political crimes, i.e., crimes against the state whether indictable or not.<sup>111</sup>

One point needs to be clarified. The Constitutional Convention substituted the phrase “high crimes and misdemeanors” for the “vague” term “maladministration.” Yet Sir William Blackstone—whose views on this matter many scholars of impeachment consult<sup>112</sup>—considered maladministration to be a high crime or misdemeanor. The answer to this seeming contradiction lies in the fact that Blackstone (and Mason) were describing a key political crime while Madison was warning about an abuse of the terminology used to name that crime. Blackstone’s use of maladministration is clearly limited to crimes against the state and does not extend to removing one’s personal enemies. For example, he writes that public officials are subject to impeachment because they “may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either does not or cannot punish.”<sup>113</sup>

The Framers were well aware of the 400 years of English impeachment history. Richard Wooddeson, Blackstone’s successor as Vinerian Lecturer, authored the first “methodical compilation” on the subject of English impeachment beginning in 1777. The work was “much cited in our country.”<sup>114</sup>

Wooddeson explicitly stated that impeachment is appropriate for misdeeds that would not be cognizable in the ordinary courts of

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108. By 1777, there was a definitive work on the English impeachments available. See *infra*, text note 114. See also, BERGER, IMPEACHMENT, *supra* note 58, at 75 n. 112, 113.

109. BERGER, IMPEACHMENT, *supra* note 58, at 59-61.

110. *Id.* at 61.

111. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND \*121-23 (discussing “high misdemesnors [sic]).

112. These scholars include many of those cited *supra* note 58.

113. 4 BLACKSTONE, *supra* note 111, at \*258.

114. BERGER, IMPEACHMENT, *supra* note 58, at 56, n.12.

law. In his discussion of what had historically constituted “high crimes and misdemeanors” and thus grounds for impeachment, he wrote that judges could be impeached if they “mislead their sovereign by unconstitutional opinions.”<sup>115</sup> In his *Commentaries on the Constitution of the United States*, Justice Joseph Story paraphrased and summarized Wooddeson’s work:

In examining the parliamentary history of impeachments it will be found that many offenses not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy. Thus, lord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions and for attempts to subvert the fundamental laws, and introduce arbitrary power.<sup>116</sup>

Mason (as noted above) was desirous that, because the traditional definition of treason had been narrowed by the Convention, some of the old grounds for treason would be under “maladministration.” In particular, Mason was concerned that efforts to subvert the Constitution might not constitute treason. To modern scholars it may seem strange that Mason had any question whatsoever about this matter. It appears—on the face of the document—that subverting the Constitution is outside the definition of treason adopted by the Convention. Perhaps the answer lies in the fact that Mason understood that, under the constitutional definition, treason includes “levying war.”<sup>117</sup> In the English impeachment of the Earl of Strafford (1642), subverting the fundamental laws and introducing arbitrary

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115. 2 RICHARD WOODDESON, *LAW OF ENGLAND* 602-03 (Dublin: E. Lynch 1792).

116. STORY, *supra* note 57, § 800.

117. “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” U.S. CONST. art. III, sec. 3.

power were characterized as “high treason” because such actions were held to constitute “levying war” against the people and the King.<sup>118</sup>

The early Supreme Court likely relied on the same logic when it declared that either usurping or abrogating authority constituted treason under the Constitution—despite the fact that, to modern thinking, these things do not fit the Constitutional definition. The Court stated, “We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”<sup>119</sup>

So, although subverting the Constitution very possibly was included as an impeachable offense under the treason provision, Mason wanted to “hedge his bets” and cover it in another provision, as well. The term “high crimes and misdemeanors,” was eventually adopted to meet Mason’s concerns. The term, therefore, subsumes the political crimes of subverting the fundamental laws and introducing arbitrary power.

The fact that Jefferson, as President, went too far does nothing to change the Framers’ intention regarding the proper uses of impeachment. Clearly, the Framers intended to create an independent judiciary. Hamilton dedicated several numbers of the *Federalist* to this issue.<sup>120</sup> However, it is equally true that Hamilton, in *Federalist No. 81*, wrote of

the important constitutional check which the power of instituting impeachments . . . would give to [Congress] upon the judicial department. This is alone a complete security. There can never be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted [sic] with it.<sup>121</sup>

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118. 8 JOHN RUSHWORTH, HISTORICAL COLLECTIONS (London: N.p., 1721). See also, BERGER, IMPEACHMENT, *supra* note 58, at 30-40.

119. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

120. See, e.g., THE FEDERALIST NOS. 79-80 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

121. THE FEDERALIST NO. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Jefferson and his allies sought to remove Federalist judges from the bench simply because they were political adversaries. The nation should be grateful that they failed. When many of the Framers and early constitutional scholars stated that impeachments were political in nature, they did not mean that they were to be used as a political weapon against political enemies. Rather, they meant that they were to be used to punish “political crimes,” which would often be outside the cognizance of the criminal statutes or which could be punished both by criminal prosecutions and with impeachment.

The Framers did not simply have knowledge of English impeachment history. They also explicitly adopted the same “ground rules” for America. Consider several of the following representative quotations. Alexander Hamilton, in *The Federalist Papers*, wrote:

The subjects of its [impeachment’s] jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words from the abuse or violation of some public trust. They are of a nature which with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.<sup>122</sup>

Justice James Wilson, a signer of the Constitution and one of the five original Supreme Court Justices explained that “Impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments.”<sup>123</sup>

In multiple discussions in his *Commentaries*, Justice Joseph Story strongly attacked the idea that high crimes and misdemeanors could be limited to indictable offenses:

The jurisdiction is to be exercised over *offences, which are committed by public men in violation of their public trust and duties*. Those duties are, in many cases, political; and, indeed, in other cases, to which the power of impeachment will probably be applied, they will respect functionaries of a

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122. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

123. 2 JAMES WILSON, THE WORKS OF THE HONORABLE JAMES WILSON 166 (Bird Wilson ed. 1804).

high character, *where the remedy would otherwise be wholly inadequate*, and the grievance be incapable of redress. Strictly speaking, then, *the power partakes of a political character*, as it respects injuries to the society in its political character . . . .<sup>124</sup>

The plain inference is that the remedy will be “wholly inadequate” because the offences are not indictable.

However, there are other passages in which Story speaks less ephemerically. For example, he also explained:

The offences to which the power of impeachment has been and is ordinarily applied as a remedy are of a political character. Not but that crimes of a strictly legal character fall within the scope of power . . . but that it has a more enlarged operation, and reaches what are aptly termed political offenses, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty.<sup>125</sup>

Here Story was quite specific: impeachable offenses include both indictable crimes and unindictable political offenses. Yet, he went on to make an even stronger statement, noting that no one in his day had asserted that impeachment could be confined to federal crimes:

Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, *not one of which is in the slightest manner alluded to in our statute book*. And, indeed, political

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124. STORY, *supra* note 57, § 762 (emphasis added).

125. *Id.* (emphasis added).



offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it. . . . [N]o one has as yet been bold enough to assert that the power of impeachment is limited to offences positively defined in the statute book of the Union, as impeachable high crimes and misdemeanors.<sup>126</sup>

A final point is also well worth noting. None of the earliest impeachments involved an indictable crime.

Congress have unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct; and the rules of proceeding, and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and [English] parliamentary usage. *In the few cases of impeachment, which have hitherto been tried, no one of the charges has rested upon any statutable misdemeanors.*<sup>127</sup>

We also recall that other passage from Story, cited earlier, wherein he recounts that:

[L]ord chancellors, and judges, and other magistrates, have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but *for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws, and introduce arbitrary power.*<sup>128</sup>

These last examples are not indictable crimes. Yet they constitute political offenses which judges committed from the 1300s through the 1700s.

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126. *Id.* § 795 (emphasis added).

127. *Id.* § 797 (emphasis added).

128. *Id.* § 798 (emphasis added).

In summary, it is beyond dispute that the Framers intended impeachment to be used against political crimes whether indictable or not. It is also clear that “misleading their sovereign by unconstitutional opinions and for attempts to subvert the fundamental laws, and introduce arbitrary power”<sup>129</sup> were “high crimes and misdemeanors” about which the Framers were particularly concerned with regard to the judicial branch.

Jefferson’s attempted abuse of this tool led to its disfavor. Another possible contributing factor was that officials who had been impeached for unindictable offenses almost universally argued the opposite view—that only indictable offenses were impeachable—even though no impeached official has ever persuaded the Senate with this argument.<sup>130</sup>

However, the fact that judges have been susceptible to these temptations of power for hundreds of years illustrates the biblical truth, “That which has been is that which will be, And that which has been done is that which will be done. So, there is nothing new under the sun.”<sup>131</sup> It also illustrates the wisdom of the Framers in providing for a safeguard against this propensity. The modern day advocates of judicial impeachment are not seeking to introduce some radical new threat to judicial independence. Rather, they are urging a return to the wisdom of the Framers which has been lost through historical accident.

### *B. Objection: It’s Never Been Done*

Those who want to honor the wisdom and original intent of the Framers can raise only two objections. The first is that it has never been done.<sup>132</sup>

The simple answer to this objection (other than “So what?”) is that the history of American impeachments is a history of “it has-never-been-done’s” (and for that matter, very often of “never-done-

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129. *Id.*

130. For a concise summary of the arguments made by each impeachment defendant, as well as which arguments were accepted and rejected by the Senate, see BUSHNELL, *supra* note 58 *passim*.

131. *Ecclesiastes* 1:9 (New American Standard).

132. See *infra* Section III. C. for the second objection.

again's.") Table 2 shows some of the groundbreaking aspects of each of the impeachment proceedings.

TABLE 2—GROUND BREAKING ASPECTS OF VARIOUS IMPEACHMENTS<sup>133</sup>

IMPEACHED OFFICIAL	GROUND BREAKING ASPECTS
William Blount	First impeachment under U.S. Constitution
John Pickering	First impeachment of a federal judge First impeachment for drunkenness First impeachment for blasphemy First impeachment of defendant thought insane First conviction
Samuel Chase	First impeachment of a Supreme Court Justice First impeachment initiated by a Congressman (prior two initiated by presidents) First impeachment in which defendant was present
James Peck	First impeachment initiated by a citizen's petition (petitioner tried 3 times before succeeding) First impeachment alleging only 1 article
West H. Humphreys	First impeachment for failure to hold court First impeachment in which accused refused to resign despite inability to fulfill office (Humphreys was at the time serving as a Confederate judge but Lincoln could not nominate replacement until Humphreys was impeached) First impeachment in which no defense was mounted First convicted official to be barred from future office holding
Andrew Johnson	First impeachment of a president First impeachment involving a dispute between two coordinate branches over the constitution First impeachment in which trial was never completed (Senate adjourned <i>sine die</i> after voting on only three articles)
Mark W. Delahay	First impeachment in which resignation took place before articles could be drafted
William W. Belknap	First impeachment of a Cabinet Officer First impeachment for bribery (although Articles used the term "high crimes and misdemeanors") First impeachment in which the major political parties joined forces to conduct the prosecution First acquittal on the grounds of resignation
Charles Swayne	First impeachment initiated by the petition of a state legislature
Robert W. Archbald	First impeachment of a Circuit Judge First impeachment for offenses in current and previous office First impeachment for violating good behavior clause First impeachment containing a "catch-all" summary article

133. The only way to ascertain whether something constitutes a "first" is to analyze all the primary sources for each impeachment. For any "first" dealing with the content of the articles of impeachment or with the results of the Senate trials, the primary sources listed in notes 58-93, *supra*, were compared. For "firsts" dealing with the timing of events and procedural matters, the numerous other primary sources referenced in note 58, *supra*, were compared. For this later category of "firsts," see also BUSHNELL, *supra* note 57, throughout.

Table 2 cont.

George English	First impeachment for profanity First impeachment in which House requested Senate to terminate proceedings
Harold Louderback	First impeachment initiated by a Bar Association's petition First impeachment in which the full House overrode the Judiciary Committee's recommendation not to impeach First impeachment in which the House revised the articles after they had been presented to the Senate
Halsted L. Ritter	First impeachment on "stale" charges (i.e., no on-going offenses; last allegation was 6 years old) First conviction on a "catch-all" article First conviction challenged in court
Harry E. Claiborne	First impeachment of a convicted felon First impeachment in which the Senate initially declined to receive the impeachment message from the House First impeachment in which Senate utilized a committee to investigate, i.e., the first impeachment in which the full Senate did not hear all the evidence
Alcee L. Hastings	First impeachment initiated by a petition from the Judicial Conference First impeachment in which Senate convicted despite defendant's acquittal in criminal trial First impeachment in which Senate declined to vote on all articles
Walter L. Nixon, Jr.	First time the Senate convicted two defendants in one year

Table 2 demonstrates that the rallying cry "it's never been done before" has never carried any weight with the House, the Senate or the various people inside and outside of government who sought to initiate proceedings. Likewise, the fact that no judge or justice has ever been impeached for rendering unconstitutional opinions should not carry any weight either.

Furthermore, there are, in fact, several near-precedents. At least on one occasion, a resolution seeking the impeachment of a Supreme Court Justice was introduced in response to a direct judicial act. Representative W. M. Wheeler (D-Ga.) introduced the resolution after Justice Douglas stayed the execution of Julius and Ethel Rosenberg on June 17, 1953.<sup>134</sup> The House Judiciary Committee appointed a special subcommittee that immediately began its work. It had already held one hearing, when, just two days later on June 19, the full Supreme Court overruled Douglas' stay.<sup>135</sup> Shortly thereafter, the full Judiciary Committee tabled the resolution calling for impeachment.<sup>136</sup>

134. *Rosenberg v. United States*, 346 U.S. 273 (1953). See also 99 CONG. REC. 6790 (1953) (showing introduction of H.R. Res. 290, 99th Cong. (1957)).

135. *Rosenberg v. United States*, 346 U.S. 273 (1953).

136. CONGRESSIONAL QUARTERLY, *supra* note 55, at 661.

In addition, a quick review of Table 1 demonstrates that tyrannical actions (although of a different type than discussed in this article) from the bench have often lead to impeachment proceedings against lower federal judges.

### *C. Objection: It Can't Be Done*

The other objection is that it simply cannot be done. This objection actually takes two forms. The first is that, despite the persuasive historical evidence to the contrary, rendering unconstitutional opinions has never constituted an impeachable offense in our nation's history. In other words, it is argued, a plausible case has been made that impeachment lies for political crimes. However, the argument continues, the only historical references to the impeachment for rendering unconstitutional opinions are those cited above from Story and Hamilton<sup>137</sup> and those are merely theoretical or reflect an aspect of the English impeachment history that has never been acted upon in this country.

The answer to this objection is several-fold. To a certain extent, this is just another version of the previous objection: it's never been done. That objection has been answered. However, we must also recognize that the view put forth here—that impeachment lies for unconstitutional opinions—is neither theoretical only nor limited to the pages of antiquity.

The only impeachment of a Supreme Court Justice involved, at least obliquely, the issue of rendering an opinion that in the view of Congress was unconstitutional. Thus, it provides a case study that is not totally hypothetical. After Supreme Court Justice Chase's impeachment, but prior to his acquittal, Chief Justice John Marshall wrote in a letter to Chase that:

[T]he present doctrine seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment. . . . I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the

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137. THE FEDERALIST NO. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed. 1961); STORY, *supra* note 58, at 800.

legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.<sup>138</sup>

Clearly, Marshall believed that Justices could be removed for rendering opinions that Congress considered to be unconstitutional. Marshall held this opinion, despite Jefferson's political witch-hunt and Marshall's fear that he was also likely to be a target.<sup>139</sup>

More contemporary jurists and scholars have also advocated impeachment specifically for justices who render unconstitutional opinions. Justice Felix Frankfurter was perhaps the most important of these. In *Rochin v. California*,<sup>140</sup> Frankfurter clearly stated that if Supreme Court Justices would not restrain themselves, they were subject to impeachment: "Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal *short of impeachment* or constitutional amendment."<sup>141</sup> This is a most important quotation in that it bears directly on the case of the "Romer 6" which will be examined in Section III. How can impeachment serve as an appeal of a Supreme Court opinion? The most logical answer is, only if you impeach all of the Justices who formed the majority.

Another recent voice acknowledging the role of impeachment is former West Virginia Supreme Court Chief Justice Richard Neely, a man who has engaged in quite a bit of judicial activism himself, yet who is honest enough to admit what the consequences can be.<sup>142</sup> Neely, writing as recently as 1981 and citing divisive social issues of the day, noted that:

when we come to constitutional law, the actions of courts are almost entirely outside the control of the legislative branch. The courts' rulings in constitutional matters cannot be changed except by amending the federal or state consti-

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138. 3 ALBERT J. BEVERIDGE, *LIFE OF MARSHALL* 177 (1919).

139. *Id.*

140. *Rochin v. California*, 342 U.S. 165 (1952).

141. *Id.* at 172 (emphasis added).

142. See generally RICHARD NEELY, *HOW THE COURTS GOVERN AMERICA* (1981).

tutions, which, as history demonstrates, is extremely difficult to do. Consequently, when the United States Supreme Court says that segregation is unconstitutional, or mandates the reapportionment of state legislatures to give the previously underrepresented citizen in urban areas one-man, one-vote for both houses of the state legislature, or rules that states cannot interfere with doctor-patient decision concerning abortions during the first trimester, there is absolutely no recourse from its decision except constitutional amendment or *impeachment of the court and appointment of a new court which will overrule the offending decision.*<sup>143</sup>

Another important modern day advocate of impeachment is Professor Raoul Berger. His 1973 book, *Impeachment: The Constitutional Problems*, is one of the most helpful on the subject. In it, he thoroughly discusses the nature of “high crimes and misdemeanors” including an analysis of the key passages from Joseph Story’s *Commentaries* discussing the English impeachments for rendering unconstitutional opinions.<sup>144</sup> Berger, in his 1977 book *Government by Judiciary*, wrote: “When the judiciary substitutes its own value choices for those of the people it subverts the Constitution by usurpation of power.”<sup>145</sup> Berger pointed out that “both the English and the Founders regarded ‘usurpation’ or subversion of the Constitution as the most heinous of impeachable offenses.”<sup>146</sup> He also specifically addressed *Federalist No. 81*, commenting, “judicial usurpation, as Hamilton stated, can be met by impeachment.”<sup>147</sup>

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143. *Id.* at 5-6 (emphasis added).

144. *See supra* text accompanying notes 124-129; BERGER, *IMPEACHMENT*, *supra* note 58, throughout.

145. BERGER, *JUDICIARY*, *supra* note 58, at 292; *see also id.* at 303, 395, 414-15.

146. *Id.* at 295.

147. *Id.* at 294-5. n.49. In *Impeachment*, Berger appears to erroneously come to the conclusion that judges could not be impeached for rendering unconstitutional opinions. *See* BERGER, *IMPEACHMENT*, *supra* note 58, at 90. However, in *Government by Judiciary*, he distinguishes certain comments he made in a third book, *Congress v. The Supreme Court* (1969) from his views that judges *can* be impeached for unconstitutional usurpation. The argument made in *Congress* is exactly the same argument made in *Impeachment* in which he (only) appears to say unconstitutional opinions are not proper grounds. Thus, Berger’s *seeming* denial of unconstitutional opinions as a ground for impeachment is not what it appears to be and is completely compatible with the quotations cited here. *See* Berger’s discussion of all this in BERGER, *JUDICIARY*, *supra* note 58, at 294 n.50.

Berger's work is especially important because of his acknowledged standing as an expert on impeachment. Major portions of *Impeachment*, though not yet published, were included in the Watergate impeachment resource materials compiled by the House Committee on the Judiciary.<sup>148</sup> The finished book was cited by the Supreme Court in *Nixon v. United States*<sup>149</sup> in upholding the impeachment conviction of Judge Nixon.<sup>150</sup>

The second version of the "it can't be done" objection is that there is not enough political will to accomplish impeachment. It is not the purpose of this article to prognosticate on the possibilities of successfully impeaching one or more federal judges or justices. Rather, it is the purpose of this article to demonstrate that impeachment is constitutionally justifiable in every instance of judicial tyranny and that there are dire spiritual consequences to leaving covenant-breakers in office. Under those assumptions, this article advocates pursuing impeachment, whatever the probability of eventual success may be.

It is incumbent upon those who believe that impeachment is a proper response to the *Romer* decision to educate the public and their representatives on this matter. It may be helpful to remind elected representatives of Gerald Ford's famous comments on the floor of the House during his drive to impeach Supreme Court Justice William Douglas:

What, then, is an impeachable offense? The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office.<sup>151</sup>

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148. COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, NINETY-THIRD CONGRESS, FIRST SESSION, IMPEACHMENT: SELECTED MATERIALS 617-62 (1973).

149. 506 U.S. 224 (1993).

150. *Id.* at 233.

151. 116 CONG. REC. 11,913 (1970).



The broadest possible interpretation of Ford's remarks should be repudiated as a true threat to the independence of the judiciary. However, Ford's remarks are susceptible to a narrower interpretation. They are true to the extent that "high crimes and misdemeanors" was a term deliberately chosen for its historical elasticity (although intending to set some undefined ultimate limit). His comments are also true to the extent that the judgment of the House and Senate in their respective roles is unreviewable in the federal courts.

Three times the federal courts have ruled that impeachment convictions are unreviewable. The Court of Claims so held when Judge Ritter sued for back pay.<sup>152</sup> The District Court, Court of Appeals, and Supreme Court all so held when Judge Nixon sued to have his impeachment declared unconstitutional on procedural grounds.<sup>153</sup> The District Court and Court of Appeals so held when Judge Hastings challenged his impeachment trial on Fifth Amendment Due Process and procedural grounds.<sup>154</sup> Ford's comments, and the unreviewable nature of impeachment convictions, may help some representatives feel "safer" in jumping on the impeachment bandwagon.

To put the proper bounds on Ford's statement one should consider the remarks made before the American Bar Association by William Taft, the only man to serve the United States as both President and Chief Justice of the Supreme Court:

Under the authoritative construction by the highest court of impeachment, the Senate of the United States, a high misdemeanor for which a judge may be removed is misconduct involving bad faith or wantonness [sic] or recklessness in his judicial actions, or in the use of his

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152. Ritter v. United States, 84 Ct. Cl. 293 (1936).

153. Nixon v. United States, 506 U.S. 224 (1993).

154. The District Court originally ruled that the impeachment conviction was reviewable and that it had in fact violated the Constitution. However, because the court knew that the Supreme Court would shortly be determining the issue in the Judge Nixon case, it stayed its order pending appeal. Hastings v. United States 802 F. Supp. 490 (D.D.C. 1992). The Court of Appeals vacated the decision and remanded it for reconsideration in light of the Nixon case. Hastings v. United States, 988 F.2d 1280 (D.C. Cir. 1993) (unpublished opinion). The District Court then acknowledged that the United States Supreme Court had settled the issue and that it had no choice but to rule that the impeachment conviction was unreviewable. Hastings v. United States, 837 F. Supp. 3 (D.D.C. 1993).

official influence for ulterior purposes. By the liberal interpretation of the term "high misdemeanor" which the Senate has given there is now no difficulty in securing the removal of a judge for any reason that shows him unfit.<sup>155</sup>

There is another answer to the objection that "it cannot be done." There is evidence that the mere threat of impeachment will have a salutary effect on the federal judiciary. As noted in the Introduction, the law school deans found this aspect of the impeachment movement especially troubling. Yet, the historical data clearly reflect that the Framers intended the threat of impeachment to have exactly this effect. Impeachment is a multi-step process. Resolutions can be introduced, authorizing impeachment directly or authorizing an investigation into possible impeachment proceedings. Assuming that an investigation occurs first, the steps leading to conviction would include investigation, debate on whether or not to draft articles of impeachment, a vote on passage of the articles, a trial in the Senate, and conviction. The farther the process goes, the greater the salutary impact will likely be. Those who are persuaded that impeaching judicial tyrants is correct should not give up before they start simply because they don't think they can obtain the final goal of conviction.

Joseph Story understood that the threat of impeachment must be real in order to serve as an effective check. He wrote that on the one hand, impeachment should not "be a power so operative and instant that it may intimidate a modest and conscientious statesman or other functionary from accepting office," but that on the other hand, it must not be "so weak and torpid as to be capable of lulling offenders into a general security and indifference."<sup>156</sup>

There is some evidence to support the thesis that impeachment investigations also serve the function Story anticipated. The following table reveals that the Congresses of the Framers' generation were much more likely to contemplate impeachment than Congress is today. The data compares impeachment investigations (judicial branch only).

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155. Merrill E. Otis, *A Proposed Tribunal: Is it Constitutional?*, 7 KAN. CITY L. REV. 3, 22 (1938).

156. STORY, *supra* note 57, § 747.

TABLE 3—IMPEACHMENT INVESTIGATIONS<sup>157</sup>

Dates (in 50 year increments)	Number of House Impeachment Investigations	Authorized Article III Judgeships (at 26th year)	Ratio of Investigations to Judgeships
1790-1839	17	28 (1815)	.61
1840-1889	12	63 (1865)	.19
1890-1939	23	146 (1915)	.16
1940-1989	7	407 (1965)	.02

On the one hand, this data might tend to show that it is harder today to generate impeachment investigations than in previous eras. On the other hand, it may also show a need to return to a day when judges knew that they were being watched. A comparison of Table 1 with Table 3 yields the following relationship: the higher the ratio of investigations, the lower the rate of actual (judicial) impeachments or convictions. Table 4, below, shows these results.

TABLE 4—IMPEACHMENT INVESTIGATION RATIOS

Dates	Number of House Impeachment Investigations	Number of Impeach- ments	Number of con- victions	Authorized Article III Judgeships (at 26th yr.)	Ratio of Investiga- tions to Judgeships	Ratio of Impeachments to Investigation/ Judge	Ratio of Convictions to Investigation/ Judge
1790- 1839	17	3	1	28 (1815)	.61	4.94	1.65
1840- 1889	12	2	1	63 (1865)	.19	10.50	5.25
1890- 1939	23	5	3 includes resig- nation	146 (1915)	.16	31.74	19.044
1940- 1989	7	3	3	407 (1965)	.02	174.43	174.43

While this is certainly not a *ceteris paribus* study and while the correlation doesn't prove causation, it is certainly grounds for the hypothesis that impeachment investigations serve as a deterrent to behavior that would lead to actual impeachments. In other words, investigations may serve as deterrents to high crimes and misdemeanors. There is every reason to believe that an investigation, an impeachment, or a conviction for rendering an unconstitutional opinion would serve as a major wake-up call to all those federal

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157. This table is recreated from Grimes, *supra* note 57, at 1216.

judges who exceed the limits of their constitutionally granted authority.

Now that Judge Sarokin has resigned and Judge Baer has reversed his ruling, there is at least anecdotal evidence that mere public debate about impeaching judges has impacted judicial behavior. The law school deans found this troubling.<sup>158</sup> This author believes these situations vindicate the wisdom of the Framers.

Here the Framers and the early Congresses appear to have implicitly incorporated a Biblical principle into their view of the proper use of the impeachment mechanism. To some extent, impeachment investigations themselves serve as a punishment to those whose judicial conduct has not been above reproach—including those who have written unconstitutional opinions. The public humiliation and interruption of one's private life are very sobering experiences, regardless of the outcome of the investigation. One biblical role of punishment is to serve as a warning to others. Several verses illustrate this point. In the book of Psalms, the principle is expressed this way:

[Evildoers] devise injustices, saying, "We are ready with a well-conceived plot;" For the inward thought and the heart of a man are deep. But God will shoot at them with an arrow; Suddenly they will be wounded. So they will make him stumble; Their own tongue is against them; All who see them will shake the head. Then all men will fear, And all will declare the work of God, And will consider what He has done.<sup>159</sup>

The same principle is at work in the book of I Corinthians. Discussing God's punishment of the Israelites in the wilderness centuries earlier, the apostle Paul writes: "Now these things happened as examples for us, that we should not crave evil things, as they also craved."<sup>160</sup> Again, this aspect of punishment is addressed in II Peter:

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158. See *supra* text accompanying note 24.

159. *Psalms* 64:6-9 (New American Standard).

160. *I Corinthians* 10:6 (New American Standard); see also, *I Corinthians* 10:11 "Now these things happened to them as an example, and they were written for our instruction . . ." (New American Standard).

“He condemned the cities of Sodom and Gomorrah to destruction by reducing them to ashes, having made them an example to those who would live ungodly thereafter.”<sup>161</sup> Joseph Story’s description of the proper use of impeachment (including the preliminary stages) appears to capture this principle perfectly: impeachment must not become “so weak and torpid as to be capable of lulling offenders into a general security and indifference.”<sup>162</sup>

The bottom line is this: There is no full answer to the problem of judicial tyranny short of impeachment. Many other proposals have been put forth over the years, and many others have been revived during the current debate, but none of them will serve as a complete solution under our current Constitution.<sup>163</sup> In fact, some of the proposals themselves are likely unconstitutional. It is true that some of the proposals have involved adopting constitutional amendments. However, the problem with most of these proposals is that they would swing the pendulum too far the other way—the independence of the judiciary would truly be threatened. Any answer involving recall, term limits, or removal on less restrictive grounds threatens the independence of the judiciary. Any answer based on removal of appellate jurisdiction only limits tyranny in those areas of law. Any answer that allows the legislature to overrule the Supreme Court adds a check not intended by the Framers—or to put it more precisely, unchecks a check (upon the legislature) that was intended. Impeachment is the only acceptable answer.

It is no less true today than it was when *The Federalist Papers* were penned that impeachment “is the only provision on the point [of checking the judiciary] which is consistent with the necessary independence of the judicial character . . .”<sup>164</sup> We should not and cannot shy away from impeachment. Joseph Story wrote of certain

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161. *II Peter* 2:6 (New American Standard).

162. STORY, *supra* note 57, 747.

163. See, e.g., AMERICAN ENTERPRISE INSTITUTE, JUDICIAL DISCIPLINE AND TENURE PROPOSALS (1979); FEDERALIST SOCIETY, SOME PROPOSALS FOR RELIMITING THE FEDERAL COURTS (visited Feb. 26, 1998) <<http://www.fed-soc.org/prop297.html>>; Grimes, *supra* note 58; Gerhardt, *Limits to Impeachment*, *supra* note 58; Maxman, *supra* note 58; Shane, *supra* note 58; Shartel, *supra* note 58; Simon, *supra* note 58; Stoltz, *supra* note 58.

164. THE FEDERALIST No. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

things that the Constitution does and does not contemplate with regard to impeachment:

The Constitution supposes that men may be trusted with power under reasonable guards. It presumes that the Senate and the executive will no more conspire to overthrow the government than the House of Representatives. It supposes the best pledges for fidelity to be in the character of the individuals, and in the collective wisdom of the people in the choice of agents. It does not in decency presume that the two-thirds of the Senate representing the States will corruptly unite with the executive, or abuse their power.<sup>165</sup>

Surely, most, if not all, of those on both sides of the current impeachment debate would give a hearty “amen” to Story’s list of presuppositions. The nation would not survive should our officials ever act so corruptly. However, Story’s list of necessary presumptions does not end here. He goes on, in the very next sentence, to say: “Neither does it suppose that a majority of the House of Representatives will corruptly refuse to impeach . . .”<sup>166</sup> Just as the Constitution cannot protect our liberties if high officials conspire to overthrow the government, so it cannot protect us if the House of Representatives fails to impeach tyrants.

#### IV. EVALUATING CANDIDATES

##### A. *The Romer Six*

This section will look at certain judges and justices who have been the target of calls for impeachment. In the spirit of the discussion in Section III. C.—that is, in the spirit of not being concerned with the ultimate chance of success—this Section begins with an examination of the six United States Supreme Court Justices, “the Romer 6,” who constituted the majority in *Romer*. In examining whether these justices are impeachable, this Section will look only at

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165. STORY, *supra* note 57, at 754.

166. *Id.* (emphasis added).

the constitutional question, i.e., whether they are guilty of high crimes and misdemeanors.

The previous sections, which reviewed the Framers' intent, highlighted certain matters that are particularly germane to the case of the "Romer 6." First, rendering unconstitutional opinions, subverting the fundamental laws, and introducing arbitrary power are all high crimes and misdemeanors that constitute impeachable offenses. Furthermore, subverting the fundamental laws may also constitute treason (see the remarks of Mason, in Section II.A.).

"The Romer 6" are guilty of all of these political crimes. The opinion is unconstitutional, i.e., it contains an erroneous interpretation of the Constitution and thereby misleads the American sovereign—the people. This is not merely sour grapes. Every lawsuit has one winner and one loser. Not every losing attorney or litigant should shout "impeachment"—that would be to recommit Jefferson's error.

However, the *Romer* opinion is egregiously non-legal and extra-legal. When Justice Kennedy declared Colorado's Amendment 2 unconstitutional, he summarily rejected the asserted governmental interests and concluded that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."<sup>167</sup> Furthermore, Kennedy asserted, there could be no explanation for the Colorado vote other than animus.<sup>168</sup>

As Justice Scalia pointed out in his dissent, the majority opinion is virtually devoid of legal reasoning. For example, it is quite true, as Scalia wrote, that "the Court's opinion is so long on emotive utterance and so short on relevant legal citation."<sup>169</sup> Scalia also charged that the majority's main "proposition finds no support in law or logic."<sup>170</sup> More specifically, he wrote that "[n]o principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here."<sup>171</sup> Finally, he wrote that "[t]oday's opinion has no foundation in American constitutional law, and barely pretends to."<sup>172</sup>

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167. *Romer*, 116 S. Ct. at 1629.

168. *Id.* at 1627.

169. *Id.* at 1630 (Scalia, J., dissenting).

170. *Id.* at 1631.

171. *Id.* at 1633.

172. *Romer*, 116 S.Ct. at 1637 (Scalia, J., dissenting).

It is not unusual for the dissenting justices to denigrate the majority's opinion. However, when broad segments of the legal community concur with the dissenting justices, the criticisms must be taken seriously. In the case of *Romer*, numerous critics have already pronounced Scalia's criticisms to be completely legitimate or have added new criticisms of their own. One recent Law Review article collected and summarized the criticisms of many observers this way:

[W]hen the Court rendered its decision, the only clear aspect of its opinion was the conclusion that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment. The Court's rationale and analytical approach were both unclear. While the Court claimed to apply the traditional framework of equal protection analysis, the result it reached was inconsistent with the method it purported to employ. This resulting inconsistency prompted some commentators to suggest that the Court was disingenuous or at least shallow in its legal reasoning. Despite the Court's problematic legal reasoning, *Romer* is a decision with precedential value that will inevitably affect future equal protection cases.<sup>173</sup>

Other criticisms have included the following: "In the end, *Romer v. Evans* is a bad judgment because it is a dishonest one."<sup>174</sup> "Justice Kennedy's majority opinion conspicuously failed to articulate a principled justification. His opinion was rooted neither in original meaning nor in precedent, and provided little guidance for future controversies."<sup>175</sup> "The troubling thing about the 6-3 *Romer* decision is that the majestic generalities of Justice Anthony Kennedy's majority opinion are surrounded by such crude, superficial, and

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173. Raffi S. Baroutjian, Note, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis*, In with *Romer v. Evans*, 30 LOY. L. A. L. REV. 1,277-78 (1996) (citations omitted).

174. David Frum, *Suspect Jurisprudence*, WKLY. STANDARD, June 3, 1996, at 11-2.

175. Stuart Taylor Jr., *Is Judicial Restraint Dead?*, 16 LEGAL TIMES S25, S27 (July 29, 1996).



evasive legal reasoning . . . .”<sup>176</sup> These criticisms have come from all over the jurisprudential and ideological map, and have been further summarized this way: “Many commentators have labeled the Court’s opinion conclusory, incoherent, and superficial.”<sup>177</sup>

These are the very problems that initially sparked the talk of impeachment. Among the problems that make the *Romer* decision unconstitutional, Justice Scalia points out the following:

[Amendment 2’s] objective and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion’s heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

. . . .

Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, announcing that “animosity toward homosexuality is evil.”

. . . .

[T]he principle underlying the Court’s opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged “equal protection” violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.

The central thesis of the Court’s reasoning is that any group is denied equal protection when, to obtain advantage

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176. Stuart Taylor Jr., *Twisting and Turning on Gay Rights: Admirable Decision in Landmark Case Marred by Superficial Reasoning*, FULTON COUNTY DAILY REP., May 28, 1996, at 10.

177. Baroutjian, *supra* note 173, at 1300 (citations omitted).

(or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decision making than others. *The world has never heard of such a principle*, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. *And it seems to me most unlikely that any multilevel democracy can function under such a principle.*

....

The Court today asserts that this most democratic of procedures [the vote on Amendment 2] is unconstitutional. Lacking any cases to establish that facially absurd proposition, it simply asserts that it must be unconstitutional, because it has never been done before.

....

The Court today . . . employs a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values.

....

I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.

But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes. To suggest, for example, that this constitutional amendment springs from nothing more than "a bare . . . desire to harm a politically unpopular group," is nothing short of insulting.

....

*Today's opinion has no foundation in American constitutional law, and barely pretends to. . . . Striking [Amendment 2] down is an act, not of judicial judgment, but of political will.*<sup>178</sup>

Furthermore, in the passages in which Scalia discusses Colorado's right to pass Amendment 2, the Tenth Amendment seems to be

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178. *Romer*, 116 S. Ct. at 1629, 1630, 1634, 1636, 1637 (Scalia, J., dissenting) (citations omitted, emphasis added, ellipses in internal quotation original, other ellipses added).

lurking between the lines. One of the powers retained by the states is the police power—which involves regulating the public health, public safety, as well as the public morality.<sup>179</sup> Scalia defends passage of Amendment 2 in terms that implicitly rely upon the police power: “Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before.”<sup>180</sup>

Implicit in this discussion of the unconstitutionality of the *Romer* decision are the elements that also make “the Romer 6” guilty of subverting the fundamental law and of introducing arbitrary power. As Justice Scalia pointed out, the majority decision threatens the very existence of a multilevel democracy as we know it. Discounting whatever melodrama may be contained in Scalia’s words, the concern is legitimate. The *Romer* decision certainly makes a mockery of the Fourteenth Amendment’s Equal Protection Clause, turning it into, as Scalia wrote, a principle “the world has never heard of.”<sup>181</sup> In addition it violates the Tenth Amendment. The *Romer* opinion, in and of itself constitutes arbitrary power because it is an exercise of “political will” by the judiciary.

We recall William Taft’s criteria for impeachment: “wantonness [sic] or recklessness in his judicial actions.”<sup>182</sup> The Amendment 2 decision is clearly within those bounds. It shows both a wanton and a reckless disregard for certain specific legal principles and for the rule of law, *per se*.

### *B. Judge Harold Baer, Jr.*

The case against Judge Baer is very different from that of “the Romer 6.” Analysis of his first controversial opinion reveals a fairly detailed interaction with the facts, evidence and precedents pertinent

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179. See generally W. P. PRENTICE, POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY (1894).

180. *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

181. *Id.* at 1630.

182. OTIS, *supra* note 155, at 22.

to the case.<sup>183</sup> He was using the tools of his trade. He was not making up new constitutional “rights” or legislating from the bench.

The problem with Baer’s first opinion was pointed out in his own words in his second opinion:

A legal opinion stands for a proposition of law, a holding. Additional material which is included in most opinions but which does not relate directly to the holding is known as dicta. Although dicta may color the holding of an opinion, it by no means constitutes a legal or factual conclusion. On that score, unfortunately the hyperbole (dicta) in my initial decision not only obscured the true focus of my analysis, but regretfully may have demeaned the law-abiding men and women who make Washington Heights their home and the vast majority of the dedicated men and women in blue who patrol the streets of our great City.<sup>184</sup>

Baer’s comments, about demeaning the police, refer to statements in his first opinion implying that the police in question were part of a corrupt and incompetent force and that a specific officer who had testified was not to be believed.<sup>185</sup> As a result, Baer originally suppressed 34 kilograms of cocaine and 2 kilograms of heroin and a confession to twenty drug-running trips.<sup>186</sup>

Even this does not rise to the level of constituting judicial tyranny in any of the senses encountered in the *Romer* opinion. On the other hand, Baer’s confession of analytical incompetence could have serious consequences if this opinion is not an anomaly. Impeachment was used to remove the incompetent Judge Pickering in 1803—but only because he was thought insane. Thus, targeting Baer for impeachment is probably near the edge of legitimacy. If Congress is concerned that this is a judge who is demonstrating a pattern of analytical incompetence, it could certainly investigate him. There would be cause for concern if there were numerous instances in which any such incompetence were endangering the public as it did in the

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183. *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996).

184. *Id.* at 217.

185. *Id.* at 239-43.

186. *Id.*

*Bayless* case. We have seen that scrutiny less than a congressional investigation has had a salutary effect. However, calling for Baer's impeachment based on this one opinion alone appears to be illegitimate.

### C. Judge Nixon

Judge Nixon, on the other hand, does demonstrate a pattern of judicial behavior that appears to constitute introducing arbitrary power. He appears to be motivated by his own personal predilections against the death penalty. He routinely creates an inordinate delay in the death penalty cases assigned to him. Although in some of these cases it may have been appropriate for Judge Nixon to forego involvement until after the state court appeals had been resolved,<sup>187</sup> this does not explain all the delays. Some of the cases before him had been through the state court system four times.<sup>188</sup> Moreover, higher federal judges have criticized him for his slow pace.<sup>189</sup> Judge Gilbert Merritt of the Sixth Circuit Court of Appeals declared that there was "no acceptable reason" for the delay in two of the death penalty cases assigned to Nixon<sup>190</sup> and took the unusual measure of writing to a newspaper editor to tell him he thought so.<sup>191</sup> In one case, the Sixth Circuit ordered Nixon to expedite a case that he had in his court for eight years.<sup>192</sup>

Several of these cases involve overturning convictions or death sentences under highly questionable rationales which has led to questions by those who know that Judge Nixon has accepted an award from an anti-death penalty group.<sup>193</sup> In one case,<sup>194</sup> Nixon allowed one death row inmate and other individuals and organizations to serve as next friends for another death row inmate in order to seek a stay of

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187. Cf. Section IV. D.

188. Richard Urban, *Slow to Judge: The Closely Analyzed Life of John Nixon*, NASHVILLE SCENE, July 10, 1997, at 22.

189. Harry Moskos, *Higher Court Should Rein in Judge Nixon*, KNOXVILLE NEWS-SENTINEL, Jan. 5, 1997, at F2.

190. *Id.*

191. *Id.*

192. URBAN, *supra* note 188, at 22.

193. Penny Bender, *Lawmakers Get Call to Impeach Nixon*, THE TENNESSEAN (Nashville), March 3, 1997, at 11A.

194. *Groseclose ex rel. Harries v. Dutton*, 589 F. Supp. 362 (M.D. Tenn. 1984).

execution.<sup>195</sup> The inmate facing execution, Ronald Harries, had decided to forego any further appeals.<sup>196</sup> After that decision, he had been given antidepressant drugs, which the next friends alleged rendered him unable to reconsider his decision.<sup>197</sup> Judge Nixon then stayed the execution, pending a hearing on Harries' competency to waive further appeals.<sup>198</sup>

Although Harries originally opposed the next friend action, he later changed his mind and joined the action as a party plaintiff.<sup>199</sup> His argument was that although he had been competent to waive further appeal, his waiver was involuntary because of the unconstitutional conditions of confinement.<sup>200</sup> In other words, because the prison was not kept in nice enough condition, Harries had decided he would rather accept execution than live there and this decision was therefore involuntary.<sup>201</sup>

Because the claims before Judge Nixon were based upon an alleged violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution,<sup>202</sup> he provided some historical background on that amendment:

It is appropriate to examine the history of the Eighth Amendment in an attempt to resolve issues pertaining to treatment of those sentenced to death.

The courts have historically held that the Eighth Amendment was adopted to prevent inhuman, barbarous, or tortuous punishments . . . .

As late as 1782 in the case of David Tyree, the [English] Court pronounced sentence as follows:

Mr. Justice Heath.

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195. *Id.*

196. *Id.* at 363.

197. *Id.*

198. *Id.* at 366.

199. *Groseclose ex rel. Harries v. Dutton*, 594 F. Supp. 949, 951 (M.D. Tenn. 1984).

200. *Id.*

201. *Id.* at 960.

202. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. CONST. amend. VIII.

You David Tyrie, are to be led from hence to the gaol [sic] from whence you came; and from thence you are to be drawn, upon a hurdle, to the place of execution; and there you are to be hanged by the neck; and being alive, to be cut down, and your private members to be cut off, and your bowels to be taken out of your belly, and there burnt, you being alive: and your head to be cut off, and your body to be divided into four quarters; and that your head and quarters to be disposed of where his majesty shall think fit.<sup>203</sup>

One would have thought that with this rehearsal of history, either one would find torture chambers in the Tennessee prison or Judge Nixon would find no Eighth Amendment problem. Not so. Instead, Judge Nixon thought that the idleness and confinement of the inmates, the small size of the cells, poor lighting, outmoded toilets, temperature variations, the presence of insects, and some safety concerns combined to constitute cruel and unusual punishment.<sup>204</sup> Not surprisingly, the Sixth Circuit vacated Judge Nixon's decision.<sup>205</sup>

It is not the intention of this article to comprehensively analyze all of Judge Nixon's rulings in death penalty cases. Some of his rulings cannot be questioned under the controlling precedents.<sup>206</sup> For example, in *Houston v. Dutton*,<sup>207</sup> the Sixth Circuit upheld Judge Nixon's application of *Sandstrom v. Montana*,<sup>208</sup> *Francis v. Franklin*,<sup>209</sup> and *Yates v. Evatt*<sup>210</sup> to invalidate the state trial judge's presumption of malice instruction.<sup>211</sup> In the same case, the Sixth Circuit upheld Judge Nixon's finding that the trial judge's "heinous,

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203. *Groseclose v. Dutton*, 609 F. Supp. 1432, 1439-40 (M.D. Tenn. 1985) (citation omitted).

204. *Id.* at 1446.

205. *See* *Groseclose v. Dutton*, 829 F.2d 581 (6<sup>th</sup> Cir. 1987).

206. *See, e.g., Houston v. Dutton*, 50 F.3d 381 (6<sup>th</sup> Cir. 1995) (Sixth Circuit upholding Judge Nixon's application of the law).

207. 50 F.3d 381 (6<sup>th</sup> Cir. 1995).

208. 442 U.S. 510 (1979).

209. 471 U.S. 307 (1985).

210. 500 U.S. 391 (1991).

211. *Houston*, 50 F.3d at 385-87.

atrocious or cruel” instruction constituted error.<sup>212</sup> On these two grounds, the Sixth Circuit upheld Nixon’s writ of habeas corpus.<sup>213</sup>

However, Nixon had not limited himself to these grounds for granting the writ. He had also found that “the evidence of first degree murder offered by the state was insufficient under the Due Process Clause to justify a rational jury in making such a finding.”<sup>214</sup> The Court of Appeals chastised Nixon for his misuse of state cases to reach this conclusion and noted that “[t]he District Court’s holding, based on the constitutional insufficiency of the evidence at Houston’s trial, if upheld, would mean that under normal circumstances a retrial of Houston for murder would be barred by the Double Jeopardy Clause of the Fifth Amendment.”<sup>215</sup>

Such misuse of the law is part of the pattern of anti-death penalty behavior by Judge Nixon that has been well documented.<sup>216</sup> Certainly, when both houses of the state legislature, by overwhelming and bi-partisan votes, and the governor ask the United States House of Representatives to investigate these matters because they are convinced that a federal judge is a tyrant in their midst,<sup>217</sup> that judge is a good candidate for an impeachment inquiry. Let the House and Senate do their job and decide if he should be impeached and convicted.

#### D. Judge Dalzell

Judge Dalzell represents a middle case between judges Baer and Nixon. As the description immediately following indicates, his behavior clearly appears to be tyrannical like Judge Nixon’s, yet the impeachment push is based on only one case as is true with Judge Baer. The actual facts in the case before Judge Dalzell revolve around a bizarre and tragic murder and whether the real murderer was convicted.<sup>218</sup> However, the case is controversial because of what Dalzell did and what he wrote. First, he granted a writ of habeas

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212. *Id.* at 387.

213. *Id.* at 382-83, 387.

214. *Id.* at 383.

215. *Id.* at 384.

216. *See supra* text accompanying notes 187-193.

217. Loggins, *supra* note 28, at A1.

218. Lambert v. Blackwell, 962 F. Supp. 1521 (E.D. Pa. 1997).



corpus after the convicted murderer had appealed her conviction once but before she exhausted all state remedies.<sup>219</sup> Judge Dalzell also held that the convicted murderer, Lisa Lambert, had established actual innocence,<sup>220</sup> and that the state of Pennsylvania could not re-prosecute.<sup>221</sup> He also declared a man named Lawrence Yunkin to be the actual killer<sup>222</sup> and accused Lancaster County officials of deliberately convicting the wrong person.<sup>223</sup>

The question for this article, however, is whether Dalzell's actions are impeachable. His actions strike at the heart of federalism concerns and thus could be considered as subverting the fundamental law. Senator Arlen Specter, while opposing the impeachment of Dalzell,<sup>224</sup> nonetheless, introduced legislation designed to prohibit federal judges from barring state retrials.<sup>225</sup> Representative Joseph Pitts introduced the House counterpart.<sup>226</sup> The attorneys general of six states filed an amicus brief in support of Pennsylvania's position when it appealed Dalzell's ruling.

One could argue that legal appeals and new legislation would suffice to solve the problems raised by Dalzell's actions. On the other hand, one could argue that the responses to Dalzell's ruling show just how egregious it was. The Third Circuit's reversal of Dalzell<sup>227</sup> also lends credence to the severity of the assault on federalism contained in his opinion.

Among other things, the Third Circuit noted:

Under *Rose v. Lundy*, 455 U.S. 509, 522 (1982), the district court is *required* to dismiss a federal habeas petition filed pursuant to 28 U.S.C. § 2254 which contains both unexhausted and exhausted claims. Because we find the

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219. *Id.* at 1553-54.

220. *Id.* at 1528-55.

221. *Id.* at 1552.

222. *Id.* at 1535-55.

223. *Id.* at 1555.

224. Jan Hoffman, *Why do they want to keep doing this to me?: Lisa Michelle Lambert speaks to the New York Times*, INTELLIGENCER JOURNAL (LANCASTER, PA.), Dec. 27, 1997, at B1.

225. 143 CONG. REC. S8572. (daily ed. July 31, 1997).

226. *Id.*

227. *Lambert v. Blackwell*, 1997 WL 815397 (3<sup>rd</sup> Cir. Dec. 29, 1997) (emphasis added).

petitioner has not yet pursued her remedies under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. Ann. § 9542 et seq. (West 1997 Supp.), her federal habeas petition includes unexhausted claims and, hence, the result here is dictated by *Rose v. Lundy, supra*.<sup>228</sup>

Dalzell's refusal to dismiss the habeas petition was compounded by his insistence on addressing Lambert's innocence. Compare the approach of the Third Circuit:

Each side has brought to our attention serious factual issues concerning the district court's finding that Lambert was actually innocent of first degree murder. In light of our resolution of Lambert's petition, we need not comment on Lambert's actual innocence. Indeed, to do so would be to "deprive the state courts of an 'opportunity to correct their own errors, if any,'" by engaging in a premature examination of the verdict prohibited by Congress under the [Anti-Terrorism and Effective Death Penalty Act of 1996].<sup>229</sup>

Certainly, Congress' investigation of Dalzell would be legitimate, especially in light of the Third Circuit's discussion of the federalism question and the tone of Dalzell's opinion, which smacks of arrogance and condescension.<sup>230</sup> This may or may not be a situation in which an

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228. *Id.* at \*1.

229. *Id.* at \*17 (citations omitted).

230. Consider for example this passage:

*Digression 2: Why Did This Happen?*

Those who have read this sad history may well ask themselves, how could a place idealized in Peter Weir's *Witness* become like the world in David Lynch's *Blue Velvet*? Because it is so important to that community—and indeed to many others—to prevent a recurrence of this nightmare, we offer a few reflections on the record.

... The record is clear that East Lampeter Township Police Chief Glick and his colleagues never considered any other suspects than the now-familiar three. And of this trio, Lisa Lambert was as though delivered from Central Casting for the part of villainess. By the testimony of those who loved her, Aimee Shearer Bernstein and Michael Pawlikowski, she was at the time literally "trailer trash."

The community thus closed ranks behind the good family Show and exacted instant revenge against this supposed villainess. It is important to stress that this

investigation based upon one opinion would reveal a bigger problem. Once again, in an arguably close case, let the investigation have its salutary effect and let Congress do its job of deciding whether it should proceed further.

### *E. The Easy Cases*

Some of the other judges often mentioned as being on the conservatives' "hit list"<sup>231</sup> are actually "easier cases" than those discussed above and are clearly prime candidates for impeachment under the historical grounds. These judges are "easier cases" because they have committed some of the acts that clearly constitute "high crimes and misdemeanors." The brief mention that follows will not serve as the definitive case against these judges. However, it shows that under historical standards, these judges are not being targeted for political reasons.

Judge Russell Clark has conducted himself in the most clearly tyrannical manner. Judge Clark has been running many aspects of the Kansas City School District since at least 1984, when he issued his first published order in a school desegregation lawsuit.<sup>232</sup> While it is beyond the scope of this article to even attempt to summarize the

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solidarity and compassion for the Shows defines our outsiders' idealization of this community. But then what was and is a social strength was turned inside out into corruption.

Almost immediately after the snap judgment was made, law enforcement officials uncovered inconvenient facts such as the absence of cuts and bruises on Ms. Lambert—answer, no photographs of her—and many on Tabitha Buck and some on Yunkin—answer, conceal or destroy the mug shots. And as these untidy facts accumulated, Kenneff and Savage discovered a balm for these evidentiary bruises, Lawrence Yunkin. Yunkin would say and do anything to obtain what his lawyer rightly described as "the deal of the century" in the February 7, 1992 plea agreement for "hindering apprehension", which would carry a state sentencing guidelines range of 0-12 months. Thus Lancaster's best made a pact with Lancaster's worst to convict the "trailer trash" of first degree murder.

In making a pact with this devil, Lancaster County made a Faustian Bargain. It lost its soul and it almost executed an innocent, abused woman. Its legal edifice now in ashes, we can only hope for a Witness-like barn-raising of the temple of justice.

*Lambert*, 962 F. Supp. at 1555 (emphasis in original).

231. See, e.g., Victor, *supra* note 27.

232. *Jenkins v. Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984).

myriad of published opinions in this case,<sup>233</sup> perhaps the tyrannical nature of his judicial conduct can best be summarized by several lengthy excerpts from Justice Kennedy's concurring opinion in one of the case's several trips to the United States Supreme Court:

The plan was intended to "improve the quality of education of all KCMSD [Kansas City, Missouri School District] students." The District Court was candid to acknowledge that the "long term goal of this Court's remedial order is to make available to all KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district."

It comes as no surprise that the cost of this approach to the remedy far exceeded KCMSD's budget, or for that matter, its authority to tax. A few examples are illustrative. Programs such as a "performing arts middle school," a "technical magnet high school" that "will offer programs ranging from heating and air conditioning to cosmetology to robotics," were approved. The plan also included a "25 acre farm and 25 acre wildland area" for science study. The court rejected various proposals by the State to make "capital improvements necessary to eliminate health and safety hazards and to provide a good learning environment," because these proposals failed to "consider the criteria of suburban comparability." The District Court stated: "This 'patch and repair' approach proposed by the State would not achieve suburban comparability or the visual attractiveness sought by the Court as it would result in floor coverings with unsightly sections of mismatched carpeting and tile, and individual walls possessing different shades of paint." Finding that construction of new schools would result in more "attractive" facilities than renovation of existing ones, the District Court approved new construction at a cost

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233. A Westlaw search for published opinions or orders in this case produced sixty-four results.

ranging from \$61.80 per square foot to \$95.70 per square foot as distinct from renovation at \$45 per square foot.

By the time of the order at issue here, the District Court's remedies included some "\$260 million in capital improvements and a magnet-school plan costing over \$200 million." And the remedial orders grew more expensive as shortfalls in revenue became more severe. As the Eighth Circuit judges dissenting from denial of rehearing in banc put it: "The remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court's order—the large number of magnet schools and the quantity of capital renovations and new construction—are concededly without parallel in any other school district in the country."

The judicial taxation [mandated by Judge Clark and] approved by the Eighth Circuit is also without parallel.<sup>234</sup>

Justice Kennedy was also clear that this judicial taxation was not only without parallel, it was also a usurpation of power:

Article III of the Constitution states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The description of the judicial power nowhere includes the word "tax" or anything that resembles it. This reflects the Framers' understanding that taxation was not a proper area for judicial involvement. "The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever." *The Federalist No. 78*, p. 523 (J. Cooke ed. 1961) (A. Hamilton).

Our cases throughout the years leave no doubt that taxation is not a judicial function.<sup>235</sup>

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234. *Missouri v. Jenkins*, 495 U.S. 33, 61 (1990) (Kennedy, J. concurring).

235. *Id.* at 65.

Another passage, this one dripping with sarcasm, points out once again the tyrannical nature of what Judge Clark has imposed on the Kansas City School District.

Perhaps it is good educational policy to provide a school district with the items included in the KCMSD capital improvement plan, for example: high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; greenhouses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities. But these items are a part of legitimate political debate over educational policy and spending priorities, not the Constitution's command of racial equality. Indeed, it may be that a mere 12-acre petting farm, or other corresponding reductions in court-ordered spending, might satisfy constitutional requirements, while preserving scarce public funds for legislative allocation to other public needs, such as paving streets, feeding the poor, building prisons, or housing the homeless. Perhaps the KCMSD's Classical Greek theme schools emphasizing forensics and self-government will provide exemplary training in participatory democracy. But if today's dicta become law, such lessons will be of little use to students who grow up to become taxpayers in the KCMSD.<sup>236</sup>

Other judges who are on the "hit list" are guilty of the same or similar "political crimes" as the Romer 6<sup>237</sup> and, thus, are also legitimate candidates for impeachment. Among these are judge

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236. *Id.* at 77.

237. *See supra* Section IV. A.

Thelton Henderson whose opinion in *Coalition for Economic Equality v. Wilson*<sup>238</sup> employed a fatally flawed Equal Protection analysis, as did the majority in *Romer*. This was pointed out forcefully by the Ninth Circuit in its opinion reversing Henderson:

Where, as here, a state prohibits race or gender preferences at any level of government, the injury to any specific individual is utterly inscrutable. No one contends that individuals have a constitutional right to preferential treatment solely on the basis of their race or gender. Quite the contrary. What, then, is the personal injury that members of a group suffer when they cannot seek preferential treatment on the basis of their race or gender from local government? This question admits of no easy answer.<sup>239</sup>

Thus, everything discussed above with regard to *Romer v. Evans*, is equally applicable here.

As a final example, Judge Stephen Reinhardt held that Washington state's ban on assisted suicide violated the Due Process Clause of the United States Constitution.<sup>240</sup> In so holding, he ignored the entire history of our nation and, indeed, 700 years of common law history.<sup>241</sup> This kind of cavalier disregard for our tradition, history, and morality is clearly something the American people do not have to sit still for—not if they are willing to protect themselves with the tool provided by the Framers.

The argument that the normal appeals process is the proper solution to judicial tyranny by lower court judges will not hold up. Litigants should not be subjected to tyrants and be provided with no remedy other than to spend more of their lives and their fortunes in the hope that the appeal judge or judges will be less tyrannical. Litigants have a right to expect that Congress will exercise its constitutional duty to check the judiciary. Furthermore, many of the actions of these judicial tyrants can impact an entire city, as in the Kansas City desegregation case. In other cases, due to *stare decisis*,

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238. 946 F. Supp. 1480 (N.D. Cal. 1996).

239. *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431, 1442 (9<sup>th</sup> Cir. 1997).

240. *Compassion in Dying v. Washington*, 79 F.3d 790 (9<sup>th</sup> Cir. 1996).

241. *Washington v. Glucksberg*, 117 S. Ct. 2258-59 (1997).

future litigants and, indeed, large segments of society, can be harmed by an unconstitutional opinion that is never appealed.

## V. CONCLUSION

This article has sought to show that the current movement to impeach federal judges for tyrannical behavior is on firm footing. It is no coincidence that Christians have been in the forefront of this movement. With their insight into the spiritual consequences of covenant breaking, they have greater reasons than most to get serious about federal judges who refuse to stay within the proper bounds of their jurisdiction.

However, one need not be a member of the "Religious Right" to appreciate the constitutional legitimacy of impeaching federal judges for rendering unconstitutional opinions, subverting the fundamental laws, or introducing arbitrary power. Nonetheless, everyone who understands that impeachment is the only tool that the Framers gave us to reign in federal judges, must also understand that the tool is susceptible to abuse, just as it was in the days of Jefferson. Therefore, judges must never be targeted for merely "unpopular" opinions.

On the other hand, we should never shy away from this powerful safeguard. Even now, because Congress has not used impeachment as a check on the judicial branch, it has become "so weak and torpid as to be capable of lulling offenders into a general security and indifference,"<sup>242</sup> as Justice Story warned it would. It is time to revitalize impeachment and to rein in the federal judiciary.

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242. STORY, *supra* note 57, at 747.