# INTRAGOVERNMENTAL SPEECH AND SANCTION

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*This Essay, prepared as part of a symposium on Professor Helen Norton's* The Government's Speech and the Constitution*, asks what role, if any, we should understand the Constitution to play in mediating disputes over speech between and among government entities. Focusing on the examples of impeachment and censure, the piece considers scenarios in which one arm of government takes action in response to the speech of another arm or entity of government, exploring what role the Constitution should play in shaping or constraining those responses*.

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## I. INTRODUCTION

We are accustomed to thinking about how the Constitution, in particular the First Amendment, limits government's power over *private* speech. Professor Helen Norton's new book *The Government's Speech and the Constitution* tackles a distinct set of questions, exploring the wide range of ways the government's own expressive activities may implicate, and potentially contravene, constitutional protections.[1] It's a rich and textured account of the many ways government speech intersects with constitutional rules, principles, and values, and it raises a host of questions that warrant further exploration.

This symposium contribution focuses on one of those questions: what role, if any, does the Constitution play in mediating disputes over speech between and among government entities? That is, when one arm of government takes action in response to the speech of another government entity or official, does the Constitution have a role to play in shaping or constraining those responses?

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1. HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 1–3 (2020).

To make the question more concrete, consider a few examples. When the House seeks to impeach or the Senate seeks to try the president based in part upon that president's speech, does the Constitution provide the president with any defenses against that impeachment? When Congress or a state or local legislative body seeks to censure a member based on that member's speech, does the Constitution provide the member any protections or remedies? These examples may implicate different substantive and structural principles, but each involves both government speech in the first instance and government responses that may themselves have communicative content.

As Professor Norton's book recognizes, the government consists of "a large number and range of potential government speakers, both individual and institutional, with various and competing interests."[2] So it is not surprising that at times the speech of one arm of government comes into conflict with another. And there is not—nor should there be—a single answer to the question of the role the Constitution should play in each of these conflicts. Much depends on the context in which the speech in question is made and both the nature and context of the government response or sanction. As Professor Norton also notes, "[t]hat government speech is by no means homogenous both adds to its informational value and detracts from its potential danger."[3]

For good reason, disputes like the ones sketched above usually play out outside of courts. So the question of what role the Constitution might play in these conflicts cannot be answered just by reference to judicial doctrine—that is, whether and how courts have enforced particular provisions of the Constitution when invoked by one government entity against another. These disputes, then, have much to teach not only about the ways the Constitution, particularly the First Amendment, may constrain or shape government responses to government speech, but also more broadly about the making of constitutional meaning outside of courts.[4]

## II. INTRAGOVERNMENTAL SPEECH CONFLICTS

Professor Norton proposes a two-step framework for identifying the constitutional rules that should constrain government speech. The first stage involves determining whether government is speaking at all;[5] the second stage asks "whether and when specific constitutional provisions . . . restrain the government's speech."[6]

Intragovernmental speech conflicts sometimes present first-stage questions—that is, questions about whether the speech at issue *is* the speech of the

2. *Id.* at 207.

3. *Id.* at 208.

4. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348 (1994); Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 263 (2014).

5. NORTON, *supra* note 1, at 5.

6. *Id.* at 6–7.

government. But they will more frequently raise second-stage questions—that is, whether government should be understood to infringe specific constitutional provisions, involving either the rights of *another* government actor or general structural principles. The fact that in such scenarios government actors appear on both sides of the dispute—as speaker and potentially also as regulator or discipliner—adds another layer to Professor Norton's framework.[7]

Of course, government entities are in constant dialogue. Presidents exercise authority over administrative agencies, sometimes with formal commands, other times through more informal messages and signals.[8] Agencies communicate with one another as both partners[9] and adversaries.[10] Legislators engage in internal debate that simultaneously serves as public-facing speech.[11] Legislatures, both state and federal, compel the testimony of executive-branch officials.[12] State officials, often acting through state interest groups, provide input to federal agencies on matters of regulatory policy.[13] The list, of course, goes on. But my interest here is primarily in government-government speech conflicts in which there is a suggestion that the Constitution, in particular the First Amendment, plays some role in limiting or mediating the range of permissible government responses vis-à-vis other government actors.

One sizeable carve-out from my discussion is the question of discipline for government employee speech. The case of a police officer or public school teacher who faces discipline for speech she has made is certainly a type of intragovernmental speech conflict.[14] But I do not include such disputes here, largely because the Supreme Court has developed a complex body of law governing them.[15] In that line of cases, culminating in *Garcetti v. Ceballos*,[16] the Court has explained that public employees possess very limited First Amendment rights when they speak pursuant to their official duties, reasoning that such public employee speech is "speech for which the government has paid a salary, and thus speech that the government may restrain and punish without running afoul of the

7. Of course, courts, too, are government actors, but my interest here is in disputes between nonjudicial government actors, which may or may not end up in judicial fora, rather than disputes between government and private parties that end up in court.

8. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2249–50, 2267 (2001); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 698 (2007); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House,* 80 COLUM. L. REV. 943, 958 (1980); *cf.* Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1338 (2019).

9. Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 213 (2015).

10. Daniel A. Farber & Anne Joseph O'Connell, *Agencies As Adversaries*, 105 CALIF. L. REV. 1375, 1380 (2017).

11. *See* Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529, 536 (2020).

12. *See id.* at 530–31.

13. Miriam Seifter, *States as Interest Groups in the Administrative Process,* 100 VA. L. REV. 953, 959–60 (2014).

14. NORTON, *supra* note 1, at 60.

15. Professor Norton discusses, and is quite critical of, those cases. *See id.* at 61–67.

16. 537 U.S. 410 (2006).

First Amendment."[17] The reasoning in those cases is both questionable[18] and difficult to square with the limited judicial authority on other government-government speech disputes discussed in the Sections that follow.[19] But because the doctrine has placed those cases in a category of their own, I largely set them aside for purposes of this short piece.

I turn now to specific examples of intragovernmental speech clashes—first, impeachment based at least in part on an official's speech or expression; second, censure and other legislative responses to the speech or expression of a legislator.

### *A. Impeachment*

The 2021 impeachment of President Donald Trump—the second impeachment he faced—was, among other things, an intragovernmental speech dispute.[20] The single article of impeachment approved by the House of Representatives charged Trump with "incitement of insurrection," based in significant part on his speech and conduct at a rally on the Ellipse on January 6, 2021.[21] During that rally, he repeated false claims that "we won this election, and we won it by a landslide" and told the assembled crowd "if you don't fight like hell you're not going to have a country anymore."[22] He continued:

> [A]fter this, we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down. . . . [w]e're going to walk down to the Capitol, and we're going to cheer on our brave senators and congressmen and women, . . . [b]ecause you'll never take back our country with weakness. You have to show strength and you have to be strong.[23]

Following those remarks, members of the crowd breached and vandalized the Capitol, menaced government officials, and engaged in a riot that resulted in seven deaths and hundreds of injuries,[24] all in an effort to interfere with the final counting of electoral votes for Joe Biden.[25] The impeachment case against Donald Trump was not limited to the events of January 6th; it also encompassed "prior efforts to subvert and obstruct the certification of the results of the 2020

17. NORTON, *supra* note 1, at 61.

18. *See generally* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301 (2015); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1 (2009); Katherine Shaw, *Partisanship Creep* (unpublished manuscript) (on file with author).

19. *See* discussion *infr*a Sections II.A, II.B.

20. Sam Levine & Lauren Gambino, *Donald Trump Acquitted in Second Impeachment Trial*, GUARDIAN (Feb. 13, 2021, 7:12 PM), https://www.theguardian.com/us-news/2021/feb/13/donald-trump-acquitted-impeachment-trial [https://perma.cc/E8UA-TYME].

21. H.R. Res. 24, 117th Cong. (2021).

22. *Id.*

23. Brian Naylor*, Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial [https://perma.cc/X224-Z79F].

24. Chris Cameron, *These Are the People Who Died in Connection to the Capitol Riot*, N.Y. TIMES, https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html (July 12, 2022) [https://perma.cc/W6EK-XTXL].

25. H.R. Res. 24, 117th Cong. (2021).

Presidential election," including through a January 2, 2021 phone call to Georgia Secretary of State Brad Raffensperger.[26] But the President's role in inciting the January 6th riot, and his words immediately preceding it, were without question at the center of the charge.[27] And an important component of Trump's impeachment defense was that his speech enjoyed the protection of the First Amendment.[28] This was not Trump's only argument—his arguments also sounded in due process and jurisdiction.[29] But as for the First Amendment, Trump argued that his speech did not satisfy the judicially announced standards for chargeable incitement consistent with the First Amendment and that his January 6th speech "fell well within the norms of political speech . . . protected by the First Amendment."[30]

President Trump's claim that the impeachment charge against him should be dismissed in part because "the Article of Impeachment violates Mr. Trump's First Amendment Rights"[31] was not the first time an impeached president had raised such an argument.[32] As early as 1868, well before the development of modern First Amendment doctrine, President Andrew Johnson raised a similar defense to the tenth article of impeachment against him.[33] That article accused President Johnson of "mak[ing] and deliver[ing] . . . certain intemperate, inflammatory, and scandalous harangues . . . [which] are peculiarly indecent and unbecoming in the Chief Magistrate of the United States."[34] The article reproduced speeches in which Johnson accused Congress of "poison[ing] the constituents against [Johnson]" and "trying to break up the government."[35] In one speech he also promised the crowd, apparently in reference to his congressional critics: "if you will stand by me in this action, if you will stand by me in trying to give the people a fair chance, soldiers and citizens . . . . God be willing, I will kick them out. I will kick them out just as fast as I can."[36]

26. *Id.*

27. Trial Memorandum of United States House of Representatives at 20, *In re* Impeachment of President Donald J. Trump (2021).

28. Trial Memorandum of Donald J. Trump, 45th President of The United States of America at 37, *In re* Impeachment of Former President Donald J. Trump (2021).

29. Although President Trump was impeached in the House on January 13, 2021, his Senate trial did not begin until February 9, 2021, and he claimed that the Senate lacked the power to try him as ex-president, arguing that following his departure from office on January 20, 2021, he was "factually and legally, a private citizen" not subject to impeachment. *Id.* at 18.

30. *Id.* at 37.

31. *Id.*

32. *See* Josh Blackman & Seth Barrett Tillman, *We Should Not Forget the Free Speech Lessons from President Johnson's Impeachment Trial*, REASON (Jan. 14, 2021, 2:35 PM), https://reason.com/volokh/2021/01/14/we-should-not-forget-the-free-speech-lessons-from-president-johnsons-impeachment-trial/ [https://perma.cc/4SR6-LCQ9].

33. JAMES D. ST. CLAIR, JOHN J. CHESTER, MICHAEL A. STERLACCI, JEROME J. MURPHY & LOREN A. SMITH, AN ANALYSIS OF THE CONSTITUTIONAL STANDARD FOR PRESIDENTIAL IMPEACHMENT 56 (1974).

34. *Impeachment Trial of President Andrew Johnson, 1868*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm (last visited July 31, 2022) [https://perma.cc/YZ9N-HBAX].

35. *Id.*

36. *Id.*; *see also* Katherine Shaw, *Impeachable Speech*, 70 EMORY L.J. 1, 61–62 (2020).

President Johnson claimed in his written brief that the article "relat[ed] to freedom of speech or its exercise by the citizens of the United States, or by this respondent as one of the said citizens or otherwise."[37] He also referenced the First Amendment in his response to the eleventh article of impeachment, which charged him with "by public speech, declar[ing] and affirm[ing] in substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same."[38] His written answer to the eleventh article repeated that "[t]he President denies specifically the charges, standing upon his right to freedom of speech as set forth in the answer to the preceding article."[39]

Although the trial brief's invocation of the First Amendment was fairly cursory, one of Johnson's defense attorneys, Ben Curtis, developed the argument during his opening statement at Johnson's Senate trial, maintaining that "this prohibition in the Constitution against any legislation by Congress in restraint of the freedom of speech is necessarily an absolute prohibition . . . . What is the law to be? . . . The only rule I have heard, . . . is that you may require the speaker to speak properly."[40]

He continued: "[w]ho are to be the judges whether he speaks properly? In this case the Senate of the United States, on the presentation of the House of Representatives of the United States; and that is supposed to be the freedom of speech secured by this absolute prohibition of the Constitution."[41]

Here Curtis seemed to suggest that article ten identified nothing more serious than breaches of protocol or etiquette and that to predicate an impeachment on such speech was inconsistent with the guarantees of the First Amendment. Because the Senate never voted on the tenth article of impeachment—after the failure of the second, third, and eleventh articles, no further votes were taken—the Senate offered no judgment on either the tenth article or the First Amendment defense.[42] But scattered references during the Senate debate suggest that some Senators viewed the First Amendment arguments as generally inapposite, while others found them persuasive.[43]

Over a hundred years later, President Richard Nixon's attorneys referenced Johnson's First Amendment argument in a memorandum they prepared for the House Judiciary Committee, although they failed to develop the argument.[44] And of course, President Nixon resigned rather than subject himself to full

37. 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2428, at 885 (1907).

38. *Impeachment Trial of President Andrew Johnson, supra* note 34.

39. *See generally* HINDS, *supra* note 37.

40. 1 BENJAMIN ROBBINS CURTIS, A MEMOIR OF BENJAMIN ROBBINS CURTIS LL. D. WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITINGS 420 (Benjamin R. Curtis ed., 1879).

41. *Id.*

42. *See generally* ST. CLAIR ET AL., *supra* note 33.

43. Shaw, *supra* note 36, at 1 nn.118–19 and accompanying text.

44. ST. CLAIR ET AL., *supra* note 33, at 56 ("President Johnson . . . noted that the charges in Articles ten and eleven were protected by the freedom of speech guaranteed by the Constitution.").

impeachment proceedings.[45] So no real debate occurred in either house of Congress on the role of the First Amendment as a defense to the impeachment charges approved by the House Judiciary Committee, the first of which accused Nixon of, among other things, "making false or misleading public statements for the purpose of deceiving the people of the United States."[46]

In contrast to these passing earlier invocations, the First Amendment played a significant role in the 2021 impeachment trial of President Trump.[47] Trump devoted substantial space in his trial brief to arguing that judicially announced First Amendment rules applied in impeachment, insisting that "the Supreme Court is the final arbiter of whether Congressional acts are consistent with the Constitution"[48] and maintaining that any suggestion to the contrary "invite[d] Senators to violate their own oaths to uphold the Constitution and the bedrock principle" of judicial supremacy.[49] Trump went on to argue that under the Supreme Court's First Amendment cases, his speech could not support conviction by the Senate.[50] Invoking the Supreme Court's decision in *Brandenberg v. Ohio*,[51] Trump argued that the standard set forth in that case applied wholesale in the context of impeachment: "[a]bsent an imminent threat, . . . it is expressly within the First Amendment to advocate for the use of force; similarly, it is protected speech to advocate for violating the law; and as Mr. Trump did neither of these things, his speech at all times fell well within First Amendment protections."[52]

In addition to maintaining that *Brandenberg* shielded him from sanction for his speech, Trump argued that his speech was subject to *heightened* First Amendment protection under *New York Times v. Sullivan*,[53] relying on its statement that "speech and association for political purposes is the kind of activity to which the First Amendment offers its strongest protection."[54] Trump also cited cases like

45. Valerie Strauss, *History Lesson: Richard Nixon Was Not Impeached*, WASH. POST (May 29, 2017, 11:55 AM), https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/29/richard-nixon-was-not-impeached-despite-what-hillary-clinton-and-others-say/ [https://perma.cc/44Y3-RNQA].

46. H.R. REP. NO. 93-1305, at 2 (1974); *see* Shaw, *supra* note 36, at 29. Although Nixon's primary argument against the disclosure of the Oval Office tapes that eventually led to his resignation were based on executive privilege, Nixon *did* reference the First Amendment in his briefs in that case. *See* Brief for Respondent, Cross-Petitioner at 70, U.S. v. Richard M. Nixon, 418 U.S. 683 (1974), Nos. 73-1766, 73-1834, 1974 WL 174855, at *69–70 (citing cases including E. R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961), and NAACP v. Alabama, 357 U.S. 449 (1958), for the view that "the effective functioning of representative government depends on the most generous support for First Amendment values," and referencing the "constitutionally protected freedom of expression possessed by the President, his advisers and others with whom he confers in the course of carrying out his official responsibilities").

47. Trial Memorandum of Donald J. Trump, *supra* note 28, at 38.

48. *Id.*

49. *Id.* at 38. ("In doing so, the House Managers shockingly invite Senators to violate their own oaths to uphold the Constitution and the bedrock principle—established over two hundred years ago—that the Supreme Court is the final arbiter of whether Congressional acts are consistent with the Constitution.").

50. *Id.* at 50.

51. 395 U.S. 444, 446 (1969).

52. Trial Memorandum of Donald J. Trump, *supra* note 28, at 50.

53. 376 U.S. 254 (1964).

54. *See* Trial Memorandum of Donald J. Trump, *supra* note 28, at 47, 47 n.125.

*Bond v. Floyd*,[55] discussed below, and *Wood v. Georgia*,[56] which, on Trump's view, stand for the principle that "the protection of an elected public official [is] a core First Amendment principle."[57]

The Trial Brief of the House Managers prosecuting Trump's impeachment argued forcefully that the First Amendment, designed to protect private citizens against the government, did not apply at all in impeachment proceedings, where the goal is not to punish or impose liability, but rather to protect the constitutional order.[58] The brief went on to argue that even if the First Amendment did apply, it did not provide public officials with a complete shield against all potential consequences of their actions, including the consequence of impeachment.[59]

These arguments were also aired during the five days of Trump's impeachment trial. Lead Manager Jamie Raskin spent significant time during his opening statement arguing that the *Brandenberg* standard had no place in impeachment; he also argued that the remedy of impeachment might be appropriate or even required in response to presidential speech that would be protected if voiced by a private citizen.[60] Trump attorney Michael Van der Veen reiterated the argument that the First Amendment, and specifically judicial interpretations of that amendment's protections, applied with full force to impeachment and that not only *Brandenberg* but cases like *Bond* and *Wood* prevented the Senate from convicting based on speech.[61]

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As the foregoing discussion makes clear, the second Trump impeachment featured more extensive discussion of the role of the First Amendment when mediating between Congress and a president facing impeachment than had any previous impeachment episode.[62] The precedential value of this aspect of Trump's second impeachment is far from clear; indeed, the general function of precedent in impeachment is a contested question.[63] Still, it's possible to draw some tentative conclusions from the episode. Trump was acquitted, but over the votes of

55. 385 U.S. 116 (1966).

56. 370 U.S. 375 (1962).

57. *Id.* at 42.

58. Trial Memorandum of United States House of Representatives, *supra* note 27, at 45.

59. *Id.* at 46. Of less relevance to this piece was a final argument, that even if the *Brandenberg* standard did apply, it was satisfied. *Id*. at 47. Reply Memorandum of the United States House of Representatives at 19, *In re* Impeachment of President Donald J. Trump (2021).

60. 167 CONG. REC. S615, S617 (daily ed. Feb. 10, 2021) (opening statement of Lead Manager Jamie Raskin in the Impeachment Trial of Donald J. Trump), https://www.congress.gov/117/crec/2021/02/10/CREC-2021-02-10-pt1-PgS615-4.pdf [https://perma.cc/MWM2-X6UP] ("Undoubtedly, a private person can run around on the street expressing his or her support for the enemies of the United States and advocating to overthrow the United States Government. You have got a right to do that under the First Amendment, but if the President spent all of his days doing that, uttering the exact same words, expressing support for the enemies of the United States and for overthrowing the government, is there anyone here who doubts that this would be a violation of his oath of office to preserve, protect, and defend the Constitution of the United States and that he or she could be impeached for doing that?").

61. 167 CONG. REC. S667 (daily ed. Feb. 12, 2021) (statement of Michael Van der Veen), https://www.congress.gov/117/crec/2021/02/12/CREC-2021-02-12.pdf [https://perma.cc/Y2Y8-LN9P].

62. *Id.*

63. Shaw, *supra* note 36, at 40.

seven members of his own party, significantly more than any previous impeached president.[64] And the statements by Senators, both those who voted to acquit and those who voted to convict, suggest that Trump's First Amendment defense was not widely credited by Senators in either group.[65] Senator Susan Collins, one of the members of the President's own party who voted to convict, dismissed the First Amendment defense, reasoning that "the first Amendment was not designed and has never been construed by any court to bar the impeachment and conviction of an official who violates his oath of office by summoning and inciting a mob to threaten other officials in the discharge of their constitutional obligations."[66] Senate Majority Leader Mitch McConnell voted to acquit but justified his conclusion largely by reference to timing, explaining that he had concluded that because the trial occurred following the end of the presidential term, "former President Trump is not constitutionally eligible for conviction."[67] Indeed, of those Senators who made statements explaining their votes either to convict or to acquit, none seems to have been moved by the First Amendment arguments.

Independent of whatever precedential force these explanations have, or even what they convey generally about the Senate's response to Trump's First Amendment defense, there are a number of reasons for skepticism about the degree to which the First Amendment should be understood to shield a president from impeachment. For one thing, none of the broadly recognized purposes of the First Amendment—the importance of robust and uninhibited debate,[68] self-government,[69] tolerance,[70] autonomy[71]—would be advanced by interpreting that amendment to provide the president with a First Amendment protection against Congress during the course of an impeachment proceeding.[72] In addition, even

64. Brakkton Booker, *Trump Impeachment Trial Verdict: How Senators Voted*, NPR (Feb. 13, 2021, 4:15 PM), https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/13/967539051/trump-impeachment-trial-verdict-how-senators-voted [https://perma.cc/U76C-U865].

65. *See, e.g.*, Senator Susan Collins, Statement in Impeachment Trial of Donald J. Trump (Feb. 13, 2021), https://www.rev.com/blog/transcripts/susan-collins-speech-transcript-after-her-vote-to-convict-in-2nd-trump-impeachment-trial [https://perma.cc/4GE2-EGVR].

66. *Id.*

67. Senator Mitch McConnell, Statement in Impeachment Trial of Donald J. Trump (Feb. 13, 2021), https://www.rev.com/blog/transcripts/mitch-mcconnell-speech-transcript-after-vote-to-acquit-trump-in-2nd-impeachment-trial [https://perma.cc/KX9E-9JKX].

68. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1961).

69. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

70. LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 8–11 (1986).

71. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

72. Indeed, the Managers argued that Trump's claims that the First Amendment shielded his speech had it precisely backwards, and that "President Trump's incitement of deadly violence to interfere with the peaceful transfer of power, and to overturn the results of the election, was . . . a direct assault on core First Amendment principles." PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP: PART I, S. DOC. NO. 117-2, at 67 (1st Sess. 2021); *see also* Peter D. Keisler & Richard D. Bernstein, *Freedom of Speech Doesn't Mean What Trump's Lawyers Want It to Mean*, ATLANTIC (Feb. 8, 2021), https://www.theatlantic.com/ideas/archive/2021/02/first-amendment-no-defense-against-impeachment/617962/ [https://perma.cc/MC4S-FQHC]; Keith E. Whittington, *Is There a Free Speech Defense to an Impeachment?*, LAWFARE (Jan. 19, 2021, 4:18 PM), https://www.lawfareblog.com/there-free-speech-defense-impeachment [https://perma.cc/H372-A78P].

for public officials other than the president, there is good reason for skepticism that the First Amendment protects their speech from all sanction, for "the historic purpose of the first amendment has been to limit government, not to serve as a source of government rights."[73]

When it comes to the president, access to the bully pulpit—the most powerful speech platform in the country—is a compelling argument against interpreting the First Amendment to supply a shield against congressional attempts to invoke the constitutional remedy of impeachment.[74] At this point, it is well settled that speech is a "key [feature] of presidential governance."[75] During the administrations of Teddy Roosevelt, and even more completely, Woodrow Wilson, presidents began taking their messages directly to the American people.[76] Whether that was a result of Wilson's deliberate remaking of the presidency, as political scientist Jeff Tulis argues,[77] or whether the shift is also attributable to changes in the media environment, as Samuel Kernell maintains,[78] there is no question that today the president is expected to engage in constant public-facing communication. There is also no question that speech today is both a key feature of presidential governance and an important source of presidential power.[79] As Justice Jackson noted about the president in his *Youngstown* concurrence:

> [A]lmost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.[80]

Those observations are far truer today than in 1952. The president's uniquely powerful ability to reach the public suggests heightened reason for concern about granting the president yet another tool—the ability to use the First Amendment as both sword and shield—in clashes with other government entities that might rightly serve as checks or institutional counterweights.

In addition, there are strong parallels between the argument pressed by Trump in his impeachment trial—that the First Amendment shielded his speech from sanction—and an argument made by every president to face impeachment,

73. Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 867 (1979); *see also* Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865, 871 (1975) ("[T]he Bill of Rights was designed to secure protection to the people against the government, not to insulate government officers from accountability. . . . [T]he [F]irst [A]mendment is concerned with 'the right of the people peaceably to assemble,' not of officers of government against whom protection was thus guaranteed.").

74. Shaw, *supra* note 36, at 55.

75. Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 73 (2017).

76. *Id.* at 81.

77. JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 20 (2d ed. 2017).

78. *See* SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP 2, 11–12 (3d ed. 1997).

79. *See* NORTON, *supra* note 1, at 16–19. *See generally* CAROL GELDERMAN, ALL THE PRESIDENT'S WORDS: THE BULLY PULPIT AND THE CREATION OF THE VIRTUAL PRESIDENCY (1997).

80. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring).

that the constitutional standard of "high crimes and misdemeanors" requires proof that could support conviction in a criminal court.[81] Both represent a profoundly juricentric conception of the Constitution, seeking to bind nonjudicial actors to judicially announced conceptions of the meaning of constitutional provisions or to conform impeachment proceedings to the standards for judicial proceedings.[82] Indeed, the argument that the First Amendment supplied a complete defense to the impeachment charges against Trump was in some ways a variant of the argument that only chargeable crimes may warrant impeachment.[83] Trump's argument was essentially that the First Amendment rendered his speech lawful, shielding him from punishment for that speech.[84] But whether or not Trump's speech could have supported criminal charges was largely irrelevant, as the vast weight of authority has squarely rejected the argument that impeachment requires proof of a crime.[85]

Finally, if the First Amendment has any role to play in impeachment, there are First Amendment interests on both sides of the proceedings. Even if President Trump's speech did in some sense implicate the First Amendment, the House Managers prosecuting the impeachment case had an interest in pursuing impeachment in part for expressive reasons. Impeachment has both tangible and symbolic dimensions.[86] Under ordinary circumstances, a conviction effects removal from office and, upon a separate vote, disqualification from future office-holding.[87] But even proceedings that fall short of conviction may influence the public or impact a president's term in office or place in history.[88] In this respect, the expressive and symbolic aspect of impeachment was the more important one in the case of Trump's second impeachment, since the timing of the trial took the remedy of removal (though not disqualification) off the table.

It may be that the argument that the First Amendment "simply does not apply" to impeachment goes too far.[89] But if it *does* apply, it cannot be that it

81. *See* Jeffrey K. Tulis, *Impeachment in the Constitutional Order*, *in* THE CONSTITUTIONAL PRESIDENCY 231 (2009).

82. This seems particularly inappropriate in impeachment, over which the Constitution assigns Congress near exclusive authority, as even courts have recognized. *See* Nixon v. United States, 506 U.S. 224, 238 (1993).

83. *See* Whittington, *supra* note 72.

84. *See* Nicholas Fandos et al., *144 Constitutional Lawyers Call Trump's First Amendment Defense 'Legally Frivolous'*, N.Y. TIMES (Feb. 5, 2021), https://www.nytimes.com/interactive/2021/02/05/us/first-amendment-lawyers-trump-impeachment-defense.html [https://perma.cc/9NQE-PLS5]; *see also* Letter from Constitutional Law Scholars on President Trump's First Amendment Defense (Feb. 5, 2021), https://int.nyt.com/data/documenttools/first-amendment-lawyers-trump-impeachment-defense/7fc3e63ae077f83d/full.pdf [https://perma.cc/PD3R-ZJXJ].

85. *See, e.g.*, FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP 296 (2019); LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 28 (2018); CHARLES BLACK, IMPEACHMENT: A HANDBOOK 35 (2d ed. 1998).

86. *See* Amber Phillips, *'We All Have to Answer for What We Did': A Compelling Argument for Impeachment, Explained*, WASH. POST (June 10, 2019), https://www.washingtonpost.com/politics/2019/06/10/we-all-have-answer-what-we-did-compelling-argument-impeachment-explained/ [https://perma.cc/96EP-9SK3].

87. U.S. CONST. art. II, § 4; *id.* art. I, § 3, cl. 7.

88. *Trump Impeachment: What Happens to Impeached Presidents?*, BBC (Jan. 13, 2021), https://www.bbc.com/news/world-us-canada-50813276 [https://perma.cc/8AMH-XRWN].

89. Trial Memorandum of United States House of Representatives, *supra* note 27, at 48.

applies to the speech and expressive activities of just one of the players in the legal and political process that is impeachment.

Here it is useful to return to Professor Norton's guiding principles for second-stage government speech problems. She offers a series of questions to guide our analysis of whether government speech violates the Constitution, including asking whether the government speech "changes its targets' choices or opportunities to their disadvantage," inflicts expressive or dignitary harm of the sort the Constitution prohibits, or is driven by a constitutionally prohibited purpose.[90]

In the context of impeachment, where there are speech interests on both sides of the balance, it is clear that none of the concerns Professor Norton identifies has much salience; neither impeacher nor impeached limits the other's prospects in Professor Norton's formulation, or inflicts types of harm the Constitution prohibits. As important, whatever the proper balance of the constitutional speech interests in impeachment, the resolution to that question should lie not with the courts but with the political branches.[91]

### *B. Censure and Other Legislative Discipline*

In addition to granting the House the power of impeachment[92] and the Senate the power to try impeachments,[93] the Constitution authorizes each House of Congress to punish its members "for disorderly behavior."[94] From very early in the country's history, each House has exercised that authority, including through the use of censure or other reprimand for members' speech.[95] The first recorded censure of a U.S. Senator, in 1811, was for the offense of reading a confidential document aloud while the Senate was in public session.[96] The first House censure, in 1832, was for use of "unparliamentary language" in criticizing the

90. NORTON, *supra* note 1, at 8–9.

91. Yudof, *supra* note 73, at 917 ("If the legislature is the branch of government most likely to address government speech excesses, a judicial approach that focuses legislative attention on those issues and encourages legislative debate and resolution of the role of government speech in a democracy is desirable."); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1970 (2003) ("[C]onstitutional interpretation always proceeds within specific institutional contexts that inform both the substance of constitutional rights and the procedural framework within which they are enforced.").

92. U.S. CONST. art. I, § 2, cl. 5.

93. *Id*. art. I, § 3, cl. 6.

94. *Id*. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

95. CONG. RSCH. SERV., EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES 2 (2016) ("A 'censure' is a formal, majority vote in the House on a resolution disapproving a Member's conduct, generally with the additional requirement that the Member stand at the 'well' of the House chamber to receive a verbal rebuke and reading of the resolution by the Speaker," while in the House, a reprimand "involves a lesser level of disapproval of the conduct of a Member than that of a 'censure,' but also involves a formal vote by the entire House."); NORTON, *supra* note 1, at 14 ("Legislatures' speech—like that of other governmental speakers—often takes the form of one-way communications like resolutions and reports. But sometimes the government's speech involves rebuttals, dialogues, conversations, and other forms of counter-speech.").

96. JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 243–44 (2017).

Speaker of the House.[97] In the decades before the Civil War, the House censured a number of members for speech-related offenses, including for violation of a "gag rule" the House adopted in 1840 prohibiting members from introducing petitions seeking to abolish slavery.[98] Congressman (and former president) John Quincy Adams waged a protracted battle against that gag rule; his campaign led to multiple attempts to censure him, and ultimately to repeal of the rule.[99] Once the Civil War began, in addition to the expulsion of members for their support of secession, the House censured several members for "speeches advocating recognition of the Confederacy."[100]

Each House of Congress has continued to utilize this power in contemporary times—including, in the House in particular, for members' speech. A 1967 House report on the investigation of Representative Adam Clayton Powell explained that "[m]ost cases of censure have involved the use of unparliamentary language, assaults upon a Member or insults to the House by introductions of offensive resolutions. . . ."[101] Indeed, the most recent congressional censure, of Arizona Representative Paul Gosar in November 2021, was in response to Gosar's posting of an animated video that depicted him killing New York Representative Alexandria Ocasio-Cortez and attacking President Biden.[102] Gosar was only the twenty-fifth House Member ever to have been formally censured.[103]

State legislatures, too, have long exercised the power of "legislative self-discipline,"[104] including through devices like censure and reprimand.[105] Many states include in their constitutions "an express provision authorizing each branch of the legislature thereby established 'to punish its members for disorderly behavior.'"[106] But even in those states without such a formal provision,

97. *Id.* at 244.

98. *Id.* at 245.

99. WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: JOHN QUINCY ADAMS AND THE GREAT BATTLE IN THE UNITED STATES CONGRESS 348–57 (1995).

100. CHAFETZ, *supra* note 96, at 246. The Senate has used its power of censure (sometimes referred to in that chamber as condemnation or denunciation) throughout its history, though less frequently than the House has, and more for offenses involving conduct, like corruption or self-dealing, than for speech or expression as such. *About Censure*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/censure.htm (last visited July 31, 2022) [https://perma.cc/2ALL-4QNQ]; ANNE M. BUTLER & WENDY WOLFF, UNITED STATES SENATE ELECTION, EXPULSION, AND CENSURE CASES 1793–1990, at 13 (1995).

101. IN RE ADAM CLAYTON POWELL, H. REP. NO. 27, at 25–26, 29 (1967); CONG. RSCH. SERV., *supra* note 95, at 10.

102. Jonathan Weisman & Catie Edmonson, *House, Mostly on Partisan Lines, Censures Gosar for Violent Video*, N.Y. TIMES (Nov. 17, 2021), https://www.nytimes.com/2021/11/17/us/politics/paul-gosar-video.html [https://perma.cc/Y2J2-SXBE].

103. Beyond those twenty-five, an additional ten have received reprimands. *List of Members Expelled, Censured, or Reprimanded By the House of Representatives*, HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Discipline/Expulsion-Censure-Reprimand/#censure (last visited July 31, 2022) [https://perma.cc/973H-3QCN]. And only nine Senators have received formal censures or other similar forms of discipline. *About Censure*, *supra* note 100.

104. Josh Chafetz, *Congress's Constitution,* 160 U. PA. L. REV. 715, 756 (2012).

105. JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 214–22 (2007).

106. LUTHER STEARNS CUSHING, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA 269 (1856).

legislatures have relied upon their inherent authority to discipline members.[107] Although most state censures have been for various sorts of misconduct—bribery or corruption, self-dealing, sexual harassment—in some instances, state disciplinary actions have been for members' speech or expressive conduct.[108]

The practice of censuring or otherwise disciplining members for speech, whether in the federal or state legislature, raises many of the same questions as impeachment for speech:[109] does the Constitution, in particular the First Amendment, constrain a legislative body's authority to discipline a member for speech? Put differently, when a legislature seeks to discipline a member for speech or expression, does the Constitution, in particular the First Amendment, provide the member with any particular rights or remedies? And—a separate question—if so, are those rights or remedies judicially enforceable?

It is difficult to disaggregate these two questions—substantive limitations and judicial enforceability—in the context of censure and other legislative discipline. This is because the First Amendment has not figured prominently in legislative debate or consideration around censure and other similar remedies.[110] This means that where First Amendment questions have surfaced, it has been in the context of judicial challenges to censure and similar efforts. By contrast, the notion of due process has arisen inside legislative chambers, so that there is a developed congressional law of disciplinary due process in a way that there simply is not in the context of the First Amendment.[111]

Whatever the source of potential constraint, the power of each House of Congress to discipline its members might appear to present a paradigmatic political question in which courts have no role to play. After all, *Baker v. Carr*'s classic formulation maintains that "[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department,"[112] and the Constitution clearly assigns to each House the power to "punish its members" for disorderly conduct.[113] And that has been largely the case in the context of forms

107. NAT'L CONF. OF STATE LEGISLATURES, *General Legislative Process, in* INSIDE THE LEGISLATIVE PROCESS 1 (2010), https://www.ncsl.org/documents/legismgt/ILP/96Tab6Pt1.pdf [https://perma.cc/6W5K-T642]; STEARNS CUSHING, *supra* note 106, at 269–70.

108. For examples of state censure, see NAT'L CONF. OF STATE LEGISLATURES, *supra* note 107, at 9; OFF. OF LEGIS. RSCH. & LEGIS. COMM'RS' OFF., DISCIPLINARY ACTIONS IN OTHER STATES' LEGISLATIVE BODIES (Oct. 2, 2007), https://www.cga.ct.gov/2007/rpt/2007-R-0715.htm [https://perma.cc/86LQ-SQ2K] (describing 2001 incident in which Maine state representative John Michael was censured for "berat[ing] two female senators during a State House argument over which committee should handle certain legislation").

109. Because it does not appear that legislatures have successfully expelled members for speech or expressive conduct, I do not address expulsion here. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 107, at 1.

110. *Id.* at 1–2.

111. CONG. RES. SERV., *supra* note 95, at 9 ("The [ethics] committee has promulgated detailed procedural rules to implement fairness in the disciplinary process, specifically providing the requirements of notice, the specification of charges, and opportunities for the charged Member to be heard and to examine witnesses and evidence. After proceedings by an investigatory subcommittee, the taking of evidence, and an adjudicatory hearing, if the Member is found by the majority of the committee members to have committed the specific offenses charged, the full committee will then consider the appropriate discipline.").

112. 369 U.S. 186, 217 (1962).

113. U.S. CONST. art. I, § 5.

of legislative discipline like censure, where courts have for the most part not interceded.[114] Courts have, however, granted requests to resolve some disputes between individual members and legislative bodies, at least when it comes to efforts to *exclude* members.[115] The most important case here is *Powell v. McCormack*, in which the Court rejected the House's efforts to have it deem nonjusticiable Representative Adam Clayton Powell's challenge to the chamber's refusal to seat him.[116] In addition to finding the case justiciable, the Court also sided with Powell on the merits, concluding that the House had lacked the authority to refuse to seat Powell, who had been duly elected and who met all the constitutional requirements for eligibility to serve in the House.[117] *Powell* suggests that courts will not remain entirely hands-off when it comes to challenges by members to at least some legislative actions.[118] But *Powell* turned on congressional power in the first instance—not the question of whether the First Amendment, or any other constitutional provision, affirmatively limited congressional authority.[119] The Court has never addressed any such limits on Congress,[120] but it has suggested that at least in some instances, the First Amendment constrains a *state* legislature's power to respond to a member's speech—although, like *Powell*, the key case did not involve censure or other legislative discipline, but rather refusal to seat a duly elected member of a state legislature.[121] The case, *Bond v. Floyd*, involved a young Julian Bond, then the Communications Director for the Student Nonviolent Coordinating Committee ("SNCC"), who in 1965 was elected to the Georgia House of Representatives.[122] In early 1966, SNCC issued a statement that was sharply critical of the United States' involvement in Vietnam; it also charged the federal government with failing to safeguard civil and human rights at home in the United States and failing to protect or respond appropriately to violence against civil rights activists. The statement ended by encouraging Americans to resist the draft.[123] In a radio interview the day of the statement, Bond set forth his view that it was "hypocritical for us to maintain that we are

114. *See, e.g.*, Alana Wise, *Arizona State Senate Censures Lawmaker Who Threatened Rivals with Violence*, NPR (Mar. 1, 2022, 8:11 PM), https://www.npr.org/2022/03/01/1083817494/arizona-state-senate-censures-lawmaker-who-threatened-rivals-with-violence [https://perma.cc/YD7U-YD3A].

115. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 489 (1969).

116. *Id.* at 518–48.

117. *Id.* at 522.

118. *Id.* at 489.

119. *Id.* at 522.

120. Courts *have* decided cases involving ancillary aspects of the legislative authority to discipline, affirming its breadth; in *In re Chapman,* the Court affirmed the Senate's power to compel testimony from private citizens in furtherance of its investigation into members. 166 U.S. 661, 668 (1897) ("The senate, by the action taken, signifying its judgment that it was called upon to vindicate itself from aspersion, and to deal with such of its members as might have been guilty of misbehavior, and brought reproach upon it, obviously had jurisdiction of the subject-matter of the inquiry it directed. . . ."). *See generally* Anderson v. Dunn, 19 U.S. 204 (1821).

121. *See* Bond v. Floyd, 385 U.S. 116, 118 (1966).

122. *Id.*

123. *Id.* at 119–21 ("We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost their lives—as painfully as in Viet Nam.").

fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States."[124] He continued:

> Well, I think that the fact that the United States Government fights a war in Viet Nam, I don't think that I as a second class citizen of the United States have a requirement to support that war. I think my responsibility is to oppose things that I think are wrong if they are in Viet Nam or New York, or Chicago, or Atlanta, or wherever.[125]

The Georgia House of Representatives was scheduled to convene four days later, and in the intervening days, a number of members of the House filed petitions challenging Bond's right to be seated, arguing that Bond's statements "gave aid and comfort to the enemies of the United States and Georgia, violated the Selective Service laws, and tended to bring discredit and disrespect on the House."[126] They also charged that his statement was "repugnant to and inconsistent with the mandatory oath prescribed by the Constitution of Georgia for a Member of the House of Representatives to take before taking his seat."[127] After the clerk refused to administer Bond the oath of the House at the start of the session, Bond filed a response indicating that he was willing to take the oath to support the Constitution and could do so in good faith.[128] He argued that the failure to seat him deprived him of First Amendment rights and also constituted discrimination on the basis of race.[129]

After the Georgia House voted 184-12 to prevent Bond from taking the oath and being seated, Bond brought suit for injunctive relief in federal district court.[130] The three-judge court ruled against him.[131] A unanimous Supreme Court reversed, in an opinion strongly endorsing Bond's First Amendment rights and rejecting the State's argument that the First Amendment afforded Bond lesser protection than it would a private citizen because, on the State's logic, "a State is constitutionally justified in exacting a higher standard of loyalty from its legislators than from its citizens."[132]

The Court spent little time on the question of whether it had jurisdiction at all, moving swiftly to the merits of Bond's First Amendment claim. The Court wrote:

> The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment, as summarized in the opinion of the Court in *New York Times v. Sullivan*, is that "debate on public issues should be uninhibited, robust, and wide-open." We think the rationale of the *New York Times* case disposes

124. *Id.* at 121.
125. *Id.*
126. *Id.* at 123.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 125–26.
131. *Id.* at 126.
132. *Id.* at 135–36.

> of the claim that Bond's statements fell outside the range of constitutional protection. Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.[133]

As this excerpt makes clear, *Bond* suggests that the First Amendment's application was in no way lessened—and perhaps was even amplified—as a result of the identity of the speaker, here an elected but not-yet-seated legislator.[134] But the circumstances are significant: as was the case in *Powell*, the fact that the legislature did not seek to impose a remedy like censure, but rather to deny a seat entirely, would seem to distinguish *Bond* from ordinary cases of legislative censure.[135]

Indeed, both *Bond* and *Powell* involved courts stepping in to vindicate voters' choices where legislatures sought to undermine those choices. On that view, *Bond* should not be understood to stand for the broad principle that government speakers may invoke the full protections of the First Amendment against other government entities and actors outside of its particular context.[136] Moreover, it is possible that *Bond* should not be understood to present an intragovernmental speech conflict at all, since Bond had not yet been sworn into the legislature at the time he raised his claims.[137]

The Supreme Court also recently decided a case involving a local government official's attempt to invoke the protections of the First Amendment in response to censure proceedings. That case, *Houston Community College v. Wilson*, involved the question whether the First Amendment limited the ability of an elected community college board to censure one of its members, David Wilson, for that member's speech.[138] The Court, in a unanimous opinion authored by Justice Gorsuch, rejected Wilson's First Amendment argument.[139] The opinion relied heavily on historical practice, explaining that "elected bodies in this country have long exercised the power to censure their members," a practice that

133. *Id.* (citation omitted).

134. Finding that the First Amendment protected Bond from exclusion, the Court did not consider separately the other arguments in the case, including that Bond's exclusion was tainted by racial prejudice. *Id.* at 137 ("Because of our disposition of the case on First Amendment grounds, we need not decide the other issues advanced by Bond and the amici.").

135. The case also was decided at a moment when the Court appeared especially concerned with protecting the speech rights of Vietnam War critics and dissenters. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 514 (1969); Cohen v. California, 403 U.S. 14, 26 (1971); N. Y. Times Co. v. United States, 403 U.S. 713, 714 (1971); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 514 (1985). In addition, the fact that Bond had suggested that his exclusion was infected by racial bias, not just viewpoint discrimination, may have had a subtle impact on the Court's reasoning even on the First Amendment claim.

136. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1510 (2005) (arguing that as in *Bond*, "to the extent that an individual rights claim is present, the Court should be reluctant to find that the text of the Constitution completely forecloses judicial review").

137. 385 U.S. at 125–26.

138. Wilson v. Houston Cmty. Coll. Sys., 955 F.3d 490, 493–94 (5th Cir. 2020), *rev'd*, 142 S. Ct. 1253 (2022).

139. Houston Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253 (2022).

dated back to colonial assemblies.[140] The Court also explained that the board's censure should be understood as a form of legislative counterspeech: "[t]he First Amendment surely promises an elected representative like Mr. Wilson the right to speak freely on questions of government policy. But just as surely, it cannot be used as a weapon to silence other representatives seeking to do the same."[141] The Court therefore reversed the Fifth Circuit decision finding that Wilson had an actionable First Amendment claim against the board. Justice Gorsuch ended the opinion with a suggestion that such disputes should in the future be resolved in nonjudicial fora: "[a]rgument and 'counterargument,' not litigation, are the 'weapons available' for resolving this dispute."[142]

Although it was not addressed in the *Wilson* opinion, there is yet another reason for concern about courts granting First Amendment protection to local officials facing censure: the doctrine of legislative immunity. As to the federal legislature, legislative immunity is explicitly protected by the Constitution's "speech or debate clause," which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."[143] The provision has been understood to grant legislative-branch officials immunity from criminal and civil penalties for actions and statements within the sphere of legislative activity;[144] as the Court explained in *Powell v. McCormack*, "the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It ensures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation."[145] And courts have held that legislators in local bodies enjoy analogous immunity.[146]

The Speech or Debate Clause is not understood to confer absolute immunity on legislators.[147] But, importantly, the very existence of this privilege

140. *Id*. at 1259.

141. *Id*. at 1261. The Court also distinguished the cases of *Bond* and *Powell*, discussed *supra*, on the grounds that they involved exclusion rather than censure and that they implicated not only the interests of government officials on each side of the dispute, but also voters.

142. *Id*. at 1264 (citations omitted).

143. U.S. CONST. art. I, § 6, cl. 1; *see* Tenney v. Brandhove, 341 U.S. 367, 372 (1951) ("Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.").

144. *See, e.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975); Doe v. McMillan, 412 U.S. 306, 312–13 (1973); United States v. Brewster, 408 U.S. 501, 516 (1972); *see also* Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity*, 32 YALE L. & POL'Y REV. 351, 371–84 (2014); CHAFETZ, *supra* note 105, at 106.

145. Powell v. McCormack, 395 U.S. 486, 503 (1969).

146. Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 403 (1979) ("The immunity of legislators from civil suit for what they do or say as legislators has its roots in the parliamentary struggles of 16th- and 17th-century England; such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders."); Bogan v. Scott-Harris, 523 U.S. 44, 46 (1998) ("local officials performing legislative functions" are "entitled to the same protection" as "federal, state, and regional legislators").

147. *See* Hutchinson v. Proxmire, 443 U.S. 111, 130–32 (1979) (permitting lawsuit against Senator based on materials he distributed outside of the legislature, on the grounds that "neither the newsletters nor the press release was 'essential to the deliberations of the Senate' and neither was part of the deliberative process"); Gravel v. United States, 408 U.S. 606, 625–26 (1972) (concluding that Senator Gravel's activities surrounding

underscores the importance of taking a broad view of legislative authority to discipline members. Legislative immunity means that ordinary civil liability will be off limits for such elected officials; the only meaningful restraints on their conduct and speech, then, are legislative sanctions and elections.[148] So for courts to recognize First Amendment claims against censure would substantially limit one of the two existing mechanisms for checking members.

## III. CONCLUSION

Although each of the scenarios considered above centers on legislative responses to the speech or expressive activities of other government actors, intragovernmental speech conflicts can arise in a range of additional contexts. State executives may seek to rein in or control the messages of local officials. State or federal legislatures may seek to compel testimony from executive-branch officials, including because of statements those officials have made. State lawmakers and state universities may clash over the speech of faculty members or students. In each of these, one or more governmental actors may seek to invoke the First Amendment as either sword or shield.

One of the great virtues of Professor Norton's new book—like her previous writings on government speech—is the insistence that we push past simple categorical rules or claims about government speech, and that we remain sensitive both to context and to the principles and values that underlie various constitutional provisions, especially the First Amendment.

In that spirit, the materials surveyed above suggest that it would be an overstatement to claim that either the Constitution in general or the First Amendment in particular *never* constrains government responses to government speech. But judicially cognizable First Amendment claims, by government and against government, should be exceedingly rare. As a general matter, intragovernmental speech conflicts are best resolved by political actors and the political process, with those actors taking care to identify the constitutional principles and values at stake.

publication of the Pentagon Papers were "not part and parcel of the legislative process" and thus not covered by the Speech or Debate Clause).

148. Tenney v. Brandhove, 341 U.S. 367, 378 (1951) ("Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.").