Written Statement of

Michael J. Gerhardt, Arthur B.Hanson Professor at William & Mary Law School and
Visiting Professor at the University of Minnesota Law School

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I appreciate greatly the honor and privilege of being allowed to participate in today's hearing on "The Constitution Restoration Act of 2004" (hereafter "the Act"). I understand the purpose of today's hearing is to examine the constitutionality of Congress' power to limit all federal jurisdiction with respect to "any matter to the extent relief is sought against an element of Federal, State, or local government, or against an officer of Federal, State, or local government (whether or not acting in official capacity), by reason of that element's or officer's acknowledgment of G-d as the sovereign source of law, liberty, or government." As I pondered the constitutionality of this proposed bill, I could not help but think of Justice Antonin Scalia's prescient defense in Morrison v. Olsen.[1] There, in a memorable turn of phrase, he denounced the now-defunct Independent Counsel Act as "a wolf that comes as a wolf."[2] With all due respect, I think that the same could be said of the "Constitution Restoration Act of 2004." It is a wolf that comes before this Subcommittee as wolf. The name of the Act alone admit to an unconstitutional objective; Congress has no constitutional authority to overturn, or dilute, the constitutional opinions of Article III courts through any of its legislative powers. This bill is a

[1]487 U.S. 654 (1988).

[2]Id. at 698 (Scalia, J., dissenting).

transparent attempt to diminish if not eliminate the status of certain constitutional decisions of Article III courts as constitutional law, to weaken the independence of the federal judiciary, and to subject certain constitutional claims and claimants to disparate treatment.

In my opinion, there is nothing magical about Congress' power to regulate federal jurisdiction. It is tempting to construe this power as unlimited; it has never been clear whether Article III sets any limits on this power. Scholars have long disagreed about whether Article III imposes any so-called "internal" constraints on the Congress' power to regulate federal jurisdiction. But it is a major mistake to read Article III as if the only constraints on it are those that may be set forth in Article III. It is a further mistake to read it as if it were not affected by subsequent constitutional amendments. Both the Fifth Amendment Due Process Clause and its equal protection component constrain how Congress may withdraw federal jurisdiction. There is no question, for instance, it may not force African-Americans, women, or Jews to litigate their constitutional claims in state courts, while leaving everyone else access to Article III courts for their constitutional claims.

It should go without saying that the Congress has no unlimited powers. Nor, for that matter, do any other constitutional actors have unlimited powers. Congress' power to regulate federal jurisdiction is subject to the same constitutional limitations as every other plenary power, even those pertaining to war. If the invocation of the war powers were not a "blank check" to do as Congress or the President pleases (as Justice O'Connor declared at the end of last Term), this is no less true for every other power, including the power to regulate federal jurisdiction. Consequently, the latter is subject to separation of powers and federalism limitations and to the individual rights guarantees set forth in the Bill of Rights.

An especially troubling aspect of this bill is that it appears to lack a legitimate objective. At the very least, the Fifth Amendment requires that every congressional enactment must at least have a legitimate objective, but it is not possible to find one for the Act. It is motivated by distrust of the federal judiciary. Distrust of the federal judiciary is, however, not a legitimate objective. Nor is either disagreement with certain constitutional precedents of the courts or a desire to displace those decisions a legitimate objective. Under our Constitution, the federal judiciary is integral to protecting the rule of law in our legal system, balance of power among the branches, and protecting unpopular minorities from the tyranny of the majority.

For good reason, the Supreme Court has never upheld efforts to use the regulatory power over federal jurisdiction to regulate substantive constitutional law. With all due respect, I urge the Subcommittee to do as its illustrious predecessors have done in recognizing the benefits of our constitutional systems of separation of powers, federalism, and due process far outweigh whatever their costs. Below, I explain the principal grounds on which I believe this proposed bill is unconstitutional.

I.

General Principles

A few general principles should guide our consideration of the constitutionality of the Constitution Restoration Act of 2004. I discuss each briefly before considering how the proposed bill threatens each of them.

A. The Constitution Restricts the Means by which Article III Courts' Constitutional Decisions May Be Overturned. The United States Constitution allows the decisions of Article III courts on constitutional issues to be overturned by two means and two means only. The first is by a constitutional

amendment. Article V of the Constitution sets forth the requirements for amending the Constitution. In our history, constitutional amendments have overruled only a few constitutional decisions, including both the Eleventh and Fourteenth Amendments. Thus, it would not be constitutional for the Congress to enact a statute to overrule a court's decision on constitutional law. For instance, it would be unconstitutional for the Congress to seek to overrule even an inferior court's decision on the Second Amendment by means of a statute.

The second means for displacing an erroneous constitutional decision is by a superior court or by a court's overruling its own decisions. Since the Constitution places the Supreme Court at the apex of the federal judicial system, it has no superior; it is the only Article III court that may overturn its constitutional decisions. And it has done so expressly in more than a 150 of its constitutional decisions. On countless other occasions, the Court has modified, clarified, but not overruled its prior decisions on constitutional law. It is perfectly legitimate to ask the Supreme Court – or any other court, for that matter – to reconsider a constitutional decision.

It follows that the Congress may not, even through the exercise of its plenary power to regulate federal jurisdiction, to overrule a federal court's decision on constitutional law or to require inferior courts not to follow it. Nor, for that matter, may Congress direct the Court to ignore, or not to rely on or make reference to, some of its constitutional opinions. Indeed, the Supreme Court has long recognized that the Congress may not use its power to regulate jurisdiction -- or, for that matter, any other of its powers -- in an effort to override substantive judicial decisions. *See, e.g.*, City of Boerne v.

Flores,[3] Dickerson v. United States,[4] and Eichman v. United States.[5] Efforts, taken in response to or retaliation against judicial decisions, to withdraw all federal jurisdiction are transparent attempts to influence, or displace, substantive judicial outcomes. For several decades, the Congress, for good reason, has refrained from enacting such laws. The closest the Congress has come to doing this has been in restricting judicial review with respect to certain war-time measures, but I am unaware of any jurisdiction-stripping proposals pending in the House designed to protect national security.

Moreover, proposals that would limit the methods available to Article III courts to remedy constitutional injuries are constitutionally problematic. The problem with such restrictions is that, as the Task Force of the Courts Initiative of the Constitution Project found, "remedies are essential if rights are to have meaning and effect." Indeed, the bipartisan Task Force was unanimous "there are constitutional limits on the ability of legislatures to preclude remedies. At the federal level, where the Constitution is interpreted to vest individual rights, it is unconstitutional for Congress to preclude the courts from effectively remedying deprivations of those rights." While Congress clearly may use its power to regulate jurisdiction to provide for particular procedures and remedies in inferior federal courts, it may do so in order to increase the efficiency of Article III courts not to undermine those courts. The Congress needs a neutral reason for procedural or remedial reform. Indeed, the Fifth Amendment Due Process requires that the Congress must have a neutral justification, or legitimate

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[3]521 U.S. 507 (1997).

[4]530 U.S. 428 (2000).

[5]496 U.S. 310 (1990).

objective, for every piece of legislation that it enacts. While national security and promoting the efficiency of the federal courts qualify plainly as neutral justifications, distrust of the federal judiciary does not.

B. Constitutional Precedents Have the Status of Constitutional Law. It is tempting to think that when the Supreme Court makes a mistake that its mistake is not entitled to inclusion as a part of constitutional law. The mistake is to yield to this temptation. The fact is that the major sources of constitutional meaning – text, original understanding, structure, and historical practice – support treating all the Supreme Court's constitutional opinions as constitutional law, which only may be altered in by either a constitutional amendment or the Court's change of mind.

First, the Constitution extends "the judicial Power" of the United States over certain "cases" or "controversies." Judicially decided cases or controversies constitute precedents. Article V sets forth the requirements for the ratifications of amendments overturning erroneous precedents. The fact that amendments have been chronologically added to the Constitution, rather than integrated within the original text (with appropriate deletions), suggests that constitutional law remains static unless or until such time as amendments are ratified.

Second, "the judicial Power" set forth in Article III of the Constitution was understood historically to include a power to create precedents of some degree of binding force. In Federalist Number 78, Alexander Hamilton specifically referred to rules of precedent and their essential connection to the judicial power of the United States: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents . . ." Indeed, legal scholars have found that the doctrine of precedent either was established or becoming established in state courts

by the time of the Constitutional Convention."[6] The framers, in other words, were familiar with reliance on precedent as a source of constitutional decision.

Third, historical practices uniformly support treating precedents as constitutional law and thus unalterable except through extraordinary constitutional mechanisms. As one of my colleagues and a distinguished critic of the doctrine of stare decisis has acknowledged, "the idea that 'the judicial Power' establishes precedents as binding law, obligatory in future cases,' traces at least to the early nineteenth century, 'perhaps presaged by certain Marshall Court opinions."[7] Another commentator recently found that the framers rejected "the notion of a diminished standard of deference to constitutional precedent" as distinguished from common-law precedents." Justice Joseph Story agreed that the "conclusive effect of [constitutional adjudication] was in the full view of the Framers of the Constitution."

Fourth, constitutional structure supports the status of constitutional precedents as constitutional law. As one of the nation's foremost authorities on constitutional law and federal jurisdiction, Richard Fallon of Harvard Law School, has observed, "Under the Constitution, the judiciary, like the executive branch, has certain core powers not subject to congressional regulation under the Necessary and Proper Clause. For example, it is settled that the judicial power to resolve cases encompasses a power

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[6]See, e.g., Morton J. Horwitz, The Transformation of American Law, 1780-1860, at 8-9 (1977). See also Thomas Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 659 (1999) ("legal historians generally agree that the doctrine of stare decisis [was] of relatively recent origin" at the time of the Founding and had begun to resemble its modern form only during the eighteenth century).

[7]Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?, 109 Yale L.J. 1535,1578 n.115 (2000).

to invest judgments with 'finality'; congressional legislation purporting to reopen final judgments therefore violate Article III. And there can be little doubt that the Constitution makes Supreme Court precedents binding on lower courts. If higher court precedents bind lower courts, there is no structural anomaly in the view that judicial precedents also enjoy limited constitutional authority in the courts that rendered them."[8]

It follows that any attempt by the Congress to dilute the authority of Supreme Court opinions on constitutional law within the federal court system would be plainly unconstitutional. Congress could not, for instance, enact a statute directing the Court either to ignore its precedents on abortion rights as a source of decision altogether or to forego ever reconsidering certain 11th amendment precedents. Either enactment would be unconstitutional.

C. The Constitution Guarantees The Independence of Federal Judges from Political Reprisals. The Constitution vests Article III judges and justices with life tenure and undiminished compensation in order to ensure that they may decide cases or controversies without fear of political retaliation. The independence from political reprisals that federal judges enjoy includes the authority to prioritize sources of constitutional meaning. This authority is at the core of the judicial function. As Professor Fallon has argued, "The power to say what the Constitution means or requires – recognized in Marbury v. Madison – implies a power to determine the sources on which constitutional rulings may properly rest. To recognize a congressional power to determine the weight to be accorded to [the Court's] precedent – no less than to recognize congressional authority to prescribe the significance that should

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[8]Richard H. Fallon, Jr., Stare Decisis and the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. Rev. 570, 579 (2001) (footnotes and citations omitted).

attach to the original understanding – would infringe that core judicial function."[9]

D. The Supreme Court is Essential for Ensuring the Uniformity and Finality of Constitutional Law. Referring to the Court's decision in Martin v. Hunter's Lessee,[10] Justice Oliver Wendell Holmes remarked, "I do not think that the United States would come to an end if we [judges] lost our power to declare an Act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several states."[11] Without the authority to review state court judgments on federal law recognized in *Martin* (and ever since), there would be no means by which to ensure uniformity and finality in the application of federal law across the United States. This would be particularly disastrous for constitutional law. Federal rights, for instance, would cease to mean the same thing in every state. States could dilute or refuse to recognize these rights without any fear of reversal; they would have no incentive to follow the same constitutional law. Indeed, many state court judges are subject to majoritarian pressure to rule against federal rights, particularly those whose enforcement would result in a diminishment in state sovereignty. The Fourteenth Amendment would amount to nothing if Congress were to leave to state courts alone the discretion to recognize and vindicate the rights guaranteed by the Fourteenth Amendment. Judicial review within the federal courts is indispensable to the uniform, resolute, final application of federal rights protected by the Fourteenth Amendment.

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[9]Id. at 592.

[10]14 U.S. (1 Wheat.) 304 (1816).

[11]Oliver Wendell Holmes, Collected Papers 295-96 (1920).

In effect, the Constitution Restoration Act of 2004 allows the highest courts in each of the fifty states to become the courts of last resort within the federal judicial system for interpreting, enforcing, or adjudicating certain claims under the Establishment and Free Exercise Clauses. This Act allows different state courts to reach different conclusions regarding the viability of various claims differently, without any possibility of review in a higher tribunal to resolve conflicts among the states. Thus, the Act precludes any finality and uniformity across the nation in the enforcement and interpretation of the affected rights.

An equally troubling aspect of the bill is its implications for the future of judicial review. The Constitution does not allow the Congress to vest jurisdiction in courts to enforce a law but prohibit it from considering the constitutionality of the law that it is enforcing. The Task Force of the Courts Initiative of the Constitution Project unanimously concluded "that the Constitution's structure would be compromised if Congress could enact a law and immunize that law from constitutional judicial review." For instance, it would be unconstitutional for a legislature to assign the courts with enforcing a criminal statute but preclude them from deciding the constitutionality of this law. It would be equally unlawful to immunize any piece of federal legislation from constitutional judicial review. If Congress could immunize its laws from the Court's judicial review, then this power could be used to insulate every piece of federal legislation from Supreme Court review. For instance, it is telling that in response to a Supreme Court decision striking down a federal law criminalizing flag-burning, many members of the Congress proposed amending the Constitution. This was an appropriate response allowed by the Constitution, but enacting the same bill but restricting federal jurisdiction over it would be unconstitutional.

In addition, courts must have the authority to enjoin ongoing violations of constitutional law.

For example, the Congress may not preclude courts from enjoining laws that violate the First Amendment's guarantee of freedom of speech. If an article III court concludes that a federal law violates constitutional law, it would shirk its duty if it failed to declare the inconsistency between the law and the Constitution and proceed accordingly.

Proposals to exclude all federal jurisdiction would, if enacted, open the door to another, equally disastrous constitutional result – allowing the Congress to command the federal courts on how they should resolve constitutional results. In Ex Parte Klein, 80 U.S. at 146-47, the Supreme Court declared that it

> seems to us that it is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power . . . What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department or the government in cases pending before it? . . . We think not. . . We must think that Congress has inadvertently passed the limit which separates the legislature from the judicial power.

The law at issue in Ex Parte Klein attempted to foreclose the intended effect of both a presidential pardon and an earlier Supreme Court decision recognizing that effect. The Court struck the law down. In all likelihood, the same outcome would arise with respect to any other law excluding all federal jurisdiction, for such a law is no different than a law commanding the courts to uphold the law in question, a command no doubt Article III courts would strike down even if they thought the law in question was constitutional. There is no constitutionally meaningful difference between these laws,

because the result of a law excluding all federal jurisdiction over a federal law and a command for the courts to uphold the law are precisely the same – preserving the constitutionality of the law in question.

II.

The Constitution Restoration Act of 2004 Violates Separation of Powers

With the aforementioned principles in mind, I believe that the Constitution Restoration Act violates separation of powers in several ways. First, it attempts to dilute several constitutional precedents of the Supreme Court, the Eleventh Circuit (on the Ten Commandments), and the Ninth Circuit (on the Pledge of Allegiance). Part III, Section 301 of the Act, provides that "Any decision of a Federal court which has been made prior to or after the effective date of this Act, to the extent that the decision relates to an issue removed from Federal jurisdiction under section 1260 or 1370 of title 28, United States Code, as added by this Act, is not binding precedent on any state court." The Supreme Court no doubt qualifies as one of the federal courts covered by this provision. In previous cases, the Supreme Court has held that posting the Ten Commandments in public school classrooms violates the First Amendment,[12] that mandatory school prayer is unconstitutional,[13] and that students may not be required to recite the Pledge of Allegiance.[14] The Constitution Restoration Act allows state courts to ignore each of these precedents. Indeed, this is the purpose of the Act. Moreover, it invites state

[12]See Stone v. Graham, 449 U.S. 39 (1980).

[13]See, e.g., Engel v. Vitale, 370 U.S. 421 (1962).

[14]See West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

courts to overturn these precedents. State courts could, for instance, choose simply to post the Ten Commandments and allow mandatory school prayer or mandatory recitation of the Pledge of Allegiance, without any fear the Court might order them to comply with its precedents. The precedents will lose their constitutional significance.

Second, Title II, section 201 of the Act, provides that in constitutional adjudication "a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law." This provision is almost certainly unconstitutional, because it interferes with the core function of federal judges to decide for themselves on how much weight to attach to particular sources of constitutional meaning. In almost every instance in which Supreme Court justices have referenced foreign law in their constitutional opinions, the justices' reliance on foreign law has been de minimis. In those few instances, they took great pains to explain that they have attached no, or little, weight to the foreign law referenced in their opinions. Moreover, some foreign law is arguably pertinent to constitutional interpretation; for instance, the bill mentions "English common law" as being relevant to constitutional interpretation but does not mention some precedents from classical antiquity on which some Framers relied in fashioning certain parts of the Constitution, such as separation of powers.[15]

Third, Section 302 of Title III of the Act declares that "any activity" by a federal judge "that

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[15]The leading expert on this question is David Bederman of Emory Law School. He has just completed a manuscript of a forthcoming book on the influence of ancient precedents in the drafting and ratification of the Constitution.

exceeds the jurisdiction of the court of that judge or justice, as the case may be, by reason of section 1260 or 1370 of title 28, United States Code, as added by this Act,"is "deemed to constitute the commission of" an impeachable offense. This provision is constitutionally problematic for many reasons. To begin with, "any activity" might include striking down the Act as unconstitutional. If, for instance, the Supreme Court struck the law down, then the House will have to determine whether it must then impeach the offending majority, perhaps the entire Court itself. I do not believe that such a result is at all consistent with our constitutional traditions, historical practices, and structure, including our cherished notion of judicial independence.

Nor does the Act qualify how much reliance on foreign law is unacceptable. It seems outlandish to treat minimal reliance on foreign law as constituting the grounds for a judge's removal from office.

Though the Act allows judges and justices to rely on "constitutional law" in interpreting the Constitution, the Act does not define the terms. While some members of Congress might reach different conclusions than some justices about both the appropriate sources of constitutional meaning and how much weight to attach to them, the opposite holds true as well: Justices are not, nor may they be required, to comply with the directives of Congress on which constitutional conclusions they may reach, which sources they may consult, or how much weight they ought to attach to these sources.

Moreover, it is difficult, if not impossible, to make a judge's bad decision grounds for his or her impeachment.[16] Judicial independence requires relatively wide latitude of discretion in determining how

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[16]A few years ago I had the opportunity explore in depth the question about whether Article III judges may be impeached and removed for their decisions. See Michael J. Gerhardt, Chancellor Kent

to prioritize sources of decision. Indeed, this independence is an important feature within the appellate system, which is designed in part to correct judicial errors. Bad decisions may be appealed, and they may be overturned on appeal. They may also be overturned by constitutional amendment. So, it is not clear why impeachment is required to check these mistakes. I assume that some think it necessary to correct mistakes that cannot be corrected by these other means. But if the decisions are made by a group of judges or justices, then the entire group would have to be removed. I know of no source of constitutional meaning that would support such an outlandish outcome. The fact that the Congress has never impeached and removed a group of judges for a collective decision is telling. If, however, dissenting justices have made the bad decisions, then it seems silly to impeach them, because their decisions carry remarkable little weight in constitutional law. The same would be true for many, if not most, sole concurrences.

Applying this Act to real cases produces disturbing results. For instance, if the Act were strictly interpreted, then the majority in Bowers v. Hardwick[17] should have all been subject to impeachment for relying on the Judeo-Christian tradition and the history of Western civilization in reaching their conclusion. The reference to the Judeo-Christian tradition and Western civilization was made to rebut the argument that there was a tradition of not criminalizing homosexual sodomy, and it is this reference that prompted Justice Kennedy in Lawrence v. Texas[18] to reference European law. Thus, a strict

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and the Search for the Elements of Impeachable Offenses, 74 Chi.-Kent L. Rev. 91 (1998).

[17]478 U.S. 186 (1986).

[18]539 U.S. 558 (2003).

reading of the Act would allow not only the impeachment and removal of the majority in *Bowers* but also the justices who joined Justice Kennedy's opinion in *Lawrence*.

I believe the justices in both those cases acted in good faith. An impeachable offense requires both mens reus (a criminal intent) and actus reus (a bad act); and it is impossible to prove that the justices in both *Bowers* and *Lawrence* not only acted in bad fath but had the requisite malicious intent to deviate from the Constitution.

III.

The Constitution Restoration Act of 2004 Violates Equal Protection

I have no doubt that the Constitution Restoration Act of 2004 violates the equal protection component of the Fifth Amendment Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (recognizing, inter alia, that congruence requires the federal government to follow the same constitutional standard as the Fourteenth Amendment Equal Protection Clause requires states to follow). The Court will subject to strict scrutiny any classifications that explicitly burden a suspect class or fundamental right. The Constitution Restoration Act of 2004 does both.

First, the Constitution Restoration Act of 2004 may be based on a suspect classification. The natural plaintiffs to challenge this law may be people who belong to particular religious faiths which do not believe in paying homage to idols, such as Jehovah's Witnesses and Seventh Day Adventists; people who do not want the state to tell them how and when to pray (and may adhere to particular religious faiths); or people, such as atheists, who do not believe in G-d. Each group has a claim to being a suspect class, because each is defined by virtue of its exercise of a fundamental right.

Government needs a compelling justification to burden a suspect class, but mistrust of "unelected judges" is not a compelling justification.

Even if there were no suspect class burdened by the Act and only the rational basis test had to be satisfied, a court might conclude that the Act does not even satisfy that standard. The bill lacks a neutral justification. Distrust of federal judges is inconsistent with the very structure of our Constitution. While the Act also purports to be promoting federalism, federalism is the term we use to refer to the complex relationship between the federal and state governments. This term encompasses not just states rights but also the power of the federal judiciary to review state action. Federalism limits what the Congress may do, even with respect to regulating federal jurisdiction. It limits what Congress may do to enhance state sovereignty at the expense of the federal judiciary.

IV.

The Constitution Restoration Act of 2004 Violates the Fifth Amendment Due Process Clause

In all likelihood, the Constitution Restoration Act of 2004 violates the Fifth Amendment Due Process clause. The Congress' power to regulate jurisdiction may withdraw jurisdiction in Article III courts for neutral reasons, such as promoting their efficiency, national security, or improving the administration of justice. Neither mistrust of the federal judiciary nor hostility to particular substantive judicial decisions (or to particular rights) qualifies as a neutral justification that could uphold a congressional regulation of federal jurisdiction. It is hard to imagine why an Article III court, even the Supreme Court, would treat such distrust as satisfying the rational basis test required for most legislation. By design, Article III judges have special attributes -- life tenure and guarantee of

undiminished compensation -- that are supposed to insulate them from majoritarian retaliation. They are also supposed to be expert in dealing with federal law and more sympathetic to federal claims than their state counterparts.[19]

Excluding all federal jurisdiction with respect to particular federal claims forces people seeking to vindicate those rights in state courts, which are often thought to be hostile or unsympathetic to such claims. To the extent that the federal law burdens federal constitutional rights, it is problematic both for the burdens it imposes and for violating due process. Basic due process requires independent judicial determinations of federal constitutional rights (including the "life, liberty, and property" interests protected explicitly by the Fifth Amendment). Because state courts are possibly hostile to federal interests and rights and under some circumstances are not open to claims based on those rights, due process requires an Article III forum.

In addition, a proposal excluding all federal jurisdiction may violate the Fifth Amendment's Due Process Clause's guarantee of procedural fairness. Over a century ago, the Court declared that due process "is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be construed to leave congress free to make 'any due process of law,' by its mere will." The Court has further explained "that the Due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs seeking to redress grievances." A proposal excluding all federal jurisdiction effectively denies a federal forum to plaintiffs whose constitutional interests have been impeded by the law, even though Article III courts, including

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[19]*See* Martin v. Hunters' Lessee, 14 U.S. 304 (1816).

the Supreme Court, have been designed to provide a special forum for the vindication of federal interests.

Congress has shown admirable restraint in the past when it has not approved legislation aimed at placing certain substantive restrictions on the inferior federal courts. Over the years, there have been numerous proposals restricting jurisdiction in the inferior courts in retaliation against judicial decisions, but the Congress has not enacted them. The Congress has further refused since 1869 not to expand or contract the size of the Court in order to benefit one party rather than another. These refusals, just like those against withdrawing all federal jurisdiction in a particular class of constitutional claims, constitute a significant historical practice – even a tradition -- that argues against, rather than for, withdrawing all jurisdiction over particular classes of constitutional claims.

V.

Constitutional Structure Further Bars Congress

from Eliminating Federal Jurisdiction over Claims Against Federal Officials

Another aspect of federalism, to which I have alluded, is that it is not just concerned with protecting the states from federal encroachments. It also protects the federal government and officials from state encroachments. In a classic decision in Tarble's Case,[20] the Supreme Court held that the Constitution precluded state judges from adjudicating federal officials' compliance with state habeas laws. The prospect of state judges exercising authority over federal officials is not consistent with the structure of the Constitution. They could then direct, or impede, the exercise of federal power. The

[20]80 U.S. (13 Wall.) 197 (1871).

Act allows, however, state courts to do this. By stripping all federal jurisdiction over certain claims against federal officials, the Act leaves only state courts with jurisdiction over claims brought against those officials. The popular will might lead state judges to be disposed to be hostile to federal claims or federal officials. Hostility to the federal claims poses problems with the Fifth Amendment, while hostility to federal officials poses serious federalism difficulties.

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Beyond the constitutional defects with the Constitution Restoration Act of 2004, it may not be good policy. It may send the wrong signals to the American people and to people around the world. It expresses hostility to our Article III courts, in spite of their special function in upholding constitutional rights and enforcing and interpreting federal law. If a branch of our government demonstrates a lack of respect for federal courts, our citizens and citizens in other countries may have a hard time figuring out why they should do otherwise. Rejecting proposals to exclude all federal jurisdiction or inferior court jurisdiction for some constitutional claims extends an admirable tradition within the Congress and reminds the world of our hard-won, justifiable confidence in the special role performed by Article III courts throughout our history in vindicating the rule of law.