CONSTITUTION RESTORATION ACT OF 2004

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

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CONSTITUTION RESTORATION ACT OF 2004

MONDAY, SEPTEMBER 13, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 4:40 p.m., in Room 2141, Rayburn House Office Building, Hon. Lamar Smith (Chair of the Subcommittee) presiding.

Mr. SMITH. This Subcommittee on Courts, the Internet, and Intellectual Property will come to order. Today's hearing is on H.R. 3799, the "Constitution Restoration Act of 2004." I am going to recognize myself for an opening statement, then the Ranking Minority Member, Mr. Berman, and then proceed to introduce the witnesses. Without objection, all Members will be able to submit their opening statements for the record. And also without objection we will include the entire testimony of all witnesses today since, as they know, we are limited to 5 minutes for each of their testimonies.

Today's hearing addresses an important subject matter, the right of Congress to prevent the Supreme Court and the lower Federal courts from reviewing a specialized category of cases that touches upon religious faith. The legislation before us that facilitates this also imposes a tough penalty, impeachment on any Federal judge who ignores Congress's directive. The bill addresses tangential but related issues as well, including the obligation of State courts to observe Federal precedence and the ability of Federal judges to use foreign legal services—excuse me, foreign legal sources when interpreting the Constitution.

H.R. 3799 is the latest in a series of legislative and oversight responses to questionable, or at least controversial Federal court decisions. For the most part, I subscribe to the notion that the American justice system is the envy of the world. But it is far from perfect, as the behavior of unprincipled trial lawyers and activist judges attest. Religious faith and practice are part of the American culture. Many of our ancestors fled to the colonies that became this country to avoid religious persecution. Hundreds of years later, our respective faiths inform and influence our behavior as individuals and as a Nation.

I firmly believe that Americans are the most prosperous and caring people in world history, largely because we are a religious people. But our status as the leader of the free and civilized world is also based on our commitment to the rule of law. All are bound by it from presidents to truck drivers to judges to waitresses. We can-

not function as a society if some citizens are beyond the law's reach. We cannot pick and choose those laws we will obey.

Academics, legislators, and other interested parties are divided as to whether court-stripping bills are constitutionally sound. We look forward to our hearing because we have a balanced panel of experienced and learned witnesses, and I am confident that our discussion this afternoon will be both informative and constructive.

That concludes my opening remarks. And the gentleman from California, Mr. Berman, is recognized for his.

Mr. BERMAN. Thank you very much, Mr. Chairman.

I am not sure whether the greater irony is that this bill is called the Constitutional Restoration Act when it does the opposite of restoring the Constitution's integrity. Or that this hearing is taking place days before the Jewish High Holidays, a time in which Jews spend days reciting prayers replete with acknowledgment of God and his sovereignty.

America was founded by those attempting to escape religious persecution. The pilgrims set forth to a new continent in the hope of establishing what was at the time a radical idea, a society free from the tyranny of religious discrimination. This tradition led the framers of the first amendment to our Constitution to insist on the principle of separation of church and State. They enshrined in our founding document the twin pillars of our country's policy toward religion, a commitment to allow freedom of religious expression and a rejection of the State's establishment of religion. They entrusted our courts with the ability to differentiate between the two.

H.R. 3799 is a reactionary piece of legislation. It is borne out of an attempt to politicize recent decisions of the supreme court and lower Federal courts. And the most egregious part, H.R. 3799, would seemly make it an impeachable offense for a Federal judge to decide that H.R. 3799 or a specific portion of it violates the U.S. Constitution.

This bill attempts to circumvent the only available process for legislators to reverse the effects of judicial decisions concerning the Constitution. That process is called a constitutional amendment. The Framers deliberately made it difficult to achieve because it did not want legislators repeatedly tinkering with the founding document.

Supporters of this bill have repeatedly promoted the concept of court stripping in an effort to give legislators the power to take decisions out of the hands of judges, an approach that is thoroughly at odds with what the Framers of the Constitution intended. I'm surprised at it in an age where we are trying to eradicate the Taliban, a group that infused a fundamentalist interpretation of their religion in every aspect of public life; we are here now talking about removing Federal judicial oversight in some religion cases.

The Constitution created the most delicate balance between the branches of Government. We must protect the sanctity of the autonomous nature of our judiciary. By giving Congress power to overturn the judiciary's core function of constitutional interpretation, this bill would fundamentally alter that constitutional balance.

The bill is not about freedom of expression, as some might proclaim. It is a mockery of what our Founders considered to be an

integral part of our system of Government, the separation of powers, and the system of checks and balances between the branches of Government. Are we to chain the hands of the judicial branch of the Federal Government so that they merely serve as a rubber stamp for the political mores of the moment? Ironically, while supporters of H.R. 3799 seek to assert greater congressional control over review of the laws it passes, making State courts the primary avenue for challenges to Federal legislation actually erodes Congress's control over judicial review. Unlike with the Federal judiciary, Congress has no impeachment power over State judges or authority to regulate State courts, and the Senate has no power to advise and consent in their selection.

Speaking of our Framers, are we now to question the influence foreign law played in the development of the Constitution? And what about the usage of foreign law in decisions that the sponsor presumably likes? As Professor Gerhardt states in his written testimony, if this bill were law in 1986, then the majority in the *Bowers* v. *Hardwick* case presumably would have been subject to impeachment for their reliance on the judiciums on Western civilization and the Judeo-Christian civilization.

The attack on usage of foreign law is said to be a way to clamp down on unacceptable judicial activism. But the opposition to judicial activism is selective, limited to a specific type of decision with which the sponsor disagrees. The sponsors are content to allow other examples of judicial activism to pass unchallenged. For example, of relevance to this Subcommittee but not at all addressed in the bill is the judicial activism evident in the Florida prepaid cases.

In those cases, the Supreme Court based its decisions not on the text of the Constitution, but rather on fundamental postulates that directly contradict the actual language of the 11th amendment. Apparently, the sponsors of this bill are only opposed to judicial activism when it runs counter to their political ideology. This legislation would give asking the power that our Founding Fathers specifically intended to deny the political branches; namely, the power to ensure that judicial decisions aren't held postage to prevailing political sentiment in the country. That is not the role the Founding Fathers intended for Congress or the independent Federal judiciary. That Congress would threaten to impeach Federal judges because of the substance of their constitutional decisions is itself an abuse of power and one which our system of Government cannot tolerate.

Other than that, I remain open-minded on this bill. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Berman. And your voice was running out concurrent with the 5 minutes, I think.

Let me say that we have been joined by a colleague of ours from Alabama, Representative Aderholt. And I am going to recognize him to introduce a former colleague of ours and a constituent of his, and then I will proceed to introduce the remaining witnesses. Representative Aderholt.

Ms. LOFGREN. Could I just very quickly—I don't have an opening statement, but I do have—I am hosting a briefing at the Science Committee at 5:00, and I wanted to apologize to the witnesses. I have read the testimony.

Mr. SMITH. I didn't see that the gentlewoman was seeking to be recognized. But she is. And are you—but you are not seeking to make an opening statement?

Ms. LOFGREN. No. I am just apologizing to the witnesses in advance, and letting them know I have read the written testimony, and I appreciate it and I can't get out of my 5:00 meeting.

Mr. SMITH. Okay. Thank you.

Representative Aderholt.

Mr. ADERHOLT. Good afternoon, Chairman Smith, Members of the Subcommittee, distinguished guests, and members of the public. I thank you for this opportunity to join in with you here in the Judiciary Committee to introduce the Former Chief Justice of the Alabama Supreme Court, Roy Moore.

Judge Moore has been at the heart of controversy surrounding the display of the Ten Commandments in the State of Alabama. Anyone who has followed the series of events regarding the public display of the Ten Commandments in Alabama knows Roy Moore.

Many Government buildings across the Nation have displayed the Ten Commandments since this Nation was born as a reminder that the laws of this Nation acknowledge God as a sovereign source of law and liberty. Shortly after being appointed circuit judge, Roy Moore displayed a copy of the Ten Commandments in his assigned courtroom at the Etowah County Courthouse. He did this without fanfare or a desire for media attention.

The acknowledgment of God has been at the heart of the top Government that was set in place by our Founding Fathers going back to the 1700's. A brief reading of the writings of the Founders on the way they incorporated opening prayer for the United States House of Representatives and the United States Senate are clear examples that our laws were built on this type of acknowledgment. It is that acknowledgment that has set the United States of America apart from all other republics in the history of man kind.

I say acknowledgment of God because acknowledgment of God should not be confused with the establishment of religion. I think everyone here agrees that establishment of religion was not favored by the Founders just as it is not favored by those who will be testifying this afternoon.

The legislation that is at the focus today is the Constitutional Restoration Act, H.R. 3799. Since there has been hostility toward even the acknowledgment of God over the past several years by the Federal courts, this legislation would remove from the jurisdiction of the Federal court system any case involving acknowledgment of God by a public official. The acknowledgment of God as a sovereign source of law, liberty, and Government is contained within the Declaration of Independence which is cited as the organic law of our country by the United States Code Annotated.

Furthermore, the Constitution of every State in the union acknowledges God and his sovereignty as do the three branches of the Federal Government.

The Constitutional Restoration Act, which will be discussed by Judge Moore, would restore the balance of power among the various branches of Government and restore the fundamental precepts upon which our Constitution and Government is based. To prohibit a State official from acknowledging God is a violation of the tenth

amendment as well as the first amendment of the United States Constitution as completely contrary to the intent of our Founding Fathers. Because of the comprehensive nature of this legislation, it addresses several issues, such as the pledge, the Ten Commandments, our national motto, "In God We Trust." and other acknowledgments of God. The public recognition of God by State and Federal authorities exist today in oaths, mottos, documents, prayers, monuments, and various other medium.

Judge Moore is a native of Etowah County, Alabama. He graduated from Etowah High School in 1965 and obtained a bachelor of science degree in 1969 from the United States Military Academy at West Point. After military service, Judge Moore returned to Alabama where he completed his juris doctorate degree in 1977 from the University Alabama school of law. Judge Moore served our country as captain in the military police corps of the United States Army. During his professional career, he became the first full-time deputy district attorney in Etowah County and served in this position from 1977 until 1982.

In 1984, he undertook private practice in the city of Gadsden until his appointment to the circuit bench in 1992. Judge Moore served in this capacity until his election as chief justice of the Supreme Court of Alabama in November of 2000, where he served until 2000—November of 2003. Judge Moore currently travels throughout the United States speaking about America's history and our right to acknowledge God. He also serves as chairman of the Moral Law Foundation, an organization in Montgomery, Alabama dedicated to the defending of the public acknowledgment of God.

I think the Committee will find Judge Moore's testimony enlightening this afternoon, and see that this is an issue that Judge Moore believes in with all sincerity.

Mr. SMITH. Thank you, Mr. Aderholt. And let me say, you are welcome to stay and join us and listen to the hearing as well.

Mr. ADERHOLT. Thank you.

Mr. SMITH. Our next witness is the Honorable William E. Dannemeyer, an alumnus of our Committee while a Member of Congress from 1979 to 1992. He also served on the Budget and Energy and Commerce Committees, and chaired the Republican Study Committee. Mr. Dannemeyer worked as a special agent in the Army counterintelligence corps during the Korean War. He has also practiced law and served as the deputy district attorney, a State judge, and a member of the California State assembly. Mr. Dannemeyer is a graduate of Valparaiso University and the Hastings college of law.

Our next witness is Professor Arthur D. Hellman of the Pittsburgh school of law. He possesses expertise in the areas of Federal courts and constitutional law, and is a familiar witness to Members of our Subcommittee. Professor Hellman received his bachelor's degree from Harvard with high honors and his law degree from Yale.

Our last witness is Michael J. Gerhardt, professor of law at William and Mary, who is currently a visiting professor of law at the University of Minnesota. He is the author of several books, including The Federal Impeachment Process. Professor Gerhardt has served as a special consultant to the National Commission on Judicial Discipline and Removal, and the 1992 presidential transition

team. He has also taught law at Princeton, Cornell, and Duke. Professor Gerhardt received his bachelor's degree from Yale, a master's from the London School of Economics, and a law degree from the University of Chicago.

We welcome you all. And as I mentioned a while ago, your full testimony will be made a part of the record. It is a tradition with the full Committee and with the Subcommittee that we swear in witnesses, so I would like to ask you all to stand and take the oath. If you will raise your right hand, please.

[witnesses sworn.]

Mr. SMITH. Thank you. Please take your seats.

Professor Gerhardt, we are going to begin with you.

STATEMENT OF MICHAEL J. GERHARDT, PROFESSOR OF LAW, WILLIAM & MARY LAW SCHOOL

Mr. GERHARDT. Thank you very much, Mr. Chairman; and also thank you to Congressman Berman and the whole Subcommittee for the great privilege of being able to appear today.

You have my written statement, and I won't try your patience by going through it in any detail here. But it does amplify some of the points that I hope to make briefly right now.

As I have suggested, one of the things that struck me when I first read the Constitution Restoration Act of 2004 was a quote from Justice Antonin Scalia. In his prescient dissent in Morrison versus Olsen, Justice Scalia described the Independent Counsel Act as a wolf that comes as a wolf. And my concern with this statute is that this statute comes as a wolf before this Committee. It is very clear what the purpose of this statute is, and at least to me I think it is very clear the constitutional problems with it.

Very briefly, the first is that it attempts to dilute several constitutional precedents of article III courts. As we all know, there are only two ways in which to overturn or to eradicate article III courts' decisions that we don't like. One is by constitutional amendment, and the other is by asking the courts that rendered them to overturn them. In a case of an inferior court and a superior court, the superior court might reverse the lower court. But this statute, of course, doesn't satisfy those conditions. This statute, by its very name, I think, is attempting to do something that is only permissible through those means I just described. If there are any problems with the particular precedents of article III courts, they cannot be, as I said, diluted or diminished by statutory means.

And by requiring that—or by allowing every State court the judge not to be bound by precedents that might touch upon the substance of this Act, I think this Act essentially allows State courts to have final word on the application of the United States Supreme Court precedent. And I don't think that's consistent with the United States Constitution.

Secondly, I think the Act does intrude upon the core functioning of article III judges. That core functioning does include the power to say what the law is, and the power to say what the law is includes within it the power to determine appropriate sources on which to rely. Reference to, for example, a foreign law, might well arise or might well be appropriate in the course of constitution adjudication. We have seen that reliance, for example, in Bowers

versus Hardwick, we have seen it in very few other cases. One of the few other cases in which we do see it is *Lawrence* v. *Texas*.

But as Congressman Berman just pointed out, the application of this statute would allow for, I think, a use of impeachment that goes far beyond anything the Framers of the Constitution permit. I don't think that it is appropriate for people to be impeached and removed from office because of something they have written or declared in the course of rendering a judicial opinion. That exercise of power, that act lies well within the core functioning of an article III judge, and the judiciary is constitutionally independent from political interference.

Moreover, this Act, I think, does raise some problems under the fifth amendment due process clause. That clause, at the very least, would require a neutral justification for this Act, and I am at a loss to know what that neutral justification is. As far as I can tell, the objective or the animating force behind this Act is distrust of the Federal judiciary, and I don't think that's an appropriate objective for Congress to pursue through statutory means.

There are other difficulties with this statute, but, of course, I have limited time, and I am happy to amplify those later. Thank you.

Mr. SMITH. Thank you, Professor Gerhardt.

[The prepared statement of Mr. Gerhardt follows:]

PREPARED STATEMENT OF MICHAEL J. GERHARDT

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 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'

[1] 487 U.S. 654 (1988).
[2] Id. at 698 (Scalia, J., dissenting).

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.

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[3] 521 U.S. 507 (1997).
[4] 530 U.S. 428 (2000).
[5] 496 U.S. 310 (1990).

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 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 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

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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).

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 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.

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 Con-

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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).

[9] Id. at 592.

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

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

stitution. 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 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

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[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).

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 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 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 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.

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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.

[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 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).

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 the Supreme

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

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 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.

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.

Mr. SMITH. Professor Hellman.

STATEMENT OF ARTHUR D. HELLMAN, PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Mr. HELLMAN. Thank you, Mr. Chairman.

Any citizen who cares deeply about public affairs and particularly about the role of Government in the life of the nation is going to experience frustration from time to time with decisions handed down by the Federal courts. The sponsors of H.R. 3799 plainly feel a great deal of frustration with certain decisions interpreting the establishment clause as well as decisions in which courts have relied on foreign law. And Members of this Subcommittee may share those views. But however much you might disagree with those court decisions, this bill is not an appropriate response. Most of its provisions—not all of them, but most of them—are unconstitutional.

And the bill as a whole is bad public policy because it seeks to impair the independence of the judiciary, an independence that has

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

been forged through 200 years of history and also a set of traditions that have served this Nation well.

I will begin with what is the most radical provision of the bill, section 302. That is the impeachment provision that Mr. Berman and Professor Gerhardt have referred to. It seems to me that this is something the Constitution just doesn't allow Congress to do. Now, the Constitution doesn't say that in so many words, but it does say that Congress cannot dock the pay of judges because they don't like their decisions, not even 1 percent. And the reason the Framers put that in the Constitution is that they thought it was essential to have an independent judiciary. And what they meant by that was a judiciary not beholden to Congress.

Well, if you can't reduce their salary by even 1 percent for decisions that you disagree with, how could it be constitutional to impeach and remove them from office?

In addition to the text, we have guidance from tradition, and the authoritative expositor of that tradition is Chief Justice Rehnquist in his book Grand Inquests, and I have included some extracts from that in my statement.

The second mechanism for enforcement is the section 301, which says that decisions made by Federal courts contrary to this bill, before or after it, are not binding precedents. And it seems to me that that's plainly unconstitutional under the decision just 4 years ago in Dickerson, a decision written by the Chief Justice saying that Congress does not have the power to legislatively supersede the Supreme Court's decisions interpreting and applying the Constitution. But that is just what this provision attempts to do.

I think that Dickerson also dictates the unconstitutionality of the provision on foreign law, although I don't think you need Dickerson for that. I think all you have to do is to read *Marbury* v. *Madison*, the foundational decision of American constitutional law, and the familiar statement that it is emphatically the province and duty of the judicial department to say what the law is.

Now, that brings me to the two jurisdictional provisions of the bill. I believe that those two jurisdictional provisions raise very different issues. The provision on the Supreme Court appellate jurisdiction I think is a very closely balanced constitutional question, and perhaps we can get to that during the questions.

On the other side, I think that the bill—the provisions of the bill on district court jurisdiction are constitutional; that the Congress is not required to have Federal courts, and Congress has very wide discretion in deciding which kinds of matters to vest in the jurisdiction of the Federal courts. But to say that a provision, or perhaps two of them are constitutional is not to say that they are good policy, and they are not.

There have been many bills like this over the past 50 years. None have been enacted. And I think that that history has established a tradition almost as strong as the one that Chief Justice Rehnquist discussed with respect to impeachment.

There is more that could be said about the particular provisions, but I will close with these thoughts: Ours is a pluralistic nation. We are closely divided on many issues.

What that means is that depending on the time and the circumstances, anyone can be part of a minority. And the availability

of an independent Federal court with power to hear everyone's constitutional claims is a source of reassurance to all of us. For that reason and for the others I have indicated, Congress, and in this—in the first instance this Subcommittee, should adhere to these long and valuable traditions and should reject this bill in its entirety. Thank you.

Mr. SMITH. Thank you, Professor Hellman.

[The prepared statement of Mr. Hellman follows:]

PREPARED STATEMENT OF ARTHUR D. HELLMAN

Statement of
Arthur D. Hellman

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify at this legislative hearing on H.R. 3799, the "Constitution Restoration Act of 2004." My view, in brief, is that most of the provisions of H.R. 3799 are unconstitutional, and all of them are unwise. An independent federal judiciary has served this nation well, and Congress should resist measures that would diminish or threaten that independence.

It is important to emphasize that opposition to H.R. 3799 is justified irrespective of whether one shares the concerns that underlie the bill. Certainly reasonable people can argue that the courts have sometimes gone too far in banishing religious references from public ceremonies and religious displays from public places. And I would have no difficulty in endorsing the position, well articulated by Judge Richard A. Posner and Professor John O. McGinnis, that the federal courts should not use foreign or international law as persuasive authority in interpreting our own Constitution. But however wrong (or even wrong-headed) some of the decisions may be, H.R. 3799 is a misguided remedy that should be rejected outright.

Before turning to the issues raised by H.R. 3799, I will say a few words by way of personal background. I am a professor of law and Distinguished Faculty Scholar at the University of Pittsburgh School of Law, where I teach courses in Federal Courts and Constitutional Law. I have written numerous articles and reports on various aspects of the work of the federal courts; I have also written on free speech and on judicial activism. Of particular relevance to today's hearing, I am the author (with Dean Lauren Robel of the Indiana University School of Law) of FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE

LAWYERING PROCESS, which is scheduled for publication in the spring of 2005. I am responsible for the chapters on "Congressional Power to Control the Jurisdiction of the Federal Courts" and "Congressional Power to Control Judicial Decision Making," and in this statement I have adapted some material from those chapters. Of course, in my testimony today I speak only for myself.

I. H.R. 3799 in Context

Although H.R. 3799 can be referred to colloquially as "court-stripping" legislation, it goes considerably further than most of the bills that fall within that category. A useful point of comparison is H.R. 3313, the Marriage Protection Act of 2004, which was passed by the House in July of this year.

Title I of H.R. 3799 parallels the Marriage Protection Act in its entirety. Each of the bills eliminates both the Supreme Court's appellate jurisdiction and the district courts' trial jurisdiction to hear a particular kind of case. In the Marriage Protection Act, the prohibition extends to "any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C [of Title 28] or this section." In H.R. 3799, the proscription embraces "any matter to the extent that 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 personal capacity), by reason of that element's or officer's acknowledgement of God as the sovereign source of law, liberty, or government."[1]

The remaining provisions of H.R. 3799 have no counterpart in the Marriage Protection Act. Two of these provisions are designed as enforcement mechanisms

[1] Although I will not develop the point here, I note that the jurisdictional provisions in Title I are inartfully drafted. Each of the provisions excludes jurisdiction over "any matter" of the kind described. But the relevant provisions of Title 28 define jurisdiction by reference to "cases," "judgments," and "civil actions." The statute as drafted would thus pose difficult problems of interpretation and application.

for the jurisdictional restrictions in Title I. Section 301 provides that any decision of a federal court that relates to an issue removed from jurisdiction by Title I "is not binding precedent on any state court." Section 302 provides that if any federal judge or Justice engages in any activity that exceeds the jurisdiction of the judge's court by reason of the Act's jurisdictional restrictions, that activity shall be deemed to constitute an impeachable offense.

Finally – and without apparent connection to the other provisions – Title II of the Act takes aim at recent decisions by the Supreme Court that look to foreign and international law for guidance in the resolution of questions arising under the Constitution of the United States. It states: "In interpreting and applying the Constitution of the United States, 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."

In this statement, I will discuss the three titles of H.R. 3799 in the reverse order of their appearance in the bill. I will address the jurisdictional provisions only briefly, because the issues are familiar to the members of this Subcommittee from the debates on the Marriage Protection Act in the full Committee and on the House floor.

In discussing the constitutional issues presented by H.R. 3799, I will confine myself to the tools of constitutional interpretation that the Supreme Court is likely to use if the various provisions of the bill should come before it. I have avoided esoteric theories that are not likely to command the Court's attention.

II. Impeachment as a Remedy

Section 302 is the most radical provision of H.R. 3799. It provides:

> To the extent that a justice of the Supreme Court of the United States or any judge of any Federal court engages in any activity that exceeds the jurisdiction of the court of that justice or judge, as the case may be, by reason of [the jurisdictional provisions of Title I], engaging in that activity shall be deemed to constitute the commission of--
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> (1) an offense for which the judge may be removed upon impeachment and conviction; and
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> (2) a breach of the standard of good behavior required by article III, section 1 of the Constitution.

I believe that this provision is plainly unconstitutional; in addition, it would breach a longstanding constitutional tradition that has served this country well.

On the first point, my conclusion is grounded in the text of the Constitution. It is true, of course, that the Constitution does not say in so many words that a federal judge cannot be impeached and convicted for rendering decisions that Congress does not like. But it does say that "[t]the judges, both of the supreme and inferior courts, shall … receive for their Services *a Compensation, which shall not be diminished* during their Continuance in Office." (Emphasis added.) The Framers included this provision because they thought it was essential to have an independent judiciary – a judiciary not beholden to Congress.

The Constitution thus forbids Congress from reducing a judge's salary by even 5 percent because it disagrees with one of the judge's decisions. Is it conceivable that the Constitution would allow Congress, by reason of that same disagreement, to impeach a judge, convict him, and remove him from office? Logically, there can be only one answer: it is not possible.

In addition to the text, we can also draw guidance from tradition – in this instance, a tradition that has been chronicled and summarized by none other than

the Chief Justice of the United States, William H. Rehnquist. In his book GRAND INQUESTS (1992), the Chief Justice describes in detail the impeachment trial of Justice Samuel Chase in 1805. Chase, a Federalist, was impeached by the House at the instigation of President Jefferson, a Republican.[2] All of the charges grew out of alleged misbehavior while Chase was sitting in the circuit court as a trial judge. The most serious accusations were based on his conduct during two criminal trials and his partisan comments during a charge to a grand jury.

The Senate acquitted Chase on all of the articles of impeachment. On most of the articles there was not even a majority, much less the two-thirds required for conviction. Chief Justice Rehnquist summarizes the consequences of that momentous series of votes:

> The acquittal of Samuel Chase by the Senate had a profound effect on the American judiciary. First, it assured the independence of federal judges from congressional oversight of the decisions they made in the cases that came before them. Second, by assuring that impeachment would not be used in the future as a method to remove members of the Supreme Court for their judicial opinions, it helped to safeguard the independence of that body. ...
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> The acquittal of Chase [was] significant in that it seemed to draw a line as the proper use of the congressional power to impeach and remove a judge from office. Jefferson himself freely acknowledged this fact shortly after the Chase acquittal, saying the impeachment was a "scarecrow" which would not be used again. The Senate's action prevented the Republicans from further exploring and expanding the possible use of impeachment to remove from office judges whose views they considered to be unwise or out of keeping with the times. ...
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> Neither the Chase acquittal nor any other single event could possibly remove the potential for conflict between the federal judiciary and the other branches of the federal government. That sort of conflict is contemplated by the Constitution, and it would require a rewriting of that

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[2] Jefferson's Republican Party was of course unrelated to the Republican Party of today.

> document to avoid the occasional confrontations that have taken place. But the Chase acquittal has come to stand for the proposition that impeachment is not a proper weapon for Congress (abetted, perhaps, by the executive as in the case of Chase) to employ in these confrontations. No matter how angry or frustrated either of the other branches may be by the action of the Supreme Court, removal of individual members of the Court because of their judicial philosophy is not permissible. The other branches must make use of other powers granted them by the Constitution in their effort to bring the Court to book.

You might respond to this by saying that, as judge himself, the Chief Justice is not the most impartial of observers. But one does not have to be a judge to look back on 200 years of American history and see the benefits of an independent judiciary.

I will return to this point at the conclusion of my testimony, but there is more that needs to be said about H.R. 3799's willingness to use impeachment as a remedy. Reasonable people can disagree about the merits of many federal-court decisions today, as they have disagreed about past decisions such as *Dred Scott*, *Brown v. Board of Education*, and many others. And in a free society, it is legitimate to launch "vehement, caustic, and sometimes unpleasantly sharp attacks" on judges as on other public officials.[3] But for members of Congress to propose impeachment and removal from office as a means of combating court decisions they disapprove of goes beyond the boundaries of appropriate legislative response.

III. State Courts and Supreme Court Precedent

In addition to the impeachment provision, H.R. 3799 includes a second mechanism for enforcing its jurisdictional restrictions. Section 301 states that any decision of a federal court, whether made prior to or after the effective date of the

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[3] See New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

Act, "to the extent that the decision relates to an issue removed from Federal jurisdiction [by the Act], is not binding precedent on any State court." This provision too is both unconstitutional and unwise.

Preliminarily, it should be noted that the only federal-court decisions that are binding on state courts under current practice are the decisions of the United States Supreme Court. State courts may find guidance in decisions of the federal courts of appeals and the district courts, but they are under no obligation to rule in accordance with them. Section 301 is thus a directive addressed to state courts instructing them that they need not follow certain decisions of the Supreme Court of the United States.

The unconstitutionality of section 301 is made clear by the recent decision in *Dickerson v. United States*, 530 U.S. 428 (2000). In *Dickerson*, the Supreme Court considered the constitutionality of 18 USC § 3501, enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968. Section 3501 provides in part: "In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given." The statute offers a non-exclusive list of factors that courts should consider in determining voluntariness.

Two years before section 3501 was enacted, the Supreme Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, of course, the Court held that a confession could not be admitted into evidence against a defendant unless it was preceded by the now-familiar warnings. Section 3501 made no mention of any required warnings. In *Dickerson*, Chief Justice Rehnquist, writing for the Court, described the conflict between section 3501 and *Miranda*:

> Given § 3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and

> the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*. Because of the obvious conflict between our decision in *Miranda* and § 3501, we must address whether Congress has constitutional authority to thus supersede *Miranda*. If Congress has such authority, § 3501's totality-of-the-circumstances approach must prevail over *Miranda*'s requirement of warnings; if not, that section must yield to *Miranda*'s more specific requirements.

The Chief Justice then laid out the governing rules:

> The law in this area is clear. … Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.
>
> But *Congress may not legislatively supersede our decisions interpreting and applying the Constitution*. (Emphasis added.)

By telling state judges that they need not follow Supreme Court decisions on issues removed from Federal jurisdiction by Title I of the Act, Section 301 is an attempt to "legislatively supersede [the Supreme Court's] decisions interpreting and applying the Constitution." It is therefore unconstitutional. Indeed, the point is even clearer than it was in *Dickerson*, because the attempt to countermand the Court's decisions is more direct.

Yet even if the unconstitutionality of section 301 were not so clear, the provision would still be unwise. Alexander Hamilton, in an oft-quoted passage in Federalist No. 82, emphasized that "the state governments and the national governments … truly are …parts of ONE WHOLE." It would be poor policy indeed for one branch of the national government to tell state courts that they can ignore the hitherto binding judgments of another branch.

IV. Use of "Foreign or International Law" in Constitutional Interpretation

Section 201 of the bill is a directive addressed not to state judges but to federal judges. It provides:

> In interpreting and applying the Constitution of the United States, 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.

Although the rule of *Dickerson* may not directly apply to section 201, I believe that the *Dickerson* principle does control and that it renders section 201 unconstitutional. The reason is that the *Dickerson* principle derives ultimately from the bedrock decision in American constitutional law, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803). *Marbury* in turn rests on the proposition that "[i]t is emphatically the province and duty of the judicial department to say what the law is." The power to "say what the law is" necessarily encompasses the power to determine where to look for guidance in interpreting the law. Indeed, the *Marbury* opinion itself states: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." For Congress to tell a federal court that it may not "rely upon" sources that the court believes to be relevant is thus to intrude on core Article III functions.

A similar conclusion is suggested by the recent decision in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Justice Scalia, writing for the Court, emphasized the Framers' "sense of a sharp necessity to separate the legislative from the judicial power." He continued by describing how the Framers acted on that belief:

> The essential balance created by [the allocation of authority in the Constitution] was a simple one. The Legislature would be possessed of power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated," but the power of "[t]he interpretation of the laws" would be "the proper and peculiar province of the courts." The Federalist No. 78, pp. 523, 525.

By its very terms, section 201 attempts to exercise the power of "[t]he interpretation of the laws" which under the Constitution is "the proper and peculiar province of the courts."

Section 201 is also ill-advised. Like the impeachment provision, a frontal challenge to the courts' approach to constitutional interpretation would further damage the already troubled relations between the judiciary and Congress. And it would be counterproductive, for it would tend to discredit reasoned arguments, such as those made by Judge Posner and Professor McGinnis, against the practices that it would outlaw.[4]

V. Limiting the Supreme Court's Appellate Jurisdiction

I turn now to the first of the jurisdictional restrictions in H.R. 3799. Section 101 would add a new section to Chapter 81, the chapter in Title 28 that defines the jurisdiction of the Supreme Court. Section 1260 would provide:

> Notwithstanding any other provision of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter to the extent that 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 personal capacity), by reason of that element's or officer's acknowledgement of God as the sovereign source of law, liberty, or government.

Is the proposed section 1260 constitutional? The argument that it is relies heavily on the language and structure of Article III section 2. The first sentence of section 2 defines the "judicial power of the United States" by listing nine categories of "Cases" and "Controversies." The second sentence provides that in two of those classes of cases—"Cases affecting Ambassadors, other public

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[4] See Richard A. Posner, No Thanks, We Already Have Our Own Laws, Legal Affairs, July-August 2004; John O. McGinnis, Statement Before the Subcommittee on the Constitution, House Committee on the Judiciary, Mar. 25, 2004.

Ministers and Consuls, and those in which a State shall be Party"—the Supreme Court shall have original jurisdiction. Article III continues: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The final clause thus authorizes Congress to make "Exceptions" to the Supreme Court's appellate jurisdiction. Nothing in Article III limits that authorization. The proposed section 1260 would simply create an "exception" to the grants of appellate jurisdiction in sections 1254 and 1257. Therefore it is constitutional.[5]

So goes the argument. But I believe that the analysis cannot end there. The reason lies in one of the most profound comments about constitutional interpretation that anyone has ever made. In Monaco v. Mississippi, 292 U.S. 313 (1934), Chief Justice Hughes said: "Behind the words of the constitutional provisions are postulates which limit and control." One of the "postulates" that lies behind the words of the Constitution – notably Article III and the Supremacy Clause – is that review by the United States Supreme Court would be available to assure that state courts comply with the commands of federal law. To the extent that the proposed section 1260 would allow state courts to reject federal claims without the possibility of review by the Supreme Court, it would violate that postulate.

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[5] In this statement, I discuss the proposed restriction only as it affects 28 USC § 1257 and the Supreme Court's appellate jurisdiction over state courts. If Congress can eliminate particular categories of cases from the jurisdiction of the lower federal courts, as I believe it can, the appellate jurisdiction under 28 USC § 1254 in such cases would be of little importance.

Admittedly, this argument seems to run up against the language of the "exceptions" clause. My response is this. We know that many of the delegates to the Constitutional Convention were concerned about assuring state-court compliance with federal law.[6] If they thought that the "exceptions" clause would leave Congress free to disarm the mechanism established by the Constitution to accomplish this purpose, they would have raised the point in the debates. They might not have pursued it, but they would not have remained silent. Yet when the "exceptions" clause came up for consideration, no one said anything about Supreme Court review of state-court decisions.[7] The most plausible explanation is that the delegates did not view the language as allowing Congress to withhold the jurisdiction to which they attached so much importance.

Yet even if this argument is not accepted, it is significant that the first Congress did authorize the Supreme Court to review state-court decisions rejecting federal claims or defenses, and that this jurisdiction has continued without interruption to the present day. Numerous bills have been proposed to limit the jurisdiction, but none have been enacted. A jurisdictional arrangement that was seen as necessary by the Framers and that has been part of our system for the entire life of the Republic should not be lightly disturbed.

VI. Limiting the Jurisdiction of the District Courts

Finally, section 102 of the bill provides: "Notwithstanding any other provision of law, the district court shall not have jurisdiction of a matter if the

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[6] For example, Edmund Randolph, in the course of the debate on the judiciary article, commented that "the Courts of the States can not be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the General & local policy at variance." Daniel A. Farber & Suzanna Sherry, A HISTORY OF THE AMERICAN CONSTITUTION 58 (1990).

[7] See id. at 62.

Supreme Court does not have jurisdiction to review that matter by reason of section 1260 of this title." This language thus excludes district-court jurisdiction over –

> any matter to the extent that 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 personal capacity), by reason of that element's or officer's acknowledgement of God as the sovereign source of law, liberty, or government.

Functionally, section 102 embraces two distinct categories of cases, each raising somewhat different constitutional issues.

First, section 102 eliminates district court jurisdiction over suits challenging action by *state or local* officials. If Congress retains – as I believe it must – the Supreme Court's appellate jurisdiction over state-court cases within this category, then there is no constitutional obstacle to denying jurisdiction to the district courts. The Constitution does not require Congress to create lower federal courts at all, and the Supreme Court has repeatedly said that "Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers." Sheldon v. Sill, 8 How. (49 U.S.) 441 (1850).

Of course, Congress's power over the lower federal courts is subject to the various limitations that the Constitution imposes on all exercises of Congressional power. Thus, notwithstanding the language in *Sheldon v. Sill*, a law that prohibited Jews or Republicans from filing suit in federal district court plainly would be unconstitutional under the First Amendment. But H.R. 3799 is not such a law. And in explaining why section 102 is constitutional with respect to challenges to state action, I cannot improve on the words of the late Professor Paul Bator:

> If the Congress decides that a certain category of case arising under federal law should be litigated in a state court, subject to Supreme Court review, *neither the letter nor the spirit of the Constitution has been violated*. What has happened is that Congress has taken up one of the precise options which the Constitutional Framers specifically envisaged. From the viewpoint of the Constitution, nothing has gone awry.[8]

Section 102 raises more difficult issues in its application to suits challenging action by *federal* government officials. The reason is that the Supreme Court, again speaking through Chief Justice Rehnquist, has referred to the "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988). To be sure, section 102 does not, by its own terms, deny *any* judicial forum for the suits within its ambit; it denies only the *federal* forum. But under 28 USC § 1442(a), a federal official who is sued in state court, whether "in an official or [an] individual capacity," for "any act under color of [his] federal office," may remove the case to federal district court. If, under section 102, the district court were required to dismiss the action, this would present the "serious constitutional question" that concerned the Court in *Webster*. If the statute is construed to allow the district court to remand the case to state court, the constitutional problem would be avoided.

But to say that section 102 is constitutional is not to say that it is good policy, and it is not. It would send a handful of suits to the state courts rather than the federal district courts. If the state courts chose not to follow the governing precedents, and review was sought in the Supreme Court, the Supreme Court would probably feel obliged to correct the erroneous decisions. Little would be

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[8] Paul M. Bator, Congressional Power Over the Jurisdiction of the Federal Courts, 27 Vill. L. Rev. 1030, 1034 (1982) (emphasis in original).

accomplished except perhaps to create some friction between state and federal judiciaries.

VII. Conclusion

Any citizen who cares deeply about public affairs and the role of government in the life of the nation will experience frustration from time to time with decisions handed down by the federal courts. And when the citizen is a Member of Congress, it will be tempting to promote legislation that will eliminate the jurisdiction of the courts to hear cases raising the particular issue. But the temptation should be resisted.

One reason it should be resisted is that Congress has always resisted it in the past. Over the last half-century, there have been numerous bills to curtail the jurisdiction of the federal courts on a wide spectrum of constitutional issues, including prayer in the schools, criminal procedure, abortion, and many others. Some of these bills have had substantial support. But none has been enacted.

This history has established a tradition almost as strong as the one that Chief Justice Rehnquist discussed in his chapter on the impeachment of Justice Samuel Chase. This tradition has served the country well. It has helped to maintain a system of judicial independence that is the envy of civilized nations throughout the world.

Ours is a pluralistic nation, closely divided on many issues. Depending on the time and the circumstances, anyone can be part of a minority. The availability of an independent federal court, with power to hear everyone's constitutional claims, is a source of reassurance to all. Congress should adhere to that tradition and should reject H.R. 3799 in its entirety.

Mr. SMITH. Representative Dannemeyer.

STATEMENT OF THE HONORABLE WILLIAM E. DANNEMEYER, MEMBER OF CONGRESS, 1979 TO 1992

Mr. DANNEMEYER. Thank you.

Mr. Chairman and Members of the Subcommittee, I think we need to really recognize what the issue is today: Do the political leaders of this country, you elected Members, have the courage to acknowledge that God exists as the means whereby we teach the next generation in this country in our public schools?

Now, that acknowledgment of God is totally different from a religion. A religion is man's effort to reach God; but God's effort to reach us and his word, the Bible, which is the basis upon which this Nation was founded, was the philosophy that our political leaders followed until about a little after World War II. And, today, we have a majority of justices on the U.S. Supreme Court, sadly for all of us, who really have established a religion for America called secular humanism which says there is no God.

That is why we are here. And you Members have the authority under article III, section 2, to cut it out, and to tell those nine distinguished folk across the street where the line is. And the line is that America's a people who says that God exists who created rules for man to live by. Not a religion, but an acknowledgment of basis of God, the basis of Judaism, Muslim, and Christianity, throughout history. We should be able to come together on that affirmation.

Now, among the papers that I've filed with you is a letter signed by representatives of 27 organizations across this country that really are asking Congress to adopt legislation of the type now pending before you. I won't take my time to read all the names, but believe me, almost all of the people active in the evangelical community of this country are asking Congress to adopt this legislation.

As to article III, section 2, there is nothing novel about it, also in this packet of information that I filed with this Committee. Congress used this authority 12 times in the last Congress. One of note is, of course, by Senator Daschle of South Dakota that used it as a means of cutting down some trees assertedly to assist one of his colleagues in his reelection campaign. He was wise enough to understand that Congress can pass the law, but the moment somebody doesn't like it, they go to a Federal court and get an injunction; and so he put a provision in that bill that says this cannot be taken to the Federal court.

Now, I have passed out to you a book who I believe is one of the greatest scholars on this issue is David Barton of Texas. He has worked on a group called Americans for Voluntary School Prayer, was co-chairman of that group. He has written a book, and I have got a copy here that I have left with you. And on page 9 to 11, if you have time, you can read, court rulings that have really prevented the free exercise of religious thought in this country. And also on pages 11 to 14, decisions by public officials prohibiting the free exercise by people, among them the valedictorian of a public high school, graduating class, should be able publicly to State his or her religious convictions, whatever they happen to be, even though they may be out of synch with some Federal judge in this area.

And then, lastly, let me just say that, you know, the American people are totally with us by a big majority. This may come to a shock to my friend from California, Mr. Berman. About 75 percent of the American people want this legislation to be adopted. And the questions for all of you who are elected Members of Congress: Why are we taking so long to get it done?

So that's the pitch that I want to share with you today, and I thank you very much for this time.

Mr. SMITH. Thank you, Representative Dannemeyer.

[The prepared statement of Mr. Dannemeyer follows:]

PREPARED STATEMENT OF THE HONORABLE WILLIAM E. DANNEMEYER

Mr. Chairman and members of the Subcommittee:

Thomas Jefferson is generally recognized by most historians as the principal author of the Declaration of Independence and James Madison as the father of the U.S. Constitution. Our founding fathers created a federal system of three branches—executive, legislative and judicial. The system was not designed to be efficient; on the contrary, the checks and balances of these branches of government, as they struggled for power, were designed to provide the best chance of preserving freedom for the people of America.

On Aug. 18, 1821, Jefferson wrote to Charles Hammond and expressed that of the three branches of government, the one he feared the most was the federal judiciary: "The federal judiciary is . . . working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped from the states, and the government of all be consolidated into one (i.e., federalization)."

Decisions of the federal judiciary over the last half-century have resulted in the theft of our Judeo-Christian heritage. Here's a brief sampling:

- Enacting "a wall of separation between church and state"; Everson vs. Board of Education, 1947.
- Banning nondenominational prayer from public schools; Engel vs. Vitale, 1962.
- Removing the Ten Commandments from public school walls; Stone vs. Graham, 1980.
- Striking down a "period of silence not to exceed one minute . . . for mediation or voluntary prayer"; Wallace vs. Jaffree, 1985.
- Censoring creationist viewpoints when evolutionist viewpoints are taught; Edwards vs. Aguillard, 1987.
- Barring prayers at public school graduations; Lee vs. Weisman, 1992.

On Jan. 12, Supreme Court Justice Antonin Scalia gave a speech at Fredericksburg, Va., in which he did a rare thing for a sitting justice: He publicly criticized decisions of the U.S. Supreme Court and lower federal courts. The sense of his comments was that the courts have gone overboard in keeping God out of government. He cited the recent decision of Judge Alfred Goodwin of the 9th Circuit Court of Appeals barring students in a public school from using the word "God" in the Pledge of Allegiance.

Polling data shows overwhelmingly support for legislation that would prevent such prohibitions.

For example, in 1985, 69 percent of Americans supported school prayer; by 1991, that number had increased to 78 percent. Similarly, in 1988, 68 percent of Americans supported a constitutional amendment to reinstate school prayer; by 1994, that number had risen to 73 percent.

Furthermore, the public is strongly unified on the subject of spoken—not silent—prayer. In 1995, support for spoken prayers by students of all faiths was at 75 percent; by 2001, before the terrorist attacks, it was at 77 percent.

Congress can correct the wrong interpretation of the 1st Amendment by decisions of the federal judiciary in two different ways.

One method is a constitutional amendment which would apply to the federal judiciary and to the supreme courts of the states. This, of course, requires a two-thirds vote in the House and the Senate and the approval of three-fourths of the states. It is a very daunting hurdle, to say the least.

The other alternative is a statutory approach. It would require a majority vote in the House and the Senate and the signature of the president. It would utilize Article III, Section 2.2 of the U.S. Constitution, which authorizes Congress to except certain subject matter from jurisdiction of the federal courts. This authority was used by the last Congress, the 107th, 12 different times.

Legislation using this approach has been introduced in Congress.

Sen. Wayne Allard, R-Colo., has introduced Senate Bill 1558 to allow display of Ten Commandments and to retain "God" in the pledge and "In God We Trust" as national motto. It uses the Article III exception.

Rep. Ernest Istook, R-Okla., has introduced House Joint Resolution 46 with 95 co-sponsors for a constitutional amendment to allow voluntary prayer in public schools.

Rep. Robert Aderholt, R-Ala., has introduced House Resolution 3799, the Constitutional Restoration Act of 2004. A statute, it would allow voluntary prayer in public schools, the display of the Ten Commandments and keep God in the Pledge and in the National Motto. It utilizes Article 3 Sec. 2.2.

ATTACHMENTS

COALITION TO ACKNOWLEDGE THAT GOD EXISTS AND TO ALLOW EXPRESSIONS OF FAITH

January 15, 2004

SUBJECT: REQUESTING CONGRESS TO ENACT LEGISLATION NOW PENDING IN THE HOUSE AND SENATE

ADDRESSED TO CONGRESSIONAL LEADERS

HOUSE
- **Speaker Dennis Hastert**
- **Majority Leader Tom DeLay**
- **Majority Whip Roy Blunt**
- **Judiciary Committee Chairman James Sensenbrenner, Jr.**
- **Judiciary Committee Constitution Subcommittee Chairman Steve Chabot**
- **Value Action Team Chairman Joseph R. Pitts**

SENATE
- **Majority Leader Bill Frist**
- **Majority Whip Mitch McConnell**
- **Policy Committee Chairman Jon Kyl**
- **Judiciary Committee Chairman Orrin G. Hatch**
- **Judiciary Committee Constitution, Civil Rights and Priority Rights Subcommittee Chairman John Cornyn**
- **Value Action Team Chairman Sam Brownback**

The current Congress has a unique and historic opportunity to correct a wrong interpretation of the First Amendment by decisions of the U.S. Supreme Court which in the past half century have stolen our Judeo Christian heritage. Unique and historic because this is the first time since 1955 that both Houses of Congress and the White House are supportive of a political philosophy which is willing to acknowledge that God exists who created rules which all persons are to observe.

A brief sampling of some of these decisions is as follows:

Enacting "a wall of separation between church and state"
(Everson v. Board of Education, 1947)
Banning nondenominational prayer from public schools
(Engel v. Vitale, 1962)
Removing the Ten Commandments from public school walls
(Stone v. Graham, 1980)
Striking down a "period of silence not to exceed one minute...for mediation or voluntary prayer"
(Wallace v. Jaffree, 1985)
Censoring creationist viewpoints when evolutionist viewpoints are taught
(Edwards v. Aguillard, 1987)
Barring prayers at public school graduations
(Lee v. Weisman, 1992)

We believe that the principle problem facing America is a spiritual one. Since 9-11, our political leaders have been heard to publicly ask on many occasions "God Bless America." If we are honest with ourselves, why should God Bless America? For over two generations we have been teaching children in public schools the God does not exist.

We are encouraged that in the current Congress legislation has been introduced to allow public expression of faith and to acknowledge that God exists in America. We thank and support the following authors and the legislation they have introduced and strongly urge the Congressional leadership to move this legislation expeditiously and produce a statute and/or a Constitutional Amendment which will minimally retain God in the Pledge of Allegiance; retain "In God We Trust" as our national motto; allow voluntary prayer in public schools; allow the display of the Ten Commandments in public buildings and if a statute, utilize Article 3, 2.2 of the U.S. Constitution to except these subject areas from the federal court system.

Senator Allard of Colorado – S1558, 10 co-sponsors
Statute to allow display of Ten Commandments and to retain God in pledge and "In God We Trust" as national motto. Uses Article 3, 2.2 to except these subjects from Federal Courts

Congressman Aderholt of Alabama, HR 2045 - Ten Commandments Defense Act of 2003, 110 co-sponsors
Allows displaying of Ten Commandments, Allows expressions of faith in public

Congressman Akin of Missouri – HR 2028 IH, 222 co-sponsors
Statute to retain "God" in pledge and uses Article 3, 2.2 to except this from Federal Court jurisdiction.

Congresswoman Emerson from Missouri – HJ Res. 7, 1 co-sponsor
Constitutional Amendment to allow voluntary prayer in public schools

Congressman Istook of Oklahoma – HJ Res. 46, 100 co-sponsors
Constitutional Amendment to allow voluntary prayer in public schools

Congressman Paul of Texas – HR 1547, 3 co-sponsors
Statute to except religious freedom from jurisdiction of federal courts

Congressman Pickering of Mississippi – HJ Res. 40, 11 co-sponsors
Constitutional Amendment to retain God in pledge and "In God We Trust" as national motto

Congressman Pickering of Mississippi – H R 3190, 35 co-sponsors
Statute to allow display of Ten Commandments and to retain "God" in pledge and "In God We Trust" as national motto. Uses Article 3, 2.2 to except these subjects from Federal Courts.

Polling data overwhelmingly supports this legislation:

"For example, in 1985, 69 percent of Americans supported school prayer; by 1991, that number had increased to 78 percent. Similarly, in 1988, 68 percent of Americans supported a constitutional amendment to reinstate school prayer; by 1994, that number had risen to 73 percent.

Furthermore, the public is strongly unified on the subject of spoken – not silent – prayer. In 1995, the support for spoken prayers by students of all faiths was at 75 percent and by 2001 (before the terrorist attacks) it was at 77 percent. Additionally, 80 percent believe that students should be able to recite a spoken prayer at graduations, and support for other types of visible religious expressions at schools remains equally high."

Signed,

Mr. David Barton
Wallbuilders, Inc.
Aledo, TX

Congressman Bill Dannemeyer (1979-1992)
Americans For Voluntary School Prayer

Mr. Gary Bauer
Campaign For Working Families

Dr. James Dobson
Focus on the Family
Colorado Springs, CO

Mr. Joel Belz
World Magazine

Rev. Jerry Falwell
Liberty Alliance
Lynchburg, VA

Mr. Phil Burress
Citizens For Community Values
Cincinnati, OH

Mr. Mike Farris
Home School Legal Defense Association

Mr. Jack Clayton
Christian Legal Defense and Education
Foundation

Rev. Ted Haggard
National Association of Evangelicals
Washington, D.C.

Mr. Chuck Colson
Prison Fellowship
Washington, D.C.

Mr. David Keene
American Conservative Union

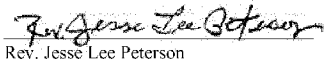
Mrs. Roberta Combs
Christian Coalition
Washington, D.C.

Dr. D. James Kennedy
Coral Ridge Ministries
Ft. Lauderdale, FL

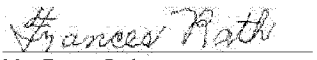
Mr. Martin Mawyer
Christian Action Network

Mr. William Murray
Religious Freedom Coalition
Washington, D.C.

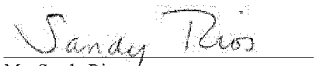
Mr. Tony Perkins
Family Research Council
Washington, D.C.



Rev. Jesse Lee Peterson
Bond, Los Angeles, CA

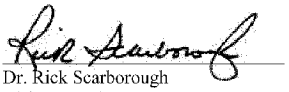


Mrs. Frances Rath
Committee For Biblical Principles in Government
Aloha, OR

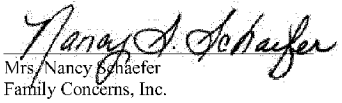


Ms. Sandy Rios
Concerned Women For America
Washington, D.C.

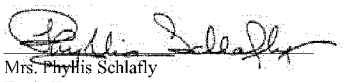
Rev. Pat Robertson
CBN, Virginia Beach, VA



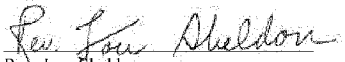
Dr. Rick Scarborough
Vision America, Houston, TX



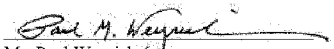
Mrs. Nancy Schaefer
Family Concerns, Inc.
Turnerville, GA



Mrs. Phyllis Schlafly
Eagle Forum



Rev. Lou Sheldon
Traditional Values Coalition
Washington, DC



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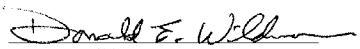
Free Congress Foundation



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Commentary 4 | Sunday, Sept. 21, 2003 The Orange County Register

Judges are stealing our Judeo-Christian heritage

WILLIAM E. DANNEMEYER
THE FULLERTON RESIDENT IS CO-CHAIRMAN OF AMERICANS FOR VOLUNTARY SCHOOL PRAYER AND WAS AN ORANGE COUNTY CONGRESSMAN FROM 1979-1992

In response to Tibor R. Machan's Sept. 15 column, "Faith and its place": Thomas Jefferson is generally recognized by most historians as the principal author of the Declaration of Independence and James Madison as the father of the U.S. Constitution. Our founding fathers created a federal system of three branches - executive, legislative and judicial. The system was not designed to be efficient; on the contrary, the checks and balances of these branches of government, as they struggled for power, were designed to provide the best chance of preserving freedom for the people of America.

On Aug. 18, 1821, Jefferson wrote to Charles Hammond and expressed that of the three branches of government, the one he feared the most was the federal judiciary: "The federal judiciary is …working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped from the states, and the government of all be consolidated into one (i.e., federalization)."

Decisions of the federal judiciary over the last half-century have resulted in the theft of our Judeo-Christian heritage. Here's a brief sampling:

- Enacting "a wall of separation between church and state"; Everson vs. Board of Education, 1947.
- Banning nondenominational prayer from public schools; Engel vs. Vitale, 1962.
- Removing the Ten Commandments from public school walls; Stone vs. Graham, 1980.
- Striking down a "period of silence not to exceed one minute…for mediation or voluntary prayer"; Wallace vs. Jaffree, 1985.
- Censoring creationist viewpoints when evolutionist viewpoints are taught; Edwards vs. Aguillard, 1987.
- Barring prayers at public school graduations; Lee vs. Weisman, 1992.

On Jan. 12, Supreme Court Justice Antonin Scalia gave a speech at Fredericksburg, Va., in which he did a rare thing for a sitting justice: He publicly criticized decisions of the U.S. Supreme Court and lower federal courts. The sense of his comments was that the courts have gone overboard in keeping God out of government. He cited the recent decision of Judge Alfred Goodwin of the 9th Circuit Court of Appeals barring students in a public school from using the word "God" in the Pledge of Allegiance.

Polling data shows overwhelmingly support for legislation that would prevent such prohibitions.

For example, in 1985, 69 percent of Americans supported school prayer; by 1991, that number had increased to 78 percent. Similarly, in 1988, 68 percent of Americans supported a constitutional amendment to reinstate school prayer; by 1994, that number had risen to 73 percent.

Furthermore, the public is strongly unified on the subject of spoken – not silent – prayer. In 1995, support for spoken prayers by students of all faiths was at 75 percent; by 2001, before the terrorist attacks, it was at 77 percent.

Congress can correct the wrong interpretation of the 1st Amendment by decisions of the federal judiciary in two different ways.

One method is a constitutional amendment which would apply to the federal judiciary and to the supreme courts of the states. This, of course, requires a two-thirds vote in the House and the Senate and the approval of three-fourths of the states. It is a very daunting hurdle, to say the least.

The other alternative is a statutory approach. It would require a majority vote in the House and the Senate and the signature of the president. It would utilize Article III, Section 2.2 of the U.S. Constitution, which authorizes Congress to except certain subject matter from jurisdiction of the federal courts. This authority was used by the last Congress, the 107th, 12 different times.

Legislation using this approach has been introduced in Congress.

Sen. Wayne Allard, R-Colo., has introduced Senate Bill 1558 to allow display of Ten Commandments and to retain "God" in the pledge and "In God We Trust" as national motto. It uses Article III exception.

Rep. Ernest Istook, R-Okla., has introduced House Joint Resolution 46 with 95 co-sponsors for a constitutional amendment to allow voluntary prayer in public schools

Rep. Robert Aderholt, R-Ala., has introduced House Resolution 2045 with 61 co-sponsors to allow displays of the Ten Commandments on public property.

Congress responds to pressure from the public. Contact your House member and senators to support these measures.

The Washington Times

Article III, Section 2

By William E. Dannemeyer
THE WASHINGTON TIMES
Published October 7, 2003

Thomas Jefferson is generally recognized by most historians as the principle author of the Declaration of Independence. Our Founding Fathers created a federal system of three branches, Executive, Legislative and Judicial.

On Aug. 18, 1821, Jefferson wrote to Charles Hammond and expressed his fear that, of the three branches of government which were created, the one he feared the most was the federal judiciary in these words:

"The federal judiciary is working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped from the States, and the government of all be consolidated into one (i.e., federalization)."

Decisions of the federal judiciary over the last half century have resulted in the theft of our Judeo-Christian heritage, a brief sampling is as follows:

- Enacting "a wall of separation between church and state"
- Banning nondenominational prayer from public schools
- Removing the Ten Commandments from public school walls
- Removing God from the Pledge of Allegiance

Congress should use Article III, Section 2, clause 2 of the U.S. Constitution to recover what has been stolen. Under the heading "Jurisdiction of Supreme and Appellate Courts," the clause says:

> "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Over the last 200 years, Congress has exercised this authority to except certain areas from the jurisdiction of the federal court system. In Turner vs. Bank of North America 4 Dall. (4 U.S.,8(1799)), the Supreme Court concluded that the federal courts derive their judicial power from Congress, not the Constitution.

In Cary vs. Curtis 3 How, (44 U.S.), 236 (1845), a statute made final the decision of the secretary of the Treasury in certain tax deductions. The statute was challenged as an unconstitutional deprivation of the judicial power of the courts. The Supreme Court concluded that the jurisdiction of the federal courts (inferior to the Supreme Court) was in

the sole power of Congress.

In Sheldon vs. Sill 8 How (49 U.S. 441(1850)), involved the validity of the assignee clause of the Judicial Act of 1789 restricting such action to establish federal court jurisdictions. The Supreme Court sustained the power of Congress to limit the jurisdiction of the inferior federal courts.

In Ex Parte McCardle 6 Wall. (73 U.S.) 318 (1 868), the Supreme Court accepted review on certiorari of a denial of a petition for a writ of habeas corpus by the circuit court. Congress, fearful the Supreme Court would honor the writ, passed a law repealing the act which authorized the appeal. The Supreme Court dismissed the case for lack of jurisdiction.

In Lauf vs. E.G. Shinner & Co. 303 U.S. 323, 330 (1938), the Supreme Court upheld the power of Congress to define and limit the jurisdiction of the inferior courts of the United States in the form restrictions on the issuance of injunctions in labor disputes under the Norris-La Guardia Act of 1932.

In Lockerty v. Phillips 319 U.S. 182 (1943), Congress provided for a special court to appeal price control decisions under the Emergency Price Control Act of 1942. The Supreme Court sustained this restriction.

One of the outstanding Constitutional scholars in the Senate is Robert Byrd, West Virginia Democrat. In 1979, in order to once again allow voluntary prayer in public schools, he introduced a law to except this subject from the federal court system under Article III, 2.2. Unfortunately, it was not enacted into law.

In the 107th Congress (2001-2002), Congress used the authority of Article III, Section 2, clause 2 on 12 occasions to limit the jurisdiction of the federal courts.

Sen. Thomas A. Daschle, South Dakota Democrat, used the exception authority of Article III, 2.2 in order to cut some timber in South Dakota.

Congress responds to pressure from the public. Call, write, e-mail or fax your senator or member of the House to enact 51 558 by Sen. Allard, Colorado Republican, and HR 3190 by Rep. Pickering Mississippi Republican. These bills allow the Ten Commandments to be displayed and retain God in the Pledge of Allegiance and use Article III, Sec. 2.2.

Former Rep. William E. Dannemeyer is co-chairman of Americans For Voluntary School Prayer.

103d Congress
1st Session

SENATE

DOCUMENT
No. 103–6

THE CONSTITUTION

of the

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

ANNOTATIONS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JUNE 29, 1992

PREPARED BY THE
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of the opinion specify the elements essential of a foreign state for purposes of jurisdiction, such as sovereignty and independence.

Narrow Construction of the Jurisdiction.—As in cases of diversity jurisdiction, suits brought to the federal courts under this category must clearly state in the record the nature of the parties. As early as 1809, the Supreme Court ruled that a federal court could not take jurisdiction of a cause where the defendants were described in the record as "late of the district of Maryland," but were not designated as citizens of Maryland, and plaintiffs were described as aliens and subjects of the United Kingdom.[1037] The meticulous care manifested in this case appeared twenty years later when the Court narrowly construed § 11 of the Judiciary Act of 1789, vesting the federal courts with jurisdiction when an alien was a party, in order to keep it within the limits of this clause. The judicial power was further held not to extend to private suits in which an alien is a party, unless a citizen is the adverse party.[1038] This interpretation was extended in 1870 by a holding that if there is more than one plaintiff or defendant, each plaintiff or defendant must be competent to sue or liable to suit.[1039] These rules, however, do not preclude a suit between citizens of the same State if the plaintiffs are merely nominal parties and are suing on behalf of an alien.[1040]

Clause 2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

THE ORIGINAL JURISDICTION OF THE SUPREME COURT

From the beginning, the Supreme Court has assumed that its original jurisdiction flows directly from the Constitution and is

[1037] Hodgson & Thompson v. Bowerbank, 5 Cr. (9 U.S.) 303 (1809).

[1038] Jackson v. Twentyman, 2 Pet. (27 U.S.) 136 (1829); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

[1039] Coal Co. v. Blatchford, 11 Wall. (78 U.S.) 172 (1871). See, however, Lacassagne v. Chapuis, 144 U.S. 119 (1892), which held that a lower federal court had jurisdiction over a proceeding to impeach its former decree, although the parties were new and were both aliens.

[1040] Browne v. Strode, 5 Cr. (9 U.S.) 303 (1809).

therefore self-executing without further action by Congress.[1041] In *Chisholm v. Georgia*,[1042] the Court entertained an action of assumpsit against Georgia by a citizen of another State. Congress in § 3 of the Judiciary Act of 1789[1043] purported to invest the Court with original jurisdiction in suits between a State and citizens of another State, but it did not authorize actions of assumpsit in such cases nor did it prescribe forms of process for the exercise of original jurisdiction. Over the dissent of Justice Iredell, the Court, in opinions by Chief Justice Jay and Justices Blair, Wilson, and Cushing, sustained its jurisdiction and its power to provide forms of process and rules of procedure in the absence of congressional enactments. The backlash of state sovereignty sentiment resulted in the proposal and ratification of the Eleventh Amendment, which did not, however, affect the direct flow of original jurisdiction to the Court, although those cases to which States were parties were now limited to States as party plaintiffs, to two or more States disputing, or to United States suits against States.[1044]

By 1861, Chief Justice Taney could confidently enunciate, after review of the precedents, that in all cases where original jusrisdiction is given by the Constitution, the Supreme Court has authority "to exercise it without further act of Congress to regulate its powers or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice."[1045]

Although Chief Justice Marshall apparently assumed the Court had exclusive jurisdiction of cases within its original jurisdiction,[1046] Congress from 1789 on gave the inferior federal courts concurrent jurisdiction in some classes of such cases.[1047] Sustained in the early years on circuit,[1048] this concurrent jurisdiction was finally approved by the Court itself.[1049] The Court has also relied on the first Congress' interpretation of the meaning of Article III

[1041] But in § 13 of the Judiciary Act of 1789, 1 Stat. 80, Congress did so purport to convey the jurisdiction and the statutory conveyance exists today. 28 U.S.C. § 1251. It does not, however, exhaust the listing of the Constitution.

[1042] Dall. (2 U.S.) 419 (1793). In an earlier case, the point of jurisdiction was not raised. Georgia v. Brailsford, 2 Dall. (2 U.S.) 402 (1792).

[1043] 1 Stat. 80.

[1044] On the Eleventh Amendment, see *infra*. On suits involving States as parties, see *supra*.

[1045] Kentucky v. Dennison, 24 How. (65 U.S.) 66, 98 (1861).

[1046] Marbury v. Madison, 1 Cr. (5 U.S.) 137, 174 (1803).

[1047] In § 3 of the 1789 Act. The present division is in 28 U.S.C. § 1251.

[1048] United States v. Ravara, 2 Dall. (2 U.S.) 297 (C.C.Pa. 1793).

[1049] Rhode Island v. Massachusetts, 12 Pet. (37 U.S.) 657 (1838); Bors v. Preston, 111 U.S. 252 (1884); Ames v. Kansas ex rel. Johnson, 111 U.S. 449 (1884). Such suits could be brought and maintained in state courts as well, the parties willing. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898); Ohio ex rel. Popovici v. Alger, 280 U.S. 379 (1930).

in declining original jurisdiction of an action by a State to enforce a judgment for a precuniary penalty awarded by one of its own courts.[1050] Noting that § 13 of the Judiciary Act had referred to "controversies of a civil nature," Justice Gray declared that it "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."[1051]

However, another clause of § 13 of the Judiciary Act of 1789 was not accorded the same presumption by Chief Justice Marshall, who, interpreting it as giving the Court power to issue a writ of mandamus on an original proceeding, declared that as Congress could not restrict the original jurisdiction neither could it enlarge it and pronounced the clause void.[1052] While the Chief Justice's interpretation of the meaning of the clause may be questioned, no one has questioned the constitutional principle thereby proclaimed. Although the rule deprives Congress of power to expand or contract the jurisdiction, it allows a considerable latitude of interpretation to the Court itself. In some cases, as in *Missouri v. Holland*,[1053] the Court has manifested a tendency toward a liberal construction of its original jurisdiction, but the more usual view is that "our original jurisdiction should be invoked sparingly."[1054] Original jurisdiction "is limited and manifestly to be sparingly exercised, and should not be expanded by construction."[1055] Exercise of its original jurisdiction is not obligatory on the Court but discretionary, to be determined on a case-by-case basis on grounds of practical necessity.[1056] It is to be honored "only in appropriate cases. And the

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[1050] Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[1051] Id., 297. See also the dictum in Cohens v. Virginia, 6 Wheat. (19 U.S.) 264, 398–399 (1821); Chisholm v. Georgia, 2 Dall. (2 U.S.) 419, 431–432 (1793).

[1052] Marbury v. Madison, 1 Cr. (5 U.S.) 137 (1803). The Chief Justice declared that "a negative or exclusive sense" had to be given to the affirmative enunciation of the cases to which original jurisdiction extends. Id., 174. This exclusive interpretation has been since followed. Ex parte Bollman, 4 Cr. (8 U.S.) 75 (1807); New Jersey v. New York, 5 Pet. (30 U.S.) 284 (1831); Ex parte Barry, 2 How. (43 U.S.) 65 (1844); Ex parte Vallandigham, 1 Wall. (68 U.S.) 243, 252 (1864); Ex parte Yerger, 8 Wall. (75 U.S.) 85, 98 (1869). In the curious case of Ex parte Levitt, 302 U.S. 633 (1937), the Court was asked to unseat Justice Black on the ground that his appointment violated Article I, § 6, cl.2. Although it rejected petitioner's application, the Court did not point out that it was being asked to assume original jurisdiction in violation of *Marbury v. Madison*.

[1053] 252 U.S. 416 (1920). See also South Carolina v. Katzenbach, 383 U.S. 301 (1966), and Oregon v. Mitchell, 400 U.S. 112 (1970).

[1054] Utah v. United States, 394 U.S. 89, 95 (1968).

[1055] California v. Southern Pacific Co., 157 U.S. 229, 261 (1895). Indeed, the use of the word "sparingly" in this context is all but ubiquitous. E.g., Wyoming v. Oklahoma, 112 S.Ct. 789, 798–800 (1992); Maryland v. Louisiana, 451 U.S. 725, 739 (1981); United States v. Nevada, 412 U.S. 534, 538 (1973).

[1056] Texas v. New Mexico, 462 U.S. 554, 570 (1983).

question of what is appropriate concerns of course the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."[1057] But where claims are of sufficient "seriousness and dignity," in which resolution by the judiciary is of substantial concern, the Court will hear them.[1058]

POWER OF CONGRESS TO CONTROL THE FEDERAL COURTS

The Theory of Plenary Congressional Control

Unlike its original jurisdiction, the appellate jurisdiction of the Supreme Court is subject to "exceptions and regulations" prescribed by Congress, and the jurisdiction of the inferior federal courts is subject to congressional prescription. Additionally, Congress has power to regulate modes and practices of proceeding on the part of the inferior federal courts. Whether there are limitations to the exercise of these congressional powers, and what the limitations may be, are matters that have vexed scholarly and judicial interpretation over the years, inasmuch as congressional displeasure with judicial decisions has sometimes led to successful efforts to "curb" the courts and more frequently to proposed but unsuccessful curbs.[1059] Supreme Court holdings establish clearly the

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[1057] Illinois v. City of Milwaukee, 406 U.S. 91, 93–94 (1972). In this case, and in Washington v. General Motors Corp., 406 U.S. 109 (1972), and Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), the Court declined to permit adjudication of environmental pollution cases manifestly within its original jurisdiction because the nature of the cases required the resolution of complex, novel, and technical factual questions not suitable for resolution at the Court's level as a matter of initial decision but which could be brought in the lower federal courts. Not all such cases, however, were barred. Vermont v. New York 406 U.S. 186 (1972) (granting leave to file complaint). In other instances, notably involving "political questions," cf. Massachusetts v. Mellon, 262 U.S. 447 (1923), the Court has simply refused permission for parties to file bills of complaint without hearing them on the issue or producing an opinion. E.g., Massachusetts v. Laird, 400 U.S. 886 (1970) (constitutionality of United States action in Indochina); Delaware v. New York, 385 U.S. 895 (1966) (constitutionality of electoral college under one-man, one-vote rule).

[1058] Wyoming v. Oklahoma, 112 S.Ct. 789, 798–799 (1982). The principles are the same whether the Court's jurisdiction is exclusive or concurrent. Texas v. New Mexico, 462 U.S. 554 (1983); California v. West Virginia, 454 U.S. 1027 (1981); Arizona v. New Mexico, 425 U.S. 794 (1976).

[1059] A classic but now dated study is Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1, 161 (1913). The most comprehensive consideration of the constitutional issue is Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953), reprinted in HART & WECHSLER, op. cit., n. 260, 393.

breadth of congressional power, and numerous dicta assert an even broader power, but that Congress may through the exercise of its powers vitiate and overturn constitutional decisions and restrain the exercise of constitutional rights is an assertion often made but not sustained by any decision of the Court.

Appellate Jurisdiction.—In *Wiscart v. D'Auchy*,[1060] the issue was whether the statutory authorization for the Supreme Court to review on writ of error circuit court decisions in "civil actions" gave it power to review admiralty cases.[1061] A majority of the Court decided that admiralty cases were "civil actions" and thus reviewable; in the course of decision, it was said that "[i]f Congress had provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."[1062] Much the same thought was soon to be expressed by Chief Justice Marshall, although he seems to have felt that in the absence of congressional authorization, the Court's appellate jurisdiction would have been measured by the constitutional grant. "Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court, as ordained by the constitution; and in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished.

"The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject."[1063] Later Justices viewed the matter differently than had Marshall. "By the constitution of the United States," it was said in one opinion, "the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress."[1064] In order for a case to come within its appellate jurisdiction, the Court has said, "two things must concur: the Con-

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[1060] 3 Dall. (3 U.S) 321 (1796).

[1061] Judiciary Act of 1789, § 22, 1 Stat. 84.

[1062] Wiscart v. D'Auchy, 3 Dall. (3 U.S.) 321, 327 (1796). The dissent thought that admiralty cases were not "civil actions" and thus that there was no appellate review. Id., 326–327. See also Clarke v. Bazadone, 1 Cr. (5 U.S.) 212 (1803); Turner v. Bank of North America, 4 Dall. (4 U.S.) 8 (1799).

[1063] Durousseau v. United States, 6 Cr. (10 U.S.) 307, 313–314 (1810). "Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." Ex parte Bollman, 4 Cr. (4 U.S.) 75, 93 (1807) (Chief Justice Marshall). Marshall had earlier expressed his *Durousseau* thoughts in United States v. More, 3 Cr. (7 U.S.) 159 (1805).

[1064] Barry v. Mercein, 5 How. (46 U.S.) 103, 119 (1847) (case held nonreviewable because minimum jurisdictional amount not alleged).

stitution must give the capacity to take it, and an act of Congress must supply the requisite authority." Moreover, "it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation." [1065]

This congressional power, conferred by the language of Article III, § 2, cl. 2, which provides that all jurisdiction not original is to be appellate, "with such Exceptions, and under such Regulations as the Congress shall make," has been utilized to forestall a decision which the congressional majority assumed would be adverse to its course of action. In *Ex parte McCardle*, [1066] the Court accepted review on *certiorari* of a denial of a petition for a writ of *habeas corpus* by the circuit court; the petition was by a civilian convicted by a military commission of acts obstructing Reconstruction. Anticipating that the Court might void, or at least undermine, congressional reconstruction of the Confederate States, Congress enacted over the President's veto a provision repealing the act which authorized the appeal McCardle had taken. [1067] Although the Court had already heard argument on the merits, it then dismissed for want of jurisdiction. [1068] "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

"What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the

[1065] Daniels v. Railroad Co., 3 Wall. (70 U.S.) 250, 254 (1865) (case held nonreviewable because certificate of division in circuit did not set forth questions in dispute as provided by statute.)

[1066] 6 Wall. (73 U.S.) 318 (1868). That Congress' apprehensions might have had a basis in fact, see C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. VI, PT. I—RECONSTRUCTION AND REUNION 1864–88 (New York: 1971), 493–495. *McCardle* is fully reviewed in id., 423–514.

[1067] By the Act of February 5, 1867, § 1, 14 Stat. 386, Congress had authorized appeals to the Supreme Court from circuit court decisions denying *habeas corpus*. Previous to this statute, the Court's jurisdiction to review *habeas corpus* decisions, based in § 14 of the Judiciary Act of 1789, 1 Stat. 81, was somewhat fuzzily conceived. Compare United States v. Hamilton, 3 Dall. (3 U.S.) 17 (1795), and Ex parte Burford, 3 Cr. (7 U.S.) 448 (1806), with Ex parte Bollman, 4 Cr. (8 U.S.) 75 (1807). The repealing statute was the Act of March 27, 1868, 15 Stat. 44. The repealed act was reenacted March 3, 1885, 23 Stat. 437.

[1068] Ex parte McCardle, 7 Wall. (74 U.S.) 506 (1869). In the course of the opinion; Chief Justice Chase speculated about the Court's power in the absence of any legislation in tones reminiscent of Marshall's comments. Id., 513.

cause."[1069] Although *McCardle* grew out of the stresses of Reconstruction, the principle there applied has been similarly affirmed and applied in later cases.[1070]

Jurisdiction of the Inferior Federal Courts.—The Framers, as we have seen,[1071] divided with regard to the necessity of courts inferior to the Supreme Court, simply authorized Congress to create such courts, in which, then, judicial power "shall be vested" and to which nine classes of cases and controversies "shall extend."[1072] While Justice Story deemed it imperative of Congress to create inferior federal courts and, when they had been created, to vest them with all the jurisdiction they were capable of receiving,[1073] the First Congress acted upon a wholly different theory. Inferior courts were created, but jurisdiction generally over cases involving the Constitution, laws, and treaties of the United States was not given them, diversity jurisdiction was limited by a minimal jurisdictional

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[1069] Id., 514.

[1070] Thus, see Justice Frankfurter's remarks in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1948) (dissenting): "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*." In The Francis Wright, 105 U.S. 381, 385–386 (1882), upholding Congress' power to confine Supreme Court review in admiralty cases to questions of law, the Court said: "[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to reexamination and review, while others are not." See also Luckenbuch S. S. Co. v. United States, 272 U.S. 533, 537 (1926); American Construction Co. v. Jacksonville, T. & K.W. RY., 148 U.S. 372, 378 (1893); United States v. Bitty, 208 U.S. 393 (1908); United States v. Young, 94 U.S. 258 (1876). Numerous restrictions on the exercise of appellate jurisdiction have been upheld. E.g., Congress for a hundred years did not provide for a right of appeal to the Supreme Court in criminal cases, except upon a certification of division by the circuit court: at first appeal was provided in capital cases and then in others. F. FRANKFURTER & J. LANDIS, op. cit., n. 12, 79, 109–120. Other limitations noted heretofore include minimum jurisdictional amounts, restrictions of review to questions of law and to questions certified from the circuits, and the scope of review of state court decisions of federal constitutional questions. See Walker v. Taylor, 5 How. (46 U.S.) 64 (1847). Though *McCardle* is the only case in which Congress successfully forestalled an expected decision by shutting off jurisdiction, other cases have been cut off while pending on appeal, either inadvertently, Insurance Co. v. Ritchie, 5 Wall. (72 U.S.) 541 (1866), or intentionally, Railroad Co. v. Grant, 98 U.S. 398 (1878), by raising the requirements for jurisdiction without a reservation for pending cases. See also Bruner v. United States, 343 U.S. 112 (1952); District of Columbia v. Eslin, 183 U.S. 62 (1901).

[1071] *Supra*, pp. 597–598, 599–600.

[1072] Article III, § 1, 2.

[1073] Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304, 374 (1816). For an effort to reframe Justice Story's position in modern analytical terms, see the writings of Professors Amar and Clinton, *supra*, n. 134; *infra*, n. 1098.

amount requirement and by a prohibition on creation of diversity through assignments, equity jurisdiction was limited to those cases where a "plain, adequate, and complete remedy" could not be had at law.[1074] This care for detail in conferring jurisdiction upon the inferior federal courts bespoke a conviction by Members of Congress that it was within their power to confer or to withhold jurisdiction at their discretion. The cases have generally sustained this view.

Thus, in *Turner v. Bank of North America*,[1075] the issue was the jurisdiction of the federal courts in a suit to recover on a promissory note between two citizens of the same State but in which the note had been assigned to a citizen of a second State so that suit could be brought in federal court under its diversity jurisdiction, a course of action prohibited by § 11 of the Judiciary Act of 1789.[1076] Counsel for the bank argued that the grant of judicial power by the Constitution was a direct grant of jurisdiction, provoking from Chief Justice Ellsworth a considered doubt[1077] and from Justice Chase a firm rejection. "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution: but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant."[1078] Applying § 11, the Court held that the circuit court had lacked jurisdiction.

Chief Justice Marshall himself soon made similar assertions,[1079] and the early decisions of the Court continued to be

[1074] Judiciary Act of 1789, 1 Stat. 73. See Warren, *New Light on the History of the Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923). A modern study of the first Judiciary Act that demonstrates the congressional belief in discretion to structure jurisdiction is Casto, *The First Congress's Understanding of Its Authority over the Federal Courts' Jurisdiction*, 26 B. C. L. Rev. 1101 (1985).

[1075] 4 Dall. (4 U.S.) 8 (1799).

[1076] "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 79.

[1077] Turner v. Bank of North America, 4 Dall. (4 U.S.) 8, 10 (1799).

[1078] Ibid.

[1079] In Ex parte Bollman, 4 Cr. (8 U.S.) 75, 93 (1807), Marshall observed that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

sprinkled with assumptions that the power of Congress to create inferior federal courts necessarily implied "the power to limit jurisdiction of those Courts to particular objects." [1080] In *Cary v. Curtis*, [1081] a statute making final the decision of the Secretary of the Treasury in certain tax disputes was challenged as an unconstitutional deprivation of the judicial power of the courts. The Court decided otherwise. "[T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." [1082] Five years later, the validity of the assignee clause of the Judiciary Act of 1789 [1083] was placed in issue in *Sheldon v. Sill*, [1084] in which diversity of citizenship had been created by assignment of a negotiable instrument. It was argued that inasmuch as the right of a citizen of any State to sue citizens of another flowed directly from Article III, Congress could not restrict that right. Unanimously, the Court rejected these contentions and held that because the Constitution did not create inferior federal courts but rather authorized Congress to create them, Congress was also empowered to define their jurisdiction and to withhold jurisdiction of any of the enumerated cases and controversies in Article III. The case and the principle has been cited and reaffirmed numerous times, [1085] and has been quite recently applied. [1086]

[1080] United States v. Hudson & Goodwin, 7 Cr. (11 U.S.) 32, 33 (1812). Justice Johnson continued: "All other Courts [beside the Supreme Court] created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer." See also Rhode Island v. Massachusetts, 12 Pet. (37 U.S.) 657, 721–722 (1838).

[1081] 3 How. (44 U.S.) 236 (1845).

[1082] Id., 244–245. Justices McLean and Story dissented, arguing that the right to construe the law in all matters of controversy is of the essence of judicial power, Id., 264.

[1083] *Supra*, n. 1076.

[1084] 8 How. (49 U.S.) 441 (1850).

[1085] E.g., Kline v. Burke Construction Co., 260 U.S. 226, 233–234 (1922); Ladew v. Tennessee Copper Co., 218 U.S. 357, 358 (1910); Venner v. Great Northern R. Co., 209 U.S. 24, 35 (1908); Kentucky v. Powers, 201 U.S. 1, 24 (1906); Stevenson v. Fain, 195 U.S. 165, 167 (1904); Plaquemines Fruit Co. v. Henderson, 170 U.S. 511, 513–521 (1898); The Mayor v. Cooper, 6 Wall, (73 U.S.) 247, 251–252 (1868).

[1086] By the Voting Rights Act of 1965, Congress required covered States that wished to be relieved of coverage to bring actions to this effect in the District Court

Congressional Control Over Writs and Processes.—The Judiciary Act of 1789 contained numerous provisions relating to the times and places for holding court, even of the Supreme Court, to times of adjournment, appointment of officers, issuance of writs, citations for contempt, and many other matters which it might be supposed courts had some authority of their own to regulate.[1087] The power to enjoin governmental and private action has frequently been curbed by Congress, especially as the action has involved the power of taxation at either the federal or state level.[1088] Though the courts have variously interpreted these restrictions,[1089] they have not denied the power to impose them.

Reacting to judicial abuse of injunctions in labor disputes,[1090] Congress in 1932 enacted the Norris-La Guardia Act which forbade the issuance of injunctions in labor disputes except through compliance with a lengthy hearing and fact-finding process which required the district judge to determine that only through the injunctive process could irremediable harm through illegal conduct be prevented.[1091] The Court seemingly experienced no difficulty upholding the Act,[1092] and it has liberally applied it through the years.[1093]

Congress' power to confer, withhold, and restrict jurisdiction is clearly revealed in the Emergency Price Control Act of 1942[1094] and in the cases arising from it. Fearful that the price control pro-

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of the District of Columbia. In South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966), Chief Justice Warren for the Court said: "Despite South Carolina's argument to the contrary, Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals." See also Palmore v. United States, 411 U.S. 389, 400–402 (1973); Swain v. Pressley, 430 U.S. 372 (1977). And see Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973), *aff'd.*, 523 F.2d 75 (9th Cir.), CERT. DEN., 424 U.S. 948 (1976).

[1087] 1 Stat. 73. For a comprehensive discussion with itemization, see Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010 (1924).

[1088] The Act of March 2, 1867, 10, 14 Stat. 475, as amended, now 26 U.S.C. § 7421 (federal taxes); Act of August 21, 1937, 50 Stat. 738, 28 U.S.C. § 1341 (state taxes). See also Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. § 1342 (state rate-making).

[1089] Compare Snyder v. Marks, 109 U.S. 189 (1883), with Dodge v. Brady, 240 U.S. 122 (1916); with Allen v. Regents, 304 U.S. 439 (1938).

[1090] F. FRANKFURTER & I. GREENE, THE LABOR INJUNCTION (New York: 1930).

[1091] 47 Stat. 70 (1932), 29 U.S.C. §§ 101–115.

[1092] In Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938), the Court simply declared: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."

[1093] E.g., New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938); Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co., 353 U.S. 30 (1957); Boys Market v. Retail Clerks Union, 398 U.S. 235 (1970).

[1094] 56 Stat. 23 (1942).

a theory, variously expressed, that the Supreme Court has "essential constitutional functions" of judicial review that Congress may not impair through jurisdictional limitations,[1100] which lack textual and subsequent judicial support, one can see nonetheless the possibilities of restrictions on congressional power flowing from such basic constitutional underpinnings as express prohibitions, separation of powers, and the nature of the judicial function.[1101] Whether because of the plethora of scholarly writing contesting the existence of unlimited congressional power or because of another reason, the Court of late has taken to noting constitutional reservations about legislative denials of jurisdiction for judicial review of constitutional issues and construing statutes so as not to deny jurisdiction.[1102]

Ex parte McCardle[1103] marks the furtherest advance of congressional imposition of its will on the federal courts, and it is significant because the curb related to the availability of the writ of *habeas corpus*, which is marked out with special recognition by the Constitution.[1104]

But how far did *McCardle* actually reach? In concluding its opinion, the Court carefully observed: "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is de-

U. Pa. L. Rev. 741 (1984); Clinton, *Early Implementation and Departures from the Constitutional Plan*, 86 Colum. L. Rev. 1515 (1986). Though perhaps persuasive as an original interpretation, both theories confront a large number of holdings and dicta as well as the understandings of the early Congresses revealed in their actions. See Casto, *supra*, n. 1074.

[1099] Justice Brewer in his opinion for the Court in United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 339 (1906), came close to asserting an independent, inherent power of the federal courts, at least in equity. See also Paine Lumber Co. v. Neal, 244 U.S. 459, 473, 475–476 (1917) (Justice Pitney dissenting). The acceptance by the Court of the limitations of the Norris-LaGuardia Act, among other decisions, contradicts these assertions.

[1100] The theory was apparently first developed in Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. rev. 157 (1960). See also Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 Vill. L. Rev. 929 (1981–82). The theory was endorsed by Attorney General William French Smith as the view of the Department of Justice. 128 CONG. REC. 9093–9097 (1982) (Letter to Hon. Strom Thurmond).

[1101] An extraordinary amount of writing has been addressed to the issue, only a fraction of which is touched on here. See HART & WECHSLER, op. cit., n. 250, 362–424.

[1102] Johnson v. Robison, 415 U.S. 361, 366–367 (1974); Weinberger v. Salfi, 422 U.S. 749, 762 (1975); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n. 12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988). In the last cited case, Justice Scalia attacked the reservation and argued for nearly complete congressional discretion. Id., 611–615 (concurring).

[1103] 7 Wall (74 U.S.) 506 (1869). For the definitive analysis of the case, see Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229 (1973).

[1104] Article I, § 9, cl. 2.

gram might be nullified by injunctions, Congress provided for a special court in which persons could challenge the validity of price regulations issued by the Government with appeal from the Emergency Court of Appeals to the Supreme Court. The basic consitutionality of the Act was sustained in *Lockerty v. Phillips*.[1095] In *Yakus v. United States*,[1096] the Court upheld the provision of the Act which conferred exclusive jurisdiction on the special court to hear challenges to any order or regulation and foreclosed a plea of invalidity of any such regulation or order as a defense to a criminal proceeding under the Act in the regular district courts. Although Justice Rutledge protested in dissent that this provision conferred jurisdiction on district courts from which essential elements of the judicial power had been abstracted,[1097] Chief Justice Stone for the Court declared that the provision presented no novel constitutional issue.

The Theory Reconsidered

Despite the breadth of the language of many of the previously cited cases, the actual holdings constitute something less than an affirmance of plenary congressional power to do anything desired by manipulation of jurisdiction and indeed the cases reflect certain limitations. Setting to one side various formulations, such as mandatory vesting of jurisdiction,[1098] inherent judicial power,[1099] and

Contra

[1095] 319 U.S. 182 (1943).

[1096] 321 U.S. 414 (1944).

[1097] Id., 468. In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), purportedly in reliance on *Yakus* and other cases, the Court held that a collateral challenge must be permitted to the use of a deportation proceeding as an element of a criminal offense where effective judicial review of the deportation order had been denied. A statutory scheme similar to that in *Yakus* was before the Court in Adams Wrecking Co. v. United States, 434 U.S. 275 (1978), but statutory construction enabled the Court to pass by constitutional issues that were not perceived to be insignificant. See esp. id., 289 (Justice Powell concurring). See also Harrison v. PPG Industries, 446 U.S. 578 (1980), and id., 594 (Justice Powell concurring).

[1098] This was Justice Story's theory propounded in Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304, 329–336 (1816). Nevertheless, Story apparently did not believe that the constitutional bestowal of jurisdiction was self-executing and accepted the necessity of statutory conferral. White v. Fenner, 29 Fed. Cas. 1015 (No. 17,547) (C.C.D.R.I. 1818) (Justice Story). In the present day, it has been argued that the presence in the jurisdictional-grant provisions of Article III of the word "all" before the subject-matter grants - federal question, admiralty, public ambassadors - mandates federal court review at some level of these cases, whereas congressional discretion exists with respect to party-defined jurisdiction - such as diversity. Amar, *A Neo-Federalist View of Article III: Separating the Two-Tiers of Federal Jurisdiction*, 65 B. U. L. Rev. 205 (1985); Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499 (1990). Rebuttal articles include Meltzer, *The History and Structure of Article III*, id., 1569; Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, id., 1633; and a response by Amar, id., 1651. An approach similar to Professor Amar's is Clinton, *A Mandatory View of Federal Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132

nied. But this is an error. The act of 1868 does not exempt from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised."[1105] A year later, in *Ex parte Yerger*,[1106] the Court held that it did have authority under the Judiciary Act of 1789 to review on *certiorari* a denial by a circuit court of a petition for writ of *habeas corpus* on behalf of one held by the military in the South. It thus remains unclear whether the Court would have followed its language suggesting plenary congressional control if the effect had been to deny absolutely an appeal from a denial of a writ of *habeas corpus*.[1107]

Another Reconstruction Congress attempt to curb the judiciary failed in *United States v. Klein*,[1108] in which a statute, couched in jurisdictional terms, which attempted to set aside both the effect of a presidential pardon and the judicial effectuation of such a pardon was voided.[1109] The statute declared that no pardon was to be admissible in evidence in support of any claim against the United States in the Court of Claims for the return of confiscated property of Confederates nor, if already put in evidence in a pending case, should it be considered on behalf of the claimant by the Court of

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[1105] Ex parte McCardle, 7 Wall. (74 U.S.) 506, 515 (1869).

[1106] 8 Wall. (75 U.S.) 85 (1869). *Yerger* is fully reviewed in C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. VI, PT. I—RECONSTRUCTION AND REUNION, 1864–88 (New York: 1971), 558–618.

[1107] Cf. Eisentrager v. Forrestal, 174 F. 2d 961, 966 (D.C.Cir. 1949), *rev'd. on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950). Justice Douglas, with whom Justice Black joined, said in Glidden Co. v. Zdanok, 370 U.S. 530, 605 n. 11 (1962) (dissenting opinion): "There is a serious question whether the *McCardle* case could command a majority view today." Justice Harlan, however, cited *McCardle* with apparent approval of its holding, id., 567–568, while noting that Congress' "authority is not, of course, unlimited." Id., 568. *McCardle* was cited approvingly in Bruner v. United States, 343 U.S. 112, 117 n. 8 (1952), as illustrating the rule "that when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law. . . ."

[1108] 13 Wall. (80 U.S.) 128 (1872). See C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. VI, PT. I—RECONSTRUCTION AND REUNION 1864–88 (New York: 1971), 558–618. The seminal discussion of *Klein* may be found in Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 Wisc. L. Rev. 1189. While he granted that *Klein* is limited insofar as its bearing on jurisdictional limitation *per se* is concerned, he cited an ambiguous holding in Armstron v. United States, 13 Wall. (80 U.S.) 154 (1872), as in fact a judicial invalidation of a jurisdictional limitation. Young, id., 1222–1223 n. 179.

[1109] Congress by the Act of July 17, 1862, §§5, 13, authorized the confiscation of property of those persons in rebellion and authorized the President to issue pardons on such conditions as he deemed expedient, the latter provision being unnecessary in light of Article II, §2, cl. 1. The President's pardons all provided for restoration of property, except slaves, and in United States v. Padelford, 9 Wall. (76 U.S.) 531 (1870), the Court held the claimant entitled to the return of his property on the basis of his pardon. Congress thereupon enacted the legislation in question. 16 Stat. 235 (1870).

Claims or by the Supreme Court on appeal. Proof of loyalty was required to be made according to provisions of certain congressional enactments and when judgment had already been rendered on other proof of loyalty the Supreme Court on appeal should have no further jurisdiction and should dismiss for want of jurisdiction. Moreover, it was provided that the recitation in any pardon which had been received that the claimant had taken part in the rebellion was to be taken as conclusive evidence that the claimant had been disloyal and was not entitled to regain his property.

The Court began by reaffirming that Congress controlled the existence of the inferior federal courts and the jurisdiction vested in them and the appellate jurisdiction of the Supreme Court. "But the language of this provision shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. . . . It is evident . . . that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The Court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."[1110] The statute was void for two reasons: it "infring[ed] the constitutional power of the Executive,"[1111] and it "prescrib[ed] a rule for the decision of a cause in a particular way."[1112] *Klein* thus stands for the proposition that Congress may not violate the principle of separation of powers[1113] and that it may not accomplish certain forbidden substantive acts by casting them in jurisdictional terms.[1114]

Other restraints on congressional power over the federal courts may be gleaned from the opinion in the much-disputed *Crowell v.*

[1110] United States v. Klein, 13 Wall. (80 U.S.) 128, 145–146 (1872).

[1111] Id., 147.

[1112] Id., 146.

[1113] Id., 147. For an extensive discussion of *Klein*, see United States v. Sioux Nation, 448 U.S. 371, 391–405 (1980), and id., 424, 427–434 (Justice Rehnquist dissenting). See also Pope v. United States, 323 U.S. 1, 8–9 (1944); Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962) (Justice Harlan). In Robertson v. Seattle Audubon Society, 112 S.Ct. 1407 (1992), the 9th Circuit had held unconstitutional under *Klein* a statute that it construed to deny the federal courts power to construe the law, but the Supreme Court held that Congress had *changed* the law that the courts were to apply. The Court declined to consider whether *Klein* was properly to be read as voiding a law "because it directed decisions in pending cases without amending any law." Id., 1414.

[1114] United States v. Klein, 13 Wall. (80 U.S.) 128, 147 (1872).

Benson.[1115] In an 1856 case, the Court distinguished between matters of private right which from their nature were the subject of a suit at the common law, equity, or admiralty and which cannot be withdrawn from judicial cognizance and those matters of public right which, though susceptible of judicial determination, did not require it and which might or might not be brought within judicial cognizance.[1116] What this might mean was elaborated in *Crowell v. Benson*,[1117] involving the finality to be accorded administrative findings of jurisdictional facts in compensation cases. In holding that an employer was entitled to a trial *de novo* of the constitutional jurisdictional facts of the matter of the employer-employee relationship and of the occurrence of the injury in interstate commerce, Chief Justice Hughes fused the due process clause of the Fifth Amendment and Article III but emphasized that the issue ultimately was "rather a question of the appropriate maintenance of the Federal judicial power" and "whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." The answer was stated broadly. "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of law and fact, necessary to the performance of that supreme function. . . . We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."[1118]

It is not at all clear that, in this respect, *Crowell v. Benson* remains good law. It has never been overruled, and it has been cited

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[1115] 285 U.S. 22 (1932). See also Ng Fung Ho v. White, 259 U.S. 276 (1922); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); St. Joseph Stock Yard Co. v. United States, 298 U.S. 38 (1936).

[1116] Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. (59 U.S.) 272 (1856).

[1117] 285 U.S. 22 (1932). Justices Brandeis, Stone, and Roberts dissented.

[1118] Id., 56, 60, 64.

by several Justices approvingly,[1119] but the Court has never applied the principle to control another case.[1120]

Express Constitutional Restrictions on Congress.—"[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas;" Justice Black said in a different context, "these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution."[1121] The Supreme Court has had no occasion to deal with this principle in the context of Congress' power over its jurisdiction and the jurisdiction of the inferior federal courts, but the passage of the Portal-to-Portal Act[1122] presented the lower courts such an opportunity. The Act extinguished back-pay claims growing out of several Supreme Court interpretations of the Fair Labor Standards Act; it also provided that no court should have jurisdiction to enforce any claim arising from these decisions. While some district courts sustained the Act on the basis of the withdrawal of jurisdiction, this action was disapproved by the Courts of Appeals which indicated that the withdrawal of jurisdiction would be ineffective if the extinguishment of the claims as a substantive matter was invalid. "We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due

[1119] See Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76–87 (1982) (plurality opinion), and id., 100–103, 109–111 (Justice White dissenting) (discussing the due process/Article III basis of *Crowell*). Both the plurality and the dissent agreed that later cases had "undermined" the constitutional/jurisdictional fact analysis. Id., 82, n. 34; 110 n. 12. For other discussions, see Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (Justice Brennan announcing judgment of the Court, joined by Justice Goldberg); Pickering v. Board of Education, 391 U.S. 563, 578–579 (1968); Agosto v. INS, 436 U.S. 748, 753 (1978); United States v. Raddatz, 447 U.S. 667, 682–684 (1980), and id., 707–712 (Justice Marshall dissenting).

[1120] Compare Permian Basin Area Rate Cases, 390 U.S. 747, 767, 792 (1968); Cordillo v. Liberty Mutual Ins. Co., 330 U.S. 469 (1947); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940). Justice Frankfurter was extremely critical of *Crowell*. Estep v. United States, 327 U.S. 114, 142 (1946); City of Yonkers v. United States, 320 U.S. 685 (1944).

[1121] Williams v. Rhodes, 393 U.S. 23, 29 (1968) (opinion of the Court.) The elder Justice Harlan perhaps had the same thought in mind when he said that, with regard to Congress' power over jurisdiction, "what such exceptions and regulations should be it is for Congress, in its wisdom to establish, having of course due regard to all the Constitution." United States v. Bitty, 208 U.S. 393, 399–400 (1908).

[1122] 52 Stat. 1060, 29 U.S.C. § 201.

process of law or to take private property without just compensation."[1123]

Conclusion.—There thus remains a measure of doubt that Congress' power over the federal courts is as plenary as some of the Court's language suggests it is. Congress has a vast amount of discretion in conferring and withdrawing and structuring the original and appellate jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court; so much is clear from the practice since 1789 and the holdings of many Court decisions. That its power extends to accomplishing by means of its control over jurisdiction actions which it could not do directly by substantive enactment is by no means clear from the text of the Constitution nor from the cases.

FEDERAL-STATE COURT RELATIONS

Problems Raised by Concurrency

The Constitution established a system of government in which total power, sovereignty, was not unequivocally lodged in one level of government. In Chief Justice Marshall's words, "our complex system [presents] the rare and difficult scheme of one general government, whose actions extend over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union. . . ." Naturally, in such a system, "contests respecting power must arise."[1124] Contests respecting power may frequently arise in a federal system with dual structures of courts exercising concurrent jurisdiction in a number of classes of cases. Too, the possibilities of frictions grow out of the facts that one set of courts may interfere directly or indirectly with the other through injunctive and declaratory processes, through the use of *habeas corpus* and removal to release persons from the custody of the other set, and through the refusal by state courts to be bound by decisions of the United States Supreme Court. The relations between federal and state courts are governed in part by constitutional law, with respect, say, to state court interference with federal courts and

[1123] Battaglia v. General Motors Corp., 169 F. 2d 254, 257 (2d Cir.), *cert. den.* 335 U.S. 887 (1948) (Judge Chase). See also Seese v. Bethlehem Steel Co., 168 F. 2d 58, 65 (4th Cir. 1948) (Chief Judge Parker). For recent dicta, see Johnson v. Robison, 415 U.S. 361, 366–367 (1974); Weinberger v. Salfi, 422 U.S. 749, 761–762 (1975); Territory of Guam v. Olsen, 431 U.S. 195, 201–202, 204 (1977); Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n. 12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988); but see id., 611–615 (Justice Scalia dissenting). Note the relevance of United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[1124] Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1,204–205 (1824).

MAJOR LEGISLATION USING ARTICLE III, SEC. 2 POWER IN 107TH CONGRESS (SPECIFIC LANGUAGE EXAMPLES):

- 2002 SUPPLEMENTAL APPROPRIATIONS ACT FOR FURTHER RECOVERY FROM AND RESPONSE TO TERRORIST ATTACKS ON THE UNITED STATES (PL 107-206)

  Daschle Language protecting Black Hills Forest from NEPA and other environmental laws:

  "Due to the extraordinary circumstances present here, actions authorized by this section shall proceed immediately… Any actions authorized by this section **shall not be subject to judicial review by any court of the United States."**

- INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2003 (PL 107-306)

  Sec 502; '(B)

  "**Judicial review shall not be available** in the manner provided for under subparagraph (A) as follows:"

- TERRORISM RISK INSURANCE ACT OF 2002 (PL 107-297)

  Sec 102; Sub Sec. C

  "Any certification of, or determination not to certify, an act as an act of terrorism under this paragraph shall be final, and shall **not be subject to judicial review."**

FURTHER EXAMPLES OF 107TH CONGRESS LEGISLATION (PASSED) USING ARTICLE III, SEC. 2 POWERS:

- SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT (PL 107-118)
- USA PATRIOT ACT (PL 107-056)
- 21ST CENTURY DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT (PL 107-273)
- ANDEAN TRADE PROMOTION AND DRUG ERADICATION ACT (PL 107-210)
- AMERICAN SERVICEMEMBERS' PROTECTION ACT OF 2002 (Pl 107-206)
- PUBLIC HEALTH SECURITY AND BIOTERRORISM RESPONSE ACT OF 2001 (PL 107-188)
- AVIATION SECURITY ACT (PL 107-071)
- TO EXPEDITE THE CONSTRUCTION OF THE WORLD WAR II MEMORIAL IN THE DISTRICT OF COLUMBIA (PL 107-011)
- SMALL BUSINESS INVESTMENT COMPANY AMENDMENTS ACT OF 2001 (PL 107-100)

Pages 20-21 of Booklet by David Barton showing polling data supporting voluntary prayer in Public Schools

> When the Congress first met, Mr. Cushing made a motion that it should be opened with prayer. It was opposed by Mr. Jay of New York and Mr. Rutledge of South Carolina because we were so divided in religious sentiments, some Episcopalians, some Quakers, some Anabaptists, some Presbyterians, and some Congregationalists, that we could not join in the same act of worship. [78]

In theory, it appeared that public prayer would be divisive; yet, as confirmed by the remainder of John Adams' letter, the theory was disproved when the practice became reality:

> Mr. Samuel Adams arose and said he was no bigot, and could hear a prayer from a gentleman of piety and virtue. . . . Accordingly, next morning. . . . Mr. Duché . . . struck out into an extemporary prayer, which filled the bosom of every man present. I must confess I never heard a better prayer, or one so well pronounced. . . . It has had an excellent effect upon everybody here. [79]

Daniel Webster, in arguments before the U. S. Supreme Court, described that same event and reminded the Court of the unifying power of prayer. [80] This issue was also addressed in *Lee* v. *Weisman* (1992) by Justices Scalia, Rehnquist, White, and Thomas, who declared:

> The founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration — no, an affection — for one another than voluntarily joining in prayer together, to God whom they all worship and seek. . . . The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that can not be replicated. To deprive our society of that important unifying mechanism . . . is as senseless in policy as it is unsupported in law. [81]

Significantly, the support for prayer has been growing over recent years as the public has become even more unified on this issue. In fact, as borne out by numerous public polls, prayer is a unifying, not a divisive, force.

For example, in 1985, 69 percent of Americans supported school prayer; [82] by 1991, that number had increased to 78 percent. [83] Similarly, in 1986, 68 percent of Americans supported a constitutional amendment to reinstate school prayer; [84] by 1994, that number had risen to 73 percent, [85] and by 2001 (*before* the terrorist attacks) it had climbed to 78 percent. [86]

Furthermore, the public is strongly unified on the subject of spoken — not silent — prayer. In 1995, the support *for spoken* prayers by students of all faiths was at 73 percent and by 2001 (*before* the terrorist attacks) it was at 77 percent. [87] Additionally, 80 percent believe that students should be able to recite a spoken prayer at graduations, [88] and support for other types of visible religious expressions at schools remains equally high. [89]

Despite such high numbers, these activities continue to be impermissible — and unreasonably so, for on the issue of school prayer, there are only two possibilities: either there will be voluntary prayer in school or there will not; there is no middle ground; the supporters of only one position will prevail. Which position should prevail? The theoretical answer is obvious, but the actual answer is quite different.

In fact, after a review of the Supreme Court's decisions on prayer, the federal judge who originally presided over the *Lee* v. *Weisman* decision that restricted prayer at graduation ceremonies reluctantly concluded:

> [T]he Constitution, ***as the Supreme Court views it,*** does not permit it [prayer]. . . . Unfortunately, in this instance there is no satisfactory middle ground. . . . Those who are anti-prayer have thus been deemed the victors. [90] (emphasis added)

This is a clear case of the minority prevailing over the wishes of the majority, and until recent years, courts had long rejected the concept of dissident individuals or groups setting aside the rights of the majority. (See, for example, *Updegraph* v. *Commonwealth*, [91] *People* v. *Ruggles*, [92] *Commonwealth* v. *Wolf*, [93] etc.). In fact, in 1952, the Court declared:

> We are a religious people whose institutions presuppose a Supreme Being. . . . When the State encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not. . . . would be ***preferring those who believe in no religion over those who do believe.*** . . . We find no constitutional requirement which makes it necessary for government to be hostile

THE WHITE HOUSE
WASHINGTON

February 7, 2003

The Honorable William E. Dannemeyer
Congressman
1105 E. Commonwealth, Box 13
Fullerton, CA 92831

Dear Bill,

Great to meet you. I have forwarded everything to White House legislative affairs with a positive recommendation. Let's be in touch. Blessings on you and yours.

Warmly,

Tim Goeglein
Special Assistant to the President &
Deputy Director of Public Liaison

Time to End Judicial Tyranny

The judicial despotism the Founders warned against is happening today. It is time for an informed electorate to spur Congress to defend and restore our constitutional republic.

by John Eidsmoe

"Should the constitutional republic our forefathers designed be replaced with a government by the majority vote of a nine-person committee of lawyers who shall be appointed rather than elected and shall hold office for life?"

If a pollster were to ask this question, probably 99 percent of the public would answer with an emphatic "No!"

And yet, without an abundance of exaggeration, that is a fair description of the power now wielded by the U.S. Supreme Court — a court that claims the power to strike down and invalidate almost any action by almost any other branch or level of government.

It didn't begin that way. The Framers established a constitutional republic in which the powers delegated to the federal government were, in James Madison's words, "few and defined," while those reserved to the states were many. And the powers delegated to the federal government were carefully separated into legislative, executive and judicial branches.

In *The Federalist*, No. 78, Alexander Hamilton wrote that of the three branches of government, the judiciary "will always be the least dangerous to the political rights of the constitution, because it will be least in a capacity to annoy or injure them." The legislative branch exercises "will," that is, it determines the policy of the nation; the executive branch exercises "force," that is, it implements and enforces the will of the legislature. But the judiciary exercises only "judgment," interpreting the will of the legislature and the actions of the executive. Hamilton wrote that the judiciary is "beyond comparison the weakest of the three departments of government; that it can never attack with success either of the other two...."

JS Supreme Court

Overturning the rule of law: The Framers of the Constitution did not give the U.S. Supreme Court power to act as a super-legislature, overruling state laws and mandating federal policies. But the court has arrogated these powers unto itself by judicial usurpation.

The Constitution nowhere expressly states that the federal courts have the power to strike down laws as unconstitutional. But in the famous 1803 case of *Marbury vs. Madison*, Chief Justice John Marshall claimed that power for the Supreme Court. Since Article III, Section 2 of the Constitution gives the court power over cases arising under the Constitution and laws of the United States, the Constitution therefore gives the court the authority to interpret the Constitution and statutes, argued Marshall. And if the court determines that a statute is inconsistent with the Constitution, then the court must rule that the Constitution stands and the statute falls. As Marshall declared:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

President Thomas Jefferson emphatically disagreed with Marshall's decision. Jefferson had not been a delegate to the Constitutional Convention; during the Convention and the ratification process, he was in France. He had mixed feelings about the Constitution. He admired some features of it, but he was deeply concerned about the power of the judiciary. In 1804 he wrote to

John Eidsmoe, a retired Air Force lieutenant colonel, is a professor of constitutional law at the Thomas Goode Jones School of Law, Faulkner University, Montgomery, Alabama.

The Framers wisely gave Congress a check on the Court: Congress can limit the Court's appellate jurisdiction. The concept could be used, for instance, to allow states to outlaw abortion or local school boards to reinstitute school prayer without the federal courts being able to rule against them.

Abigail Adams: "[T]he opinion which gives to the judges the right to decide what laws are Constitutional and what not, not only for themselves in their own sphere of action, but for the legislature and executive also in their spheres, would make the judiciary a despotic branch."

Steady Usurpation

Jefferson and his supporters called themselves the Democratic Republicans, the ancestor of the Democratic Party. They generally favored individual liberty, states' rights, and a narrow view of the powers delegated to the federal government. Alexander Hamilton and his supporters called themselves the Federalists, and they believed the constitutional powers delegated to the federal government should be interpreted more broadly. When Jefferson was elected president in 1800, the defeated Federalist president, John Adams, in the closing days of his administration appointed Federalist John Marshall chief justice of the Supreme Court. President Jefferson and Chief Justice Marshall were distant cousins, but they clashed bitterly on issues of constitutional interpretation, and this clash intensified Jefferson's distrust of the federal judiciary.

In 1821 Jefferson warned that "the germ of dissolution of our federal government is in the constitution of the federal judiciary, an irresponsible body ... working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction, until all shall be usurped from the states, and the government of all be consolidated into one."

And in 1823 he seemed to suggest that Hamilton's view of the judiciary as the "least dangerous" branch had proven to be incorrect: "At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions nevertheless become law by precedent, sapping by little and little the foundations of the Constitution, and working its change by construction, before anyone has perceived that the invisible and helpless worm has been busily employed in consuming its substance."

Jefferson was not alone in his fear of judicial usurpation. When President Andrew Jackson vetoed the rechartering of the national bank, he argued that the national bank was unconstitutional even though the Supreme Court had held it constitutional in *McCulloch vs. Maryland* in 1819. Jackson declared in his veto message: "It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point, the President is independent of both."

In a similar vein President Lincoln wrote: "[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties to personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

And President Theodore Roosevelt expressed a similar view: "It is the people, and not the judges, who are entitled to say what their constitution means, for the constitution is theirs, it belongs to them and not to their servants in office — any other theory is incompatible with the foundation principles of our government."

The Devious Dialectic

Several factors have led to the expansion of judicial power. One is the changing view of truth. The Framers believed that truth is fixed, absolute and ordained by God Himself. The Christian majority believed this, and the Deist minority just as strongly believed in a universe that ran according to the absolute laws of the clockmaker God.

But in the 1800s this view began to change. Hegel taught that truth is not fixed but rather changes according to a dialectical process of thesis, antithesis and synthesis. Darwinism led to the belief that truth evolves and changes. And the postmodern view is that truth is subjective — that is, truth is whatever you perceive it to be.

Along with postmodernism came the movement known as language deconstruction, which holds that words have no intrinsic meaning, and what really matters is not the author's intent or the dictionary definition, but rather the meaning drawn by the reader or viewer. A deconstructionist theater producer obviously feels much greater freedom to put her own message into Shakespeare's plays than a producer who believes she must be faithful to Shakespeare's intent. Likewise, a judge who holds this view of truth, law and language feels much more free to read his own views into the Constitution, than the judge who believes in jurisprudence of original intent.

Understood thus, Charles Evans Hughes' statement that "We are under a Constitution, but the Constitution is what the judges say it is" takes on a new and ominous meaning. And as Chancellor James Kent said, if judges are not bound by the plain meaning of the Constitution, they are free to roam at large in the trackless fields of their own imaginations.

Another contributing factor is the incorporation doctrine. Originally, as the Supreme Court recognized in *Barron vs. Baltimore* (1833), the Bill of Rights applied only to the federal government; people looked to state constitutions and state courts for protection if state officials abused their rights. But this began to change.

Ratified in 1868, the 14th Amendment provides in part that no state shall "deprive any person of life, liberty or property without due process of law." For about half a century thereafter, the courts interpreted the Due Process Clause to mean that no one may be deprived of life (executed), liberty (jailed) or property (fined) without due process of law (a fair trial). But in the early 1900s the view developed that the Due Process Clause means that states may not deprive people of free speech, press, religious liberty, or other basic rights. In other words, according to this view, the Bill of Rights, or at least some of the rights in the Bill of Rights, are incorporated into the Due Process Clause and are therefore applied to state and local governments.

Protecting people's constitutional rights against state and local abuses seems laudable. But the practical effect of the incorporation doctrine is to give the federal courts a virtual monopoly on the business of rights protection. This greatly expands the authority of federal courts, and raises a perplexing question: In the long run, are rights really more secure in the hands of unelected federal judges, than with those who are more directly responsible to the people?

Put these concepts together — the incorporation doctrine and the postmodern concept of truth and law — and we have a recipe for judicial absolutism.

In *Roe vs. Wade* (1973), the Supreme Court struck down the abortion laws of Texas and most other states on the ground that they violated the purported constitutional right to abort a child. But where is that right found in the Constitution? As Justice Blackmun claimed, quoting from previous decisions: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."

Included in those zones of privacy, Blackmun insisted, is the right to make decisions about oneself, including whether to have children, and the right to make that decision retroactively after conception by means of abortion. More recently in the 2003 *Lawrence vs. Texas* decision, the Supreme Court found that this penumbral right of privacy also includes the right to engage in homosexual sodomy.

But consider the consequences of this type of decision making. Jurisprudence based upon "penumbras" and "emanations" removes the constitutional interpretation from any kind of objective scholarship and leaves us with a Constitution that can mean anything any judge wants it to mean.

Digital Stock

Congress is the key to reining in errant courts. Article III, Section 2 of the Constitution gives Congress the power (and duty) to proscribe the jurisdiction of the federal courts to keep them from doing harm.

Reining In the Courts

What can be done to combat judicial tyranny? Many remedies have been suggested: constitutional amendments, limited terms for judges, defunding the courts, impeachment. But the Constitution itself provides a remedy that is worthy of consideration.

Article III, Section 2 of the Constitution, provides that the Supreme Court shall have original jurisdiction over a narrow range of cases, mostly involving foreign ambassadors. It then provides: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." The Framers wisely gave Congress a check on the court: Congress can limit the court's appellate jurisdiction.

Predictably, the courts have not exactly been enamored with this provision. But they have generally, if reluctantly, upheld the power of Congress to limit the court's appellate jurisdiction, in such cases as *Ex Parte McCardle* (1869), *Ex Parte Yerger* (1869), *Robertson vs. Seattle Audubon Society* (1992), and *Felker vs. Turpin* (1996).

In two cases, the Supreme Court has struck down statutes that limit its appellate jurisdiction: *United States vs. Klein* (1872) because Congress was trying to affect the outcome of a pending case; and *Plaut vs. Spendthrift Farm, Inc.* (1995), because Congress was trying to overturn a court decision.

And what about limiting the jurisdiction of lower federal district courts and circuit courts of appeals? Many are unaware that the only court expressly created by the Constitution is the U.S. Supreme Court; all other federal courts were created by Congress under Article I, Section 1 and can be abolished by Congress. It seems self-evident that since Congress can create or abolish federal courts inferior to the Supreme Court, Congress can define, expand or limit their jurisdiction. Supreme Court cases so holding include *Sheldon vs. Sill* (1850), *Lockerty vs. Phillips* (1943), and *Yakus vs. United States* (1944).

Several bills are pending in Congress that would limit the appellate jurisdiction of the federal courts over cases involving the public display of the Ten Commandments. But the basic concept of limiting the federal courts' jurisdiction could be applied to many other cases as well. The concept could be used, for instance, to allow states to outlaw abortion or local school boards to reinstitute school prayer without the federal courts being able to rule against them.

The judicial despotism Jefferson and others warned against can indeed happen here, and what might have seemed fanciful prophecy in 1800 is rapidly becoming established fact. It is time to take action to defend and restore our constitutional republic. ■

108th CONGRESS
1st Session

S. 1558

To restore religious freedoms.

IN THE SENATE OF THE UNITED STATES

August 1 (legislative day, JULY 21), 2003

Mr. ALLARD introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To restore religious freedoms.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Religious Liberties Restoration Act'.

SEC. 2. FINDINGS.

Congress finds the following:

(1) The Declaration of Independence declares that governments are instituted to secure certain unalienable rights, including life, liberty, and the pursuit of happiness, with which all human beings are endowed by their Creator and to which they are entitled by the laws of nature and of nature's God.
(2) The organic laws of the United States Code and the constitutions of every State, using various expressions, recognize God as the source of the blessings of liberty.
(3) The first amendment to the Constitution secures rights against laws respecting an establishment of religion or prohibiting the free exercise thereof made by the Federal Government.
(4) The rights secured under the first amendment have been interpreted by the Federal courts to be included among the provisions of the 14th amendment.
(5) The 10th amendment reserves to the States, respectively, the powers not delegated to the Federal Government nor prohibited to the States.
(6) Disputes and doubts have arisen with respect to public displays of the Ten Commandments and to other public expression of religious faith.

(7) Section 5 of the 14th amendment grants Congress the power to enforce the provisions of the 14th amendment.
(8) Article III, section 2 of the Constitution grants Congress the authority to except certain matters from the jurisdiction of the Federal courts inferior to the Supreme Court.

SEC. 3. RELIGIOUS LIBERTY RIGHTS DECLARED.

(a) DISPLAY OF TEN COMMANDMENTS- The power to display the Ten Commandments on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively.
(b) WORD `GOD' IN PLEDGE OF ALLEGIANCE- The power to recite the Pledge of Allegiance on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively. The Pledge of Allegiance shall be, `I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with Liberty and justice for all.'.
(c) MOTTO `IN GOD WE TRUST'- The power to recite the national motto on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively. The national motto shall be, `In God we trust'.
(d) EXERCISE OF CONGRESSIONAL POWER TO EXCEPT- The subject matter of subsections (a), (b), and (c) are excepted from the jurisdiction of Federal courts inferior to the Supreme Court.

END

COSPONSORS(11), ALPHABETICAL

Sen Brownback, Sam - 9/23/2003 [KS]
Sen Bunning, Jim - 10/20/2003 [KY]
Sen Burns, Conrad R. - 9/29/2003 [MT]
Sen Cochran, Thad - 9/30/2003 [MS]
Sen Craig, Larry E. - 10/21/2003 [ID]
Sen Enzi, Michael B. - 10/2/2003 [WY]
Sen Graham, Lindsey O. - 9/26/2003 [SC]
Sen Inhofe, Jim - 9/30/2003 [OK]
Sen Lott, Trent - 9/30/2003 [MS]
Sen Miller, Zell - 2/10/2004 [GA]
Sen Shelby, Richard C. - 9/25/2003 [AL]

108th CONGRESS
1st Session
H. R. 3190

To safeguard our religious liberties.

IN THE HOUSE OF REPRESENTATIVES

September 25, 2003

Mr. PICKERING introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To safeguard our religious liberties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Safeguarding Our Religious Liberties Act'.

SEC. 2. FINDINGS.

Congress finds the following:

(1) The Declaration of Independence declares that governments are instituted to secure certain unalienable rights, including life, liberty, and the pursuit of happiness, with which all human beings are endowed by their Creator and to which they are entitled by the laws of nature and of nature's God.

(2) The organic laws of the United States Code and the constitutions of every State, using various expressions, recognize God as the source of the blessings of liberty.

(3) The first amendment to the Constitution secures rights against laws respecting an establishment of religion or prohibiting the free exercise thereof made by the Federal Government.

(4) The rights secured under the first amendment have been interpreted by the Federal courts to be included among the provisions of the 14th amendment.

(5) The 10th amendment reserves to the States, respectively, the powers not delegated to the Federal Government nor prohibited to the States.

(6) Disputes and doubts have arisen with respect to public displays of the Ten Commandments and to other public expression of religious faith.

(7) Section 5 of the 14th amendment grants Congress the power to enforce the provisions of the 14th amendment.

(8) Article III, section 2 of the Constitution grants Congress the authority to except certain matters from the jurisdiction of the Federal courts inferior to the Supreme Court.

SEC. 3. RELIGIOUS LIBERTY RIGHTS DECLARED.

(a) DISPLAY OF TEN COMMANDMENTS- The power to display the Ten Commandments on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively.

(b) WORD `GOD' IN PLEDGE OF ALLEGIANCE- The power to recite the Pledge of Allegiance on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively. The Pledge of Allegiance shall be, `I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with Liberty and justice for all.'.

(c) MOTTO `IN GOD WE TRUST'- The power to recite the national motto on or within property owned or administered by the several States or political subdivisions of such States is among the powers reserved to the States, respectively. The national motto shall be, `In God we trust'.

(d) EXERCISE OF CONGRESSIONAL POWER TO EXCEPT- The subject matter of subsections (a), (b), and (c) are excepted from the jurisdiction of Federal courts inferior to the Supreme Court.

END

H. R. 3190
COSPONSORS(34), ALPHABETICAL :

Rep Akin, W. Todd - 11/20/2003 [MO-2]
Rep Bachus, Spencer - 10/17/2003 [AL-6]
Rep Barrett, J. Gresham - 11/6/2003 [SC-3]
Rep Bartlett, Roscoe G. - 10/28/2003 [MD-6]
Rep Barton, Joe - 11/21/2003 [TX-6]
Rep Beauprez, Bob - 10/21/2003 [CO-7]
Rep Bishop, Rob - 11/19/2003 [UT-1]
Rep Brady, Kevin - 11/20/2003 [TX-8]
Rep Davis, Jo Ann - 10/29/2003 [VA-1]
Rep Doolittle, John T. - 10/28/2003 [CA-4]
Rep Everett, Terry - 11/20/2003 [AL-2]
Rep Franks, Trent - 10/30/2003 [AZ-2]
Rep Goode, Virgil H., Jr. - 10/16/2003 [VA-5]
Rep Graves, Sam - 10/28/2003 [MO-6]
Rep Herger, Wally - 11/20/2003 [CA-2]
Rep Hoekstra, Peter - 11/21/2003 [MI-2]
Rep Hostettler, John N. - 10/20/2003 [IN-8]
Rep Keller, Ric - 11/21/2003 [FL-8]
Rep King, Steve - 10/29/2003 [IA-5]
Rep Kingston, Jack - 10/29/2003 [GA-1]
Rep Latham, Tom - 11/20/2003 [IA-4]
Rep McCotter, Thaddeus G. - 11/19/2003 [MI-11]
Rep McHugh, John M. - 10/30/2003 [NY-23]
Rep Miller, Jeff - 10/7/2003 [FL-1]
Rep Musgrave, Marilyn N. - 10/29/2003 [CO-4]
Rep Norwood, Charlie - 11/20/2003 [GA-9]
Rep Osborne, Tom - 11/21/2003 [NE-3]
Rep Rogers, Mike D. - 10/28/2003 [AL-3]
Rep Shimkus, John - 10/28/2003 [IL-19]
Rep Souder, Mark E. - 10/30/2003 [IN-3]
Rep Terry, Lee - 10/1/2003 [NE-2]
Rep Turner, Jim - 11/20/2003 [TX-2]
Rep Wamp, Zach - 10/8/2003 [TN-3]
Rep Wicker, Roger F. - 11/19/2003 [MS-1]

108th CONGRESS
2d Session

S. 2323

To limit the jurisdiction of Federal courts in certain cases and promote federalism.

IN THE SENATE OF THE UNITED STATES

April 20, 2004

Mr. SHELBY (for himself, Mr. MILLER, Mr. BROWNBACK, Mr. GRAHAM of South Carolina, Mr. ALLARD, Mr. INHOFE, and Mr. LOTT) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To limit the jurisdiction of Federal courts in certain cases and promote federalism.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Constitution Restoration Act of 2004'.

TITLE I--JURISDICTION

SEC. 101. APPELLATE JURISDICTION.

(a) AMENDMENT TO TITLE 28- Chapter 81 of title 28, United States Code, is amended by adding at the end the following:

`Sec. 1260. Matters not reviewable

`Notwithstanding any other provision of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter to the extent that relief is sought against an entity of Federal, State, or local government, or against an officer or agent of Federal, State, or local government (whether or not acting in official or personal capacity), by reason of that entity's, officer's, or agent's acknowledgement of God as the sovereign source of law, liberty, or government.'.

(b) TABLE OF SECTIONS- The table of sections at the beginning of chapter 81 of title 28, United States Code, is amended by adding at the end the following:

`1260. Matters not reviewable.'.

SEC. 102. LIMITATIONS ON JURISDICTION.

(a) AMENDMENT TO TITLE 28- Chapter 85 of title 28, United States Code, is amended by adding at the end of the following:

`Sec. 1370. Matters that the Supreme Court lacks jurisdiction to review

`Notwithstanding any other provision of law, the district court shall not have jurisdiction of a matter if the Supreme Court does not have jurisdiction to review that matter by reason of section 1260 of this title.'.

(b) TABLE OF SECTIONS- The table of sections at the beginning of chapter 85 of title 28, United States Code, is amended by adding at the end the following:

`1370. Matters that the Supreme Court lacks jurisdiction to review.'.

TITLE II--INTERPRETATION

SEC. 201. INTERPRETATION OF THE CONSTITUTION.

In interpreting and applying the Constitution of the United States, 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 English constitutional and common law.

TITLE III--ENFORCEMENT

SEC. 301. EXTRAJURISDICTIONAL CASES NOT BINDING ON STATES.

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.

SEC. 302. IMPEACHMENT, CONVICTION, AND REMOVAL OF JUDGES FOR CERTAIN EXTRAJURISDICTIONAL ACTIVITIES.

To the extent that a justice of the Supreme Court of the United States or any judge of any Federal court engages in any activity that exceeds the jurisdiction of the court of that justice or judge, as the case may be, by reason of section 1260 or 1370 of title 28, United States Code, as added by this Act, engaging in that activity shall be deemed to constitute the commission of--

(1) an offense for which the judge may be removed upon impeachment and conviction; and

(2) a breach of the standard of good behavior required by article III, section 1 of the Constitution.

END

COSPONSORS(6), ALPHABETICAL:

Sen Allard, A. Wayne - 4/20/2004 [CO]
Sen Brownback, Sam - 4/20/2004 [KS]
Sen Graham, Lindsey O. - 4/20/2004 [SC]
Sen Inhofe, Jim - 4/20/2004 [OK]
Sen Lott, Trent - 4/20/2004 [MS]
Sen Miller, Zell - 4/20/2004 [GA]

108th CONGRESS
2d Session

H. R. 3799

To limit the jurisdiction of Federal courts in certain cases and promote federalism.

IN THE HOUSE OF REPRESENTATIVES

February 11, 2004

Mr. ADERHOLT (for himself and Mr. PENCE) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To limit the jurisdiction of Federal courts in certain cases and promote federalism.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Constitution Restoration Act of 2004'.

TITLE I--JURISDICTION

SEC. 101. APPELLATE JURISDICTION.

(a) IN GENERAL-

(1) AMENDMENT TO TITLE 28- Chapter 81 of title 28, United States Code, is amended by adding at the end the following:

`Sec. 1260. Matters not reviewable

`Notwithstanding any other provision of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter to the extent that 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 personal capacity), by reason of that element's or officer's acknowledgement of God as the sovereign source of law, liberty, or government.'.

(2) TABLE OF SECTIONS- The table of sections at the beginning of chapter 81 of title 28, United States Code, is amended by adding at the end the following:

`1260. Matters not reviewable.'.

(b) APPLICABILITY- Section 1260 of title 28, United States Code, as added by subsection (a), shall not apply to an action pending on the date of enactment of this Act, except to the extent that a party or claim is sought to be included in that action after the date of enactment of this Act.

SEC. 102. LIMITATIONS ON JURISDICTION.

(a) IN GENERAL-

(1) AMENDMENT TO TITLE 28- Chapter 85 of title 28, United States Code, is amended by adding at the end of the following:

`Sec. 1370. Matters that the Supreme Court lacks jurisdiction to review

`Notwithstanding any other provision of law, the district court shall not have jurisdiction of a matter if the Supreme Court does not have jurisdiction to review that matter by reason of section 1260 of this title.'.

(2) TABLE OF SECTIONS- The table of sections at the beginning of chapter 85 of title 28, United States Code, is amended by adding at the end the following:

`1370. Matters that the Supreme Court lacks jurisdiction to review.'.

(b) APPLICABILITY- Section 1370 of title 28, United States Code, as added by subsection (a), shall not apply to an action pending on the date of enactment of this Act, except to the extent that a party or claim is sought to be included in that action after the date of enactment of this Act.

TITLE II--INTERPRETATION

SEC. 201. INTERPRETATION OF THE CONSTITUTION.

In interpreting and applying the Constitution of the United States, 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.

TITLE III--ENFORCEMENT

SEC. 301. EXTRAJURISDICTIONAL CASES NOT BINDING ON STATES.

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.

SEC. 302. IMPEACHMENT, CONVICTION, AND REMOVAL OF JUDGES FOR CERTAIN EXTRAJURISDICTIONAL ACTIVITIES.

To the extent that a justice of the Supreme Court of the United States or any judge of any Federal court engages in any activity that exceeds the jurisdiction of the court of that justice or judge, as the case may be, by reason of section 1260 or 1370 of title 28, United States Code, as added by this Act, engaging in that activity shall be deemed to constitute the commission of--

(1) an offense for which the judge may be removed upon impeachment and conviction; and

(2) a breach of the standard of good behavior required by article III, section 1 of the Constitution.

END

COSPONSORS(20), ALPHABETICAL:

Rep Bachus, Spencer - 2/24/2004 [AL-6]
Rep Bishop, Rob - 4/27/2004 [UT-1]
Rep Cramer, Robert E. (Bud), Jr. - 2/24/2004 [AL-5]
Rep Davis, Jo Ann - 3/10/2004 [VA-1]
Rep Deal, Nathan - 3/18/2004 [GA-10]
Rep DeMint, Jim - 4/1/2004 [SC-4]
Rep Everett, Terry - 2/24/2004 [AL-2]
Rep Hall, Ralph M. - 4/27/2004 [TX-4]
Rep Jones, Walter B., Jr. - 4/27/2004 [NC-3]
Rep Kingston, Jack - 2/24/2004 [GA-1]
Rep Lewis, Ron - 4/27/2004 [KY-2]
Rep McCotter, Thaddeus G. - 4/27/2004 [MI-11]
Rep Miller, Jeff - 3/10/2004 [FL-1]
Rep Pearce, Stevan - 3/18/2004 [NM-2]
Rep Pence, Mike - 2/11/2004 [IN-6]
Rep Pitts, Joseph R. - 2/24/2004 [PA-16]
Rep Rogers, Mike D. - 2/24/2004 [AL-3]
Rep Ryun, Jim - 3/11/2004 [KS-2]
Rep Souder, Mark E. - 3/25/2004 [IN-3]
Rep Wamp, Zach - 3/10/2004 [TN-3]

Mr. SMITH. Judge Moore.

STATEMENT OF THE HONORABLE ROY S. MOORE, FOUNDATION FOR MORAL LAW, INC.

Mr. MOORE. Mr. Chairman, Mr. Berman, I want you to know that I have the greatest respect for the man sitting at this——

Mr. SMITH. Is your microphone on, Judge Moore?

Mr. MOORE. Okay. Mr. Chairman, Mr. Berman, I want you to know I have the greatest respect for the gentlemen which have come before me here. But entertaining as I do sentiments in direct opposition, I hope I may be understood not to be critical of them and their opinions. But this is a momentous moment to our country. And, quite frankly, I'm confused. I agree with Mr. Gerhardt that the purpose of this bill is very clear. One can't read the simple lines of this thing without understanding that this is about the right of State and Federal officials to acknowledge God.

And I'm confused. I got up here this afternoon and I walked around Washington. I passed by the Washington Monument standing 555 feet, 5 and 125/1000 inches above this city, at the top of which is the Latin phrase, Laus Deo, "Praise Be To God." It certainly wasn't an offense to our Founding Fathers. This Nation was founded upon a belief in God, not upon a belief in Buddha, not upon Hinduism. Nothing in western theology or western jurisprudence indicates otherwise. The acknowledgment of God was not prohibited by the first amendment to the United States Constitution. Is not then, is not now.

I walked by Oscar Straus memorial, saw a carved thing of the Ten Commandments. At least that's what Oscar Straus said it was. There was a woman leaning on it in prayer. Adolph Weinman designed that. It is an exact duplicate of what hangs over the Chief Justice of the United States Supreme Court's head; and yet they say, if you go to the Supreme Court, that it's the Bill of Rights. But in 1975, the United States Supreme Court pamphlet said it was the Ten Commandments. You see, we are erasing our history right under your noses in this Congress, right under your watchful eye.

We are losing our right to acknowledge God as the sovereign source. And it is very important. Our liberty of public worship is not a concession nor a privilege, but an inherent right. Those words are written on that monument. And that truth was recognized that God gives us the right to be a pluralistic society to believe what we want. That right was recognized quite clearly in 1931 by both the minority and the majority of the United States Supreme Court. In the case of the *U.S.* versus *Macintosh*, it was written by Justice Sutherland for the majority: We are Christian people, according to one another the equal right of religious freedom and acknowledging with reverence the duty of obedience to the will of God.

The minority, written by Chief Justice Charles Evans Hughes said: One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. Indeed, the acknowledgment of God lies at the very basis of the first amendment.

There was another Judiciary Committee in 1853, both of the House and the Senate which undertook objections by certain people

that wanted to eliminate chaplaincy. I have the legislative histories here. Both the United States Senate and House of Representatives recognized that acknowledgment of God was essential. In the Senate, they said they did not intend to prohibit a just expression of religious devotion by the legislators of the Nation.

Even in their public character as legislators, they did not intend to send our armies and navies forth to do battle for their country without a national recognition of that God upon whom success or future depends. They did not intend to spread over all the public and over the whole action of the Nation, the dead and resulting spectacle of atheistical apathy. And that's exactly what's being spread over this country today.

The acknowledgment of God is part of our organic law. They say this is a court stripping bill. I'm not trying and the proponents of this bill are not trying to deny the Supreme Court the right to say what the law is, when they improperly interpret the law. We are not trying to interfere with the independence of the judiciary. Indeed, they must be independent. I was a Supreme Court Chief Justice. I believe in independence. I'm not trying to deny judicial review. Judicial review is a valid part of the Constitution. But that's not judicial tyranny.

You see, the rule of law requires that we go by the written text of the Constitution. And I defy anybody in this room, any professor, any lawyer to stand up and tell me what religion means under the first amendment of the United States Constitution. Unless they go by what the Supreme Court said in 1892, in 1890, and 1878. Religion was the duties which we owe to the creator and the manner of discharging it. James Madison's Memorial and Remonstrance remarks. And James Madison ought to know what the first amendment was about. He promoted it and offered it into Congress. He said in his Memorial that, because we hold it for a fundamental and undeniable truth that religion or the duty which we owe to the Creator and manner of discharging it can be directed only by reason and conviction, not by force and violence.

The rule of law is very simple. We go by written definition. Recently, I believe last week or not long ago you had a football game here between the Washington Redskins and the Tampa Bay Buccaneers. And I understand a lot of people in Washington are big Washington Redskins fans. What would have happened if Tampa Bay had gotten down to the five yard line, and the time ran out and they were behind in score, but the referee stood up and said: Touchdown; Tampa Bay, they win? They were on the five yard line. You would run to the referee and say, what do you mean, referee? That's not a touchdown. What would you say if the referee said: Well, ma'am, or sir, we don't know how to define touchdown. But, you know, we really thought they tried to play a hard game and we felt sorry for them and they should have won.

That's exactly what the United States Supreme Court and Federal district court does in first amendment cases. They do not go by the law. And there is a reason for that. They have no law. The law is Congress, part of the Federal Government, shall make no law respecting the establishment of religion, being the duties we owe to the Creator and the manner of discharging it, or prohibiting the free exercise of the duties we owe to the Creator and the man-

ner of discharging it. It was to keep Federal Government out of the affairs of the State.

Mr. SMITH. Judge Moore, to follow up on your football metaphor, I'm afraid I'm going to need to call a time out. And we will proceed with our questions. Thank you for your testimony.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT OF THE HONORABLE ROY S. MOORE

Written Statement of
the Honorable Roy S. Moore

House Committee on the Judiciary,
Subcommittee on Courts, the Internet,
and Intellectual Property

Hearing on the Constitution Restoration Act
of 2004 (H.R. 3799)

September 13, 2004

I am here today to discuss how the federal courts have strayed from the Constitution on an issue that I believe strikes at the core of who we are a nation: the acknowledgment of God. For over fifty years, the federal courts have steadily eroded our first freedom, the freedom of conscience, and have attempted to replace the Godly foundation upon which this country was built with a foundation that espouses the philosophy of secular humanism, demanding people's ultimate allegiance to the state rather than to God. Couched in the innocuous language of "neutrality toward religion," the federal courts deceive those unfamiliar with our history into believing that the First Amendment's prohibition against "establishment[s] of religion" requires the complete removal of God from the public square. Nothing could be further from the truth, yet our courts continue unchecked ordering the cessation of any act or mention by a public official acknowledging God, spurred on by a coterie of anti-religious zealots led by the ACLU. Indeed, just this past June the entire country took a collective breath while the fate of the phrase "under God" in our Pledge of Allegiance depended upon the opinions of eight justices who seriously considered whether those words violate the First Amendment. This should not be! We dodged that bullet, but only on a technicality, and it is quite possible that the next time[1] we will not be so fortunate and the Court will do what its current precedent (as distinguished from the law) demands by declaring the Pledge unconstitutional.[2] We are at a point where Alexander Hamilton's now infamous statement labeling the federal courts as "the least dangerous" branch of government[3] is

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[1] Michael Newdow, the plaintiff in the case challenging the Pledge, has already indicated that the issue is "just going to go right back" to the Supreme Court because he has been in contact with numerous people who have expressed a willingness to be plaintiffs" in a future challenge. Television interview by Heidi Collins with Michael Newdow (June 14, 2004), *available at* http://www.cnn.com/2004/LAW/06/14/newdow/.

[2] *See Elk Grove Unified School Dist. v . Newdow*, 124 S. Ct. 2301 (2004) (Thomas, J., concurring) (explaining that an honest application of the Supreme Court's "coercion" test analysis dictated the result reached by the Ninth Circuit Court of Appeals when it declared the Pledge to be unconstitutional).

[3] THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds. 2001). Hamilton made this observation because, as he pointed out, "the judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *Id.*

viewed as laughable and naive in today's lawsuit-happy age in which a person who feels offended can erase over two hundred years of history simply by appealing to what is rapidly becoming "the despotic branch."

But this is America, and we are not without recourse against the federal courts' efforts to ensure that this country turns from God. If Congress would exercise the power it has under Article III of the United States Constitution, the unlawful usurpation of jurisdiction by the federal courts would cease and no longer would they run roughshod over the will of the American people. I implore you to act! But in order to gain a proper perspective of how far we have strayed from the Constitution, let us examine a few legal and historical facts.

I. The Acknowledgment of God

A) God and Religion

In the case of *Glassroth v. Moore*,[4] I refused to remove a monument of the Ten Commandments or stop the acknowledgment of God even though an unlawful order from a federal district judge commanded me to do so. Because of that refusal, the monument was removed to a locked closet and I was removed from office. The federal district court that ruled the monument to be a violation of the Establishment Clause of the First Amendment concluded that I had "placed a slightly over two-and-a-half ton granite monument—engraved with the Ten Commandments and other references to God—in the Alabama Judicial Build **with the specific purpose and effect . . . of acknowledging the Judeo-Christian God** as the moral foundation of our laws." *Glassroth v. Moore*.[5] As if to leave no doubt as to why the district court felt the monument was unconstitutional, the court ended its opinion with an even more explicit explanation of the "wrong" I had committed:

> "If all Chief Justice Moore had done were to emphasize the Ten Commandments' historical and educational importance (for the evidence shows that they have been one of the sources of our secular laws) or their importance as a model code for good citizenship (for we all want our children to honor their parents, not to kill, not to steal, and so forth), this court would have a much different case before it. But the Chief Justice did not limit himself to this; he went far, far beyond. He installed a two-and-a-half ton monument in the most prominent place in a government building . . . **with the specific purpose and effect of establishing a permanent recognition of the 'sovereignty of God,'** the Judeo-Christian God, over all citizens of this country, regardless of each taxpaying citizen's individual personal beliefs or lack thereof. To this, the Establishment Clause says no."

Id. at 1318 (emphasis added).

Unfortunately, the Founders' grand design and the modern reality in the courts have become two vastly different things.

[4] 229 F. Supp. 2d 1290 (M.D. Ala. 2002).

[5] 229 F. Supp. 2d 1290, 1293 (M.D. Ala. 2002) (emphasis added).

Despite the district court's stern conclusion, the Establishment Clause says no such thing. In fact, with respect to this issue the First Amendment simply provides that "Congress shall make no law respecting an establishment of religion."[6] Putting aside for purposes of this hearing the obvious fact that the monument I put on public display in no way shape or form resembles a "law," and foregoing any discussion of the plain truth that the monument does not constitute an "establishment" under any generally understood definition of that term, the point that must be emphasized is that the monument does **not** represent "religion." As the term "religion" was understood at the time the Bill of Rights was adopted, it did not constitute the general acknowledgment of God. A religion, as understood by the founding generation, dictates both the duties we owe to our Creator and the manner in which we discharge, or carry out, those duties. This definition of the word "religion" was used in the Virginia Declaration of Rights of 1776,[7] James Madison's *Memorial and Remonstrance Against Religious Assessments* of 1785,[8] and the North Carolina (1788), Rhode Island (1790), and Virginia (1788) Ratifying Conventions' proposed amendments to the United States Constitution. Under this widely accepted definition, a "religion" dictates not only **that** a person is to worship God, but also **how** he or she is to do so. In contrast, an acknowledgment of God recognizes God's existence, place, and influence in our society.[9]

B) Historical Precedents

There have been acknowledgments of God throughout our history that, until the modern Supreme Court decided otherwise, were never considered to be government establishments of religion. In fact, our Nation was founded upon a document that explicitly acknowledges God: the Declaration of Independence. The Declaration intones that "all men" are "endowed by their Creator with certain unalienable Rights," that we were entitled to independence based on "the Laws of Nature and Nature's God," and it invokes "a firm Reliance on the Protection of Divine Providence" for the act of declaring independence.

Benjamin Franklin, during a particularly contentious debate in the Constitutional Convention of 1787, "beg[ged] leave to move that, henceforth, prayers imploring the assistance of heaven, and its blessing on our deliberations, be held in this assembly every morning before we proceed to business, and that one or more of the Clergy of the City be requested to officiate in that service."[10] While Franklin's request was voted down due to the pressing business in the Convention (the delegates believed they would have to find and pay a church pastor to perform the prayer), his proposal was a direct precursor to

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[6] U.S. Const., amend. I.

[7] Virginia Const, Art. I, § 16 (1776).

[8] J. Madison, *Memorial and Remonstrance Against Religious Assessments*, (June 20, 1785) in 5 *The Founders Constitution* 82 (P. Kurland & R. Lerner eds. 1987).

[9] Remarks made by President Bush concerning the Ninth Circuit Court of Appeals' ruling regarding the Pledge of Allegiance indicate that he, like those of the founding generation, understands this distinction: "Declaration of God in the Pledge of Allegiance doesn't violate rights. As a matter of fact, it's a confirmation of the fact that we receive our rights from God, as proclaimed in our Declaration of Independence." Jimmy Moore, *Pledge Protection Act Blocked by House Judiciary Committee Chairman*, TALON NEWS, Sept. 17, 2003, *available at* http://mensnewsdaily.com/ archive/newswire/nw03/ talonnews/0903/091703-pledge.htm.

[10] AMERICA'S GOD AND COUNTRY, 249 (William J. Federer ed. 1996).

action taken by the First Congress, which nine days after it convened with a quorum, on April 9, 1789, appointed two chaplains of different denominations to serve in the House and Senate respectively, paying them a salary of $500 each for their services.[11]

Immediately following the approval of the Bill of Rights (including the First Amendment) by Congress on September 25, 1789, Congress passed a resolution requesting that the President of the United States "recommend to the people of the United States a day of public thanksgiving and prayer."[12] President Washington heartily agreed with the Congressional recommendation and declared:

> "**Whereas it is the duty of all nations to acknowledge the providence of Almighty God**, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor. . . . Now, therefore, I do appoint Thursday, the 26th day of November 1789 . . . that we may all unite to render unto Him our sincere and humble thanks for His kind care and protection."[13]

Most of the Presidents of the United States have followed Washington's example by calling upon the American people to pause for national thanksgiving and prayer in times of crisis. Starting with Abraham Lincoln in November 1863, Presidents for the next 75 years annually declared a day of national thanksgiving until Congress permanently established a national holiday of thanksgiving in 1941.

Since the passage of the Judiciary Act of 1789, federal judicial officers have been required to take an oath of office swearing to support the United States Constitution that concludes with the phrase, "So help me God." That requirement remains unchanged to this day.[14]

Due to an outpouring of pleas from people across the country during the Civil War, then Secretary of the Treasury Salmon P. Chase by letter instructed James Pollack, Director of the U.S. Mint at Philadelphia, on November 20, 1861, to prepare a motto incorporating God to be placed on U.S. coins.

> "Dear Sir: No nation can be strong except in the strength of God, or safe except in His defense. The trust of our people in God should be declared on our national coins.
>
> "You will cause a device to be prepared without unnecessary delay with a motto expressing in the fewest and tersest words possible **this national recognition**."[15]

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[11] *See* David S. Barton, "Franklin's Appeal for Prayer at the Constitutional Convention," *at* http://www.wallbuilders.com/resources/search/detail.php?ResourceID=19.

[12] 1 ANNALS OF CONG. 949-50 (Joseph Gales ed., 1789).

[13] 4 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 131-32 (W. W. Abbot et al, eds., 1987) (emphasis added).

[14] *See* 28 U.S.C. § 453.

[15] *Fact Sheets: Currency & Coins—History of "In God WE Trust,"* United States Department of the Treasury, *at* http://www.ustreas.gov/education/fact-sheets/currency/in-god-we-trust.html (emphasis added).

After various suggestions were considered, "In God We Trust" was selected as the message and Congress enacted legislation on April 22, 1864 authorizing the mint to place the motto on one and two-cent coins.[16] The motto has appeared on all U.S. coins since 1938 and on all currency since 1964.[17]

On June 14, 1954, Congress added the words "Under God" to the Pledge of Allegiance, which is codified at 4 U.S.C. § 4. The House Report that accompanied the legislation observed that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God."[18] President Eisenhower, in commenting on this addition to the Pledge, stated that by adding the words "Under God" "we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource in peace and war."[19]

In short, public acknowledgments of God are replete throughout our history and in no way violate the constitutional prohibition on establishments of religion because they do not dictate the duties which we owe to our Creator or the manner in which we are to carry out those duties. A display of the Ten Commandments, for instance, does not dictate a person's form of worship or articles of faith. Thus, acknowledgments of God do not coerce belief or behavior, whereas, a particular religion, such as Protestantism, Catholicism, or Judaism, requires a person to believe certain tenets and act or refrain from acting in certain ways. The monument of the Ten Commandments that I placed in the rotunda of the Alabama Judicial Building was simply one more example of our country's substantial tradition of acknowledging God.

C) Straying from the Path

Despite this tradition, the United States Supreme Court—and lower federal courts following its lead—pay no attention to the words of the First Amendment and instead have concocted an elaborate array of tests from which these federal courts pick and choose in determining whether a particular public reference to God is unconstitutional. The original test, known as the *Lemon* test because it was introduced in *Lemon v. Kurtzman,*[20] is a three-prong test that is supposed to articulate the Supreme Court's definitive standard for whether a government action violates the Establishment Clause. However, the *Lemon* test has been criticized so often[21] that members of the Court have

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[16] *Id.*
[17] *Id.*
[18] H. R. Rep. No. 1693, 83d Cong., 2d Sess., p. 2 (1954).
[19] AMERICA'S GOD AND COUNTRY, 226 (William J. Federer ed. 1996).
[20] 403 U.S. 602 (1971)
[21] Probably the best criticism of *Lemon* remains the stinging prose from the pen of Justice Scalia, in his dissent *in Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398, 399 (1993):

> "As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. . . . The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it

felt free to try their hands at coming up with their own legal tests, much the way a cook experiments with a recipe. These newer tests, such as the "Endorsement" test invented in 1984[22] and the "Coercion" test invented in 1992,[23] purport to ensure that government remains "neutral" toward religion. However, far from achieving this theoretical neutrality,[24] in practice these tests encourage and often demand hostility toward religion, especially the Christian religion.[25] They do so by punishing the very religion that is interwoven into America's historical fabric: if a particular display or act can be perceived by a "reasonable observer" as "endorsing" a religion or if it can be said to "coerce" a non-believer—where "coercion" somehow means that the non-believer simply feels

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> to return to the tomb at will. . . . For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."

[22] *See Lynch v. Donnelly*, 465 U.S. 668 (1984).
[23] *See Lee v. Weisman*, 505 U.S. 577 (1992).
[24] If post-modern thought has taught us anything, it should be that for humans it is simply impossible to achieve true neutrality because we are all affected by a myriad of influences that inform our thoughts. Only God, who has always existed and is unaffected by human whims and faults, is truly impartial. Yet this inconvenient philosophical fact does not daunt the United States Supreme Court, which has placed itself in the role of ultimate and final arbiter of all the important issues of the day. In essence, the Supreme Court has installed itself as God on earth by pretending to be the impartial arbiter of right and wrong and the source on high from which the law is handed down to the rest of us. As my personal experience demonstrates, allegiance to their "law" must be unwavering unless you are prepared to suffer severe consequences, in my case the loss of the position to which I was elected as the highest judicial officer in the State of Alabama. Obviously, from the federal courts' perspective, my position was not high enough to permit me to question their wisdom, even though I took the same oath as they do to support the Constitution of the United States "so help me God."

The inability to be completely impartial does not, of course, mean that humans are incapable of making rational decisions, it just means that we must be careful to recognize how our prejudices—which may be good or bad—influence our decisions, and that our decisions stand a much better chance of being correct if they are based on God's law and will because He is the foundation that never wavers, the only One who is truly impartial. Our inherent prejudices mean that we must take care not to set ourselves or anyone else up as somehow immune from ordinary human faults in reason, but this is exactly what we have done with the Supreme Court. As renowned Judge Richard Posner of the Seventh Circuit Court of Appeals has observed:

> "There is a tendency to lionize the Supreme Court justices. They are sometimes depicted as intellectual, even moral, giants (in some versions, as avatars of the Old Testament prophets), to be entirely disinterested, to 'do their own work' (as Louis Brandeis once said), and to produce a judicial product that reflects deep scholarship and mature, even agonized deliberation. In *Casey v. Planned Parenthood*, three of the justices sought to place the Court in tutelary relation to a submissive population whose 'very belief in themselves' as 'people who aspire' to live according to the rule of law' is 'not readily separable from their understanding of the Court.'"

Richard A. Posner, *The People's Court*, THE NEW REPUBLIC, July 19, 2004, *available at* http://www.tnr.com/doc.mhtml?pt=DXiDIQtR6xTqTkBSvzhYJH==. Posner rightly labels such inflated self-importance as "nauseat[ing]," but we give the Court no reason to think otherwise so long as it is not challenged by the People and reigned in by the other branches of government.
[25] *See, e.g.*, *Supreme Court Hostility Toward Religion in the Public Square: Hearings before the Senate Subcomm. on the Constitution, Civil Rights, and Property Rights*, 104th Cong. (2004) (statement of Vincent Phillip Muñoz) [Hereinafter *Hearing*].

offended by the display or act—then the federal courts declare the display or act to be unconstitutional. Obviously, because so many of this country's laws and traditions have been directly influenced by Christianity, the "reasonable observer" will see the Christian religion everywhere and non-believers may feel offended by this pervasive influence. The result is the removal of anything from the public square that shows even the slightest hint of stemming from Christianity, including all acknowledgments of God despite the fact that they do not constitute "religion." In sum, as American Enterprise Institute Fellow Vincent Phillip Muñoz has aptly put it:

> "The Constitution's text prohibits laws respecting an establishment of religion or prohibiting the free exercise thereof. It says nothing about government 'endorsement of religion.' Justice O'Conner effectively has replaced the text and original meaning of the First Amendment with her own words and ideas. Justice Kennedy's 'psychological coercion' test is also far off the mark. The Founders understood religious 'coercion' to mean being fined, imprisoned, or deprived of a civil right on account of one's religion. Coercion to them did not include feeling uncomfortable when other people mention God."
>
> "The modern Court has lost sight of the fact that the framers of the First Amendment meant to protect religious freedom, not to banish religion from the public square. The free exercise of religion is the primary end of the First Amendment; 'no-establishment' is a means toward achieving that end."[26]

Not only have the federal courts strayed far from the text of the Constitution that is supposed to be their guide, but their approach has resulted in making a mess of the law on the issue in question. One would think that having the federal courts as the sole arbiter of constitutional meaning and having the Supreme Court as the final arbiter of constitutional questions—as principally and historically incorrect as that is—would at least provide consistency and stability to constitutional decision-making. Sadly, again nothing could be further from the truth, particularly in cases allegedly implicating the principle of separation of church and state. In my case, the method of decision-making used by the Eleventh Circuit Court of Appeals was typical of federal courts in these cases: "Establishment Clause challenges," the Court asserted, "are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts."[27] This means that little certainty exists as to which displays or actions will pass constitutional muster according to the federal courts and which will fail.[28] Indeed, as one federal district court expressed recently in deciding that a public display of the Bible is unconstitutional, while the *Lemon* test is supposed to be the standard for Establishment Clause violations, "[u]nfortunately, it is difficult to find coherent guidance from the

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[26] *Id.*

[27] *Glassroth v. Moore*, 335 F.3d 1282, 1288 (11th Cir. 2003).

[28] The Third Circuit Court of Appeals has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997).

Supreme Court's later opinions applying the *Lemon v. Kurtzman* analysis."[29] "Coherent guidance," the one thing that ought to be expected from a Court that declares itself "supreme" in all things related to the Constitution, is the one thing it has failed to provide in Establishment Clause jurisprudence.

There is one point in these cases, however, on which the federal courts are quite clear, and the point is demonstrated by a contrast between my case and another recent case involving a Ten Commandments monument. While the Eleventh Circuit affirmed the decision that the granite monument of the Ten Commandments that I placed in the Alabama Judicial Building was unconstitutional, just last year the Fifth Circuit in *Van Orden v. Perry*,[30] ruled that a granite monument of the Ten Commandments erected on the grounds of the Texas State Capitol was constitutionally permissible. The primary difference that ostensibly made the Texas monument permissible but the Alabama one impermissible was that the Texas monument was one of a number of monuments erected on the capitol grounds, while the Alabama monument was what the courts label a "stand-alone" Ten Commandments monument. While this may seem to be a distinction without a difference—both monuments display the Ten Commandments—the distinction makes all the difference in the world to the federal courts. If a display of the Ten Commandments is surrounded by historical documents, if it is included as just one of many displays on public property, if special attention is not drawn to God's law, then the federal courts generally will extend the imprimatur of constitutionality on the given display. However, if, like the Alabama monument, the Ten Commandments are displayed more prominently or stand alone, and therefore draw attention to the God who wrote those commandments rather than relegating the Ten Commandments to a mere historical influence on our laws that carry no current relevance, the federal courts cannot countenance it and will order the removal of the display. In other words, the one clear rule in Establishment Clause cases is that if the display or action in question acknowledges God, it will be declared unconstitutional, but if the display or action relegates God to a footnote in history, then it will be tolerated.[31] Thus, the one thing that should without question be constitutional because it does not constitute "religion" under the First Amendment—the acknowledgment of God—is the one thing that the federal courts and especially the Supreme Court will not allow.

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[29] *Staley v. Harris County*, __ F Supp. 2d __, __(S.D. Tex. Aug. 10, 2004). That district court is far from being alone in expressing this sentiment. The Fifth Circuit Court of Appeals has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000); the Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence." *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999); the Tenth Circuit admitted that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High School*, 132 F.3d 542, 561 (10th Cir. 1997).

[30] 351 F. 3d 173 (5th Cir. 2003).

[31] My case unequivocally demonstrates this fact, as sometime after the monument of the Ten Commandments was removed from the rotunda of the Alabama Judicial Building, the remaining eight justices of the Alabama Supreme Court placed in the same rotunda a display containing the Ten Commandments together with several other historical documents such as Magna Charta, the Code of Justinian, the Mayflower Compact, and, ironically enough, the United States Constitution. Neither the federal district court nor the plaintiffs who sued to have the monument removed complained about the subsequent display. The only explanation for why this second display would not "offend" sensibilities is that it does not acknowledge God.

This conclusion is simply absurd. The First Amendment was never intended to exclude acknowledgments of God. As the Senate Judiciary Committee observed during a time when some were questioning the constitutionality of the Congressional chaplaincy:

> "[The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy."[32]

Unless action is taken by Congress, "atheistical apathy" or worse is exactly where we are headed courtesy of the federal judiciary.

II. The Way Back: The CRA

A) Restricting Jurisdiction

Obviously, given the current landscape in which federal judges feel no compunction about removing God from the public square regardless of the will of the People or what the Constitution dictates, action must be taken to curb the overreaching of those judges. A convenient and constitutional solution can be found in the proposed Constitution Restoration Act of 2004 (CRA), H.R. 3799,[33] which this subcommittee has convened to discuss today. Simply put, the major thrust of the CRA is to employ Congress's Article III, § 2 power to restrict the jurisdiction of the federal courts, preventing them from hearing "any matter" that concerns a federal or state official's "acknowledgment of God as the sovereign source of law, liberty, or government."[34] Enactment of the CRA would mean that the federal courts could no longer hear legal challenges to such things as public displays of the Ten Commandments, our national motto "In God We Trust," "One Nation Under God," invocations of prayer at public functions by public officials, and the like.

Some have questioned whether Congress has the authority under Article III, § 2 to limit the jurisdiction of the federal courts on issues such as the CRA proposes. The pertinent constitutional language provides:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction. **In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.**[35]

This passage plainly provides that in all cases in which the Supreme Court does not have original jurisdiction Congress is free to limit or deprive altogether the Supreme Court's

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[32] *The Reports of the Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress, 1852-53*, The Senate Judiciary Committee, January 19, 1853 (Washington: Robert Armstrong, 1853).
[33] The Senate counterpart is S. 2323.
[34] H.R. 3799, 108th Cong. (2004).
[35] U.S. Const., Art. III, § 2, para. 2 (emphasis added).

jurisdiction over those cases. **Establishment Clause cases are not among those over which the Supreme Court has original jurisdiction**. Because the lower federal courts are creatures of statute according to the Constitution,[36] the result is that Congress possesses the authority to deprive both the Supreme Court and lower federal courts of cases implicating the public acknowledgment of God.

That the Constitution grants Congress plenary power to regulate the jurisdiction of the federal courts is, by far, the view accepted by most constitutional law scholars.[37] While a handful of scholars have taken issue with this reading of the Constitution,[38] these alternative views have been widely criticized as illogical and policy-driven rather than being faithful to the constitutional text.[39] Moreover, the Supreme Court has approved congressional regulation of the federal courts' jurisdiction based on the Constitution's text since at least 1799, and Congress has employed this power recently in a number of legislative enactments, including as recently as last year.[40] Certainly a large number of those in Congress, and at least 13 members of this subcommittee, believe that it possesses this power as they have recently supported bills calling for removing the federal courts' jurisdiction in the areas of marriage[41] and the Pledge of Allegiance.[42] Thus, there can be no doubt of Congress's power to regulate the jurisdiction of the federal courts in the fashion proposed by the CRA.

Not only is preventing the federal courts from hearing cases concerning the public acknowledgment of God authorized under the Constitution, it is also the principled thing to do. As I have already explained, there have been numerous examples of acknowledgements of God throughout the history of our nation that, until the modern Supreme Court took them under consideration, were never considered to be violations of the First Amendment. No one's right to worship (or not worship) God according to the dictates of his conscience is infringed through public acknowledgments of God.[43] No one is forced to believe in God because of the words in the Pledge; no one is forced to become a Christian or a Jew because the Ten Commandments are displayed in a government building; no member of this body is forced to join in when the chaplain of

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[36] *See* U.S. Const., Art. I, § 8, cl. 9; Art. III, § 1.

[37] Appendix A: "Select Bibliography on the Constitutional Restoration Act" (hereinafter "Appendix A"), part I-A.

[38] *See* "Appendix A," part I-B.

[39] *See* "Appendix A," part I-C.

[40] *See* Appendix B: "A Brief History of Congressional Regulation of the Federal Courts' Jurisdiction" (hereinafter "Appendix B"). Some of the information in Appendix B may be found in William E. Dannemeyer, *Article III, Section 2*, THE WASHINGTON TIMES, Oct. 7, 2003, *available at* http://www.washtimes.com/op-ed/20031006-085845-5892r.htm.

[41] The Marriage Protection Act of 2004 (H.R. 3313), which prohibits federal courts from hearing certain types of marriage cases as well as any challenge to the Defense of Marriage Act of 1996 (DOMA), passed the House of Representatives by a vote of 233 to 194 this year. The MPA has 48 co-sponsors, including three members of this subcommittee: Representatives J. Randy Forbes, William Jenkins, and Mike Pence. Subcommittee members Mark Green, Melissa Hart, and Rick Boucher also voted for the MPA.

[42] The Pledge Protection Act (H.R. 2028) proposes to deprive the federal courts of jurisdiction over cases challenging the phrase "Under God" in the Pledge of Allegiance. The PPA has 224 co-sponsors, including ten members of this subcommittee: Representatives Spencer Bachus, John Carter, J. Randy Forbes, Elton Gallegly, Bob Goodlatte, Henry Hyde, William Jenkins, Ric Keller, Mike Pence, and Lamar Smith.

[43] *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, (June 20, 1785) in 5 *The Founders Constitution* 82 (P. Kurland & R. Lerner eds. 1987).

the House of Representatives, Rev. Daniel P. Coughlin, offers a prayer before a legislative session of Congress. Public acknowledgments of God profess God's role in the past and present development of our country, recognizing the first principle upon which this nation was founded: liberty under law, God's law. They do not violate the conscience of any individual and thus removal of jurisdiction from the federal courts to decide cases concerning such acknowledgments renders no legal harm to any individual. Moreover, cases concerning actual violations of the Establishment Clause may still be heard in the federal courts and cases involving the acknowledgment of God may still be reviewed in the state court systems, so the CRA does not foreclose an individual's right to legal redress of an actual harm.

Even though the action proposed in the CRA is constitutional and principled, some still question whether it is necessary. To answer, one need only look to the number of actual and threatened lawsuits occurring each year concerning "religious" displays and practices in the public square. This past year alone we have seen challenges to the Pledge,[44] the decisions of the City of Redlands and of Los Angeles County in California to remove depictions of crosses from their seals because of the threat of a lawsuit from the ACLU, the filing of a lawsuit to remove the display of a Bible in front of a courthouse,[45] a principal whose job is in jeopardy for speaking out about God,[46] and, of course, several more cases involving displays of the Ten Commandments.[47] There can be no doubt that as long as the federal courts continue to entertain complaints from "special interest litigators who are professionally hostile toward religion"[48] such as the ACLU and Americans United for Separation of Church and State, the right to publicly acknowledge God will continue to be in jeopardy.

B) The Supreme Law of the Land

Article VI of the Constitution provides that "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law

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[44] *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

[45] *See Staley v. Harris County*, __ F Supp. 2d __, __(S.D. Tex. Aug. 10, 2004).

[46] Boca Raton, Florida principal Geoff McKee is taking heat for speaking about God in at least three staff meetings and for attempting to start a Bible study at school. *See* Lois K. Solomon, *Boca principal under fire for making references to God*, THE SUN-SENTINEL, August 25, 2004, available at http://www.sun-sentinel.com/news/local/palmbeach/sfl-pmckee25aug25,0,236086,print.story?coll=sfla-news-palm.

[47] For example, there is a movement in Boise, Idaho to return a Ten Commandments monument the city recently removed from its public park. *See* Brad Hem, *Boise mayor says no to election on monument: Coalition moves forward with petition, says it might sue for public vote*, THE IDAHO STATESMAN, June 23, 2004, *available at* http://www.idahostatesman.com/apps/pbcs.dll/article?AID=/20040623/NEWS01/406230331. City officials in Everett, Washington are fighting against Americans United for Separation of Church and State to keep a Ten Commandments monument on city property. In a sign of the times, officials turned down an offer of free legal representation from a Christian organization because they did not want the defense to appear to be too religious. *See* David Olson, *Everett turns down help with monument fight*, THE HERALD, June 11, 2004, *available at* http://www.heraldnet.com/stories/04/06/11/loc_monument001.cfm. The borough of Hanover, Pennsylvania is also fighting Americans United to keep a Ten Commandments monument located in its public park. *See* Julie Sheldon, *Group helping to keep memorial: Hanover association gives $1,000 for fight to keep Ten Commandments monument*, EVENING SUN, June 10, 2004, available at http://www/eveningsun.com/cda/article/print/0,1674,140%7E9956%7E2204951,00.html.

[48] Muñoz, *Hearing, supra* note 25.

of the Land,"[49] and it requires that all "judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution.[50] Thus, the Constitution is the governing law and federal judges are required to rule in accordance with it because it is from the Constitution that federal judges derive their authority. Unfortunately, federal judges, even some of those on the United States Supreme Court, appear to be forgetting that oath as they have increasingly begun to look to international law—rather than the text of the Constitution—for guidance in their decision-making. This trend began in *Atkins v. Virginia*[51] in which the Court struck down state laws applying the death penalty to convicted murderers who are mentally retarded, and the trend continued in *Grutter v. Bollinger*[52] in which the Court concluded that student body diversity is a compelling state interest that can justify using race as a factor in university admissions without violating the Equal Protection Clause of the Fourteenth Amendment.

However, the reality that the Court is starting to substitute rulings of international law in place of the authority of the U.S. Constitution is best demonstrated in *Lawrence v. Texas*[53] in which the Court struck down state laws criminalizing homosexual sodomy. Over fifteen years before *Lawrence*, the Supreme Court declared in *Bowers v. Hardwick*[54] that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy.[55] In *Lawrence*, the Court boldly proclaimed that "[homosexuals'] right to liberty under the Due Process Clause gives them the full right to engage in [sodomy] without intervention of the government."[56] In overruling *Bowers*, the Court stated:

> "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[57]

Thus, the United States Supreme Court relied in part on foreign law to declare several states' laws unconstitutional even though in 1986 it declared that such laws did not violate the Constitution.

Such reliance on foreign law for constitutional decision-making directly contradicts Article VI's declaration that the Constitution is the supreme law of the land and it is a manifest breach of the judicial oath of office. So, as a secondary but related

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[49] U.S. CONST., Art. VI, para. 2.
[50] U.S. CONST., Art. VI, para. 3.
[51] 536 U.S. 304 (2002).
[52] 539 U.S. 306 (2003).
[53] 539 U.S. 558 (2003).
[54] 478 U.S. 186 (1986).
[55] *Id.* at 190-94.
[56] *Lawrence*, __ U.S. at __.
[57] *Id.* at __ (citation omitted).

measure, the CRA prohibits federal courts from relying upon any source of foreign law other than the common law of England in interpreting the United States Constitution. Violation of this provision by a federal judge is an impeachable offense. The problems attendant with applying international law in our judicial decisions range from those of legitimacy to the failure to take cultural differences into account,[58] but the specter of using foreign law to warp our fundamental principles, such as religious freedom, makes passing of the CRA all the more imperative. One need only look at France, where earlier this year all religious articles and symbols were banned in its state schools, to see the dangers attendant with following international precedents. France, like several of its European counterparts, is already a highly secularized society devoid of almost any references to God or even religion in general. We also appear headed down such a path, but reliance upon foreign law as authority for constitutional decisions would only serve to speed up that journey toward destruction. Thus, in a very real way this provision of the CRA also helps protect the right to publicly acknowledge God that holds such a vital place in this nation's history and continued survival.

III. Conclusion

I have attempted here to provide an adequate explanation of why the CRA is constitutionally permissible, practically viable, and socially vital for the protection of our right to publicly acknowledge God. The CRA would cover not only the issue of the Pledge, but also so many other issues that are dealt with by the federal judiciary under the guise of Establishment Clause jurisprudence. The members of this committee should be inspired to support this important piece of legislation and I hope you all will endeavor to convince your fellow Congressmen to do likewise. The bottom line is that CRA will halt the federal courts' distortion of the law of the Constitution in this area. The courts have been given ample opportunities to answer the call for returning to the objective standard of the Constitution as the rule of law for religious expressions in the public square. They have failed and in so doing have shirked their responsibility as expositors of the law. It is therefore up to **Congress** to make use of **its** responsibility as the law-making branch. I urge the Congress to answer the call to this responsibility on behalf of the People so that the fundamental right to publicly acknowledge God may be pulled back from the precipice of extinction it has been pushed to by the federal judiciary.

[58] Some scholarly critiques of the use of international law by the American judiciary are listed in *Appendix A*, part IV.

APPENDIX A: Select Bibliography on the Constitution Restoration Act

I. **Congressional Regulation of the Federal Courts:** The "traditional view" is that Congress has plenary authority to regulate and even abolish all jurisdiction of the lower federal courts and it has near plenary authority to restrict the jurisdiction of the United States Supreme Court.

A. The traditional view is explained and advocated in several pieces, including:

1. William J. Quirk, *The Fourth Choice: Ending the Reign of Activist Judges*, Chronicles, June 2004, *available at* http://www.chroniclesmagazine.org/Chronicles/June2004/0604Quirk.html.

2. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984).

3. James McClellan, *Congressional Retraction of Federal Court Jurisdiction*, 27 Vill. L. Rev. XX (1982); McClellan, *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government* 511-516 (3d ed. 2000).

4. Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 Vill. L. Rev. 959 (1982); Rice, *Withdrawing Jurisdiction from the Federal Courts,* 7 Harv. J. L. & PP. 13 (1984).

5. Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and Spirit of the Exceptions Clause*, 24 Wm. & Mary L. Rev. 385 (1983).

6. Julian Valasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 Cath. L. Rev. 677 (1997).

7. William Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229 (1973).

B. The traditional view has been challenged by a group of scholars who wish to ensure the dominance of the Supreme Court in American law:

1. Akil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985).

2. Lawrence Gene Sager, *Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981).

3. Mark Strasser, *Taking Exception to Traditional Exceptions Clause Jurisprudence: On Congress's Power to Limit the Court's Jurisdiction*, 2001 Utah L. Rev. 125 (2001).

4. Lawrence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129 (1981).

C. However, these critiques have been strongly refuted by newer traditionalists:

1. Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Penn. L. Rev. 569 (1990).

2. Martin Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. Pa. L. Rev. 1633 (1990); Redish, *Constitutional Limitations on Congressional Power to Control Jurisdiction: A Reaction to Professor Sager*, 77 Nw. U. L. Rev. 143 (1982).

II. Whether federal court opinions are the equivalent of law: That the opinions of courts are the law is, in essence the view taken by the U.S. Supreme Court in *Cooper v. Aaron*, 358 U.S. 1 (1958). However, some scholars have pointed out the fallacies of such a view.

A. Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 Harv. L. Rev. 4 (2001). Several articles discuss the fact that the other branches have interpretive responsibilities concerning the Constitution. Kramer is among the more noted of such scholars and argues that historically the Constitution was seen as a popular document that was meant to be interpreted by more than one branch. Kramer contends that the Supreme Court needs to be the final authority on constitutional issues, but thinks we have gone too far in proclaiming the Court the only authority on such issues.

B. Larry D. Kramer, *Marbury and the Retreat from Judicial Supremacy*, 20 Const. Comm. 205 (2003) (presenting a more refined version of Kramer's argument).

C. Gary Lawson, *Interpretive Equality as a Structural Imperative (or "Pucker Up and Settle This!")*, 20 Const. Comm. 379 (2004). Lawson argues for the view traditionally known as "departmentalism," which advocates equal interpretive powers for each of the three branches of government concerning the Constitution. Lawson also provides reasons why it is not necessarily logical that the Supreme Court should be the final authority on the Constitution.

D. Sanford Levinson, *Perspectives on the Authoritativeness of Supreme Court Decisions: Could Meese Be Right This Time?*, 61 Tul. L. Rev. 1071 (1987)

(supporting Meese's then-controversial claim from *The Law of the Constitution*); Levinson, *Constitutional Faith* 27-52 (1988).

E. Edwin Meese III, *The Law of the Constitution*, 61 Tulane L. Rev. 979 (1987). This is the touchstone piece on this subject, wherein Meese reminded people that the only binding authority the Supreme Court possesses is on the parties to the particular case on which it rules. Unfortunately, Meese later tempered his view after receiving a mountain of criticism not unlike what Chief Justice Moore has endured, conceding that judicial decisions are "the law of the land," among other things. Edwin Meese III, *The Tulane Speech: What I Meant*, Wash. Post, Nov. 13, 1986, at A21.

F. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law is*, 83 Geo. L. J. 373 (1994); Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L. Rev. 81 (1993). Paulsen also argues for a form of departmentalism, *i.e.*, that each branch of the federal government has co-equal power to interpret the Constitution independently, with no requirement of giving deference to another branch's interpretation. Specifically, he states that if the Supreme Court renders a decision with which the President disagrees on constitutional grounds, the President is at liberty to refuse to enforce the judgment.

G. Charles Warren, *The Supreme Court in United States History* 470-71 (1923).

IV. **The Use of Foreign Sources of Law**. Citations to foreign law as authority in American judicial opinions has been sparse and is of relatively new vintage. The Supreme Court began to make use of it in *Atkins v. Virginia*, 536 U.S. 304 (2002), a case in which the Court struck down laws applying the death penalty to convicted murderers who are mentally retarded, and in *Lawrence v. Texas*, 539 U.S. 558 (2003), the case which struck down state criminal laws prohibiting homosexual sodomy.

A. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int'l L. 57 (2004) (listing a myriad of reasons why it is principally and practically wrong to use foreign law for judicial decision-making).

B. Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (2003): This is the most famous current work on the subject, in which Judge Bork makes such observations as: "International law is not law but politics. For that reason, it is dangerous to give the name 'law', which summons up respect to political struggles that are essentially lawless."

C. Donald E. Childress III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 Duke L. J. 193 (2003) (Advocating cautious restraint in the use of foreign law because of the Supreme Court's role in our

system of government. While he does not suggest that foreign law should never be resorted to, he believes it should not be used with any frequency).

V. Literature on Impeachment and What Constitutes and Impeachable Offense:

A. Raoul Berger, *Impeachment: Constitutional Problems* (1973) (explaining that "high crimes and misdemeanors" is a term of art exclusive to impeachment that has a long history and has no relation to ordinary criminal law, nor does it require that an indictment could lie for the particular offense).

B. *The Federalist Papers* No. 65, at 330-31 (Gary Wills ed. 1982): Alexander Hamilton argued that impeachable offenses are "those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated Political, as they relate chiefly to injuries done immediately to the society itself." A judge's refusal to follow a duly enacted statute could certainly fall into this category. Any doubt on the subject is erased by *Federalist 81*, p. 411, in which Hamilton states:

> "It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been on many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments, in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be a danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords at the same time a cogent argument for constituting the senate a court for the trial of impeachments." (Emphasis added).

C. Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 Regent U. L. Rev. 111

(1998) (explaining the history and meaning of the impeachment clause and why it is okay to remove judges for extra-constitutional decisions).

D. Michael J. Gerhardt, *The Constitutional Limits to Impeachment and its Alternatives*, 68 Tex. L. Rev. 1 (1989). Gerhardt argues that impeachment is a political proceeding and thus Congress can decide what is an impeachable offense within certain limits of our system. Gerhardt does not believe that the "good behavior" clause provides a second means for removal (pp. 70-71). However, he also seems to think that impeachment of judges cannot be for "conduct central to the performance of a judge's constitutional obligations." P. 69.

E. Michael Gerhardt, *The Federal Impeachment Process: A Constitutional and Political Analysis* (2000): Here Gerhardt gives a more extensive argument along the lines that impeachment can be for both criminal and non-criminal offenses. He also states that the "good behavior" Clause was not intended to allow judges to be impeached "on the basis of a looser standard than the president or other impeachable officials, but rather that they may be impeached on a basis that takes into account their special duties or functions. Thus, a federal judge might be impeached for a particularly controversial law review article or speech, because these actions undermine confidence in the neutrality and impugn the integrity of the judicial process." Pp. 106-07. This passage seems to indicate that perhaps Gerhardt does believe that a judge could be impeached for misapplying the law, but it is unclear.

F. *Senate Documents: Cases of Impeachment* 1798-1904, vol. 32 (1912) (athorough collection of primary source material from impeachments which takes no position on what constitutes an impeachable offense).

G. Alexander J. Simpson, Jr., *A Treatise on Federal Impeachments* 30-60 (1916) (convincingly argues that impeachment includes more than just criminal offenses and does not include any opinion or evidence suggesting that the impeachment provision in the CRA is improper).

H. Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 Geo. L.J. 2193 (1998) (states that impeachable offenses clearly include more than just criminal offenses (pp. 2218-2219), and that what constitutes an impeachable offense is a non-justiciable matter (pp. 2222-2225)).

I. Emily Van Tassel & Paul Finkelman, *Impeachable Offenses: A Documentary History from 1787 to the Present* (1999): This is mostly a compilation of primary source material on impeachments that have occurred throughout the country's history. As such, the book does not reach any conclusions *per se* about what is an impeachable offense. It does point out that no judge has been removed for an improper interpretation of law.

APPENDIX B: A Brief History of Congressional Regulation of the Federal Courts' Jurisdiction

Court Cases

1. 1799 – *Turner v. Bank of North America*, 4 U.S. 8 (1799): Lower federal courts are courts of limited jurisdiction and it is presumed that such courts are without jurisdiction unless there is an enactment stating otherwise.

2. 1845 – *Cary v. Curtis*, 44 U.S. 236 (1845): A statute made final the decision of the Secretary of the Treasury in a tax case. A party argued that the statute represented an unconstitutional limitation on the judicial power of the courts. The Supreme Court rejected that argument, stating the following:

> [T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority, certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in no wise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.

   Cary, 44 U.S. at 245 (footnotes omitted).

3. 1850 – *Sheldon v. Sill*, 49 U.S. 44 (1850): A question arose as to Congress's authority to limit the jurisdiction of the lower federal courts. The Supreme Court stated:

> It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result,--either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.
>
> The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.
>
> Such has been the doctrine held by this court since its first establishment.

Sheldon, 49 U.S. at 448-49 (footnotes omitted).

4. 1938 – *Lauf v. EG Shinner & Co.*, 303 U.S. 323 (1938): Again dealing with the congressional power to limit lower federal court jurisdiction, this time in relation to issuing injunctions in labor disputes under the Norris-La Guardia Act of 1932, the Court reiterated: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." *Lauf*, 303 U.S. at 330.

5. 1943 – *Lockerty v. Phillips*, 319 U.S. 182 (1943): In this case the Supreme Court affirmed that Congress also has the power to restrict jurisdiction on a certain subject to a particular lower court and only that court, stating:

> By this statute Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other federal and state court. There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the

> authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe.

Lockerty, 319 U.S. at 187.

Examples from the 107th Congress of Legislation Limiting Federal Court Jurisdiction

1. 21st Century Department of Justice Appropriations Authorization Act (PL 107-273, § 201(a)).

2. Approval of World War II Memorial Site and Design (PL 107-011, § 3).

3. Aviation and Transportation Security Act (PL 107-071, § 117).

4. Intelligence Authorization Act for Fiscal Year 2003 (PL 306, § 502).

5. Public Health Security and BioTerrorism Preparedness and Response Act of 2002 (PL 107-188, § 102).

6. Small Business Liability Relief and Brownfields Revitalization Act (PL 107-118, § 102).

7. Terrorism Risk Insurance Act of 2002 (PL 107-297, § 102).

8. Trade Act of 2002 (PL 107-210, § 5101).

9. USA Patriot Act (PL-056).

10. 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States (PL 107-206, § 706):

    - Tom Daschle (D-S.D.) had an amendment added to this legislation protecting the Black Hills Forest by prohibiting the federal courts from handling challenges to timber-thinning to control forest fires in the forest. The Amendment provided, in part: "Due to the extraordinary circumstances present here, actions authorized by this section shall proceed immediately . . . Any actions authorized by this section shall not be subject to judicial review by any court of the United States."

Other Past Key Examples of Congressional Limitation on the Federal Courts' Jurisdiction

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Stripped federal courts of jurisdiction over Immigration and Naturalization Service (INS) decisions on whether and to whom to grant asylum. The act effectively permitted the INS to deny an individual asylum without the decision being reviewable by the federal courts.

2. The Prison Litigation Reform Act of 1996 (PLRA): Restricted remedies that a judge can provide in civil litigation concerning prison conditions.

3. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA): Limited the number of habeas corpus petitions that a state prisoner is allowed to file in federal court.

Mr. SMITH. Professor Hellman, let me just ask you for a point of clarification. Did I understand you to say that you thought Congress had the constitutional right to define impeachable offenses, to define the jurisdiction of the Federal courts even though you thought the bill that we are having a hearing on today was not good public policy.

Mr. HELLMAN. I think the comment you are referring to is a comment about the authority of Congress to define the jurisdiction of a lower Federal court.

Mr. SMITH. Correct.

Mr. HELLMAN. I think that is a very, very broad power. It is subject, I perhaps should have added, and as Professor Gerhardt has said, to the specific prohibitions in the Constitution, first amendment and so forth.

But apart from those specific prohibitions, I think that Congress has very broad power to say that this or that class of case cannot be heard in the first instance by the district courts.

Mr. SMITH. Thank you. That's what I thought you had said.

Professor Gerhardt, I read a book over the weekend not necessarily expecting it to have any interconnection to what we are called today. But the book was called Weapons of Mass Distortion by Brent Bozell. But in that book he does refer to the case that Judge Moore was so involved with. And according to a CNN, USA Today Gallup poll, 77 percent of Americans disapproved of the Federal court order to remove the Ten Commandments monument from public display.

My question for you is, suppose you have a Federal judge who regularly makes decisions that most of the American people and most of their elected representatives felt was really legislating from the bench, not deciding on the basis of strict constitutional interpretation. Absent a so-called court-stripping bill like the one we are considering today, what recourse do the American people's representatives have, if not Congress, to determine what is an impeachable offense, to determine what the jurisdiction of the Federal courts should be? Again, assuming you have a sitting judge—we are not talking about appointments, a sitting judge who routinely seems to legislate rather than—legislate rather than base his rulings upon a reading of the Constitution.

Mr. GERHARDT. How much time do I have to answer that question?

Mr. SMITH. Unfortunately, I am hoping you will answer it fairly quickly.

Mr. GERHARDT. Well, with all due respect, I think there are very limited means for addressing what the judge has ruled, what the judge that you just described has ruled. The fact is, that article III judges, particularly—well, I should say article III judges, including those on the Supreme Court of the United States, create precedents which are themselves part of the rule of law in this country. I think every source of decision supports that. And in the course of rendering constitutional interpretations, judges and justices will oftentimes make decisions that are not popular with majorities.

Mr. SMITH. I understand that, and I will even concede that. But my question was, what recourse do we have if a majority of the American people, a majority of their representatives feel that a

judge has overstepped his or her bounds? If it's not article III, what is it?

Mr. GERHARDT. You have a couple possibilities. One is a Constitutional amendment, as prescribed by article V. So article V offers one possibility. You can look to overturn the judicial decisions through a Constitutional amendment. For example, that's what the eleventh amendment does, that's what the fourteenth amendment does in part.

A second is to of course pass a resolution or even back a brief before the judges in question or the courts in question and ask them to reverse themselves.

Mr. SMITH. Of course, a resolution doesn't have the force of law; so that can be ignored as well. Okay. Thank you, Professor Gerhardt.

Obviously, Representative Dannemeyer and Judge Moore, you have a different take on article III. I want to give you the opportunity to answer two questions. One, if you feel there is more than what you have already said about Congress's power to, in fact, use article III to impose some restraints on Federal judges. The second question is not unrelated and is this: Do you feel that the Founding Fathers would have disagreed with a lot of what you would call and many people would call an anti-religious bias found among many of the Federal court decisions in the last 40 years, since 1962? Representative Dannemeyer, you can start.

Mr. DANNEMEYER. I don't think there is any question about that being the status of our lifetime. From 1789 to right after World War II, if you asked the leaders of elites of the country what is the basis on which America was founded, they would say God. And we acknowledged God exists. And that—taking away of that acknowledgment began in the case of Everson versus Board of Education in 1947, where the judge who wrote that opinion put a last clause, was that separation of church and State. He didn't quote a reference for where he got that because there wasn't any. If he had stated one, there was one in the previous century in the case arising out of Utah.

But separation of church and State means basically this: We will not have a national religion in America. That's the establishment and origin. We don't want any part of that. I don't seek that.

Mr. SMITH. That answers my question. Let me move on. And without objection, I will recognize myself for an additional minute so that Judge Moore can answer the question.

Mr. MOORE. Well, I think we have several options to use against the judicial branch, impeachment being one by Congress.

Mr. SMITH. Your mike still may not be on there.

Mr. MOORE. I'm sorry, I'm not used to turning it on.

We have several remedies against the judicial branch, impeachment being one, that Congress can defund the Federal courts. They create them, they can defund them.

But I think in this case it is clear what the remedy is, is article III jurisdiction.

And I will say this first. I disagree most strongly with the use of the words "court stripping." because, you see, this is a jurisdiction that the Federal courts do not have regarding the acknowledgment of God. Every State in this union, every one of the congress-

men here, California included, acknowledges God in their Constitution. All three branches of the Federal Government acknowledge God. The United States Supreme Court opens with, God save the United States and this Honorable Court. You all open with prayer. It's written all over these walls. And then the President declares national days of prayer.

The acknowledgment of God is not within the jurisdiction of the Federal courts. If someone were breaking in your house and stealing and you found out after 20 years, you wouldn't just say, just don't come into my house and take my silverware; you would say stay out of my house.

This is not a court stripping bill. This is one to regulate the jurisdiction when the judges have usurped that jurisdiction and gone outside.

I asked a very important question about definition, and I tried to give an example. It is because of that that you must understand they cannot, will not even today define the word religion. In my case in Alabama, the judge said he did not have the expertise. He said it was dangerous and unwise to define the word. When you can't define the word, you can't interpret the statute, you rule by your own feelings, and it is the rule of man not the rule of law. The rule of law is the Constitution of the United States and the first amendment and the Constitution of each State in which you live. That's what the rule of law is. And all of it acknowledges God. And I could go on for hours telling you about what James Madison said about the law of God and so forth.

Mr. SMITH. Thank you, Judge Moore.

The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. Thank you, Mr. Chairman.

Judge Moore, if it's appropriate, if you think it's appropriate to impeach a judge whose interpretation of the Constitution leads him to violate the terms of the Constitution Restoration Act, is it also appropriate to impeach a judge whose religious convictions and interpretation of the Constitution leads him to flagrantly violate the dictates of the superior courts by displaying a religious monument?

Mr. MOORE. First, Mr. Berman, this statute doesn't require impeachment of anybody. It says Congress can impeach. It repeats something that's already in the Constitution.

Mr. BERMAN. It's says it's an impeachable offense.

Mr. MOORE. It's an impeachable offense. If someone violates the Constitution, if someone takes an oath of the Constitution under article VI to uphold that Constitution and disregards it and rules according to foreign law, which is not the law they are sworn to uphold, yes, I think Congress can impeach them. And, indeed, in 1986, in Bowers versus Hardwick, they said sodomy was not a right under the Constitution by a majority of the Supreme Court. 17 years later, they found it in a European court of human rights.

Mr. BERMAN. And in deciding that it was not a human right, did they rely on any foreign laws and foreign customs and practices?

Mr. MOORE. Absolutely. They said in their opinion——

Mr. BERMAN. Should those judges be—should—was that—was relying on that an impeachable offense?

Mr. MOORE. When they go to swear to the Constitution to uphold it and the morality under that Constitution, and they go to foreign law to destroy that morality, absolutely they could be impeached.

Mr. BERMAN. What about when they go to foreign law to support that morality?

Mr. MOORE. They should not go to foreign law whatsoever, sir, if they are sworn to the Constitution of the United States.

Mr. BERMAN. Okay. What if there were—do you think Congress has the authority to prohibit a class of persons from bringing a Federal case, say under the equal protection clause, to say that no African Americans can bring a legal action.

Mr. MOORE. No.

Mr. BERMAN. Challenging a governmental policy on the basis that it violates equal protection?

Mr. MOORE. No, I don't think they have that authority.

Mr. BERMAN. What about atheists?

Mr. MOORE. Pardon?

Mr. BERMAN. What about atheists?

Mr. MOORE. Atheists are not a class of persons under the Constitution.

Mr. BERMAN. Because?

Mr. MOORE. Because just like Christians are not a class of persons under the Constitution.

Mr. BERMAN. All right. What about—so therefore?

Mr. MOORE. So Christians couldn't bring it and atheists couldn't bring it.

Mr. BERMAN. All right.

Mr. MOORE. We're talking about the definition of first amendment——

Mr. BERMAN. Then, for instance, you could pass a law stripping Jews of the right to bring certain kinds of Federal court actions?

Mr. MOORE. No, sir.

Mr. BERMAN. You just said they're not a class of—blacks are, and——

Mr. MOORE. That's a system of belief. You cannot forbid anyone because of their beliefs—the Government's actions must stay out of the beliefs of people. The beliefs are given by God. It's between God and man that those beliefs exist.

Mr. BERMAN. I asked you whether or not Congress could pass a law stripping African Americans of the right to bring Federal actions claiming that a particular policy violated the equal protection clause.

Mr. MOORE. And I said no.

Mr. BERMAN. And you said no. But then you said atheists could be stripped of that right because—and Christians could.

Mr. MOORE. Could be stripped of what rights, sir?

Mr. BERMAN. To bring a Federal action.

Mr. MOORE. Anybody can bring an action that they want. But there is no class of people of atheists that have—we're talking about freedom of thought and conscience. For them to recognize a class——

Mr. BERMAN. I'm talking about who has access to the Federal courts to raise a constitutional issue.

Mr. MOORE. Every person, no matter if he's an atheist or a Christian. But to recognize——

Mr. BERMAN. And what does this bill do?

Mr. MOORE. But to recognize people for what they believe——

Mr. BERMAN. What does this bill do?

Mr. MOORE. This allows every State and Federal official to acknowledge God as the sovereign source of law, liberty and Government. It is something that is historical, legal, and logical. That freedom—now listen.

Mr. BERMAN. What does it prohibit? What does this bill prohibit?

Mr. MOORE. It prohibits—it prohibits when they acknowledge God by its instance——

Mr. BERMAN. What does the bill prohibit?

Mr. MOORE. The bill prohibits Government from interfering with the freedom of conscience of individuals by acknowledging God as sovereign source of law, liberty, and Government. Atheist, Hindus, Buddhists, all have the right to identify with God without Government interference. It carries out the restoration of the first amendment.

Mr. BERMAN. Would this stripping of Federal jurisdiction—hear my question, please. Would this stripping of Federal jurisdiction apply to a challenge to a mandated school prayer?

Mr. MOORE. If it was mandated as a form of worship under articles of faith—it would depend on what the State officials said what it was done for. If it's acknowledging God as the sovereign source of law, liberty, and Government, not necessarily.

Mr. BERMAN. It requires a specific—it requires everyone to require a specific prayer to——

Mr. MOORE. Any requirement is absolutely establishment. That's right. Any requirement to tell people how they must worship is an establishment of the duties you owe to God and the manner of discharging them.

Mr. BERMAN. So this will not apply to——

Mr. MOORE. It would depend on——

Mr. BERMAN. This would not apply to a prescribed prayer, the stripping of federal——

Mr. MOORE. It would have to go to court to see the specifics. I would have to see the——

Mr. BERMAN. Could—I would like to hear Professor Gerhardt respond on this issue on the class of people.

Mr. GERHARDT. Well, first, I think there is no question at all that it would be violative of the fourth—excuse me, of the fifth amendment for Congress to create any classification that disadvantaged, for example, women, Jews, African Americans. So any court stripping measure that was directed against a particular class such as those I just listed would be, I think, unconstitutional.

But I might also take the liberty of adding that, with all due respect to Chief Justice Moore, that I don't think the Constitutional Restoration Act of 2004 does allow public officials to acknowledge God. That's not what it does. For example, State courts could strike it down. That's certainly a possibility. What this Act does is to precludes all judicial review in any article III court over the subject matter of this statute. That's what it does. And as a result, you can have 50 different States reaching different conclusions regarding

Federal rights and Federal claims. That kind of chaos, I believe, is prohibited by the United States Constitution. It ensures that the Supreme Court is here at the very least to guarantee the uniformity and finality in interpreting the Constitution and Federal laws.

Mr. SMITH. The gentleman's time has expired.

Before I recognize Mr. Bachus, let me explain to you all that I have to leave to go appear before the Rules Committee on behalf of a piece of legislation that's going to be on the House floor tomorrow, and I am expected to be there at 5:30, so I am going to have to leave. The Subcommittee will continue to be chaired by Bob Goodlatte of Virginia.

And now let me recognize the gentleman from Alabama, Mr. Bachus, for his questions.

Mr. BACHUS. I thank the Chairman.

I would ask Mr. Gerhardt, Dr. Gerhardt, and Mr. Hellman, who is the interpreter of the law and what is constitutional? Who interprets the law and what is constitutional?

Mr. GERHARDT. Everyone who takes an oath, of course, under the Constitution is in the position of interpreting that law for purposes of exercising their duties.

Mr. BACHUS. So every Government official has a duty to interpret the law themselves?

Mr. GERHARDT. But there is an interpretive authority that the United States Supreme Court has that ultimately I think many other officials cannot supersede. It has the authority to say what the law is.

Mr. BACHUS. And who is that?

Mr. GERHARDT. The United States Supreme Court has the authority to say what law is.

Mr. BACHUS. They are the final interpreter or arbiter of what the law is?

Mr. GERHARDT. In many cases they are.

Mr. BACHUS. Professor Hellman, do you subscribe to that, that the Supreme Court and the Federal courts are the final interpreters of what the law is and what is constitutional and what is not?

Mr. HELLMAN. Well, I think we do have to distinguish between the Supreme Court and other Federal courts.

Mr. BACHUS. Okay.

Mr. HELLMAN. For example, decisions of lower Federal courts are not binding on State courts. But that is an example of a broader point that I might make just to supplement what Professor Gerhardt has said. We have many questions of constitutional interpretations that are very difficult, that will be disputed by people, people in good faith.

Mr. BACHUS. Oh, sure. And when there are these disputes, who is the final arbiter?

Mr. HELLMAN. We have to have a system. The system that has developed over 200 years is that in the end, the Supreme Court makes those judgments.

Mr. BACHUS. Okay. And you say it is developed over 200 years because certainly, at the start of this country under the Constitu-

tion, the Supreme Court was not perceived as the final arbiter of what the law is and what is constitutional; is that right?

Mr. HELLMAN. It was unclear, because the constitutional questions that arose didn't come to the Supreme Court in the way that they routinely do today.

Mr. BACHUS. Professor Gerhardt.

Mr. GERHARDT. Of course, I agree with that, but I would also add that I think some of the early decisions of the Supreme Court are consistent with—are themselves historical practices and reflect traditions under which the Supreme Court does resolve constitutional conflicts.

Mr. BACHUS. So they actually began to exercise jurisdiction and become the final arbiter of what the law was?

Mr. GERHARDT. That was permitted by the Constitution.

Mr. BACHUS. Well, let me ask you this: Would you agree or disagree with Thomas Jefferson when he said—he was responding to someone when they asked him if the Supreme Court or the Federal courts were or the judges were—well, he actually asked if the Supreme Court was the final arbiter or interpreter of what was constitutional and what was not. He said, you seem to consider that Federal judges are the ultimate arbiters of all constitutional questions, a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power and privilege. The Constitution has erected no single tribunal, knowing that to whatever hand is confided with the corruption of time and party, its members become despots. If Federal judges become the final arbiters, then indeed our Constitution is a complete act of suicide.

Do you agree with what Thomas Jefferson said, or is he indicating there that he is very uncomfortable with this single tribunal becoming the——

Mr. GERHARDT. I could agree with President Jefferson because what he is saying is there is no final arbiter of all—that is the quote you just gave—of all constitutional questions, and the fact is not all constitutional questions come before the United States Supreme Court. Some are decided finally in other fora. But when questions do come before the United States Supreme Court, its interpretations of the Constitution——

Mr. BACHUS. Oh, when they do come before it. But I am saying he obviously—Abraham Lincoln—I will close with this. He said the—this was in his first inaugural address. The candid citizen must confess that if the policy of the Government upon final questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, that people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of an eminent tribunal.

Do you agree with his statement?

Mr. GERHARDT. Again, I can agree with it in part because I know that President Lincoln was talking in part about Dred Scott. And one thing that President Lincoln did——

Mr. BACHUS. But he doesn't talk about that here. He just says that if we give that right to the Supreme Court, then we will have ceased to be our own rulers.

Mr. GERHARDT. Right. But President Lincoln also acknowledged more than once, in fact repeatedly, he was a lawyer after all, that the critical factor, of course, has to do with who the parties to a particular case happen to be. And for President Lincoln, a great—one of things that mattered a great deal was the fact that he felt he had the unilateral authority to interpret the law with respect to sort of the war conditions under which he was operating

Mr. BACHUS. I understand that he, on many occasions, just disregarded it.

Mr. GERHARDT. But I don't believe he did disregard the Court. In fact, what he tried to argue the Courts precedent did not involve his conduct—he took great pains to do this.

Mr. BACHUS. Well, he argued that they weren't binding on him.

Mr. GERHARDT. Because he felt that he was not a party to those lawsuits.

Mr. BACHUS. I mean, he acted in disregard of them for whatever reason.

Mr. GERHARDT. But I think that is a very significant reason. Technically you are disregarding——

Mr. BACHUS. Well, he had a reason.

Mr. GERHARDT. Well, with all due respect, I don't think it is disregarding, at least from his point of view.

Mr. BACHUS. No. I agree. I don't think he saw it as disregard. I think he figured they didn't have the power to do that.

Mr. GERHARDT. He felt he was not obliged to follow a case in which he wasn't a party, in which his office was not really involved or his particular powers were not directly challenged.

Mr. BACHUS. Okay. Thank you.

Judge Moore had his hand up, if I could let him.

Mr. GOODLATTE. The time of the gentleman has expired.

The gentlewoman from California is recognized for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman.

I would like to request Mr. Moore or any other panelist who would like to respond to this question, do you agree with the proposition in Professor Gerhardt's testimony that the only way that a decision of the Supreme Court may be overturned is through a constitutional amendment, or when the Supreme Court itself overrules a prior opinion of the Court? If you agree—well, if not, why not? And if so, explain, then, how this bill possibly could be constitutional.

Mr. DANNEMEYER. I will just read to you——

Ms. WATERS. My friend Mr. Dannemeyer.

Mr. DANNEMEYER. Thank you.

Just very briefly. We do not by this legislation seek to do anything to the United States Constitution. All we seek to do is to utilize an existing provision of the Constitution, article III, section 2, which says Congress has the authority to except from the jurisdiction of the Federal court system such subjects as it chooses to except. That is the authority this Congress has. So I—constitutional amendment, of course, is one course. The other course is what the Constitution says.

And the challenge that I have shared with the Members is very clearly do the elected leaders of this country have the courage, the political courage, to tell to the nine Justices of the U.S. Supreme

Court, who literally have stolen the Judeo-Christian heritage on which this Nation was founded. That is why we are here.

Ms. WATERS. Has it ever been done before?

Mr. DANNEMEYER. There has been a series of decisions over the last half century that those rascals across the street have been in their mischief.

Ms. WATERS. Has this ever been done before?

Mr. DANNEMEYER. Twelve times in the last Congress that article III, section 2 was used by this—by the Congress, the previous Congress, to except areas from the jurisdiction of the Federal court system. Twelve times. And in the papers that I have filed with you, you will find a history of the use of article III, section 2 by Congress from 1789 to 1992. It is an op/ed piece. It was published in the Washington Times last September, and it is among your packet.

Ms. WATERS. What you are telling me is if you have documentation that decisions of the Supreme Court have been overturned by the Congress of the United States as relates to——

Mr. DANNEMEYER. No. I am saying that Congress exercised the authority under article III, section 2 12 times in the last congress to except the subject matter of those areas from the jurisdiction of the Court.

Mr. BERMAN. Will the gentlelady yield?

Ms. WATERS. Yes, I will yield.

Mr. BERMAN. Dealing with interpretations of constitutional provisions? Cite me one situation where the Congress removed the jurisdiction of the Court to decide a constitutional question based on unhappiness with previous Supreme Court decisions.

Mr. DANNEMEYER. We need to recognize——

Mr. BERMAN. Cite me one example. Where in your——

Mr. DANNEMEYER. Let me respond.

Mr. BERMAN. Well, you have a Washington Times article.

Mr. DANNEMEYER. Let me respond. We need to acknowledge the difference between the interpretation of the U.S. Constitution by the U.S. Supreme Court and the authority of Congress utilized in article III, section 2. Those provisions are sometimes in conflict.

Mr. BERMAN. All the gentlelady requested was interpreting that Constitution, in cases arising under the Constitution, has the Congress ever removed jurisdiction from the Supreme Court?

Mr. DANNEMEYER. Well, I think it is—you can go down those 12 cases.

Mr. BERMAN. That doesn't make it good or bad. She just asked whether.

Ms. WATERS. I don't think so. I think that's——

Mr. DANNEMEYER. Well, see, article III, section 2, we need to understand something. It doesn't say that there is a limitation on the power of Congress to use that section. You are trying to suggest, if I may make this addition, Congress can use article III, section 2 for little matters, but not for matters of substance. For example, if the U.S. Supreme Court has interpreted what the U.S. Constitution means, well, Congress can't touch that. Nonsense. Congress has the authority to correct an erroneous interpretation of the first amendment by the U.S. Supreme Court which says, in effect, that God doesn't exist.

Ms. WATERS. What little matters would you direct us to where it has been done?

Mr. DANNEMEYER. Well, just use the power and see what happens.

Ms. WATERS. Yes.

Mr. Moore.

Mr. MOORE. Ma'am, first let me clarify something. The premise upon which your questions are asked is that we are trying to overturn any decision of the Supreme Court or Federal district court. That's not the purpose of this bill. Yes, constitutional amendment is a way you can overturn a decision. And article III is not trying to overturn a decision.

But as far as the use of article III in the courts, to stop the Supreme Court, it has been used many times. And one particular time was in the McCardle case in 1868. There was an 1867 statute that authorized the Supreme Court to hear appeals from denials of writ of habeas corpus. A Mississippi writer had spoken out against the Reconstruction efforts of the Congress, and Congress moved to repeal that statute.

This is what Chief Justice Salmon P. Chase said about article III restrictions: We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution, and the power to make exceptions to the appellate jurisdiction of this Court is given by express words. What then is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction, the Court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining of the Court is that of announcing the fact and dismissing the cause.

Now, what we are trying to clarify in this constitutional restoration act is the right of Justices on the Supreme Court to say, you cannot, as a State, acknowledge God. Every State does. All three branches of the Federal court do. The first amendment does not give them that right. That is the law. And the reason it is so important to interpret the words of the statutes to define the words is you can't interpret the law unless you define the words.

It is a simple thing. If—I could use many examples, but if you walked down by a creek, and you picked up a stick, and you were arrested for fishing without a license, and you went before a judge and he said, I am going to have to fine you and put you in jail, and you said, why, he said, you are fishing without a license, he said. You said, Judge, I wasn't fishing without a license. I didn't have a line on the stick. I didn't have a weight, a hook; didn't have any bait, and I wasn't in the water. If the judge said, but, Mr. Jones, sir, or, Mrs. Jones, you could kill a fish with that stick, couldn't you? I am going to have to put you in jail. Would he be interpreting law? No, he would be making law. And that's exactly what the Supreme Court does when it forbids the acknowledgment of God.

The first amendment's only purpose was to allow that freedom to worship God, and it is from that worship of God that we get freedom of conscience to do and believe. That's why there is no class of citizen called atheist or Christians or Buddhists. They are all free to believe, because Government can't interfere with their right

to believe and worship. That's the purpose of the first amendment. And the purpose of the first amendment was to prohibit the Federal Government, and especially the lawmaking branch, from interfering with that right. They never anticipated that the Supreme Court would be making law. And that's exactly what happened.

And how did they make law? Not by the first amendment. Congress shall make no law respecting an established religion. They do it by test, tests that have no relevance to law. Law is supposed to be a prescribed rule by the supreme authority of the State commanding what is right and prohibiting what is wrong. You are supposed to know what the law is. When you go out on the highway and you proceed down the highway, and it is marked 60 miles an hour, you know how fast you can go. If that law just says, don't go fast, and you have to come before a judge to find out whether you violated that law or not, then you are subject to tyranny. And that's exactly what the first amendment stands for.

The first amendment doesn't prohibit the acknowledgment of God. The very definitions under it acknowledge God. And yet they say you cannot acknowledge God. That was done in this case. I have my opinion right here. Federal courts do not have that authority. Nor does the Supreme Court. And it is the right of Congress who recognizes acknowledgment of God to be the right of every person. It doesn't discriminate against anybody.

Ms. WATERS. My time has long since been up. I mean, we could debate this for a long time. Thank you very much, Mr. Chairman.

Mr. GOODLATTE. I thank the gentlewoman.

The gentleman from Indiana is recognized for 5 minutes.

Mr. PENCE. I thank the acting Chairman and the Committee and all the witnesses for this very stirring and, in many ways, engaging debate. I was one, along with Congressman Aderholt, who authored the legislation. I was one of two original cosponsors of this legislation, so my biases should be fairly obvious from the beginning. This is one of those hearings, though, Mr. Chairman, that I do think that if the Founding Fathers could wander onto Capitol Hill for a year, this would be one of those hearings where their mouths would just hang open.

I think just George Washington, Thomas Jefferson, the quote that my colleagues Mr. Bachus used was so on point. I think the idea that the freedom of religion would evolve in this country into the freedom from religion, I think, would astound the Founders of this country. And there has been some acknowledgment of that by the very distinguished experts who have spoken in opposition to this legislation is—that particularly heard Mr. Gerhardt speak, who has been very impressive. And back in my days in law school I would have loved to have been in your class, and I would have sat on the front row.

But you made the comment that over time, that these matters have been entrusted to the Federal judiciary, and that's absolutely correct. I grant the point. And in your dialogue with Mr. Bachus—but you suggested, and I think this is exactly right, that if, in fact, the Constitution Restoration Act became law, the 50 States in this country would be left entirely on their own to define what constitutes acceptable religious expression in the public square; which sounds for all the word like 1776 to me.

When you study the 13 Original Colonies, there was a wide variety—and I think 11 of the 13 original States had established religions. But there was a wide variety of religious expression that was approved and sanctioned and in some ways mandated, if the truth of that history be told.

And I—so, I go back to the idea of the Founders being stunned at an official Washington that feels that it is the duty of the Court to—irrespective of the clear language of article III, section 2, clause 2, that it is nevertheless the duty of the Court to exclusively harmonize what is acceptable in the public square with regards to the acknowledgment of the Creator that is referenced in the Declaration of Independence.

Now, as to my colleague Mr. Berman, who I would come just to hear him today, his comment about this being—I think if I am quoting you correctly, I think the reference was to this being a reactionary piece of legislation. Well, I—it probably is to some extent. It is a reaction to banning nondenominational prayer from the New York schools in 1962. It is a reaction of the Court's removing the 10 Commandments from public school walls in 1980, a reaction to striking down a period of silence in the *Wallace* v. *Jaffrey* case. It is a reaction to barring prayers at public school graduations in 1992. Now, it is a 42-years-in-coming reaction, which is not a reflexive reaction. One could maybe acknowledge that Congress in coming to this place has come in a fairly deliberate manner and in a thoughtful way. And let me just close by saying that.

Mr. BERMAN. Would the gentleman yield just on this question, just since you mentioned my name?

Mr. PENCE. Yes, I will. I will yield to my friend.

Mr. BERMAN. In—first of all, as you point out, reactionary can be good, and reactionary can be bad. I think we disagree about this particular reaction, but that's all right. But you mentioned when they banned nondenominational prayer in the New York City Schools——

Mr. PENCE. Right.

Mr. BERMAN. —what if they had banned a denominational prayer?

Mr. PENCE. But they didn't though.

Mr. BERMAN. I am just curious. Does this bill strip the Federal courts of the power to hear cases challenging a denominational——

Mr. PENCE. Let me respond to that, reclaiming my time, because I think it is a very excellent question. This bill, as I have been given to understand, and the plain language of the legislation simply denies from the article III courts the ability to except cases where the acknowledgment of God—which was all the New York City public school prayer did. The acknowledgement of God is the point in controversy. I think that under the long history of cases, there would be very—it would be very difficult to say that the courts could not consider sectarian prayer or the imposition of an established religion, and I frankly, as a Libertarian, would support that jurisdiction strongly.

What this legislation speaks to, Mr. Berman, I believe, is simply the ability of people in the public square, including public officials and States for that matter, to simply acknowledge God, as our

Founders did, as the source of law and as, in a very simple sense, the ethical monotheism upon which this Nation was founded.

Mr. BERMAN. Would the gentleman yield further?

Mr. PENCE. Yes.

Mr. BERMAN. Context is important. The chief witness for this bill was involved in the case involving not simply the acknowledgement of God, but a belief that God also laid out 10 Commandments.

Mr. MOORE. No, sir. I have got the opinion right here. I can read the first paragraph and the second paragraph. The judge in this case said the 10 Commandments are not improper necessarily in a public office building, he said, but when you do it with the specific purpose and effect, as the Court finds from the evidence, of acknowledging the Judeo-Christian God as the moral foundation of law, you have committed a constitutional violation. In his last paragraph he said the same thing. It was not about the 10 Commandments. It was not about a rock.

Mr. BERMAN. No, I know it wasn't. It wasn't about the 10 Commandments historically. The question is whether your notion and the proponent's notion of acknowledgment of God involves something more than the acknowledgment of God, because if you acknowledge God, you have to acknowledge the following things about God, and I—and no one can challenge forcing me to acknowledge God that way.

Mr. PENCE. Reclaiming my time. I think——

Mr. GOODLATTE. The gentleman is recognized for an additional minute.

Mr. PENCE. I thank the Chairman for the courtesy, and I will close.

The purpose here is while the gentleman raises a number of points about other issues that may become in controversy or be of interest to individuals, I know that millions of the American people and I know tens of thousands of my constituents across the heartland of Indiana are deeply troubled in their hearts about this intolerance of the simple and profound acknowledgment of God as the cornerstone and the foundation of our law and our liberty. And the purpose of this legislation, very simply, is to restore that basic freedom of expression that I believe was contemplated by our Founders and is in keeping according to the express language of the Declaration of Independence, as we open this Congress every day in prayer, as we did today, and we open the Supreme Court in prayer. Allowing and ensuring that the courts will not meddle with the ability of individuals in the discharge of their public duties in the public square to acknowledge that same good that we so freely acknowledge in Washington, D.C., is the aim of this legislation. And I yield back my time.

Mr. GOODLATTE. The time of the gentleman has expired.

We will now recognize the gentleman from Virginia Mr. Forbes for 5 minutes.

Mr. FORBES. Thank you, Mr. Chairman. And I do thank all of you for being here. Many of you have been here on panels before, and this is just—it is an honor for me just to sit here and listen to you and be able to hear your thoughts and the distinguished people on this panel, and I am always so impressed with them. They come with great quotes, and I am going to get my legislative

director Andy Halataei to get me some of those nice quotes to bring in here and cite.

But, you know, so many times one of the things that just baffles me is this, that process ought to be designed to get us to the truth. And that's what we should be seeking, but yet so often we spend so much time on process and talking about process that we never get to the truth. And sometimes we even get to the point that if we can talk long enough, we can run out the clock, and we never get to ask the tough questions about what the truth really is.

And I just want to ask you, members of the panel, today if you can give me a yes or no answer on this one, because I have only got 5 minutes. But from what I read on this bill, it talks about the acknowledgment of God as the sovereign source of law, liberty and Government. And my question to you today is do you believe that God is the sovereign source of law, liberty and Government? And if each of you could just give me a yes or no answer.

Mr. Moore, since you have got your hand up, I will go to you first.

Mr. MOORE. Yes.

Mr. FORBES. Mr. Dannemeyer.

Mr. DANNEMEYER. Yes, I do.

Mr. FORBES. Professor Hellman.

Mr. HELLMAN. I don't think my view on that is of any importance or should be to this Committee.

Mr. FORBES. Well, it could be important to me, but if you don't want to answer that, I certainly understand that. I mean, when you come before us and testify, we like to know what your feelings are, and if you don't want to answer it, we certainly understand, and I appreciate that. But that's a question that I would posit to you, and if you don't want to answer it, certainly you don't have to. We are not compelling anybody to answer.

Mr. HELLMAN. Thank you.

Mr. FORBES. Mr. Gerhardt.

Mr. GERHARDT. Representative Forbes, I am actually a deeply religious person and a—spirituality is very important in our household. We are going to celebrate Rosh Hashanah soon ourselves. But I have always made a practice of not talking about my religion publicly.

Mr. FORBES. Okay. Let me ask you this question. Do you believe that the Supreme Court or the fellow judiciary has before been wrong in their interpretation of the United States Constitution? Is that a question that you feel you can answer?

Mr. GERHARDT. Yes, sir. We know the Supreme Court has certainly made its mistakes; for example, in Dred Scott, overturned by constitutional amendment.

Mr. FORBES. Okay. But let me ask you this. How do you know they were not wrong? And the reason I say that, because if you tell us that what the Supreme Court says is the Constitution, what they say is wrong, how can you say that they are wrong at that particular point in time?

Mr. GERHARDT. Because I believe the Constitution allows us to say that. I think until such time as there is an amendment, they were wrong.

Mr. FORBES. So until such time as there is an amendment, then what they say is the Constitution, and they are not wrong is that what you are saying?

Mr. GERHARDT. I think that Supreme Court interpretations of the Constitution are part of the constitutional law of this country and, therefore, under the supremacy clause would be binding on an inferior——

Mr. FORBES. But that was not my question. My question is whether or not they were wrong. And your comment was that they were wrong at times or that they were not wrong? How can they be wrong, is my question to you, if what they say is the Constitution? How can you say they were wrong? We may amend it and change it later, but how do you say they were wrong when they rendered that decision? What do you compare it to to say they were wrong?

Mr. GERHARDT. I think there we maybe perhaps even come full circle. You mentioned process. And there is a process by which mistakes determine that, and article V sets forth that process.

Mr. FORBES. Okay. On the process.

Mr. HELLMAN. Mr. Forbes, I'd like to add to that, because it goes back to the original question about not being concerned enough about truth and focusing too much on process. I think Professor Gerhardt has addressed that. There are many questions on which we will not be able to agree, you or I or any two citizens or any 10 citizens, on what is the truth. And therefore, we have a process for establishing the answer, at least provisionally, in an authoritative way, and that's the way the system has developed, that the Supreme Court does that until superseded by constitutional amendment or the Court's own rejection of its prior ruling.

Mr. FORBES. Judge Moore, you had a comment?

Mr. MOORE. Yes, sir. I can't, right now, remember the judge—Justice on *Dred Scott* that dissented, but, of course, we know Abraham Lincoln didn't follow the ruling. And we know one—two Justices dissented, one of which said this, and this is how you know the Supreme Court's wrong on the Constitution: When the strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution. We are under a Government of individual men who for the time being have the power to declare what the Constitution is according to their own views of what they think it ought to mean.

That's exactly what the Supreme Court and the Federal district courts are doing today with regard to the first amendment. It does not forbid acknowledgment of God. I will agree with Mr. Berman, and I couldn't leave this hearing without agreeing with Mr. Berman, that no Government can mandate the duties you owe to the Creator and the manner of discharging it. They can't tell you how to pray. But the acknowledgment of God is not the establishment the religion. They can't tell you how to pray, because that is—that is completely foreign. That would establish the duties you owe to the Creator and how you perform those duties. But to acknowledge God as the sovereign source of law, liberty and Government is not

the establishment of religion and cannot be forbidden by the Federal courts.

Mr. FORBES. I have a red light, so thank you, Mr. Moore, and thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

Well, I want to thank all the gentlemen on this panel for their contribution. I have a few questions myself. This has been a very enlightening debate, and I think you can tell by the debate that we have right up here on the dais that this is not something that's going to be resolved easily.

But I will tell you that I very much sympathize with the sentiments of the gentleman from Indiana, and I am troubled by some of the observations about some of the solutions that the Congress has to addressing the courts when the Congress, as the elected representatives of the people, feel that the courts have strayed their boundaries.

Professor Gerhardt, you started out your remarks by citing Justice Scalia in his comments about the Independent Counsel Act, calling that a wolf coming as a wolf, and saying this legislation is in the same manner. You then went on to say that you felt that there were appropriate circumstances in which the Supreme Court and other courts could look to the guidance of foreign court decisions in interpreting the U.S. Constitution. I must tell you I am deeply troubled by that. Did you want to respond to that? Is that an accurate——

Mr. GERHARDT. I don't think that's quite what I said, sir.

Mr. GOODLATTE. What did you say?

Mr. GERHARDT. What I said was, there is a paragraph in my statement, I don't have it front of me, in which we talk about the fact that reference to foreign law has been certainly done in some Supreme Court cases, but in almost every instance in which it is done, Justices have taken great pains to minimize their reliance on it; in fact, even to say, they are not going to attach any weight to it. That's basically I think what I said. I am not—I don't believe—I mean, I am not saying that——

Mr. GOODLATTE. Well, do you object to the provision in this bill that prohibits that, that effectively removes the jurisdiction of the Court to rely upon such opinions?

Mr. GERHARDT. Well, the part of the bill that concerns me about foreign law the most is the one that would make a judge or Justice impeachable for relying on it. The fact is that every reliance that I know of has been de minimis, and it has only been probably less than a handful of times, and it is troubling to me in any event——

Mr. GOODLATTE. I am referring to title 2, interpretation, which simply prohibits the consequences of violating that are contained in the enforcement section, title 3. Are you objecting to title 2 of the bill?

Mr. GERHARDT. I am sorry. Do you mind if I——

Mr. GOODLATTE. I have a particular interest in this because I have introduced legislation along with Congressman Feeney, another Member of this Committee, which does not have the enforcement provisions of title 3, but has a sense of the Congress, a resolution that the Court should not rely upon foreign decisions in arriving at the interpretation of the U.S. Constitution. And I am

leading back to my own citing of Justice Scalia, who is appalled by that practice, as you may well know, in his dissent in the *Adkins* v. *Virginia* death penalty case. He said that Justice Stevens' invoking the authority of, quote, the world community was irrelevant, and he ridiculed the practices of the world community whose notions of justice are thankfully not always those of our people. Similarly, in the Lawrence case, he said the Court's discussion of these foreign views, ignoring, of course, the many countries that have retained criminal prohibitions of sodomy, is meaningless dicta, dangerous dicta, however, since this Court should not impose foreign moods, fads or fashions on Americans.

Mr. GERHARDT. Well, again, my concern with this is that this makes any reliance whatsoever, even if it is appropriate, even if it is logical in the context of the case, an impeachable offense. For example, my recollection of Justice Stevens' opinion, and, again, I don't have it in front of me, so I could be mistaken, is that the reference he makes is in a footnote, and then he goes on to suggest that he rises in that cause because he is trying to determine what's cruel or unusual, and he is suggesting, well, it may look odd or unusual in comparison to what's happening elsewhere in the world, but then he says basically he is not going to rely on that.

Mr. GOODLATTE. Well, what if we simply said it is a violation of statute to do that?

Mr. GERHARDT. A violation of Federal statute to have a footnote like that?

Mr. GOODLATTE. To interpret and apply to the Constitution the directives, policies, judicial decisions or any other action of any foreign state or international organization.

Mr. GERHARDT. I think that it is very—again, I would have to admit to being very troubled, because the fact is that there are—foreign authorities were part of what the Framers had to consult at the time they drafted——

Mr. GOODLATTE. All right. Well, let me—I want to get to Professor Hellman with one last question. I will recognize myself for a—one additional minute.

I am a little concerned about something that I think did not follow in your own analysis of whether or not it was appropriate for the Congress to exercise its impeachment powers to remove Justices for bad decisions, something, to my knowledge, we have never done, but certainly increasingly talk about given the fact that we have decisions coming down we think are further and further from what we think was the intent of the Founding Fathers or the intent of the public today in terms of what our Constitution means. But your analysis was that we can't, and I think you are correct in this, dock the pay of judges for making bad decisions. We can't give them a cut in pay by even 1 penny, as you noted, if we don't like their decisions. Therefore, you said it followed that we certainly wouldn't be able to remove them from office for doing that. On the other hand, if a judge engages in bribery, we can't dock his pay even a penny to punish him for that action, can we?

Mr. HELLMAN. No, but you can——

Mr. GOODLATTE. No. So it doesn't follow then. We certainly can remove him, and I think you'd agree with us that in appropriate circumstances should remove a judge for engaging in bribery.

Mr. HELLMAN. Yes. And the difference lies in the reason the compensation—the provision in the Constitution prohibiting the Congress from diminishing compensation is in there. The reason that is in there is to protect the independence of the judiciary, and the specific independence that they were concerned with was independence from Congress. They didn't want judges to be—to feel that they had to decide cases in a way that would please Congress.

Mr. GOODLATTE. I don't think you can make that step. I think that if you have a judge who repeatedly and willfully constantly enters outrageous, erroneous decisions, I don't believe that the Constitution would prohibit the Congress from removing that individual from office. It is an extreme remedy, and it is a remedy that requires considerable showing on the part of the Congress, action by the House, and then a two-thirds vote from the Senate to effectuate the removal from office.

So it is not an easy remedy to pursue. But I don't think you can conclude from the fact that we can't reduce the pay of judges that we want to remove judges from office for a variety of actions that many of us would regard as misfeasance of office when they make outrageously—decisions that are outrageously contrary to the Constitution that we were sworn to uphold, just as they are.

Mr. HELLMAN. If I might respond briefly to that, because it actually goes both to the impeachment provision and to the jurisdiction restricting provision. We don't have to call it jurisdiction stripping or court stripping, if people are bothered by that. Most of these remedies have been proposed, but from time to time——

Mr. GOODLATTE. Well, the court-stripping remedy has been used.

Mr. HELLMAN. Not the way this bill would do.

Mr. GOODLATTE. No. I agree with that.

Mr. HELLMAN. It has not been successful even though——

Mr. GOODLATTE. But there is nothing in the Constitution that draws a line between the ways in which Congress has utilized it and the ways that this bill proposes to utilize it.

Mr. HELLMAN. Well, what I would like to suggest is this: That the fact that bills of this kind and even impeachment have been proposed from time to time, but have always been rejected in the end, that's a long history. And history creates a tradition. And I think one of the things that Congress should be respectful of is tradition, not just because it is old and has a lot of history behind it, but because the fact that so many of your predecessors have been tempted by bills like this, have looked at them and in the end decided they didn't want to do it. It seems to me that history should carry some weight. Now, that's not to say that people in the past were right about everything, but the cumulative weight of their judgments, it seems to me, is usually a pretty good guide.

Mr. GOODLATTE. Well, I have obviously exceeded my time as well, and I will take note of Ms. Waters' observation that this debate could persist on and on. But I will close by saying that I fully agree with you that we would like people to follow the full weight of history and tradition. We had 50 State laws that prohibited the desecration of the American flag. That history and tradition was thrown out by the courts in disregard of that. And I think the same thing, the same thing is very much true of what the Court's recent

history of decisionmaking in this area of religious freedom has been. And so I——

Mr. BERMAN. Will the gentleman yield?

Mr. GOODLATTE. I will yield to the gentleman.

Mr. BERMAN. Well, when Justice Scalia, relying on the American Constitution, decided that that was speech, I didn't think it was callous disregard.

Mr. GOODLATTE. But I will throw Justice Black back at you, who also determined in a previous decision that he didn't see any reason why the Supreme Court should interfere with the rights of the States to pass those laws. I am not going to take any statements from the witness.

Mr. BERMAN. And you are head of the new technology caucus?

Mr. GOODLATTE. Absolutely. Absolutely. And you are a Member. With that, gentleman——

Mr. BACHUS. Are we going to have a second round?

Mr. GOODLATTE. I don't think we are going to have a second round. Is that the plan? I think the fact that we are going to have votes in about 10 minutes dictates that we need to bring it to a conclusion.

Mr. BACHUS. Could we have 5 minutes on each side?

Mr. GOODLATTE. Well, why don't we give you 2 minutes. I will give the gentleman from Alabama 2 minutes, and if the gentlelady from California wants to take 2 minutes in response, we will do that.

Mr. BACHUS. Thank you, and I appreciate the Chairman's indulgence.

Mr. Gerhardt, you talked about you were uncomfortable with publicly acknowledging your religious beliefs or acknowledging God, and I understand that. But do you believe that citizens who choose to do so, do you think they are protected by the Constitution, or do you think they are prohibited from the Constitution from acknowledging God or from discussing their religious beliefs?

Mr. GERHARDT. Well, I think the critical thing is time and place. The Constitution is all about allocating particular authority to particular officials and also putting limits on——

Mr. BACHUS. Well, you think citizens—there are a lot of limits put—by the Constitution put on their expression of religious beliefs?

Mr. GERHARDT. Um——

Mr. BACHUS. Do you think there are any limits on the Constitution on them expressing their——

Mr. GERHARDT. On public citizens expressing their beliefs? Well, as long as—well, in the course of——

Mr. BACHUS. Well, go ahead.

Mr. GERHARDT. If I understand the question correctly, I think the answer will probably be no, because as long as they are acting——

Mr. BACHUS. You started talking about Government officials, so—you got into what Government—and let's talk about Government officials. Do you think there is anything in the Constitution that prohibits Government officials in their official positions from acknowledging God?

Mr. GERHARDT. Again, I——

Mr. BACHUS. Or from the free exercise of——

Mr. GERHARDT. I think it is how you do it and what form it takes.

Mr. BACHUS. All right. What about invoking a prayer to God asking for his assistance in a public place?

Mr. GERHARDT. Well, again, it depends on the public place.

Mr. BACHUS. Well, what if it is under their official duties? What if they were doing it as part of their official duties? Would that violate the Constitution?

Mr. GERHARDT. Well, we know that——

Mr. BACHUS. I in my official duties in an official session of Congress pray to God and ask for his blessings. Would that be a violation of the Constitution?

Mr. GERHARDT. Well, we know that prayer, at the House of legislative sessions is constitutional. It becomes much more problematic if you are also doing that in a public school.

Mr. BACHUS. Well, if it is—in other words, it is constitutional for our Congressmen to do it in a session of Congress, but it is unconstitutional for our schoolchildren to do it in the schools.

Mr. GERHARDT. I accept the Supreme Court doctrine on this.

Mr. BACHUS. And is that what you are saying, that that's the law of our land?

Mr. GERHARDT. I believe that is.

Mr. BACHUS. So we are limiting our schoolchildren and what they can do under the Constitution, yet we, as Congressmen, can pray to God ask for his assistance, ask for his blessings on our deliberations, but the same Government that allows its representatives to do that prohibits schoolchildren from doing that, or schoolteachers or principals. Is that right? Is that kind of ironic to you?

Mr. GERHARDT. No.

Mr. BACHUS. It is not to you and Ms. Waters. Okay.

Mr. GERHARDT. I think the logic of the Supreme Court's opinions happens to be that in the school settings, the extent to which the sort of coercive influences which can control the circumstances is very high.

Mr. BACHUS. Well, I mean—but, I mean, if the Constitution grants a right, it is not up to the Supreme Court to say—to try to find a motive, is it?

Mr. GOODLATTE. The time of the gentleman has expired.

Mr. BACHUS. Let me just—just one.

Mr. GOODLATTE. We will yield the same amount of time to Ms. Waters when you are done.

Mr. BACHUS. Mr. Hellman and Mr. Gerhardt, you are talking about what the courts found and what the tradition is, and they—prayer in the schools as a tradition from the 1700's to 1947 when the first decision was made which start eroding that. So that's a good case of history being thrown out the window; is it not? In fact, the New and Old Testament were taught in the schools in New York State up until right before that. I have those copies in my office, because a relative of mine was taught—the New Testament and the Old Testament was a part of their education in the public schools. When did that become unconstitutional? I will just close with that.

Mr. GERHARDT. The New York State? That's *Engel* v.——

Mr. BACHUS. When did it start violating the Constitution to have public prayers in the schools? It was constitutional until a certain point, right, and then it became unconstitutional.

Mr. GERHARDT. Not necessarily. I mean——

Mr. BACHUS. You think it was unconstitutional from the start?

Mr. GERHARDT. It may have been. Let me explain. And then I have to deal with the higher authority of my wife.

Mr. GOODLATTE. The gentleman has to catch a 7 o'clock train.

Mr. GERHARDT. And I am going to get into trouble one way or another.

Mr. GOODLATTE. You have to catch the train.

Mr. BACHUS. You would acknowledge the Constitution hasn't changed, right?

Mr. GERHARDT. Right. But with all due respect——

Mr. GOODLATTE. Let the gentleman have a final answer to the question.

Mr. GERHARDT. With all due respect, I mean, I think these are great questions, and this is a very important line of inquiry. But we also know the schools were segregated for decades, for a very, very long time.

Mr. BACHUS. But the law changed. The amendments of the Constitution changed.

Mr. GERHARDT. Right. I am talking about between the 14th amendment and the time of *Brown* v. *Board of Education*, they were segregated.

Mr. BACHUS. But——

Mr. GOODLATTE. The gentleman suspend. We will accept the answer of the witness, and now I am going to recognize the gentlewoman from California for 3 minutes.

Ms. WATERS. I yield to Professor Gerhardt.

Mr. BERMAN. I think Professor Gerhardt should be able to leave.

Ms. WATERS. Yes, to continue.

Mr. BERMAN. Well, I think he wants to catch that train. So I think we should let him.

Ms. WATERS. Well, I would like to hear your answer if you have got a few more minutes.

Mr. GERHARDT. Okay. But I just was going to add that the—I think that the other development that arose, Congressman, was—had to deal with the incorporation of the 14th amendment to the States, and that, of course, arose as a result of the 14th amendment as well. So the practice that you are talking about to some extent predated, of course—I am not real sure it predated the 14th amendment, but in any event it predated the time that the Supreme Court had considered challenges to practices like that. Once the 14th amendment gets enacted, and once incorporation takes place, incorporation of that amendment against the States, that is going to allow the Court to adjudicate matters like prayer and segregation.

Ms. WATERS. Thank you. On my time. This is my time. On my time.

Mr. GERHARDT. And I apologize to the Committee. I'm sorry.

Ms. WATERS. Thank you.

Reclaiming my time. A question of any of the panelists, because I must admit I am playing a little bit of catch-up on this. Is there

a definition of God in the legislation, in the proposed legislation? Definition of God?

Mr. DANNEMEYER. Well, let me just say that the Declaration of Independence makes reference to a Creator, and when you look at the signature on the Constitution of the United States, it makes reference to God. So this legislation, 3799, does not seek to define God.

Ms. WATERS. Well, what—what I am not clear about, and perhaps this is even the wrong place to try and hold this discussion, is whether this is synonymous with Allah, is it synonymous with Jehovah, Buddha, Mohammed? I—what——

Mr. DANNEMEYER. Throughout the history of Western civilization, the word God, G-O-D, encompasses the existence of a sovereign supreme being, and there are those of us who believe in the Bible that this supreme being created the world as described in Genesis. That's the basis on which the Nation was founded, and that was what we believed and taught and professed from 1789 to 1947, when the series of decisions of the U.S. Supreme Court have really stolen that.

Ms. WATERS. Sir, I guess what we are saying is when you talk about symbols or you define the teachings, whether it is the 10 Commandments or something else, that if it is different from the God that someone else believes in, that that would be illegitimate—I mean, that would be legitimate for everyone, whatever the symbols are or the teachings are that—of the God that you are describing here.

Mr. DANNEMEYER. Let me respond this way, if I may. I think in the public square, which is what we are talking about, in public policy, we should strive, those of us who have different religious convictions, to find a common ground. That's why I am here. I believe the common ground historically has been the existence of God. That's what this fight's all about.

Ms. WATERS. Mr. Dannemeyer, do you believe God is black?

Mr. DANNEMEYER. That's not the question. The Bible makes very clear that is God not a respecter of any person's color.

Ms. WATERS. So if we had a symbol in the public square of a black God, that would be perfectly acceptable to—for you?

Mr. DANNEMEYER. It certainly would. It certainly would.

Ms. WATERS. Okay.

Mr. BERMAN. Will the gentlelady yield?

Ms. WATERS. Yes, I will yield.

Mr. BERMAN. I mean, we really haven't explored the article III issues. The proponents both on the Committee and the two of you gentlemen have talked about this exception provision. There is a very different interpretation of article III, and I think Professor Hellman and Gerhardt spoke about it. But where I am—what I can't quite put my hands on is your insistence that the acknowledgment of God is divorced from a religion. I understand your quickness to define, and it is interesting that you don't choose to define God in response to Ms. Waters' question, but you are talking about defining fishing.

Mr. MOORE. Wait a minute. I haven't answered Ms. Waters yet.

Mr. BERMAN. Well, I was taking your comments about fishing and her question about defining God. My only point was—this isn't

even a question. It is—I don't have my hands on the acknowledgment of God, and then all of a sudden we have a bill that applies to school prayer, the 10 Commandments, a number of other things which you lump into an acknowledgment of God because you know you can't establish religion, but looks to me like you get down the road toward establishing a religion, or at least excluding some religions from your definition. And I just—I don't mean this as a question because we can go on this forever, but I just want to leave with that observation.

Mr. MOORE. You don't want an answer?

Mr. BERMAN. I mean someday, but not this moment.

Mr. MOORE. But not here. Is that what you are saying?

Mr. BERMAN. Here is fine. Now is the problem.

Mr. MOORE. The God—did I misunderstand? I can answer? I can't?

Mr. GOODLATTE. I think the time has expired.

Mr. MOORE. Okay.

Mr. GOODLATTE. I would like to thank the witnesses for their testimony. The Subcommittee very much appreciates their contribution.

This concludes the legislative hearing on H.R. 3799, the Constitution Restoration Act of 2004. The record will remain open for 1 week. Thank you for your cooperation. The Subcommittee stands adjourned.

[Whereupon, at 6:30 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman,

I'm not sure whether the greater irony is that this bill is called the Constitution Restoration Act, when it does the opposite of restoring the Constitution's integrity, or that this hearing is taking place days before the Jewish High Holidays, a time in which Jews spend days reciting prayers replete with acknowledgements of God and His sovereignty.

America was founded by those attempting to escape religious persecution. The pilgrims set forth to a new continent in the hope of establishing what was at the time a radical idea, a society free from the tyranny of religious discrimination. This tradition led the framers of the First Amendment to our Constitution to insist on the principle of separation of church and state. They enshrined in our founding document the twin pillars of our country's policy toward religion: a commitment to allow freedom of religious expression, and a rejection of the state's establishment of religion. They entrusted our courts with the ability to differentiate between the two.

H.R. 3799 is a reactionary piece of legislation. It is born out of an attempt to politicize recent decisions of the Supreme Court and lower federal courts. And the most egregious part: H.R. 3799 would seemingly make it an impeachable offense for a federal Judge to decide that H.R. 3799 violates the U.S. Constitution.

This bill attempts to circumvent the only available process for legislators to reverse the effects of judicial decisions concerning the Constitution. That process is called a constitutional amendment, and the framers deliberately made it difficult to achieve because they did not want legislators repeatedly tinkering with the founding document. Supporters of this bill have repeatedly promoted the concept of court stripping in an effort to give legislators the power to take decisions out of the hands of judges, an approach that is thoroughly at odds with what the framers of the Constitution intended.

I am surprised that, in an age when we are trying to eradicate the Taliban, a group that infused a fundamentalist interpretation of their religion into every aspect of public life, we are here, now, talking about removing federal judicial oversight in some religion cases. The Constitution created the most delicate balance between the branches of government. By giving Congress power to overturn the judiciary's core function of constitutional interpretation, this bill would fundamentally alter that constitutional balance.

This bill is not about freedom of expression, as some might proclaim. It is a mockery of what our founders considered to be an integral part of our system of government—the separation of powers and the system of checks and balances between the branches of government. Are we to chain the hands of the judicial branch of the federal government so that they merely serve as a rubber-stamp for the political mores of the moment?

Ironically, while supporters of H.R. 3799 seek to assert greater congressional control over review of the laws it passes, making state courts the primary avenue for challenges to federal legislation actually erodes Congress' control over judicial review. Unlike with the federal judiciary, Congress has no impeachment power over state judges or authority to regulate state courts, and the Senate has no power to advise and consent in their selection.

And speaking of our framers, are we now to question the influence foreign law played in the development of the Constitution? And what about the usage of foreign law in decisions that the sponsors presumably likes? As Professor Gerhardt states in his written testimony, If this bill were law in 1986, then the majority in the *Bow-*

ers v. *Hardwick* case presumably would have been subject to impeachment for their reliance on the traditions of Western civilization and the Judeo-Christian tradition.

The attack on usage of foreign law is said to be a way to clamp down on unacceptable judicial activism. But the opposition to judicial activism is selective, limited to a specific type of decision with which the sponsor disagrees. The sponsors are content to allow other examples of judicial activism to pass unchallenged. For example, of relevance to this subcommittee, but not at all addressed in the bill, is the judicial activism evident in the Florida Prepaid cases. In those cases, the Supreme Court based its decisions not on the text of the Constitution, but rather on "fundamental postulates" that directly contradict the actual language of the 11th amendment. Apparently the sponsors of this bill are only opposed to judicial activism when it runs counter to their political ideology.

This legislation would give Congress the power that our founding fathers specifically intended to deny the political branches—namely, the power to ensure that judicial decisions are held hostage to prevailing political sentiment in the country. That is not the role the founding fathers intended for Congress or the independent federal judiciary. That Congress would threaten to impeach federal judges because of the substance of their constitutional decisions is itself an abuse of power and one which our system of government cannot tolerate.

I urge my colleagues to reject this bill in its entirety.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

This legislation is merely the latest Republican political assault on our independent federal judiciary. *The bill is unconstitutional, undermines our system of government, is unnecessary, and is hypocritical. It is a Republican tactic to avoid debating issues of real importance during an election: the economy, jobs, domestic security, and health care.*

Just a few months ago, we passed a bill stripping federal courts from reviewing challenges to the 1996 Defense of Marriage Act. In two days, we will vote on whether to strip courts from hearing challenges to the pledge of allegiance. *Today, we are considering legislation that furthers alienates federal courts from issues that are important to right-wing conservatives: affirmations of God and foreign legal judgments. Like the other two bills, this has no chance of becoming law, so why are we here? Because the Republican leadership does not like to talk about its deficit-raising tax cuts or its intelligence failures or its backstabbing of American workers in a close election year. Also, it wants to coddle its right-wing, extremist base.*

I could not be more certain of how unconstitutional this legislation is. *Separation of powers prevents Congress from managing the deliberations of the judicial branch, yet this proposal would prevent the judiciary from enforcing the Constitution and ensuring separation of church and state.*

The legislation also undermines the supremacy of federal law as governed by article VI of the Constitution. By preventing federal courts from reviewing certain cases, the bill serves to weaken and divide our Nation. *If supporters of H.R. 3799 had their way, our schools would never have become integrated because the federal courts should not have "interfered" in state matters during the civil rights era.* Ultimately, the bill would result in fifty different state court interpretations of constitutional law.

The legislation goes even further in this radical direction by being retroactive. State courts would not be bound to related federal court that may have been issued prior to enactment.

This is why anti-liberal thinkers such as former-Attorney General William French Smith and former Rep. Bob Barr have written in opposition to these extreme, anti-American initiatives.

It is also unheard of to state that a specific act is impeachable. *Never before has Congress statutorily deemed certain acts to be impeachable. If we start down this road, it is only a matter of time before it will be a statutorily impeachable offense to mislead the American people into war and to use that war to line the pocketbooks of friends and political contributors.* Decisions about impeachment should be made on a case-by-case basis by Congress, and hopefully only rarely.

I have to admit that all this back and forth on federalization has me a little confused. Last week, Republicans moved a bill that subjects lawyers in state lawsuits to federal sanctions. Every year, they move tort reform legislation that moves class action cases into federal court. Finally, they made it a federal offense for a doctor to comply with a woman's right to choose. *Perhaps if my colleagues on the other side*

could provide a list of which issues should be federal and which should be left to the states, I could follow along better in the future.

SUPPLEMENTAL PREPARED STATEMENT OF ROY S. MOORE

The Constitution Restoration Act of 2004 (H.R. 3799) (CRA) exempts from federal courts cases brought over a public official's or element's public "acknowledgment of God as the sovereign source of law, liberty or government." During the course of my testimony before this honorable subcommittee, I did not have an opportunity to answer a question asked by a subcommittee member who wanted to know whether "God" was defined in the CRA, or, as the subcommittee member put it, "Which God is this legislation referring to?"

The answer is so obvious it forces one to wonder about the real purpose for asking. There can be no doubt as to which God the legislation must be referring to when it discusses acknowledgments of God as "the sovereign source of law, liberty, and government" because a basic knowledge of America's history and of our Founders' innumerable acknowledgments of the same God reveals that the God America always acknowledges is the God of the Holy Scriptures.

The brave pioneers who in 1620 landed at Plymouth Rock bound themselves to a governing compact before departing from the *Mayflower* onto dry land "[h]aving undertaken for the Glory of God and Advancement of the Christian Faith, and the Honour of our King and Country, a voyage to plant the first colony in the northern Parts of Virginia. . . ."[1] The *Fundamental Orders of Connecticut* of 1639, the first permanent governing document of that colony, summarized its purpose stating that, "where a people are gathered together the word of God requires that to maintain the peace and union of such a people there should be an orderly and decent Government established according to God, to order and dispose of the affairs of the people at all seasons as occasion shall require. . . ." The Declaration of Independence expressly relies upon the "Laws of Nature and of Nature's God"[2] as self-evident proof for its claims, and after several references to God, appeals to the "Supreme Judge of the World for the Rectitude of our Intentions." The Continental Congress, on November 1, 1777, declared a day of national thanksgiving even in the midst of the war for independence because they believed "it is the indispensable Duty of all Men to adore the superintending Providence of Almighty God; to acknowledge with Gratitude their Obligation to him for benefits received, and to implore such further Blessings as they stand in Need of. . . ." Our sixth President of the United States, John Quincy Adams, on the anniversary of the Declaration of Independence in 1837, noted that "the Declaration of Independence first organized the social compact on the foundation of the Redeemer's mission upon earth [and] laid the corner stone of human government upon the first precepts of Christianity."[3] In his Thanksgiving Day proclamation of October 3, 1863, President Abraham Lincoln noted the many blessings that had been bestowed upon this country even in the midst of the Civil War and acknowledged that "[t]hey are the gracious gifts of the Most High God, who, while dealing with us in anger for our sins, hath nevertheless remembered mercy." In 1931, the United States Supreme Court observed that "[w]e are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God."[4] I cited some other examples in my original written statement to this subcommittee and there are a myriad of others throughout the history of this country and in the present day.

In short, there never has been a question as to "which God" the people of this country have recognized as the source of our law, liberty, and government. When Congress sang "God Bless America" on the steps of the Capitol Building on September 11, 2001, no member balked because they were concerned about "which God." When Congress recites the Pledge of Allegiance, there is no question raised as to "which God" our nation is under. Our official national motto, "In God We Trust," is not footnoted with a question about "which God." When presidents or

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[1] *Our Nation's Archive: The History of the United States in Documents* 46 (Bruun & Crosby eds. 1999).

[2] Sir William Blackstone in his *Commentaries on the Law of England*, the definitive legal commentary of the late Eighteenth Century and heavily relied upon by the Founders, described the "law of nature" as originating from God: "The doctrines thus delivered [by divine revelation] we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity." I Blackstone *Commentaries* 42 (Univ. of Chi. Facs. ed. 1765).

[3] William J. Federer, *America's God and Country* 18 (1996).

[4] *United States* v. *Macintosh,* 283 U.S. 605, 625 (1931) (citation omitted).

would-be presidents conclude their speeches or addresses with "God bless America," no one objects because they are concerned about "which God" is being invoked.

A person shrinks from the idea that there is one God who should be acknowledged above others when he or she does not want to acknowledge that there is any authority higher than himself or herself. In his Bill for Religious Freedom, Thomas Jefferson speaks of "fallible and uninspired men" who have "established and maintained false religions over the greatest part of the world, and through all time."[5] The common characteristic among false religions is the installation of man as the ultimate determiner of right and wrong. Have we become like those "fallible and uninspired men"?

When we refuse to acknowledge the God Whom our forefathers recognized, the only God Who gives freedom of conscience to man, we reject the founding principle of the First Amendment and enshrine the message of totalitarian regimes throughout time: that man is god and will save us from ourselves. Indeed, this nation specifically placed the phrase "under God" in the Pledge of Allegiance to contrast us with the atheism of such regimes.[6] The public acknowledgment of God has been a part of this country from its inception. We must preserve this right before the federal courts completely take it away.

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[5] *Documents of American History* 125 (Henry Steele Commager, ed., 6th ed. 1973).

[6] "At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual." H.R. 1693, 83rd Cong., 2nd Sess. (1954).

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September 27, 2004

The Honorable Lamar Smith, R.-Texas, and Howard Berman, D.-Calif.:
Subcommittee on Courts, the Internet, and Intellectual Property
House Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20510

Dear Representatives Smith and Berman:

I am writing to supplement the written statement I submitted to your Subcommittee for its September 13th hearing on the proposed "Constitution Restoration Act of 2004." I regret I could not stay for the entire duration of the hearing, but hope that through this letter I can provide some useful comments on important questions posed by this bill.

1. Constitutional Precedents of Article III Courts Have the Status of Constitutional Law. More than once during your Subcommittee's hearing, the assertion was made that only the Constitution and not the United States Supreme Court's interpretations of it constitute constitutional law. With all due respect, I believe this comment misstates a basic fact about American constitutional law. The Constitution is not the only component of constitutional law. Of course, the Constitution is the fundamental ingredient of constitutional law, but it is not, nor has it ever been, the only ingredient. The Supreme Court's constitutional precedents are another important component of constitutional law. And this has been true from the inception of the Republic.

A number of authoritative sources establish that the Court's constitutional precedents have the status of constitutional law. For instance, the Framers were quite familiar with the hierarchical relationship among courts. In both the British and early American judicial systems, inferior courts were bound by the precedents of superior courts. The Framers recognized further that in constitutional adjudication Supreme Court precedents are binding on inferior courts and the parties unless or until they have been formally overturned by constitutional amendment or by the Supreme Court itself.

Moreover, as I stated repeatedly in our hearing, the structure of the Constitution plainly accords constitutional precedents the status of constitutional law. It is a plain (and widely

accepted) inference from the constitutional design that there is no way to undo a constitutional precedent of the Supreme Court except through constitutionally permissible means. These include constitutional amendments and the Court's subsequent decisions. The Congress has no legislative power whatsoever to displace, or dilute, the constitutional precedents of Article III courts, including the United States Supreme Court.

It is also clear from the constitutional structure that if the Supreme Court's opinions were not law, then the rule of law ceases to have any meaning in our society. In his opening statement, Congressman Smith spoke eloquently about the nation's commitment to the rule of law. The critical questions before the Subcommittee are what the rule of law entails and requires. From the outset of our Republic, the rule of law has included Supreme Court precedent, even precedents with which state and national political leaders disagree. If this were not the case, then we really would be left in circumstances not unlike 1776. 1776 was of course a critical time in our history, not the least of which was because we had no Constitution in 1776. By 1787, our forefathers whom we now call the Framers recognized the pressing need for a federal constitution. They further recognized that this Constitution needed to provide for "one Supreme Court." From personal experience, they determined that the absence of a Supreme Court under the Articles of Confederation precluded ensuring finality and uniformity in interpreting and enforcing federal law. The Framers also recognized that a defect in the Articles as well as the original Constitution was that they lacked a Bill of Rights. So, they added a Bill of Rights, and by the early 1790s we had a much different legal framework than the one that existed in 1776. Consequently, it is a mistake to read Article III against the background of 1776. We must read Article III (and understand the power of judicial review) against the backdrop of the circumstances that gave rise to the Constitution's initial drafting and ratification and to the subsequent ratifications of each of its amendments. Once we take this bigger picture into consideration, it is clear why Justice Oliver Wendell Holmes is surely correct when he observed that the Union might not have lasted without the Court's having the power to declare the laws of the several states unconstitutional.

If Congress had the power to simply evade judicial review of the constitutionality of its laws by the power to regulate federal jurisdiction, judicial review cease to matter. Congress could simply remove all federal jurisdiction over every law it passed and thus could leave citizens without the protections of Article III courts, particularly the Supreme Court, and the need for those courts to ensure States' compliance with the federal Constitution. Moreover, the claim of unlimited congressional power to regulate federal jurisdiction would support undoing all Supreme Court precedents with which the majority party in the Congress disagrees. Today these might be Free Exercise and Establishment Clause decisions, but they could just as easily be laws removing all federal jurisdiction over challenges to state election laws or to state and local property laws.

Historical practices further support the simple but profound fact that the Supreme Court's constitutional opinions may only be displaced through amendments or the Court's change of mind. From the outset of the Republic, political leaders have turned not to jurisdictional regulations but rather to the amendment process to undo judicial opinions with which they have disagreed. For instance, shortly after ratification the Supreme Court ruled in Chisholm v.

Georgia that the states may be held liable for damages in a diversity case filed in Article III court. The opinion provoked considerable criticism. But no one opted for the easier method of merely removing all federal jurisdiction over claims against States. It was widely recognized that the decision could only be overturned by an amendment or convincing the Court of its error. Hence, the procedures for amendment set forth in Article V were followed, and today the 11th amendment remains the first of our amendments directly overturning an opinion of the Court.

2. The Danger of Restricting Judicial Discretion to Determine the Sources on Which to Rest its Rulings. Both Professor Hellman and I suggested that one of the problematic provisions of the Constitution Restoration Act of 2004 is its provision declaring a judge's reliance on foreign law in interpreting the Constitution as an impeachable offense. I will not reiterate here what I said in the hearing, but only wish to add three brief clarifications for the record. First, I have not argued that reliance on foreign law in interpreting the Constitution is absolutely appropriate. I suggested (again following a conventional line of reasoning) that a core function of Article III judges and justices is to say what the law is and that this function includes the discretion to determine the relevant sources or bases for their judgments.

Second, references to foreign law in constitutional adjudication are nearly very few and far between. The few justices who made such references explained why they regarded it as pertinent, even though in doing so they acknowledged giving very little, if any, weight to it whatsoever. Their reliance was, as I said at the hearing, de minimis. Thus, in assessing the constitutionality of this Act, one has to wonder both whether and why de minimis – or inconsequential – reliance on foreign law constitutes grounds for impeachment and removal. A plain reading of the pertinent language of the Act suggests that merely one instance of reliance, or reference, is enough to constitute an impeachable offense. Yet, I know of no source of constitutional meaning that would support removing a judge or justice for an inconsequential reference to foreign law just once, particularly when the judge or justice has acknowledged that the foreign law in question made little or no difference to the outcome of the case whatsoever. The Constitution Restoration Act apparently seeks to impose strict liability for a particular judicial statement (perhaps even in a footnote), even though, as far as I can tell, it has been made in the course of an Article III judge's discharge of his core function. Judicial independence means nothing if it does not allow for judges and justices to decide for themselves how to prioritize the sources on which they rely in deciding constitutional cases.

Third, the burden in an impeachment proceeding is not on the accused to explain why he did what he did. The burden in impeachment proceedings is on the accusers to explain why and how the accused's conduct constitutes an impeachable offense. Consequently, the burden is on the Act's proponents to meet this burden. They need to explain, at the very least, why impeachment and removal of the majorities in *Bowers* and *Lawrence* is justified by their reference to the Judeo-Christian tradition and Western civilization.

I would be very surprised if this burden could ever be met. Sources uniformly support judicial independence as a constitutional ideal. Judicial independence allows judges and justices the requisite freedom from political retaliation to determine (and to prioritize) the sources on which they may rest their constitutional judgments.

Moreover, the Congress may not dictate to judges and justices how, or on what sources, they may base their decisions. Nor may Congress, for that matter, require the justices and judges to write opinions in every case. Consequently, one anomalous result of this Act would be not to force judges and justices to forego referring to certain sources but rather to forego acknowledging a line of reasoning or reference to a source of meaning whose authoritativeness has been questioned by some members of the Congress. This Act, in other words, would not keep judges and justices from ever relying on a source such as foreign law, even rarely; it would motivate judges and justices simply not to disclose it. Usually, judges and justices refrain from making such references for a very good reason – they are not likely to be persuasive. Until now, the need for justices to state persuasively the bases for their opinions has been one of the most significant checks on judicial abuse, for it keeps them within certain bounds – in particular, relying on sources and making arguments that are widely accepted in the legal community.

3. Frustration with the Supreme Court is Not a Legitimate Objective. In our September 13th hearing, a few Subcommittee members expressed frustration with the Supreme Court's free exercise and establishment jurisprudence. While I appreciate the frustration, it does not constitute a legitimate objective for a congressional enactment. The Fifth Amendment Due Process Clause requires every congressional enactment must have, at the very least, a legitimate objective. The problem with the Constitution Restoration Act of 2004 is that a primary objective is to deprive the Court of the means with which to preclude judicial and congressional non-compliance with its Free Exercise and Establishment Clause decisions. This objective is plainly unconstitutional. Members of Congress may try to get ratification for a constitutional amendment overturning these decisions, or they may go back to the Court to urge it to adopt their contrary view of the scope of the Free Exercise and Establishment Clauses. (They may also urge the President and senators to approve judges and justices with different attitudes toward the First Amendment). But there is no third alternative – they may not pass a law overturning these constitutional judgments.

I trust these clarifications are helpful. I appreciate the privilege of appearing before you on September 13th. If I can ever be of any other service, please do not hesitate to contact me.

Very truly yours,

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