

## THE CONSTITUTIONAL LIMITS TO COURT-STRIPPING

by  
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*This Article is part of a colloquy between Professor Michael J. Gerhardt and Professor Martin Redish about the constitutionality of court-stripping measures. Court-stripping measures are laws restricting federal court jurisdiction over particular subject matters. In particular, the authors discuss the constitutionality of the Marriage Protection Act of 2004. Professor Gerhardt argues that the Act is unconstitutional and threatens to destroy the principals of separation of powers, federalism and due process. It prevents Supreme Court review of Congressional action and hinders the uniformity and finality of constitutional law. Furthermore, the Act violates the equal protection component of the Fifth Amendment Due Process Clause as it burdens a suspect class (gays and lesbians) by restricting their access to the federal courts.*

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### I. INTRODUCTION

It is an enormous privilege to participate in a colloquy with Professor Martin Redish on a subject of great constitutional importance in this inaugural issue of the Lewis & Clark Law Review. Our colloquy focuses on the constitutionality of what are commonly called court-stripping measures—laws removing some or all federal jurisdiction over some subject matter(s). Such laws have long been thought to raise profound questions of constitutional law.

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In particular, they raise questions about the extent to which Congress's authority to regulate federal jurisdiction is constrained or limited by either Article III, which sets forth the jurisdiction of the federal courts, or by any other constitutional provisions, such as the Fourteenth Amendment.

In spite of the difficulty of comprehensively clarifying the precise scope of Congress's power to regulate federal jurisdiction, I do not believe that the constitutionality of the bill approved earlier this year by the House of Representatives (hereafter referred to as "the Act"), which removed all federal jurisdiction over cases involving the 1996 Defense of Marriage Act, is in doubt.<sup>1</sup> The Act, in my judgment, is clearly unconstitutional. The jurisdictional theory supporting the bill—that Congress has practically limitless authority to insulate its laws from Supreme Court and other Article III review—portends the destruction of judicial review itself. The theory underlying the Act would allow Congress to insulate every law it passes from federal judicial review. It would reduce the power of the United States Supreme Court to say what the law is with respect to the constitutionality of congressional legislation to a nullity. But this is not all. The Act goes further, and offends the equal protection component of the Fifth Amendment Due Process Clause by forcing gays and lesbians—the only people likely to have standing to challenge either the Defense of Marriage Act or the Act—to litigate their claims under these acts differently than plaintiffs bringing claims under any other federal enactments. The Fifth Amendment patently forbids such disparate treatment.

In my opinion, there is nothing magical about Congress's power to regulate federal jurisdiction. It is tempting to construe this power as unlimited, particularly if one consults only the text of Article III for possible limits. Federal courts scholars have long disagreed about whether there is any language in Article III restraining, or imposing what are commonly called "internal" constraints, on Congress's power to regulate federal jurisdiction.<sup>2</sup> But it is a major mistake to read Article III as if the only constraints on it were those set forth originally in Article III. It is a mistake to read it as if it were not affected by subsequent constitutional amendments. Both the Fifth Amendment Due Process Clause<sup>3</sup> and its equal protection component constrain how Congress may withdraw federal jurisdiction. There is no question, for instance, that it may not pass a law forcing African-Americans or women to litigate some or all of their constitutional claims in state courts without any possibility of review in the Supreme Court, while leaving everyone else access to Article III courts for their constitutional claims. Such a law would be subject to heightened scrutiny and lacks any substantial or compelling justification.

It should go without saying that Congress has no unlimited powers. Nor, for that matter, are the powers of any other constitutional actors unlimited. Congress's power to regulate federal jurisdiction is subject to the same

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<sup>1</sup> See Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004).

<sup>2</sup> See, e.g., Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984).

<sup>3</sup> U.S. CONST. amend. V.

constitutional limitations as every other plenary power of Congress, even those pertaining to war. Surely, the power to regulate federal jurisdiction is not broader than the war powers, which Justice O'Connor declared were not a "blank check" to do as Congress or the President pleases.<sup>4</sup> The power to regulate federal jurisdiction is no less a blank slate; it is subject, like every other congressional power is subject, to separation of powers and federalism constraints and to the individual rights guarantees set forth in the Bill of Rights.

An especially troubling aspect of the Act is that it appears to lack any legitimate objective. At the very least, the Fifth Amendment requires that every congressional enactment must at least have a legitimate objective,<sup>5</sup> but it is hard to find one for the Act. Indeed, it is hard to find even a rational basis for the Act. It appears to be openly motivated by hostility to gays, lesbians, and the federal judiciary. But the Court, more than once in recent years, has declared laws void for being motivated by animus against gays and lesbians.<sup>6</sup> Nor is distrust of, or hostility to, the federal judiciary likely to pass constitutional muster. Under our constitutional system, the federal judiciary is integral to protecting the rule of law in our legal system, protecting the 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, to undermine the power of judicial review, or to overrule constitutional precedents of Article III courts. The benefits of our constitutional systems of separation of powers, federalism, and due process far outweigh whatever their costs. They further dictate that a law stripping all federal jurisdiction over challenges to the federal Defense of Marriage Act is unconstitutional.

## II. GENERAL PRINCIPLES

A few general principles should guide our consideration of the constitutionality of the Act. I discuss each briefly before considering how the Act 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.<sup>7</sup> In our history, constitutional amendments have overruled only a few constitutional decisions, including both

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<sup>4</sup> Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2650 (2004).

<sup>5</sup> See Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955).

<sup>6</sup> See Lawrence v. Texas, 539 U.S. 558, 574, 578 (2003); Romer v. Evans, 517 U.S. 620, 635 (1996).

<sup>7</sup> U.S. CONST. art. V.

the Eleventh Amendment<sup>8</sup> and the Fourteenth Amendment.<sup>9</sup> Thus, it would not be constitutional for Congress to enact a statute to overrule a federal court's decision on constitutional law. For instance, it would be unconstitutional for Congress to seek to overrule any Article III 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's reversal or by a court's overruling one of 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 one hundred of its constitutional decisions.<sup>10</sup> 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 Article III court, for that matter—to reconsider one of its constitutional decisions.

It follows that Congress may not, even through the exercise of its plenary power to regulate federal jurisdiction, overrule a federal court's decision on constitutional law or 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 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.<sup>11</sup> 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, Congress, for good reason, has refrained from enacting such laws; and it has never previously enacted a law that withdraws all federal jurisdiction over particular constitutional claims.

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.”<sup>12</sup> Indeed, the bipartisan Task Force was unanimous: “[T]here 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.”<sup>13</sup> While Congress clearly

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<sup>8</sup> U.S. CONST. amend. XI (overturning *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

<sup>9</sup> U.S. CONST. amend. XIV.

<sup>10</sup> LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 194–206 (3d ed. 2003).

<sup>11</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Dickerson v. United States*, 530 U.S. 428 (2000); and *United States v. Eichman*, 496 U.S. 310 (1990).

<sup>12</sup> Citizens for Independent Courts Task Force on the Role of the Legislature in Setting the Power and Jurisdiction of the Courts, *Balancing Act: Legislative Power and Judicial Independence*, in *UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS* 205, 219 (2000) [hereinafter *Balancing Act: Legislative Power and Judicial Independence*].

<sup>13</sup> *Id.*

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. Congress needs a neutral reason for procedural or remedial reform. Indeed, the Fifth Amendment Due Process Clause requires Congress to have a neutral justification, or legitimate objective, for every piece of legislation that it enacts.<sup>14</sup> While national security and promoting the efficiency of the federal courts plainly qualify as neutral justifications, hostility to gays, lesbians, and federal judges does not.

*B. Constitutional Precedents Have the Status of Constitutional Law*

It is tempting to think that when the Supreme Court makes a mistake in a constitutional decision, that mistake is not accorded the status of constitutional law. The mistake is to yield to this temptation. The fact is that the major sources of constitutional meaning—text, original understanding, historical practice, and structure—support treating all the Supreme Court’s constitutional opinions as constitutional law, which may only be altered by either a constitutional amendment or the Court’s change of mind.

First, the Constitution extends “[t]he judicial Power” of the United States over certain “[c]ases” or “[c]ontroversies.”<sup>15</sup> Judicially decided cases or controversies constitute precedents. Article V sets forth the requirements for the ratifications of amendments overturning erroneous precedents.<sup>16</sup> 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, “[t]he judicial Power” set forth in Article III of the Constitution was historically understood to include a power to create precedents of some degree of binding force. In *The Federalist*, 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 down by strict rules and precedents . . . .”<sup>17</sup> Indeed, legal scholars have found that the doctrine of precedent either was established or becoming established in state courts by the time of the

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<sup>14</sup> See, e.g., *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (“[T]he guarantees of due process . . . have in this country ‘become bulwarks also against arbitrary legislation.’”) (quoting *Hurtado v. California*, 110 U.S. 516, 532 (1884)) (Harlan, dissenting); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment”); *Minn. Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291 (1984) (explaining that statutes which do not impinge constitutional rights must “rationally further a legitimate [government] purpose”).

<sup>15</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>16</sup> U.S. CONST. art. V.

<sup>17</sup> *THE FEDERALIST* NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Constitutional Convention.<sup>18</sup> The framers, in other words, were familiar with reliance on precedent as a source of constitutional decision.

Third, historical practices uniformly support treating Supreme Court precedents on constitutional matters as constitutional law that are unalterable except through extraordinary constitutional mechanisms. As one of my friends who is a distinguished critic of the doctrine of stare decisis has acknowledged, “[t]he idea that ‘[t]he judicial Power’ establishes precedents as binding law, obligatory in future cases, appears to have been an early-nineteenth-century innovation, perhaps presaged by certain Marshall Court opinions.”<sup>19</sup> 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.<sup>20</sup> Justice Joseph Story agreed that the “conclusive effect of [constitutional adjudication] was in the full view of the Framers of the Constitution.”<sup>21</sup>

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 violates Article III. And there can be little doubt that the Constitution makes Supreme Court precedents binding on lower courts. If higher court precedents bind lower courts, there is no structural anomaly in the view that judicial precedents also enjoy limited constitutional authority in the courts that rendered them.<sup>22</sup>

It follows that any attempt by 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 law directing the Supreme Court either to ignore its precedents on abortion rights as a source of decision altogether or to forego ever reconsidering certain Eleventh Amendment precedents. Either enactment would be unconstitutional, and each

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<sup>18</sup> See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 8–9 (1977); see also Thomas R. 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.).

<sup>19</sup> 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).

<sup>20</sup> Lee, *supra* note 18, at 718.

<sup>21</sup> 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 378 (Melville M. Bigelow ed., 5th ed., William S. Hein & Co. 1994) (1891).

<sup>22</sup> Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 580–81 (2001) (footnotes and citations omitted).

would be unconstitutional for the same reason: each would seek to provide a means by which a Supreme Court decision on constitutional law may be diluted through a statute, rather than the constitutionally permissible means of constitutional amendment or subsequent Supreme Court decision-making.

*C. 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*,<sup>23</sup> Justice Oliver Wendell Holmes remarked, "I do not think the United States would come to an end if we [judges] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."<sup>24</sup> 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 of 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.<sup>25</sup> Judicial review within the federal courts is indispensable to the uniform, resolute, and final application of federal rights protected by the Fourteenth Amendment. However, this Act, limiting jurisdiction over the Defense of Marriage Act, 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, and adjudicating certain claims under the Fifth and Fourteenth Amendments. The 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 this Act is its implications for the future of judicial review. The Constitution does not allow 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

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<sup>23</sup> *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

<sup>24</sup> OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295-06 (1920).

<sup>25</sup> U.S. CONST. amend. XIV.

from constitutional judicial review.”<sup>26</sup> For instance, it would be unconstitutional for a legislature to assign the courts to enforce a criminal statute but preclude them from deciding the constitutionality of the law. It would be equally unlawful to immunize any piece of federal legislation from judicial review. If Congress could immunize its laws from the Court’s power of judicial review, then Congress could use this power to insulate every piece of federal legislation from Supreme Court review. If Congress could immunize all federal laws from federal judicial review, it would eviscerate the Court’s power to say what the law is with respect to the constitutionality of those laws. And, if Congress had the power to immunize all of its laws from judicial review, it is unclear why it then could not also immunize all or some state laws from judicial review by the Supreme Court. The end result would be the destruction of the Supreme Court’s power of judicial review.

In addition, courts must have the authority to enjoin ongoing violations of constitutional law. For example, 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 Congress to command the federal courts on how they should resolve constitutional questions. In *United States v. Klein*,<sup>27</sup> 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 *United States v. 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 effect of a law excluding all federal jurisdiction over some federal law and a command for the courts to uphold the law is the same—the law faces little risk of being completely overturned on constitutional grounds.

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<sup>26</sup> *Balancing Act: Legislative Power and Judicial Independence*, *supra* note 12, at 217.

<sup>27</sup> *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146–47 (1871).



## III. THE ACT VIOLATES SEPARATION OF POWERS

With the aforementioned principles in mind, I believe that the Act violates separation of powers in several ways. First, the Act violates the basic principle that Congress may not use its power to regulate jurisdiction to control substantive judicial outcomes. The obvious effect of a prohibition of all federal jurisdiction is to make it nearly impossible for the law to be struck down in every part of the United States. The jurisdictional restriction seeks to increase the likelihood that the federal statute will not be fully struck down.

Second, the Act undermines the Supreme Court's ability to ensure the uniformity and finality of constitutional adjudication. The Court's essential functions include ensuring finality and uniformity across the United States in the enforcement and interpretation of federal law. In effect, the Act allows the highest courts in each of the fifty states to become courts of last resort for interpreting, enforcing, or adjudicating challenges to the federal Defense of Marriage Act. This allows for the possibility that different state courts will render different interpretations of the federal law and different conclusions regarding the constitutionality of the Act, without any possible review in a higher tribunal.

Separation of powers constrains Congress from regulating federal jurisdiction in a way that eviscerates an essential function of the Supreme Court—namely, to say what the law is with respect to the federal Defense of Marriage Act. Imagine, for instance, Congress withdraws all federal jurisdiction with respect to a particular constitutional claim or a set of constitutional claims. If only state courts retained the power to review congressional laws, then it is likely that such laws would be enforced and construed differently throughout the country. The absence of finality and uniformity in the enforcement and interpretation of federal law violates separation of powers because it robs Article III courts, particularly the Supreme Court, of an essential function—ensuring the finality and uniformity in the enforcement and interpretation of federal law in the United States. The Supreme Court's decision in *Martin v. Hunter's Lessee*<sup>28</sup> upheld the necessity for judicial review by the Supreme Court to keep states from undermining federal law. If Congress could simply avoid compliance with a constitutional directive of an Article III court through its power to regulate jurisdiction, then every law could evade constitutional judicial review. Congress would simply insulate every single one of its laws from judicial review in Article III courts. Under the same logic, it could insulate every state law from judicial review. I cannot imagine that the Constitution would allow for such an easy method of destroying judicial review altogether.

At least one tenable response to these problems might be that there is no constitutional requirement of federal jurisdiction over challenges to the federal Defense of Marriage Act in the first instance. The Act withdraws federal jurisdiction over a subject over which the Constitution does not require federal jurisdiction. If Congress does not have to authorize federal jurisdiction over

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<sup>28</sup> 14 U.S. (1 Wheat.) at 304.

the Act, then, one might argue, it ought to be able to withdraw it if Congress sees fit. The authority to regulate jurisdiction includes the powers both to create and to withdraw jurisdiction. Indeed, through most of our history, including the years immediately following ratification, Congress did not grant the Court jurisdiction over every case or controversy involving a constitutional claim. The Act merely withdraws a grant of jurisdiction to restore, in one area, a circumstance that is consistent with the Constitution—the absence of judicial review over this particular federal law.

The problem with this response is that it fails to appreciate the significant difference between vesting and withdrawing federal jurisdiction over a constitutional subject matter. Vesting federal jurisdiction is one thing, but withdrawing jurisdiction previously granted is quite another. Congress may be using the same power to do each of these things, but each has very different constitutional consequences. While it is not clear that the Constitution requires an Article III forum be available to adjudicate certain claims,<sup>29</sup> it is clear that withdrawing particular subject matter jurisdiction will subject certain constitutional claimants and claims to disparate treatment.<sup>30</sup> I explain in the

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<sup>29</sup> Academics hotly dispute whether there are any internal constraints on the powers to abolish or withdraw jurisdiction, i.e., whether any of the provisions in Article III restrict these powers. Article III conceivably limits Congress's power to regulate federal jurisdiction in at least two ways (both discussed in Professor Redish's written statement and amply elsewhere in the literature on federal jurisdiction). Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 465 (1986); see also ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 3.3 (4th ed. 2003). Justice Story suggested in *Martin* that Article III's provisions constrain the power to regulate federal jurisdiction. He argued that at the very least the text of Article III, by its use of the word "shall," ought to vest the entire judicial power of the United States, in original or appellate form, in some Article III court. 14 U.S. (1 Wheat.) at 330–31. He read the vesting clause of Article III as a mandate. Professor Amar at Yale Law School refines Story's argument. Alternatively, he argues that the text indicates that only three categories of cases—those preceded in Article III's text by the word "all"—ought to be vested in at least one Article III court in some form, original or appellate. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 261–62 (1985).

<sup>30</sup> One defense of the Act is that Congress's power to create or abolish inferior tribunals includes the authority to curtail their jurisdiction as it sees fit. There are two major problems with this argument vis-a-vis the Act. First, while the same constitutional limitations apply to Congress's powers to abolish and withdraw jurisdiction, they may apply differently because these powers have different effects. Abolition tends to have a general impact, while withdrawal may have a general or more particular effect. Abolishing a single seat in a district that has been vacated is not likely to be constitutionally problematic because at least some district judges persist in exercising Article III power within that district. But abolishing an entire district could severely compromise the constitutional entitlements of U.S. citizens within the district, depending on which district has been abolished and the alternative remaining fora. If, for instance, Congress abolished a state's only district, then the citizens of that state have been left in a precarious circumstance with respect to their federal claims. Recall that a major premise of Article III is that state courts lack the trustworthiness and expertise that Article III courts have in handling federal interests and claims. If state courts were to remain the only forum available for vindicating particular constitutional or federal claims (because of abolition or withdrawal), the constitutional or federal claims of the affected residents would be compromised. This is especially true if the effect of a congressional law is to leave state courts as the residents' only fora for adjudicating their

next section in greater detail why this disparate treatment violates the Fifth Amendment Due Process Clause.

#### IV. THE ACT VIOLATES THE FIFTH AMENDMENT DUE PROCESS CLAUSE

I am convinced that the Act violates the Fifth Amendment Due Process Clause. First, it violates the equal protection component of the Fifth Amendment Due Process Clause.<sup>31</sup> The Court will subject any classifications that explicitly burden a suspect class or fundamental right to strict scrutiny. A federal law withdrawing all federal jurisdiction over a particular federal law or related constitutional questions has the potential to do both. A law withdrawing federal jurisdiction has a different effect and purpose than one that foreclosed federal jurisdiction over the same subject in the first place. It is, in

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federal or constitutional claims, in retaliation against particular substantive judicial decisions.

The difference between abolition and withdrawal is particularly clear in the equal protection context. Here, it might be useful to consider a possible analogy to the Supreme Court's decision in *Palmer v. Thompson*, 403 U.S. 217 (1971). In that case, the Court upheld a city's decision to close its public pools rather than open them to African-Americans. The city responded by abolishing its public pools. Some local governments responded to the decision in *Brown v. Board of Education* by closing their schools rather than opening them to African-American children. 349 U.S. 294 (1955). The decision was constitutional because it was a facially neutral classification with a disproportionate impact. Such a classification is usually subject only to the rational basis test. *M.L.B. v. S.L.J.*, 519 U.S. 102, 115–16 (1996) (“Absent a fundamental interest or classification attracting heightened scrutiny . . . the applicable equal protection standard is that of rational justification.”) (internal quotations omitted). It is constitutional to abolish a public pool or even a public school, because that is a facially neutral classification likely to satisfy the rational basis test because it can be defended as saving money. The Supreme Court has ruled, however, that a facially neutral classification is not always subject to a rational basis test. If such a classification were to have an overwhelming or uniformly disproportionate impact against a particular racial minority, then it is subject to strict scrutiny. The Court said as much in both *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), cases in which the Court applied strict scrutiny to facially neutral classifications with an almost 100% disproportionate impact against racial minorities.

I am sure you would agree that it would be unconstitutional to close a public pool or school only to African-American or Jewish children, because the closure would no longer be facially neutral but instead be a race-based or faith-based classification, either of which would trigger strict scrutiny. If Congress were to abolish a seat or two on a circuit court because it believes that the caseload within that circuit no longer justifies filling all its seats, then it has effectively enacted a facially neutral statute with respect to that circuit. It also has a rational basis for that facially neutral classification, namely, preserving fiscal resources and streamlining the administration of justice. If, however, the Congress were to withdraw jurisdiction on the basis of a classification directed against African-Americans or Jews for particular claims unique to their respective classes, that would pose a serious equal protection problem. The Court has held that strict scrutiny is appropriate with respect to race-specific subjects (so that a state's decision to override a locality's decision to require busing children as a means to facilitate integration was subjected to strict scrutiny). *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25–26 (1971).

<sup>31</sup> 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).

other words, a very different matter to restrict jurisdiction over a subject matter that Congress has never directed should fall within federal jurisdiction than to withdraw jurisdiction previously granted by Congress with respect to some subject matter. A fatal difficulty with the Act is that it is withdrawing jurisdiction that previously and otherwise had been authorized with respect to the constitutionality of the Act.

To further appreciate how the withdrawal of jurisdiction (rather than the restriction of jurisdiction in the first place) poses equal protection problems, it is useful to remember when strict scrutiny is triggered under the Fifth Amendment. First, it may be based on a suspect classification. For instance, a jurisdictional regulation restricting access by African-Americans, or a particular religious group, to Article III courts to vindicate certain interests ostensibly because of mistrust of “unelected judges” plainly lacks a compelling justification and thus violates the equal protection component of the Due Process Clause.

While the usual constitutional measure of a jurisdictional regulation is the rational basis test, a court (indeed, even a state court) might find that even that test has not been satisfied if it finds that the argument in support of burdening African-Americans, women, or Jews is illegitimate. While the Court has not employed strict scrutiny to analyze the constitutionality of laws burdening gays and lesbians, the Court has found two such laws fail to satisfy even the rational basis test. A court analyzing whether a classification precluding a gay or lesbian citizen from petitioning any Article III court—and the only people likely to have standing to challenge the Act would be gays or lesbians interested in marrying—would probably conclude that such a restriction is no more rational than the classification struck down by the Supreme Court in *Romer v. Evans*. In *Romer*, the Court found that the state referendum disadvantaging gays and lesbians failed to pass the rational basis test, because it had been motivated by animus.<sup>32</sup> The Court reached a similar conclusion in *Lawrence v. Texas*,<sup>33</sup> striking down the criminalization of homosexual sodomy. In all likelihood, a majority of the Supreme Court would strike down a measure such as the Act as having been driven by the same illegitimate concerns that it rejected in both *Romer* and *Lawrence*.

A federal law withdrawing all federal jurisdiction may also run afoul of the Fifth Amendment by violating a fundamental right. Such is the case with a proposal restricting all federal jurisdiction over flag burning or school prayer. Such a law would leave those rights vulnerable to varying state court interpretations. It is unlikely that the Court would find a compelling justification for burdening fundamental rights in that manner. Nor can I imagine that the Court would ever agree that distrusting “unelected judges” qualifies as a compelling justification.

In addition, a proposal withdrawing all federal jurisdiction over a particular constitutional subject may violate the Fifth Amendment’s Due Process Clause’s guarantee of procedural fairness. Over a century ago, the

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<sup>32</sup> *Romer v. Evans*, 517 U.S. 620, 633 (1996).

<sup>33</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

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.”<sup>34</sup> For instance, the Court has 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.”<sup>35</sup> 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 Court, have been designed to provide a special forum for the vindication of federal interests.

Withdrawing all federal jurisdiction with respect to a particular constitutional claim forces litigants into state courts, which our Framers thought to be hostile or unsympathetic to federal interests. The Court declared as much in the classic case of *Martin v. Hunter’s Lessee*.<sup>36</sup> To the extent that the Act 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 potentially (if not actually) hostile to federal interests and rights, and under some circumstances not open to claims based on federal rights, due process requires the availability of an Article III forum.

Last but not least, as the authors of a leading casebook on federal jurisdiction have observed, “[a]t least since the 1930s, no bill that has been interpreted to withdraw all federal court jurisdiction with respect to a particular substantive area has become law.”<sup>37</sup> This refusal, like those against withdrawing all federal jurisdiction in a particular class of constitutional claims, constitutes 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*,<sup>38</sup> the Supreme Court held that the Constitution precluded state judges from adjudicating federal officials’

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<sup>34</sup> *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

<sup>35</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).

<sup>36</sup> *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 339 (1816).

<sup>37</sup> RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 322 (5th ed. 2003).

<sup>38</sup> 80 U.S. (13 Wall.) 397, 411 (1871).

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, however, allows 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. It further leaves only to the state courts enforcement of the provisions of the Bill pertaining to federal officials.<sup>39</sup> 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 Act,<sup>40</sup> 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 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.

Separation of powers is a body of law based on inferences from the design of the Constitution. Separation of powers constrains the power to regulate federal jurisdiction (including abolishing some inferior Article III courts) in at least three ways: First, it constrains Congress from using this power to usurp the authority of the other branches in any way. Second, it constrains Congress from using this power in any way that undermines the functioning of Article III courts. Consequently, if Congress used its power to abolish inferior federal courts in an effort to retaliate against or to override their substantive constitutional decisions, that would violate separation of powers. Third, separation of powers constrains Congress from bypassing the constitutional requirements for achieving certain outcomes. For instance, the Supreme Court has recognized in its *INS v. Chadha*<sup>41</sup> decision and the decision in *Clinton v. City of New York*<sup>42</sup> that the presentment and bicameral clauses need to be satisfied in order for a bill to become a law. For instance, at the June 24th hearings, Professor Redish inquired about the nature of the separation of

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<sup>39</sup> Marriage Protection Act of 2004, H.R. 3313, 108th Cong. § 2 (2004).

<sup>40</sup> Another bill pending before the House Judiciary Committee has, at least in my judgment, similar constitutional deficiencies. See Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. §§ 101–102 (2004). Indeed the very name of the latter proposed bill indicates its purpose to displace certain Supreme Court decisions on constitutional law.

<sup>41</sup> 462 U.S. 919, 951 (1983).

<sup>42</sup> 524 U.S. 417, 421 (1998).

powers problem if Congress abolished an inferior court that was occupied.<sup>43</sup> Say, Congress abolished a particular judge's seat on the Ninth Circuit. This would completely undermine that particular judge's ability to exercise Article III power and thus to be an Article III judge. He would have no forum in which to exercise his power unless Congress reassigned his jurisdiction, i.e., assigned him—for some neutral reason—to exercise his authority elsewhere within the circuit. (Even then, there might still be an equal protection problem with why this judge has been singled out for disparate treatment.) Abolishing a particular judge's seat or perhaps an entire district deviates from the limited paths by which constitutional decisions of Article III courts may be overridden—by constitutional amendment or the Court's overruling itself. Moreover, if Congress abolished an inferior court that was occupied, it would be effectively removing an Article III judge without complying with the constitutional requirements for impeachment and removal of Article III judges. These requirements include impeachment by a majority of the House and a vote to remove by at least two-thirds of the Senate.<sup>44</sup>

Moreover, separation of powers constrains Congress from regulating federal jurisdiction in a way that eviscerates an essential function of the Supreme Court. Imagine, for instance, that Congress withdraws all federal jurisdiction with respect to a particular constitutional claim or a set of constitutional claims. If only state courts retained the power to review congressional laws, then it is likely that such laws would be enforced and construed differently throughout the country. The absence of finality and uniformity in the enforcement and interpretation of federal law violates separation of powers because it robs Article III courts, particularly the Supreme Court, of an essential function—ensuring the finality and uniformity in the enforcement and interpretation of federal law in the United States. I read the Supreme Court's decision in *Martin v. Hunter's Lessee*, among other decisions, as directing such a result.<sup>45</sup> If Congress could simply avoid compliance with a constitutional directive of an Article III court through its power to regulate jurisdiction, then every law could evade constitutional judicial review. Congress would simply insulate every single one of its laws from judicial review in Article III courts.

Last, but not least, I think that at least two Supreme Court decisions from 2004 reinforce the constitutional arguments I have made in this article and in the June 24, 2004 hearing.<sup>46</sup> In particular, both decisions recognize that, as

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<sup>43</sup> *Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong. 21 (2004) (statement of Martin H. Redish, Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern Law School).

<sup>44</sup> U.S. CONST. art. I, §§ 2–3.

<sup>45</sup> See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 305 (1816); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 582 (1842).

<sup>46</sup> See *Rasul v. Bush*, 124B S. Ct. 2686, 2699 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635, 2650 (2004); *Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong. 14 (2004) (statement of Michael Gerhardt, Arthur B. Hanson Professor of Law, William and Mary Law School).

Justice O'Connor suggested, the war power is not a "blank check" and thus cannot justify restricting access altogether to an Article III court for an "enemy combatant" or, for that matter, a detainee at Guantanamo Bay, to challenge the conditions of their detention.<sup>47</sup> In my view, the power to regulate is also not a "blank check" to do as Congress pleases with respect to particular plaintiffs or particular constitutional or federal claims.

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<sup>47</sup> *Hamdi*, 124 S. Ct. at 2635, 2650.